

ASSET PROTECTION ASSOCIATION
A Private Member Association

LIVING TRUST GUIDE

Overview of Living Trust

A Living Trust is often viewed as a preferable alternative to the Will. Some of the perceived advantages of the Living Trust relate to privacy, reduced probate costs, and management of assets. Even if you do not own real estate or have much accumulated in the way of assets as Living Trust should be considered for a couple reasons. As you begin to build wealth and assets of any amount it is very easy to cross over the low threshold requiring costly and time-consuming probate court proceedings to simply get your assets in the hands of your desired heirs. You also begin training yourself and your family to think “trust” at all times when making asset purchases and investments. Death and incapacitation rarely arrive when we expect it. Planning sooner than later prevents unnecessary grief. Your loved ones will suffer enough from your loss then to add the grief and frustration of legal and financial burdens. By creating a Living Trust now, you can add assets to the trust throughout your lifetime.

Below is a brief overview for both couples and single individuals using Living Trusts. For more information, see the [Trust vs. Will Comparison](#) topic. And for a review of what to consider when deciding on a Living Trust, see the [Factors to Consider](#) topic.

Overview of Joint Living Trust

A Joint Living Trust can be created by a person and that person's spouse. In some cases, this method is preferable to creating two separate Living Trusts, especially where assets to be contributed are held jointly and could not easily be divided to be placed into two separate trusts. Another advantage is that the joint trust is created in a single document rather than multiple documents.

Typically, the Joint Living Trust provides for both spouses, who are the Co-Grantors, to serve as the initial Co-Trustees. They serve for such time as they are able and willing to manage the assets of the Trust during their joint lifetime. After the death, "disability" or voluntary resignation of one, the other can continue as Trustee. When neither Grantor serves as Trustee, a successor Trustee takes over the management of the Trust.

The Joint Living Trust is "revocable," that is, it can be amended or revoked at a later time.

Payments

During the Grantors' lifetime, payments of the net income of the Trust are usually made to the Grantors at fixed intervals. The amount of the payments can be changed from time to time at the request of the Grantors.

When a Grantor dies, the Trust provisions designate the beneficiaries who will receive that Grantor's property, much in the same manner as a will. At the option of the Grantor, these provisions can include specific distributions and distributions of tangible personal property before the distributions of the remaining trust assets. The successor Trustee carries out these provisions in a role similar to that of an Executor. These provisions also allow the Grantors to include a trust share that will be maintained for the benefit of the Grantors' minor children through a trust for minor children.

NOTE: The joint living trust provided by NTA is not appropriate for couples whose combined estates (including life insurance proceeds and retirement plans) exceed the federal estate tax applicable exclusion amount. For 2023 that amount is \$25.84 million and 2024 is \$28.4 million. For couples whose estates exceed those amounts, please consult with the fellow member who is assisting you and request information regarding alternative forms of trusts, or you may wish to consult an attorney outside of the Association.

Overview of Single Grantor Living Trust

An unmarried individual or one who prefers to keep assets separate from a spouse will use a living trust designed for a single Grantor. All other advantages and considerations outlined above for a joint living trust apply to the single grantor trust.

NOTE: The single grantor living trust provided by NTA is not appropriate for an individual whose estate (including life insurance proceeds and retirement plans) exceeds the federal estate tax applicable exclusion amount. For 2023 that amount is \$12.92 million and 2024 is \$14.2 million. For individuals whose estate exceeds those amounts, please consult with the fellow member who is assisting you and request information regarding alternative forms of trusts, or you may wish to consult an attorney outside of the Association.

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Alternate Beneficiaries

The Living Trust document allows multiple opportunities to provide for "alternate" beneficiaries, beneficiaries who will receive distributions of assets if the first choice does not survive you. For example, you can give all of the remaining trust assets to your children as the first choice, but if your children and grandchildren do not survive you, you may want to select:

1. the "several beneficiaries" option to give 40% of the remaining trust assets to one niece and 60% to a nephew with unique needs,
2. the "several beneficiaries" option to divide the remaining trust assets equally among three brothers, or
3. the "one beneficiary" option to give the remaining trust assets to an elderly parent.

These examples do not illustrate all of the many options.

In most cases, you will have the opportunity to provide for several layers of alternate beneficiaries. However, if you do not want to use the many options, there is an easy out -- choose a primary beneficiary, and then select the "heirs" option to provide that your heirs (and/or your spouse's heirs) will be the alternate beneficiaries. If the "heirs" option is selected, no further choices are necessary.

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Alternate Successor Trustee

It is recommended that you name an ALTERNATE successor trustee to serve if your first choice is unavailable or unwilling to serve. If your first choice cannot serve and you fail to name an alternate, your survivors and the court system will be left to make the decision for you.

You may name one alternate successor trustee to serve alone or alternate successor co-trustees to serve together.

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Amending a Living Trust

There may be occasions when you may want to amend a Living Trust after the Trust has become "operational." For example, you may want to change a beneficiary, name a different Trustee, or add a new provision.

There are several ways to amend the Trust. For minor deletions and/or additions, see the "Living Trust Amendment" document. For major and/or numerous changes, however, it is recommended that the Trust be "amended and restated" in its entirety. For such cases, this document offers an optional

sentence that can be included in the Living Trust. This sentence provides that the Trust agreement is "amending and restating" the existing Trust agreement. By including this reference to the existing Trust agreement, the new agreement has the effect of simply continuing the current, existing Trust, which was established under the prior agreement, but with the desired changes.

This "continuation" means that a new trust is not being created, and therefore, it is not necessary to transfer assets from an "old" trust into a "new" trust. In order to amend and restate the Trust, you must deliver to the Trustee an appropriate written amendment or restatement, signed by both you and your spouse as Co-Grantors (or just you if you are the only Grantor), and by the Trustee(s).

Operational Living Trust

A Trust is not considered "operational" until it has been signed and assets have been transferred into the Trust. Therefore, it is not necessary to use this "amending" feature if the prior trust agreement was signed, but not made operational by transferring assets into the trust. Instead, simply create the new trust and revoke the old trust (see the "Living Trust Revocation" document). A fellow NTA member with experience in the area should be consulted regarding any questions, or you can visit with an outside attorney who practices estate planning law.

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Beneficiaries

When the first spouse dies, the Trust provisions designate the beneficiaries who will receive that Grantor's property. At the option of that Grantor, these provisions can include specific bequests and immediate distribution of some, or all of the trust assets contributed by that person. These provisions also can include retaining those assets within the trust for the benefit of the surviving spouse and/or the minor children. Because you do not know which spouse will survive the other, you can make specific distributions payable either upon your death (regardless of whether your spouse is surviving) or only upon the death of the surviving spouse. This latter choice allows the surviving spouse to continue to enjoy the property during his or her lifetime.

If the deceased Grantor was serving as a Trustee, the successor Trustee (which may be the surviving spouse, now as surviving Co-Trustee), will carry out the deceased Grantor's directions.

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Bonding

You may require that your Trustee obtain a bond. A bond is similar to an insurance policy in that it covers against losses from misappropriation of assets by the Trustee.

However, most people choose not to require a bond because:

1. Most choose trustees they know they can trust,
2. Bonds are expensive,
3. Bonds are not usually necessary if a bank or licensed trust company is the Trustee because they are already bonded, and
4. Bonds may necessitate greater court involvement.

Because a Trustee might occasionally misappropriate assets--either through theft or error-- **IF** a court is involved with the trust, most states require that they obtain a bond before they are given authority to act as a Trustee, **UNLESS** you state in your Living Trust that no bond is required.

Note: These bonds are also known as "fiduciary bonds." A fiduciary is a person or organization who is given the authority and responsibility over assets which are not owned for the benefit of that fiduciary. For example, the Trustee has control over the trust assets for the benefit of others.

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Categories of Specific Distributions

Specific Distributions can include (a) intangible personal property, (b) tangible personal property, or (c) real property. The following are examples of these categories of specific bequests:

1. Intangible personal property.

- An amount of cash
- An entire bank account
- Stocks, bonds or an entire brokerage account
- A patent or copyright
- Contract rights, such as the right to receive payments from a third party under a promissory note or an annuity
- Business interests in a privately-held corporation or partnership

2. Tangible personal property.

- Jewelry
- Heirlooms
- Antiques
- Vehicles
- A boat, snowmobile, motorcycle, or airplane
- Clothing and personal effects
- A household item OR "all household furnishings"

3. Real property.

- House or condominium
- Cabin or vacation home
- Bare lot
- Farmland

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Choosing a Trustee

A trustee is the person or organization named in a trust who has the responsibility of carrying out the terms of the trust, including managing the trust's assets and making distributions to the beneficiaries.

The trustee should be dependable and capable of handling financial matters. A business background may be helpful but is not required. Many banks have trust operations that provide trustee services, but of course, the bank will charge for its services.

Generally, the grantor of a living trust serves as the initial sole trustee until such time as (i) the grantor wants to turn over the trustee responsibilities to a successor trustee, (ii) the grantor is physically or mentally unable to serve as trustee, or (iii) the grantor dies. (In the case of a joint living trust, it is typical that both grantors—the co-grantors—act together as co-trustees.)

Alternatively, you can nominate two or more persons (or institutions) to serve together as co-trustees. Decisions of co-trustees need to be unanimous, and therefore, the co-trustees need to be able to work together.

You also can provide the Trustee with additional powers. See [Optional Trustee Powers](#) for more information.

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Compensation for Trustees

If a bank's trust department or other institution is selected as the Trustee, it is automatically understood that the Trustee will charge a fee for its services. However, if a family member or friend is chosen, there may be some dispute whether you intended for that individual Trustee to receive compensation for his or her services.

This optional power clarifies your intent by stating that the Trustee IS entitled to reasonable compensation for his or her services and is entitled to reimbursement for out-of-pocket expenses incurred in the performance of the Trustee's duties.

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Components of Your Estate

Your estate is composed of your assets at the time of your death. Your assets may include the following:

- Joint Property
- Individual Property
- Life Insurance / Annuity / Retirement Plan Designations

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Distributing Assets to Benefit a Beneficiary

The language of a Trust typically provides for payments and distributions of trust assets "to," or "for the benefit of," a beneficiary. However, it is often useful to clarify your intent that the Trustee is authorized to make payments directly to others who are providing something of value to the beneficiary.

The most common example is that the Trustee can make a payment directly to a college to cover a child's tuition. By including specific authority in the Trust for the Trustee to make such payments to others, the Trustee is better protected against claims that required payments to a beneficiary were never received by that beneficiary.

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Distributing the Remaining Trust Assets

This document allows you to distribute the remaining trust assets by selecting from a variety of alternatives. For example, you can choose to distribute the remaining trust assets to your children. If you have minor children, you can select a Trust for Children (commonly referred to as a minor's trust).

You also have the options of distributing the remaining trust assets to:

1. "one beneficiary" who may be a person (or a charity) other than a child, or
2. "several beneficiaries" in shares that are stated in percentages.

This latter option, for example, would allow you to give 97% of your remaining trust assets to a trust for your children and 3% to a favorite charity.

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Distributing the Trust

During your lifetime, payments of the net income of the Trust should be made to you at fixed intervals. The amount of the payments and the intervals can be changed from time to time at your request.

When you die, the Trust provisions designate the beneficiaries who will receive your property, much in the same manner as a will. At your option, these provisions can include specific distributions, distributions of tangible personal property, and immediate distributions of the remaining trust assets. These provisions also allow you to include a trust share that will be maintained for the benefit of your minor children through a trust for minor children.

The successor Trustee carries out these provisions in a role similar to that of an Executor.

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Estate Taxes

Federal Estate Tax is a tax imposed at the federal level (in addition to possible estate and/or inheritance taxes imposed at the state level) for the privilege of transferring property at death. (The states that do NOT impose their own estate taxes at the time of this writing are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.)

This tax is imposed whether the assets pass under the Decedent's Will or Trust, or by the state laws of intestacy (without a Will). The tax is based on the total value of ALL assets owned by the Decedent at death, plus taxable gifts made during the Decedent's lifetime (the Decedent's "Gross Estate").

The 2017 Tax Cuts and Jobs Act (TCJA) adjusted the federal estate tax exemption to a much higher amount than previously allowed. (The exemption is the amount each person can transfer in total during life and at death without paying transfer or estate tax.) For 2023, the estate tax exemption amount is \$12.92 million for a single taxpayer and \$25.84 million for a married couple. The amount is adjusted up each year for inflation. However, this tax advantage is set to expire at the end of 2025 and revert back to

a much lower exemption amount unless Congress renews it. Check with your tax advisor for more information or a fellow member with knowledge of estate taxes.

The living trust that NTA creates for most members does not need to be concerned about estate taxes as most members have estates smaller than the full exemption amount. Members who have large estates and are concerned about the possibility of estate taxes being imposed on the death of one or both of the grantors, discuss your concerns with a fellow member with experience in this field as to other solutions, which may include a different form of living trust. Or, you may consult an outside estate planning attorney.

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Excluding Spouses

Many states "protect" spouses with laws that permit a spouse to receive a portion of your estate even though your Pour-Over Will and/or Joint Living Trust do not provide for your spouse. If the intent in the Pour-Over Will and/or Joint Living Trust is to "disinherit" your spouse, you should consult with a lawyer regarding the legal rights of your spouse to receive property from your estate. The Association is unable to provide assistance or legal advice in this area. If you choose to "disinherit" your spouse within the living trust that you request from the Association, the Association disclaims any legal problems you may encounter with that decision.

"Disinheriting" means to deprive another person (an heir or spouse) of property that would have been distributed to that person under the laws of intestacy (dying without a valid will). An agreement between you and your spouse, signed prior to marriage, may permit you to disinherit your spouse.

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Exclusion from the Trust

If substantially all of your assets will be transferred to a living trust, it is common practice for you to provide for distributions upon your death to your family, particularly your spouse (if married) and your children (if any), or in the case of a deceased child, to such child's children (if any). Such persons are said to be "the natural objects of your (the Grantor's) bounty".

If such persons exist but are not included in the Trust, a question may arise as to whether you simply made a mistake. Further, such excluded persons may attempt to challenge the Trust on this very basis, that is, that you simply made an error in excluding them from the Trust.

If you intend to exclude someone that might expect to be included in the Trust, it is advisable to include a statement in the Trust that makes it clear that the omission was intentional. Although this type of exclusion generally applies only to individuals, this provision can also be used to list organizations that will be excluded.

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Funding the Trust

In addition to creating and signing a Living Trust document, assets must be transferred “into” the Trust—that is, conveyed to the trustee(s). A Living Trust only applies to the assets that are actually transferred into the Trust. Assets can be transferred both at the time of the creation of the Trust and also at later times. The transfer of the assets to the trustee(s) (into the trust) is called “funding the trust.”

Separate transfer documents must be used for this purpose because the Trust document itself does not contain any language of conveyance or any list of assets. In most cases, the newly named owner of the assets will be the trustee of the Trust. However, under some unusual circumstances, a nominee person or entity may need to hold the asset for the trustee. Your fellow member assisting you with your plan will likely know if you have an asset that requires such an unusual transfer.

For example, an account for John T. and Jane B. Doe who have created a trust dated January 1, 2023, could be transferred into the Trust by changing the account name to "The Trustee of the John T. and Jane B. Doe Joint Living Trust dated January 1, 2023."

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Factors to Consider

There are several important factors to consider in creating and using a Living Trust.

- 1. Use of this Document as a Planning Device.** Creating a Living Trust involves careful planning and consideration. Not all of the steps, including the very important step of transferring assets, can be completed while sitting at a computer. Although your fellow member that interviews you will guide you through the process of creating a valid Living Trust and other associated documents, you may need to seek other counsel during the process. In fact, it is expected that many people will use the creation of a Living Trust as a planning tool, especially if there are special circumstances or if your estate may exceed the federal estate tax exemption at your death (see [Estate Taxes](#)). If that is the case, then after going through the Living Trust questionnaire and the information in this guide for your education, you may wish to finalize the Living Trust document after seeking other counsel, whether within the Association or outside professional advice.
- 2. Transfer of Assets into the Trust.** In addition to creating and signing the Living Trust document, assets must be transferred into the trust. A Living Trust only applies to the assets that are actually transferred into the Trust. For additional information on this very important point, read the [Funding the Trust](#) topic.
- 3. Pour-Over Will.** The use of a Living Trust does not eliminate the need for a will. You may have assets that you overlooked or that you purposefully do not wish to transfer into the Living Trust. For example, it

may be preferable not to transfer some personal property such as vehicles and a personal checking account. A Pour-Over Will handles the distribution of such assets upon your death by directing that such assets be transferred to the Trustee of the Living Trust for final distribution. It is highly recommended that a Living Trust is not signed unless a [Pour-Over Will](#) is also properly signed.

4. Tax Consequences. Generally, the income earned by the assets transferred into your Living Trust will be taxable to you on your personal income tax return in the same manner as if the assets continued to be held personally by you during your lifetime. Because the trust is revocable, the IRS defines the trust as a "grantor trust." Grantor trusts, under IRS definition, do not file or pay taxes. The assets and income of the trust are treated as if still owned directly by the grantor(s) of the trust.

5. Estate Planning. The estimated value of your assets, minus the estimated value of your liabilities is critical information in planning your estate. A high value -- more than \$12 million individually or more than \$25 million as a married couple in value at your death -- suggests that more complex estate planning techniques may be required to minimize federal estate taxes. (See [Estate Taxes](#)) If this is your situation consult with your fellow member assisting you with your estate plan as to other solutions available to you.

6. When to Use a Single Grantor Living Trust. Single people will need to create a Living Trust designed for one grantor. Also, in some cases, married couples who prefer to keep their assets separate from each other and/or have very different plans for their personal beneficiaries should also each create a Single Grantor Living Trust.

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Heirs-at-Law

Heirs-at-law are persons who would be entitled to the assets of your estate if you died without leaving a valid Will or Trust. The laws of each state define who are the heirs of persons who die as residents of that state. Although state laws vary somewhat, in general, your heirs are those persons who are most closely related to you by blood or adoption.

For example, the priority in most states is that your heirs are only your children, if you have children, with grandchildren or other descendants taking the share of a child who dies before you do. Only if you have no descendants will the definition of an heir be expanded to include your parents (either one), then your siblings (if any), with nieces and nephews (possibly other descendants of your siblings) taking the share of a deceased sibling. If your parents and all of their descendants are deceased, the circle is expanded to include your grandparents and all of their descendants. If no relatives at all can be found, your estate then "escheats" to your state of residence, generally, a rare occurrence. Because heirs are usually defined by state law to be related to you only through blood or adoption, your spouse is usually not your heir. But keep in mind that there are other kinds of state laws that protect spouses by guaranteeing your surviving spouse all or a portion of your estate.

If you are married and select the "heirs-at-law" option, only YOUR heirs will benefit unless you specifically choose to also benefit your spouse's heirs by allocating a percentage of your estate to your spouse's heirs.

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Holding Assets as a Single Fund

If the Trust is being maintained for the benefit of more than one beneficiary, each of which is entitled to a specific share of the Trust, the Trustee will have to keep careful records of each beneficiary's share. Each such share typically earns income and pays its proportionate share of the Trust expenses.

The optional power to hold trust assets as a single fund allows the Trustee to maintain a single fund for joint investment and management purposes of the entire Trust, without the need for physical segregation of each beneficiary's share.

For example, one brokerage account and one bank account could be used by the Trust instead of multiple accounts, one such account for each beneficiary. Instead of establishing multiple accounts with brokers and banks, it is the Trustee who keeps a careful accounting of the trust shares. The Trustee allocates to each beneficiary's share a proportionate share of the trust's total income and expenses and subtracts from each beneficiary's share the payments and distributions made to that beneficiary.

Allowing the Trustee to hold assets as a single fund often reduces the expense of operating the Trust. Most people choose this option.

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Joint Property

Most states permit an individual to own property with another individual in a manner known as "joint tenancy" or "joint with rights of survivorship." In such a case, when the first joint owner dies, the property passes automatically to the surviving joint owner, even if the first owner attempted to give the property to a third person through his or her will.

In many cases this never becomes a problem because the joint property is owned between spouses, and the Wills or Trusts of the spouses provide that the property owned by the spouses should be given to the survivor of them anyway. In those situations, there is no conflict between the ownership of the joint property and the provisions of the Wills or Trusts.

