Who Shot John ?

Everyone loves a great mystery. I remember as a child asking the girl next door 'What ya doing?' only to be told 'Are you writing a book? Well, leave that chapter out and make it a mystery." Oh that made me so mad.

Complicated mysteries are great to keep the mind working to figure out "**Who Shot John?**" until Columbo came along.

Everyone knew in the first few minutes who the culprit was and then came in the bungling Detective Columbo. Of course he always caught the killer but such is not the norm when someone has the arduous chore to figure out what Bill or Mary wanted done upon their incapacity, incompetence, or death.

"**Who Shot John?**" is dedicated to establishing the duties and qualifications necessary to be a successor trustee, executor/executrix, conservator, health care agent, or personal representative and then ferreting out who is best to fill those positions.

Loyalty to birth order or a close relative are not prerequisites to these appointments. Careful consideration of your wishes and who will act accordingly without reading between the lines is the person for the job.

When you are unable to communicate your wishes about your health care, distribution of your estate, etc. is not the time to try and figure out "**Who Shot John?**"

This booklet is divided into two parts. Part One helps you choose the right person while Part Two discusses "stale trusts" and their effects on your estate planning.

Follow Columbo's format and let everyone know "**Who Shot John?**"

PART ONE

Choosing a Successor Trustee

Occasionally people have difficulty in choosing a successor trustee of their living trusts. This article will hopefully outline some of the major issues and help to guide you in your choice. The following choices include your major options and have several advantages and disadvantages:

1) **Naming your children as successor trustees.** This choice is often appropriate when the children are older and very responsible and savvy with money and their own financial situation. It is also appropriate when there is little likelihood of lawsuit or divorce diverting the funds inherited by the children. It has the advantage of giving the children maximum control and saving the trust from incurring outside trustee fees. The children can always hire an accountant to do the tax returns and an attorney should they have legal questions regarding the trust. This is not appropriate, however, when there is a significant chance of lawsuit or divorce affecting the children, as there is greater likelihood of funds being diverted to the creditor or son/daughter in law. It is also inappropriate when children are spendthrifts or immature and would simply blow the inheritance, or if you would like to insure that some funds be left over for grandchildren. Some liken this choice to "the fox guarding the chicken coop." However, if you do not mind the possibility of the children draining all of the trust assets, this still gives better protection and advantages than if you had simply left the inheritance outright in a will.

2) **Naming a bank or a trust company.** This choice is appropriate if the children are less mature, are spendthrifts, or if you would like to better protect the children's inheritance from creditors, divorces and the like. It gives the children a relief from responsibility over the management of the trust. Many banks and trust departments have a long history of providing such services to families and this can often be the best choice. Banks and trust companies understand the law and are experienced at interpreting trust documents. They also understand the income tax issues of beneficiaries and trusts. There are several drawbacks, however. Many banks have minimum deposit requirements for a trust. Some will not take trusts under half a million dollars. Also, banks charge an annual trustee fee that is often a minimum fee plus roughly 1% of trusts assets annually. This can be more prohibitive, especially for smaller accounts. Many banks have merged in recent years and they sometimes move the trust departments to Columbus or Chicago, thus moving the trust officers offsite and more unavailable for personal contact. Some companies still have trust officers in the local area though. Also, banks are somewhat notorious for being overly conservative with investments and distributions. This is somewhat due, I believe, to prior

limitations on investments in trust law, and should be ameliorated in the future due to recent changes in the Uniform Prudent Investor Act.

3) **Naming a stockbroker or financial planner.** This is usually a poor choice, but may be appropriate in the right family situations. The advantage to such an arrangement is that you have an objective party as an independent trustee. In contrast to a bank, the stockbroker or financial planner may be more aggressive and provide a better return on investment than a bank. However, unlike a bank or attorney, they are not familiar with the law of fiduciary obligations and trusts. They are not typically experienced in interpreting trusts or dealing with trustees or beneficiaries. They might or might not understand the income tax issues and advantages to using trusts. The biggest problem may be that their broker dealer may prohibit them from serving as trustees. The SEC/NASD has restrictions on a planner being trustee and managing money for that same trust. Thus, this is usually a poor choice for trustee. However, under relatively new Ohio laws, you can appoint such a person as the Trust Investment Advisor, effectively directing the trustee to use such a person for investment decisions. This may give you the best of both worlds.

4) **Naming an attorney.** This may be an appropriate choice sometimes. The attorney understands the rights and obligations of the parties and is experienced at interpreting trust documents and legal issues. An attorney experienced in tax law (this would not be most attorneys, but only those concentrating in tax or estate planning), would also understand the tax issues and loopholes that beneficiaries can take advantage of. Thus, an attorney has many of the advantages of a bank in these respects, and are usually much less expensive. However, attorneys are often less experienced than banks in day to day trust operation issues and dealing with beneficiary legal issues. Attorneys may also not outlive you, especially if the attorney is the same age as the client. Banks offer greater potential for longevity, although businesses also fail and merge and go out of business as well. Also, if the attorney is the same as the person drafting the document, the bank would provide a more objective, "second opinion", that the attorney could not provide. However, the attorney is more likely to understand the original intent of the people setting up the trust, since he or she has met and discussed the issues with them.

