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11B

Estate Planning for Clients Facing Future Long-Term Care Costs

Steven M. Ratner

Maya M. Pinchman

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§11B.1 I. INTRODUCTION TO LONG-TERM CARE COSTS

This chapter was written to illustrate the importance of long-term care planning and long-term care planning provisions in estate planning documents.

By becoming familiar with the ethical issues involved in elder law and the potential long-term care consequences that an estate-planning client may face, attorneys are better prepared to represent their clients. Likewise, attorneys are less likely to become involved in a malpractice lawsuit.

While most estate planning attorneys are aware that they must notify the California Department of Health Care Services of an individual's death prior to distributing the estate to its beneficiaries, they are usually unaware of the Medi-Cal estate recovery process. The information contained in this chapter enables estate planning attorneys to anticipate issues that may arise in the future and be prepared to deal with them, thereby protecting themselves and their clients.

Sample forms have been provided in §§11B.33–11B.41 to aid counsel in guiding their clients through the detailed, and often times emotional, process of long-term care planning.

In addition, this chapter was written to assist estate planning attorneys in preventing a commonly occurring scenario. *Consider the following example:*

EXAMPLE ► David Moore visits attorney Phillips for an estate plan. David is 70 years old, divorced, and has two children. Attorney Phillips drafts a living trust, will, power of attorney, and advanced health care directive. David's assets, a home worth \$500,000 and investments worth \$250,000, are funded into the trust.

Five years later David suffers a massive stroke and is admitted to a nursing home. David no longer has decision-making capacity and will need nursing home care for the remainder of his life.

David's children consult with an expert in elder law, attorney Miller. Miller reviews David's estate plan. His plan provides that upon his incapacity the assets may be used by his children for David's support, comfort, and welfare; however, nothing in David's plan allows his children to engage in Medi-Cal planning. There are no provisions allowing revocation or amendment of his trust by an attorney-in-fact, no gifting provisions, and no provisions allowing the establishment of an irrevocable trust.

Miller must deliver the bad news. David's children will be forced to spend down his investments. And even if they can obtain Medi-Cal after the spend-down (because the home is an exempt asset), Medi-Cal will assert an estate recovery on David's death.

This story should have had a happy ending. Had estate planning attorney Phillips been familiar with long-term care planning, he would have known that over 40 percent of people age 65 and over need nursing home care at some point in their lifetimes and that having the flexibility to take advantage of techniques to avoid spending down investments, and avoid later recovery from the estate by Medi-Cal, would make estate management for David's two children more straightforward and cost-effective.

Phillips could have prevented this result by drafting David's plan to address this risk. Phillips has not only done a disservice to his client, but he may face a malpractice suit as well.

NOTE► After January 1, 2017, the estate recovery will be limited solely to the probate estate. As David's home is held in a revocable trust, there would be no estate recovery. The changes to the estate recovery provisions are discussed later in this chapter.

II. PLANNING FOR CLIENTS WHO MAY FACE LONG-TERM CARE COSTS

A. Ethics

§11B.2 1. Overview

Chapter 2 provides an extraordinary overview of the ethical challenges faced by estate planning attorneys. This section provides a brief overview of these challenges and addresses a few issues unique to elder law.

The rules governing the conduct of California estate planning attorneys can be found primarily in the California Rules of Professional Conduct, Business and Professions Code, and Probate Code. Additional rules are also found in the Penal Code, Evidence Code, and Welfare and Institutions Code.

An excellent compendium of these rules is published by the California State Bar in the "California Rules of Professional Conduct and The State Bar Act" (Publication 250), which is available online at <http://ethics.calbar.ca.gov/Publications/Pub250.aspx>.

The consequences for violating these rules include state bar discipline, liability for malpractice, fraud and elder abuse, and invalidation of your client's estate plan.

§11B.3 a. Attorney's Duty to Client

The primary duties an attorney owes to his or her client are the duty of loyalty, duty to maintain confidences, duty to avoid conflicts of interest, and duty to act competently.

The field of elder law presents unique challenges. The attorney often represents more than one party, seeks to provide a benefit to a party who is not a client, or interacts with nonclients to gather information to aid in drafting his or her client's plan.

Addressing these challenges should be done at the time the attorney is retained. A sample attorney-client engagement letter is provided at the end of this chapter (see form in §11B.33). This engagement letter addresses the following:

- Identifying the client;
- Setting forth the scope of services;
- The legal fee to be charged, and how to compute refunds;
- A disclaimer of guaranty;
- Dealing with the future incapacity of the client; and
- Maintaining confidences, and sharing information with third parties.

§11B.4 b. Fee Splitting

California Rules of Professional Conduct 2-200(A) provides:

A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: (1) [t]he client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and (2) [t]he total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

Because the field of estate planning is a relatively high-volume field in which clients pay modest fees, paying or accepting referral fees in estate planning matters is not considered a best practice. Clients are better served by referrals to attorneys for their expertise, not their promise to pay a referral fee. In addition, an attorney should be wary when a third party offers to pay a client's fee.

California Rules of Professional Conduct 3-310(F) provides:

A member shall not accept compensation for representing a client from one other than the client unless: (1) [t]here is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and (2) [i]nformation relating to representation of the client is protected as required by Bus & P C §6068, subdivision (e); and (3) [t]he member obtains the client's informed written consent.

However, it is common for children to pay for a parent's legal services. In most cases, this arrangement is proper with the client's consent.

PRACTICE TIP▶ The estate planning attorney should use his or her common sense. Payment from a third party (whether a family member or not) should be refused where the person paying the fee will benefit from the plan to the exclusion of other family members.

§11B.5 2. Clients With Diminished Capacity

An attorney must proceed with caution when representing a client in poor health or with diminished capacity. This is the case even when the attorney concludes that the client has capacity.

A good practice is to request a letter from the client's physician that the client has capacity. See form in §11.34. This step will help protect both the client's estate plan from challenge and the attorney from possible liability.

Ideally, the attorney would have every client in poor health undergo an exam by a neuropsychologist. But in practice this may prove too costly and burdensome for the client.

For more on diminished capacity, see §§2.42–2.55.

§11B.6 3. Identifying Client

Identifying the client in an elder law matter is critical. In doing so, the attorney has three options: (1) represent the elder, (2) represent the children, or (3) represent both the elder and the children.

Representing the elder may be the best option when the elder is well enough to come to the attorney's office or is a previous client of his or her firm.

Choosing to represent the children may also be an appropriate choice. The elder may have already executed a trust and power of attorney that allows Medi-Cal planning. If the elder lacks capacity, this is your only choice.

Also, if the children first visit the attorney's office, with a parent in a nursing home, this second option is acceptable as long as the attorney insists that the elder retain independent counsel. Typically, the added cost of independent counsel is minimal, and the protection provided both to the clients (the children) and the estate planning attorney against allegations of conflict of interest, or worse, is significant.

Representing both the elder and the children is the least desirable option and should be avoided at all cost. *Consider the following example:*

EXAMPLE ► Children visit their attorney and ask for help with Medi-Cal planning for their mother in a nursing home. The attorney fails to properly identify his client and seeks to help all parties. The attorney drafts a power of attorney for the elder, and then helps the children transfer the parent's assets to themselves.

A year later, the elder complains to Adult Protective Services that her assets have been stolen, and she wants to return home from the nursing home. She sues her children and their attorney for fraud and elder abuse.

To avoid this scenario, think about how things would be different if the attorney had insisted that the mother retain her own independent counsel before signing the power of attorney that authorized gifting.

§11B.7 4. Malpractice Exposure

The elements of a cause of action for legal malpractice are (1) an attorney-client relationship or other basis for duty, (2) a negligent act or omission, (3) causation, and (4) damages. *Lombardo v Huysentruyt* (2001) 91 CA4th 656.

An estate planning attorney may inadvertently commit malpractice simply by not being familiar with the field of elder law. Consider the example in §11B.1 where the client's children were forced to spend

down their father's assets after his stroke. Was this malpractice by failing to foresee the need for long-term care planning? *Consider another example:*

EXAMPLE ► An estate planning attorney drafts a plan for an elderly client living at home. The client has few assets other than her home, worth \$350,000. The attorney fails to inquire whether the client is a Medi-Cal recipient. On the client's death, the client's children are in for a rude surprise as Medi-Cal's claim for reimbursement will come ahead of their inheritance. Is this malpractice?

§11B.8 5. Avoiding Elder Abuse Claims

Elder abuse occurs when a person or entity does any of the following (Welf & I C §15610.30(a)(1)–(3)):

- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

Think about the Example in §11B.6. Did the attorney assist in taking, secreting, appropriating, obtaining, or retaining the property of an elder or a dependent adult for a wrongful use or with intent to defraud, or both? Probably not. The attorney was likely acting in good faith trying to help the elder and her children. But this might be a hard case to defend.

To avoid finding yourself as a defendant in an elder abuse lawsuit, follow these suggestions:

- Use your common sense. If a case does not feel right, decline representation.
- Have the client's physician tell you in writing that the client has capacity to sign a new trust, will, power of attorney, and deed.
- Avoid changing the dispositive provisions of an elder's plan. If the elder's living trust provides for equal shares to all children, then make sure to follow that plan if you take the case. For example, you might choose to draft an irrevocable trust to avoid an estate recovery, but make sure the beneficiaries don't change.
- Go to court when possible. Court proceedings are available to engage in Medi-Cal planning. One example is a Prob C §3100 proceeding for transactions involving spouses.
- Perhaps obvious, but crucial, is never to draft a power of attorney, trust, deed, or other legal document without personally explaining it to your client, and to always be present when any document is signed.
- If your client lives in a nursing home, do not be the notary. Instead, hire an independent notary or, if possible, ask the facility's ombudsman to be a witness to the signing.
- Represent the children and have the elder hire his or her own attorney.

B. Public Benefit; Means Tested Programs

§11B.9 1. Supplemental Security Income (SSI)

Supplemental Security Income (SSI) provides a federal welfare payment to those who are aged (age 65 and over), blind, or disabled with limited “means” (income and assets). Disability is defined as the inability to do any substantial gainful activity. See 20 CFR §416.972. SSI is administered by the Social Security Administration, and the statutes and regulations applicable to the program can be found at 42 USC §§1381–1383f and 20 CFR §§416.101–416.2227.

The amount of the monthly SSI payment depends on factors including marital status, type of living situation, other income, and whether the recipient is blind; in addition, the amount is inflation-adjusted each year. In 2016, for example, SSI provided a monthly cash payment of up to \$889.40 to an unmarried person living independently. See <http://www.ssa.gov/pubs/EN-05-11125.pdf>. To be eligible for SSI, the applicant (1) must be aged (age 65 or over), blind, or disabled; (2) must have limited income and resources; and (3) must be a citizen of the United States or be a qualified alien. 42 USC 1382(a).

The resource limits for SSI are \$2000 for an individual, and \$3000 for a couple. See 20 CFR §416.1205(c). Certain assets are exempt for SSI eligibility purposes. Exempt assets include the principal residence, one car, household items and personal effects, and some retirement plans. See 42 USC §1382b(a).

§11B.10 2. Medi-Cal

Medi-Cal provides comprehensive health insurance for those who are aged, disabled, or blind and who have limited “means” (income and assets). It is the primary health insurance program that pays for long-term care in nursing homes. A person who is eligible for Supplemental Security Income (SSI) is automatically eligible for Medi-Cal. A person who is not eligible for SSI can separately qualify for Medi-Cal.

Medi-Cal is administered by the California Department of Health Care Services, and the statutes and regulations that apply to Medi-Cal can be found at 42 USC §§1396—1396w–5, 42 CFR §§430.0–456.725, Welf & I C §§14000–14198.2, and 22 Cal Code Regs §§50000–58082.

There are several types of Medi-Cal eligibility including those who are categorically needy; the Aged and Disabled Federal Poverty Level program; and the Aged, Blind, and Disabled Medically Needy program.

The Aged and Disabled Federal Poverty Level program is available to applicants who meet the Medi-Cal resource limits, and who have limited income. The income limit changes annually; effective April 1, 2016, for example, it was \$1220 for an individual and \$1645 for a couple. Department of Health Care Services All County Welfare Directors Letter No. 16–06 (Apr. 21, 2016). Applicants who are categorically eligible or who qualify under the Aged and Disabled Federal Poverty Level program receive Medi-Cal with no share of cost. Applicants who qualify under the Aged, Blind, and Disabled Medically Needy program receive Medi-Cal with a share of cost.

The asset limitations for Medi-Cal are \$2000 for an individual and \$3000 for a couple. 22 Cal Code Regs §50420. Certain assets are exempt for Medi-Cal including the principal residence, one car, household items and personal effects, and some retirement plans. See 42 USC §1396p(h)(5).

Medi-Cal is available to U.S. citizens and qualified aliens (including permanent residents).

The SSI and Medi-Cal programs have complex transfer of asset rules. The SSI transfer rules apply to all applicants, and the Medi-Cal transfer rules apply to those seeking long-term care coverage. A comprehensive overview of the Medi-Cal transfer rules can be found in *California Elder Law Resources, Benefits, and Planning: An Advocate's Guide*, chaps 10–11 (Cal CEB).

§11B.11 C. Entitlement Programs

The principal entitlement programs are Social Security Retirement, Social Security Disability, and Medicare. These are entitlement programs because an applicant is eligible based on his or her work history, not their asset and income levels.

§11B.12 1. Social Security Retirement

Social Security Retirement benefits are available to those who are at least 62 years of age (see 42 USC §402), with full benefits available to those who are 65 to 67, depending on their year of birth. See 42 USC §416(1); see also 42 USC §414(c) (qualification requirements for non-U.S. citizens).

§11B.13 2. Social Security Disability

Social Security Disability benefits are available to those who are under age 65 and are unable to perform any substantial gainful activity. The Code of Federal Regulations defines “disability” as (20 CFR §404.1505(a))

the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (see [20 CFR] §404.1560(b)) or any other substantial gainful work that exists in the national economy.

§11B.14 3. Medicare

Medicare is a health insurance program for those who are 65 years of age or older and have a sufficient work history to qualify for the program. The Medicare statutes are located at Title XVIII of the Social Security Act. 42 USC §§1395—1395kkk-1.

Medicare consists of several “Parts,” which include the following:

- Part A, which provides hospital coverage (42 USC §§1395c—1395i-5);
- Part B, which pays for physician services (42 USC §§1395j—1395w-4);
- Part C, which is an optional, managed care replacement to Parts A and B (called Medicare Advantage) (42 USC §§1395w-21—1395w-28); and
- Part D, which provides prescription drug benefits (42 USC §§1395w-101—1395w-154).

A major limitation of Medicare is that it does not provide long-term care either at home or in a nursing home. Part A does provide up to 100 days of skilled coverage in a nursing home, but does not pay for custodial care.

A person under age 65, who has received Social Security Disability for 24 months, will qualify for Medicare.

For a comprehensive overview of public benefit programs, see *Special Needs Trusts: Planning, Drafting, and Administration*, chap 3 (Cal CEB). In addition, a complete overview of Medi-Cal planning can be found in *California Elder Law Resources, Benefits, and Planning: An Advocate's Guide*, chaps 9–12 (Cal CEB).

§11B.15 D. Tax Considerations in Elder Law Practice

This section sets forth a basic overview of tax considerations in elder law practice, including a checklist of issues to address when dealing with an elder law matter (see §§11B.16–11B.19). For a comprehensive overview of tax considerations, see chap 3.

§11B.16 1. Gift Tax

The gift tax is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual resident or nonresident. See IRC §2501.