On the other hand, if an individual owns property with another person "joint with rights of survivorship" and wants the property to pass to a third person under the Will or Trust, a different process of conveying the property to the trust must occur. Let your fellow member who is assisting you know if this might be an issue for you. Also, the Association's Coordinator team that reviews your plan along with any property titles and deeds that you provide will usually notice if you may have that issue. In that event you will be informed of the steps you must take. Alternatively, you may also wish to consult professional advisors outside of the Association.

If property held "joint with rights of survivorship" is transferred properly into trust, such survivorship status will be lost, and the terms of the trust will prevail. It is very important that the title is passed to the trust correctly.

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Life Insurance / Annuity / Retirement Plan Designations

Life insurance, annuity, and retirement plan agreements (and similar agreements) are contracts that permit the owner to name those who will receive the proceeds of such agreements, either as primary or alternate beneficiaries.

Your Living Trust does NOT determine the beneficiary (recipient) of the proceeds of these agreements. Thus, when preparing your Living Trust, you should review the agreements to make sure that the beneficiary designations of such agreements correspond to your wishes described in your Living Trust. You may also wish to change the beneficiary of those instruments to the trust. For example, a retirement plan cannot be transferred into trust, but the beneficiary designation of the plan can usually be the trust.

It is important to remember that only the "owner" of those plans and agreements can change the beneficiary. For example, if you are the "insured" of a life insurance policy you may not be the owner. Review your policy or check with your insurance company or agent.

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Making a Living Trust Operational

A Trust is not considered "operational" until it has been signed and assets have been transferred into the Trust (See [Funding the Trust](#)). Therefore, if amending the trust it is not necessary to use this "amending" feature if the prior trust agreement was signed, but not made operational by transferring assets into the trust. Instead, simply create a new trust. Consult a fellow experienced member regarding any questions.

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Making Loans to Beneficiaries

Occasionally, the Trustee may consider it appropriate to make a loan of Trust assets to a beneficiary. For example, the beneficiary may be ready to purchase a home or a business and could greatly benefit from a Trust distribution, but he or she is not scheduled to receive such a distribution from the Trust for another year or two.

By including this optional power, the Trustee has the flexibility to advance funds, in unusual circumstances, to a beneficiary before that beneficiary would otherwise receive those funds.

The advance would be in the form of a loan which the beneficiary is obligated to repay with interest. However, the Trustee may allow the beneficiary to repay the loan using money that the beneficiary would otherwise receive from the Trust.

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Managing Trust Assets

Typically, a Living Trust includes provisions that allow the Grantor or Co-Grantors, who often serve as the initial Trustee or Co-Trustees, to manage the assets of the Trust until such time as either Grantor:

1. becomes "disabled" (unable to manage his or her financial affairs),
2. simply prefers to have someone else (perhaps a financially responsible family member or a bank's trust department) manage his or her affairs, or
3. dies.

If that occurs, the trust provisions can provide that the remaining Co-Trustee will serve alone, or, if the Trustee is serving alone, for a successor Trustee to take over the management of the Trust.

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Optional Trustee Powers

In addition to the standard powers given to the Trustee, it is often desirable to provide the Trustee with specific, additional powers:

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Personal Property

Personal Property is either tangible or intangible. Tangible personal property includes jewelry, furniture, cars, and other items that have a physical essence. Intangible personal property includes cash accounts, stocks, bonds, and other similar assets that are nonphysical.

A coin is tangible personal property, while 25 cents in a checking account is intangible personal property.

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Pour-Over Will

A Pour-Over Will is a specialized will that is used as a supplementary document to the Living Trust. Its primary function is to "pour over" the Will writer's remaining assets (at the Will writer's death) into the Will writer's Living Trust.

A Pour-Over Will includes a standard provision to name an Executor (Personal Representative in some states). It also includes an optional provision to name a Guardian if the Will writer has minor children. Instead of the usual provisions that provide for the distribution of specific bequests, the Pour-Over Will simply distributes all of the Will writer's remaining assets to his or her Living Trust. The Living Trust then distributes that remaining property, together with the existing Trust assets, in accordance with the distribution provisions of the Living Trust.

The Pour-Over Will must be signed with the same formalities as any other Will.

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Protection of Beneficiaries

The Living Trust document includes a provision for the protection of the Beneficiaries of the Trust, if a Children's Trust is created. The purpose of this provision is to prevent the Beneficiaries from impoverishing themselves by "selling" or "assigning" their interests in the trust to third parties.

For example, a 19-year-old might be tempted to "sell" or "trade" all or a portion of his or her interest in a trust for an expensive sports car. This provision does not prevent the 19-year-old from making a deal with the car dealer, but it does prevent the car dealer from enforcing the deal against the Trust. Sometimes these provisions are known as "spendthrift" provisions. (See [Spendthrift Clause](#))

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Providing for Children

The Living Trust offers a unique planning opportunity for parents with minor children. Assume you leave your remaining trust assets to your spouse if your spouse survives you. If your spouse does not survive you or you are not married, you can provide for a trust for your children.

You can provide that all of the remaining assets of the Trust will be retained by the Trustee for the benefit of your children, or you can provide that a percentage of the remaining assets of the Trust will go to a named beneficiary, with the remainder retained in the Children's Trust.

Providing for a trust for children can be appropriate if you:

1. have no children but intend to have children in the future,
2. have minor children, or
3. have children who are no longer minors, but who have not yet reached an age at which it is appropriate for them to receive a large distribution of your assets.

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Remaining Trust Assets

The "remaining trust assets" is a term used in the Living Trust that is similar to the term "residuary estate" that is used in Wills. The remaining trust assets include the Grantors' assets that remain after paying debts and expenses and making distributions of specific bequests. In most Living Trusts, the remaining trust assets include most of the assets.

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[Distributing the Remaining Trust Assets](#)

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Signing Instructions

1. The Living Trust should be signed by both the Grantor(s) and the Trustee(s). For states other than Florida, it is recommended (and may be required if real property is included among the trust assets) that these signatures be notarized; however, unlike a will, no witnesses are necessary. However, in Florida, a Living Trust must be signed with the same formalities required for the signing of a will (see provisions 8 - 13 below).
2. After signing the Living Trust document and creating the Trust, the next step which must be taken is to legally transfer specific assets into the Trust. The Trust provisions will only apply to assets that have been placed into the Trust. Assets can be transferred at the time of the creation of the Trust and/or at later dates, but it is recommended that the assets be transferred as soon as possible after the Trust is signed. For a review of methods used to transfer specific types of assets into the Trust, re-read and/or

print the Help Topic [Transferring Assets into the Trust](#), or see the "Living Trust Funding Worksheet" available from your fellow Association member that is assisting you.

3. The use of a Living Trust does not eliminate the need for a will. The Grantors may have assets that they overlooked, or that they purposefully do not wish to transfer into the Living Trust. For example, it may be preferable not to transfer some personal property such as vehicles and a personal checking account. A Pour-Over Will is useful to transfer such assets to the Trustee of the Living Trust for final distribution. IT IS HIGHLY RECOMMENDED THAT A LIVING TRUST NOT BE SIGNED UNLESS A POUR-OVER WILL IS ALSO PROPERLY SIGNED BY EACH GRANTOR. (See [Pour-Over Will](#))

4. The original of the Trust should be kept in a secure location such as a safe deposit box at a bank. A photocopy should be given to the named Trustee(s) if he or she is not the Grantor(s). A third copy could be kept in the Grantors' home files. The Grantors may wish to provide a copy to their lawyer and/or to the person named as successor Trustee. However, before distributing such copies, the Grantors should consider that it may become awkward to later retrieve these copies if they should decide to change the designation of successor Trustee. **(The Association may offer services for preserving your original documents or digital copies. Ask your fellow member who is assisting you about this service.)**

5. The Trust includes provisions which reserve to the Grantors the right to revoke or amend the Trust. In order to do this, the Grantors must sign and deliver to the Trustee an appropriate written revocation or amendment.

6. If you indicated that your property or assets should be distributed in percentages, it is very important that each percentage section total equals 100%. Check the printed totals before signing the Trust.

7. The Grantors should initial on the bottom margin of each page of the Living Trust. This is done to prevent the subsequent substitution of pages.

FLORIDA ONLY (8 - 13):

8. This Living Trust is not valid unless it is signed by the Grantors who are of "sound mind" and of the minimum age for this state. In most states, the minimum age is eighteen. Some states permit an individual below the minimum age to sign a Living Trust if the person is married or in the military. Being of "sound mind" requires that the Grantors each: (a) know that he or she is signing a Living Trust, (b) know the general nature and extent of his or her property, and (c) know the descendants or other relatives that would ordinarily be expected to share in the estate.

9. If the Grantors are unable to sign due to physical disability, another person may be able to sign on behalf of the Grantors, in the Grantors' presence, and at the express direction of the Grantors. However, this document does not provide the necessary language for another person to sign for the Grantors. For assistance with this procedure discuss with a fellow Association member.

10. The Living Trust should be signed by the Grantors in the presence of three DISINTERESTED adult witnesses and a notary public. Many states require only two witnesses, but the signature of a third witness provides some protection against the possibility that one of the witness' signature will be invalid for some reason. For example, a person should not be a witness if that person is a beneficiary under the Living Trust. In most states, if a beneficiary's signature is counted in order to satisfy the minimum

number of witnesses, then the Living Trust is not necessarily invalidated, but that "interested witness" may not receive a share of the estate any larger than if the Grantors had died without a trust or will.

11. All of the witnesses must watch the Grantors sign this Living Trust. The Grantors should verbally declare that the document is intended to be their Living Trust, but the witnesses need not read the Living Trust or know of its contents.

12. Each witness must sign his or her name with the Grantors and the other witnesses present. The witnesses should be satisfied that the Grantors willingly signed the document as their free and voluntary act, and that the Grantors were of full age and sound mind.

13. The Florida Self-Proving Affidavit is a document which should be attached to the end of the Living Trust, and which contains the Grantors' acknowledgment and the affidavit of the witnesses, made before a person authorized to take acknowledgments and administer oaths. The affidavit recites that the requisite formalities were observed in signing the Living Trust. Although attaching the affidavit has nothing to do with the legality of the Living Trust itself, it can speed the admission of the Living Trust to probate (if necessary) after the death of the Grantors because it eliminates the need to have a witness appear at the probate proceeding to testify that the formalities in signing the Living Trust were followed. The witnesses may not be available later when they are needed. A self-proved Living Trust may be admitted to probate without additional witnesses or affidavits, but it is still subject to contest on such grounds as undue influence, lack of testamentary capacity, or prior revocation.

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Specific Distributions

A "specific distribution" is a gift of cash, a specific item, or a category of items to a named person or organization before the bulk of the Trust is distributed. For example, a wedding ring, \$1,000, an antique, a car, or "all of my remaining tangible personal property" can be given.

For example, a mother may want to make sure that her jewelry goes to her daughter. Grandparents may decide that they would like to give \$1,000 to each of their five grandchildren. Specific distributions are usually followed by other provisions that distribute the remaining assets of the trust.

You are also allowed (next) to give all of your (remaining) tangible personal property (vehicles, clothing, furnishings, etc.) apart from the remaining trust assets.

Example: John wants to give \$1000 to his favorite charity, his coin collection to his granddaughter, and all of his remaining tangible personal property (vehicles, clothing, furnishings, etc.) to his children from a prior marriage. But he wants his current spouse to be able to enjoy his tangible personal property for her entire lifetime, even if John dies first. Therefore, John selects "Specific items or cash then all remaining tangible personal property" as the type of specific distributions he will make. He gives the \$1000 and the coin collection, to be distributed immediately upon his death (regardless of who dies first). He gives his (remaining) tangible personal property to his prior-marriage children, but only to be distributed "upon the death of the surviving Grantor."

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Specifying Who Died First

When a married couple are Co-Grantors of a Joint Living Trust, consideration must be given in the event of a common disaster or situation where it is difficult or impossible to determine which spouse died first. This is an important issue for both Wills and Trusts.

When two parties with intertwined estates die in the same event or accident, it's not always possible to determine who died first. That can lead to some confusion over who gets what; for example, it's likely that a married couple named each other as their primary beneficiary in their Joint Living Trust.

So-called simultaneous death clause (also known as Common Disaster clause or Titanic clause) specifies which person should be deemed to have died first, which can be an important consideration for estate taxes and the ultimate direction of the bequests. In more complex trusts and wills there often needs to be one spouse designated as the first to die, and the other as the second to die.

Without that language, your estate might be subject to the Uniform Simultaneous Death Act that some states have adopted. Not all states have adopted that Act, however, some states like California have adopted their own version that will be fairly similar. The Uniform Simultaneous Death Act sets out that if two or more people die within 120 hours of one another and no other will or document has planned for that situation, each is considered to have predeceased the other. (So, in the case of that married couple, the husband's other heirs would get his estate as if the wife had predeceased him, and the wife's other heirs would get her estate as if the husband had predeceased her.) On the other hand, California's version simply states that, unless a will or trust states otherwise, one half of the married couple's estate will be passed on to the heirs as if one spouse died first and the other half be distributed as if the other spouse died first. For many people this provision is not a problem.

By inserting a "first-to-die" clause (Common Disaster clause) you are able to control the flow of distributions. If you are presumed to have died first, your spouse's estate will receive any bequest given to your spouse in your Trust or Will. These bequests will then pass to your spouse's beneficiaries under your spouse's Trust or Will provisions. The reverse is true if you elect that your spouse be presumed to have died first. In that case, any bequest given to your estate in your spouse's Will or the Trust instead will pass to the alternate beneficiaries of your Will or Trust. To make this election you must understand the consequences of using the election.

There can also be an issue in regard to simultaneous or near-term deaths of a Grantor and Beneficiary. For this discussion see [Thirty-Day Survival Requirement](#).

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Spendthrift Clause

Within the Children's Trust (See [Trust for Children](#)), if the Grantor(s) elect to include for their minor children, has a provision known as a "spendthrift clause." The clause limits the ability of assets to be reached by the beneficiary or their creditors. A trust with a spendthrift provision usually requires the trustee to only give a certain amount of income or support to the beneficiary and further prevents a financially unstable beneficiary from mismanaging the funds. Beneficiaries and their creditors cannot place liens or other judgments on the assets of the trust themselves, but a creditor may get a garnishment against the payments to the beneficiary. Each state may have laws that further govern the extent of creditor access to a beneficiary's allocated portion in a trust. Nevertheless, a spendthrift clause is honored in most states and most cases.

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Successor Trustee

A successor trustee should be named to serve upon the resignation, incapacity, or death of the initial trustee(s). You may name one successor trustee to serve alone, or two successor co-trustees to serve together.

A good choice in many situations is to have an individual and a bank or trust company serve together as co-trustees. The individual can be a family member who is close to the beneficiaries and knows their needs. The bank or trust company may have a better background for handling investments, preparing tax returns, and providing accountings.

If the Trust will include a Children's Trust that will take effect at some point, it is recommended that you NOT choose one of the children as a trustee, even if that child is of adult age, because doing so can lead to conflicts among the children regarding distributions.

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Thirty-Day Survival Requirement

This document allows the user to include language which requires a named beneficiary to survive you by at least 30 days in order to receive a distribution. This provision is sometimes included because, if the named Beneficiary dies within thirty days after you, you may prefer that the distribution pass to your other beneficiaries, rather than to the persons named in the Beneficiary's own will or trust.

In fact, even if the Beneficiary's beneficiaries are acceptable to you (assuming that you know who they are or care who they are), by including this survival requirement, you can avoid having the distribution pass through the Beneficiary's estate, with possible death taxes assessed in that estate, before reaching the ultimate recipient.

There can also be an issue in regard to simultaneous death of Grantors. For this discussion see [Specifying Who Died First](#).

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Transferring Assets into the Trust

The following describes how various assets are transferred into the Living Trust:

- Tangible personal property -- can be transferred into the Trust by using a Bill of Transfer. (See the "Bill of Transfer" document.)
- Bank accounts -- can be transferred into the Trust by using the appropriate form supplied by the bank. (See the "Trust Letter to Bank or Broker" document.)
- Stocks or bonds in a brokerage account -- can be transferred into the Trust by using the appropriate broker form. (See the "Trust Letter to Bank or Broker" document.)
- Stocks or bonds in certificate form -- can be transferred into the Trust by using a Bill of Transfer document. Consult your broker for assistance. (Also see the "Trust Letter to Bank or Broker" document.)
- Vehicles can be transferred into the Trust by using a change of title form. Contact your local Motor Vehicle Department for assistance. (Typically, you cannot transfer a vehicle title if you have a loan on the vehicle. You will need permission from the lender if they give it.)
- A life insurance policy -- can be transferred into the Trust by using a change of ownership/beneficiary form. Contact your insurance agent for assistance. (See the "Change of Beneficiary Letter" document.)
- An IRA or pension plan -- can be transferred into the Trust by using a change of ownership/beneficiary form, but it is NOT recommended. Contact your plan administrator for assistance.
- Real estate -- can be transferred into the Trust by using a deed. The Association Coordinator can usually assist you with this process. (See the "Trust Letter to Mortgage Lender" document.)
- Business interests -- can be transferred into the Trust through various means. The Association Coordinator can usually assist you with this process.
- Property that is jointly held -- (for example, real estate held jointly by spouses) can be transferred into a trust, but the process may require more careful planning because of the joint ownership.

Note: This process may require the use of professional assistance beyond what the Association can provide. Speak to your fellow member who is assisting you about your needs to determine what the Association can offer. In some case you may need to seek outside professional assistance. (Also see the "Living Trust - Funding Worksheet.")

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Trustee Accounting

An accounting is a report by the trustee that shows the values of the trust assets as of a specific date (usually the last day of a month). The accounting also shows the income and expenses of the trust for a specific period of time. For example, an "annual" accounting for 2023 would show the values of the trust assets on December 31, 2023, and the income and expenses of the trust for the 12-month period ending on December 31, 2023.

The accounting is needed so that income tax returns, if required (and they usually are), can be filed. The accounting also serves the very important purpose of allowing the beneficiaries the opportunity to review the performance of the trustee. For example, beneficiaries may want to offer comments to the trustee on the rate of return earned by the assets.

An accounting should be required at least annually, but it may be preferable from the beneficiaries' perspective to receive reports monthly, or perhaps quarterly. Bank trustees are well suited to provide reports more frequently, but individual trustees (especially ones not receiving compensation) are usually not as able to provide monthly or quarterly reports.

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Trustee for Children

When selecting a trustee for the Children's Trust, it is recommended that you NOT choose one of the children, even if that child is of adult age. The reasons are several:

1. that child has a conflict of interest in distributing money to his or her siblings which depletes his or her own share,
2. the child becomes the "bad guy" if he or she refuses to honor a request for money from his or her siblings, and
3. there is some risk of adverse tax consequences to a trustee who is also a beneficiary of the trust.

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Trustee Liability

Generally, most states protect a trustee from personal liability in the absence of fraudulent conduct or bad faith (deliberate wrongdoing). However, by specifically including a provision that relieves your

trustee from personal liability, your intentions are clear, and your trustee may be more willing to accept your request to serve.

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Trust for Children

The Children's Trust (also known as a Minor's Trust) that springs into operation upon the death of the last Grantor. It provides money for the health, education, maintenance, and support of your children until the youngest child reaches an "adult" age. Presumably, this is the same way that you would have provided for your children if you had survived: supporting all of them out of a common "pot" of assets according to each child's individual needs until the youngest one becomes independent. Often age 25 years is used because it offers the children an opportunity to attend college and "settle down" before receiving their trust shares outright.

When the youngest child reaches the specified "adult" age, the trust is divided into equal shares for the children and either:

1. distributed immediately, or
2. distributed in three installments.

For example, assume that Dave and his spouse Rosie have three children: Joel, age 6; Jay, age 4; and Justin, age 2. Under the first option, the trust would be maintained until Justin reaches age 25 years (or some other specified adult age). The trust would then be divided equally among Joel (now age 29), Jay (now age 27), and Justin (age 25). The goal is to preserve the trust assets until the youngest child attains "maturity".

Under the second option, Dave might specify that the final distribution should be made in three installments at ages 25 years, 28 years, and 31 years. Now when Justin attains age 25 years the trust is divided into three equal shares, one for each child. Joel receives two-thirds of his share ($\frac{1}{3}$ because he has attained age 25 years and $\frac{1}{3}$ because he has attained age 28 years), and Jay and Justin will each receive one-third of their respective shares. All three will receive their remaining shares as they attain the appropriate ages.