5) **Naming an accountant/tax preparer/CPA.** This can also be an appropriate choice. The accountant often knows the family finances and situation as well if not better than the family attorney. Accountants' familiarity with trust law and taxation varies with the individual, but they undoubtedly understand the tax issues at least. Like the attorney, they have more personal contact with the family and know the situation better, but have less experience and depth in dealing with potential trust issues than an experienced bank. Like the attorney, it

is important to consider whether the person is likely to outlive the grantors and be able to help the children. Attorneys and accountants both do not have the investment experience and expertise of the bank, and especially not that of the financial planner. However, the accountant is more personal than the bank, and offers more objectivity than the attorney. Another issue to address is that of liability insurance. Banks have insurance that covers their mistakes or negligence. Attorneys and accountants may have such coverage, but their policies do not typically cover investment decisions (unless a separate policy is purchased). Thus, many will not serve as trustees unless a separate investment advisor is named.

6) **Naming other family members.** This is not the "fox guarding the chicken coop", but the fox's uncle. Much of this choice depends on the personality and experience of the family member. Often people will name a brother or sister. This is a good choice while the children are younger and the brother or sister may also be guardian of the children. It has the advantage of better objectivity than naming the children. Also, the family member will hopefully better understand the family dynamics and situation better than an outside professional or bank. However, this person is unlikely to know trust or tax law. This might be rectified by hiring an accountant or attorney. The drawback is that your brother or sister may not outlive you, or perhaps not for very long. However, you likely trust this person more than outsiders. Sometimes people name a professional trustee, and then direct that the trustee consult with a family member for distributions from the trust. This gives some contact and involvement for the family member, without the burden and liability associated with it. This type of arrangement may be more appropriate in family situations where the burden on the family member may potentially sour relations among the family. Having an independent party lets the disgruntled beneficiary take it out on an outside trustee and keeps any dispute from further poisoning the family.

7) **Naming a family member/bank/professional as trustee, with a financial planner as Trust Investment Advisor.** This may give the best of both worlds. It allows the trust to get the financial returns that a professional advisor can achieve, but provides the more personal attention of a professional advisor or family member, or affords the professional management of a bank. Note, however, that many banks are behind the times on this issue and either do not permit this or do not give a discounted trustee fee. Check with your preferred bank.

8) **Naming an independent company or individual as trustee and/or trust investment advisor, but make family members the Trust Protectors.** This choice gives additional flexibility if non-family members are used as trustees or trust financial advisors. A trust protector is a person (or persons) who has the right to demand accounting and can fire the trustee or financial advisor.

Executors/Executrixes

When a person dies, someone must step in to wind up the deceased person's affairs. Bills must be paid, property must be accounted for, and items must be passed on to the people chosen by the deceased person. If state law requires that all this be handled through probate court proceedings, the process can take many months. Because probate is time-consuming, expensive and usually unnecessary, many people plan in advance to avoid it. There are a number of ways to pass property to your inheritors without probate. Some of these probate-avoidance methods are quite simple to set up; others take more time and effort.

An executor/executrix is the person you would name in your will to handle your property after death. The executor/executrix must be prepared to carry out a long list of tasks, prudently and promptly.

What does an executor/executrix do?

Essentially, the executor/executrix's job is to protect the deceased person's property until all debts and taxes have been paid, and see that what's left is transferred to the people who are entitled to it. The law does not require an executor/executrix to be a legal or financial expert or to display more than reasonable prudence and judgment, but it does require the highest degree of honesty, impartiality and diligence. This is called a "fiduciary duty" -- the duty to act with scrupulous good faith and candor on behalf of someone else.

Executors/executrixes have a number of duties, depending on the complexity of the deceased person's estate. Typically, an executor/executrix must:

> Decide whether or not probate court proceedings are needed. If the deceased person's property is worth less than a certain amount (it depends on state law), formal probate may not be required.
>
> Figure out who inherits property. If the deceased person left a will, the executor/executrix will read it to determine who gets what. If there's no will, the administrator will have to look at state law (called "intestate succession" statutes) to find out who the deceased person's heirs are.

Decide whether or not it's legally permissible to transfer certain items immediately to the people named to inherit them, even if probate is required for other property.

If probate is required, file the will (if any) and all required legal papers in the local probate court.

Find the deceased person's assets and manage them during the probate process, which may take up to a year. This may involve deciding whether to sell real estate or securities owned by the deceased person.

Handle day-to-day details, such as terminating leases and credit cards, and notifying banks and government agencies -- such as Social Security, the post office, Medicare and the Veterans Administration -- of the death.

Set up an estate bank account to hold money that is owed to the deceased person -- for example, paychecks or stock dividends.

Use estate funds to pay continuing expenses -- for example, mortgage payments, utility bills and homeowner's insurance premiums.

Pay debts. As part of this process, the executor/executrix must officially notify creditors of the probate proceeding, following he procedure set out by state law.

Pay taxes. A final income tax return must be filed, covering the period from the beginning of the tax year to the date of death. State and federal estate tax returns may also be required, depending on how much property the deceased person owned at death and to whom the property was left.

Supervise the distribution of the deceased person's property to the people or organizations named in the will.

How do I choose an executor/executrix?

An executor/executrix doesn't need special financial or legal knowledge. Common sense, conscientiousness and honesty are the main requirements. An executor/executrix who needs help can hire lawyers, accountants or other experts and pay them from the assets of the estate.

The person you choose should be honest, with good organizational skills and the ability to keep track of details. If possible, name someone who lives nearby and who is familiar with your financial matters; that will make it easier to do chores like collecting mail and locating important records and papers.

Many people select someone who will inherit a substantial amount of their property. This makes sense because a person with an interest in how your property is distributed is likely to do a conscientious job of managing your affairs after your death. He or she may also come equipped with knowledge of where your records are kept and an understanding of why you want your property left as you have directed.

