

Table of Contents

Volume 1

CHAPTER 1. ESTATE PLANNING PRACTICE

I. THE MODERN CALIFORNIA ESTATE PLANNING PACKAGE

A. OVERVIEW

- § 1:1 Introduction
- § 1:2 Probate system
- § 1:3 Probate avoidance may not benefit client
- § 1:4 Loss of due process inherent in probate avoidance
- § 1:5 Typical California estate planning package
- § 1:6 Revocable living trust as centerpiece
- § 1:7 Practical problems caused by overselling of trusts

B. REVOCABLE LIVING TRUSTS COMPARED TO OTHER METHODS OF TRANSFERRING PROPERTY AT DEATH

1. Living Trusts Compared to Wills

- § 1:8 Overview
- § 1:9 Publicity
- § 1:10 Consumption of time
- § 1:11 Formality
- § 1:12 Cost
- § 1:13 Disadvantages of living trusts compared to wills
- § 1:14 Trustee's heavy burden of fiduciary responsibility

2. Living Trusts Compared to Joint Tenancy

- § 1:15 Overview

C. REVOCABLE LIVING TRUSTS COMPARED TO OTHER LIFETIME PLANNING DEVICES

- § 1:16 Compared to conservatorship
- § 1:17 Durable powers of attorney for property

D. AVOIDING PROBATE WITHOUT A TRUST

- § 1:18 Property subject to probate; intestacy

- § 1:19 Nonprobate transfers under Prob C § 5000
- § 1:20 Joint tenancy
- § 1:21 Severing joint tenancies in real property
- § 1:22 Community property
- § 1:23 Aggregate or asset-by-asset division of community property
- § 1:24 Community property versus joint tenancy
- § 1:25 Joint tenancy or community property treatment of property in revocable trust
- § 1:26 Quasi-community property; separate property
- § 1:27 Collection of personal property in small estates
- § 1:28 Real property of total estate of small value

E. SPECIAL CONSIDERATIONS FOR MINORS

- § 1:29 Options involving gifts to minors

II. RULES GOVERNING THE ATTORNEY IN ESTATE PLANNING

A. COMPETENCE, CAPACITY AND REFERRALS

- § 1:30 Rules of Professional Conduct
- § 1:31 Duty to act competently
- § 1:32 Testamentary capacity
- § 1:33 Knowledge required of estate planner
- § 1:34 Referral fees

B. CONFLICTS OF INTEREST

- § 1:35 Attorney's relationship with a party, witness, or interested person
- § 1:36 Conflicts between clients

III. WORKING WITH THE CLIENT

A. QUESTIONNAIRE

- § 1:37 Overview
- § 1:38 Content and format
- § 1:39 Integration with computerized document assembly

B. ESTATE PLANNING PACKET

- § 1:40 Content; timing of delivery

C. INITIAL CLIENT MEETING

- § 1:41 Purpose and agenda
- § 1:42 Physical setting of meeting

TABLE OF CONTENTS

- § 1:43 Introductions
- § 1:44 Discussing the estate planning process
- § 1:45 Addressing dual representation conflicts
- § 1:46 Client questions
- § 1:47 Reviewing/completing client questionnaire
- § 1:48 Presenting estate planning alternatives
- § 1:49 Fees
- § 1:50 Post-meeting issues

D. FEE CONSIDERATIONS

- § 1:51 Statutory requirements
- § 1:52 Rules of Professional Conduct
- § 1:53 Billing costs
- § 1:54 Drafting principles
- § 1:55 Tax deductibility of fees

E. DOCUMENT PRODUCTION

- § 1:56 Style and readability
- § 1:57 Boilerplate
- § 1:58 Computerized document assembly
- § 1:59 Finalizing drafts
- § 1:60 Signing final documents
- § 1:61 Delivery of will after testator's death
- § 1:62 Retention of original documents

F. FINAL CONSIDERATIONS

- § 1:63 Initial trust funding and administration
- § 1:64 Follow-up communications
- § 1:65 Annual or periodic client review

IV. BUSINESS OF ESTATE PLANNING ATTORNEY

A. MARKETING

- § 1:66 Overview
- § 1:67 Statutory requirements
- § 1:68 Rules of Professional Conduct
- § 1:69 Methods

B. OFFICE ADMINISTRATION

- § 1:70 Overview
- § 1:71 Billing policies
- § 1:72 Role of legal secretary and paralegal
- § 1:73 Docketing
- § 1:74 Clients' trust account

§ 1:75 Resources for the estate planning attorney

V. CHECKLISTS

§ 1:76 Important dates in generating estate plan

§ 1:77 Matters to consider regarding property distribution

VI. FORMS

A. ATTORNEY-CLIENT FORMS AND AGREEMENTS

§ 1:78 Preliminary estate planning questionnaire

§ 1:79 Fee agreement for single client

§ 1:80 Fee agreement for married clients

§ 1:81 Memorandum to married clients regarding property characterization

§ 1:82 Cover letter enclosing client drafts

§ 1:83 Final instruction letter

§ 1:84 Forms of title to trust assets

§ 1:85 Document retention agreement

§ 1:86 Memorandum regarding execution of will

§ 1:87 Estate planning questionnaire supplement

B. ESTATE PLANNING DOCUMENTS

§ 1:88 Property agreement

§ 1:89 Cover letter to doctor enclosing health care documents

§ 1:90 Form declaration under California Natural Death Act

§ 1:91 Cover letter to county clerk enclosing original will
[Prob C § 8200(a)(1)]

§ 1:92 Broker or bank funding letter

§ 1:93 Certification of trust [Prob C § 18100.5]

§ 1:94 Nomination of conservator

§ 1:95 Nomination of successor custodian

§ 1:96 Letter trust agreement for joint tenancy

§ 1:97 Promissory note including provision for forgiveness at death

§ 1:98 Promissory note including provision for continued payment after death

§ 1:99 Affidavit of death of joint tenant

§ 1:100 Declaration under Prob C § 13101

§ 1:101 Affidavit of death of trustee

§ 1:102 Simple form of declaration

§ 1:103 IRS Form 1041—Income tax return for trusts and estates

C. GRANT DEEDS

§ 1:104 Grant deed to trustee

TABLE OF CONTENTS

- § 1:105 Grant deed to trustee transmuted joint tenancy to community property
- § 1:106 Deed to joint tenant severing joint tenancy
- § 1:107 Revocable grant deed
- § 1:108 Grant deed to spouses as community property
- § 1:109 Grant deed severing joint tenancy by one joint tenant
- § 1:110 Grant deed severing joint tenancy by joint tenants

D. JUDICIAL COUNCIL FORMS

- § 1:111 Petition for probate [Judicial Council Form DE-111]
- § 1:112 Notice of hearing [Judicial Council Form DE-120]
- § 1:113 Notice of petition to administer estate [Judicial Council Form DE-121]
- § 1:114 Citation (probate) and proof of service [Judicial Council Form DE-122]
- § 1:115 Summons (probate) [Judicial Council Form DE-125]
- § 1:116 Proof of subscribing witness [Judicial Council Form DE-131]
- § 1:117 Proof of holographic instrument [Judicial Council Form DE-135]
- § 1:118 Order for probate [Judicial Council Form DE-140]
- § 1:119 Duties and liabilities of personal representative [Judicial Council Form DE-147]
- § 1:120 Confidential supplement to duties and liabilities of personal representative [Judicial Council Form DE-147S]
- § 1:121 Letters [Judicial Council Form DE-150]
- § 1:122 Request for special notice [Judicial Council Form DE-154]
- § 1:123 Notice of administration to creditors [Judicial Council Form DE-157]
- § 1:124 Inventory and appraisal [Judicial Council Form DE-160]
- § 1:125 Inventory and appraisal attachment [Judicial Council Form DE-161]
- § 1:126 Notice of proposed action (objection-consent) [Judicial Council Form DE-165]
- § 1:127 Waiver of notice of proposed action [Judicial Council Form DE-166]
- § 1:128 Creditor's claim [Judicial Council Form DE-172]
- § 1:129 Allowance or rejection of creditor's claim [Judicial Council Form DE-174]
- § 1:130 Order prescribing notice [Judicial Council Form DE-200]
- § 1:131 Spousal property petition [Judicial Council Form DE-221]
- § 1:132 Spousal property order [Judicial Council Form DE-226]