Within the Children's Trust there is a clause known as a "spendthrift clause" that prevents a creditor from attaching to the trust assets in the event the beneficiary child (whether still a minor or an adult child) attempts to pledge or otherwise encumber the assets they will inherit in the future. (See

[Spendthrift Clause](#))

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Trust vs. Will Comparison

Last wills and testaments are powerful documents. They give you the ability to distribute your estate, choose your heirs, appoint guardianship, and give your most precious belongings to your favorite people. But it's important to keep in mind that a last will should be only a part of an estate plan, not an entire estate plan.

A comprehensive estate plan contains much more than just your last will and testament. It should include a **power of attorney**, an **advanced directive** (also known as “living will” in some states), and, if you so choose **trusts** for your children, grandchildren, favorite charity, or even a beloved pet. But why might a trust be needed if a will can accomplish the same thing?

When a person dies the state has a compelled interest in what happens to that person’s estate. It’s the state’s duty to make sure the estate goes to the right party(ies). The procedure is known as **probate**. Every county of every state has a **probate court**. The court’s duty is to examine whether the decedent made any plans, requests, etc. in regard to disposition of his/her estate upon death. Most all know that a Last Will and Testament executed by the descendant when he or she was alive has long been recognized by probate courts as the official method to let the court know what was desired. Nevertheless, the estate is no longer owned by anyone, so the court takes over the estate and oversees the transfer or liquidation of assets according to the Will. There are factors that can delay this process and add much to the fees imposed by the court and probate lawyer.

The larger the estate the more likelihood of delays and increased costs. The Will can be contested by anyone. This becomes a form of litigation in probate court. When this happens, the court must take the time to hear all sides, and unfortunately the very person that would have the absolute answers to the issue is deceased. In addition, it is the court’s responsibility to make sure the decedent’s debts are paid, which of course also includes the probate court’s fees and attorney costs. In many cases the court will force a sale of assets to pay those debts, which usually devalues the assets under those conditions.

The **alternative** to a Will is to place assets into a trust while you are still living and have full mental facilities. It’s done while one is living, therefore the trust is often called a “**Living Trust**.” A trust is not actually an entity that you can transfer assets into like you can a corporation. It is a type of contract between you (the one with the assets) (often called a **grantor** or **settlor**) and another person that will hold the assets under the terms of that contract for the benefit of the heirs. That person is called a **trustee** and the heirs called **beneficiaries**. (And yes, you can be both a grantor and the trustee.) A trust provides for continuity of trustees holding the assets so that even if you are a trustee and die, there will be another trustee to take over. Thus, upon death, the assets are never in your “estate” requiring the probate court’s intervention. The trustee, usually a family member or someone you trust and that cares about your desires, administers your terms in the trust, not an impersonal, costly probate court process.

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Waiving Bonds

Most Grantors decide to waive (not require) a bond because:

1. The Trustee chosen is trusted; and
2. Bonds:
 - are expensive;
 - are usually not necessary if a bank is the Trustee because most banks are already bonded; and
 - require greater court involvement in some states because the court must ensure that the bond is handled properly.

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ASSET PROTECTION ASSOCIATION
A Private Member Association

TRUST FUNDING GUIDE

Overview Living Trust Funding Worksheet

In addition to creating and signing a living trust document, assets must be transferred into the trust. A living trust only owns the assets that are actually transferred into the trust. Any assets that remain titled in the name of a grantor will be subject to potential probate administration at the death of that grantor. (The exceptions include assets which (a) are held jointly with another person with rights of survivorship, for example a home, (b) pass pursuant to "transfer-on-death" or "pay-on-death" designations, for example bank accounts, or (c) pass by beneficiary designation, for example retirement plans and life insurance.) Assets should be transferred from the grantor to the trust to achieve the result that the property is then legally owned by the trust. Then, upon the grantor's death, because the trust (as owner) survives the grantor's death, it is not necessary to use the probate system to effectuate a transfer of the assets to the grantor's beneficiaries. Instead, the (successor) trustee can distribute the assets in accordance with the trust provisions.

Assets can be transferred to a living trust both at the time of the creation of the trust and also at later times. Separate transfer documents must be used for this purpose because the trust document itself does not contain any language of conveyance or any list of assets.

The Funding Worksheets (Tangible Personal Property worksheet and other Itemized Assets worksheets) provide a convenient method to list all assets owned by the grantors. With each category of assets, explanatory information is provided with which to decide whether and how to transfer the asset into the living trust. For easy reference, some of the same information will be printed on the worksheet with the asset category. Further, each asset will automatically be included on (a) a bill of transfer document, (b) a trust property schedule, and/or (c) a property ownership memorandum as appropriate. The documents generated should be used for their intended purposes. They can also be saved and updated periodically as appropriate.

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Bank Accounts

Bank accounts can be transferred into the living trust by contacting the bank and requesting the appropriate change of title form. (See the "Trust Letter to Bank or Broker" document.)

Checking Account. It is usually recommended that the grantor's regular checking account used to pay monthly expenses NOT be transferred to the trust, especially if that account can otherwise avoid probate by being titled with the grantor's spouse in joint tenancy with survivorship, or by designating a "pay-on-death" beneficiary. The reason for not placing the account in the trust is so that the trustee can avoid the inconveniences sometimes encountered when check recipients refuse to accept a check from a trust, absent proof of the trustee's authority to sign as the authorized trustee. Nevertheless, if the account usually maintains a large balance, the account SHOULD be transferred to the trust to allow for proper estate planning. Note: Exercise caution before adding a non-spouse as a co-owner of a bank account because the account may be subject to that co-owner's creditors.

Certificates of Deposit. Before transferring certificates of deposit (or similar investments) to the living trust, it should be determined from the bank that the transfer will not adversely affect the interest being paid on the investment, for example, a penalty for early withdrawal. Most banks are willing to re-title the investment without any loss of interest, when there is no substantive change of owner, which is the case where one or two individuals transfer the investment to their living trust.

All Bank Accounts. If the account is jointly owned by both spouses, it will be necessary for both spouses to sign the forms requesting the transfer. If the account to be transferred is owned by more than one person OTHER THAN SPOUSES, an attorney or tax consultant should be contacted because there may be gift tax implications.

If the owner(s) of the account is/are not the currently-acting trustee(s) of the trust, the trustee(s) may also be required to sign the change of title form to establish authority over the account.

In order to properly re-title the account, the bank will need to know the name of the trust. Furthermore, the bank will usually want to make sure that the trust is in existence, learn the identity of the current trustee(s) and any successor trustee(s), and verify that the trustee(s) has/have the authority under the trust document to open and maintain the bank account. In order to provide the bank with this information, an original copy (or a photocopy) of the entire trust agreement can be supplied. However, if privacy is desired, the bank can be supplied instead with only the selected information about the trust that is needed by the bank. The simplest way to do this is to provide the bank with photocopies of selected pages attached to a cover letter, which letter is certified and signed as true. The selected pages should include those which contain the following information:

Declaration of Trust (first page);

Identity of the trustees (first page, plus other pages which describe alternate and/or successor trustees);

Powers of the trustees; and

Signature page (and notary page, if any).

See the "Trust Letter to Bank or Broker" document.

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Bill of Transfer

The bill of transfer is used to transfer personal property to a living trust or joint living trust. In addition to creating and signing a living trust document, assets must be transferred into the trust. A living trust only owns the assets that are actually transferred into the trust. Any assets that remain titled in the name of the grantor will be subject to potential probate administration at the death of the grantor. Assets should be transferred from the grantor to the trust to achieve the result that the property is then legally owned by the trust. Assets can be transferred to the trust both at the time of the creation of the trust and also at later times. Separate transfer documents, such as this bill of transfer, must be used for this purpose because the trust document itself does not contain any language of conveyance or any list of assets. Note: This document cannot be used to transfer real estate or other property which has a title document, such as a vehicle.

If the asset consists of a category of items, especially those that may change regularly, for example household goods and personal effects, continuous transfers would be impractical so the initial transfer should convey that category of assets, "whether now owned or later acquired."

Assets should be transferred to "The Trustee of ?[name of living trust]". Later-acquired property should also be titled in the name of the trust.

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Brokerage Accounts

Contact the broker for assistance in re-titling the brokerage account in the name of the living trust. In order to properly re-title the account, the broker will need to know the name of the trust. Furthermore, the broker will usually want to make sure that the trust is in existence, learn the identity of the current trustee(s) and any successor trustee(s), and verify that the trustee(s) has/have the authority under the trust document to open and maintain the brokerage account. In order to provide the broker with this information, an original copy (or a photocopy) of the entire trust agreement can be supplied. However, if privacy is desired, the broker can be supplied instead with only the selected information about the trust that is needed by the broker. The simplest way to do this is to provide the broker with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. The selected pages should include those which contain the following information:

Declaration of Trust (first page);

Identity of the trustees (first page, plus other pages which describe alternate and/or successor trustees;

Powers of the trustees; and

Signature page (and notary page, if any).

See the "Trust Letter to Bank or Broker" document.

If the account is jointly owned by non-spouses, an attorney or tax consultant should be contacted because there may be gift tax implications of the transfer.

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Certification of Trust

These pages of the living trust contain the key information likely to be requested by banks, brokers and corporate secretaries. The pages can be attached to a "Certification of Trust" cover sheet and provided instead of providing a copy of the entire trust document.

See the "Trust Letter to Bank or Broker" document.

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Closely-held Business Interests (with restrictions on transfer)

The interests in a closely-held business can be transferred by having new certificates prepared in the name of the living trust and the old certificates surrendered. However, many closely-held businesses have restrictions in place to prevent the transfer of interests without the prior consent of the remaining owners. These restrictions, often detailed in a "buy-sell" document, are usually intended to prevent the admission of unknown third parties as co-owners, NOT to prevent the transfer of the grantor's interest to the living trust. But it is important to obtain the necessary consent prior to the transfer in order to ensure the validity of the transfer. Contact the principals of the business and/or review the restrictive agreements in order to determine whether and how a transfer can be effected.

See the "Stock Power" and "Trust Letter to Bank or Broker" documents.

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Clothing and Personal Effects

Untitled tangible personal property is transferred into the living trust through the use of a "bill of transfer" document. Because clothing and personal effects change frequently, and continuous transfers would be impractical, the initial transfer should describe all clothing and personal effects "now owned or later acquired." Items with significant value should be separately and carefully described in the bill of

transfer, even though, presumably, they are included in the generic description of "all of the grantor's clothing and personal effects." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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Collections, Collectibles and Antiques

Untitled tangible personal property is transferred into the living trust through the use of a "bill of transfer" document. Because collections, collectibles and antiques may change, and continuous transfers would be impractical, the initial transfer should describe all collections, collectibles and antiques "now owned or later acquired." Items with significant value should be separately and carefully described in the bill of transfer, even though, presumably, they are included in the generic description of "all of the grantor's collections, collectibles and antiques." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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Debts

Debts should not be transferred to the living trust; the trust should hold only assets. However, including them in this worksheet may be useful information for the successor trustee.

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Gas, Oil, and Mineral Rights

Oil, gas or mineral rights are sometimes classified as personal property, sometimes as an interest in real estate, and sometimes as both. A transfer, therefore, may require the use of a bill of transfer, a deed, or both, respectively, and the governing entity may require that specific forms be used. It is recommended that an attorney be contacted for assistance.

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Household Goods, Furniture and Furnishings

Untitled tangible personal property, including household goods, furniture and furnishings, are transferred into the living trust through the use of a "bill of transfer" document. Because household goods, furniture and furnishings change frequently, and therefore continuous transfers would be impractical, the initial transfer should describe all of the grantor's household goods, furniture and furnishings "now owned or later acquired." If items are located in more than one residence, a reference to each residence should also be included.

Items with significant value, such as jewelry, untitled recreational equipment, collections, collectibles, antiques and works of art should be separately and carefully described in the bill of transfer, even though, presumably, they could be included in a generic description of "all of the grantor's tangible personal property." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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Incentive Stock Options

An employee who receives an incentive stock option ("ISO") generally is not required to recognize income for tax purposes at the time the option is received, or even at the time the option is exercised, but only when the stock received is sold (or when the option is sold). Transfer of an ISO into the grantor's

living trust may (a) constitute a taxable disposition, and (b) violate ISO restrictions that (i) allow only the individual employee to exercise the option and (ii) prohibit transfers other than by will or intestacy. Therefore, it is not advisable to transfer an ISO (or even the stock received by exercising an ISO) into a living trust. Contact an attorney for further advice.

To transfer non-employment-related stock options, contact the secretary of the entity which issued the options for assistance in having new certificates prepared in the name of the living trust and the former certificates surrendered. In order to properly re-title the account, the secretary will need to know the name of the trust. Furthermore, the secretary will usually want to make sure that the trust is in existence, learn the identity of the current trustee(s) and any successor trustee(s), and verify that the trustee(s) has/have the authority under the trust document to open and maintain the brokerage account. In order to provide the secretary with this information, an original copy (or a photocopy) of the entire trust agreement can be supplied. However, if privacy is desired, the secretary can be supplied instead with only the selected information about the trust that is needed by the secretary. The simplest way to do this is to provide the secretary with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. The selected pages should include those which contain the following information:

Declaration of Trust (first page);

Identity of the trustees (first page, plus other pages which describe alternate and/or successor trustees;

Powers of the trustees; and

Signature page (and notary page, if any).

See the "Trust Letter to Bank or Broker" and "Stock Power" document.

If the options are jointly owned by non-spouses, an attorney or tax consultant should be contacted because there may be gift tax implications of the transfer.

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Individual Retirement Account or Keogh Account

The OWNERSHIP of IRA and Keogh accounts should NOT be transferred to a living trust because such a transfer will cause immediate tax recognition of the entire account. Instead, if the grantor is single, the living trust can be designated as the BENEFICIARY of the account. But if the grantor is married, it is nearly always recommended that the spouse be designated as the primary beneficiary, and the living trust be designated as the contingent beneficiary (if the spouse fails to survive the grantor, or after the grantor's death). In this way, the spouse can elect to "roll over" the grantor's IRA to the spouse's IRA and achieve further deferral, if that is desired at the time.

Contact the custodian of each account for assistance with the beneficiary designation forms.

Note: If the living trust is designated as the beneficiary of the IRA (either as primary or contingent beneficiary), some tax-beneficial deferral of payments can often be achieved if IRS requirements are strictly followed, including, for example, providing a copy of the living trust to the IRA custodian. In short, it is possible to measure the distribution period by the expected remaining life of the oldest trust beneficiary and so extend that distribution period beyond the otherwise default period of just five years following the grantor's death. For a full explanation of this matter, contact an attorney.

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Initial Trustee

The first responsibility of the trustee is to make certain that all of the (appropriate) assets owned by the grantor are transferred to the living trust. Any assets that remain titled in the name of the grantor will be subject to potential probate administration at the death of the grantor. (The exceptions include assets which (a) are held jointly with another person with rights of survivorship, for example a home, (b) pass pursuant to "transfer-on-death" or "pay-on-death" designations, for example a bank account, or (c) pass by beneficiary designation, for example retirement plans and life insurance.) If the initial trustee is not the grantor, it will be necessary to obtain a tax identification number for the trust and begin filing trust tax returns.

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Isolation of Trust Assets

It is important to respect the distinction in the ownership of trust assets -- assets owned by the trust as opposed to owned individually by the grantor. The trustee is only a caretaker of the trust assets and must keep appropriate records of income, expenses, additions and distributions of the trust. Especially when a successor trustee assumes that office, all cash should be channeled through a separate trust-owned bank account.

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Installment Obligations

If property (for example real estate) is sold on the installment method (where two or more payments will be received), rights to the installment sale contract can be transferred to the living trust using a bill of transfer. However, check for a provision in the contract that prohibits assignments. (See the "Bill of Transfer" document.)

If the grantor and any another person (for example the grantor's spouse) JOINTLY sold the property which produced the installment obligation, then BOTH such sellers must be able to revoke the trust in order to avoid accelerating the taxable gain, if any, inherent in the sale because of the transfer. This is due to tax rules which deem a transfer to a trust, if it is irrevocable by the transferor, a "total disposition" of the installment obligation by that transferor, and therefore presently taxable in its entirety.

Installment obligations relating to REAL ESTATE are sometimes classified as personal property, sometimes as an interest in real estate, and sometimes as both. A transfer, therefore, may require the use of a bill of transfer, a deed, or both, and the recording agency may require that specific forms be used. It is recommended that an attorney be contacted for assistance.

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Interests in a Closely-Held Business

The interests in a closely-held business can be transferred by having new certificates prepared in the name of the living trust and the old certificates surrendered. However, many closely-held businesses have restrictions in place to prevent the transfer of interests without the prior consent of the remaining owners. These restrictions, often detailed in a "buy-sell" document, are usually intended to prevent the admission of unknown third parties as co-owners, NOT to prevent the transfer of the grantor's interest to the living trust. But it is important to obtain the necessary consent prior to the transfer in order to ensure the validity of the transfer. Contact the principals of the business and/or review the restrictive agreements in order to determine whether and how a transfer can be effected.

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Jewelry

Untitled tangible personal property is transferred into the living trust through the use of a "bill of transfer" document. Because jewelry items may change, and continuous transfers would be impractical, the initial transfer should describe all jewelry "now owned or later acquired." Items with significant value should be separately and carefully described in the bill of transfer, even though, presumably, they are included in the generic description of "all of the grantor's jewelry." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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Life Insurance Policy

It is important to distinguish between the OWNERSHIP of a policy and the named BENEFICIARY of the policy. The living trust is often named as the beneficiary of all life insurance policies. (Note: Policies provided to veterans may prohibit naming a trust as beneficiary.) By having the proceeds combined with the other living trust assets, the grantor's distribution scheme is unified within the trust.

Furthermore, if a policy insures the life of someone other than the grantor, the OWNERSHIP of that policy should also be transferred to the living trust. Otherwise, if the insured person survives the grantor, and therefore the policy is still in place at the grantor's death, that policy is an asset that may be subject to the grantor's probate administration.

Contact the appropriate insurance agent for a change of beneficiary form or change of ownership form. (See the "Change of Beneficiary Letter" document.)

IMPORTANT: If the grantor's estate, including assets in the grantor's living trust, and including the face value of life insurance, exceeds the federal estate tax applicable exclusion amount (\$5,000,000), an attorney or financial advisor should be contacted before making any changes in ownership or beneficiary designations of insurance policies. This is because it may be possible to achieve significant savings in federal estate taxes through careful planning.

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Living Trust Tax Return

As long as the grantor is a trustee (and, for a joint living trust, as long as the grantors file a joint return), it is not necessary to file a separate tax return for the trust. All income and deductions of both the grantor and the trust are reported on the grantor's personal income tax return (joint personal return for the grantors of a joint living trust). However, if and when the grantor is no longer a trustee, the trust must obtain its own tax identification number and file a separate income tax return. While the grantor is alive

and can therefore still revoke the trust, the tax return is merely a "pass-through" return where the trust allocates the income to the beneficiaries who received the income. This allocation of income is detailed on schedules that are filed with the IRS by both the trust and the individual beneficiaries. When the grantor dies and the trust therefore becomes irrevocable, the beneficiaries are still taxed on the income paid out to them. But if some of the income is retained in the trust, the trust pays the tax on that income.

Especially after the grantor's death, the trust may provide that trust income is to be paid to one beneficiary, perhaps the spouse, while the trust principal is to be maintained intact for the "remainder" beneficiaries, those who will receive the assets that remain in the trust after the death of the income beneficiary. In such cases, it is especially important for the trustee to follow the terms of the trust instrument, or established state law if the trust is silent, in making allocations between income and principal. Income receipts consist of earnings from the investment of the principal, usually including such items as dividends, interest, rents and royalties. Principal receipts consist of such items as the proceeds received from the sale of assets, stock dividends, casualty insurance proceeds, royalties from depletable resources, and principal payments from loans. Income expenses consist of the costs of administering and preserving the trust property. Principal expenses consist of the costs of investing and reinvesting the principal, including defending an action to protect the trust property, making capital improvements to the assets, and taxes on capital gains.