There is a gift tax annual exclusion of \$10,000, plus inflation adjustments, per donee. IRC §2503(b). For 2016, the annual exclusion amount is \$14,000. Rev Proc 2015–53, 2015–44 Int Rev Bull 615. This gift tax annual exclusion applies to present interest gifts but not to gifts of future interests, such as gifts to trusts over which the donee does not have a withdrawal power. Thus, for example, there is no requirement to file a gift tax return if no more than \$14,000 per donee is gifted in 2016, although a gift tax return may be desirable for gifts other than cash to establish the value of the gift property for estate and gift tax purposes. See §3.12.

In addition, each individual has an applicable exclusion amount of \$5 million, plus inflation adjustments, against the estate and gift tax. IRC §§2010(c), 2505(a). In 2016, this amount is \$5,450,000. Rev Proc 2015–53, 2015–44 Int Rev Bull 615. Spouses may therefore transfer up to twice that amount through taxable gifts or at death with no estate or gift tax paid, with the precise amount depending on the application of the portability election when one spouse predeceases the other. See §3.26A. The unified credit will offset taxes on the first \$5,450,000 that is gifted by the donor.

There is an unlimited marital deduction for gifts between spouses where the donee is a U.S. citizen. IRC §2523. This means there is no gift tax paid on gifts between spouses. For gifts to a noncitizen spouse, there is a gift tax annual exclusion of \$100,000 plus inflation adjustments (\$148,000 in 2016) in lieu of the marital deduction. IRC §2523(i); Rev Proc 2015–53, 2015–44 Int Rev Bull 615.

For a gift to be treated as made within a given year, it must be complete. An incomplete gift occurs when the donor has not given up complete dominion and control over the property. For example (Treas Reg §25.2511–2(b)):

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Structuring gifts as incomplete is an important tool used by estate and elder law attorneys, as an incomplete gift will not require a gift tax return. In addition, when an incomplete gift is made, the property will be taxable in the donor's estate. See IRC §§2036–2038. This is advantageous in small estates because the property will receive a full step-up in basis on death. See IRC §1014, discussed in §§3.99–3.105.

§11B.17 2. Estate Tax

The federal estate tax is assessed on the taxable estate of decedents who are U.S. residents or citizens. IRC §2001. The unified credit against the estate tax is used to shelter \$5 million plus inflation adjustments (\$5,450,000 in 2016; Rev Proc 2015–53, 2015–44 Int Rev Bull 615) for an individual and up to twice that amount for spouses, with the precise amount depending on the application of the portability election when one spouse predeceases the other. See IRC §2010(c). For further discussion of the estate tax, see chap 3.

§11B.18 3. Real Property Tax

One of the greatest pitfalls for estate planning and elder law attorneys is the California real property tax. Under Proposition 13, the maximum amount of property taxes assessed on real property is 1 percent of the full cash value of the property. In addition, Proposition 13 restricts increases in the value of the property to no more than 2 percent per year, and prohibits reassessment of the value of the property, except in the case of a change in ownership. See Article XIII A of the California Constitution.

PRACTICE TIP► The estate planning and elder law attorney must have a full understanding of the change in ownership rules to avoid unexpected consequences and potential malpractice claims that could arise from a reassessment.

There is an exclusion from reassessment for transfers between spouses. See Rev & T C §63. In addition, there is no change of ownership when property is transferred into a revocable trust by a settlor or back to the settlor when a revocable trust is revoked. See Rev & T C §62(d). There is also an exclusion from change of ownership when a property is transferred from a parent to a child, or from a child back to a parent. This exclusion applies to a transfer of a principal residence of any value and up to \$1 million of other real estate. The \$1 million rule is applied to the assessed value and not the fair market value of real estate. See Rev & T C §§63.1, 110.1. For complete discussion of property tax issues, see chap 3.

§11B.19 4. Income Tax

Estate and elder law attorneys must be familiar with income tax considerations when dealing with the transfer of assets. The two most important issues are the IRC §121 exclusion and the step-up in basis under IRC §1014. These are important issues because the donor will often own a highly appreciated principal residence. Internal Revenue Code §121 provides the following:

Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.

The exclusion is limited to \$250,000 (\$500,000 in the case of certain joint returns). See IRC §121(b).

The basis of property acquired from a decedent is the fair market value at death. IRC §1014. The basis of property acquired through a gift is generally the basis in the hands of the donor. IRC §1015.

It is important to structure gifts of appreciated property to ensure that there will be a step-up in basis on death of the donor. This can be accomplished by ensuring that the donor either retains a right to income or possession of the property or retains the right to change the beneficial enjoyment of the gift. See IRC §§2036, 2038.

E. Drafting Revocable Trusts With Long-Term Care Planning Provisions

§11B.20 1. Available Assets

Assets held in a revocable trust are considered available to an applicant when a Medi-Cal application is submitted. “In the case of a revocable trust ... the corpus of the trust shall be considered resources available to the individual.” 42 USC §1396p(d)(3)(A)(i).

§11B.21 2. Estate Recovery Program

Assets held in a revocable trust are also subject to the estate recovery program. The estate recovery regulations define “estate” to include (22 Cal Code Regs §50960.12)

all real and personal property and other assets in which the decedent had any legal title or interest at the time of death (to the extent of such interest), including assets conveyed to a dependent, heir, survivor, or assignee of the decedent through joint tenancy, tenancy in common, survivorship, life estate, living trust, annuities purchased on or after September 1, 2004, life insurance policy that names the estate as the beneficiary or reverts to the estate, or any retirement account that names the estate as the beneficiary or reverts to the estate.

§11B.22 3. Need to Plan for Medi-Cal

Clients often believe that assets in a revocable trust are protected if Medi-Cal is needed in the future. This is not the case. However, if the revocable trust is properly drafted, the trustee can engage in long-term care planning if the need for Medi-Cal arises.

Probate Code allows an agent under a power of attorney to amend or revoke the trust if the power is expressly granted in both the trust and the power of attorney. See Prob C §§4264, 15401(c).

Attorneys need to remember that the provisions in the trust govern only assets that are funded into the trust. Assets that are not in the trust need to be handled using a power of attorney. These assets may include life insurance, retirement plans, and assets that are held in joint tenancy. Therefore, the power of attorney should also include long-term care planning provisions.

Care should be taken when drafting a joint revocable trust. An A-B-C trust, with the deceased spouse's share going to a bypass trust, with or without a Qualified Terminable Interest Property (QTIP) Trust, should not be used. The reason for this is that requiring the funding of a bypass trust on the death of the first spouse may present complications if the survivor is in need of Medi-Cal in the future. The assets held in a bypass trust will be available to the Medi-Cal applicant; there may not be any way to gift those assets if the bypass trust is set up solely for the benefit of the survivor; and the assets in the bypass trust might be subject to recovery if the survivor is able to qualify for benefits.

NOTE► When broad powers are given to the trustee and agent under a power of attorney to amend and revoke the trust, and make gifts from the trust, there is the potential for elder abuse. Thus, great care must be taken in choosing an appropriate trustee.

For sample revocable trusts for an individual and a married couple, respectively, see the forms in §§11B.35 and 11B.36.

§11B.23 F. When to Use Last Will and Testament as Primary Planning Vehicle

Federal law governing the availability of assets in a third party irrevocable trust is complex. See 42 USC §1396p(d).

Section 1396p(d)(1) provides:

For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) *shall apply to a trust established by such individual*. (Emphasis added.)

Next, §1396p(d)(2)(A) provides:

(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

- (i) The individual.
- (ii) The individual's spouse.
- (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
- (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

The term "assets," with respect to an individual, includes all income and resources of the individual and of the individual's spouse. 42 USC §1396p(h)(1).

Finally, §1396p(d)(3)(B) provides:

In the case of an irrevocable trust—(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual.

Where an irrevocable trust is fully discretionary, and funded by a third party, the assets in the trust are not available to a Medi-Cal applicant. There is one significant exception to this rule. Where a spouse establishes a discretionary trust for another spouse, the assets are only considered unavailable if the trust is established pursuant to a will. If the trust is established in a living trust, the assets will be available when an applicant applies for Medi-Cal.

Some attorneys will plan for an ill spouse by establishing a living trust. The living trust will provide that if the well spouse is the first spouse to die, then the assets are paid to a testamentary special needs trust (SNT) established under the decedent's will.

A more conservative approach is simply to have the well spouse establish a testamentary-based estate plan. This would include a will, power of attorney, and advanced health care directive. If the well spouse dies first, then the assets are left to the ill spouse under a will-based SNT.

If the well spouse survives the ill spouse, the well spouse can then establish a living trust leaving their assets to his or her children and other beneficiaries.

G. Powers of Attorney With Long-Term Care Planning Provisions

§11B.24 1. Drafting a Power of Attorney

Drafting a power of attorney with long-term care planning provisions is a straight-forward task. Use the Uniform Statutory Form Power of Attorney under Prob C §4401. Then refer to Prob C §§4400–4465 for a detailed explanation of each power listed on the form. For a sample Uniform Statutory Form Power of Attorney, see §11B.38.

§11B.25 2. Powers to Include

Certain powers must be specifically included. Probate Code §4264 provides the following:

An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact:

(a) Create, modify, revoke, or terminate a trust, in whole or in part. If a power of attorney under this division empowers the attorney-in-fact to modify or revoke a trust created by the principal, the trust may be modified or revoked by the attorney-in-fact only as provided in the trust instrument.

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.

(c) Make or revoke a gift of the principal's property in trust or otherwise.

(d) Exercise the right to reject, disclaim, release, or consent to a reduction in, or modification of, a share in, or payment from, an estate, trust, or other fund on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

(g) Make a loan to the attorney-in-fact.

Note the “expressly grants” language. Both the power of attorney and the trust must allow an agent to modify or revoke the trust. See Prob C §15401(c).

If the principal wants the agent to make gifts to herself, that power should be expressly authorized to avoid a claim of self dealing.

With respect to future long-term care planning, the most important powers to include are the following:

- The power to create, modify, revoke, or terminate a trust, in whole or in part (allows an agent to revoke the elder's current estate plan, and allows the creation and funding of an irrevocable trust (such as an irrevocable income only trust));
- The power to make or revoke a gift of the principal's property in trust or otherwise (allows the agent to engage in Medi-Cal planning that involves the gifting of assets); and
- The power to designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death (allows the agent to ensure that the estate recovery is avoided).

For a sample Uniform Statutory Form Power of Attorney that authorizes the agent to exercise these powers, see §11B.38.

NOTE► The estate planning attorney should carefully explain to his or her client the broad nature of these powers and the potential for an abuse of power by the agent. The agent should be selected with the greatest of care.

H. Medi-Cal Estate Recovery

§11B.26 1. Basics

California has one of the most aggressive estate recovery programs in the country. After a Medi-Cal recipient dies, the State shall claim against the estate of a decedent, or against any recipient of the decedent's property by distribution or survival, an amount equal to the lesser of (1) all payments made by the Medi-Cal program on behalf of the decedent or (2) the decedent's equity interest in the property at the time of death (to the extent of such interest). 22 Cal Code Regs §50961(a).

Regulations define "estate" to include the following (22 Cal Code Regs §50960.12):

All real and personal property and other assets in which the decedent had any legal title or interest at the time of death (to the extent of such interest), including assets conveyed to a dependent, heir, survivor, or assignee of the decedent through joint tenancy, tenancy in common, survivorship, life estate, living trust, annuities purchased on or after September 1, 2004, life insurance policy that names the estate as the beneficiary or reverts to the estate, or any retirement account that names the estate as the beneficiary or reverts to the estate.

The Department of Health Care Services' (DHCS) claim must include all payments made by the Medi-Cal program on behalf of the decedent, including nursing facility and other long-term care services, home- and community-based services, inpatient/outpatient services, durable medical equipment, related hospital and prescription drug services, health care and insurance premiums, and payments to managed care plans. 22 Cal Code Regs §50961(c).

The DHCS' claim will not include payments made for personal care services provided under In-Home Support Services (IHSS), or the cost of premiums, co-payments, and deductibles paid on behalf of either Qualified Medicare Beneficiaries (QMB) or Specified Low-Income Medicare Beneficiaries (SLMB). 22 Cal Code Regs §50961(c).

Within 90 days of the date of death of an individual who received or may have received Medi-Cal benefits, or was the surviving spouse of a person who received Medi-Cal benefits, the attorney for the estate, or if there is no attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent, must give written notice by mail of the decedent's death to the Director of the Department of Health Care Services at his or her Sacramento office, or, Estate Recovery Section, Mail Stop 4720, P.O. Box 997425, Sacramento, CA 95899-7425. The notice must include a copy of the decedent's death certificate. Any other notice or submission of county vital records (*i.e.*, death certificate) submitted to the State Registrar of Vital Statistics or other governmental entities shall not satisfy this requirement. 22 Cal Code Regs §50962(a).

If the deceased Medi-Cal recipient's estate is subject to probate, the state has 4 months to file the estate recovery claim. Prob C §9202. For estates not subject to probate, the state's policy is to respond within 4 months. By law, the state has 3 years from receipt of notice to file a suit for recovery. CCP §338(a).

§11B.27 2. Exemptions From Recovery

The Department of Health Care Services (DHCS) must provide an exemption of the claim in any of the following circumstances (22 Cal Code Regs §50961(d)(1)–(4) (emphasis added)):

1. Where the decedent was under age 55 when the services were provided, unless the decedent was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution;
2. During the lifetime of a surviving spouse;
3. When, *as of the date of decedent's death*, there is a surviving child of the decedent who is under age 21, and who can provide the Department with the documentary evidence specified in §50966(a)(2), to the address specified in §50966(a); or
4. When, *as of the date of the Department's notice of claim*, there is a surviving child of the decedent who is blind, or disabled, within the meaning of Section 1614 of the Federal Social Security Act (42 USC §1382c).

In the case of a minor, blind, or disabled child, the whole claim is barred regardless of who inherits the property. 22 Cal Code Regs §50961(d)(3)–(4).

EXAMPLE ► A mother passes away and leaves a principal residence worth \$400,000. The mother was a Medi-Cal recipient. The home is left in equal shares to her four children. One of the four children is disabled and receives Social Security Disability Insurance (SSDI). Medi-Cal's claim is barred in full, and all four children will each receive their share of the principal residence. There will be no reimbursement to Medi-Cal.

§11B.28 3. Hardship Waivers

An applicant has 60 days from the date stated on the Department of Health Care Services' (DHCS) notice of claim in which to submit an application for waiver due to substantial hardship. 22 Cal Code Regs §50962(e).

Section 50963(a)(1)–(6) of Title 22 of the California Code of Regulations states:

The Department shall waive an applicant's proportionate share of the claim if the applicant can demonstrate through submission of an Application for Hardship Waiver, Form DHCS 6195 (05/15), and documentation to substantiate hardship, or, if applicable, at an estate hearing, that enforcement of the Department's claim would result in substantial hardship to the applicant. In determining the existence of substantial hardship, the Department shall waive an applicant's proportionate share of the claim if one or more of the following criteria apply:

- (1) When allowing the applicant to receive the inheritance from the estate would enable the applicant to discontinue eligibility for public assistance payments and/or medical assistance programs; or,
- (2) When the estate property is part of an income-producing business, including a working farm or ranch, and recovery of medical assistance expenditures would result in the applicant losing his or her primary source of income; or,
- (3) When an aged, blind, or disabled applicant has continuously lived in the decedent's home for at least one year prior to the decedent's death and continues to reside there, and is unable to obtain financing to repay the State. The applicant shall apply to obtain financing, for an amount not to exceed his or her proportionate share of the claim, from a financial institution as defined in Prob C §40. The applicant shall provide the Department with a denial letter(s) from the financial institution; or,
- (4) When the applicant provided care to the decedent for two or more years that prevented or delayed the decedent's admission to a medical or long-term care institution. The applicant must have resided in the decedent's home during the period care was provided and continue to reside in the decedent's home.