Whomever you select, make sure the person is willing to do the job. Discuss the position with the person you've chosen before you make your will.

Are there restrictions on whom I may choose as my executor/executrix?

Your state may impose some restrictions on who can act as executor/executrix. You can't name a minor, a convicted felon or a someone who is not a U.S. citizen. Most states allow you to name someone who lives in another state, but some require that an out-of-state executor/executrix be a relative or a primary beneficiary under your will. Some states also require that nonresident executors obtain a bond (an insurance policy that protects your beneficiaries in the event of the executor's wrongful use of your estate's property) or an in-state resident to act as the executor's representative. These complexities underscore the benefits of naming someone who lives nearby. If you feel strongly about naming an executor/executrix who lives out of state, be sure to familiarize yourself with your state's rules.

Does the person named in a will as executor/executrix have to serve?

No. When it comes time, an executor/executrix can accept or decline this responsibility. And someone who agrees to serve can resign at any time. That's why many wills name an alternate executor/executrix, who takes over if necessary. If no one is available, the court will appoint someone to step in.

Does an executor/executrix get paid?

Obviously, the main reason for serving as an executor/executrix is to honor the deceased person's request. But the executor/executrix is also entitled to payment. The exact amount is regulated by state law and is affected by factors such as the value of the deceased person's property and what the probate court decides is reasonable under the circumstances. Commonly, close relatives and close friends (especially those who are inheriting a substantial amount anyway) don't charge the estate for their services. In California, the executor/executrix is paid the same amount that the probate attorney charges.

Must an executor/executrix hire a lawyer?

Not always. An executor/executrix should definitely consider handling the paperwork without a lawyer if he or she is the main beneficiary, the deceased person's property consists of common kinds of assets (house, bank accounts, insurance), the will seems straightforward, and good self-help materials are at hand. Essentially, shepherding a case through probate court requires shuffling a lot of papers. In the vast majority of cases, there are no disputes that require a decision by a judge. So the executor/executrix may never see the inside of a courtroom, but will certainly become familiar with the court clerk's office. The executor/executrix may even be able to do everything by mail. Doing a good job requires persistence and attention to tedious detail, but not necessarily a law degree.

If, however, the estate has many types of property, significant tax liability or potential disputes among inheritors, an executor/executrix may want some help.

There are two ways for an executor/executrix to get help from a lawyer:

> Hire a lawyer to act as a "coach," answering legal questions as they come up. The lawyer might also do some research, look over documents before the executor/executrix files them or prepare an estate tax return.
>
> Turn the probate over to the lawyer. If the executor/executrix just doesn't want to deal with the probate process, a lawyer can do everything. The lawyer will be paid out of the estate. In most states, lawyers charge by the hour ($150-$200 is common) or charge a lump sum. But in a few places, including Arkansas, California, Delaware, Hawaii, Iowa, Missouri, Montana and Wyoming, state law authorizes the lawyer to take a certain percentage of the gross value of the deceased person's estate unless the executor/executrix makes a written agreement calling for less. An executor/executrix can

probably find a competent lawyer who will agree to a lower fee.

If an executor/executrix doesn't want to hire a lawyer, is there any other way to get help?

Lawyers aren't the only source of information and assistance. Here are some others:

The court. Probate court clerks will probably answer basic questions about court procedure, but they staunchly avoid saying anything that could possibly be construed as "legal advice." Some courts, however, have lawyers on staff who look over probate documents; they may point out errors in the papers and explain how to fix them.

Other professionals. For certain tasks, an executor/executrix may be better off hiring an accountant or appraiser than a lawyer. For example, a CPA may be a big help on some estate tax matters.

Paralegals. In many law offices, lawyers delegate all the probate paperwork to paralegals (non-lawyers who have training or experience in preparing legal documents). Now, in some areas of the country, experienced paralegals have set up shop to help people directly with probate paperwork. These paralegals don't offer legal advice; they just prepare documents as the executor/executrix instructs them, and file them with the court. To find a probate paralegal, an executor/executrix can look in the Yellow Pages under "Typing Services" or "Attorney Services." The executor/executrix should hire someone only if that person has substantial experience in this field and provide references that check out.

The checklist on the following page may be helpful in establishing your Pour-Over Last Will and Testament to accompany your living trust.

POUR ~ OVER LAST WILL and TESTAMENTS

NOTE: If for any reason, probate is required because there are assets outside of the Trust that belong to the Deceased Spouse with a combined value that exceeds $100,000 in California and are not exempt from probate, a probate attorney should be contacted. This should not happen if the Trust was properly utilized and funded. If a probate attorney has to be contacted, the Trustee must make sure to provide the Pour~Over Will of the Deceased Spouse and point out that everything is to go to the Trust. Hopefully, this should expedite the probate and reduce the costs and time needed.

Decisions previously made that should be verified in the Will:

[ ] Selected guardians and successor guardians for any minor children.

[ ] Selected executors and successor executors.

[ ] Disinherit of any parties, such as children and spouses.

[ ] Disposing of interests in retirement plans and individual retirement plans.

[ ] Making specific bequests, usually of items of personal property that are not ordinarily transferred to trust.

Remember: Your Pour~Over Last Will and Testament must be signed and witnesses by two people who are not related to you by birth, marriage, or employments, they must be at least eighteen years of age and should be citizens of the State and County where the Will was signed.

Your Will should be up-dated every five to seven years and especially if you move from one county to another or one State to another.