- § 1:133 Report of sale and petition for order confirming sale of real property [Judicial Council Form DE-260]
- § 1:134 Order confirming sale of real property [Judicial Council Form DE-265]
- § 1:135 Ex parte petition for authority to sell securities and order [Judicial Council Form DE-270]
- § 1:136 Ex parte petition for approval of sale of personal property and order [Judicial Council Form DE-275]
- § 1:137 Ex parte petition for final discharge and order [Judicial Council Form DE-295]
- § 1:138 Affidavit re real property of small value (\$50,000 or less) [Judicial Council Form DE-305]
- § 1:139 Petition to determine succession to real property (estates \$150,000 or less) [Judicial Council Form DE-310]
- § 1:140 Order determining succession to real property (estates \$150,000 or less) [Judicial Council Form DE-315]
- § 1:141 Petition for appointment of guardian ad litem under the Probate Code [Judicial Council Form DE-350]
- § 1:142 Order for appointment of guardian ad litem under the Probate Code [Judicial Council Form DE-351]

Bibliography

CHAPTER 2. AVOIDING MALPRACTICE

I. LEGAL PRINCIPLES

A. OVERVIEW

- § 2:1 Current estate planning environment
- § 2:2 Applicability of general negligence law to California estate planning
- § 2:3 Standard of care in general
- § 2:4 Standard of care for experts and specialists in estate planning
- § 2:5 Necessity of privity between estate planner and ultimate beneficiary
- § 2:6 California Rules of Professional Conduct as standards of liability
- § 2:7 Statute of limitations; tolling
- § 2:8 Conduct of practitioner to limit tolling of statute of limitations
- § 2:9 Conduct and policies of practitioner to avoid malpractice

B. MALPRACTICE PROBLEM AREAS

1. General Considerations

- § 2:10 Overview; conflicts of interest; confidentiality

TABLE OF CONTENTS

| | |
|--------|---|
| § 2:11 | Planning for avoidance of malpractice claim; the underlying case |
| § 2:12 | Failure to refer to specialist; negligent referral or entrustment |
| § 2:13 | Separate versus community property issues |
| § 2:14 | Failure to properly designate disposition of assets, provide for pretermitted heirs, and plan for dissolution of marriage |
| § 2:15 | Asset protection planning |
| | 2. Capacity |
| § 2:16 | Overview |
| § 2:17 | Definitions of capacity |
| § 2:18 | Due Process in Competence Determinations Act |
| § 2:19 | Duty to advocate for client's capacity; obtaining evidence of client's capacity |
| § 2:20 | Documenting capacity |
| § 2:21 | Execution of documents under durable power of attorney; substituted judgment |
| | 3. Undue Influence; Duress or Coercion; Fraudulent Deceit |
| § 2:22 | Definition of undue influence |
| § 2:23 | Presumption of undue influence |
| § 2:24 | Fraudulent deceit; duress or coercion |
| | 4. Prohibited Transfers |
| § 2:25 | Overview—Limitations on transfers to drafters and others |
| § 2:26 | Fiduciaries |
| § 2:27 | Exceptions to limitations on transfers to drafters and others |
| | 5. General Form Drafting |
| § 2:28 | Overview |
| § 2:29 | Coordination between will and trust |
| § 2:30 | Disinheritance clauses |
| | 6. Tax Provisions |
| § 2:31 | Overview |
| § 2:32 | Marital deduction provisions |
| § 2:33 | Tax proration clauses |
| | 7. No-Contest Clauses |
| § 2:34 | Overview |
| § 2:35 | Impact of <i>Burch v. George</i> |
| § 2:36 | Criteria for use of no-contest clauses in estate planning documents |

- § 2:37 Use of no-contest clause where client may have
borderline capacity
- § 2:38 Provision for forfeiture by issue
- § 2:39 Republication of no-contest clause in will or trust in
codicil to will or amendment to trust
- § 2:40 Coordination of no-contest clauses in wills and trusts
- § 2:41 Applicability of no-contest clauses to omitted heir
under pretermitted heir statute

8. Execution of Plan; Postexecution Issues

- § 2:42 Execution of documents
- § 2:43 Failure to follow up on postexecution duties
- § 2:44 Estate plan closure; terminating attorney-client
relationship
- § 2:45 Disclaimers; reformation

II. CHECKLIST

- § 2:46 Matters to consider to avoid malpractice

III. FORMS

- § 2:47 Client consent to association of counsel
- § 2:48 Memorandum regarding bookkeeping and funding
trust
- § 2:49 Separate versus community property agreement (non
pro rata agreement)
- § 2:50 Declaration of videographer
- § 2:51 Certificate of Independent Review
- § 2:52 Statutory tax clause for single person trust
- § 2:53 Clause allowing specific gifts to pass tax free,
otherwise statutory tax clause for single person trust
- § 2:54 General no-contest clause for declaration of trust for
single settlor
- § 2:55 Broad no-contest clause
- § 2:56 Letter terminating attorney-client relationship

Bibliography

CHAPTER 3. GIFT AND ESTATE TAX

I. FEDERAL GIFT AND ESTATE TAXATION

A. OVERVIEW

- § 3:1 Governing law
- § 3:2 Unified tax for gifts and estates
- § 3:3 Unified estate and gift tax credit

TABLE OF CONTENTS

B. GIFT TAX

1. Application and Procedure of Gift Tax

- § 3:4 Imposition of tax
- § 3:5 Taxable gifts
- § 3:6 Computation of tax if no prior taxable gifts made
- § 3:7 Computation of tax if taxable gifts made in prior years
- § 3:8 Return filing requirements
- § 3:9 Valuation of gifts

2. Allowable Exclusions, Deductions, and Credits

- § 3:10 Annual exclusion
- § 3:11 Marital deduction
- § 3:12 Charitable gifts
- § 3:13 Educational and medical payments exclusion

3. Special Issues Relating to Gift Tax

- § 3:14 Below market loans
- § 3:15 Jointly owned property
- § 3:16 Gifts made within three years of death
- § 3:17 Powers of appointment
- § 3:18 Indirect gifts

4. Disclaimers in Context of Gift Tax

- § 3:19 Qualified disclaimers
- § 3:20 Disclaimers of jointly held property

5. Basis Rules in Context of Gift Tax

- § 3:21 Carryover basis rule
- § 3:22 Increase in basis for gift taxes paid
- § 3:23 Property acquired by part sale part gift
- § 3:24 Documentation of basis of gifted property

C. GENERATION-SKIPPING TAX

1. Application of Tax

- § 3:25 Imposition of tax
- § 3:26 Transfers subject to tax
- § 3:27 Exceptions to generation-skipping transfers
- § 3:28 Types of generation-skipping transfers
- § 3:29 Determining generations

2. Filing and Compliance

- § 3:30 Reporting tax
- § 3:31 Taxable terminations
- § 3:32 Taxable distribution

- § 3:33 IRS Form 7004—Application for automatic extension of time to file certain business income tax, information and other returns
- § 3:34 Direct skips
- § 3:35 IRS Form 706—Estate (and GST) tax return
- § 3:36 IRS Form 4768—Application for extension of time to file a return and/or pay estate (or GST) taxes

D. ESTATE TAX

1. Application and Procedure

- § 3:37 Imposition of tax
- § 3:38 Gross estate defined
- § 3:39 Return filing requirements

2. Valuation of Assets in Gross Estate

a. Introduction

- § 3:40 General principles
- § 3:41 Alternate valuation date

b. Special Use Valuation

- § 3:42 Requirements for electing special use valuation
- § 3:43 Determining special use value
- § 3:44 Recapture of estate tax attributable to special use valuation
- § 3:45 Electing special use valuation

c. Valuation of Specific Assets

- § 3:46 Real property
- § 3:47 Stocks and securities
- § 3:48 Closely held corporations and other business interests
- § 3:49 Cash and cash equivalents
- § 3:50 Annuities and other partial interests
- § 3:51 Life insurance, commercial annuities and mutual funds
- § 3:52 Personal property

3. Allowable Deductions and Credits

a. Family-Owned Business Deduction

- § 3:53 Overview
- § 3:54 Ownership qualifications
- § 3:55 Additional requirements
- § 3:56 Application of deduction

b. Marital Deduction

- § 3:57 Overview

TABLE OF CONTENTS

| | |
|--|---|
| § 3:58 | Property qualifying for deduction |
| § 3:59 | Qualified domestic trusts |
| § 3:60 | Terminable interests |
| § 3:61 | Qualified terminable interest property |
| § 3:62 | Extent of deduction |
| c. Charitable Deduction | |
| § 3:63 | Overview |
| § 3:64 | Amount of deduction |
| § 3:65 | Qualifying transfers |
| § 3:66 | Split interest transfers |
| d. Deductible Expenses | |
| § 3:67 | Funeral expenses |
| § 3:68 | Administration expenses |
| § 3:69 | Miscellaneous expenses |
| e. Claims and Losses | |
| § 3:70 | Mortgages |
| § 3:71 | Claims against the estate |
| § 3:72 | Losses during administration of the estate |
| f. Credits Against Estate Tax | |
| § 3:73 | Unified credit |
| § 3:74 | Credit for state death taxes |
| § 3:75 | Gift taxes paid |
| § 3:76 | Tax on prior transfers |
| § 3:77 | Credit for foreign death taxes |
| 4. Special Issues Relating to Estate Tax | |
| § 3:78 | Community property |
| § 3:79 | Jointly owned property |
| § 3:80 | Dower and curtesy |
| § 3:81 | Gifts made within three years of death |
| § 3:82 | Transfers with retained possession or enjoyment |
| § 3:83 | Transfers taking effect at death |
| § 3:84 | Revocable transfers |
| § 3:85 | Powers of appointment |
| § 3:86 | Annuities |
| § 3:87 | Life insurance |
| § 3:88 | IRS Form 712—Life insurance statement |
| § 3:89 | Employee benefit plans |
| 5. Disclaimers in Context of Estate Tax | |
| § 3:90 | Qualified disclaimers |
| 6. Basis Rules in Context of Estate Tax | |
| § 3:91 | Step-up in basis rule |