The applicant must provide written medical substantiation from a licensed health care provider(s), which clearly indicates that the level and duration of care provided, prevented, or delayed the decedent from being placed in a medical or long-term care institution; or,

(5) When the applicant transferred the property to the decedent for no consideration; or,

(6) When equity in the real property is needed by the applicant to make the property habitable, or to acquire the necessities of life, such as food, clothing, shelter or medical care.

The DHCS shall provide written notification to the applicant of its decision regarding the hardship waiver application within 90 days of the application's submission. 22 Cal Code Regs §50963(d).

§11B.28A 4. Amendments to Estate Recovery Laws—Senate Bill 833

On June 27, 2016, the Governor signed into law SB 833. Senate Bill 833 contains the most significant changes to California's Medi-Cal program in 25 years. The amendments to the estate recovery program are contained in Section 22 of SB 833. The full import of these changes will be difficult to understand until clarifying regulations are issued.

The bill would require the State Department of Health Care Service to make claims against the estate of a decedent (or against any recipient of the property of the decedent by distribution or survival) only in specified circumstances. Under Welf & I C §14009.5, the intent of the legislature, with the amendments made to this section by the Act include the following (Welf & I C §14009.5(a)(1)–(5)):

5. Limit Medi-Cal estate recovery only for those services required to be collected under federal law.
6. Limit the definition of "estate" to include only the real and personal property and other assets required to be collected under federal law.
7. Require the State Department of Health Care Services to implement the option in the State Medicaid Manual to waive its claim, as a substantial hardship, when the estate subject to recovery is a homestead of modest value, subject to federal approval.
8. Prohibit recovery from the estate of a deceased Medi-Cal member who is survived by a spouse or registered domestic partner.
9. Ensure that Medi-Cal members can easily and timely receive information about how much their estate may owe Medi-Cal when they die.

These amendments take effect on January 1, 2017. The most significant changes to the Estate Recovery Program are as follows:

- For Medi-Cal recipients who receive services prior to age 55, the recovery is limited to inpatient nursing home services and may only be made against real property.
- For Medi-Cal recipients aged 55 and older, the recovery may be made against real and personal property.
- There is a claim exemption where a recipient is survived by a spouse or registered domestic partner (RDP). Unlike past law where the recovery was deferred until the death of the surviving spouse or RDP, this is a bar to recovery where a spouse or registered domestic partner survives.
- There is a new hardship exemption where the estate consists of a homestead of modest value. "Homestead of Modest Value" means "a home whose fair market value is 50 percent or less of the average price of homes in the county where the homestead is located, as of the date of the decedent's death."

- The Department of Health Care Services must now provide a living recipient the amount of their potential Medi-Cal liability on death. This provision states: “The department shall provide a current or former member, or his or her authorized representative designated under [Welf & I C] Section 14014.5, upon request, a copy of the amount of Medi-Cal expenses that may be recoverable under this section through the date of the request. The information may be requested once per calendar year for a fee to cover the department’s reasonable administrative costs, not to exceed five dollars (\$5).”
- The definition of “estate” will be limited to the Probate Estate. There will no longer be recovery against non-probate assets such as living trusts.

§11B.29 I. Protection of Family Home

The estate recovery can be an unwelcome trap for those who do not plan properly. As noted above, SB 833 will limit the estate recovery to the Probate Estate. The authors recommend the use of an irrevocable trust or life estate until the Department of Health Care Services issues regulations implementing SB 833.

A Medi-Cal applicant can obtain benefits owning substantial assets. This is because the value of the applicant’s home is not a countable asset. In addition, other assets such as retirement accounts and life insurance policies with limited cash value can be owned.

As previously noted (see §11B.26), after a Medi-Cal recipient dies (22 Cal Code Regs §50961(a)(1)–(2)):

The Department shall claim against the estate of a decedent, or against any recipient of the decedent’s property by distribution or survival, an amount equal to the lesser of:

- (1) All payments made by the Medi-Cal program on behalf of the decedent . . . ; or
- (2) The decedent’s equity interest in the property at the time of death (to the extent of such interest).

There are two major exceptions to this rule. First, “the Department’s claim shall not apply against property interests that the decedent irrevocably transferred before death.” 22 Cal Code Regs §50961(j). Second, “where the decedent made an irrevocable transfer of a remainder interest in property with a retained life estate, the Department’s claim shall not apply against the life estate or the remainder interest.” 22 Cal Code Regs §50961(i).

The following are several issues to consider when planning to protect the family home from an estate recovery:

- The gift tax;
- The estate tax;
- The IRC §121 exclusion from gain from the sale of a principal residence;
- The step-up in basis under IRC §1014; and
- Preserving the Proposition 13 assessed value in real estate.

There are three ways to avoid a recovery. The first is to make an outright transfer of the home; the second is to transfer the home and retain a life estate; and the third is to establish an irrevocable income only trust. For consequences of these three options, see §§11B.30–11B.32.

§11B.30 1. Outright Transfer

An outright transfer of a home may be appropriate when the home is not highly appreciated in value. An outright transfer of a home is considered a taxable gift, and will not be part of the donor's taxable estate on death because the donor has relinquished dominion and control over the property.

The IRC §121 exclusion will not be available unless the donee independently qualifies under that section. This means the donee as "taxpayer" must meet the requirements of IRC §121 (*i.e.*, "during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more").

There will be no step-up in basis on death in the case of an outright transfer. Rather, the donee will take a carryover basis under IRC §1015.

Proposition 13 issues are relatively straightforward in the case of an outright transfer. There is no change in ownership if the donee is a spouse, and there is an exclusion from reassessment where the donee is a child.

§11B.31 2. Retained Life Estate

Transferring real estate subject to a retained life estate is one of the most secure ways to avoid the estate recovery. The estate recovery regulations provide that "where the decedent made an irrevocable transfer of a remainder interest in property with a retained life estate, the [Department of Health Care Services'] claim shall not apply against the life estate or the remainder interest." 22 Cal Code Regs §50961(i).

When an applicant transfers the property and retains a life estate, the transfer is considered a taxable gift; therefore, a gift tax return must be filed. In addition, because of the retained life estate, the property will also be included in the gross estate of the donor on death. See IRC §2036.

Transferring property subject to a retained life estate is not an ideal plan where the home may be sold during the applicant's lifetime. This is because the IRC §121 exclusion will not be fully available to the donor. The exclusion needs to be prorated between the life estate holder, who may qualify for the §121 exclusion, and the donee, who likely will not qualify for the exclusion. Life Estate/Remainder Value Tables can be found in the Medi-Cal Eligibility Procedures Manual (MEPM), Article 9A (Property Held in Life Estate), available online at <http://www.dhcs.ca.gov/services/medical/eligibility/pages/medeligprocmanual.aspx>.

EXAMPLE ► Wanda transfers her principal residence to her daughter. Two years later Wanda and her daughter sell the home. Wanda is aged 78. Under the Life Estate/Remainder Value Tables, Wanda is entitled to 47.05 percent of the sales proceeds. Her daughter is entitled to 52.95 percent.

There will be a step-up in basis on the death of the applicant because the property is included in the gross estate of the donor under IRC §2036. This means that the basis will step up to the fair market value on the death of the donor. See IRC §1014.

There is no change of ownership when property is transferred subject to a reserved life estate. See Rev & T C §62(e). The change of ownership occurs on death.

§11B.32 3. Irrevocable Income Only Trust

An irrevocable income only trust is an ideal solution where the home may be sold during the donor's life. The trust should be structured so that the transfer to the trust is not considered a completed gift. This can be accomplished by having the donor reserve a limited power of appointment to change who inherits the property on death. See Treas Reg §25.2511-2(b).

The home will be included in the donor's gross estate because of the reserved right to income under IRC §2036.

The applicant can take advantage of the IRC §121 exclusion, upon a later sale of the property, if the trust is structured as a grantor trust. The grantor trust provisions are very complex. See IRC §§671-679. The sample trust is designed as a grantor trust, as a power of substitution is given to the creator. See IRC §675(4).

There will be a step-up in basis on death of the donor because of the reserved right to income. The full value of the property in the trust will be included in the gross estate for estate tax purposes under IRC §2036, and there will be a step-up under IRC §1014.

The estate planning or elder law attorney should carefully structure the trust to ensure that only children will receive the property if the Proposition 13 basis is intended to be preserved.

The forms in §§11B.39, 11B.40, and 11B.41 set forth a sample outright transfer deed, retained life estate deed, and irrevocable income only trust, respectively.

III. SAMPLE FORMS

§11B.33 A. Form: Flat Fee Agreement

__ [Date] __

JONES & SMITH, PC ("Attorney") and __ [name of client] __ ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

CONDITIONS

This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the legal fee set forth herein.

SCOPE OF SERVICES

Client hires Attorney to provide legal services in the following matter: ESTATE PLANNING AND LONG-TERM CARE ADVICE FOR CLIENT.

This Agreement does not cover litigation services of any kind. This Agreement also does not cover investment advice or accounting services, including the preparation of tax returns. Services in any matter not described above will require a separate written agreement.

CLIENT'S DUTIES

Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments that may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time, and to keep Attorney advised of Client's address, telephone number, and whereabouts. Client will assist Attorney in providing information and documents necessary for the representation in the described matter.

LEGAL FEE

Client agrees to pay Attorney a flat fee of \$ _ _ [amount] _ _.

REFUND OF LEGAL FEES

If for any reason this matter is not completed, unearned fees shall be refunded. For purposes of a refund only, legal fees shall be computed at our prevailing rates which are \$ _ _ [amount] _ _ per hour for Attorney Jones and \$ _ _ [amount] _ _ per hour for Attorney Smith.

COSTS AND OTHER CHARGES

Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements, and expenses in addition to the hourly fees. Costs are billed after they are incurred and are not applied to any deposit paid to firm.

BILLING STATEMENTS

Attorney will send Client periodic statements for costs incurred. Each statement will be payable within 15 days of its mailing date.

DISCHARGE AND WITHDRAWAL

Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter, or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable.

DISCLAIMER OF GUARANTY AND ESTIMATES

Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guaranty about the outcome of the matter. Attorney makes no such promises or guaranties. Attorney's comments about the outcome of the matter are expressions of opinion only.

For Medi-Cal planning and other public benefit matters, the field of Medi-Cal and other public benefits planning is governed by state and federal law, regulations, draft regulations, policy and procedure manuals, and other such authority. New laws may be enacted, and regulations, draft regulations, and program procedures may be changed by administrative agencies at any time. Such changes are being discussed within the State of California and Congress at the time this agreement is signed.

In addition, Congress has enacted changes in federal statutes that would substantially and adversely change the area of Medi-Cal planning, and is considering changes to other public benefits such as Veterans Affairs (VA) benefits. When and how the State of California and the federal government will implement these changes is unknown.

Changes to regulatory rules are usually not made retroactive, but they can be. The Attorney will base his or her recommendations on existing rules. By signing below, Client agrees that Client understands that rule changes could frustrate the purpose of our planning, or result in periods of disqualification that may not have otherwise occurred.

ENTIRE AGREEMENT

This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

ARBITRATION

In any dispute subject to the jurisdiction of the State of California over attorneys fees, charges, costs, or expenses, Client has the right to elect arbitration pursuant to the fee arbitration procedures of the State Bar of California, as set forth in California Business and Professions Code §6200.

IF YOU BECOME DISABLED

The ethics rules that govern us state that if you become unable to make adequately considered decisions about the matters on which you have retained us to advise you, whether because of mental disability or other reasons, we may attempt to continue a normal attorney-client relationship with you as much as possible.

You are permitted under the law to appoint other persons to act on your behalf (such as an attorney-in-fact under a durable power of attorney). Those persons can continue to act on your behalf even if you later become unable to make your own decisions. If the authority that you give to those other persons is broad enough, they can make decisions for you concerning your estate planning and any other matters that you have retained us to advise you on. For example, that authority could include the ability to make gifts of your assets during your lifetime (and perhaps include making gifts to the agent himself or herself), and to execute contracts and agreements on your behalf.

If you have authorized another person to act on your behalf under a power of attorney or some other arrangement, and if in our judgment that authorization is broad enough to include the authority for that person to instruct us on your estate planning or any other matters that you have retained us to advise you on, you agree that we can continue to represent you in your estate planning or those other matters, and that we may rely upon the communications and instructions from your authorized agents.

You also agree that we may communicate with your authorized agents and disclose to them information that is relevant and necessary to allow them to make informed decisions on your

behalf, including information that has been communicated to us by you that is protected by the attorney-client privilege.

If we reasonably believe that your agent does not have the authority to act on your behalf in the matter that we represent you on, or if we reasonably believe that your agent is not acting in your best interests or in furtherance of your objectives as we understand them, we reserve the right to refuse to act upon the instructions of your agent.

CONFIDENTIAL INFORMATION

The ethics rules require that we keep all information that you disclose to us confidential and not disclose it to persons outside our firm without your permission. If other persons not in our firm are working with us on your estate planning with your permission (such as family members, your accountant, a bank trust officer, a financial planner, an insurance agent, or another law firm), you agree that we may disclose such information to them as is necessary to allow them to fulfill their role in your estate planning. We will use our judgment in making disclosures to these persons, but unless you instruct us otherwise, you agree that we may disclose information to them as we deem necessary for your best interests.

IRS CIRCULAR 230 DISCLOSURE

Federal tax regulations require us to notify you that any tax advice in this representation is not intended to be used, and cannot be used, for the purpose of avoiding penalties.

TRUST FUNDING

Client acknowledges that counsel has advised client about the importance of funding my Living Trust, and I understand that funding my Living Trust is my responsibility. I also understand that neither my attorneys, nor JONES & SMITH, PC, is responsible for funding my Living Trust.

SPOUSAL DISCLOSURE AND CONSENT (FOR SPOUSES ONLY)

Because you are married, we are representing both of you jointly in your estate planning. Your best interest and our ethical obligation to each of you require that you fully understand the considerations involved in such “dual representation.” This means that we owe duties and obligations to both of you, and that each of you in turn has an obligation to disclose to us all information that is relevant to your estate planning. Estate planning is an area in which persons with shared interests can often disagree. As husband and wife, you share certain goals and interests. Yet, at the same time, your interests can differ, and sometimes conflict.

For example, couples may have different views on how property should pass after the death of one or both of you. In some situations, we may recommend that asset holdings be restructured to take advantage of available income and death tax benefits, which may involve gifts from one spouse to the other, or the formation of irrevocable trusts. These actions can affect the division of property in the event of dissolution of marriage. Each couple’s situation is unique.

If you each had a separate attorney, you would each have an “advocate” for your position and would receive independent advice. Information given to your own attorney is confidential and

cannot be obtained by your spouse without your consent. When we advise both of you, we cannot be advocates for one of you against the other. Information that either of you gives us relating to your planning cannot be kept from the other. If you ask us to continue to serve you jointly, our effort will be to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner. Rather than being an advocate for either of you, we would act more as a mediator working toward creating a plan reflecting both of your interests and goals.

By employing us to represent you jointly, you agree that among us (the two of you and our firm), there will be no confidentiality of communications or information; if one of you discloses information to us about your financial affairs or intentions, we are free to disclose that information to the other one of you if we think that is necessary to fulfill our duties and obligations to the other one in your estate planning.

If this is not acceptable to you, you must advise us immediately so that other arrangements can be made. If a legal controversy ever developed between you concerning your estate planning, JONES & SMITH, PC would be required by the ethics rules to withdraw from the joint representation. We could not thereafter represent either of you individually in that controversy without the consent of both of you. In addition, if there was litigation between the two of you, we could be compelled to testify about information we obtained from either of you or about advice that we gave to you in your estate planning.

[Optional]

THIRD PARTY PAYOR

Client has requested that the Attorney accept payment for the services to be rendered to Client from __[name]__ (Payer) who is Client's __[specify relationship]__. Client understands that Client is primarily responsible for fees and costs incurred under the Agreement and will be liable for same if Payer fails or refuses to pay. Client acknowledges that Client has been informed in writing of any potential conflicts that may exist in connection with the payment by Payer, and Client has given informed consent to payment by Payer.