Upon you death ... your Executor or successor executor must take the Will and a certified copy of the Death Certificate to the County Probate Court for lodging. This procedure will ensure the Probate Court knows that a living trust is in existence and will start the "one year" creditor claims period.

The Probate Court will give the Executor a Certified Copy of the Will back which should be filed in the trust portfolio. Remember to make all appropriate minutes in the Trust Minutes section.

WHAT IS A SUBSTITUTE DECISION MAKER?

There are different types of substitute decision makers including:

Guardians
Conservators
Power of Attorneys
Trustees
Personal Representative Payees

WHAT IS A CONSERVATORSHIP?

One form of substitute decision-making is established through a legal proceeding conducted by the local county probate court. Conservatorship is established to manage an individual's financial and/or personal affairs when that person is unable to do so for themself.

A *conservator of the person* is appointed when someone needs help taking care of his or her daily needs. When someone needs help managing his or her finances, a *conservator of the estate* is appointed. In many cases, one person is appointed both conservator of the person and conservator of the estate.

WHAT IS THE DIFFERENCE BETWEEN A VOLUNTARY AND AN INVOLUNTARY CONSERVATORSHIP?

A voluntary conservatorship is a legal proceeding that occurs when the proposed conservatee files a petition to establish the conservatorship.

An involuntary conservatorship is a legal proceeding in which someone other than the proposed conservatee files a petition to establish a conservatorship.

WHY IS A LEGAL PROCEEDING NECESSARY?

A legal proceeding determines by clear and convincing evidence that an individual does not have the decision-making capacity to care for themselves financially and/or physically. In other word, they are adjudicated incompetent.

WHAT DOES "INCOMPETENT" MEAN?

In California, an individual is considered incompetent if he meets at least one of the following criteria:

a) Decision-making capacity which is so impaired that the individual is unable to care for their own personal safety or to attend to or to provide for necessities for themselves such as food, shelter, clothing or medical care, without which physical injury or illness will occur.

b) Decision-making capacity so impaired that the individual is unable to make, communicate or carry out important decisions concerning their own financial affairs.

c) Decision-making capacity is so impaired that both "a" and "b" are applicable to the individual.

WHAT KIND OF CONSERVATORSHIPS CAN BE ESTABLISHED BY THE COURT?

In California, two distinctions of conservatorship can occur. They are (1) probate conservatorship and (2) Lanterman-Petris-Short (LPS) conservatorship.

Most conservatorships are probate conservatorship. They may be general, limited, or temporary.

General Conservatorship
General conservatorships are set up for persons who cannot handle their own finances or care for themselves.

Limited Conservatorship
Limited conservatorships can be set up for adults with developmental disabilities such as mental retardation, epilepsy, cerebral palsy, or autism that began before age 18.

Temporary Conservatorship

Temporary conservatorships are set up when a person needs immediate help until a permanent conservatorship can be established for the person's personal care, finances, or both.

Lanterman-Petris-Short (LPS) Conservatorship

Lanterman-Petris-Short (LPS) conservatorships are set up ONLY when a person needs mental health treatment but can't or won't accept it voluntarily.

When a person owns property in California and his whereabouts are unknown, and no provision of care, control and supervision of such property has been made, with the result that the property is likely to be destroyed or damaged, it shall be proper for any person to file a petition for appointment of a conservator of the property of the absentee.

WHAT QUALIFICATIONS MUST AN INDIVIDUAL HAVE TO BE A CONSERVATOR?

Any natural person of full age who is a resident of California except those mentally incompetent or those the court determines unsuitable.

A natural person who is a nonresident if a resident is also appointed. However, for good cause shown, the court may appoint a nonresident to serve alone.

Banks and trust companies if otherwise authorized to act in a fiduciary capacity.

Private nonprofit corporations organized.

For children preference is given to a parent(s) if qualified and suitable otherwise it is up to the court to appoint an individual who is qualified, suitable and willing to serve in that capacity.

WHAT ARE THE RESPONSIBILITIES OF THE CONSERVATOR?

Duties of Conservator

It is the duty of the conservator of the estate to protect and preserve it, to invest it prudently, to account for it as herein provided and to perform all other duties required of the conservator by law and at the termination of the conservatorship to deliver the assets of the conservatee to the person entitled thereto.

Powers of the Conservator

The conservator shall have the following powers without prior approval of the court:

Collect, receive, receipt for any principal or income, and to enforce, defend against or prosecute any claim against the conservatee or conservator; to sue on or defend claims in favor of, or against, the conservatee or conservator.

To sell, transfer personal property of a perishable nature and personal property for which there is a regularly established market.

To vote at corporate meetings in person or by proxy.

To receive additional property from any source.

Continue to hold any investment or other property originally received by the conservator.

The conservator can exercise the following powers with court approval:

Invest the funds belonging to the conservatee.

Execute leases.

Make payments to, and for the benefit or, the conservatee in any of the following ways:

Directly to the conservatee.

Directly for the maintenance, welfare and education of the conservatee.

To the legal guardian of the person of the conservatee.

To anyone who at the time shall have the custody and care of the person of the conservatee.

To apply in portion of the income or of the estate of the conservatee for the support of any person for whose support the conservatee is legally liable.

To compromise or settle any claim by, or against, the conservatee or the conservator; to adjust, arbitrate or compromise claims in favor or against the conservatee or conservator.

To make an election for the conservatee who is a surviving spouse.

To do any other thing the court determines to be in the best interests of the conservatee and the conservatee's estate.