- § 3:92 Property not subject to step-up in basis rules
- § 3:93 Basis rules applicable to community property

II. CALIFORNIA GIFT AND ESTATE TAXATION

A. CALIFORNIA INHERITANCE AND GIFT TAX

- § 3:94 Historical perspective
- § 3:95 Repeal of inheritance and gift tax

B. CALIFORNIA ESTATE TAX

- § 3:96 Application of tax
- § 3:97 Property included in estate
- § 3:98 Residency of decedent
- § 3:99 Computation of tax
- § 3:100 Filing return
- § 3:101 Payment of tax
- § 3:102 Generation-skipping transfer tax

III. INCOME TAXATION OF DECEDENTS AND DECEDENTS' TRUSTS AND ESTATES

A. DECEDENTS

- § 3:103 Decedent's final return
- § 3:104 Special reporting rules
- § 3:105 Medical expense deduction
- § 3:106 Request for prompt assessment

B. TRUSTS AND ESTATES

- § 3:107 Overview
- § 3:108 IRS Form SS-4—Application for employer identification number
- § 3:109 IRS Form 56—Notice of fiduciary relationship
- § 3:110 Client letter regarding IRS Forms SS-4 and 56
- § 3:111 Tax year
- § 3:112 Filing and compliance
- § 3:113 Gross income
- § 3:114 Deductions
- § 3:115 Credits
- § 3:116 Distributable net income
- § 3:117 Distributable net income of a simple trust
- § 3:118 Distributable net income of a complex trust or an estate

C. INCOME IN RESPECT OF DECEDENT

- § 3:119 Overview

TABLE OF CONTENTS

- § 3:120 Reporting income in respect of decedent
- § 3:121 Deductions

IV. CHECKLISTS

- § 3:122 Checklist for determining what constitutes gift
- § 3:123 Checklist for preparation of gift tax return
- § 3:124 Checklist for preparation of decedent's final income tax return
- § 3:125 Checklist for preparation of estate's income tax return
- § 3:126 Checklist for preparing estate tax return
- § 3:127 Checklist for preparing trust income tax return

V. TABLES

- § 3:128 Unified Estate and Gift Tax Rates
- § 3:129 Unified Estate and Gift Tax Credit

Bibliography

CHAPTER 4. GENERATION-SKIPPING TRANSFER TAX

I. GENERAL CONSIDERATIONS

A. INTRODUCTION

- § 4:1 Overview
- § 4:2 General definitions

B. EFFECTIVE DATE OF TAX: THE TRANSITION RULES

- § 4:3 Inter vivos transfers made before September 26, 1985
- § 4:4 Testamentary transfers
- § 4:5 Mental disability of transferor on and after October 22, 1986
- § 4:6 Trusts irrevocable on September 25, 1985—Constructive additions

C. TRANSFERS NOT SUBJECT TO THE TAX

- § 4:7 Lifetime exemption
- § 4:8 Educational and medical expenses
- § 4:9 Annual gift tax exclusion
- § 4:10 Multiple skip transfers to trusts
- § 4:11 Transfers subject to gift and estate taxes
- § 4:12 Transfers subject to a prior GSTT

D. COMPUTATION OF THE TAX

- § 4:13 Overview
- § 4:14 Taxable amount for direct skips
- § 4:15 Taxable amount for taxable terminations
- § 4:16 Taxable amount for taxable distribution
- § 4:17 Inclusion ratio; applicable fraction

II. ALLOCATION OF THE GENERATION-SKIPPING TRANSFER EXEMPTION

- § 4:18 In general
- § 4:19 Automatic allocation during life
- § 4:20 Automatic allocation upon death
- § 4:21 Separate share rule

III. VALUATION

A. LIFETIME TRANSFERS

- § 4:22 In general
- § 4:23 Timely gift tax return
- § 4:24 Late gift tax return
- § 4:25 ETIP rules

B. TRANSFERS AT DEATH

- § 4:26 In general
- § 4:27 Pecuniary payments
- § 4:28 Residual transfers preceded by a pecuniary payment payable in cash
- § 4:29 Residual transfers preceded by a pecuniary payment payable in kind

IV. PLANNING FOR USE OF GENERATION-SKIPPING TRANSFER EXEMPTION

- § 4:30 Determining unused exemption
- § 4:31 Verifying past inclusion ratios
- § 4:32 Creating exempt and nonexempt trusts

V. COMPLIANCE

- § 4:33 Returns; filing and payment requirements
- § 4:34 Checklist for notification of distribution from GST
- § 4:35 Notification of distribution from GST [Form 706-GS(D-1)]
- § 4:36 Checklist for GST transfer tax
- § 4:37 GST transfer tax [Form 706-GS(D)]
- § 4:38 Penalties

TABLE OF CONTENTS

§ 4:39 Statute of limitations

VI. CHECKLIST

§ 4:40 Filing and compliance

Bibliography

CHAPTER 5. REAL PROPERTY TAX

I. GENERAL CONSIDERATIONS

§ 5:1 Importance of real property tax considerations in estate planning

§ 5:2 Governing law; resources

II. CHANGE IN OWNERSHIP

A. OVERVIEW

§ 5:3 Constitutional principles; Proposition 13

§ 5:4 “Change in ownership” defined

§ 5:5 Date of change in ownership

§ 5:6 Presumption as to names on deed

§ 5:7 Step transaction doctrine

§ 5:8 Land use restrictions; agricultural preserve

B. TRANSFERS OF REAL PROPERTY

1. Individual Ownership

§ 5:9 Overview

§ 5:10 Joint tenancy

§ 5:11 Life estates

§ 5:12 Leases

2. Trusts

§ 5:13 Beneficiary considerations

§ 5:14 Revocable trusts

§ 5:15 Irrevocable trusts

§ 5:16 Trusts for years

§ 5:17 Identifying transferor for purposes of change in ownership analysis

§ 5:18 Trusts are not legal entities

3. Legal Entities Owning Real Property

a. Transfers to and From Legal Entities

§ 5:19 Contributions to legal entities

§ 5:20 Distributions from legal entities

b. Transfers of Ownership Interests in Legal Entities

- § 5:21 General rule
- § 5:22 Exception of reassessment pursuant to “cumulative count”
- § 5:23 Exception of reassessment pursuant to “change in control”
- § 5:24 History of legal entity for purpose of “change in control” or “cumulative count” analysis
- § 5:25 Partnerships
- § 5:26 Transfer of ownership interests among legal entities
- § 5:27 Reorganizations; conversions

C. EXCLUSIONS FROM CHANGE IN OWNERSHIP

1. Spousal Exclusion

- § 5:28 Transfers between spouses

2. Parent-Child, Grandparent-Grandchild Exclusion

- § 5:29 Overview
- § 5:30 Allocation of exclusion
- § 5:31 Trust applications
- § 5:32 Application when interest in legal entity transferred
- § 5:33 Time for filing claims for exclusion

3. Other Exclusions

- § 5:34 Proportional ownership interest
- § 5:35 Change in method of holding title
- § 5:36 Homeowners over age 55 or severely disabled
- § 5:37 Under 5 percent and under \$10,000
- § 5:38 Minor child or disabled child after death of parents
- § 5:39 Corrections to title or deed
- § 5:40 Employee benefit plan
- § 5:41 New construction

4. Exemptions

- § 5:42 Definition; exemptions for individuals
- § 5:43 Exemptions for charities and foundations

D. CHANGE IN OWNERSHIP REPORTING REQUIREMENTS

- § 5:44 Change in ownership statement; preliminary change in ownership report
- § 5:45 Change in control of legal entity
- § 5:46 Signature authority