[Continue]

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

Date: _____

By: __[Signature]__
 __[Typed name]__
 Client

Date: _____

By: __[Signature]__
 __[Typed name]__
 JONES & SMITH, PC

§11B.34 B. Form: Physician's Letter re Capacity

__ [Date] __

__ [Name of physician] __

__ [Address of physician] __

Dear __ [Name of physician] __:

We are in the process of providing estate planning services and are requesting confirmation that __ [name] __ has the capacity to sign a will, living trust, power of attorney, and advanced health care directive.

Kindly sign below to confirm that __ [name] __ has such capacity.

We are grateful for your assistance with this matter.

Sincerely,

__ [Name of requesting attorney] __

Date: _____

__ [Signature] __

__ [Typed name] __

Attorney for __ [name] __

Physician's Signature

Physician's Printed Name

Physician's Printed Address

§11B.35 C. Form: Individual Revocable Trust

[Adapted from trust in §10.32]

JANE JOHNSON REVOCABLE TRUST

I, JANE JOHNSON, declare that I have transferred to myself as Trustee the property listed on the attached Schedule A, to be administered and distributed according to the provisions of this Declaration of Trust.

ARTICLE 1: CREATION OF TRUST

1.1. Identification of Settlor. By executing this Declaration of Trust, I am creating a revocable trust to hold my property for my benefit. All references in this Declaration to "Settlor" refer only to me as the creator of this Trust.

1.2. Identification of Trustee. I have appointed myself as Trustee of this Trust to manage my property according to the provisions of this Declaration. References in this Declaration to “Trustee” refer to me as manager of this Trust and also to all persons who may later serve as Successor Trustees, including Successor Co-Trustees.

1.3. The Trust Estate. I have transferred, or will transfer, property I currently own to this Trust. I may transfer to the Trust additional property that I acquire in the future. Others may add property to this Trust with my consent, or if I am not then serving as Trustee, with the consent of the Successor Trustee. References in this Declaration to “Trust estate” include all property now or hereafter added to this Trust. All property added to this Trust shall be subject to the provisions of this Declaration.

1.4. The Settlor’s Family. I am unmarried. I have two children, my daughter, AMY JOHNSON, and my son, ANDREW JOHNSON. I have no other children, living or deceased.

1.5. Name of Trust. The name of this Trust is the “Jane Johnson Revocable Trust dated __[date]__.”

ARTICLE 2: DISTRIBUTIONS DURING MY LIFETIME

2.1. Payments From Trust Estate. During my lifetime, the Trustee shall pay to or apply for my benefit as much of the income and principal of the Trust estate as I may request, plus such additional sums as the Trustee, in the Trustee’s discretion, determines are appropriate for my proper health care, education, support, maintenance, and comfort, in accordance with my accustomed standard of living.

2.2. Payments to Others. During the settlor’s lifetime, the trustee shall distribute such sums of trust principal to such person or persons who are the natural objects of the settlor’s bounty, as the settlor may direct in writing.

In the event that the settlor is unable to direct the trustee in writing under this section due to incapacity, the trustee may transfer such sums of the property of the Settlor to an individual serving as agent or attorney-in-fact under a valid power of attorney signed by the Settlor (or to several individuals serving jointly as agents or attorneys-in-fact under a valid power of attorney signed by the Settlor) as such agent or agents may request in order to make gifts, which are specifically authorized by such power of attorney, on behalf of the Settlor.

ARTICLE 3: DISTRIBUTION OF THE TRUST ESTATE AFTER MY DEATH

After my death, and after the lapse of the survivorship period required by section 3.1 and the payment of debts and taxes as required by section 3.2 and section 3.3, the Trustee shall distribute the balance of the Trust according to the provisions of this Article 3.

3.1. Requirement to Survive Settlor for Distribution. If any beneficiary does not survive me for thirty (30) days, for all purposes of this Declaration of Trust, such beneficiary shall be considered to have died before me. Further, all references to a beneficiary’s survivorship shall be deemed to require survival for such 30-day period.

3.2. *Payment of Expenses and Debts.* The Trustee shall pay my debts, except for unmatured mortgages and obligations secured by trust deeds on real estate; the expenses of my last illness and funeral; all estate and inheritance taxes, if any; and fees and costs incurred in administering this Trust, unless the Trustee determines that other adequate provisions have been made for payment of these expenses.

3.3. *Payment of Taxes Resulting From My Death.* Except as otherwise provided in this Declaration, the Trustee may pay all inheritance, estate, generation-skipping transfer taxes, or other taxes, including interest and penalties, resulting from my death attributable to assets passing under or outside of this Trust from the assets of the Trust. All such taxes attributable to a gift designated as “free of any inheritance, estate, generation-skipping transfer, or other similar taxes” shall be paid out of the balance of the Trust estate without apportionment, deduction, or reimbursement.

All inheritance, estate, generation-skipping transfer taxes, or other taxes, including interest and penalties, resulting from my death attributable to assets passing under or outside of this Trust shall be apportioned among the beneficiaries in the manner provided by California and federal law in effect at the time of my death. For purposes of this Section 3.3, “taxes” includes all estate and inheritance taxes, generation-skipping transfer taxes, Internal Revenue Code section 2032A recapture taxes, taxes attributable to excess retirement accumulations, and interest and penalties on such taxes. I direct my Trustee to seek reimbursement for such taxes paid by the Trustee from the recipients of property subject to any such tax to the fullest extent permitted by law.

3.4. *Distribution of Tangible Personal Property.* The Trustee shall distribute all of my tangible personal property, including automobiles, household furniture, furnishings, objects of art, clothing, personal effects, and other tangible articles of a personal nature, together with any interest in any insurance on such property, to my children who survive me, to be divided as they shall agree, or if they cannot agree, in approximately equal shares as determined by the Trustee.

If at the time of my death any child of mine is then a minor, the Trustee shall select items from among my tangible personal property for each minor child, taking into account, to the extent the Trustee deems advisable, any preferences expressed by each child. The Trustee shall distribute the items selected on behalf of each minor child to the child at such times as the Trustee deems appropriate. The Trustee may, in the Trustee’s discretion, distribute such items to the person with whom the minor child lives as Custodian for the child under the California Uniform Transfers to Minors Act.

3.5. *Distribution of the Balance of the Trust Estate.* On the death of the Settlor, the Trustee shall hold, administer, and distribute the assets of the Trust in the following manner:

If any children of Settlor survive the Settlor, the Trustee shall divide the trust property (including all income then accrued but uncollected and all income then remaining in the hands of the Trustee) into as many shares of equal market value as are necessary to create one share for each of the Settlor’s children who survive the Settlor and one share for each of the Settlor’s children who predecease the Settlor but who leave issue surviving the Settlor.

Each share created for a surviving child of the Settlor shall be distributed outright to that surviving child.

The Trustee shall distribute each share created for a deceased child outright to the then-living issue of that child, with those issue to take that share in the manner provided in California Probate Code section 246.

If none of the children of the Settlor survive the Settlor but there are issue of the Settlor who survive the Settlor, the Trustee shall distribute the trust property outright to those issue, who are to take that property in the manner provided in California Probate Code section 246.

If none of the issue of the Settlor survive the Settlor, the trust property shall be distributed outright as follows: To the heirs of the settlor.

ARTICLE 4: TRUSTEE PROVISIONS

4.1. Trustee During My Lifetime. During my lifetime and for as long as I have capacity to manage my financial affairs, I shall act as Trustee of this Trust. I shall be conclusively deemed to have lost capacity to serve as Trustee when my primary care physician certifies in writing that I do not have capacity to serve as Trustee.

4.2. Successor Trustee. If I do not serve as Trustee for any reason, my father, MICHAEL JONES, shall serve as Trustee. If MICHAEL does not serve as Trustee for any reason, my mother, KAREN JONES, shall serve as Trustee.

4.3. Bond of Trustee. No person I have named as Trustee shall be required to post a bond.

4.4. Disability of Trustee. For the purposes of this Declaration, an individual Trustee (other than me) shall not be qualified to act if suffering from any disability, illness, or injury that renders the Trustee unable to conduct the regular affairs of the Trust if such disability is likely to extend for a period of more than thirty (30) days. In determining the disability of an individual Trustee, a remaining Co-Trustee or a Successor Trustee may rely on a certificate or other written statement from a licensed physician who has examined the individual, certifying that such Trustee has a disability likely to adversely affect her or his ability to manage the Trust estate properly. A court determination of such disability shall not be necessary.

4.5. Liability of Successor Trustee. No Successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee. 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 the Trust.

4.6. Resignation of Trustee. A Trustee may at any time resign by giving thirty (30) days' written notice to me, if I am then living, or to the person or persons then entitled to receive income payments from this Trust and to any remaining Co-Trustee or, if there is none, to the Successor Trustee. If there is no such remaining Co-Trustee or Successor Trustee named above who is willing to serve, the Trustee shall select a Successor Trustee, and may resign upon receiving written acceptance of trusteeship from the successor.

4.7. *Trustee Compensation.* I shall receive no compensation for serving as Trustee. Any other person who serves as Trustee shall be entitled to reasonable compensation for services rendered and to reimbursement for costs and expenses advanced on behalf of the Trust.

ARTICLE 5: TRUSTEE'S POWERS

To carry out the purposes of this Trust, and subject to any limitation stated elsewhere in this Declaration, I, as Trustee, and all successor Trustees are vested with the powers described in this Article 5 in addition to those powers now or hereafter conferred by law.

5.1. *Power to Employ Agents and Advisers.* The Trustee may employ investment advisers, experts, attorneys, and accountants, for Trust purposes, at the expense of the Trust.

5.2. *Power to Receive Income and Assets.* The Trustee may apply for and receive all income, reimbursements, and assets to which I or the Trust estate is entitled, including but not limited to interest, dividends, rent, salaries, wages, distributions from partnerships, insurance reimbursements, gifts, bequests, devises, and tax refunds.

5.3. *Payment of Trust Expenses and Trustee Compensation.* The Trustee may disburse Trust funds to pay all costs and expenses of the Trust estate, including reasonable compensation to the Trustee for services rendered to the Trust. The Trustee may also reimburse the Trustee for out-of-pocket expenses incurred on behalf of the Trust.

5.4. *General Property Powers.* The Trustee may perform all acts and exercise all rights and privileges in managing the Trust as if the absolute owner of the Trust estate. These powers include the right to manage, control, sell, convey, exchange, partition, assign, divide, improve, and repair Trust property; to grant options and to sell Trust property upon deferred payments; to lease Trust property for terms within or extending beyond the duration of the Trust for any purpose, including the exploration and removal of oil, gas, and other minerals; and to create restrictions, easements, and other servitudes.

5.5. *Retention of Assets.* The Trustee may retain in trust, without liability for loss or depreciation, the original Trust assets and all other property hereafter transferred to the Trust.

5.6. *Power to Insure.* The Trustee may carry insurance of such kinds and in such amounts as the Trustee deems advisable to protect the Trust, estate, and the Trustee personally against any hazard. The costs of such insurance shall be paid from the Trust.

5.7. *Bank Accounts.* The Trustee may open and maintain bank accounts in the name of the Trustee with any bank, trust company, or savings and loan association and may designate one or more agents to conduct banking by giving written notice of such designation to the bank, trust company, or savings and loan association. Such bank, trust company, or savings and loan association shall be protected in relying upon such designation.

5.8. *General Investment Powers.* The Trustee may invest principal and income in every kind of property, real, personal, or mixed, and every kind of investment, including but not limited to shares in mutual funds, corporate obligations of every kind, and preferred and common stock, that persons of prudence, discretion, and intelligence acquire for their own accounts.

5.9. Powers Regarding Securities. The Trustee may exercise all of the rights, powers, and privileges of an owner of securities, including the right to vote and give proxies; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations; to deposit securities with and transfer title to any protective committee on such terms as the Trustee may deem advisable; to exercise or sell stock subscriptions or conversion rights; to hold securities or other property in the Trustee's name as Trustee under this Trust, or in the Trustee's own name, or in the name of a nominee, or in unregistered shares.

As Trustee, I may buy, sell, and trade securities on margin, and for such purposes may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased with such brokers as security for loans and advances made to the Trustee for Trust purposes. No Successor Trustee may buy, sell, or trade securities on margin.

5.10. Power to Purchase Bonds. The Trustee may purchase bonds and pay any premiums connected with the purchase that the Trustee deems advisable, provided, however, that each premium is repaid periodically to principal from the interest on the bond in a reasonable manner as determined by the Trustee or from the proceeds on the sale or other disposition of the bond.

The Trustee may purchase bonds at a discount as the Trustee deems advisable. If the Trustee determines that the current yield on the bonds is materially less than the rate of return that the Trust estate could otherwise obtain with equivalent safety, all or a portion of the discount shall be credited periodically to income of the Trust in a reasonable manner determined by the Trustee and, to the extent necessary, paid from the proceeds on the sale or other disposition of the bond or from Trust principal.

5.11. Authority to Purchase Life Insurance and Annuities. The Trustee may purchase and maintain annuities and life insurance policies on the life of any beneficiary or for the benefit of any beneficiary as a Trust investment. The Trustee may exercise settlement options and compromise claims made on any such policy. The Trustee may accept payments due the Trust under any settlement arrangement made before or after the death of the insured and may exercise any rights available to the Trustee under such agreement. The receipt of proceeds by the Trustee shall fully discharge the insurer, who shall not be required to see application of the proceeds.

5.12. Right to Cancel Insurance Policies. The Trustee may, in the Trustee's sole discretion, cancel any insurance policy at any time. In the event the Trustee intends not to pay any premium or otherwise intends to cancel, convert, or substantially modify any policy, the Trustee shall first give the insured, or the guardian or conservator of the insured, at least fifteen (15) days' written notice.

5.13. Authority to Borrow and Encumber. The Trustee may borrow money for any Trust purpose upon such terms and conditions as the Trustee deems proper. To secure such loans, the Trustee may encumber any Trust property by mortgage, deed of trust, pledge, or otherwise. In addition to encumbering property for a loan being made to the Trust, the Trustee may also obligate, hypothecate, and encumber Trust property to guarantee repayment of loans to me personally.

5.14. Loans to Trust by Trustee. The Trustee may advance money from the Trustee's own funds to the Trust for any Trust purpose. Such loans shall earn interest at the prevailing market rate and shall be repaid out of principal.

5.15. Power to Operate Business. The Trustee may retain and operate any business that becomes a part of the Trust estate for as long as the Trustee deems advisable, solely at the risk of the Trust. The Trustee may incorporate any such business and hold the stock as an asset of the Trust estate; and may employ such officers, managers, employees, and agents as the Trustee deems advisable to manage the business. The Trustee may dissolve, liquidate, or sell any business at such time and upon such terms as the Trustee deems advisable.

5.16. Power to File Tax Returns. The Trustee may file tax returns of every type on my behalf and on behalf of the Trust estate.

5.17. Adjustment for Tax Consequences. The Trustee may take any action and make any election that the Trustee deems necessary to minimize the tax liabilities of the Trust or Trust beneficiaries.

5.18. Power to Commence or Defend Litigation; Compromise Claims. The Trustee may commence or defend such litigation with respect to the Trust or any property of the Trust estate as the Trustee deems advisable, at the expense of the Trust. The Trustee may compromise and settle any claims or litigation against or in favor of the Trust.

5.19. Power to Reimburse Trustee. The Trustee may reimburse the Trustee from principal or income for any loss or expense incurred by reason of the Trustee's ownership or holding of any property in this Trust.

5.20. Delegation by Trustee. Any individual Co-Trustee may, with the consent of the other Co-Trustees, delegate any or all of such individual Co-Trustee's power, duty, and discretion to the other Co-Trustees by a written instrument. The individual Co-Trustee may revoke such delegation at any time.