WHEN CAN A CONSERVATOR BE REMOVED?

Failure to qualify as a fiduciary.

Mismanagement of the conservatee's estate.

Failure to perform any duty.

Termination of California residency.

DURABLE POWER OF ATTORNEY FOR ASSET/PERSON MANAGEMENT

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

UNLESS YOU LIMIT THE POWER IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT (ATTORNEY-IN-FACT) THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOURSELF. FOR EXAMPLE, YOUR AGENT CAN:

- ✦ BUY, SELL, AND MANAGE REAL AND PERSONAL PROPERTY FOR YOU. THIS MEANS THAT YOUR AGENT CAN SELL YOUR HOME, YOUR SECURITIES, AND YOUR OTHER PROPERTY.
- ✦ DEPOSIT AND WITHDRAW MONEY FROM YOUR CHECKING AND SAVINGS ACCOUNTS.
- ✦ BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.
- ✦ PUT THINGS IN AND TAKE THINGS OUT OF YOUR SAFETY DEPOSIT BOX.
- ✦ OPERATE YOUR BUSINESS FOR YOU.
- ✦ PREPARE AND FILE TAX RETURNS FOR YOU AND ACT FOR YOU IN TAX MATTERS.
- ✦ ESTABLISH TRUSTS FOR YOU AND TAKE OTHER ACTIONS FOR YOU IN CONNECTION WITH PROBATE AND ESTATE PLANNING MATTERS.
- ✦ PROVIDE FOR THE SUPPORT AND WELFARE OF YOUR SPOUSE, CHILDREN, AND DEPENDENTS, IF ANY.
- ✦ CONTINUE PAYMENTS TO THE CHURCH AND OTHER ORGANIZATIONS OF WHICH YOU ARE A MEMBER OR HAVE AN INTEREST AND MAKE GIFTS TO YOUR SPOUSE, DESCENDANTS, AND CHARITIES.

THIS DOCUMENT DOES NOT AUTHORIZE YOUR AGENT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU. YOU CAN DESIGNATE AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU ONLY BY A SEPARATE DOCUMENT.

THE POWERS GRANTED BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT. HOWEVER, IF YOU DO NOT WANT TO GRANT YOUR AGENT THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOURSELF, IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A LAWYER INSTEAD OF USING THIS FORM.

YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS DURABLE POWER OF ATTORNEY FOR FINANCIAL/ASSET MANAGEMENT.

YOU ARE NOT REQUIRED TO USE THIS FORM; YOU MAY USE A DIFFERENT DURABLE POWER OF ATTORNEY FOR FINANCIAL/ASSET MANAGEMENT IF THAT IS DESIRED BY THE PARTIES CONCERNED.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND; YOU SHOULD ASK AN ATTORNEY TO EXPLAIN IT TO YOU.

WHY SHOULD I CHOOSE A HEALTH CARE AGENT?

If you become unable, even temporarily, to make health care decisions, someone else must decide for you. Health care providers often look to family members for guidance. Family members may express what they think your wishes are related to a particular treatment. However, in California, only a health care agent you appoint has the legal authority to make treatment decisions if you are unable to decide for yourself. Appointing an agent lets you control your medical treatment by:

allowing your agent to make health care decisions on your behalf as you would want them decided;

choosing one person to make health care decisions because you think that person would make the best decisions;

choosing one person to avoid conflict or confusion among family members and/or significant others. You may also appoint an alternate agent to take over if your first choice cannot make decisions for you.

Who can be a health care agent?

Anyone 18 years of age or older, of sound mind, can be a health care agent. The person you are appointing as your agent or your alternate agent cannot sign as a witness on your Advanced Health Care Directive form.

How do I appoint a health care agent?

All competent adults, 18 years of age or older, (or is an emancipated minor) can appoint a health care agent by signing a form called a Advanced Health Care Directive. You don't need a lawyer or a notary, just two adult witnesses. Your agent cannot sign as a witness.

When would my health care agent begin to make health care decisions for me?

Your health care agent would begin to make health care decisions after your doctor decides that you are not able to make your own health care decisions. As long as you

are able to make health care decisions for yourself, you will have the right to do so.

What decisions can my health care agent make?

Unless you limit your health care agent's authority, your agent will be able to make any health care decision that you could have made if you were able to decide for yourself. Your agent can agree that you should receive treatment, choose among different treatments and decide that treatments should not be provided, in accordance with your wishes and interests. However, your agent can only make decisions about artificial nutrition and hydration (nourishment and water provided by feeding tube or intravenous line) if he or she knows your wishes from what you have said or what you have written. The Advanced Health Care Directive form does not give your agent the power to make non-health care decisions for you, such as financial decisions.

Why do I need to appoint a health care agent if I'm young and healthy?

Appointing a health care agent is a good idea even though you are not elderly or terminally ill. A health care agent can act on your behalf if you become even temporarily unable to make your own health care decisions (such as might occur if you are under general anesthesia or have become comatose because of an accident). When you again become able to make your own health care decisions, your health care agent will no longer be authorized to act.

How will my health care agent make decisions?

Your agent must follow your wishes, as well as your moral and religious beliefs. You may write instructions on your Advanced Health Care Directive form or simply discuss them with your agent.

How will my health care agent know my wishes?