TABLE OF CONTENTS

§ 5:47 Exchange of information among governmental entities

III. CHECKLIST

§ 5:48 Exclusions from change in ownership applicable to estate planning

IV. FORMS

A. LETTERS TO CLIENT

§ 5:49 Letter advising clients of property tax consequences of making gifts of interest in real property to children

§ 5:50 Letter advising clients of property tax consequences of transferring residence to qualified personal residence trust (QPRT)

§ 5:51 Letter advising clients of property tax consequences of transferring real property to legal entity

B. CHANGE OF OWNERSHIP FORMS

§ 5:52 Preliminary change of ownership report [Form BOE-502-A]

§ 5:53 Change of ownership statement [Form BOE-502-AH]

§ 5:54 Statement of change in control and ownership of legal entities [BOE-100-B]

§ 5:55 Claim for reassessment exclusion for transfer between parent and child [Form BOE-58-AH]

§ 5:56 Claim for reassessment exclusion for transfer from grandparent to grandchild [Form BOE-58-G]

§ 5:57 Application for changed assessment [BOE-305-AH]

§ 5:58 Claim for refund

Bibliography

CHAPTER 6. BENEFICIARIES

I. LEGAL PRINCIPLES

A. INTRODUCTION

§ 6:1 Definitions

§ 6:2 Who may be beneficiary under will

§ 6:3 Who may be beneficiary of trust

§ 6:4 Devise to trust

§ 6:5 Effect of homicide or abuse on beneficiary status

B. CLASS GIFTS

1. General Rules

§ 6:6 Distinction between class and individual gifts

§ 6:7 Persons included in class

2. Methods of Distribution

§ 6:8 Distribution under Prob C § 240

§ 6:9 Distribution by representation or per stirpes

§ 6:10 Distribution per capita at each generation

3. Parent-Child Relationship for Intestate Purposes

§ 6:11 Existence of relationship

§ 6:12 Natural parents of adopted child

§ 6:13 Conditions preventing parent from inheriting from a child

§ 6:14 Foster or stepparent

C. DEVISES TO MINORS

§ 6:15 Minors' capacity to take devised property

§ 6:16 Guardian of person

§ 6:17 Guardian of estate or of property

§ 6:18 Custodian under Uniform Transfers To Minors Act

D. DEVISES TO ORGANIZATIONS AND OTHER ENTITIES

§ 6:19 Charitable organizations

§ 6:20 Corporations, associations, governments, and other entities

E. RESTRICTIONS ON BENEFICIARIES

1. Survival Requirements

§ 6:21 Devisee's failure to survive

§ 6:22 Antilapse statutes

§ 6:23 Simultaneous death

§ 6:24 Survival requirements on marital deduction gifts

2. Disinheritance

a. Introduction

§ 6:25 In general

§ 6:26 Drafting disinheritance provisions

b. Omitted Spouse

§ 6:27 Omitted spouse statute

§ 6:28 Exceptions to omitted spouse statute

§ 6:29 Manner of satisfying omitted spouse's share

§ 6:30 Effect of dissolution or annulment of marriage

TABLE OF CONTENTS

§ 6:31 Effect of termination of domestic partnership

c. Omitted Children

§ 6:32 Omitted child statutes

§ 6:33 Exceptions to omitted child statute

§ 6:34 Manner of satisfying omitted child's share

F. CONTEST PROVISIONS

§ 6:35 Contest provisions generally

§ 6:36 Enforcing no-contest provisions

§ 6:37 Drafting no-contest provisions

G. POWERS OF APPOINTMENT

§ 6:38 Definitions

§ 6:39 Creating power

§ 6:40 Exercising power

H. DISCLAIMERS

§ 6:41 Introduction

§ 6:42 Definition and creation of interest

§ 6:43 Right to disclaim and waiver of right

§ 6:44 Procedure when beneficiary is conservatee, ward, or decedent

§ 6:45 Effect of beneficiary's acceptance of interest

§ 6:46 Format and filing requirements

§ 6:47 Time for filing disclaimer

§ 6:48 Federal disclaimer requirements

§ 6:49 Effect of disclaimer

I. TAX ASPECTS

§ 6:50 General tax considerations for estate beneficiaries

§ 6:51 General tax considerations for trust beneficiaries

II. CHECKLISTS

§ 6:52 Matters to consider in drafting dispositions to beneficiaries

§ 6:53 Matters to consider in drafting class gifts

§ 6:54 Matters to consider in drafting gifts to minors

§ 6:55 Matters to consider in drafting gifts to charitable organizations

§ 6:56 Matters to consider in drafting gifts to corporations, associations, governments, and other entities

§ 6:57 Matters to consider in drafting disinheritance clause

§ 6:58 Matters to consider in drafting no-contest clause

- § 6:59 Matters to consider in drafting power of appointment
- § 6:60 Matters to consider in drafting disclaimer

III. FORMS

A. CLASS GIFTS

- § 6:61 Distribution as provided in Prob C § 240
- § 6:62 Distribution as provided in Prob C § 246
- § 6:63 Distribution by right of representation or per stirpes
- § 6:64 Distribution in manner provided in Prob C § 247
- § 6:65 Distribution per capita at each generation
- § 6:66 Beneficiaries determined under laws of intestate succession
- § 6:67 Devise to children living at testator's death
- § 6:68 Devise to children living on date of will execution and on testator's death
- § 6:69 Afterborn children to participate in devise
- § 6:70 Devise to specific persons and to afterborn or adopted members of certain class
- § 6:71 Devise to children of present and previous marriages
- § 6:72 Determining membership of class

B. MINORS AS BENEFICIARIES

- § 6:73 Devise to trust for child who is minor at testator's death
- § 6:74 Appointment of guardian of person of minor child and statement of desire that same person be appointed guardian of minor's estate
- § 6:75 Appointment of guardian of person and estate of minor children
- § 6:76 Appointment of guardian of specific property
- § 6:77 Authority of guardian of person
- § 6:78 Use of child's estate by guardian of person
- § 6:79 Devise to custodian for child who is minor at testator's death under California Uniform Transfers to Minors Act
- § 6:80 Distribution of minor's bequest to parents

C. OTHER BENEFICIARIES

1. Individuals

- § 6:81 Devise to creditor of testator
- § 6:82 Devise to citizen of foreign country
- § 6:83 Devise to employee
- § 6:84 Devise to employee in lieu of compensation

2. Charitable Organizations

- § 6:85 Devise to charitable organization

TABLE OF CONTENTS

- § 6:86 Devise to educational fund
- § 6:87 Designation of alternate charity if first designated charity ceases to exist or loses nontaxable status
- § 6:88 Advancement to charitable beneficiary
- § 6:89 Direction to executor to honor charitable pledges
- § 6:90 Gift of lapsed devises to charitable organization
- § 6:91 Charitable devise as exempt from contributions to estate taxes
- § 6:92 Gift over to alternate charity where preferred charitable organization becomes defunct before distribution date

3. Other Entities

- § 6:93 Devise to corporation
- § 6:94 Devise to association
- § 6:95 Devise to governmental entity

D. RESTRICTIONS ON BENEFICIARIES

1. Disinheritance

a. General Forms

- § 6:96 Omission of specific heir
- § 6:97 Omission of heir provided for by transfer outside of testamentary instrument

b. Omitted Spouse

- § 6:98 Omission of existing spouse
- § 6:99 Omission of future spouse
- § 6:100 Omitted spouse provided for by transfer outside of testamentary instrument
- § 6:101 Omitted spouse made valid agreement waiving right to share in decedent's estate
- § 6:102 Spouse omitted if marriage is terminated by dissolution or annulment

c. Omitted Child

- § 6:103 Omission of living child
- § 6:104 Omission of child born or adopted after execution of instrument
- § 6:105 Omission of child provided for by transfer outside of testamentary instrument
- § 6:106 Disposition of estate to parent of omitted child

2. Lapse Provisions

- § 6:107 Devise lapses if devisee predeceases testator
- § 6:108 Requirement that beneficiary survive decedent by specified period

- § 6:109 Devise not to lapse on death of beneficiary before death of testator
- § 6:110 Lapsed devise to become part of residuary estate
- § 6:111 Residuary devises not to lapse with beneficiary's estate to receive devise
- § 6:112 Devise of lapsed or void devises
- § 6:113 Devise to beneficiary's issue if beneficiary predeceases testator
- § 6:114 Devise to issue of decedent's child's if child predeceases decedent
- § 6:115 Devise to child's surviving spouse and children and decedent's surviving spouse if child predeceases decedent

3. Simultaneous Death Provisions

- § 6:116 Presumption in event of simultaneous death
- § 6:117 Presumption in event of simultaneous death of spouses
- § 6:118 Simultaneous death—Testator and spouse; testator and beneficiary other than spouse