5.21. Personal Care Powers During Incapacity. If I lose capacity to manage my financial affairs, the Trustee shall have authority to provide for my personal care and to maintain my customary standard of living; to provide suitable living quarters for me; and to hire and compensate household, nursing, and other employees as my Trustee considers advisable for my well-being. This shall specifically include but not be limited to the authority to procure and pay for clothing, transportation, medicine, medical care, food, recreational and entertainment activities, and other needs and to make arrangements, enter into contracts, and commit my resources on my behalf with respect to provision of residential care for me in a convalescent hospital, skilled nursing facility, or other alternative residential facility.

5.22. Release of Powers. The Trustee may release or restrict the scope of any power that the Trustee may hold in connection with the Trust, whether such power is expressly granted in this Declaration or implied by law. The Trustee shall exercise this authority in a written instrument executed by the Trustee, specifying the powers to be released or restricted and the nature of the restriction.

5.23. Power to Make Nonprorata Distributions. When the Trustee must divide any Trust property into parts or shares for the purpose of distribution or otherwise, the Trustee may, in the Trustee's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and

partly in money, prorata or nonprorata. The Trustee may make sales of the Trust property that the Trustee considers appropriate to accommodate such distributions.

5.24. Power to Delay Distributions. When an event occurs on which the Trustee is required to divide or distribute Trust property, the Trustee may delay the division or distribution of all or part of the property for the period of time necessary to ascertain and provide for the payment of any tax claim or other liability, contingent or otherwise, against the Trust property. During this period, the Trustee may pay the net income of the Trust to the beneficiaries entitled to it, and any income not distributed shall on resolution of any tax claim or other liability be payable to the person entitled to it immediately after the Trustee receives the income. This provision shall not be deemed to postpone or defer the vesting of any interest created by the dispositive clauses of the Trust.

ARTICLE 6: ADMINISTRATIVE PROVISIONS

The administration of the Trust shall be subject to the general provisions set forth in this Article 6.

6.1. Physical Division of Property. If this Declaration instructs the Trustee to create separate Trusts for my beneficiaries, the Trust property need not be physically divided between the respective Trusts. However, at all times the Trustee shall keep records and books of accounts with respect to each Trust whereby all of its assets, income, and liabilities will be clearly distinguishable from each other Trust.

6.2. Spendthrift Clause. The interests of the beneficiaries in the principal and income of this Trust shall not be subject to any claim or claims of my creditors or others, or to legal process, and may not be voluntarily or involuntarily alienated or encumbered.

6.3. Principal and Income Act Governs. The Trustee shall determine all matters with respect to what is principal and income of the Trust estate and apportionment and allocation of receipts and expenses between these accounts by the provisions of the California Revised Uniform Principal and Income Act. When such Act does not provide, the Trustee shall determine the characterization in the Trustee's reasonable discretion. The Trustee shall establish reasonable reserves for depreciation, notwithstanding any other provisions of this Trust or the California Revised Uniform Principal and Income Act.

6.4. Application to Probate Court. If any disputes arise as to interpretation of this Declaration, or if a need arises to obtain court approval of any accounting, the Trustee shall make application to the Probate Court. I intend that the court shall not assume continuing jurisdiction of the Trust except as may be required by law.

6.5. Authorization for Single Signature. Whenever two or more individuals are serving as Trustee, each individual Trustee is authorized to sign alone on any Trust account maintained by the Trustee at any bank or other financial institution. The bank or other financial institution shall have no duty to investigate or inquire with respect to any actions taken with regard to such an account by any Trustee acting alone.

6.6. *Number and Gender.* As used in this Declaration, the masculine, feminine, and neuter gender, and the plural and singular number, shall each be deemed to include the others when the context so indicates.

6.7. *Partial Invalidity.* If any provision of this Declaration is void, invalid, or unenforceable, the remaining provisions shall nevertheless be valid and effective.

6.8. *Headings.* The headings, titles, and subtitles are inserted solely for convenient reference and shall be ignored in any construction of this Declaration.

6.9. *Perpetuities Savings Clause.* Unless terminated earlier in accordance with other provisions of this Declaration, this Trust shall terminate twenty-one (21) years after the death of the last of my issue to die who was living on the date of my death. The principal and undistributed income of a terminated Trust shall be distributed to the income beneficiaries of the Trust in the same proportion that the beneficiaries are entitled to receive income when the Trust terminates. If at the time of termination the rights to income are not fixed by the terms of the Trust, distribution under this clause shall be made to the persons who are then entitled or authorized, in the Trustee's discretion, to receive trust payments.

6.10. *Contests and Disinheritance of Omitted Heirs.* Except as otherwise provided in this Declaration, I have intentionally and with full knowledge failed to provide for my heirs. In the event that any person, singly or in conjunction with any other person, contests the validity of this Trust, my last Will, or the disposition of the assets of the Trust estate, or otherwise seeks to void, nullify, or set aside this Trust, then that person's right to take any interest given to him or her by this Trust shall be determined as if the person had predeceased me without surviving issue.

6.11. *Survivorship Requirements.* All references in this Trust to a beneficiary surviving me shall be interpreted to require that the beneficiary survive for thirty (30) days. If the beneficiary does not survive for thirty (30) days, for all purposes of this Trust the person shall be considered to have died before me.

6.12. *Definitions of "Children," "Issue," and "Education."* As used in this Declaration, the term "issue" refers to lineal relatives of all degrees related by blood or adoption. This term "children" as used in this Declaration do not include stepchildren, foster children, and adopted children who were adults at the time of their adoption.

Distribution to a deceased beneficiary's issue shall be made in the manner prescribed in California Probate Code section 246.

As used in this Declaration, the term "education" refers to secondary education, including private schooling, costs of extracurricular activities, training in music, theater, and the arts, and any course of study at any postsecondary institution chosen by the beneficiary, including vocational, trade, and technical schools, junior and 4-year colleges, professional schools, and postgraduate schools, so long as the beneficiary is making satisfactory academic progress toward a degree or certificate, as determined by the Trustee. Payments for education shall include costs of tuition, fees, books, and reasonable living and transportation expenses. The Trustee may purchase a vehicle for the beneficiary if the Trustee determines that such purchase is in the best interest of the beneficiary.

6.13. Choice of Law. The validity of this Trust and the construction of its beneficial provisions shall be governed by the laws of the State of California. This paragraph shall apply regardless of any change of residence of the Trustee or any beneficiary, or the appointment or substitution of a Trustee residing or doing business in another state.

ARTICLE 7: REVOCATION AND AMENDMENT

7.1. Revocation During My Lifetime. At any time, I may revoke this Trust by withdrawing the assets from the Trust or by signing a written declaration stating that the Trust is revoked. I must notify the Trustee immediately in writing of such revocation if I am not then serving as Trustee.

7.2. Amendment During My Lifetime. At any time, I may amend any term of this Declaration by signing a written amendment. An amendment shall become effective immediately after I sign it and acknowledge my signature before a Notary Public. I may change or cancel any amendment in the same manner.

7.3. Revocation and Amendment After My Death. After my death, no Trust created by this Declaration shall be amended or revoked.

7.4. Exercise of Rights and Powers of Settlor By Others. Any right or power that the Settlor could exercise personally under the terms of this instrument, including any power to amend, revoke, or terminate this trust, may be exercised for and on behalf of the Settlor by any attorney in fact who, at the time of the exercise, is duly appointed and acting for the Settlor under a valid and enforceable durable power of attorney executed by the Settlor under the Uniform Durable Power of Attorney Act, or any successor statute.

In witness whereof, the provisions of this Declaration shall bind me as Settlor and Trustee, Successor Trustees assuming the role of Trustee, and the beneficiaries of this Trust, as well as all of my heirs, successors, personal representatives, agents, conservators, and assigns.

Executed on __[date]__, at __[city]__, California.

Date: _____

__[Signature]__
JANE JOHNSON
 Settlor and Trustee

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
 County of __ *[Name of county]* __)
)

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

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

WITNESS my hand and official seal.

__ *[Signature of Officer]* __ __ *[Officer's seal]* __

Exhibit A

Initial Trust Property

The initial trust estate consists of all right, title, and interest of the settlor in or to any and all of the following property.

[Edit as appropriate]

1. The residence commonly known as __ *[street address]* __.
2. The contents of that residence.
3. All other real property.
4. All bank, stock brokerage, and other financial and securities accounts of any kind.
5. All stocks, bonds, and other securities of any kind.
6. All intangible property, including any indebtedness of any person or entity.
7. Vehicles, boats, __ *[other known tangible property]* __.
8. Small business interest: __ *[Identify]* __.

Despite the foregoing, the initial trust estate does not include the following property:
 __ *[Specify]* __.

§11B.36 D. Form: Joint Revocable Trust

[Adapted from trust in §11A.38]

THE HAROLD AND WENDY OLDER REVOCABLE TRUST

We, Harold Older and Wendy Older, sometimes hereafter called “settlers,” residing in San Diego County, California, hereby create The Harold and Wendy Older Revocable Trust, declaring:

ARTICLE 1: CREATION OF TRUST

1.1. Initial Trust Property. The property described in the attached listing of “Initial Trust Property,” marked “Exhibit A,” is now held by us in trust. This property and any other property later transferred to the trust is hereafter referred to as the trust property and shall be held, administered, and distributed as provided in this document and any subsequent amendments to this document.

1.2. Character of Trust Property. All community property of the settlers transferred to this trust, and the proceeds of all such property, shall continue to be community property under the laws of California, subject to the provisions of this instrument. All separate and quasi-community property shall remain the separate or quasi-community property, respectively, of the contributing settlor.

ARTICLE 2: PURPOSES, TRUSTEES, AND FAMILY DECLARATIONS

2.1. Purposes of Trust. The primary purposes of this trust are:

2.1.1. Care of Settlers. To provide for our care and maintenance as long as either of us is living;

2.1.2. Avoid Conservatorship. To facilitate management of the trust property in the event of the incapacity of one or both of us;

2.1.3. Transfer Property at Death. To facilitate transfer of the trust property on our deaths; and

2.1.4. Tax Planning. To provide opportunities for reducing and/or postponing taxes which might be imposed as a result of our deaths.

2.2. Initial Trustees. We are the initial trustees of this trust.

2.3. Successor Trustees. If either of us ceases to be a trustee of this trust, the other shall become the sole trustee. If the sole trustee resigns or ceases to be trustee, our daughter, CATHERINE OLDER, shall become trustee, and if she fails to qualify, resigns, or ceases to act, our son, DAVID OLDER, shall become the trustee. Except as otherwise provided, the provisions of this document concerning the identity of trustees apply to all trusts established by this document.

2.4. Family Information. In connection with the administration of this trust, the trustee may rely on the following family information:

2.4.1. Marriage. We are husband and wife and were married in __[city]__, California, on __[date]__.

2.4.2. Citizenship. We are both citizens of the United States.

2.4.3. Children. The names and birth dates of our children are: David Older, December 31, 1976; Catherine Older, December 1, 1980; Beatrice Older, August 1, 1982; and Arnold Older, February 2, 1986.

2.4.4. Deceased Children. Neither of us have deceased children.

ARTICLE 3: DISTRIBUTIONS WHILE BOTH SETTLORS ARE LIVING

3.1. Distributions of Community Property. While we are both living, the trustee shall pay to us, or apply for our benefit, as much of the community property income and principal of this trust as either of us requests plus such additional sums as the trustee in its discretion determines are appropriate for our health, education, maintenance, support, comfort, and welfare in accordance with our accustomed standard of living. All distributions of community property income or principal shall be distributed to or for our benefit as community property.

3.2. Distributions of Separate Property. While we are both living, and with respect to trust property that is the separate property of one of us (the “Owning Settlor”), the trustee shall pay to the Owning Settlor or apply for his or her benefit as much of the Owning Settlor’s separate property income and principal as shall be distributed or the Owning Settlor requests, plus such additional sums as the trustee in its discretion determines are appropriate for the Owning Settlor’s health, education, maintenance, support, comfort, and welfare in accordance with the Owning Settlor’s accustomed standard of living.

3.3. Continuation of Gifting Program. In the event that a settlor is unable to direct the trustee in writing under this section due to incapacity, the trustee may transfer such sums of the property of the Settlers to an individual serving as agent or attorney-in-fact under a valid power of attorney signed by either Settlor (or to several individuals serving jointly as agents or attorneys-in-fact under a valid power of attorney signed by the either Settlor) as such agent or agents may request in order to make gifts, which are specifically authorized by such power of attorney, on behalf of either Settlor.

ARTICLE 4: DISTRIBUTION ON FIRST DEATH

On the death of whichever of us is the first to die (the “Deceased Settlor”), the trust estate shall be distributed as follows:

4.1 Surviving Settlor’s Property. The property of the survivor of us (the “Surviving Settlor”) held as a part of the trust estate (including any additions made by the will of the Deceased Settlor or by any insurance or benefit plan proceeds or otherwise) shall be distributed to the trustee of the Survivor’s Trust described in Paragraph 4.2.

4.2. Deceased Settlor’s Property. The trustee shall distribute any of the Deceased Settlor’s property held as part of the trust estate to the trustee of the Survivor’s Trust. Notwithstanding the foregoing, if the Surviving Settlor disclaims his or her entire interest in a portion or all of the Deceased Settlor’s property, such portion so disclaimed shall instead be distributed to the trustee of a trust designated as the “Disclaimer Trust,” to be held, administered, and distributed as described in Article 6. The Surviving Settlor shall not have a special power of appointment over

such portion or any other power, as trustee or otherwise, to direct the beneficial enjoyment of the Disclaimer Trust to any person.

4.3. *Survivor's Trust as Only Trust.* If the Survivor's Trust is the only trust established on the death of the Deceased Settlor, a transfer to that trust need not be evidenced by a change of title.

ARTICLE 5: SURVIVOR'S TRUST

5.1. *Distributions During Surviving Settlor's Lifetime.* During the lifetime of the Surviving Settlor, the trustee shall pay to or apply to the benefit of the Surviving Settlor as much of the income and principal of the Survivor's Trust as the Surviving Settlor requests, plus such additional sums as the trustee, in the trustee's discretion, determines are appropriate for the Surviving Settlor's health, maintenance, support, education, comfort, and welfare, in accordance with his or her accustomed standard of living. In addition, the trustee shall pay to the Surviving Settlor during the Surviving Settlor's lifetime, from the Survivor's Trust, such amounts as the surviving Settlor may from time to time request in writing, up to the whole of the trust property.

5.2. *Distribution on Death—General Power of Appointment.* On the death of the Surviving Settlor, the trustee shall distribute the remaining trust property as the Surviving Settlor appoints in accordance with the provisions of this trust for exercising a power of appointment. This is a general power of appointment that may be exercised in favor of any desired appointee, including the Surviving Settlor's estate.

5.3. *Distribution on Death—Property Not Appointed.* On the death of the Surviving Settlor, the trustee shall hold, administer, and distribute the assets of the Trust as follows:

5.3.1. If any children of the settlors survive the Surviving Settlor, the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of the settlors' children who survive the Surviving Settlor and one share for each of the settlors' children who predecease the Surviving Settlor but who leave issue surviving the Surviving Settlor.

5.3.2. Each share created for a surviving child of the settlors shall be distributed outright to that surviving child.

5.3.3. The trustee shall distribute each share created for a deceased child outright to the then-living issue of that child, with those issue to take that share in the manner provided in California Probate Code section 246.

5.3.4. If none of the children of the settlors survive the Surviving Settlor but there are issue of the settlors who survive the surviving settlor, the trustee shall distribute the trust property outright to those issue, who are to take that property in the manner provided in California Probate Code section 246.

5.3.5. If none of the issue of the settlors survive the Surviving Settlor, the trust property shall be distributed outright as follows: one half (1/2) to the heirs of the deceased settlor and one half (1/2) to the heirs of the Surviving Settlor.