Having an open and frank discussion about your wishes with your health care agent will put him or her in a better position to serve your interests. If your agent does not know your wishes or beliefs, your agent is legally required to act in your best interest. Because this is a major responsibility for the person you appoint as your health care agent, you should have a discussion with the person about what types of treatments you would or would not want under different types of circumstances, such as:

whether you would want life support initiated/continued/removed if you are in a permanent coma;

whether you would want treatments initiated/continued/removed if you have a terminal illness;

whether you would want artificial nutrition and hydration initiated/withheld or continued or withdrawn and under what types of circumstances.

Can my health care agent overrule my wishes or prior treatment instructions?

No. Your agent is obligated to make decisions based on your wishes. If you clearly expressed particular wishes, or gave particular treatment instructions, your agent has a duty to follow those wishes or instructions unless he or she has a good faith basis for believing that your wishes changed or do not apply to the circumstances.

Who will pay attention to my agent?

All hospitals, nursing homes, doctors and other health care providers are legally required to provide your health care agent with the same information that would be provided to you and to honor the decisions by your agent as if they were made by you. If a hospital or nursing home objects to some treatment options (such as removing certain treatment) they must tell you or your agent BEFORE or upon admission, if reasonably possible.

What if my health care agent is not available when decisions must be made?

You may appoint an alternate agent to decide for you if your health care agent is unavailable, unable or unwilling to act when decisions must be made. Otherwise, health care providers will make health care decisions for you that follow instructions you gave while you were still able to do so. Any instructions that you write on your Advanced Health Care Directive form will guide health care providers under these circumstances.

What if I change my mind?

It is easy to cancel your Advanced Health Care Directive, to change the person you

have chosen as your health care agent or to change any instructions or limitations you have included on the form. Simply fill out a new form. In addition, you may indicate that your Advanced Health Care Directive expires on a specified date or if certain events occur. Otherwise, the Advanced Health Care Directive will be valid indefinitely. If you choose your spouse as your health care agent or as your alternate, and you get divorced or legally separated, the appointment is automatically cancelled. However, if you would like your former spouse to remain your agent, you may note this on your current form and date it or complete a new form naming your former spouse.

Can my health care agent be legally liable for decisions made on my behalf?

No. Your health care agent will not be liable for health care decisions made in good faith on your behalf. Also, he or she cannot be held liable for costs of your care, just because he or she is your agent.

Is an Advanced Health Care Directive the same as a living will?

No. A living will is a document that provides specific instructions about health care decisions. You may put such instructions on your Advanced Health Care Directive form. The Advanced Health Care Directive allows you to choose someone you trust to make health care decisions on your behalf. Unlike a living will, an Advanced Health Care Directive does not require that you know in advance all the decisions that may arise. Instead, your health care agent can interpret your wishes as medical circumstances change and can make decisions you could not have known would have to be made.

Where should I keep my Advanced Health Care Directive form after it is signed?

Give a copy to your agent, your doctor, your attorney and any other family members or close friends you want. Keep a copy in your wallet or purse or with other important papers, but not in a location where no one can access it, like a safe deposit box. Bring a copy if you are admitted to the hospital, even for minor surgery, or if you undergo outpatient surgery.

May I use the Advanced Health Care Directive form to express my wishes about organ and/or tissue donation?

Yes. Use the optional organ and tissue donation section on the Advanced Health Care Directive form and be sure to have the section witnessed by two people. You may specify that your organs and/or tissues be used for transplantation, research or educational purposes. Any limitation(s) associated with your wishes should be noted in this section of the proxy.

Failure to include your wishes and instructions on your Advanced Health Care Directive form will not be taken to mean that you do not want to be an organ and/or tissue donor.

Can my health care agent make decisions for me about organ and/or tissue donation?

No. The power of a health care agent to make health care decisions on your behalf ends upon your death. Noting your wishes on your Advanced Health Care Directive form allows you to clearly state your wishes about organ and tissue donation

Who can consent to a donation if I choose not to state my wishes at this time?

It is important to note your wishes about organ and/or tissue donation so that family members who will be approached about donation are aware of your wishes. However, California Law provides a list of individuals who are authorized to consent to organ and/or tissue donation on your behalf. They are listed in order of priority: your spouse, a son or daughter 18 years of age or older, either of your parents, a brother or sister 18 years of age or older, a guardian appointed by a court prior to the donor's death, or any other legally authorized person.

The checklist on the following page is provided to assist you in selecting health care agents that are qualified and willing to serve in this special capacity on your behalf. Please thoroughly review the information contained within the checklist an ensure that the person(s) you select meet all California mandates.

CALIFORNIA MEDICAL ASSOCIATION DURABLE APPROVED ADVANCED HEALTH CARE DECISION FORM INSTRUCTIONS AND CHECKLIST

This is your Advanced Health Care Directive form for **Advanced Medical-Life Directives** and **Terminal Comfort Care Preferences**. By filling in this form, you select someone to make health care decisions for you if for some reason you become unable to make those decisions for yourself. You can also specify any wishes you may have about your health care, including your desires concerning decisions to withhold or remove life-sustaining treatment and food or fluids. A properly completed form provides the best legal protection available to help ensure that your wishes will be respected.

READ YOUR FORM CAREFULLY BEFORE FILLING IT OUT. EACH PARAGRAPH IN THE FORM CONTAINS INSTRUCTIONS. IT IS IMPORTANT THAT YOU FOLLOW THESE INSTRUCTIONS SO THAT YOUR WISHES MAY BE CARRIED OUT.