4. No-Contest Provisions

- § 6:119 No-contest clause for will
- § 6:120 No-contest clause for trust
- § 6:121 No-contest clause broadly defining contest
- § 6:122 Forfeiture of contestant's share and distribution
- § 6:123 Forfeiture of contestant's share and distribution to residuary beneficiaries
- § 6:124 Forfeiture of contestant's share and distribution to noncontestants
- § 6:125 Debt deemed paid if will not contested

E. POWERS OF APPOINTMENT

- § 6:126 Creation of general power of appointment for spouse
- § 6:127 Creation of special power of appointment
- § 6:128 Special power of trustee to invade principal limited by ascertainable standard
- § 6:129 Declaration of intent to exercise powers of appointment
- § 6:130 Exercise of power of appointment
- § 6:131 Exercise of power of appointment and declaration that wishes of donor have been considered
- § 6:132 Exercise of power of appointment by surviving spouse to extent necessary to pay additional estate tax
- § 6:133 Declaration of intent not to exercise power of appointment

F. DISCLAIMERS

- § 6:134 Disclaimer of devise in will

TABLE OF CONTENTS

§ 6:135 Renunciation of devise in favor of other family members

§ 6:136 Qualified disclaimer by beneficiary

Bibliography

CHAPTER 7. GIFTS

I. GIFTS GENERALLY

A. LEGAL PRINCIPLES

1. Introduction

§ 7:1 Definitions and distinctions

§ 7:2 Types of gifts

§ 7:3 Role of gifts in estate planning

2. Form Drafting Principles

§ 7:4 In general

§ 7:5 Acceptance and disclaimer

3. Tax Aspects

§ 7:6 Gift tax

§ 7:7 Reducing tax liability through exclusions, deductions, and split gifts

4. Checklists

§ 7:8 Matters to consider in drafting instrument evidencing gift

§ 7:9 Matters to consider in drafting instrument accepting or disclaiming gift

B. FORMS

1. Inter Vivos Gifts

§ 7:10 Declaration of gift

§ 7:11 Declaration provision for conditional gift of money

§ 7:12 Declaration provision reserving income from gift in donor

§ 7:13 Gift of stock interest in business to family member

§ 7:14 Gift of medical or tuition expenses

§ 7:15 Grant deed making gift of real property

§ 7:16 Deed of gift of life estate to spouse

§ 7:17 Deed of gift confirming prior oral gift of real property

§ 7:18 Instrument confirming prior oral gift of personal property

§ 7:19 Acceptance of gift

§ 7:20 Disclaimer of gift

2. Gifts in View of Impending Death

- § 7:21 Declaration of gift in view of impending death
- § 7:22 Donee's acceptance of gift in view of impending death and promise to redeliver on donor's recovery
- § 7:23 Donor's demand for return of gift made in view of impending death

3. Related Instruments

- § 7:24 Declaration of advancement by donor
- § 7:25 Declaration of advancement by donee
- § 7:26 Agreement creating advancement
- § 7:27 Consent of spouse to gift
- § 7:28 Statement of revocation of spousal consent to splitting gifts

II. CHARITABLE GIFTS

A. LEGAL PRINCIPLES

- § 7:29 Introduction and tax aspects
- § 7:30 Grants for international activities
- § 7:31 Form drafting principles

B. CHECKLISTS

- § 7:32 Matters to consider in drafting instrument pertaining to charitable gift
- § 7:33 Matters to consider in drafting instrument evidencing subscription

C. FORMS

- § 7:34 Unrestricted charitable contribution of cash
- § 7:35 Restricted endowment to charitable organization
- § 7:36 Gift of works of art
- § 7:37 Gift of books—To library
- § 7:38 Subscription to university
- § 7:39 Gift of oral memoir to college or university
- § 7:40 Letter of understanding—Gift to university to establish scholarship fund
- § 7:41 Religious institution pledge card
- § 7:42 Corporate resolution authorizing charitable contribution
- § 7:43 Acknowledgment of receipt of pledged gift by charitable or educational institution

III. GIFT TO MINORS

A. LEGAL PRINCIPLES

- § 7:44 California Uniform Transfers to Minors Act

TABLE OF CONTENTS

- § 7:45 Form drafting principles
- § 7:46 Tax aspects

B. CHECKLISTS

- § 7:47 Matters to consider when making transfer under California Uniform Transfers to Minors Act

C. FORMS

- § 7:48 Nomination of custodian
- § 7:49 Transfer of certificated or uncertificated securities or tangible personal property not subject to title certification to custodian for minor
- § 7:50 Custodian's resignation and designation of successor
- § 7:51 Acceptance of custodianship by designated successor
- § 7:52 Transferor-custodian's declaration of election that court order be required for payment to or expenditure for minor

IV. ANATOMICAL GIFTS

A. LEGAL PRINCIPLES

- § 7:53 Uniform Anatomical Gift Act
- § 7:54 Form drafting principles for making anatomical gifts
- § 7:55 Drafting forms amending, revoking, or refusing to make anatomical gifts

B. CHECKLISTS

- § 7:56 Matters to consider in making anatomical gifts
- § 7:57 Matters to consider in amending, revoking, objecting to, or refusing to make anatomical gifts

C. FORMS

- § 7:58 Donor card
- § 7:59 Gift under Uniform Anatomical Gift Act
- § 7:60 Amendment of gift under Uniform Anatomical Gift Act—Anatomical gift provision—Discontinuation of life support systems
- § 7:61 General anatomical gift form
- § 7:62 Anatomical gift to relative only
- § 7:63 Pledge of eyes after death
- § 7:64 Anatomical gift by authorized person
- § 7:65 Notice of objection to anatomical gift
- § 7:66 Revocation of prior anatomical gift
- § 7:67 Refusal to make anatomical gift

Bibliography

CHAPTER 8. DURABLE POWERS OF ATTORNEY

I. OVERVIEW OF DURABLE POWERS OF ATTORNEY

- § 8:1 Power of attorney defined
- § 8:2 Durable versus nondurable powers of attorney
- § 8:3 Attorney-in-fact; principal
- § 8:4 Governing California law
- § 8:5 Application of Power of Attorney Law
- § 8:6 Principal's power to limit application of statutes
- § 8:7 Special power of attorney
- § 8:8 Ethical considerations

II. DURABLE POWER OF ATTORNEY FOR ASSET MANAGEMENT

A. LEGAL PRINCIPLES

1. Introduction

- § 8:9 Purpose; alternatives to durable powers of attorney for asset management
- § 8:10 Creating power of attorney
- § 8:11 Required statement

2. Selection of Agent

- § 8:12 Persons qualified to act as agent
- § 8:13 Choice of agent
- § 8:14 Authority to designate successor agents
- § 8:15 Delegation of authority by agent
- § 8:16 Agent's accountability to conservator
- § 8:17 Appointing multiple agents
- § 8:18 Selecting nonresident agent
- § 8:19 Agent's duty to act
- § 8:20 Resignation of agent

3. Duties, Standard of Care, and Authority of Agent

- § 8:21 Agent's standard of care; liability for loss; duties
- § 8:22 Authority of attorney-in-fact
- § 8:23 Protecting principal from sale of residence or admission to nursing home
- § 8:24 Authority to make gifts; tax aspects
- § 8:25 Compensation of agent
- § 8:26 Bond
- § 8:27 Limiting agent's liability

TABLE OF CONTENTS

4. Immediate Power of Attorney Versus Springing Power of Attorney

- § 8:28 Immediate power of attorney
- § 8:29 Springing power of attorney
- § 8:30 Termination of springing power of attorney

5. Form Drafting Principles

- § 8:31 General requirements for power of attorney for asset management
- § 8:32 California statutory form power of attorney
- § 8:33 Capacity of principal
- § 8:34 Limiting power to petition court
- § 8:35 Acceptance by agent
- § 8:36 Executing documents as agent

6. Termination of Durable Power of Attorney

- § 8:37 Modification or revocation
- § 8:38 Termination
- § 8:39 Expiration of agent's term or extinction of subject matter of instrument
- § 8:40 Resignation of agent
- § 8:41 Incapacity or death of agent
- § 8:42 Dissolution or annulment of marriage when agent is principal's spouse
- § 8:43 Death of principal
- § 8:44 Revocation of agent's authority by court-appointed fiduciary
- § 8:45 Duties of terminated agent
- § 8:46 Protection for agents acting without notice of termination; agent's affidavit

7. Utilizing Durable Power of Attorney for Asset Management

- § 8:47 Relations with third persons
- § 8:48 Protection for third persons
- § 8:49 Financial institutions
- § 8:50 Title companies
- § 8:51 Timely recording of power of attorney
- § 8:52 Stock transfer agent
- § 8:53 Photocopies
- § 8:54 Lost power of attorney document