ARTICLE 6: DISCLAIMER TRUST

6.1. *Distribution During Surviving Settlor's Lifetime.* During the lifetime of the Surviving Settlor, the trustee shall pay to or apply for the benefit of the Surviving Settlor all income of the Disclaimer Trust in quarter-annual or more frequent intervals, plus as much of the principal as the trustee in its discretion determines is appropriate for the Surviving Settlor's health, education, and support. In exercising its discretion, the trustee may take into account other income and resources available to the Surviving Settlor to such extent, if any, as the trustee deems appropriate.

6.2. *Surviving Settlor's Disclaimer of Mandatory Income Interest.* If the Surviving Settlor also disclaims the right to receive mandatory income distributions from the Disclaimer Trust without disclaiming rights to principal, income shall be added to principal and the trustee shall pay to the Surviving Settlor as much of the trust property as the trustee in its discretion determines is appropriate for the Surviving Settlor's health, education, and support. In exercising its discretion, the trustee may consider other income and resources available to the Surviving Settlor to such extent, if any, as the trustee deems appropriate.

6.3. *Surviving Settlor's Disclaimer of All Rights in Disclaimer Trust.* If the Surviving Settlor disclaims all rights to principal and income with respect to all or a fractional share of the Disclaimer Trust, the property so disclaimed shall be distributed in the manner provided in the next paragraph, except that solely for the purpose of applying the survivorship requirements in the next paragraph, the Surviving Settlor will be deemed to have died on the date of death of the Deceased Settlor.

6.4. *Distribution on Surviving Settlor's Death.* On the death of the Surviving Settlor, the remaining property of the Disclaimer Trust shall be distributed as follows:

6.4.1. If any children of the settlors survive the surviving settlor, the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of the settlors' children who survive the surviving settlor and one share for each of the settlors' children who predecease the surviving settlor but who leave issue surviving the surviving settlor.

6.4.2. Each share created for a surviving child of the settlors shall be distributed outright to that surviving child.

6.4.3. The trustee shall distribute each share created for a deceased child outright to the then-living issue of that child, with those issue to take that share in the manner provided in California Probate Code section 246.

6.4.4. If none of the children of the settlors survive the surviving settlor but there are issue of the settlors who survive the surviving settlor, the trustee shall distribute the trust property outright to those issue, who are to take that property in the manner provided in California Probate Code section 246.

6.4.5. If none of the issue of the settlors survive the surviving settlor, the trust property shall be distributed outright as follows: one half (1/2) to the heirs of the deceased settlor and one half (1/2) to the heirs of the surviving settlor.

ARTICLE 7: ADDITIONAL DISTRIBUTION PROVISIONS

7.1. *Interest on Pecuniary Amounts.* When a beneficiary is entitled to receive payment of a pecuniary amount or an annuity, the beneficiary shall be entitled to receive interest on delayed distributions to the extent provided by California law. If California law has no provision expressly applicable to trusts, interest shall be paid in accordance with California law applicable to a decedent's estate.

7.2. *Undistributed Income.* In any instance in which this document fails to expressly provide for the distribution or accumulation of any trust income, that income shall be accumulated and added to principal.

7.3. *Distributions to Young Persons.* If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state; to the beneficiary's custodian under the California Uniform Transfers to Minors Act until the beneficiary reaches the age of twenty-five (25); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. If there is no custodian then-serving or nominated to serve by the settlor for a beneficiary, the personal representative or trustee, as the case may be, shall designate the custodian. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

7.4. *Distribution Powers.* For purposes of making distributions, the trustee's powers include the following:

7.4.1. *Nonprorata Distributions.* When the trustee must divide any trust property into parts or shares for the purpose of distribution or otherwise, the trustee may, in the trustee's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The trustee may make sales of the trust property that the trustee considers appropriate to accommodate such distributions.

7.4.2. *Nonprorata Division of Community Property.* Community property and quasi-community property may be divided on the basis of a nonprorata division of the aggregate value of the property, or on the basis of a division of each individual item or asset, or partly on each basis.

7.4.3. *Power to Delay Distributions.* When an event occurs on which the trustee is required to divide or distribute trust property, the trustee may delay the division or distribution of all or part of the property for the period of time necessary to ascertain and provide for the payment of any tax claim or other liability, contingent or otherwise, against the trust property. During this period, the trustee may pay the net income of the trust to the beneficiaries entitled to it, and any income not distributed shall on resolution of any tax claim or other liability be payable to the person entitled to it immediately after the trustee receives the income. This provision shall not be deemed to postpone or defer the vesting of any interest created by the dispositive clauses of the trust. Nor

does this provision authorize a delay in any distribution that might result in a transfer's losing eligibility for a federal estate tax marital deduction or charitable deduction.

7.5. Apportionment of Taxes. Except as otherwise provided in this document, all estate, generation-skipping, and inheritance taxes, including interest and penalties, imposed on or by reason of the inclusion of any trust property in the gross taxable estate of either settlor may be paid by the trustee and charged to, prorated among, or recovered from the trust property or the persons entitled to the benefits under the trust as provided in the California Probate Code and the Internal Revenue Code.

ARTICLE 8: DEBTS

8.1. Debts of Deceased Settlor and Estate. On the death of the Deceased Settlor, the trustee may pay from the trust property:

8.1.1. Funeral and Last Illness Expenses. The Deceased Settlor's funeral and last illness expenses.

8.1.2. Other Debts. Debts of the Deceased Settlor, the Surviving Settlor, or both, that would be properly payable by the Deceased Settlor's probate estate if the trust property were included in the probate estate and a timely creditor's claim was filed.

8.1.3. Probate Expenses. Necessary and proper expenses of administration of the Deceased Settlor's probate estate.

8.2. Allocation Between Deceased Settlor and Surviving Settlor. Payments shall be allocated and charged to the separate and community property of each settlor as provided by California law, including Probate Code sections 19320–19326, and the trustee shall take any action necessary to recover from the Surviving Settlor or the Survivor's Trust amounts paid that are chargeable to the Surviving Settlor's property. Funeral and last illness expenses shall be allocated and charged to property included in the gross estate of the Deceased Settlor for federal estate tax purposes to the extent possible.

8.3. Debts of Surviving Settlor and Estate. On the death of the Surviving Settlor, the trustee may pay from the property of the Survivor's Trust:

8.3.1. Funeral and Last Illness Expenses. The Surviving Settlor's funeral and last illness expenses.

8.3.2. Other Debts. Debts of the Surviving Settlor that would be properly payable by the Surviving Settlor's probate estate if the trust property were included in the Surviving Settlor's probate estate and a timely creditor's claim was filed.

8.3.3. Probate Expenses. Necessary and proper expenses of administration of the Surviving Settlor's probate estate.

8.4. Limitations on Sources of Payment. Despite the provisions in Paragraphs 8.1, 8.2, and 8.3, the trustee shall not pay any estate or inheritance taxes (including interest or penalties), last

illness and funeral expenses, attorney fees, administration expenses, debts, or other obligations of the settlor or the settlor's estate, from any retirement plan (including an Individual Retirement Account) benefits in which the trust acquires an interest as a result of the settlor's death. Further, the trustee shall not pay any such obligation from any life insurance or other property passing to the trust on the settlor's death in accordance with a beneficiary designation unless the property would have been liable for the obligation had the property passed to an individual beneficiary rather than the trust.

ARTICLE 9: OFFICE OF TRUSTEE

9.1. *Definition of Trustee.* The term "trustee" as used in this document usually refers to such one or more persons or entities who, alone or in combination, have the power to take action on behalf of the trust, but it may instead refer to any form of limited power or special trustee or one or more individual co-trustees, depending on context.

9.2. *Scope of Trustee Provisions.* Except as otherwise provided, the provisions of this document concerning trustee duties, powers, privileges, and protections from liability apply to all trustees, including successor trustees, of all trusts established by this document.

9.3. *Resignation of Trustee.* The trustee may resign at any time by mailing notice to the persons entitled by law to receive a trustee's account. Unless circumstances are such that it is not necessary to replace the resigning trustee, the resignation becomes effective on the acceptance of office by the successor trustee who replaces the resigning trustee.

9.4. *Removal of Any Trustee.* Any trustee, including a settlor, may be removed in accordance with California law.

9.5. *Power to Name Successor Trustee.* A trustee of this trust shall have the power to name a person or entity who shall become that trustee's successor if a successor is required and this document makes no other provision for a successor, or if the successors named in this document are not willing to act.

9.6. *Applicable Rules for Cotrustees.* The following rules apply when a trust has more than one trustee, none of whom have the power to revoke the trust:

9.6.1. *Lack of Unanimity.* Co-trustees who are unable to reach a unanimous decision may act by majority decision.

9.6.2. *Vacancy.* If a vacancy occurs in a co-trusteeship, the remaining co-trustee may act for the trust.

9.6.3. *Disqualified Trustees.* If one or more trustees cannot participate in a decision concerning a discretionary distribution, the decision shall be made in accordance with the provisions of this document expressly addressing that circumstance.

9.6.4. *Temporary Disability.* If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is

necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

9.7. Compensation of Trustees. Trustees are entitled to reasonable compensation.

ARTICLE 10: TRUSTEE POWERS

10.1. General Powers of Trustee. Subject to any limitations expressly stated in this document, the trustee of each trust established under this document is authorized to exercise the following powers for purposes of discharging the trustee duties imposed by this document and by law:

10.1.1. California Law. The powers conferred on trustees by California law in the absence of a limitation in the trust instrument. These powers shall be deemed to include the power to invest in any kind of property without regard to statutory limitations, insurance, or collateralization requirements otherwise applicable, and the power to operate or participate in any business without complying with any otherwise applicable requirement for a court order.

10.1.2. Prudent Person. The power to perform any act that a prudent person would take in order to accomplish the objectives of the trust.

10.1.3. Prudent Investor. The power to perform any act that a prudent investor would take in investing trust property.

10.2. Specific Powers of Trustee. The powers listed in Paragraph 10.1 include, but are not limited to, those described in this Paragraph 10.2. The trustee may:

10.2.1. Acquire or sell property, for cash or on credit, at public or private sale;

10.2.2. Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

10.2.3. Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

10.2.4. Make loans from trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, including imposition of a lien on future distributions for purposes of securing repayment of a loan;

10.2.5. Pledge trust property to guarantee loans made by others to the beneficiary;

10.2.6. Appoint any person to be an authorized signer (either alone or with others, jointly or severally) for any financial institution account or securities account.

ARTICLE 11: TRUSTEE DUTIES, LIMITATIONS ON DUTIES, EXCULPATION

11.1. Duties of Trustee. Except as expressly provided in this document, the trustee has the duties imposed by law, including the duty to report and account to trust beneficiaries, statutory duties to give notice and copies of this document to trust beneficiaries and heirs at law on the

death of a settlor, and the duty to invest property in accordance with the Uniform Prudent Investor Act.

11.2. *Limitations on Trustee's Duty of Loyalty.* As long as the trustee does not act in bad faith or in disregard of the purposes of the trust, it is not a breach of the trust for the trustee to take any of the following actions:

11.2.1. Lend the trustee's own funds to the trust for any trust purpose, with interest at current rates;

11.2.2. Receive reasonable security for such a loan;

11.2.3. Purchase trust property from the trust at fair market value, provided the purchase price is paid in full in advance;

11.2.4. Lease or sell the trustee's own property to the trust at a rent or price not in excess of its fair market value;

11.2.5. Employ the trustee, a relative of the trustee, or a business in which the trustee has an interest, to perform needed services for the trust or any business in which the trust has an interest and to pay compensation not exceeding fair market value;

11.2.6. Acquire or retain an interest in property in which the trust also has an interest;

11.2.7. Acquire or retain stock of a corporate trustee or an affiliate of a corporate trustee unless the acquisition or retention would violate the trustee's duties in the case of stock of a similar corporation other than the trustee or its affiliate;

11.2.8. Deposit funds in a bank in which the trustee has an interest;

11.2.9. Perform as trustee any action described above with a relative of the trustee or a business in which the trustee has an interest;

11.2.10. Hold property of multiple trusts without segregating or dividing the property and without separately titling the property of each trust, but instead keeping accounts sufficient to identify the property of each trust.

11.3. *Acceptance of Additions.* The trustee has a duty to accept additions to this trust unless an addition would significantly expand the trustee's duties, the transferred property is hazardous or otherwise creates a substantial increased risk of trustee liability, or the property is transferred by a competent person other than a settlor who retains the capacity to establish a trust naming a different trustee. If an addition is rejected on the ground of increased duties or liabilities and the transferor is deceased or lacks capacity, the trustee shall give reasonable notice to the persons interested in the trust.

11.4. *Exculpation of Trustee.* A trustee of any kind nominated by this document, otherwise designated by a settlor, or designated as authorized in this document, shall not be liable to any beneficiary for the trustee's acts or omissions, except in cases of willful misconduct, bad faith, or

gross negligence. The previous sentence does not relieve a trustee of any obligation to restore to the trust any benefits received by the trustee as a result of a breach of the trust. This paragraph does not apply to a person who regularly engages in the business of acting as a trustee.

11.5. *Co-trustee's Duty to Act.* A co-trustee must participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or unless the co-trustee has properly delegated the performance of the function to another trustee.

11.6. *Limitation on Duty to Investigate Predecessor or Co-trustee.* A successor trustee or co-trustee has no duty to audit or investigate the administration or accounts of any prior trustee or co-trustee unless an audit or investigation is demanded in writing by a beneficiary. Each trustee shall exercise reasonable care to (1) prevent a co-trustee from committing a serious breach of trust, and (2) compel a co-trustee to redress a serious breach of trust.

ARTICLE 12: RULES OF CONSTRUCTION

12.1. *Applicable Law.* This document shall be construed in accordance with the laws of the State of California.

12.2. *Context.* The divisions, paragraphs, and subparagraphs of this document shall be construed in context, giving due regard to the headings and the topic of discussion.

12.3. *Survivorship Requirements.* All references in this trust to a beneficiary surviving the Settlor(s) shall be interpreted to require that the beneficiary survive for thirty (30) days. If the beneficiary does not survive for thirty (30) days, for all purposes of this Trust the person shall be considered to have died before the Settlor(s).

ARTICLE 13: MISCELLANEOUS

13.1. *Property Retains Character.* Except as expressly provided in this document, all property becoming subject to this trust shall retain its character as community property, quasi-community property, or separate property after becoming trust property.

13.2. *Spendthrift Clause.* The interests of the beneficiaries in the income and principal of the trusts created by this document are not subject to voluntary or involuntary transfer.

13.3. *Rule Against Perpetuities.* Unless terminated earlier in accordance with other provisions of this document, each trust created by this document or by exercise of any power of appointment conferred by this document (unless an appointed trust is entitled to a new perpetuities period) shall terminate 21 years after the death of the last survivor among Surviving Settlers and those of our issue living on the date of the death of the Deceased Settlor. In the event of termination under this Paragraph 13.3, the principal and undistributed income of a terminated trust shall be distributed to the then income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of such termination the rights to income are not fixed by the terms of the trust, distribution under this clause shall be made to the persons who are then entitled or authorized, in the trustee's discretion, to receive trust payments.

ARTICLE 14: REVOCATION, AMENDMENT, AND EXERCISE OF APPOINTMENT POWERS

14.1. *Trust Irrevocable Except as Provided.* Except as provided in this division, all trusts created by this document are irrevocable and cannot be amended.

14.1.1. *Exception: Revocable While Both Settlers Are Living.* During the joint lifetimes of the settlors, either settlor may revoke all trusts created by this document, with respect to both halves of the community property and the revoking settlor's own separate property. The revocation must satisfy the procedural requirements of this division for amending or revoking trusts. On revocation, community property subject to the revocation shall be delivered to both settlors or as the settlor(s) direct, except that the property shall be delivered to the competent settlor if only one is competent. Separate property trust assets of each settlor joining in the revocation shall be delivered to the settlor owning the property. A unilateral revocation of the trust by one settlor does not prevent reestablishment of the trust with respect to any property that may later pass to the trust under the will of a settlor or otherwise.