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Living Trust - Introduction

Living Trust

A Living Trust (also known as a "revocable trust") is a trust created by a person (known as the "Grantor") for use during that person's lifetime. It provides for payments of income for the Grantor and the distribution of the remaining assets of the Trust upon the Grantor's death. The Living Trust also includes an option which allows the Grantor to amend or revoke the Trust at any time. Married persons can establish either separate living trusts, or a joint living trust for their combined benefit.

Typically, a Living Trust includes provisions that allow the Grantor, who often serves as the initial Trustee, to manage the assets of the Trust until such time as the Grantor:

becomes "disabled" (unable to manage his or her financial affairs) or

simply prefers to have someone else (perhaps a bank's trust department) manage his or her affairs.

If that occurs, the trust provisions provide for a successor Trustee to take over the management of the Trust.

(NOTE: In Texas and Wisconsin, exercise caution before designating the Grantor as the sole trustee and the sole lifetime beneficiary. This is because, in those states, the trust may be considered "void" where all three interests - grantor, trustee and beneficiary - "merge" and therefore the trust has no legal significance. Consult an attorney for advice.)

Payments

During the Grantor's lifetime, payments of the net income of the Trust are made to the Grantor at fixed intervals. The amount of the payments can be changed from time to time at the request of the Grantor.

When the Grantor dies, the Trust provisions designate the beneficiaries who will receive the Grantor's property, much in the same manner as a will. At the option of the Grantor, these provisions include specific distributions of cash or named property, and distributions of all of the remaining trust assets. For a joint living trust, perhaps the first spouse to die will direct that all of that person's assets remain in the trust for the benefit of the survivor. The successor Trustee carries out these provisions in a role similar to that of an Executor. These provisions also allow the Grantor to include a trust share that will be maintained for the benefit of the Grantor's minor children through a trust for minor children.

Advantages of a Living Trust

The Living Trust is often viewed as a preferable alternative to the Will. Some of the perceived advantages of the Living Trust relate to privacy, reduced probate costs, and management of assets.

Funding the Trust. In addition to creating and signing a living trust document, assets must be transferred into the trust. A living trust only owns the assets that are actually transferred into the trust. Any assets that remain titled in the name of the grantor will be subject to potential probate administration at the death of the grantor. (The exceptions include assets which (a) are held jointly with another person with rights of survivorship, for example a home, (b) pass pursuant to "transfer on death" or "pay on death" designations, for example bank accounts, or (c) pass by beneficiary designation, for example retirement plans and life insurance.) Assets should be transferred from the grantor to the trust to achieve the result that the property is then legally owned by the trust. Then, upon the grantor's death, because the trust

(as owner) survives the grantor's death, it is not necessary to utilize the probate system to effectuate a transfer of the assets to the grantor's beneficiaries. Instead, the (successor) trustee can distribute the assets in accordance with the trust provisions. Assets can be transferred to the trust both at the time of the creation of the trust and also at later times. Separate transfer documents must be used for this purpose because the trust document itself does not contain any language of conveyance or any list of assets.

Asset Protection from Creditors. At least while the grantor is alive, holding assets in a living trust offers little protection of those assets from the claims of creditors (i.e., for debts incurred by the grantor). In most cases, this lack of protection continues to be true after the death of the grantor.

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Marital Status

The ownership of property transferred into a living trust by a married person should be clarified, whether it is placed into the grantor's single trust or the couple's joint living trust. For example, if a husband assigns his interest in "all household goods, furniture and furnishings" to the couple's joint living trust, without specifying his ownership intent with respect to a family-heirloom piano, ownership of the piano may be converted inside the trust into equal ownership between the husband and his wife, perhaps against his wishes. To avoid this result, the couple should specify, through the use of a Property Ownership Memorandum attached to the living trust, how each asset is deemed to be owned: as the husband's separate property, the wife's separate property, or jointly.

This Memorandum can be used in both common law states and in community property states. The Memorandum is useful to (a) clarify that no rights in one spouse's separate property are acquired by the other spouse, (b) preserve or establish the community property or jointly-owned nature of certain property, and/or (c) "gift" property interests, for estate tax planning or other reasons, from one spouse to the other by converting separate property to joint property or by converting joint property to separate property, or by transferring separate property from one spouse to the other spouse.

CAUTION: Although there is no longer a federal gift tax assessed on inter-spousal gifts in general, (a) an inter-spousal gift may not qualify for that general exclusion from federal gift taxes if the gift is considered a "terminable interest" ? for example if the donee's interest in the property terminates at the death of the donee because the asset passes to a beneficiary of the donor's choosing, and (b) it is possible that

there may be state gift tax issues. Consult an attorney for assistance if the use of the Property Ownership Memorandum may result in making such an inter-spousal gift.

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Partnerships

If the partnership interest was purchased through a public offering, contact that broker for assistance in transferring the interest into the living trust. The broker may require that it be provided with satisfactory evidence (a) that the trust is in existence, (b) who are the authorized trustees, and (c) what powers the trustee enjoy. This information can be provided by supplying the broker with a copy of the trust document itself. However, if privacy is desired, the broker can be supplied instead with only the selected information about the trust that is needed by the broker. The simplest way to do this is to provide the broker with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. (See the "Trust Letter to Bank or Broker" document.)

Privately-held interests in a partnership can be transferred into the living trust by contacting the managing partner for assistance. The interests can be transferred by having new certificates prepared in the name of the living trust and the old certificates surrendered. However, with many privately-held partnerships, there are restrictions in place to prevent the transfer of interests without the prior consent of the remaining partners. These restrictions, often detailed in the partnership agreement or perhaps in a separate "buy-sell" document, are usually intended to prevent the admission of unknown third parties as partners, NOT to prevent the transfer of the grantor's partnership interest to the grantor's own living trust. But it is important to obtain the necessary consent prior to the transfer in order to ensure the validity of the transfer.

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Partnership Interests (with restrictions on transfer)

Privately-held interests in a partnership can be transferred into the living trust by contacting the managing partner for assistance. The interests can be transferred by having new certificates prepared in the name of the living trust and the old certificates surrendered. However, with many privately-held partnerships, there are restrictions in place to prevent the transfer of interests without the prior consent of the remaining partners. These restrictions, often detailed in the partnership agreement or perhaps in a separate "buy-sell" document, are usually intended to prevent the admission of unknown third parties as partners, NOT to prevent the transfer of the grantor's partnership interest to the grantor's own living trust. But it is important to obtain the necessary consent prior to the transfer in order to ensure the validity of the transfer.

See the "Stock Power" and "Trust Letter to Bank or Broker" documents.

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Patents, Copyrights and Trademarks

Patents, copyrights and trademarks can be transferred to the trust through the use of a bill of transfer. (See the "Bill of Transfer" document.)

Patents. An application for a patent with the United States Patent and Trademark Office can be made only in the name of the individual inventor(s). But the assignment to the living trust can be made (a) before the application is filed, (b) after the application is filed but before the "Letters Patent" are issued, or (c) after the Letters Patent have been issued. If the Letters Patent have been applied for or issued, the assignment should include not only the grantor's rights in the invention, but also the grantor's rights in the application, or the Letters Patent, as the case may be.

After an assignment is made of ISSUED patents or Federally REGISTERED trademarks, a formal assignment should be recorded in the United States Patent and Trademark Office, similarly for copyrights in the office of the United States Copyright Office. Contact an attorney for assistance.

The description of the various interests in patents, copyrights and trademarks to be transferred should generally be in the following forms:

Trademark (used, but not Federally registered): ABCD trademark, together with the goodwill of the business in connection with which the mark is used, to the full end of the term(s) for which protection may be granted.

Trademark (if application has been made): ABCD trademark, together with the Application for registration, Serial Number 00/00000, and together with the goodwill of the business in connection with which the mark is used, to the full end of the term(s) for which protection may be granted.

Trademark (Federally registered): ABCD trademark, and United States Registration Number 0,000,000, together with the goodwill of the business in connection with which the trademark is used, to the full end of the term(s) for which protection may be granted.

Invention (patent application not yet filed): Invention of a better rat trap invented by Joe Block.

Patent (pending): Invention of a better mole trap invented by Joe Block, as disclosed in an application filed in the United States Patent and Trademark Office on February 28, 2008, Serial Number 00/000000, to the full end of the term(s) for which protection may be granted.

Patent (issued): United States Letters Patent for a better mousetrap Number 0,000,000, dated February 23, 2006, issued to Joe Block as inventor, together with all claims for damages from, and the right to sue for any past infringement of the Letters Patent, to the full end of the term(s) for which protection may be granted.

Copyright (not registered): An original literary work entitled "My Best Friend", authored and owned by Joe Block, together with all copyright rights to the work, and together with the right to secure registration for the work and all renewals, reissues, and extensions of the copyright, to the full end of the term(s) for which protection may be granted.

Copyright (registered): An original literary work entitled "My Worst Enemy", authored and owned by Joe Block, together with all copyright rights to the work, including the registration for the work issued by the United States Copyright Office on November 10, 2008, Registration Number TX000000, and together with the right to secure renewals, reissues, and extensions of the copyright, to the full end of the term(s) for which protection may be granted.

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Periodic Review

It is recommended that the Trust Property Schedule be reviewed and updated each year. Perhaps the anniversary of the trust's formation can be selected as a convenient date. The purpose of this review is to identify assets which have inadvertently not been transferred to the trust, to transfer such additional assets as appropriate, and to update the Trust Property Schedule and/or the Property Ownership Memorandum with additions and deletions. By transferring all appropriate assets to the trust, probate administration can be avoided on those assets upon the death of the grantor. Further, an up-to-date Trust Property Schedule will greatly assist the successor trustee when that person assumes the office. Additionally, the review may result in the grantor making amendments to the trust document itself or to the selection of assets to be held by the trust, perhaps as a result of new tax laws, the size of the grantor's estate, or the grantor's intentions regarding beneficiaries. Assets can be added to the trust using the various methods described in this worksheet. Changes to the trust provisions can be made by amending the trust. (See the "Living Trust - Amendment" document.)

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Privately-held Securities (with no trade restrictions)

Contact the secretary of the entity which issued the stock, bonds or other type of security (e.g. limited liability company "units") for assistance in having new certificates prepared in the name of the living trust and the former certificates surrendered.

In order to properly re-title the account, the secretary will need to know the name of the trust. Furthermore, the secretary will usually want to make sure that the trust is in existence, learn the identity of the current trustee(s) and any successor trustee(s), and verify that the trustee(s) has/have the authority under the trust document to open and maintain the brokerage account. In order to provide the secretary with this information, an original copy (or a photocopy) of the entire trust agreement can be supplied. However, if privacy is desired, the secretary can be supplied instead with only the selected

information about the trust that is needed by the secretary. The simplest way to do this is to provide the secretary with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. The selected pages should include those which contain the following information:

Declaration of Trust (first page);

Identity of the trustees (first page, plus other pages which describe alternate and/or successor trustees;

Powers of the trustees; and

Signature page (and notary page, if any).

See the "Trust Letter to Bank or Broker" and "Stock Power" document.

If the security is jointly owned by non-spouses, an attorney or tax consultant should be contacted because there may be gift tax implications of the transfer.

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Promissory Notes

Promissory notes (where another person owes the grantor money) can be transferred to the living trust by using a bill of transfer. However, check for a provision in the note that prohibits assignments. (See the "Bill of Transfer" document.)

Any associated documents should also be transferred (for example, a real estate mortgage or deed of trust, or a security agreement for equipment, fixtures or inventory). An attorney should be consulted to assist with the transfer of any such security documents because those documents must usually be recorded in the appropriate state or county office.

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Property Ownership ("Yours\Mine\Ours") Memorandum

Ownership of property of a married person that is transferred to either a single or a joint living trust should be clarified. For example, household furnishings may be owned jointly between the spouses by design or by default, before they are transferred to the trust. If one spouse simply assigns all of his or her interest in "all household goods, furniture and furnishings" to his or her single trust, it is not entirely clear which assets are included. This is especially true if one spouse claims total ownership of a certain asset perhaps received by that spouse as a gift, or brought into the marriage by that spouse. That spouse may expect to retain that asset as separate property for sentimental or financial reasons. For example, perhaps a husband brings into the marriage a grand piano that has been in his family for several generations. By assigning his interest in "all household goods, furniture and furnishings" to the couple's joint living trust, without further specifying his ownership intent with respect to the piano, ownership of the piano may be converted inside the trust into equal ownership between the husband and his wife. If the couple later divorces, or upon the death of the husband or wife, a one-half interest in the piano may be distributed to the wife or her beneficiaries, against the wishes of the husband. To avoid this result, the couple should specify, through the use of a Property Ownership Memorandum, that the piano will remain the sole property of the husband inside the trust.

This Memorandum can be used in both common law states and community property states. In the nine community property states (AZ, CA, ID, LA, NV, NM, TX, WA, WI), property or income acquired by either spouse during the marriage is considered equally owned by both spouses (unless otherwise agreed to by the spouses). Separate property brought into the marriage by one spouse theoretically will remain that spouse's property. However, if separate property is commingled with marital property, or if the couple resides in multiple states, the issues become very complicated. The Memorandum is useful to (a) clarify that no rights in one spouse's separate property are acquired by the other spouse, (b) preserve or establish the community property or jointly-owned nature of certain property (which, incidentally, provides certain tax advantages for appreciated property upon the death of one spouse), and/or (c) "gift" property interests, for estate tax planning or other reasons, from one spouse to the other by converting separate property to joint property, or by converting joint property to separate property, or by transferring separate property from one spouse to the other spouse.

CAUTION: Although there is no longer a federal gift tax assessed on inter-spousal gifts in general, (a) an inter-spousal gift may not qualify for that general exclusion from federal gift taxes if the gift is considered a "terminable interest" -- for example if the donee's interest in the property terminates at the death of the donee because the asset is then set to pass to a beneficiary of the donor's choosing, and (b) it is possible that there may be state gift tax issues. Consult an attorney for assistance if the use of the Property Ownership Memorandum may result in making such an inter-spousal gift.

The Property Ownership Memorandum provides three schedules, one each to list property to be deemed owned separately by each spouse, and one to list property to be deemed owned jointly. Any property not specifically listed on any schedule will be deemed to be owned jointly.

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Protecting Trust Assets

When the trust has been signed and assets transferred to the trust, the trust is then a viable, legal entity and the trustee has full authority, power and control to manage the trust assets. The trustee also has certain responsibilities to preserve and protect the assets.

Insurance. After insured assets have been transferred to a living trust, the insurance agent should be notified of the change. The named insured on the policy should be amended to add the trustee. The change should not affect the coverage or cost of the policy.

Documents. After the title of each asset has been transferred from the grantor to the trustee, there will be various title documents such as deeds, stock certificates, bank certificates, etc., evidencing the fact that these assets are owned by the trust. Each such title document should be kept in a safe place, such as a safe deposit box, and the person named as the successor trustee should be notified as to the location of these documents. If any securities are held in "bearer" form, such as bearer bonds or unregistered securities, it is recommended that a separate safe deposit box be obtained and clearly identified as holding only trust assets. If such items were instead held in the grantor's safe deposit box or at the grantor's home, it could be argued that those assets will be subject to probate administration, that is, not effectively owned by the trust. Additionally, the safe deposit box should be held in the name of the trust so that the successor trustee will have the right to gain entrance to the box.

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Publicly Traded Securities in Certificate Form

Contact a broker for assistance in re-titling the securities in the name of the living trust. In order to properly re-title the account, the broker will need to know the name of the trust. Furthermore, the broker will usually want to make sure that the trust is in existence, learn the identity of the current trustee(s) and any successor trustee(s), and verify that the trustee(s) has/have the authority under the trust document to open and maintain the brokerage account. In order to provide the broker with this information, an original copy (or a photocopy) of the entire trust agreement can be supplied. However, if privacy is desired, the broker can be supplied instead with only the selected information about the trust that is needed by the broker. The simplest way to do this is to provide the broker with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. The selected pages should include those which contain the following information:

Declaration of Trust (first page);

Identity of the trustees (first page, plus other pages which describe alternate and/or successor trustees;

Powers of the trustees; and

Signature page (and notary page, if any).

See the "Trust Letter to Bank or Broker" document.

If the account is jointly owned by non-spouses, an attorney or tax consultant should be contacted because there may be gift tax implications of the transfer.

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Qualified (Employment) Retirement Plan

It is recommended that the OWNERSHIP of retirement plan accounts NOT be transferred to a living trust because such a transfer will usually cause immediate tax recognition of the entire account. Instead, perhaps the living trust can be designated as the beneficiary of the plan. But if the grantor is married, it is nearly always recommended that the spouse be designated as the primary beneficiary, and the living trust be designated as the contingent beneficiary (if the spouse fails to survive the grantor, or after the

spouse's death). There are two reasons why the spouse should be the primary beneficiary: (1) the spouse generally has the RIGHT to be the primary beneficiary and must otherwise "waive" that right; and (2) if the estate exceeds the federal estate tax applicable exclusion amount (\$5,000,000), it is highly advisable that amounts passing to the spouse remain eligible for the federal estate tax "marital deduction". This deduction is always available if the spouse is named as the primary beneficiary. A tax advisor should be consulted, especially if the estate exceeds the applicable exclusion amount.

Contact the plan administrator or account custodian for assistance with the beneficiary designation forms.

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Real Estate

Real estate is transferred into a living trust through the use of an instrument called a "deed." When a transfer of ownership into a trust is desired, a deed is prepared, signed in the presence of a notary public, and then recorded by the local government office responsible for recording land transfers (for example, a county recorder).

When there is a loan against the real estate, particular attention must be paid to any loan restrictions regarding a transfer of the real estate. Most loans contain a "due-on-sale" clause, which allows the lender to "accelerate" the loan (i.e., require immediate payment of the entire remaining balance) if the real estate is transferred. The acceleration clause in the loan is designed to help protect the lender when the real estate is transferred (usually by sale) to a third party whose creditworthiness has not been approved by the lender.

Where the personal residence of a borrower is transferred to the borrower's own living trust however, there is no meaningful change in the ownership or use of the property. For this reason, federal law prevents lenders from invoking the "due-on-sale" clause in those instances, provided that the owner continues to occupy the home (as the beneficiary of the trust). Nevertheless, it is still good practice to inform the lender of, and obtain the lender's consent to, the transfer. (See the "Trust Letter to Mortgage Lender" document.)

For commercial or investment property on the other hand, there is no such law prohibiting the lender from accelerating the loan when the property is transferred into a trust. In these instances, it is critically important that the grantor of the trust (the owner of the real estate) obtain the advance written consent of the lender, confirming that the "due-on-sale" clause will not be invoked.

Transfer of Residence ? Tax Implications. There are important and valuable income tax benefits afforded to the owners of a residence at the time that the residence is sold. For example, for sales of a principal residence after May 6, 1997, a taxpayer may generally exclude up to \$250,000 (\$500,000 on a joint return) of gain realized on the sale. Holding the grantor's principal residence in a living trust does not interfere with this tax provision. Similarly, home mortgage interest and property tax deductions are available to the grantor to the same extent as if the grantor owned the residence outright.

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Signing Instructions - Bill of Transfer

The Bill of Transfer should be signed by both the grantor and the grantor's spouse. Even though the listed property may be owned solely by one grantor, including the signature of the spouse removes any doubt concerning the spouse's interest in the property.

It is not necessary that the signatures be witnessed or notarized.

If the asset is represented by a document (for example, a bearer bond, a promissory note, or a partnership interest), attach a photocopy of such document to the Bill of Transfer for positive identification. Similarly, if the asset is valuable but perhaps difficult to describe (for example, a piece of jewelry, artwork or an antique), consider attaching a photograph of the object, an appraisal, the purchase document, or an insurance policy pertaining to it.

Schedule A should be initialed where indicated, by both spouses. This is done to confirm that the grantors intended to transfer each item that is listed on the Schedule.

The Bill of Transfer should be kept in a secure location, preferably in close proximity to the living trust, in order to provide evidence of the asset transfers.

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Signing Instructions - Living Trust Funding Worksheet

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Signing Instructions - Living Trust Funding Worksheet

The Living Trust Funding Worksheet is not a legal document and does not require any signatures, witnesses or notarization. The Worksheet is merely an organizational and informational document. It should be kept in a convenient place and periodically updated. A copy of the Worksheet should be provided to the successor trustee(s) of the living trust.