GENERAL REQUIREMENTS

The following checklist is provided to help you complete this form correctly. If you have properly completed the form, you should be able to answer *yes* to each of the following:

_____ 1. I am a California resident who is at least 18 years old, of sound mind, and acting of my own free will.

_____ 2. The individuals I have selected as my agent and alternate agents to make health care decisions for me are at least 18 years old and are *not:*

- *my treating* health care provider;
- an employee of my *treating* health care provider, unless the employee is related to me by blood, marriage, or adoption;
- an operator of a community care facility or residential care facility for the elderly; (Community care facilities are sometimes called board and care homes. If you are unsure whether a person you are thinking of selecting operates a community care facility, you should ask that person.) or
- an employee of a community care facility or residential care facility for the elderly, unless the employee is related to me by blood, marriage, or adoption.

_____ 3. I have talked with the individuals I have selected as my agent and alternate agents and these individuals have agreed to participate. (You may select someone who is not a California resident to act as your agent or alternate agent, but you should consider whether someone who lives far away will be available to make decisions for you if and when that may become necessary.)

_____ 4. I have read the instructions and completed all appropriate paragraphs to reflect my desires.

_____ 5. I have *signed* and *dated* the form.

_____ 6. I have either had the form notarized *or* had the form properly witnessed:

_____ a) I have obtained the signatures of two adult witnesses who personally know me.

_____ b) Neither witness is (1) my agent or alternate agent designated in this form; (2) a health care provider, or the employee of a health care provider; (3) a person who operates or is employed by a community care facility or residential care facility for the elderly.

_____ c) At least one witness is not related to me by blood, marriage, or adoption, and is not named in my will or so far as I know entitled to and part of my estate when I die.

_____ 7. I have given a copy of the completed form to those people, including my agent, alternate agents, family members and doctor, who may need this form in case an emergency requires a decision concerning my health care.

SPECIAL REQUIREMENTS

_____ 8. Patients in Skilled Nursing Facilities: If I am a patient in a skilled nursing facility, I have obtained the signature of a patient advocate or ombudsman. (If you are not sure whether you are in a skilled nursing facility, you should ask the people taking care of you.)

_____ 9. Conservatees under the Lanterman-Petris-Short Act (LPS). If I am a Conservatee under the Lanterman-Petris-Short Act and want to select my conservator as my agent or alternate agent to make health care decisions, I have obtained a lawyer's certification. (If you are not sure whether the person you wish to select as your agent is your conservator under the Lanterman-Petris-Short Act, you should ask that person.)

If you change your mind about who you would like to make health care decisions for you, or about any of the other statements you have made in this form, you should take all of the following steps: **1.** Complete a new form with the changes you desire; **2.** Tell everyone who got a copy of the old form that it is no longer valid and ask that copies of the old form be returned to you so you may destroy them; **3.** Give copies of the new form to the people who may need the form to carry out your wishes as described above in number 7. If after reading this material you still have unanswered questions, you should talk to your doctor or a lawyer.

25 SUGGESTED TOPICS TO DISCUSS WITH YOUR HEALTH CARE AGENT

Before your health care agent signs any forms or makes decisions for you, you should discuss your beliefs and wishes with him or her. The following questions may be helpful as you have this discussion. There are no right answers. You should answer these questions based on your own beliefs and share these beliefs and wishes with your health care agent.

1. Do you think it is a good idea to sign a legal document that says what medical treatments you want and do not want if you cannot speak for yourself?

2. Do you think you would want to have the following medical treatments? In what circumstances?

> Kidney dialysis (used if your kidneys stop working) - a procedure to clean the blood of patients whose kidneys are not working.
>
> Cardiopulmonary resuscitation, also called CPR (used if your heart stops beating) - a number of medical procedures that can be used to keep blood circulating and maintain breathing in a person whose heart and/or breathing has stopped.
>
> Respirator (used if you cannot breathe on your own).
>
> Artificial nutrition (used if you are unable to eat food) and artificial hydration (used if you are unable to drink fluids). You will receive food and water by tubes inserted through the nose to the stomach, surgically inserted to the stomach, or through IVs (intravenous tubes or tubes inserted through your skin into your veins).

3. Do you want to donate parts of your body to someone else when you die? (This is called "organ donation.")

4. How would you describe your current health? If you have any medical problems, how would you describe them?

5. If you have medical problems, in what ways, if any, do they affect your ability to live your

life?

6. How do your feel about your current health?

7. If you have a doctor, do you like him or her? Why?

8. Do you think your doctor should make the final decision about any medical treatments you might need?

9. How important is "independence" and "self-sufficiency" in your life?

10. If your physical abilities or your mental abilities become limited, would that affect your attitude toward independence and self-sufficiency? How?

11. Do you have any general comments about the value of independence and control in your life?

12. Do you expect that your friends, family and/or others will support your decisions about medical treatment you may need now or in the future?

13. What will be important to you when you are dying (for example, physical comfort, no pain, family members present, etc.)?

14. Where would you prefer to die?

15. What is your attitude about death?

16. How do you feel about the use of life-prolonging treatments like artificial food and water and artificial breathing machines (ventilators) if you are terminally ill?

17. How do you feel about the use of life-prolonging treatments if you are in a permanent coma or vegetative state?

18. How do your feel about the use of these life-prolonging treatments if you have an irreversible chronic illness (for example, Alzheimer's disease)?

19. Do you have any general comments about your attitude about illness, dying and death?

20. What is your religious background?

21. How do your religious beliefs affect your feelings about serious or terminal illness?

22. Are your feelings about death supported in your religion?

23. What does your faith community, church or synagogue, see as the role of prayer or religious sacraments in an illness?