14.1.2. *Exception: Amendment While Both Settlers Are Living.* During the joint lifetimes of the settlors, all trusts created by this document may be amended by mutual agreement of the settlors. Any amendments must satisfy the procedural requirements of this division for amending or revoking trusts.

14.1.3. *Exception: Revocation or Amendment of Survivor's Trust.* The Survivor's Trust may be revoked or amended, in whole or in part, at any time by the Surviving Settlor. Any such revocation or amendment must satisfy the procedural requirement of this division for amending or revoking trusts. On revocation, the trustee shall deliver the trust property to the Surviving Settlor.

14.2. *Procedural Requirements for Amending or Revoking Trusts.* No amendment or revocation of any trust shall be effective unless all of the following requirements are satisfied:

14.2.1. *Signed Written Document.* The amendment or revocation must be accomplished by a written document signed by the settlor(s) taking the action. Despite the previous sentence, a settlor's power to revoke or amend may be exercised by an attorney-in-fact if and to the extent the document appointing the attorney-in-fact expressly so authorizes.

14.2.2. *Acknowledgment.* The document must be personally acknowledged before a notary public by the person(s) signing the document.

14.3. *Effect of Amendment Not Acceptable to Trustee.* The consent of the trustee is not required for a valid amendment. In the event a trust amendment substantially increases the duties or liabilities of the trustee or changes the trustee's compensation without the trustee's consent, the trustee shall have the right to resign.

14.4. *Exercise of Powers of Appointment.* A power of appointment conferred by this document, other than a power held in a fiduciary capacity by a trustee, may be exercised only by an instrument that specifically refers to both this trust and the specific power being exercised. Such a power must be exercised by will.

[Edit as appropriate]

1. The residence commonly known as __ [street address] __.
2. The contents of that residence.
3. All other real property.
4. All bank, stock brokerage, and other financial and securities accounts of any kind.
5. All stocks, bonds, and other securities of any kind.
6. All intangible property, including any indebtedness of any person or entity.
7. Vehicles, boats, __ [other known tangible property] __.
8. Small business interest: __ [Identify] __.

Despite the foregoing, the initial trust estate does not include the following property:
 __ [Specify] __.

§11B.37 E. Form: Testamentary Special Needs Trust for Spouse

[Adapted from will in California Will Drafting, Chap 38 (3d ed Cal CEB)]

WILL OF MARY JONES

I, Mary Jones, a resident of San Diego, California, declare this to be my will.

DIVISION ONE: INTRODUCTION

- A. *Revocation.* I revoke all wills and codicils that I have previously made.
- B. *Spouse.* I am married to John Jones.

C. *Children and Issue.* The names of my children are Joseph Jones and Katrina Brown. I have no deceased children. All references in this will to my “children” are to the children just named and no others. All references in this will to my “issue” are to my children as so defined and their issue.

DIVISION TWO: GIFT OF RESIDUE

A. *Gift to Spouse.* If John Jones survives me, I give my residuary estate to the trustee of the trust created under Division Three of this will entitled “Special Needs Trust” to provide for the special needs of John Jones.

B. *Gift to Issue.* If John Jones does not survive me, the residue of my estate shall be paid as follows:

If any children of testator survive the testator, the executor shall divide the residue into as many shares of equal market value as are necessary to create one share for each of the testator's children who survive the testator and one share for each of the testator's children who predecease the testator but who leave issue surviving the testator.

Each share created for a surviving child of the testator shall be distributed outright to that surviving child.

The executor shall distribute each share created for a deceased child outright to the then-living issue of that child, with those issue to take that share in the manner provided in California Probate Code section 246.

If none of the children of the testator survive the testator but there are issue of the testator who survive the testator, the executor shall distribute the residue outright to those issue, who are to take that property in the manner provided in California Probate Code section 246.

If none of the issue of the testator survive the testator, the residue shall be distributed outright as follows: To the heirs of the testator.

DIVISION THREE: SPECIAL NEEDS TRUST

A. Purpose of Trust. The purpose of this trust is to provide for the special needs of the beneficiary named below, an individual with a disability that substantially impairs the beneficiary's ability to provide for the beneficiary's own care and custody and constitutes a substantial handicap. The purpose of this trust is to supplement, not supplant, the public benefits that would be available to the beneficiary if the trust did not exist.

The trustee shall hold, administer, and distribute all property allocated to the trust for the benefit of the following beneficiary during the beneficiary's lifetime: John Jones.

B. Distribution for Special Needs. The trustee may pay to or apply for the benefit of the beneficiary as much of the trust net income and principal as the trustee determines, in the trustee's discretion, to be necessary or advisable from time to time to meet the beneficiary's special needs. Any income not distributed shall be accumulated and added to principal. As used in this instrument, "special needs" are the requisites for maintaining the beneficiary's good health, safety, and welfare when, in the trustee's discretion, such requisites are not being provided by any public agency, office, or department of any city, county, or state government; the federal government; or any private agency.

C. Trustee's Absolute Discretion. Although a primary intent of this trust is to preserve the beneficiary's eligibility for public benefits, the overriding goal of the trust is to ensure that the beneficiary's standard of living will be comfortable and enjoyable. Consequently, the availability of public benefits to pay for a specific need shall not deprive the trustee of the authority, in the trustee's sole and absolute discretion, to make distributions of trust assets for the specific need, even if the distributions cause the reduction of public benefits.

D. Trustee to Consider Public Benefits. The trustee is not responsible for seeking support and maintenance for the beneficiary from available public resources. In making distributions for the

beneficiary's special needs, however, the trustee shall consider (1) any other income or resources of the beneficiary known to the trustee and readily available to the beneficiary and (2) the applicable resource and income limitations of the public benefit programs for which the beneficiary may be eligible, including Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI); Medicare; Medi-Cal; In-Home Supportive Services (IHSS); public housing benefits (Section 8); Temporary Assistance for Needy Families (TANF), known in California as California Work Opportunities and Responsibility for Kids (CalWORKs); the appropriate regional center established under the Lanterman Developmental Disabilities Services Act; the State Department of Mental Health; county mental health services; and any other appropriate federal, state, or local agency serving individuals with disabilities. All references in this instrument to "Medi-Cal" shall include any other state's equivalent Medicaid program.

E. Spendthrift Clause. No interest in the principal or income of this trust may be anticipated, assigned, encumbered, or subject to any creditor's claim or to legal process before actual receipt by the beneficiary. Because this trust is intended to be conserved and maintained for the beneficiary's special needs, no part of the trust principal or income may be subject to the claims of voluntary or involuntary creditors for any costs incurred or sums expended by any public agency, office, or department of California, any other state, or the United States, for the provision of care and services (including residential care) to or for the beneficiary (whether prospectively or in reimbursement). The beneficiary of the trust has a disability that substantially impairs the beneficiary's ability to provide for the beneficiary's own care or custody and constitutes a substantial handicap.

F. Payment of Expenses. On the death of the beneficiary, the trustee may, in the trustee's discretion, pay any death taxes attributable to any part of the trust estate or otherwise, last-illness and funeral expenses, and expenses related to administration or distribution of the trust estate if, in the trustee's opinion, other satisfactory provisions have not been made for payment of these expenses. The trustee shall make no payments for expenses incurred for the beneficiary's health, support, and maintenance if any city, county, state, federal, or other government agency was obligated to pay for those expenses while the beneficiary was alive.

G. Distribution on Death. At the death of the beneficiary, the trustee shall distribute any remaining balance of the trust property (including accrued income and undistributed income) as follows: Outright to testator's issue, who are to take that property in the manner provided in California Probate Code section 246.

DIVISION FOUR: OFFICE OF TRUSTEE

A. Nomination of Trustee. I name as trustee and successor trustee of the Special Needs Trust created under Division Three of this will, in the order and priority indicated, the following:

First: Joseph Jones

Second: Katrina Brown

All powers vested in the original trustee shall be exercisable by any successor trustee. No named or unnamed, resident or nonresident trustee of this trust shall be required to post bond or security to serve.

B. Trustee Powers. The trustee of any trust established under my will shall have all powers conferred on trustees by California law in the absence of a limitation in the trust instrument. These powers shall be deemed to include the power to invest in any kind of property without regard to statutory limitations, insurance, or collateralization requirements otherwise applicable, and the power to operate or participate in any business without any otherwise applicable requirement for a court order.

C. Trustee Compensation. Trustees are entitled to reasonable compensation.

D. Exculpation of Trustee. The trustee shall not be liable to any beneficiary for the trustee's acts or omissions, except in cases of willful misconduct, bad faith, or gross negligence. The preceding sentence does not relieve a trustee of any obligation to restore to the trust any benefits received by the trustee as a result of a breach of the trust. This paragraph does not apply to a financial institution or individual regularly engaged in the business of acting as a trustee.

DIVISION FIVE: EXECUTORS

A. Nomination of Executors. I nominate the persons listed below, in the order and priority indicated, as executor and alternate or successor executor of my will:

First: Joseph Jones

Second: Katrina Brown

I request that no bond be required of any executor nominated in my will.

B. Power to Sell or Lease Estate Property. My executor may sell or lease, with or without notice, at either public or private sale, for cash or terms, any property of my estate that my executor considers necessary for the estate's proper administration and distribution.

C. Nonprorata Distributions. When making any division or distribution of property, the executor may, in the executor's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The trustee may make sales of the trust property that the trustee considers necessary to accommodate such distributions.

Executed on __[date]__, at __[city]__, California.

__[Signature]__
Mary Jones

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by Mary Jones, who declared to us that this instrument was the will of Mary Jones. At that time, Mary Jones appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of ___ pages, including the pages on which the signature of Mary Jones and our signatures appear, to be the will of Mary Jones, we subscribe our names as witnesses thereto.

We declare under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

Executed on __ [date] __, at __ [city] __, California.

__ [Signature of witness] __

Name of Witness: _____

Address of Witness: _____

__ [Signature of witness] __

Name of Witness: _____

Address of Witness: _____

§11B.38 F. Form: Uniform Statutory Form Power of Attorney

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (PROBATE CODE SECTIONS 4400–4465). THE POWERS LISTED IN THIS DOCUMENT DO NOT INCLUDE ALL POWERS THAT ARE AVAILABLE UNDER THE PROBATE CODE. ADDITIONAL POWERS AVAILABLE UNDER THE PROBATE CODE MAY BE ADDED BY SPECIFICALLY LISTING THEM UNDER THE SPECIAL INSTRUCTIONS SECTION OF THIS DOCUMENT. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, __ [PRINCIPAL'S NAME AND ADDRESS] __, appoint __ [AGENT'S NAME AND ADDRESS] __ as my attorney-in-fact to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL _____

___ (A) Real property transactions.

___ (B) Tangible personal property transactions.

___ (C) Stock and bond transactions.

___ (D) Commodity and option transactions.

___ (E) Banking and other financial institution transactions.

___ (F) Business operating transactions.

___ (G) Insurance and annuity transactions.

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

___ (I) Claims and litigation.

___ (J) Personal and family maintenance.

___ (K) Benefits from Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service.

___ (L) Retirement plan transactions.

___ (M) Tax matters.

___ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

MY AGENT SHALL HAVE THE FOLLOWING ADDITIONAL POWERS:

Create, modify, revoke, or terminate a trust, in whole or in part.

Make or revoke a gift of the principal's property in trust or otherwise. This Power shall be exercised, if at all, in favor of my issue, spouse, beneficiaries of my will or trust, and any other dependents, and may be exercised in favor of an Agent.

Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

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

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

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

When recorded, please return this deed and mail tax statements to:

**Nancy A. Client
123 Main Street
San Diego, CA 92130**

APN: 123-456-77-88

For recorder's use only

QUITCLAIM DEED

The undersigned grantor(s) declare that there is no Documentary transfer tax due. This is a transfer under Section 11911 of the Revenue and Taxation Code for consideration less than \$100.

For a valuable consideration, receipt of which is hereby acknowledged, **NANCY A. CLIENT**, a **SINGLE** woman, as her sole and separate property, hereby remise, release, and forever quitclaim to grantee, the real property in the County of San Diego, State of California, described as:

[Insert property description here.]

Date: _____

__ *[Signature]* __
__ *[Typed name]* __
Nancy A. Client

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of __ *[Name of county]* __)
)

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

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

WITNESS my hand and official seal.

__ *[Signature of Officer]* __ __ *[Officer's seal]* __

§11B.40 H. Form: Quitclaim Deed With Retained Life Estate

Recording requested by:

Jim A. Jones, Esq.

When recorded, please return this deed and mail tax statements to:

Nancy A. Client
123 Main Street
San Diego, CA 92130

APN: 123-456-77-88

For recorder's use only

QUITCLAIM DEED

The undersigned grantor(s) declare that there is no Documentary transfer tax due. This is a transfer under Section 11911 of the Revenue and Taxation Code for consideration less than \$100.

For a valuable consideration, receipt of which is hereby acknowledged, NANCY A. CLIENT, a SINGLE woman, as her sole and separate property, hereby remise, release, and forever quitclaim to grantee, the real property in the County of San Diego, State of California, described as:

[Insert property description here.]

SUBJECT TO A RETAINED LIFE ESTATE IN NANCY A. CLIENT.

Date: _____

Signature
Typed name
Nancy A. Client

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of [Name of county]

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

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

WITNESS my hand and official seal.

__ *[Signature of Officer]* __ __ *[Officer's seal]* __

§11B.41 I. Form: Irrevocable Income Only Trust

DECLARATION OF TRUST

DECLARATION OF TRUST, made as of this __ *[date]* __, between NANCY A. CLIENT as grantor (hereinafter referred to as the "Grantor"), and JILL A. JONES, as trustee (hereinafter referred to as the "Trustee").

WHEREAS, the Grantor is not married, and

WHEREAS, the Grantor desires to create an irrevocable trust of the property described in Schedule A hereto, together with such monies, securities, and other assets as the Trustee hereafter may hold or acquire hereunder (said property, monies, securities, and other assets, together with any additions thereto received pursuant to the Grantor's last will and testament or otherwise, being hereinafter referred to as the "trust estate"), for the purposes and upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the covenants herein contained and other valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the Grantor hereby irrevocably transfers, conveys, assigns, and delivers to the Trustee as and for the trust estate the property more particularly described in Schedule A hereto, to hold the same, and any other property which the Trustee hereafter may acquire, IN TRUST, for the purposes and upon the terms and conditions hereinafter set forth:

FIRST: The Trustee shall hold, manage, invest, and reinvest the trust estate; shall collect the income therefrom; and shall pay the net income to or for the benefit of the Grantor, no less often than annually, during the life of the Grantor.

During the life of the Grantor, the Trustee may distribute trust principal to the children of Grantor, provided such payments are made in equal shares.

In no event shall any principal of this trust be paid to or for the benefit of the Grantor.

SECOND: Upon the death of the Grantor, the Trustee shall pay and distribute the trust estate at that time remaining as follows:

The Grantor shall have the testamentary limited power to appoint all or any portion of the principal and undistributed income remaining in the trust at his or her death among one or more of Grantor's children. However, the grantor may not exercise this limited power of appointment to

appoint to himself or herself, his or her estate, his or her creditors, or the creditors of his or her estate.

Insofar as any part of the trust shall not be effectively appointed, the Trustee shall distribute the remaining unappointed balance *per stirpes* to the descendants of the Grantor.