The Bill of Transfer document, if selected, requires signatures as provided in its own signing instructions.

The Trust Property Schedule, if selected, is not a legal document and does not require signatures, witnesses or notarization. The Schedule should be kept with the living trust in order to provide the successor trustee with accurate information regarding the extent of the assets owned by the living trust.

The Property Ownership Memorandum, if selected, requires signatures and initials of both spouses. After the Memorandum is properly signed, it should be attached to the living trust as verification of the ownership rights agreed to between the spouses concerning all assets owned by either of them.

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Signing Instructions - Bill of Transfer

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Stocks and Bonds

Publicly-traded securities held in a brokerage account can be transferred into the living trust by re-titling the account in the name of the trust. Publicly-traded securities held in certificate form can be transferred into the living trust by using a "stock power" document. (See the "Stock Power" document.) Consult the broker for assistance with either type of security. The broker will most likely require that you provide satisfactory evidence (a) that the trust is in existence, (b) who are the authorized trustees, and (c) what powers the trustees enjoy. This information can be provided by supplying the broker with a copy of the trust document itself. However, if privacy is desired, the broker can be supplied instead with only the selected information about the trust that is needed by the broker. The simplest way to do this is to provide the broker with photocopies of selected pages attached to a cover letter. The cover letter should specifically state that the enclosed pages are, in fact, copies of the trust's provisions. (See the "Trust Letter to Bank or Broker" document.)

Privately-held stocks, bonds and other types of securities (e.g. limited liability company "units") can be transferred into the living trust by having new certificates prepared in the name of the trust and surrendering the prior certificates. Contact the secretary of the issuing corporation for assistance. (See the "Stock Power" and "Trust Letter to Bank or Broker" documents.)

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[Successor Trustee Name](#)

When the successor trustee assumes that office, the successor trustee must become familiar with the trust provisions, inventory the assets for proper control and maintenance, and attend to the requirements of accounting for the receipts and disbursements of the trust. If the grantor was the immediately-past trustee, it will be necessary to now obtain a federal tax identification number for the trust and begin filing trust tax returns.

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[Tangible Personal Property](#)

Tangible personal property includes clothing, personal effects, jewelry, household goods, furniture and furnishings, recreational equipment, collections, antiques and vehicles. Vehicles, motorcycles, boats and other recreational equipment usually have a "title" instrument that must be changed into the name of the trust. (Read the Guide Topic "Vehicles and Other Titled Personal Property".)

The other types of tangible personal property are usually not "titled", and instead, they are transferred into the trust through the use of a "bill of transfer" document. Because tangible personal property, for example household goods and personal effects, change frequently and continuous transfers would be impractical, the initial transfer signed by the grantor should convey any and all tangible personal property "now owned or later acquired."

Collectibles/collections, works of art, and antiques with significant value, even though presumably included in this generic category, should be separately and carefully described in the bill of transfer, either at the time of the initial transfer or as they are later acquired. This clarifies the grantor's intent that the trust is to own these items so that probate can be avoided.

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Tax Basis in Assets

Assets transferred to a living trust carry with them the same tax "basis" (used to compute taxable gain, if any, upon a sale of the asset) as the grantor had in those assets prior to the transfer. Upon the grantor's death, however, a living trust generally acquires a date-of-death value basis in all such assets. This is the same tax benefit applicable at death to assets owned in the name of individuals. Thus, there is no disadvantage to transferring appreciated assets into the living trust.

An example may be useful: Thomas purchased 100 shares of Acme stock in 1991 for \$1000, which \$1000 then constitutes his cost "basis" on which to compute taxable gain if he should later sell the stock. In 2008 the stock is worth \$2500. If Thomas sells the stock in 2008, he must report \$1500 in taxable gain. If he dies in 2008 still owning the stock, the basis is "stepped up" to the stock's \$2500 date-of-death value, resulting in no taxable gain if his beneficiaries immediately sell it for \$2500. Likewise, if Thomas transfers the stock to his living trust at any time before his death in 2008, the basis inside the trust remains at \$1000 while Thomas is alive, but enjoys a step-up basis of \$2500 at his death.

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Trust Property Schedule

It is very helpful to the successor trustee if a schedule of all trust assets is prepared and maintained. The successor trustee's job will be much easier if the successor trustee does not have to search for the trust assets after the death or incapacity of the grantor. Usually, no one knows more about the grantor's assets than the grantor. The schedule should be updated on an annual or more frequent basis. The schedule need not be attached to the trust document but can be paper clipped or otherwise kept with the trust document. NOTE: LISTING ASSETS ON THE TRUST PROPERTY SCHEDULE DOES NOT CAUSE THEM TO BE TRANSFERRED TO THE TRUST. ASSETS MUST BE TRANSFERRED TO THE TRUST USING THE VARIOUS METHODS DESCRIBED IN THIS WORKSHEET. THE TRUST PROPERTY SCHEDULE IS MERELY A CONVENIENT LIST OF ASSETS ALREADY TRANSFERRED (OR EXPECTED TO BE TRANSFERRED) TO THE TRUST.

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Untitled Recreational Equipment

Untitled tangible personal property is transferred into the living trust through the use of a "bill of transfer" document. Because untitled recreational equipment may change, and continuous transfers would be impractical, the initial transfer should describe all untitled recreational equipment "now owned or later acquired." Items with significant value should be separately and carefully described in the bill of transfer, even though, presumably, they are included in the generic description of "all of the grantor's untitled recreational equipment." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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U.S. Savings Bonds and Treasury Bills, Notes or Bonds

These securities should be reissued in the name of the trust. An application must be made to the Bureau of Public Debt (for U.S. Savings Bonds) or to the Federal Reserve Bank (for U.S. Treasury Bills, Notes or

Bonds). For forms and assistance, contact the bank or other agent from whom the security was purchased.

The owner of series EE U.S. Savings Bonds generally has the option to either report the interest income from the bonds each year as it is earned (even though not received) or wait until the bonds are sold or redeemed. Transferring the bonds to the grantor's living trust does not interfere with this tax provision. Transferring EE or HH bonds to the grantor's living trust is also not considered a "taxable event." (A taxable event triggers the reporting of earned or accrued interest on the bonds in the year of the taxable event.) If the grantor is the trustee of the trust, the interest will be reported using the grantor's social security number; otherwise, the trust must supply its own taxpayer identification number in connection with the transfer to the trust, and the trustee must sign the transfer request form.

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Vehicles and Other Titled Personal Property

Cars, boats, motorcycles, trailers and airplanes have formal title documents that govern ownership. These title documents are issued by various governmental agencies, depending on the asset. For example, for cars, contact the local motor vehicle department for change-of-title forms and assistance.

It is usually recommended that the grantor's personal vehicles NOT be transferred into the living trust because of possible complications with liability insurance covering the vehicle and to avoid re-transfer inconveniences. Instead, consider titling the vehicles with another person, perhaps a spouse, in joint ownership with rights of survivorship. This will still allow the vehicle to avoid probate upon the grantor's death. To establish joint ownership with survivorship, the vehicle title should include the names of both joint owners, either followed by the words "joint tenants with survivorship" or separated by the word "or" (depending on local law).

There are, however, at least two arguments in favor of keeping the title solely in the name of the grantor: (1) adding the name of a second person to the title of a vehicle exposes the grantor ("all owners") to liability claims caused by any other driver of the vehicle, which is especially devastating where liability insurance coverage is insufficient, and (2) some states allow for post-death transfers of vehicles by affidavit anyway, without the need for probate, even if titled solely in one name.

If transfer into the living trust is desired, contact the local motor vehicle department for change-of-title forms and assistance.

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Works of Art

Untitled tangible personal property is transferred into the living trust through the use of a "bill of transfer" document. Because works of art may change, and continuous transfers would be impractical, the initial transfer should describe all works of art "now owned or later acquired." Items with significant value should be separately and carefully described in the bill of transfer, even though, presumably, they are included in the generic description of "all of the grantor's works of art." This will clarify the grantor's intent that the trust is to own these items so that probate on their account can be avoided.

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ASSET PROTECTION ASSOCIATION
A Private Member Association

POUR-OVER WILL GUIDE

Overview of Pour-Over Will

A Pour-Over Will is a specialized will that is used as a supplementary document to the Living Trust or Joint Living Trust. Its primary function is to "Pour Over" the Will writer's remaining assets (at the Will writer's death) into the Will writer's Living Trust or Joint Living Trust. Often a Living Trust is established to avoid "probate" of a will, but if any assets were not transferred into the trust by design or by inadvertence, a pour-over will serves as a safety net to convey those assets into the Living Trust so that they can be distributed with the Will writer's other assets. Note: If a Joint Living Trust has been created, each joint Grantor should prepare a Pour-Over Will.

A Pour-Over Will includes a standard provision that provides for an Executor (also called a Personal Representative in some states). It also includes an optional provision to select a Guardian if the Will writer has minor children.

Instead of the usual provisions that provide for the distribution of specific bequests, tangible personal property, and the residuary estate, the Pour-Over Will simply distributes the Will writer's remaining assets to his or her Living Trust. The Living Trust then distributes that property, plus the Trust assets, in accordance with the distribution provisions (specific bequests, etc.) of the Living Trust.

The Pour-Over Will should be signed with the same formalities as any other Will.

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Alternate Executor

It is recommended that you select an Alternate Executor who will serve if the first choice is unavailable or unwilling to serve. You may name an Alternate to serve alone or name Alternate Co-Executors to serve together.

Under the latter option, you will also be asked to specify whether, if one of the Alternate Co-Executors is unable or unwilling to serve, the remaining Co-Executor will serve as sole Executor or if another name will be offered to serve so that there will still be two Alternate Co-Executors.

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Alternate Guardian

It is recommended that you select an alternate guardian who will serve if your first choice is unavailable or unwilling to serve. Your choice of guardian is very important. If your first choice cannot serve and you fail to select an alternate, your survivors and the court system will be left to make the decision for you.

You may name an Alternate to serve alone or name alternate co-guardians to serve together.

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Bonding

You may require your Executor or Trustee to be bonded. A bond is similar to an insurance policy in that it covers against losses from misappropriation of assets by the Executor or Trustee.

Because an Executor or Trustee might occasionally misappropriate assets--either through theft or error--most states require that they obtain a bond before they are given authority to act as an Executor or Trustee, UNLESS you state in your Will that no bond is required.

Note: These bonds are also known as Fiduciary bonds. A fiduciary is a person or organization who is given the authority and responsibility over assets which are not owned for the benefit of that fiduciary. For example, an Executor carries out the terms of a will and a Trustee carries out the terms of a trust.

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Choosing an Executor

If an individual will be selected as the Executor, that person should be a resident of the same state as the Will writer since some states disqualify nonresident individuals.

The Executor's responsibilities are significant. Therefore, the person or entity should be trustworthy and capable of handling financial matters. A business background may be helpful, but certainly is not required.

In the case of a Pour-Over Will, which is the type under discussion here, it is normally best practice to choose the Executor as the same person(s) that will serve as Trustee(s) and successor trustee(s) of your Living Trust. The reason for this is simple. The Living Trust in effect replaces the function of a Last Will and Testament. The Pour-Over Will is typically in place just in case some asset is found to be outside of the trust to then "pour" it into the trust. This means an Executor will normally have very little to do with the Will.

On the other hand, in the event there are significant assets outside of the trust at the time of the Will maker's death, the complications in probate court can increase. If the Executor is working with a capable lawyer at that time, the Executor's responsibilities will be much easier to handle. Many banks have trust operations that provide executor services, but of course, the bank will charge for its services. Executor fees can range from 1-2 percent in some states to as much as 4-5 percent in other locations. Frequently, a spouse or adult child is named as an executor, and in such cases, the Executor may "waive" or refuse to accept a fee for services.

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Choosing a Guardian

A guardian is the person that you nominate in a Will to have custody of your minor children if neither parent is available. The guardian has physical control over the minor children, including the responsibility to provide physical care, health care, education, and general welfare.

The responsibilities of the guardian do not include control of finances for the children. If your planning includes a Children's Trust, your trustee will have the responsibility to invest the assets of the trust and make payments to the guardian for the care of your children. You can choose the same person(s) to be the guardian and trustee. In some cases people prefer to separate those two responsibilities to prevent financial improprieties.

IMPORTANT: Naming a person as guardian in a Will is merely a nomination, not the actual appointment. Only the court can appoint a guardian. As expected, the court usually accepts the nomination specified in the Will, but it is possible that interested family members or others may challenge the appointment. In that case the court will listen to both sides before making a decision whether to appoint the person nominated in the Will or a person suggested by others. The court will appoint the person nominated in the Will unless it finds compelling reasons not to do so. The court is concerned primarily with the best interests of the children.

If you are not married to your minor child's other parent, it is important to understand that your selection of a guardian does not give your guardian priority over the other parent if you die. In most cases, the other parent will have rights as a natural guardian that will take priority over your selection.

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Executors

An "Executor" or "Personal Representative" is the person or organization named in a Will who has the responsibility of carrying out the terms of the Will. Those responsibilities are to collect your assets, pay the debts and expenses of the estate, and distribute the remaining assets to the beneficiaries. In the case of a Pour-Over Will, the primary function is to make sure any assets found to be outside of the trust at the time of the Will maker's death be transferred into the trust as specified in the Will. Also, If there is a guardian provision, then it the Executor's responsibility to present that to the probate court.

Some states use the term "Personal Representative," rather than "Executor," but generally, either term is acceptable. If you have no preference, use the term "Executor."

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Informal Administration

Some states have adopted laws which allow the Executor to administer your estate with a minimum of court supervision if the circumstances of the estate appear to be simple.

States describe this method using various terms, such as "informal," "unsupervised," or "independent." Usually, if problems arise under these less formal methods, there are legal procedures available by which objecting parties can force the estate to revert to more formal methods.

By providing the Executor with the discretion to use less formal methods (where available), you may be able to minimize unnecessary expense and delay in the administration of your estate. However, you must balance these potential savings against the increased possibility of errors or even intentional misconduct by the Executor which could occur due to the reduced court oversight.

An example of a less formal administration of a Will in California is what is called a "simplified informal process," which may be allowed when the assets in the estate (outside of the trust) have a value of \$166,250 or less.

If you have any questions about whether your state allows informal administration, or whether you should authorize your Executor to adopt informal administration, a lawyer should be consulted.

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Signing Instructions

1. This Pour-Over Will should only be used in connection with a Living Trust or a Joint Living Trust. The appropriate Trust and the Pour-Over Will should be signed at the same time.
2. This Will does not dispose of property which passes on the death of the Will writer to a person by operation of law or by any contract. For example, the Will does not dispose of joint tenancy assets or the Will writer's spouse's share of community property, and it does not normally apply to proceeds of life insurance on the Will writer's life or to the Will writer's retirement plan benefits.
3. This Will is not designed to reduce taxes. The tax results of the choices made in this Will should be discussed with a competent tax advisor.
4. The Pour-Over Will is not valid unless it is signed by a Will writer who is of "sound mind" and of the minimum age for this state. In most states, the minimum age is eighteen. Some states permit an individual below the minimum age to sign a will if the person is married or in the military. Being of "sound mind" requires that the Will writer: (a) know that he or she is signing a will, (b) know the general nature and extent of his or her property, and (c) know the descendants or other relatives that would ordinarily be expected to share in the estate.
5. If the Will writer is unable to sign due to physical disability, another person may be able to sign on behalf of the Will writer, in the Will writer's presence, and at the express direction of the Will writer. If there are any questions regarding the possibility of someone signing on behalf of the Will writer, a lawyer should be contacted.
6. The Pour-Over Will should be signed by the Will writer in the presence of three DISINTERESTED adult witnesses and a notary public. Many states require only two witnesses (such as in California), but the signature of a third witness provides some protection against the possibility that one of the witness' signature will be invalid for some reason. For example, a person should not be a witness if that person is a beneficiary under the Will. In most states, if a beneficiary's signature is counted in order to satisfy the minimum number of witnesses, then the will is not necessarily invalidated, but that "interested witness" may not receive a share of the estate any larger than if the Will writer had died without a will.
7. All of the witnesses must watch the Will writer sign this Will. The Will writer should verbally declare that the document is intended to be his or her Last Will and Testament, but the witnesses need not read the Will or know of its contents.
8. Each witness must sign his or her name with the Will writer and the other witnesses present. The witnesses should be satisfied that the Will writer willingly signed the document as his or her free and voluntary act, and that the Will writer was of full age and sound mind.
9. The Will writer should initial on the bottom margin of each page of the Will. This is done to prevent the later substitution of pages.

10. The self-proving affidavit ("Proof of Will" in some states) is a document which should be attached to the end of the Will, and which contains the Will writer's acknowledgment and the affidavit of the witnesses, made before a person authorized to take acknowledgments and administer oaths. The affidavit recites that the requisite formalities were observed in signing the Will. Although attaching the affidavit has nothing to do with the legality of the Will itself, it can speed the admission of the Will to probate after the death of the Will writer because it eliminates the need to have a witness appear at the probate proceeding to testify that the formalities in signing the Will were followed. The witnesses may not be available later when they are needed. A self-proved Will may be admitted to probate without additional witnesses or affidavits, but it is still subject to contest on such grounds as undue influence, lack of testamentary capacity, or prior revocation. In most cases, this affidavit should be signed and attached to the end of the Will. Some states do not recognize the self-proving option. Therefore, the affidavit will be of no use in those states. However, including the affidavit in those states will not invalidate the Will.

11. The date should be filled in wherever requested, using the date on which the actual signing takes place. This step could become essential to the validity of the Will (for example, if this Will revokes an earlier will).

12. The number of total pages in the Will should be indicated, including the page(s) on which the witness signature lines appear. The page with the affidavit, if included, should not be counted because the affidavit is not a part of the Will itself.

13. **EXTREMELY IMPORTANT:** The original of the Will should be kept in a secure location such as a safe deposit box at a bank, because **only the signed original can be probated**. A second copy could be kept in the Will writer's home files. The Will writer may wish to provide a copy to his or her lawyer, or possibly to the person named as Executor. However, before distributing such copies, the Will writer should consider that it may become awkward to retrieve them later, should the Will writer decide to modify the Will and/or change the designation of Executor. **(The Association may offer services for preserving your original Will or digital copies. Ask your fellow member who is assisting you about this service.)**

14. In most states, the Will cannot be changed by adding, deleting, or modifying words on the face of the Will. Such changes are usually disregarded. When changes are desired, it is recommended that the Will be revoked by signing a new Will which expressly revokes the former Will.

For More Information:

[Overview of Pour-Over Will](#)

[TOPIC INDEX](#)

Sole/Co-Executors

A sole Executor serves alone. Alternatively, you can nominate any number of persons and/or organizations to serve together as Co-Executors. All actions taken by Co-Executors must be unanimous. Therefore, difficulties and/or delays are sometimes encountered if:

- the Co-Executors reside some distance away from each other and documents to be signed must therefore be circulated among them, or
- the Co-Executors are unable to unanimously agree on some course of action.

On the other hand, there are also some advantages to naming Co-Executors. A parent may name both of his children in order to avoid the perception that one child is being favored over the other.

Also, an attractive combination of Co-Executors is a bank trust department and a family member; the bank can assume responsibility for all of the court documents, tax returns, asset management functions, and transfer documents, while the family-member Executor can provide useful insight about the beneficiaries for purposes of distributions. (This consideration may not be necessary in the case of a Pour-Over Will because of the very limited function of the Executors.)

Finally, some states require (or at least prefer) that at least one Executor be a resident of your state or else be bonded. Therefore, in order to allow an out-of-state Executor, who is your primary choice, to serve without bond, you may want to add a Co-Executor who is a resident of your state to serve.

For More Information:

[Executors](#)

[Overview of Pour-Over Will](#)

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Sole/Co-Guardians

A sole guardian serves alone. Alternatively, you can nominate two or more persons to serve together as co-guardians. Decisions of co-guardians need to be unanimous, and the co-guardians need to work together. Therefore, co-guardians are usually nominated only when the co-guardians are married to each other or when the co-guardians live together and each has an important relationship with the child(ren) (for example, two sisters who live together).

If you are inclined to name a married couple as co-guardians, consider your knowledge regarding the stability of the marriage and whether you would want both to serve if they were separated or divorced. You may prefer to name just one of the couple as your sole guardian. For example, if you are considering selecting your sister and her husband as co-guardians, maybe you want to choose just your sister as sole guardian.