B. CHECKLIST

- § 8:55 Matters to consider in drafting durable power of attorney for asset management

C. FORMS

1. Durable Power of Attorney for Asset Management

a. Complete Forms

- § 8:56 Uniform statutory form power of attorney
- § 8:57 Attorney-drafted durable power of attorney for asset management
- § 8:58 Durable power of attorney—By member of armed forces
- § 8:59 Durable power of attorney—Military general power of attorney
- § 8:60 Durable power of attorney—Military special power of attorney
- § 8:61 Durable power of attorney—Military special power of attorney—To care for children (in loco parentis)

b. Alternative Attorney-Drafted Provision

- § 8:62 Springing durable power of attorney for asset management

2. Personal Care Power of Attorney

- § 8:63 Complete form

III. DURABLE POWER OF ATTORNEY FOR HEALTH CARE

A. LEGAL PRINCIPLES

1. Introduction

- § 8:64 Purpose and scope of Health Care Decisions Law
- § 8:65 Definitions; types of powers of attorney for health care
- § 8:66 Advantages and disadvantages
- § 8:67 Alternatives to power of attorney for health care
- § 8:68 Medical-release forms
- § 8:69 Medical-release forms—Authorization—Form and contents

2. Statutory Provisions

- § 8:70 General requirements; legal sufficiency of power of attorney for health care
- § 8:71 Limiting application of Health Care Decisions Law
- § 8:72 Capacity of principal
- § 8:73 Selection of agent; compensation
- § 8:74 Limiting power to petition court
- § 8:75 Statutory form
- § 8:76 Pre-printed forms

TABLE OF CONTENTS

- § 8:77 Execution requirements
 - § 8:78 General witness requirements
 - § 8:79 Special witness requirements for patients in skilled nursing facilities
 - § 8:80 Registration of power of attorney for health care
 - 3. Authority of Agent Under Durable Power of Attorney for Health Care
 - § 8:81 Agent's authority to act in general
 - § 8:82 Statutory limitations on agent's authority
 - § 8:83 Health care privacy laws
 - § 8:84 Withholding or withdrawing medical treatment
 - § 8:85 Authority regarding postmortem decisions
 - § 8:86 Liability of agent
 - § 8:87 Revocation of agent designation or power of attorney
 - § 8:88 Resignation of agent
 - 4. Use And Effect of Durable Power of Attorney for Health Care
 - § 8:89 Priority between conservator of person and agent
 - § 8:90 Duties of health care providers and institutions
 - § 8:91 Liability of health care providers and institutions
 - § 8:92 Acceptance by third parties
- B. CHECKLIST**
- § 8:93 Matters to consider in drafting durable power of attorney for health care
- C. FORMS**
- 1. Complete Forms
 - § 8:94 Statutory form advance health care directive
 - § 8:95 Attorney-drafted durable power of attorney for health care
 - With authorization to talk with health care personnel and receive information
 - § 8:96 Written advance health care directive registration form [SFL-461]
 - § 8:98 Petition for appointment of probate conservator [Judicial Council Form GC-310]
 - § 8:99 Attachment requesting special orders regarding dementia [Judicial Council Form GC-313]
 - § 8:100 Authorization to release medical information—To health care provider
 - § 8:101 Authorization for use and disclosure of protected health information under HIPAA

2. Alternative and Optional Attorney-Drafted Provisions

- § 8:102 Alzheimer's disease or other forms of dementia
- § 8:103 Agent's authority to act if provider fails to honor principal's wishes
- § 8:104 Negative designation of agent
- § 8:105 Medical directive based on religious beliefs
- § 8:106 Agent's acceptance and consent to act

Bibliography

Volume 2

CHAPTER 9. FAMILY BUSINESS ESTATE PLANNING

I. PLANNING FOR EXISTING BUSINESS ENTITIES

A. GENERAL CONSIDERATIONS

- § 9:1 Objectives of estate planning for family businesses
- § 9:2 Review of pertinent documentation and facts

B. TYPES OF BUSINESS ENTITIES FREQUENTLY ENCOUNTERED

- § 9:3 Sole proprietorships
- § 9:4 General partnerships
- § 9:5 Limited partnerships
- § 9:6 Limited liability companies (LLCs)
- § 9:7 Corporations
- § 9:8 S corporations
- § 9:9 Personal service entities

C. USE OF LIFETIME GIFTING PROGRAM

1. Nontax Considerations

- § 9:10 Effect of present transfer of control
- § 9:11 Disposition of managing interests to qualified family members
- § 9:12 Disposition of equity interests to key employees
- § 9:13 Use of buy-sell arrangements
- § 9:14 Acquisition of life insurance as funding mechanism

2. Gift Tax Considerations

a. Overview of Gift Tax Rules

- § 9:15 Taxable transfers

TABLE OF CONTENTS

| | |
|---|--|
| § 9:16 | Necessity for completed transfer |
| § 9:17 | Effect of receipt of consideration |
| § 9:18 | Part gift/part sale transaction |
| § 9:19 | Annual exclusion from gift tax |
| § 9:20 | Application of annual exclusion to present interests |
| § 9:21 | Marital deduction |
| § 9:22 | Charitable deduction |
| § 9:23 | Transfers of split interests to charity |
| § 9:24 | Computation of gift tax |
| b. Valuation of Gifted Property | |
| § 9:25 | Willing buyer, willing seller standard |
| § 9:26 | Overview of Chapter 14 valuation rules [26 U.S.C.A. §§ 2701 to 2704] |
| c. Special Valuation of Interest in Corporation or Partnership Under 26 U.S.C.A. § 2701 | |
| § 9:27 | General application of 26 U.S.C.A. § 2701 |
| § 9:28 | Valuation methodology |
| § 9:29 | Illustration of valuation |
| § 9:30 | Turning a sale into a gift |
| § 9:31 | Compounding rule |
| § 9:32 | Impact on structuring business entity |
| § 9:33 | Application to transfers to other than family members |
| § 9:34 | Impact of extraordinary payment rights on valuations |
| § 9:35 | Application to routine business transactions |
| d. Effect of Options, Buy-Sell Agreements, and Rights of First Refusal on Value Under 26 U.S.C.A. § 2703 | |
| § 9:36 | In general |
| § 9:37 | Impact on planning for existing buy-sell arrangements |
| § 9:38 | Impact on planning for new buy-sell arrangements |
| § 9:39 | Possible application to lease situations |
| § 9:40 | Effect of options, buy-sell agreements, and rights of first refusal if 26 U.S.C.A. § 2703 does not apply |
| e. Impact of Certain Lapsing Rights and Restrictions on Value Under 26 U.S.C.A. § 2704 | |
| § 9:41 | In general |
| § 9:42 | Effect of lapsing voting or liquidation rights [26 U.S.C.A. § 2704(a)] |
| § 9:43 | Voting rights not subject to lapse rule |
| § 9:44 | Impact on valuation discounts for partnerships and LLCs [26 U.S.C.A. § 2704(a)] |

- § 9:45 Effect of substantial restrictions [26 U.S.C.A. § 2704(b)]
 - § 9:46 Impact on valuation discounts for partnerships and LLCs [26 U.S.C.A. § 2704(b)]
 - § 9:47 Effective dates for application of rule
 - f. Valuation of Business Interests When Chapter 14 Does Not Apply
 - § 9:48 Valuation of publicly traded business interests
 - § 9:49 Valuation of closely-held business interests
 - g. Application of Discounts and Premiums
 - § 9:50 Blockage discount and control premium
 - § 9:51 Discount to reflect SEC registration costs
 - § 9:52 Toxic waste discount
 - § 9:53 Minority interest discount
 - § 9:54 Swing vote premium
 - § 9:55 Lack of marketability discount
 - § 9:56 Discount for fractional interests in real property
 - § 9:57 Effect of nature of interest on application of discount or premium
- 3. Other Tax Considerations**
- § 9:58 Impact of lifetime gifts on availability of certain estate tax benefits

D. ESTATE TAX PLANNING

1. Estate Tax Rules

a. Introduction

- § 9:59 Determination of estate tax

b. Assets Included in Gross Estate

- § 9:60 General rule
- § 9:61 Lifetime transfers included in estate [26 U.S.C.A. §§ 2036, 2037, and 2038]
- § 9:62 Transfers with retained use and enjoyment by decedent [26 U.S.C.A. § 2036(a)(1)]
- § 9:63 Retained right to income
- § 9:64 Retained right to vote transferred stock [26 U.S.C.A. § 2036(b)]
- § 9:65 Transfers with retained power to affect enjoyment of transferred property by others [26 USCA §§ 2036(a)(2), 2038]
- § 9:66 Retained power to designate who possesses or enjoys property [26 U.S.C.A. § 2036(a)(2)]
- § 9:67 Retained power to revoke or change disposition [26 U.S.C.A. § 2038]