THIRD: In any case in which the Trustee is authorized or directed by any provision of this Agreement to pay or distribute income or principal to any person who shall be a minor or incompetent, the Trustee, in the absolute discretion of the Trustee and without authorization of any court, may pay or distribute the whole or any part of such income or principal to such minor or incompetent personally, or may apply the whole or any part thereof directly to the health, education, maintenance, or support of such minor or incompetent, or may pay or distribute the whole or any part thereof to the guardian, committee, conservator, or other legal representative, wherever appointed, of such minor or incompetent or to the person with whom such minor or incompetent may from time to time reside, or in the case of a minor, may pay or distribute the whole or any part thereof to a custodian for such minor under any gifts to minors or transfers to minors act. Evidence of such payment or distribution or the receipt therefor by the person to whom any such payment or distribution is made shall be a full discharge of the Trustee from all liability with respect thereto, even though the Trustee may be such person.

The Trustee, in the absolute discretion of the Trustee, may defer payment or distribution of any or all income or principal to which a minor may be entitled until such minor shall attain the age of twenty-one (21) years, or may make such payment or distribution at any time and from time to time, during the minority of such minor, holding the whole or the undistributed portion thereof as a separate fund vested in such minor but subject to the power in trust hereby given to the Trustee to administer and invest such fund and to use the income or principal thereof for the benefit of such minor as if such fund were held in trust hereunder. No bond or other security and no periodic accounts shall be required with respect to such fund, and the same shall be subject to commission as if it were a separate trust fund. The Trustee shall pay and distribute any balance of such fund to such minor when such minor shall attain the age of twenty-one (21) years. Except as is herein above provided, if such minor shall die before attaining the age of twenty-one (21) years, the Trustee shall pay and distribute such balance to the executors, administrators, or legal representatives of the estate of such minor.

The word "minor" wherever used in this Article THIRD shall mean any person who has not attained the age of twenty-one (21) years.

FOURTH: This Agreement and the trusts created hereunder are irrevocable. The Grantor shall execute such further instruments as shall be necessary to vest the Trustee with full title to the property that is the subject of this Agreement. It is the desire of the Grantor that the trust provisions in this Agreement be carried out even if all of the beneficiaries hereunder at any time express a desire to terminate this Agreement.

FIFTH: In the administration of any property, real or personal, at any time forming a part of the trust estate, including accumulated income, and in the administration of any trust created hereunder, the Trustee, in addition to and without limitation of the powers conferred on trustees under California Probate Code sections 16200 and 16220 through 16249, as amended or any successor thereto, or otherwise provided by law, shall have the following powers to be exercised

in the absolute discretion of the Trustee, except as otherwise expressly provided in this Agreement:

(a) To retain such property for any period, whether or not the same is of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such retention may have upon the diversity of investments;

(b) To sell, transfer, exchange, convert or otherwise dispose of, or grant options with respect to, such property, at public or private sale, with or without security, in such manner, at such times, for such prices, and upon such terms and conditions as the Trustee may deem advisable;

(c) To invest and reinvest in common or preferred stocks, securities, limited liability companies, investment trusts, mutual funds, regulated investment companies, bonds and other property, real or personal, foreign or domestic, including any undivided interest in any one or more common trust funds, whether or not such investments be of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such investment may have upon the diversity of investments;

(d) To render liquid the trust estate or any trust created hereunder in whole or in part, at any time and from time to time, and to hold unproductive property, cash or readily marketable securities of little or no yield for such period as the Trustee may deem advisable;

(e) To lease any such property beyond the period fixed by statute for leases made by fiduciaries and beyond the duration of any trust created hereunder;

(f) To join or become a party to, or to oppose, any reorganization, readjustment, recapitalization, foreclosure, merger, voting trust, dissolution, consolidation or exchange, and to deposit any securities with any committee, depository or trustee, and to pay any fees, expenses and assessments incurred in connection therewith, and to charge the same to principal, and to exercise conversion, subscription or other rights, and to make any necessary payments in connection therewith, or to sell any such privileges;

(g) To form one or more corporations or limited liability companies, alone or with any person, in any jurisdiction, and to transfer assets to any new or existing corporation or limited liability company in exchange for stock or membership interests; to form one or more partnerships with any person in any jurisdiction, to have any trust or a nominee be a general or limited partner, and to transfer assets to any new or existing partnership as a capital contribution; to enter into one or more joint ventures or associations with any person in any jurisdiction, and to commit assets to the purposes of those ventures or associations; and to retain as an investment for any period any securities, partnership interests or other assets resulting from any such actions;

(h) To vote in person at meetings of stock or security holders and adjournments thereof, and to vote by general or limited proxy with respect to any stock or securities;

(i) To hold stock and securities in the name of a nominee without indicating the trust character of such holding, or unregistered or in such form as will pass by delivery, or to use a central depository and to permit registration in the name of a nominee;

(j) To initiate or defend, at the expense of the trust estate, any litigation relating to this Agreement or any property of the trust estate which the Trustee considers advisable, and to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of the trust estate or any trust created hereunder against others or of others against the same as the

Trustee may deem advisable, including the acceptance of deeds of real property in satisfaction of notes, bonds and mortgages, and to make any payments in connection therewith which the Trustee may deem advisable;

(k) To borrow money for any purpose from any source, including any trustee at any time acting hereunder, and to secure the repayment of any and all amounts so borrowed by mortgage or pledge of any property;

(l) To possess, manage, develop, subdivide, control, partition, mortgage, lease or otherwise deal with any and all real property; to satisfy and discharge or extend the term of any mortgage, deed of trust or similar instrument thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the giving or granting of options in connection therewith; to make repairs, replacements and improvements, structural or otherwise, or abandon the same if deemed to be worthless or not of sufficient value to warrant keeping or protecting; to abstain from the payment of real estate taxes, assessments, water charges and sewer rents, repairs, maintenance and upkeep of the same; to permit to be lost by tax sale or other proceeding or to convey the same for a nominal consideration or without consideration; to set up appropriate reserves out of income for repairs, modernization and upkeep of buildings, including reserves for depreciation and obsolescence, and to add such reserves to principal and, if the income from the property itself should not suffice for such purposes, to advance out of other income any sums needed therefor, and advance any income of the trust for the amortization of any mortgage, deed of trust or similar instrument on property held in the trust;

(m) To carry insurance of the kinds and in the amounts which the Trustee considers advisable, at the expense of the trust estate, to protect the trust estate and the Trustee personally against any hazard;

(n) To make distribution of the trust estate or of the principal of any trust created hereunder in cash or in kind, or partly in kind, and to cause any distribution to be composed of cash, property or undivided fractional shares in property different in kind from any other distribution, and to determine the fair valuation of the property so allocated, with or without regard to the tax basis; to hold the principal of separate trusts in a consolidated fund and to invest the same as a single fund; and to make distributions pursuant to Probate Code section 16246.

(o) To execute and deliver any and all instruments or writings which it may deem advisable to carry out any of the foregoing powers.

No Trustee shall be liable for acts or omissions in administering the trust estate or any trust created by this Agreement, except for that Trustee's own actual fraud, gross negligence, or willful misconduct. If any Trustee becomes liable as Trustee to any other person who is not a beneficiary in connection with any matter not within the Trustee's control and not due to the Trustee's actual fraud, gross negligence, or willful misconduct, such Trustee shall be fully indemnified and held harmless by the trust estate and any trust created hereunder giving rise to such liability, as the case may be, against and in respect of any damages that such Trustee may sustain, including without limitation attorney fees. Unless the Trustee shall have received written notice of an event affecting the beneficial interests hereunder, the Trustee shall incur no liability for acting though event had not occurred. No successor Trustee shall incur any liability, by reason of qualifying as a Trustee hereunder, for the acts or omissions of any predecessor Trustee. No successor Trustee shall be required to examine the acts of any predecessor Trustee, and any successor Trustee shall be responsible only for those assets which are actually delivered to such successor Trustee.

The Trustee is authorized, but not required, to accept any property transferred to the Trustee by any person during such person's lifetime or by such person's last will and testament. Any property so transferred to, and accepted by, the Trustee shall become a part of such trust or trusts created by this Agreement as such person shall direct and may be commingled with the other property in the trust or trusts to which such property has been added and shall be held, administered, and disposed of as a part of such trust or trusts.

SIXTH: The Grantor hereby appoints JILL A. JONES as Trustee hereunder. PETER A. JONES shall serve as successor trustee if JILL A. JONES is unable to serve as trustee.

The Trustee shall have the right to resign at any time by giving written notice to the then income beneficiaries of each trust created hereby, or if none of the income beneficiaries of a trust are sui juris, to the persons sui juris who would be entitled to a share of the principal of such trust if it were then to terminate and to the parents or guardians of the minor income beneficiaries.

The term "Trustee" wherever used herein shall mean the trustee in office from time to time. Any such trustee shall have the same rights, powers, duties, authority, and privileges, whether or not discretionary, as if originally appointed hereunder.

No bond, surety, or other security shall be required of any Trustee acting hereunder for the faithful performance of the duties of Trustee, notwithstanding any law of any state or other jurisdiction to the contrary.

SEVENTH: The Trustee, at any time and from time to time, may render an account to the living person or persons who are entitled, at the time of such account, to receive all or a portion of the income of the trusts herein created. The approval of any person of full age, or a guardian or parent of a minor or incompetent person, to whom an account is rendered shall, as to all matters stated therein, be final and binding upon him or such minor or incompetent person, or any persons claiming through him or such minor or incompetent person, as the case may be. A person of full age, or a guardian or parent of a minor or incompetent person, to whom an account is rendered shall be deemed to have approved the account if he assents to the account in writing or if he does not communicate to the Trustee his written objections to the account within sixty (60) days after the receipt of the account (provided the account was accompanied by a notice of said 60-day period within which to raise objections).

The Trustee shall not be required at any time to file any account in any court, nor shall the Trustee be required to have any account judicially settled, whether or not required by statute. Nothing herein, however, shall be construed as limiting the right of the Trustee to seek a judicial settlement of any account.

EIGHTH: The determination of the Trustee in respect of the amount of any discretionary payment of income or principal from any trust established hereunder, and of the advisability thereof, shall be final and conclusive on all persons, whether or not then in being, having, or claiming any interest in such trust, and upon making any such payment, the Trustee shall be released fully from all further liability or accountability therefor.

The right of any beneficiary to any payment of income or principal shall in every case be subject to any charge or deduction which the Trustee may make against the same under the authority granted to the Trustee by any law or by this Agreement.

NINTH: Except as otherwise provided in this Agreement, I have intentionally and with full knowledge failed to provide for my heirs. In the event that any person, singly or in conjunction with any other person, contests the validity of this Trust, my last Will, or the disposition of the assets of the Trust estate, or otherwise seeks to void, nullify, or set aside this Trust, then that person's right to take any interest given to him or her by this Trust shall be determined as if the person had predeceased me without surviving issue.

TENTH: If any beneficiary under this Agreement shall die simultaneously with any other person upon whose death such beneficiary shall become entitled to receive either income or principal under this Agreement, or in such circumstances as to render it difficult or impracticable to determine who predeceased the other, then for purposes of this Agreement such beneficiary shall be deemed to have predeceased such other person. The provisions of this Agreement shall be construed as aforesaid, notwithstanding the provisions of any applicable law establishing a different presumption of order of death or providing for survivorship for a fixed period as a condition of inheritance of property.

ELEVENTH: No disposition, charge, or encumbrance on the income or principal of any trust established hereunder shall be valid or binding upon the Trustee. No beneficiary shall have any right, power, or authority to assign, transfer, sell, pledge, encumber, anticipate, or otherwise dispose of such income or principal or any part thereof until the same shall be paid to such beneficiary by the Trustee. No income or principal shall be subject in any manner to any claim of any voluntary or involuntary creditor of any beneficiary or liable to attachment, garnishment, execution, or other legal or equitable process prior to its actual receipt by the beneficiary.

TWELFTH: The validity and construction of this Agreement and the trusts created hereunder shall be governed by the laws of the State of California. Notwithstanding the foregoing, validity and construction of this Agreement and any trust created hereunder with respect to any real property located in any jurisdiction outside of the State of California shall be governed by the laws of such jurisdiction.

The words "child" and "children" wherever used in this Agreement shall include not only the child and children of the person or persons designated, but also the legally adopted child and children of such person or persons, at the time in question. The word "issue" wherever used in this Agreement shall include not only the child, children, and issue of the person or persons designated, but also the legally adopted child and children of such person or persons and the child, children, or issue thereof, at the time in question.

The words "in equal shares, per stirpes" wherever used in this Agreement shall mean that property shall first be divided among the members of the oldest generation of descendants who have a member surviving at the time in question, with each living member taking one share and any deceased member's child or children living at the time in question taking the share to which the deceased member would have been entitled, and likewise down the generations.

Any provision herein which refers to a statute, rule, regulation, or other specific legal reference which is no longer in effect at the time said provision is to be applied shall be deemed to refer to the successor, replacement, or amendment to such statute, rule, regulation, or other reference, if any, and shall be interpreted in such a manner so as to carry out the original intent of said provision.

Wherever used in this Agreement and the context so requires, the masculine shall include the feminine and the singular shall include the plural, and vice versa.

If under any of the provisions of this Agreement any portion of the trust estate would be held in trust beyond a date twenty-one (21) years after the death of the last survivor of the Grantor and the issue of the Grantor and other beneficiaries hereunder now in being, or such later date permitted by the rule against perpetuities applicable in the State of California, then, upon such date, the trust of such portion shall terminate and the principal, and any unpaid income thereof, shall be paid and distributed to the person or persons then living who would have been entitled to receive the income therefrom had the trust continued, in the proportions to which they would have been so entitled.

THIRTEENTH: This Agreement shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the undersigned Grantor and upon the Trustee acting hereunder.

FOURTEENTH: This Agreement and the trusts created hereunder may be referred to, in any other instrument, by the name: "NANCY A. CLIENT IRREVOCABLE LIVING TRUST DATED __[date]__". Any transfers to this Agreement or any trust hereunder may refer to the aforesaid name or to "JILL A. JONES as Trustee under NANCY A. CLIENT IRREVOCABLE LIVING TRUST DATED __[date]__" with or without specifying any change in Trustee.

FIFTEENTH: *Power of Substitution:* During my lifetime, I reserve the right to reacquire any trust property by substituting other property of equivalent value. I, however, may not reacquire any property that would cause me to have an incident of ownership, as defined in section 2042 of the Internal Revenue Code, with respect to any insurance policy on my life held as part of the trust property. Furthermore, I may not exercise this power with respect to any stock treated as voting stock under section 2036(b) of the Internal Revenue Code.

My Trustee has a fiduciary obligation to ensure my compliance with the terms of this power by satisfying itself that the properties acquired and substituted by me are in fact of equivalent value. I may not exercise this power in any manner that shifts benefits among the beneficiaries. In consideration of this limitation, during any time I hold this power of substitution:

(1) No provision in this agreement is to be construed in any manner that limits my Trustee's power to reinvest trust corpus for the benefit of the beneficiaries, and

(2) My Trustee has a fiduciary duty to act impartially toward all trust beneficiaries.

(3) It is my intention that the provisions of this subsection comply in all respects with Rev Rul 2008-22, and that this subsection must be interpreted to ensure compliance with that ruling.

__ [Signature of Officer] __

__ [Officer's seal] __

Exhibit A

Initial Trust Property

The initial trust estate consists of all right, title, and interest of the settlor in or to any and all of the following property.

[Edit as appropriate]

1. **The residence commonly known as** __ [street address] __.
2. **The contents of that residence.**
3. **All other real property.**
4. **All bank, stock brokerage, and other financial and securities accounts of any kind.**
5. **All stocks, bonds, and other securities of any kind.**
6. **All intangible property, including any indebtedness of any person or entity.**
7. **Vehicles, boats,** __ [other known tangible property] __.
8. **Small business interest:** __ [Identify] __.

Despite the foregoing, the initial trust estate does not include the following property:
__ [Specify] __.