24. Do you have any general comments about your religious background and beliefs?

25. What else do you feel is important for your agent to know?

If, over time, your beliefs or feelings in any area change, you should tell your health care agent. You also should tell your health care agent if your health changes or there is a new diagnosis. If you are told you are terminally ill, discuss this situation with your agent. You must prepare your agent well if you want him or her to speak for you.

PART TWO

OUTDATED OR "STALE" TRUSTS CAUSE PROBLEMS

Many trusts reviewed by our firm were originally adequate **but became almost worthless because** they had not been properly maintained or administered.

Some folks have been told that when they establish their Living Trust; "That's it - nothing else to do" ~ everything is protected, probate is avoided, they established Powers of Attorney in case of incapacity or incompetency and now they can just put the Trust on the shelf and forget about it. Sorry, NOT TRUE!

You may have originally acquired all of the necessary estate planning documents but **proper maintenance or administration of your Trust is necessary**. It's not tedious or difficult, but it does require attention to detail. Such maintenance may be necessary because of changes in economic and personal conditions or laws.

Proper attention to this necessary maintenance can save a great deal of time, money, and future problems.

The death of a Trustor (creator) of a living trust causes the most significant need for maintenance. Proper maintenance can eliminate capital gains taxes charged at approximately 30% [*20% Federal and 9-11% State*] and eliminate, or reduce, Federal Estate Taxes which start at 37 to 55 percent. In the case of married living trust portfolios; the death of a spouse will set in motion several things must be done quickly and correctly. Highly appreciated real estate property should be appraised at the time of death to establish a new "step-up" basis for the surviving spouse or beneficiaries. The trust may require division into the "AB" or "ABC" subtrusts, in which case, a Taxpayer Identification Number (TIN) will be required from the IRS for the "B" and "C" trusts.

Final tax returns are necessary. A regular final tax return must be filed by the due date of April 15 of the year following the death. In addition, if a decedent subtrust is established for an amount greater than the exemption equivalent, a separate Federal Estate Tax return (Form 706) is required within 9 months of death. Other tax returns may be required. Does this sound complex? It can be, but generally not. The most difficulty comes from ignoring these necessary requirements.

The death of a single or surviving Trustor may provide for the distribution of the trust estate and then the trust will cease to exist. Upon distribution of the assets, new deeds may be required and affidavits should be recorded to remove the decedents name from the deeds and property tax bills.

Change in your family or family relations is the primary cause for most changes of well-drafted family trusts. Marital dissolution changes the structure of the married trust and eliminates the need for the "B" or "BC" subtrusts which doubles the uniform tax credit allowed couples. On the marriage or remarriage of a Trustor, subtrusts should be added to provide for the second spouse.

The birth, adoption or death of a child may require changes in the manner of distribution of trust assets or the naming of the beneficiaries. A marriage or marriage dissolution of a child may also require certain changes in the gifting sections of the trust.

A child's disability, particularly when government funding is being received will require the creation of a "Special Needs Trust" to shelter assets from the reach of those government agencies.

If you created a family trust, you are a thoughtful and responsible person who provided a vehicle for the smooth transfer of wealth to the next generation; however you must keep this vehicle in proper running order so it will perform the task for which it was created. A trust not properly maintained becomes "stale" and will not work for you!

A recent review of a trust indicated that after the death of a spouse, four years previously, the surviving Trustor did not update the trust. As a result, it was necessary, but costly, to establish the value of the assets at the time of the spouses death. Amended tax returns were filed and tax refunds were obtained from tax paid on the sale of property. "ABC" provisions were properly funded to reduce taxes otherwise due with penalties and interest. Overall a potentially explosive situation was avoided, but at additional cost including penalties.

"Stale" or out-of-date trusts will defeat the purpose for which they were established. Unfortunately, many firms producing trusts fail to inform their clients of changes which affect the trusts. Many firms do not periodically review trusts for their clients to determine if amendments are necessary. Such reviews for changes cost little and should be performed every few years to ensure they are current.

In another review, it was noted that a couple had refinanced their home. The lender took the

residence **out** of the trust for the refinance, but did not place it back into the trust. As a result their home was not protected from probate by the trust and would have caused their estate to be subjected to probate costs and time delays. We prepared the proper trust transfer deed and recorded it thus placing their most valuable asset back under the probate protection of the trust.

Upon completion of a Living Trust, a another couple received the deeds for their residence and a rental. The deeds properly transferred the property to the trust **but** they were not recorded. Several years later, the owners were told that the best way to hold real estate in California **is** "Community Property." **A** title company transferred the property to them as community property. The title company had used the "last recorded" deeds which showed their ownership as joint tenants and this caused the property to be removed from the trust. Thousands of dollars could have been wasted on an unnecessary probate had the problem not been caught in time.

In another instance, upon the death of the husband, the wife attempted to transfer assets in the bank owned separately by the husband and could **not** because she had not establish the decedents **sub trust**. The bank had provided her sketchy information. It was determined that no administration of the trust had been performed on the death of the husband as it should have been. We accomplished the necessary tasks and the problem of her control and management of trust assets was eliminated.

In still another instance, property passed to the surviving spouse as a joint tenant, rather than as community property. Two years later the property was sold, resulting in a large amount of capital gains tax based on the original purchase price. The proper documents converting the property to community property were submitted, the property was re-assessed as of the date of death of the spouse thus reducing the capital gains taxes to zero.

In Summary:

Your trust must be maintained up-to-date to recognize any pertinent internal family changes. Periodic review is necessary to determine if any maintenance or administration is recommended.