TABLE OF CONTENTS

- § 9:68 Retained administrative powers
- § 9:69 Retained powers held in fiduciary capacity
- § 9:70 Life insurance on decedent's life, in general [26 U.S.C.A. § 2042]
- § 9:71 Life insurance owned by corporation
- § 9:72 Income tax consequences of transfer of life insurance policy for full and adequate consideration [26 U.S.C.A. § 101(a)]
- § 9:73 Life insurance owned by partnership
- § 9:74 Transfers made within 3 years of death [26 U.S.C.A. § 2035]
- § 9:75 Decedent's interest in qualified retirement plan or IRA [26 U.S.C.A. § 2039]
- § 9:76 Community property interest in retirement benefits
- § 9:77 Beneficiary designations of community property interests in plan or IRA [Prob C §§ 5000 et seq.]

c. Valuation of Assets Included in Gross Estate

- § 9:78 In general
- § 9:79 Special use valuation for real property used in operation of farm or business [26 U.S.C.A. § 2032A]
- § 9:80 Requirements for electing special use valuation
- § 9:81 Definition of applicable terms
- § 9:82 Requirement that property is acquired by or passes to qualified heir
- § 9:83 Material participation requirement
- § 9:84 Active management test [26 U.S.C.A. § 2032A(c)(7)(E) and 26 U.S.C.A. § 2032A(b)(5)(A)]
- § 9:85 Valuation of farms [26 U.S.C.A. § 2032A(e)(7)]
- § 9:86 Five factor method for valuation of other property [26 U.S.C.A. § 2032A(e)(8)]
- § 9:87 Availability of minority interest discount
- § 9:88 Election of special use valuation
- § 9:89 Defective election [26 U.S.C.A. § 2032A(d)(3)]
- § 9:90 Protective election [26 C.F.R. § 20.2032A-8(b)]
- § 9:91 Recapture agreement [26 U.S.C.A. § 2032A(a)(1)(B) and 26 U.S.C.A. § 2032A(d)(2)]
- § 9:92 Exposure of less than all qualified real property to recapture tax
- § 9:93 Recapture tax, liability and bond [26 U.S.C.A. § 2032A(c) and 26 U.S.C.A. § 2032A(e)(11)]

d. Allowable Deductions From Gross Estate

- § 9:94 In general
- § 9:95 Deduction for qualified family-owned business interests (QFOBI deduction) [26 U.S.C.A. § 2057]
- § 9:96 Definition of applicable terms

CALIFORNIA TRANSACTIONS FORMS ESTATE PLANNING

- § 9:97 Qualifying requirements for QFOBI deduction
- § 9:98 Requirement that QFOBI pass to qualified heir
- § 9:99 Material participation requirement
- § 9:100 Portion of QFOBI which qualifies for deduction
- § 9:101 Determination of amount of QFOBI deduction
- § 9:102 Maximum QFOBI deduction [26 U.S.C.A. § 2057(a)(2)]
- § 9:103 Election to take QFOBI deduction
- § 9:104 Defective election and protective election [26 U.S.C.A. § 2057(i)(3)(H)]
- § 9:105 Recapture agreement [26 U.S.C.A. § 2057(h)]
- § 9:106 Limitation of exposure to recapture tax
- § 9:107 Recapture tax, liability and bond [26 U.S.C.A. § 2057(f) and 26 U.S.C.A. § 2057(i)(3)(F)]
- § 9:108 Transfers not triggering recapture [26 U.S.C.A. § 2057(i)(3)(O)]
- § 9:109 Tax lien [26 U.S.C.A. § 2057(i)(3)(P)]

e. Special Mechanisms for Payment of Estate Tax

- § 9:110 Corporate redemption to pay tax [26 U.S.C.A. § 303]
- § 9:111 Deferral of estate tax attributable to business or farm [26 U.S.C.A. § 6166]
- § 9:112 Interest in closely held business qualifying for deferral
- § 9:113 Mechanics of deferral
- § 9:114 Election to claim deferral
- § 9:115 Protective election
- § 9:116 Rate of interest on deferred payments
- § 9:117 Acceleration of deferred payments due to disposition of business interest
- § 9:118 Acceleration of deferred payments due to late payment of tax or interest
- § 9:119 Application to generation-skipping transfer tax

2. Special Issues Involving Ownership of S Corporation Stock

a. Limitations on Ownership of S Corporation Stock Following Death of Shareholder

- § 9:120 Retention of S corporation stock in estate during period of administration
- § 9:121 Retention of S corporation stock in nonqualifying trust following grantor's death
- § 9:122 Income taxation of estates and complex trusts under Subchapter J
- § 9:123 Other limitations with respect to S corporation shareholders

TABLE OF CONTENTS

b. Limitations on Types of Trusts Permitted to Hold S Corporation Stock

- § 9:124 Trusts permitted to hold S corporation stock
- § 9:125 Grantor trusts
- § 9:126 Application of grantor trust exception to Crummey trusts
- § 9:127 Qualified Subchapter S Trusts (QSSTs)
- § 9:128 Determination of required income distributions
- § 9:129 Effect of provisions for accumulation of income
- § 9:130 Requirement of one income beneficiary
- § 9:131 Application of QSST provisions to QTIP trusts
- § 9:132 QSST election
- § 9:133 Income taxation of QSST beneficiary
- § 9:134 Electing small business trusts (ESBTs)
- § 9:135 Determining persons who are shareholders of the S corporation
- § 9:136 ESBT election
- § 9:137 Income taxation of ESBT
- § 9:138 Advantages of QSST over ESBT
- § 9:139 Waiver of inadvertent termination of S status

3. Special Issues Involving Marital Deduction and Credit Shelter Trusts

- § 9:140 Preservation of tax-favored provisions in both estates
- § 9:141 Preservation of tax-favored provisions at time estate plan is being prepared
- § 9:142 Preservation of tax-favored provisions following death of deceased spouse
- § 9:143 Impact of funding marital deduction trust with fractional interest in business entity

4. Special Issues Involving Income in Respect of Decedent (IRD)

a. Understanding IRD

- § 9:144 Definition of IRD
- § 9:145 Examples of IRD
- § 9:146 Income taxation of IRD
- § 9:147 Income tax deduction for estate tax paid on IRD [26 U.S.C.A. § 691(c)]
- § 9:148 Impact on deduction of difference between amount of IRD reported and IRD collected
- § 9:149 Use of IRD to fund pecuniary bequests
- § 9:150 Use of fractional share formula as an alternative

b. Potential Problems Involving IRD

- § 9:151 IRD is principal for trust accounting purposes

- § 9:152 Partner's death terminates partnership taxable year
- § 9:153 S corporation shareholder's death terminates S corporation taxable year
- § 9:154 Basis adjustments to partnership interests and S corporation stock

5. Special Issues Involving Qualified Plan and IRA Benefits

- § 9:155 Types of benefits covered
- § 9:156 Required distributions of benefits
- § 9:157 Selecting a designated beneficiary
- § 9:158 Consequences of participant's death prior to required beginning date
- § 9:159 Participant's spouse as designated beneficiary
- § 9:160 Potential estate tax problems with designation of participant's spouse as beneficiary where plan or IRA is major asset of estate
- § 9:161 Potential estate tax problems resulting from designation of participant's spouse as beneficiary where nonparticipant spouse is first spouse to die
- § 9:162 Disclaimer by nonparticipant spouse of fractional share of plan or IRA benefits
- § 9:163 Property agreement to transmute community property to separate property
- § 9:164 Property agreement to permit non pro rata division of community property
- § 9:165 Revocable family trust as designated beneficiary
- § 9:166 Potential problem when designating revocable trust as beneficiary
- § 9:167 Minimum distribution determination where trust is designated beneficiary
- § 9:168 Information which must be provided by trustee of trust following death of participant
- § 9:169 Correcting tax consequences of distribution to estate following participant's death
- § 9:170 Spousal roll-over of distributions from revocable trust following participant's death
- § 9:171 Irrevocable trust as designated beneficiary

II. CREATION OF NEW ENTITIES OR VEHICLES AS PART OF PLANNING PROCESS

A. CREATIVE USE OF FAMILY LIMITED PARTNERSHIPS (FLPS) AND LIMITED LIABILITY COMPANIES (LLCS)

- § 9:172 Advantages of creation of FLP or LLC
- § 9:173 Disadvantages of creation of FLP or LLC