For More Information:

[Choosing a Guardian](#)

[Overview of Pour-Over Will](#)

[TOPIC INDEX](#)

Waiving Bonds

Most Will writers decide to waive (not require) a bond because:

1. the Executor or Trustee chosen is trusted, and
2. because bonds:
 - are expensive,
 - are usually not necessary if a bank is the Executor or Trustee because most banks are already bonded, and
 - require greater court involvement in some states because the court must ensure that the bond is handled properly.

For More Information:

[Bonding](#)

[Executors](#)

[Overview of Pour-Over Will](#)

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Witnesses

The Pour-Over Will should be signed by the Will writer in the presence of three DISINTERESTED adult witnesses and a notary public. Many states require only two witnesses (such as in California), but the signature of a third witness provides some protection against the possibility that one of the witness' signature will be invalid for some reason.

For example, a person should not be a witness if that person is a beneficiary under the Will. In most states, if a beneficiary's signature is counted in order to satisfy the minimum number of witnesses, then the will is not necessarily invalidated, but that "interested witness" may not receive a share of the estate any larger than if the Will writer had died without a will.

For More Information:

[Overview of Pour-Over Will](#)

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ASSET PROTECTION ASSOCIATION
A Private Member Association

DURABLE POWER OF ATTORNEY GUIDE

Overview of Durable Power of Attorney

A *Power of Attorney* is a document under which you as the *Principal*, give legal permission to another person or entity (an *Attorney-in-Fact* or *Agent*) to act on your behalf. Sometimes it is referred to as a POA. You sign a POA document so that your Agent will be able to handle your affairs during a period of time when you are unavailable or unable to do so. An Agent is not required to be a lawyer.

A POA may be either general or specific. A *General Power of Attorney* (GPOA) gives the Agent broad authority to act for you. A *Special Power of Attorney* (SPOA) grants the Agent limited authority to act only in specified situations. In addition, you may create a “*Durable*” *Power of Attorney* (DPOA), which means it will remain in effect even if you become incompetent or incapable of handling your affairs. If you do not want the Power of Attorney to remain in effect during these times, then the document can be made “non-durable.” **The Association provides a Durable General Power of Attorney or DPOA with the Living Trust package.** Any other power of attorney document, whether general or special, must be requested from the fellow Association member that is assisting you.

Note: A separate DPOA should be created for each person. A “joint” Power of Attorney is not valid.

See Topic Index More Information:

TOPIC INDEX

[Access to Medical Records](#)

[Agent Accountability](#)

[Agent Choice](#)

[Agent Compensation](#)

[Agent Powers Over a Living Trust](#)

[Agent Power to Change Beneficiaries](#)

[Agent Reimbursement](#)

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[Banking Transactions](#)

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[General vs. Special](#)

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[Interpretation of the Power of Attorney](#)

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[Managing Real Estate](#)

[Mortgaging Real Estate](#)

[Other Financial Powers](#)

[Overview of DPOA](#)

[Personal Property](#)

[Revoking Prior POA Documents](#)

[Selling Real Estate](#)

[Sole/Co Digital Agents](#)

[Special Powers](#)

[Springing DPOA](#)

[Successor Agent](#)

[Your Spouse as Agent](#)

[Signing Instructions](#)

[Additional Signing Instructions for California](#)

Access to Medical Records

Although you may have a separate power of attorney for health care, you should consider granting your Agent under this document the power to review your medical records and health care billing information. Due to recent changes regarding health information privacy laws, your Agent may not have access to your health care billing information necessary to dispute charges or correct insurance information with the medical records or billing department. Click here for more information at HIPAA's website: <https://www.hhs.gov/hipaa/index.html>

For More Information:

[Agent Accountability](#)

[Choosing an Agent](#)

[Successor Agent](#)

[Your Spouse as Agent](#)

[Overview of DPOA](#)

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Agent Accountability

Generally, an Agent is not liable for damages unless he or she intentionally engages in misconduct. This protection is designed to encourage Agents to accept the responsibility of being an Agent. In order to ensure that the Agent is carrying out his or her duties in a responsible manner, it may be helpful to require the Agent to provide periodic accountings (usually annually). This would require the Agent to provide detailed reports of all actions taken during the period, including amounts of funds that have been paid or received and any property that has been sold or acquired.

For More Information:

[Agent Compensation](#)

[Agent Reimbursement](#)

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[Gifts to Your Agent](#)

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Agent Choice

An Agent, sometimes referred to as an Attorney-in-Fact, does not have to be an attorney. The Agent can be any adult that you trust and who is competent to handle your affairs. An Agent can also be someone other than an individual, including a bank, for example.

It is important that you first discuss the issue with your potential Agent and express your values and wishes with regard to how your affairs should be handled. This also gives the Agent an opportunity to consider and communicate to you whether he or she is willing and able to handle the responsibilities.

In Alaska, the Agent may not be a public home care provider who is furnishing services to the principal.

Note: A separate Power of Attorney should be created for each person. A "joint" Power of Attorney is not valid.

For More Information:

[Agent Powers Over a Living Trust](#)

[Agent Compensation](#)

[Agent Reimbursement](#)

[Agent Accountability](#)

[Gifts to Your Agent](#)

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Agent Compensation

Often Agents serve without compensation, but the Agent may be required to devote much time and effort in carrying out the powers granted in the document. For this reason, you may want to consider compensating the Agent for performing those duties. The amount may be a set fee for each period, for example \$500 per quarter, or it may be based on the actual amount of time spent carrying out the duties. In either event, compensating the Agent may serve to motivate the Agent to devote sufficient time and effort to conduct your business in a satisfactory manner.

For More Information:

[Agent Reimbursement](#)

[Agent Accountability](#)

[Choosing an Agent](#)

[Gifts to Your Agent](#)

[Successor Agent](#)

[Your Spouse as Agent](#)

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Agent Powers Over a Living Trust

A trust is an agreement between parties in which one party, the *trustee*, holds the assets or property of the person creating the trust, the *grantor*, for the benefit of another, the *beneficiary*. If you have a living trust, the trustee of that trust is typically the person who controls all disbursements from the trust assets. If you serve as the trustee and later become unable or unwilling to continue acting as trustee, a "*successor*" trustee assumes those responsibilities. If for unusual reasons you want to provide the Agent under your Power of Attorney with the authority to make changes to the trust or revoke the trust (in your place as the trust grantor, or with the authority to require the trustee to make certain distributions from the trust you will need to specify those unique powers in your DPOA. The powers granted under the DPOA prepared by the Association will not provide the Agent with that authority without your specific instructions.

For More Information:

[Agent Accountability](#)

[Durability](#)

[Estate Planning Decisions](#)

[Financial Matters](#)

[General Powers](#)

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Agent Power to Change Beneficiaries

A beneficiary is a person or entity who will receive money or property from the property owner when the property owner dies. A beneficiary can be a spouse, child, charity, or any entity or person to whom the property owner would like to leave his or her possessions and assets.

Many financial institutions, investment firms and life insurance companies allow you to designate a beneficiary or recipient of the account or policy. This beneficiary becomes entitled to the funds held in the account or the value of the policy upon your death. The power to change this type of beneficiary does not include the beneficiaries of your living trust. That power must be specified separately.

For More Information:

[Agent Powers Over a Living Trust](#)

[Agent Accountability](#)

[Choosing an Agent](#)

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Agent Reimbursement

In the course of carrying out the duties under the Power of Attorney document, your Agent may have to pay for certain expenses, such as telephone or copying charges, or mileage for travel. You may want to provide that the Agent will be reimbursed for any reasonable expenses incurred. This may be especially true if a family member or other loved one agrees to act as Agent without compensation. Reimbursing your Agent for the expenses incurred will help to lessen the burden on the Agent.

For More Information:

[Agent Accountability](#)

[Agent Compensation](#)

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Alternate Digital Agent

It is recommended that you select an Alternate Digital Agent who will serve if the first choice is unavailable or unwilling to serve. You may name an Alternate Digital Agent to serve alone or name Alternate Co-Digital Agents to serve together.

Under the latter option, you will also be asked to specify whether, if one of the Alternate Co-Digital Agents is unable or unwilling to serve, the remaining Co-Digital Agent will serve as sole Digital Agent or if another name will be offered to serve so that there will still be two Alternate Co-Digital Agents.

For More Information:

[Digital Agent](#)
[Sole/Co Digital Agents](#)
[Overview of DPOA](#)
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Banking Transactions

The power to handle banking transactions includes the authority to open and close bank accounts, as well as to make withdrawals, deposits, or other transactions on the account. For example, you may grant your Agent the power to access your accounts in order to pay your bills when you are unable to do so, or to make your investment decisions for you. You may limit the authority to specific bank accounts or provide authority over all bank accounts held by you.

For More Information:

[Borrowing Money](#)
[Financial Matters](#)
[Special Powers](#)
[Agent Powers Over a Living Trust](#)
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Borrowing Money

You may want to give your Agent authority to obtain credit or borrow money on your behalf. This power is useful in allowing the Agent to oversee and take advantage of investments, or it may simply be useful in allowing the Agent to cover day-to-day expenses. You may limit the amount which the Agent may borrow on your behalf or allow the Agent to decide how much may be necessary. In either event, it is important to remember that you are bound by your Agent's actions, and you are obligated to repay any amounts borrowed under the Power of Attorney.

For More Information:

[Banking Transactions](#)

[Financial Matters](#)

[Other Financial Powers](#)

[Special Powers](#)

[Overview of DPOA](#)

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Business Affairs

If you own a business, you may give your Agent the authority to manage and operate the business. For example, you can allow your Agent to manage the day-to-day operations of the business as well as pay employee salaries, payroll taxes, and creditors. Business affairs typically would also include dealing with legal matters, even law suits, and with filing and paying taxes plus managing audits and settling claims.

In addition, you should understand the difference between a General Power of Attorney and Special Power of Attorney in this situation. A *General Power of Attorney* (authority to act in "all situations") includes authority to sell, dissolve or close the business if the Agent deems it appropriate or necessary. However, in the *Special Power of Attorney* (authority to act in "specific situations"), you can limit the Agent's authority to act only "in the ordinary course of business," which would NOT include the authority to shut down the business.

For More Information:

[General vs. Special](#)

[Interpretation of the Power of Attorney](#)

[Hiring Business Professionals](#)

[Homestead](#)

[General Powers](#)

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Digital Assets

The definition of digital assets is broad and can include any online accounts or files stored on a computer or server. The following are examples of digital assets: digital devices like computers, tablets, smartphones; email accounts like Gmail, Yahoo, Outlook; accounts with social networking sites like Facebook, Twitter, LinkedIn; online media that is stored on iTunes, Amazon/Kindle, Instagram, photo and sharing websites. Other digital assets include things like blogs, gaming accounts, online backup servers, domain names, virtual property, and computer files. You may wish to include crypto currency and NFT's (non-fungible assets) in this category or those could be included under the investment powers of the Agent. Nevertheless, anything requiring digital access (including any banking or investments) will need to have at least the access credentials covered as Digital Assets even if the Digital Agent does not have the power to make or change investments or conduct banking. You can actually set up extra security by keeping login credentials separated between types of Agents of your Power of Attorney.

Because of the potential for the power of attorney to become a public document and because sensitive information like usernames and passwords might need to be revealed to the Agent in order to be given access, all digital assets will be contained in a Digital Assets Memorandum. This section of the document should be separated from the rest of the power of attorney and be made accessible only to the principal (you) and the designated Agent. The Digital Assets Memorandum may be updated from time to time by the principal in case any new digital assets are acquired, or usernames and passwords are changed.

For More Information:

[Digital Agent](#)

[Alternate Digital Agent](#)

[Sole/Co Digital Agents](#)

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Digital Agent

A *Digital Agent* is the person or organization named in a Power of Attorney (or a Will) who has the responsibility of carrying out the terms of your digital assets in the POA. Those responsibilities include, but are not limited to, the management, distribution, or termination of your digital assets. Generally, this allows the Digital Agent to access, download, and backup digital assets, convert file formats, access necessary digital devices, and clear computer caches and/or delete files. The Digital Agent should be trustworthy and technically savvy.

Inventory all of your digital assets in "Schedule A" and the "Letter of Instructions" to be attached to your DPOA. Notify your designated Digital Agent and anyone else important to your digital estate of your wishes and also inform them of where your Letter of Instructions is located.

*Note: While this Digital Agent provision makes your wishes known as to your digital assets, the area of digital estate planning is a relatively new field of law and there is no guarantee that your wishes can be fully implemented. For example, online accounts are usually governed by the "terms of service" agreed to when the account is opened and may prevent your Digital Agent from accessing or managing the account. Also, your digital rights to some of your online accounts may expire upon death and prevent account access by your Digital Agent.

Therefore, it is important to research the rights and issues that may impede your Digital Agent from carrying out the terms of your digital asset wishes.

For More Information:

[Digital Assets](#)

[Letter of Instructions](#)

[Sole/Co Digital Agents](#)

[Overview of DPOA](#)

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Durability

The Power of Attorney document can be made "durable." This means that the powers granted to your Agent will continue to remain in effect even if you become disabled or lack sufficient mental competence to handle your own affairs.

In fact, many Principals do not want the Power of Attorney to become effective UNTIL they become mentally incompetent. In this situation, you may specify that the Power of Attorney (i) "shall not be affected by my disability or lack of mental competence," or (ii) shall become effective "upon written certification . . . that I am disabled or lack sufficient mental competence" (a "springing" Power of Attorney).

Making the Power of Attorney durable allows you to select the individual who will handle your affairs if you become incompetent. In the absence of a Power of Attorney, the matter would have to be presented to a court who would then appoint a conservator to handle your affairs for you. You would not be able to select the individual in that situation.

The Power of Attorney provided to you by the Association is by default a Durable General Power of Attorney (DPOA). You may elect for it to become a Springing DPOA as explained above. Any other types of POA's must be requested to the Association member who is assisting you.

Note: The "springing" Power of Attorney is not available in Florida. In Florida, the Power of Attorney will go into effect immediately after it is signed and delivered.

For More Information:

[Effective Date](#)

[Agent Powers Over a Living Trust](#)

[Choosing an Agent](#)

[Estate Planning Decisions](#)

[Financial Matters](#)

[General Powers](#)

[Managing Real Estate](#)

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Effective Date

The Association offers you flexibility for you to specify when the document becomes effective and when it terminates. You may want to state that the Power of Attorney will go into effect immediately, or you may want to provide that the power will go into effect only when a physician certifies in writing that you are disabled or lack sufficient mental competence to handle your own affairs (a "springing" Power of Attorney).

On the other hand, you may want to provide a specific beginning date and ending date for the Power of Attorney. This may be appropriate if the power is being granted for a specific situation, for example if

you are traveling out of the country for one year and will not be able to manage your affairs during that period of time.

Note: The "springing" Power of Attorney is not available in Florida. In Florida, the Power of Attorney will go into effect immediately after it is signed and delivered.

For More Information:

[Agent Powers Over a Living Trust](#)

[Choosing an Agent](#)

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Estate Planning Decisions

A revocable trust or living trust is an estate planning trust that can be changed or canceled during the grantor's lifetime. The Agent's power to make decisions about your estate includes the authority to transfer assets to a revocable (living) trust established by you. One of the most important powers is the power to make gifts to others on your behalf. Another essential estate planning tool is the power to refuse any inheritance you might receive, usually for tax advantage reasons. It is recommended that this power be granted to the Agent in case this type of situation occurs.

For More Information:

[Agent Powers Over a Living Trust](#)

[Choosing an Agent](#)

[Durability](#)

[Financial Matters](#)

[General Powers](#)

[Hold Harmless](#)

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Fiduciary Transactions

A fiduciary, or trustee, is responsible for acting on behalf of another person or entity regarding specific matters, such as managing financial assets or investments, or handling legal or business matters. To review the extent of your fiduciary responsibilities, you should review any agreement you executed when accepting this responsibility.

If your most or all your assets are in trust (such as your Living Trust), your trustee (which may be you until a successor must take over) acts as a fiduciary over the trust assets on your behalf and all beneficiaries. There may not be any fiduciary matters for your POA Agent to care for. Nevertheless, a fiduciary power can be granted generally or special fiduciary powers for specific assets, business interest or other circumstances. For example, you may not need this for your own assets, but perhaps you a fiduciary for someone else, such as relative. Your POA Agent could be granted power to act in your fiduciary capacity for them as long as that is permissible by that party.

For More Information:

[Agent Powers Over a Living Trust](#)

[Agent Accountability](#)

[Choosing an Agent](#)

[Hold Harmless](#)

[Successor Agent](#)

[Your Spouse as Agent](#)

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Financial Matters

In addition to banking transactions, you may want to give your Agent the authority to make various financial and investment decisions for you.

For example, this authority may include the power to handle stock, bond, commodity, or insurance transactions. You may want to grant this power to allow an Agent to handle issues that may arise with insurance or other employee benefit situations, such as health insurance claims for medical treatment and procedures required by you.

For More Information:

[Banking Transactions](#)

[Borrowing Money](#)

[General Powers](#)

[Other Financial Powers](#)

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General Powers

A general Power of Attorney is very broad and provides extensive powers. A general statement is included which gives the Agent "full power and authority" to act on behalf of the Principal. The

document then lists certain powers to make it clear that the Principal intended to grant such broad powers.

Broad powers include powers to:

- Handle banking transactions; ([Banking Transactions](#))
- Enter safe deposit boxes; ([Other Financial Powers](#))
- Handle transactions involving U.S. securities; ([Financial Matters](#); [Other Financial Powers](#))
- Buy and sell property; ([Managing Real Estate](#); [Mortgaging Real Estate](#); [Selling Real Estate](#))
- Purchase life insurance; ([Financial Matters](#))
- Settle claims; ([Business Affairs](#))
- Enter into contracts; ([Business Affairs](#))
- Exercise stock rights; ([Business Affairs](#); [Financial Matters](#))
- Buy, manage, or sell real estate; ([Selling Real Estate](#))
- File tax returns; and ([Business Affairs](#))
- Handle matters related to government benefits. ([Other Financial Powers](#))

In addition, optional powers include powers to:

- Maintain and operate business interests; ([Business Affairs](#))
- Employ professional assistance; ([Business Affairs](#); [Hiring Business Professionals](#))
- Make gifts;
- Make transfers to revocable ("living") trusts; and ([Agent Powers Over Living Trust](#))
- "Disclaim interests" (this power can be an important estate planning tool that helps avoid estate taxes). ([Estate Planning Decisions](#))

If providing broad powers is not desirable, a Special Power of Attorney, which can be limited in scope, may be more appropriate. The above powers are all offered as "options" in developing a Special Power of Attorney document.

For More Information:

[Interpretation of the POA](#)

[General vs. Special](#)

[Special Powers](#)

[Overview of DPOA](#)

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General vs. Special

A General Power of Attorney is a document under which you authorize another person to act on your behalf in a variety of situations. In contrast, a Special Power of Attorney is a document under which you authorize another person to act on your behalf in specific situations only.

A General Power of Attorney is very broad and provides extensive powers. A general statement is included which gives the Agent "full power and authority" to act on your behalf. The document then lists certain powers to make it clear that you intended to grant such broad powers. For a list, see [General Powers](#).

A Special Power of Attorney document provides the Agent with only those powers that are listed in the document. For a list, see [Special Powers](#).

The Association provides you as a member with a *General* Durable Power of Attorney (DPOA) by default. If you do not wish to use that form or prefer to use a Special Power of Attorney or any combination thereof, please make this known to your fellow Association member that is assisting you.

For More Information:

[Interpretation of the POA](#)

[General Powers](#)

[General vs. Specific](#)

[Overview of DPOA](#)

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Gifts to Your Agent

Generally, an Agent may not use the Power of Attorney to make gifts to him or herself. If you want to make a gift to the Agent, you should appoint a substitute Agent. The substitute Agent would have authority only for the purpose of making the gift to the primary Agent. The person named as substitute Agent can, but need not, be the same person who serves as substitute Agent for other purposes, such as to handle your real estate, or it could be the person that you named as your successor Agent.

For More Information:

[Agent Powers Over a Living Trust](#)

[Agent Compensation](#)

[Agent Reimbursement](#)

[Agent Accountability](#)

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Hiring Business Professionals

You may want to authorize your Agent to hire business professionals to help manage your affairs. For example, your Agent may need to hire accountants to review and manage the business records of a business owned by you, or the Agent may need to hire a real estate agent to assist in the sale or purchase of property. This authority allows the Agent to carry out your affairs more efficiently. However, it is important to remember that any business professionals hired by your Agent will be paid out of your assets.

For More Information:

[Business Affairs](#)

[General Powers](#)

[Special Powers](#)

[Overview of DPOA](#)

Hold Harmless

Some Power of Attorney documents contain an indemnity provision that allows the Agent to protect third parties who may take actions based on the Power of Attorney. This provision grants authority to the Agent to hold a third party harmless by assuming any liability that may be imposed on the third party. With an indemnity provision, an Agent may pay the amount of any judgment entered against the third party in legal proceedings or repay the third party for any losses while acting in reliance on the Power of Attorney document.

By including an indemnity provision in the Power of Attorney, you assure third parties that they will not be penalized for any actions they may have taken in reliance on the document. This will make it easier for the Agent to conduct business because third parties will accept the Power of Attorney more readily. However, it is important to remember that any amounts reimbursed by the Agent will come from the Principal's funds.

For More Information:

[Agent Accountability](#)

[Choosing an Agent](#)

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Homestead

The term "homestead" means the property that you own and maintain as your personal residence. The exact definition of homestead varies from state to state, but generally includes the dwelling place and the related land.

In most cases, the amount of land that can be included as part of the homestead is limited. In some instances, the amount of land may be limited to a "lot," but in other cases the amount may be as much as 200 acres or more. The term "homestead" can also include a condominium or similar type of real estate interest. An apartment that is rented from another party might be a personal residence but would not be a homestead because it is not owned by the party who resides in it.

If you have executed a Living Trust and placed your "homestead" property properly into the trust, there should not be any matters your Agent needs to deal with as it becomes the responsibility of the trustee.

Important Note:

Laws in some states may limit the power of your spouse to release your ownership rights in your homestead. Therefore, if you've named your spouse as your Agent, it may be necessary to appoint a substitute Agent for the purpose of releasing your rights in your personal residence.

For More Information:

[Agent Powers Over a Living Trust](#)

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Interpretation of the Power of Attorney

The intent of a General Power of Attorney (GPOA) is to permit the Agent to take any action on behalf of the Principal. The listing of specific powers in a GPOA should not be interpreted as meaning that the Agent's powers are limited only to the listed powers. On the other hand, a Special Power of Attorney should be interpreted as allowing an Agent full authority with respect to only the powers listed in the document.

For More Information:

[General Powers](#)
[Special Powers](#)
[Overview of DPOA](#)
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Letter of Instructions

The Letter of Instructions should include all the necessary information a Digital Agent needs to manage, distribute, and terminate your digital assets. It should include: names of accounts/websites/devices, usernames, passwords, and any other access information. In addition, include instructions on how you want the digital asset administered, such as if you want the account memorialized or closed, any time-related conditions pertaining to deletion of inactive accounts or payments due, monetary, or business implications, or anything else you want the Digital Agent to know.

For More Information:

[Digital Assets](#)
[Digital Agent](#)
[Overview of DPOA](#)
[TOPIC INDEX](#)

Managing Real Estate

If you own real estate other than your residence, you may want to grant authority to the Agent to manage that real estate for you. This authority would include making repairs, collecting rent, or performing various other duties of a landlord. Additionally, this authority may involve the power to hire individuals or companies to carry out repairs, maintenance, or other duties.

For More Information:

[General Powers](#)
[Mortgaging Real Estate](#)
[Selling Real Estate](#)
[Special Powers](#)
[Overview of DPOA](#)
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Mortgaging Real Estate

The power to mortgage real estate allows your Agent to borrow money and pledge your property as collateral. For example, this power may be useful in allowing your Agent to obtain additional funds that may be needed to cover your expenses, or to allow the Agent to take advantage of investment opportunities that may arise. As with the power to sell real estate, the power to mortgage real estate can be limited to specific property only, or it can apply to all real estate owned by you.

For More Information:

[General Powers](#)

[Managing Real Estate](#)

[Selling Real Estate](#)

[Special Powers](#)

[Overview of DPOA](#)

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Other Financial Powers

The power to collect and pay debts on your behalf is a valuable tool for the Agent. Other powers also may include the power to deposit, negotiate, sell, or transfer any United States Bonds or Notes, including U.S. Treasury Securities. You may also want to grant the power to your Agent to access your safe deposit box. This authority will allow the Agent to physically access and obtain the contents of the safe deposit box in the event that you are unable to do so.

For More Information:

[Banking Transactions](#)

[Financial Matters](#)

[Special Powers](#)

[Overview of DPOA](#)

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Personal Property

The power to sell personal property is a broad power. Personal property can include both "tangible" personal property (cars, sporting equipment, jewelry, etc.) and "intangible" personal property (an account receivable, shares of stock, etc.).

For example, your Agent will be able to handle the sale of a vehicle owned by you if you are required to relocate suddenly or you are simply away for an extended period of time. The power may also be used to allow your Agent to sell personal property such as household furnishings if you are required to move for health reasons. In granting the power, you should indicate whether the authority is granted over only specific property (which should be specifically identified), or whether the authority is over all personal property owned by you in general.

For More Information:

[General Powers](#)

[Special Powers](#)

[Overview of DPOA](#)

Revoking Prior POA Documents

A Revocation of Power of Attorney is a document under which you revoke a Power of Attorney, whether general or special, that previously authorized an Agent to act on your behalf. Prior Power of Attorney documents may also be revoked by including a revocation provision in a newly executed Power of Attorney document. In either case, a copy of the Revocation **MUST** be presented to the Agent as evidence of your intent to revoke the Power of Attorney. You should also deliver copies of the Revocation to third parties who had notice of your original Power of Attorney.

Also, if you choose to revoke prior Power of Attorney documents, you should be careful to make sure that any Power of Attorney documents related to health care are not accidentally revoked. You can do this by stating specifically in the Revocation that the health care documents will remain in effect.

For More Information:

[Durability](#)

[Overview of DPOA](#)

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Selling Real Estate

You may want to give your Agent the authority to sell real estate owned by you if the real estate is not held in your Living Trust. This real estate could include your residence or other property you may own, such as rental property. You can choose to grant authority over only specific real estate, or all real estate owned by you.

For example, this authority will allow your Agent to handle the sale of your home if you have to move to a long-term care facility for health reasons or if you have to relocate suddenly and will not be available to handle the sale of your home. Usually, the trustee of your Living Trust would handle this if your home is in your trust.

For More Information:

[Agent Powers Over a Living Trust](#)

[Managing Real Estate](#)

[Mortgaging Real Estate](#)

[Special Powers](#)

[Overview of DPOA](#)

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Sole/Co Digital Agents

A sole Digital Agent serves alone. Alternatively, you can nominate any number of persons and/or organizations to serve together as Co-Digital Agents. All actions taken by Co-Digital Agents must be unanimous. Therefore, difficulties and/or delays are sometimes encountered if:

the Co-Digital Agents reside some distance away from each other and documents to be signed must therefore be circulated among them, or if the Co-Digital Agents are unable to unanimously agree on some course of action.

On the other hand, there are also some advantages to naming Co-Digital Agents. A parent may name both of his children in order to avoid the perception that one child is being favored over the other.

Also, it might be preferable for two Digital Agents to work together to co-manage your digital assets, drawing from each individual's strengths and weaknesses.

Finally, if state law requires that at least one Digital Agent be a resident of your state, you may want to add a same-state Co-Digital Agent to serve.

For More Information:

[Digital Agent](#)

[Digital Assets](#)

[Overview of DPOA](#)

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Special Powers

A Special Power of Attorney document provides the Agent with only those powers that are listed in the document. If you need the Association to prepare a Special Power of Attorney for you, the following are examples of special powers, but there is no limit:

- Handle banking transactions;
- Enter safe deposit boxes;
- Handle transactions involving U.S. securities.
- Collect debts;
- Sell real estate;
- Mortgage real estate;
- Manage real estate;
- Sell personal property;
- Borrow money;
- Manage business interests;
- Handle government matters;
- Handle legal matters;
- Make financial decisions;
- Make estate planning decisions, including gifts;
- Indemnify third parties.

The Association, by default, prepares a Durable General Power of Attorney (DPOA) for its members that select basic estate planning assistance. The DPOA is broader in scope and used by most people.

However, that is not a required choice. There are also situations where a specific power of group of powers is withheld from a General POA or DPOA and a Special POA is drafted as a secondary document giving a different Agent power over those specified matters. This requires a detailed discussion with the Association member assisting you to determine whether the Association can be of assistance with this type of structure.

For More Information:

[General Powers](#)

[General vs. Special](#)

Springing DPOA

A springing POA is a document that doesn't take effect immediately but rather “springs” into action should you be declared incompetent, unable to make your own decisions, or unable to take care of your financial needs. If you prefer that your DPOA does not take effect until you are mentally incompetent, you can elect this provision when answering the document questions with your fellow Association member that is assisting you.

If you do not elect the “springing” option than your DPOA takes effect immediately, and because it’s a “durable” power of attorney it continues to be valid after your incompetency.

It's important that you have an agent you trust to take your place should you be unable to make decisions. You'll also want to select an agent who is competent to handle financial matters and who can make other decisions on your behalf. Remember, when you are mentally incompetent you are unable to change agents or revoke the DPOA.

A DPOA is an essential part of estate planning, even if you have a small estate. Without a DPOA in place, upon your possible incapacitation, someone would have to start a court action to get guardianship or conservatorship over you to manage your affairs.

Definition of Incapacity

One problem with a springing POA is that, in most states, a doctor must declare you incompetent or incapable of making decisions. Effective POAs include language that defines incapacitation.

A springing POA should state who will declare you incapacitated, and whether the POA requires one or two doctors to declare incapacity. If this isn't spelled out clearly in your POA, then the decision could end up in court, so it's crucial to define what constitutes your incapacitation.

Springing POA vs. Immediately Effective POA

Some people prefer to just use the Durable POA (DPOA) rather than a springing POA because the latter takes effect immediately upon signing, so you won't need a doctor's letter regarding incapacity in order for the attorney-in-fact to start acting. Many people name their trusted spouse as their agent.

Downsides of Springing POAs

Your agent must wait until the doctor or doctors decide that you're unable to handle your own affairs. In the meantime, your bills could remain unpaid until the doctors agree that it's time for your agent to act. Family members or friends could challenge your incapacity in court, so if you have these concerns, it might be beneficial to have a Durable POA, which takes effect immediately.

What about HIPAA issues?

The Health Insurance Portability and Accountability Act (HIPAA) deals with privacy and with what information doctors and hospitals can release to people other than the patient.

To ensure your agent can get information about your incapacitation, sign a release or authorization form at the time you sign your springing POA. **(The Association can provide the form if you request it.)** This form will allow your agent to obtain proof of your incapacity from your doctors. Your agent will have to show the doctors the POA document to confirm the agent is authorized to work on your behalf.

Remember, a good estate plan includes having a POA, whether immediate or springing. If you have a Springing POA, make sure your document clearly states how doctors will determine your possible incapacity.

For More Information:

[Access to Medical Records](#)

[Choosing an Agent](#)

[Durability](#)

[Your Spouse as Agent](#)

[Overview of DPOA](#)

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Successor Agent

A successor Agent is someone who is appointed to serve as Agent if your original Agent becomes unable or unwilling to serve any longer. The successor Agent takes over all of the duties of your original Agent, and the original Agent is relieved of all obligations and powers.

It is a good idea to name a successor Agent in case your Agent dies or becomes disabled, and you are no longer competent to name a new Agent. In such a situation, you would no longer have the power to appoint a new Agent and it might be necessary for a court to appoint someone for you.

For More Information:

[Agent Accountability](#)

[Agent Compensation](#)

[Agent Reimbursement](#)

[Choosing an Agent](#)

[Hold Harmless](#)

[Your Spouse as Agent](#)

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Your Spouse as Agent

Generally, it is acceptable and quite common to name your spouse as your Agent. However, some states have special laws restricting the spouse from selling or mortgaging your residence. In that situation, a spouse can still be the primary Agent, but, in addition, a substitute Agent should be appointed to handle your real estate.

Without regard to real estate issues, it is also advisable to name a successor Agent who can serve if your spouse becomes unable to do so, or if you become legally separated or divorced from your spouse.

For More Information:

[Agent Accountability](#)

[Agent Compensation](#)

[Agent Power to Change Beneficiaries](#)

[Agent Powers Over a Living Trust](#)

[Agent Reimbursement](#)

[Choosing an Agent](#)

[Gifts to Your Agent](#)

[Hold Harmless](#)

[Successor Agent](#)

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Signing Instructions

1. The Power of Attorney should be signed by a Principal who is mentally competent and the signature should be notarized. A notary public is a witnessing third party who is legally empowered to certify that the signature is authentic. Notarization is required because it makes it harder for a third party to challenge the validity of the signature. In addition, notarization allows the document to be "recorded" for use with real estate transactions, if recording becomes necessary or advisable. Eleven states, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Kentucky, Michigan, Ohio, Oklahoma, South Carolina, and Vermont, require that the Power of Attorney be signed in the presence of two witnesses. Pennsylvania requires that the Power of Attorney be signed in the presence of two witnesses, that the Principal sign the Notice at the beginning of the Power of Attorney, and that the Agent(s) sign the acknowledgment at the end of the Power of Attorney. Arizona and Illinois require one witness. Furthermore, in some states, the name of the person who prepared the Power of Attorney document must be indicated in the document in order for it to be recorded.
2. A Power of Attorney is not legally binding unless the Principal is mentally competent at the time of the signing. If there is any question regarding competence, it is best to obtain a physician's written opinion that the Principal understands the document and the consequences of signing the document. It is also advisable to review any competency issues with a lawyer.
3. The Agent designated in the document should be advised of the location of the original copy of the Power of Attorney document and given access to that original. You should retain a copy for your files. **(The Association may offer services for preserving your original documents or digital copies. Ask your fellow member who is assisting you about this service.)**
4. If the Principal is unable to sign due to physical disability, another person may be able to sign on behalf of the Principal, in the Principal's presence, and at the express direction of the Principal. However, this document does not provide the necessary language for another person to sign for the Principal. For assistance with this procedure speak with the Association member assisting you.
5. **CAUTION:** Before signing this document, you should consider its consequences. You are providing another person with the power to handle business and legal matters on your behalf. Any such action undertaken by that person within the scope of the Power of Attorney document is legally binding upon you.

6. The Power of Attorney should be signed by the Principal in the presence of two DISINTERESTED adult witnesses and a notary public.
7. Both of the witnesses must watch the Principal sign this Power of Attorney. The Principal should verbally declare that the document is intended to be his or her Power of Attorney, but the witnesses need not read the Power of Attorney or know of its contents.
8. Each witness must sign his or her name with the Principal and the other witness present. The witnesses should be satisfied that the Principal willingly signed the document as a free and voluntary act, and that the Principal was of full age and sound mind.

For More Information:

[Additional Signing Instructions for California](#)

[Overview of DPOA](#)

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Additional Signing Instructions for California

A Power of Attorney is an important legal document. By signing the Power of Attorney, you are authorizing another person to act for you, the principal. Before you sign this Power of Attorney, you should know these important facts:

- Your Agent (attorney-in-fact) has no duty to act unless you and your Agent agree otherwise in writing.
- This document gives your Agent the powers to manage, dispose of, sell and convey your real and personal property, and to use your property as security if your Agent borrows money on your behalf, unless you provide otherwise in this Power of Attorney.
- Your Agent will have the right to receive reasonable payment for services provided under this Power of Attorney unless you provide otherwise in this Power of Attorney.
- The powers you give your Agent will continue to exist for your entire lifetime, unless you state that the Power of Attorney will last for a shorter period of time or unless you otherwise terminate the Power of Attorney. The powers you give your Agent in this Power of Attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property unless you provide otherwise in this Power of Attorney.
- You can amend or change this Power of Attorney only by executing a new Power of Attorney or by executing an amendment through the same formalities as an original. You have the right to revoke or terminate this Power of Attorney at any time, so long as you are competent.
- This Power of Attorney must be dated and must be acknowledged before a notary public **or** signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the Power of Attorney or (2) the principal's signing or acknowledgment of his or her signature. A Power of Attorney that may affect real property should be acknowledged before a notary public so that it may easily be recorded.
- You should read this Power of Attorney carefully. When effective, this Power of Attorney will give your Agent the right to deal with property that you now have or might acquire in the future. The Power of Attorney is important to you. If you do not understand the Power of Attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

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[Signing Instructions](#)

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ASSET PROTECTION ASSOCIATION
A Private Member Association

ADVANCE HEALTH CARE DIRECTIVE GUIDE

OVERVIEW OF ADVANCE DIRECTIVE

"Advance Directive" is a broad term used to describe health care documents, such as a Living Will, where you give directives in advance of when they are to be carried out. Additionally, some states provide for a specific document called an Advance Directive for Health Care. These documents combine the features of Living Wills and Health Care Power of Attorney documents. You may state your wishes about the medical care you receive if you are terminally ill or permanently unconscious (like a Living Will.) You may also designate another person to make health care decisions for you if you are unable to do so (like a Health Care Power of Attorney).

For states with "Advance Directive" legislation, such as California, the Association provides an Advance Health Care Directive. For states that do not have this specific legislation, the Association provides a document that combines a Living Will and Health Care Power of Attorney.

For More Information:

[Differences Between Documents](#)

[Health Care Power of Attorney Explained](#)

[Living Will Explained](#)

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[Agent's Authority](#)

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[Patient Self Determination Act](#)

[Permanent Unconsciousness](#)

[Pregnancy](#)

[Revocation of Health Care Directives](#)

[Severability](#)

[Signing Instructions](#)

[Terminal Condition](#)

[Use of Organs](#)

[Withdraw Treatment](#)

[Witnesses](#)

Agent's Authority

Generally, an agent has broad authority to make almost any decision regarding your health care if you are unconscious or otherwise unable to communicate your wishes. However, you may limit your agent's authority. For example, you can state: "My agent is not authorized to consent to my receiving blood transfusions."

It is not possible to anticipate all of the health care decisions that may be required. If you do not provide specific directions regarding a particular health care decision, your agent must act in your best interests and be consistent with the laws of your state. You should discuss your wishes, values, and preferences regarding your health care with your agent so that your agent is best able to make decisions in accordance with your wishes. Your agent is not liable for health care decisions made in good faith.

For More Information:

[Choosing an Agent](#)

[Decisions Your Agent Can Make](#)

[Overview of Advance Directive](#)

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Agent Choice

The person that you designate as the agent should be someone you know and trust. The statutes of most states require that the agent be an adult. In addition, under most circumstances, your agent cannot be your health care provider (for example, a physician, nurse, employee, officer, director, or operator of a home health agency, hospital, nursing home, or residential care facility), unless that person is related to you. Thus, in selecting an agent, you should not designate a person who is (or may become) directly involved in providing health care to you, unless that person is your spouse or a family member.

If there are two people that you would like to serve as your agent, you can name one as an alternate agent.

Some states refer to the agent as an "attorney-in-fact," "health care agent," "health care proxy," "health care representative," "patient advocate," "proxy" or "surrogate."

For More Information:

[Agent's Authority](#)

[Alternate Agents](#)

[Decisions Your Agent Can Make](#)

[Guardian or Conservator](#)

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Alternate Agents

It is advisable to designate an alternate agent to provide for the possibility that your agent will be unwilling, unable, or ineligible to act as your agent. For example, many states automatically revoke a spouse's authority to act as agent if the couple is separated or divorced. Any alternate agent has the

same authority to make health care decisions as the original agent. You may also designate a second alternate agent.

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Anatomical Gifts/Organ Donations

Organ donations are often referred to as "anatomical gifts." All fifty states have passed some version of the Uniform Anatomical Gift Act, generally providing that individuals may make a gift of their organs and tissues during their lifetime with the gift to take effect on their death. Additionally, family members may generally donate your organs and tissues when you die if you have not indicated that you are opposed to such a donation. It is therefore important to document your wishes concerning organ donation. Many states provide organ donation questions in health care directives.

For More Information:

[Organs Donated](#)

[Use of Organs](#)

[Living Will Explained](#)

[Overview of Advance Directive](#)

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Artificial Nutrition/Hydration

The term "artificial nutrition/hydration" generally means food and water that is provided to a person through artificial means such as "feeding tubes," "tube feeding" or "intravenously," rather than through the mouth. Because food and water are basic necessities to life itself, there have been concerns in the past as to whether a person should be permitted to request that food and water not be provided. A U.S. Supreme Court case decided in 1990 makes it clear that a person can state his or her preference not to receive artificially administered food and water.

For More Information:

[Decisions Your Agent Can Make](#)

[Life-Sustaining Procedures](#)

[Overview of Advance Directive](#)

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Autopsy

An "autopsy" is an examination of the body after death by a medical expert, usually conducted to determine the cause(s) of death. Except for deaths that appear to have occurred under suspicious circumstances, government officials generally do not have the authority to conduct an autopsy, unless the consent of the deceased person's legal representative (for example, an Executor or surviving spouse) is obtained.

For More Information:

[Decisions Your Agent Can Make](#)

[Living Will Explained](#)

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Decisions Your Agent Can Make

Generally, an agent will have broad authority (subject to limitations you state in the document) to make health care decisions for you. Such decisions might include:

- whether life-sustaining procedures should be withdrawn or withheld so that you can die naturally if you have a "terminal condition" or are "permanently unconscious";
- whether "artificial nutrition/hydration" should be provided to you if you have a "terminal condition" or are "permanently unconscious";
- whether to consent to a surgical procedure or treatment; and
- whether to authorize the release of your medical records.

For More Information:

[Agent's Authority](#)

[Artificial Nutrition/Hydration](#)

[Choosing an Agent](#)

[Life-Sustaining Procedures](#)

[Permanent Unconsciousness](#)

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Designated Donees

The Uniform Anatomical Gift Acts allow you to designate a "donee," the individual or institution who is to receive the donated organs and tissues. In general, the following are acceptable donees: hospitals; surgeons; physicians; accredited medical or dental schools, colleges, or universities; organ/tissue banks or storage facilities; organ procurement organizations; or a specified individual who needs an organ or tissues for therapy or transplantation.

If there is no specific designated donee or the designated donee is not available or rejects the donation, depending on the specific state law either the attending physician or any hospital can generally accept the donation.

Once a donee accepts organs and tissues, that donee can then transfer the organ and tissues so that they are ultimately received by a party who will use them. There is a national system to allocate organs to individuals who need them for transplantation. Factors such as the urgency of the prospective recipient's need for a transplant, the closeness of the biological match between donor and recipient, and geographic proximity help determine who receives donated organs.

For More Information:

[Anatomical Gifts/Organ Donations](#)

[Designating a Specific Donee](#)
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Designating a Specific Donee

Since not all donees can use a donation for any purpose, care must be taken to avoid inadvertently restricting or essentially revoking a donation. For example, a medical or dental school, college, or university is generally not authorized to use organs or tissues for transplantation or, in some states, for therapy. Individuals, except for physicians and surgeons, can only use organs or tissues for transplantation or therapy needed by that individual. Some states prohibit designating a donee on the basis of race, age, religion, color, national origin, ancestry, gender, sexual orientation, or physical or mental handicaps.

If you want to designate a specific donee, you are encouraged to contact that donee (such as a medical school or hospital) or an organ procurement organization in your state to assure the necessary steps are taken to accomplish your goal.

For More Information:

[Designated Donees](#)
[Overview of Advance Directive](#)
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Differences Between Documents

Health Care Power of Attorney documents are broader than **Living Wills** because they designate another individual to make health care decisions in circumstances beyond those generally covered by a Living Will. Living Wills generally only pertain to situations where an individual is expected to die relatively soon or is permanently unconscious. In contrast, an agent under a Health Care Power of Attorney can make decisions for an individual even if that individual is not terminally or seriously ill. Additionally, most Living Wills do not allow you to authorize someone else to make decisions for you.

You may choose to prepare and sign both a Living Will and Health Care Power of Attorney. Generally, your agent must act consistent with your known wishes. A Living Will can provide guidance to your agent as he or she makes health care decisions for you.

An **Advance Directive for Health Care**, such as used in California, combines the Health Care Power of Attorney and Living Will in one document.

A Health Care Power of Attorney document is different than a general power of attorney document. A general power of attorney document does not usually provide that the designated agent can make health care decisions. The general power of attorney form is designed to cover business or financial decision making. (See *Durable Power of Attorney Information* for discussion on that form.)

For More Information:

[Health Care Power of Attorney Explained](#)
[Living Will Explained](#)

Guardian or Conservator

In certain situations, depending on specific state law and a person's medical condition, it may be necessary to have a court-appointed guardian. A "guardian or conservator of the person" is a person who is appointed by a court to make decisions for your general welfare if the court has determined that you are no longer competent to make such decisions on your own behalf. The authority of a guardian or conservator to make decisions for your "general welfare" probably includes the power to make at least some kinds of health care decisions. Unlike the agent under a Health Care Directive, a guardian typically can also make non-health care decisions, such as decisions about living arrangements.

Even though the law requires that guardians be appointed by a court, the court would consider your preferences. In some states' health care directives, you can nominate your choice of a person who would become your guardian or conservator, if that became necessary. In many cases, the person named as the agent would be the logical choice to serve as the guardian.

For More Information:

[Choosing an Agent](#)
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Health Care Power of Attorney Explained

In a Health Care Power of Attorney you may designate a person (an "agent") who will have the authority to make health care decisions on your behalf if you are unconscious, incompetent, or otherwise unable to make such decisions.

You, as the person completing a Health Care Power of Attorney, may be referred to in this document as the principal or declarant. The person that you designate to make decisions for you may be referred to as an agent, attorney-in-fact, proxy, representative or surrogate.

The Health Care Power of Attorney is a "durable" power of attorney. Under a "durable" power of attorney document, an agent's authority to act on your behalf generally becomes effective upon your disability or mental incompetence and continues during such period of disability or mental incompetence. If the agent's authority continues to be effective despite your disability or mental incompetence, the power of attorney document is said to be "durable." Even though you execute a Health Care Power of Attorney, you still retain the right to give directions to your physicians and other health care providers as long as you are able to do so. These provisions also apply to the Advance Directive for Health Care.

For More Information:

[Choosing an Agent](#)
[Differences Between Documents](#)
[Revocation of Health Care Directives](#)
[Health Care Directives Overview](#)
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Hold Harmless

A "hold harmless" provision provides protection to the health care providers and other persons (possibly an agent) who carry out your wishes under a health care directive. This type of protection encourages others to honor your wishes.

For More Information:

[Overview of Advance Directive](#)

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Life-Sustaining Procedures

Life can sometimes be prolonged if certain treatment, often called "life-sustaining procedures," is provided. Generally, a life-sustaining procedure means any medical procedure or intervention that (i) uses mechanical or other artificial means to sustain, restore, or supplant a vital function, and (ii) only prolongs the moment of death. Some states use other terms, including "life-prolonging procedures," "death-delaying procedures," "death-prolonging procedures," "medical maintenance treatment," and "extraordinary procedures" for life-sustaining procedures.

For More Information:

[Artificial Nutrition/Hydration](#)

[Living Will Explained](#)

[Decisions Your Agent Can Make](#)

[Permanent Unconsciousness](#)

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Living Will Explained

A Living Will is a document where you can state your wishes regarding life-sustaining treatment in the event that you either have a terminal illness and are expected to die within a relatively short time or are permanently unconscious. In general, individuals use Living Wills to indicate whether they want certain medical treatment withheld or withdrawn in order to allow a more natural death if the treatment is merely prolonging the dying process or there is no hope of recovery.

A Living Will is only effective when you are no longer able to make and communicate your own wishes. For example, if you suffer a stroke or are in a motor vehicle accident and suffer a severe brain injury so that you are in a coma, you may not be able to communicate your wishes. A Living Will in these circumstances helps you communicate your desires about certain medical procedures.

You, as the person completing the Living Will, may be referred to in the document as the "declarant."

The Advance Directive for Health Care form includes the same provisions contained in a Living Will.

For More Information:

[Artificial Nutrition/Hydration](#)

[Differences Between Documents](#)

[Life-Sustaining Procedures](#)

[Patient Self Determination Act](#)
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[Revocation of Health Care Directives](#)
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Organs Donated

Unless you specifically desire to exclude certain organs, tissues, or parts from donation, it is recommended that you simply indicate that any needed organs can be donated. This allows the most flexibility and the greatest possible use of your organs. Many different organs are needed including the heart, lungs, kidneys, liver, and pancreas. Tissues and parts, such as bone, skin, and corneas, are also needed.

Body Donations

Some organ donation forms allow you to make an anatomical gift of the entire body. However, the donation of one's entire body often requires specific arrangements with the designated recipient of the body, such as a medical school. It is a good idea to contact a medical school if you desire to make such a donation.

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Other Requests or Instructions

You may give additional instructions by expressing your wishes in your own words. You may include a statement regarding religious or moral beliefs. For example: "Based on my religious beliefs, I do not want to receive blood transfusions."

You may also wish to specifically state that you do (or do not) want to receive certain types of treatment. For example, you can state: "I do not wish to receive chemotherapy." Other possible treatments to consider include cardiopulmonary resuscitation (CPR), mechanical respiration, surgery, or certain medications.

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Patient Self Determination Act

Hospitals and other health care providers are now required under the Patient Self Determination Act to provide patients with information regarding the rights of patients to make their own health care decisions, including the right to accept or refuse medical treatment. Health care providers may ask you

for copies of any Living Will, Health Care Power of Attorney or Advance Health Care Directive to place in your medical records.

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Permanent Unconsciousness

The term "permanent unconsciousness" generally means a lasting condition, indefinite and without change, in which thought, awareness of self and environment, and all other indications of consciousness are absent. Sometimes this condition is described as a "coma," an "irreversible coma," being persistently unconscious," being "permanently unconscious," or a "persistent vegetative state" from which there is no known hope of recovery.

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Pregnancy

Many states specify the extent to which an advance directive such as a Living Will or Advance Health Care Directive is effective during pregnancy. These statutes generally fall into three categories:

- the advance directive has no effect during pregnancy,
- the advance directive has no effect if the fetus could develop to live birth if life-sustaining procedures are continued, or
- the statute is silent on the pregnancy question.

This document offers optional provisions regarding pregnancy. Maximum flexibility is offered by allowing you to state a preference regarding the effect of the document during pregnancy, even though that stated preference may differ from your state statute. For example, even if your state provides that a Living Will or Advance Directive shall have no effect during pregnancy, this document allows you to state, as a preference, that the Living Will or Advance Directive should be given effect if it is determined that the fetus could not survive, even if life-sustaining procedures are continued.

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Revocation of Health Care Directives

You may revoke a health care directive, such as a Living Will, Health Care Power of Attorney, or Advance Directive, by executing a new document or by using a Revocation document provided by the Association. Many states specify that those documents may be revoked at any time and in any manner. However, the best method is to provide a written, signed and dated revocation to the agent (if any) and the

appropriate health care providers. Although other documents require a witness or notary, legal principles encourage the recognition of a revocation without the necessity of such formalities. IN MANY STATES, THE REVOCATION DOCUMENT MAY BE CONSIDERED INEFFECTIVE UNTIL YOUR AGENT AND/OR PHYSICIAN HAVE BEEN NOTIFIED OF THE REVOCATION.

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Severability

The severability paragraph provides some protection against the possibility that an entire document might be declared invalid simply because state law does not permit a specific provision that was included. For example, it is possible that you could choose to add an unusual "other" provision that would not be enforceable. If that occurred, the inclusion of the severability paragraph provides protection against the possibility that the unusual provision would cause the entire document to be invalid.

The U.S. Supreme Court has made it clear that all persons should be free to state their preferences in advance directives. Thus, if your wishes are stated as preferences, the risk should be limited to the possibility that your preference would simply not be followed if state law somehow did not permit what you requested. You are not risking that the other provisions of your advance directive could be held invalid simply because the state has decided that your preference cannot be followed. The following example illustrates this point.

Some states have not yet responded to recent changes in health law that clearly permit a person to include additional specific provisions in an advance directive. For example, some states have not yet amended their statutes to make it clear that a person can: (i) request that life-sustaining procedures be withheld or withdrawn if the person is permanently unconscious, (ii) request that artificial hydration/nutrition be withheld or withdrawn, (iii) specify a preference regarding the effect of a pregnancy, and (iv) appoint an agent to make health care decisions for you. Although it is believed that each person has the right to include provisions regarding the above matters, a severability paragraph provides protection against the possibility that the inclusion of one of these provisions would cause the other provisions of the advance directive to be invalid.

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Signing Instructions

1. First, make sure you are using the correct form(s) for your state of residence. If you are unclear, consult with the fellow Association member who is assisting you or you may choose to consult outside professional advice.
2. You must be an adult (18 in most states) and mentally competent to execute a valid document. The document must be signed and dated in order to be effective. Depending on your state, the

document must be witnessed, notarized, or both. If you designated an agent, some states require that the agent also sign the form. Finally, some states require that special provisions within the document be separately initialed or signed. Review the document carefully for these requirements.

3. The specific requirements for who can be a witness, whether the document must be notarized, and other execution formalities are printed on the document itself. **THESE ARE SPECIFIC TO YOUR STATE AND MUST BE RECAFULLY AND COMPLIED WITH TO HELP ENSURE YOU HAVE A VALID DOCUMENT.** The document provides the appropriate signature and witness information for your state based on whether you completed a Living Will, Health Care Power of Attorney, or both, or an Advance Health Care Directive.

4. While each state has its own restrictions on who may be a witness, in general, persons should not be used as witnesses if they have been appointed as your agent in the directive; are your relative by blood, marriage or adoption; are or may become directly involved in providing health care to you; are an employee of your health care provider; or are less than 18 years of age.

5. You should initial the bottom margin of each page of the document. This prevents the subsequent substitution of pages.

6. You should keep a copy of the document after signing it. One copy should be given to each of the following: each health care provider, appropriate family members, and the person named as agent, if one is appointed in the document. An indication should be made on the document itself regarding who has received a copy, in case there is a need for later retrieval, modification, or revocation. **(The Association may offer services for preserving your original documents or digital copies. Ask your fellow member who is assisting you about this service.)**

7. Before signing the document, you should be completely comfortable that you understand the nature and range of decisions that may be made on your behalf. You may wish to discuss the range of medical decisions with a physician, another health care provider, social worker, pastor, fellow Association members with experience, or a lawyer -- someone who is knowledgeable about these issues and can answer questions. You should also discuss the document and your wishes with any person you want to designate as an agent before doing so to assure they agree to act on your behalf.

8. If you learn that you have a terminal condition after signing a health care directive, execute a new Directive. This will provide an opportunity to restate or change your wishes in light of your new health status.

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Terminal Condition

A "terminal condition" is a progressive, incurable, or irreversible condition that is expected to cause death within a relatively short period of time, unless life-sustaining procedures are used. The adjectives "incurable" and "irreversible" are used to indicate that there will be no "recovery" from the condition by means of a cure or treatment of symptoms. The term "relatively short period of time" provides flexibility

to the health care providers who, at best, can only provide an estimate of when death will occur as a result of the condition and other health factors.

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[Decisions Your Agent Can Make](#)

[Life-Sustaining Procedures](#)

[Permanent Unconsciousness](#)

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Use of Organs

The Uniform Anatomical Gift Acts provide that organs, tissues, or parts may generally be used for transplantation, therapy, research, and medical education. However, it is not always possible for organs and tissues to be used for all purposes. Some organs or tissues may not be used if it would interfere with an autopsy or another investigation. Additionally, if you suffer from a particular disease or die under certain circumstances, your organs and tissues may not be suitable for transplantation. Certain medical tests will be completed to assure that organs and tissues are acceptable for transplantation or therapy. Organs and tissues not useful for transplantation or therapy may be useful for research or education.

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Withdraw Treatment

You may specify in more detail the conditions in which you would choose to forego life-sustaining measures, but some general circumstances to consider are the following:

1. A "terminal condition" is a progressive, incurable, or irreversible condition that is expected to cause death within a relatively short period of time, unless life-sustaining procedures are used. The adjectives "incurable" and "irreversible" are used to indicate that there will be no "recovery" from the condition by means of a cure or treatment of symptoms. The term "relatively short period of time" provides flexibility to the health care providers who, at best, can only provide an estimate of when death will occur as a result of the condition and other health factors.
2. The term "permanent unconsciousness" generally means a lasting condition, indefinite and without change, in which thought, awareness of self and environment, and all other indications of consciousness are absent. Sometimes this condition is described as a "coma," an "irreversible coma," being "persistently unconscious," being "permanently unconscious," or a "persistent vegetative state" from which there is no known hope of recovery.
3. Any condition that may cause severe and progressive physical or mental deterioration and/or a permanent loss of capacities and faculties where the burdens of continued life with treatment become greater than the benefits.

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Witnesses

There are state specific restrictions on who may be a witness to the execution of a health care directive. Generally, the following witnesses are prohibited: heirs, beneficiaries, individual or facility providers, and attending physicians. Your experienced, fellow Association member that is assisting you should be able to assist you with knowledge of the requirements for your state. If you are still unsure about prohibited witnesses, it is recommended that you reach out to an attorney. The witness requirements should be carefully reviewed prior to the execution of the document. IF THE DOCUMENT IS NOT WITNESSED PROPERLY BY QUALIFIED WITNESSES, IT MAY NOT BE ENFORCEABLE.

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ASSET PROTECTION ASSOCIATION
A Private Member Association

HIPAA GUIDE
Healthcare Insurance Portability and Accountability Act

Overview of HIPAA Authorization Form

By signing a HIPAA Authorization Form, a patient gives their permission for a "covered entity" (which we'll explain below) to share specific health information (which the patient identifies) with another person or group. That health information could be medical records, drug or alcohol treatment, or anything of a similar nature. "Covered entities," under the "Health Insurance Portability and Accountability Act (HIPAA)" Privacy Rule, are defined in the act and include health care providers such as doctors and hospitals as well as health care plans. In the HIPAA Authorization Form, you will name a patient, a covered entity, and a person or group that will receive the health information. The HIPAA Authorization Form can also specify whether all health information can be shared or only health information from a certain period of time. Finally, the HIPAA Authorization Form will state a specific end date since federal law says that these forms must eventually expire.

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Covered Entities

The Health Insurance Portability and Accountability Act (or "HIPAA") rules define "covered entities" as (1) health plans, (2) health care clearinghouses, and (3) health care providers that conduct transactions electronically. This could include institutions, organizations, or individual people. For example, hospitals, medical centers, doctors, and many other health care providers are covered entities under HIPAA law.

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Expiration

By law, a HIPAA Authorization Form cannot be permanent but has to expire at a certain time. You can select either a specific date that the HIPAA Authorization Form will expire, or a specific event (such as the end of a research study) for it to expire.

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Purpose

There are many reasons you might choose to complete a HIPAA Authorization Form. For example, your attorney might need access to your medical records to pursue an injury claim for you. You may be part of a research study that requires access to your medical information by the researcher. In each of these cases, you could sign a HIPAA Authorization Form that allows access to certain health information for a specific period of time.

While a Healthcare Power of Attorney allows your designated agent to make medical decisions on your behalf if you are unable to make them yourself, the HIPAA Authorization Form is a way for you to give access to your medical records to specific people or organizations.

For More Information:

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Recipient of Protected Health Information

Depending on the circumstances, a patient might give permission for any number of people to receive their health information. As the patient, you might want an attorney to have access to your health information to pursue an injury claim, or for your healthcare agent to question your doctor's office about a bill if you are hospitalized. Keep in mind that the HIPAA Authorization Form will only be in place for a certain period of time and does not give permanent access to health information. Any authorization will only be temporary, until the expiration date arrives.

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Shared Health Information

Under the Privacy Act of the HIPAA laws, a HIPAA Authorization Form must include a description of the health information to be used and disclosed. This document lets you choose the specific type of information that can be shared with the recipient.

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Time Period for Disclosure

You may specify within this document exactly what time period of health information can be shared with the recipient. For example, a patient might only give permission for one year's worth of medical records to be shared for a specific purpose. Another patient may give permission for their entire medical history to be shared. It depends on the circumstances surrounding the need for the HIPAA Authorization and is a decision that must be made by the patient.

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