TABLE OF CONTENTS

§ 9:174 Most frequently encountered challenges to planning

B. CREATIVE USE OF S CORPORATIONS

§ 9:175 Use of S corporation as opposed to FLP or LLC

§ 9:176 Creation of S corporation by non-grantor trust

§ 9:177 Benefits to non-grantor trust and its beneficiaries

§ 9:178 Transfer of passive investments to S corporation

C. CREATIVE USE OF ESOPS

§ 9:179 Use of ESOP as vehicle to meet estate planning objectives

§ 9:180 Overview of operation of ESOP

§ 9:181 Tax advantages with respect to sale of client's interest in business to ESOP [26 U.S.C.A. § 1042]

§ 9:182 Prerequisites for application of 26 U.S.C.A. § 1042

§ 9:183 Qualified replacement property and qualified replacement period

§ 9:184 Basis and holding period of qualified replacement property

§ 9:185 Advantages of sale of stock to leveraged ESOP

§ 9:186 Disadvantages of sale of stock to leveraged ESOP

III. CHECKLIST

§ 9:187 Documents to obtain from client

IV. FORMS

A. TRUST FORMS

1. Complete Forms

§ 9:188 Irrevocable trust as designated beneficiary

2. Optional Provisions For Revocable Trust

§ 9:189 Trust provision restricting ownership of shares of professional corporation

§ 9:190 QFOBI provisions

§ 9:191 Provisions of QSST

§ 9:192 IRS Form SS-4—Application for employer identification number

B. OTHER FORMS

§ 9:193 Limited partnership agreement for use in family planning context

§ 9:194 Property agreement for aggregate theory of community property

§ 9:195 Affidavit regarding material participation in farming activities

- § 9:196 Family partnership—Husband and wife
- § 9:197 Agreement to create business trust
- § 9:198 Agreement and declaration of business trust—Real estate—Massachusetts nominee realty trust—Trustees to act only as directed by beneficiaries

Bibliography

CHAPTER 10. NONPROBATE TRANSFERS OF PROPERTY

I. GENERAL CONSIDERATIONS

A. LEGAL PRINCIPLES

1. Forms of Property Ownership

- § 10:1 Overview
- § 10:2 Importance of determining character of property
- § 10:3 Separate property
- § 10:4 Community property
- § 10:5 Quasi-community property
- § 10:6 Tenancy in common
- § 10:7 Joint tenancy

2. Tax Considerations of Property Ownership

- § 10:8 Overview
- § 10:9 Separate property
- § 10:10 Community property
- § 10:11 Quasi-community property
- § 10:12 Tenancy in common
- § 10:13 Joint tenancy

3. Transmuting Joint Tenancy Property or Separate Property to Community Property

- § 10:14 Formalities required
- § 10:15 Property tax considerations
- § 10:16 Dual representation by attorney

4. Nonprobate Transfers

- § 10:17 Property that may pass without probate
- § 10:18 Property passing to spouse
- § 10:19 Joint tenancy property
- § 10:20 Deed transfers on death
- § 10:21 Contract rights
- § 10:22 Life insurance generally
- § 10:23 Tax aspects of life insurance
- § 10:24 Third party or irrevocable trust as owner of life insurance policy

TABLE OF CONTENTS

- § 10:25 Reciprocal trust doctrine
- § 10:26 Annuities
- § 10:27 Employee benefits
- § 10:28 Retirement benefits
- § 10:29 Differences between qualified retirement plans and IRAs
- § 10:30 Taxation of plans and IRAs
- § 10:31 Designated beneficiary of retirement plan
- § 10:32 Recalculation or nonrecalculation election
- § 10:33 Naming beneficiary of retirement plan
- § 10:34 Trust
- § 10:35 Multiple party accounts
- § 10:36 U.S. savings bonds
- § 10:37 Securities in transfers on death (“TOD”) title
- § 10:38 Vehicles and vessels registered in beneficiary form
- § 10:39 Form drafting principles for beneficiary designations

B. CHECKLISTS

- § 10:40 Steps to take regarding conflict of interest in representation
- § 10:41 Matters to discuss with client regarding characterization of property
- § 10:42 Matters to consider regarding passage of title
- § 10:43 Tax considerations
- § 10:44 Beneficiary designation
- § 10:45 Matters to include in community property agreement

II. FORMS

A. TRANSMUTATION OF PROPERTY

- § 10:46 Property characterization agreement
- § 10:47 Attorney certification
- § 10:48 Grant deed transmuting joint tenancy real property to community property
- § 10:49 Simple revocable transfer on death (TOD) deed
- § 10:50 Revocation of revocable transfer on death (TOD) deed

B. LIFE INSURANCE

- § 10:51 Trust provision depriving surviving spouse of incidents of ownership over life insurance

C. RETIREMENT PLANS

- § 10:52 Will provision regarding retirement plan
- § 10:53 IRA beneficiary designation for distribution outright to beneficiary

- § 10:54 IRA beneficiary designation for QTIP trust
- § 10:55 Living trust provisions for QTIPPING an IRA or retirement plan

D. LANGUAGE ESTABLISHING MULTIPLE PARTY ACCOUNTS

- § 10:56 Joint account
- § 10:57 POD account with single party
- § 10:58 POD account with multiple parties
- § 10:59 Joint account of husband and wife with right of survivorship
- § 10:60 Community property account of husband and wife
- § 10:61 Tenancy in common account

Bibliography

CHAPTER 11. CONTRACTUAL AGREEMENTS RELATING TO PROPERTY DISPOSITION

I. LEGAL PRINCIPLES

A. CONTRACTS CONTROLLING PROPERTY DISPOSITION

1. In General

- § 11:1 Overview
- § 11:2 Formalities for establishing contract concerning will or devise made on or after January 1, 1985
- § 11:3 Formalities for establishing contract concerning will or devise made before January 1, 1985
- § 11:4 Contract as distinct from will itself
- § 11:5 Common types of will contracts
- § 11:6 Effect of oral contracts and equitable estoppel
- § 11:7 Drawbacks to will contracts and malpractice avoidance
- § 11:8 Enforcement of will contracts
- § 11:9 Application to trusts

2. Contracts to Leave Property to Survivor by Will

- § 11:10 Joint wills
- § 11:11 Mutual or reciprocal wills
- § 11:12 Joint and mutual wills
- § 11:13 Use of contract in connection with joint or mutual will
- § 11:14 Rights and limitations of parties to will contract

TABLE OF CONTENTS

- § 11:15 Reasons to avoid use of joint and mutual wills
- § 11:16 Alternative estate planning devices to joint and mutual wills supported by will contract
- 3. Contracts to Leave Property to Survivor and Survivor to Leave to Third Party
- § 11:17 In general
- § 11:18 Rights of surviving testator
- § 11:19 Modification of testamentary plan by surviving testator
- § 11:20 Enforcement of contract by third party during testator's lifetime
- § 11:21 Enforcement of contract by third party beneficiaries on surviving testator's death
- § 11:22 Limitations on discovery of will during testator's lifetime
- 4. Contract to Bequeath Estate Property in Exchange for Services
- § 11:23 Validity of contracts to bequeath property in exchange for services
- § 11:24 Limitations of service contracts
- § 11:25 Enforcement of service contracts; options
- § 11:26 Income tax consequences of service contracts
- § 11:27 Alternatives to service contracts
- § 11:28 Estate planning considerations where service contract may be at issue
- B. TRANSMUTATION AGREEMENTS**
- 1. Overview
- § 11:29 In general
- 2. Uses of Transmutation Agreements in Estate Planning
- § 11:30 To increase surviving spouse's basis in appreciated property
- § 11:31 To preserve tax deductible loss
- § 11:32 To equalize spouses' estates and avoid disparity in incremental federal tax rates
- § 11:33 To fractionalize interests in order to achieve valuation discounts
- 3. Creating a Valid Transmutation Agreement
- § 11:34 Agreement entered into before January 1, 1985
- § 11:35 Agreement entered into on or after January 1, 1985

- § 11:36 Family Code § 852 transmutations and rules governing fiduciary relationships

C. MARITAL AGREEMENTS

1. Premarital Agreements

a. In General

- § 11:37 Introduction
- § 11:38 Uses in estate planning
- § 11:39 General considerations
- § 11:40 Premarital agreements entered into before January 1, 1986

b. Uniform Premarital Agreement Act [Fam C §§ 1600 et seq.]

- § 11:41 Formalities
- § 11:42 Scope of statutory framework
- § 11:43 Amendment or revocation after marriage
- § 11:44 Enforceability

2. Marital Settlement Agreements

- § 11:45 Introduction
- § 11:46 Reasons for entering into agreement
- § 11:47 Formalities
- § 11:48 Governing contractual provisions [CC §§ 1550 et seq., Fam C § 721(b)]

D. SPOUSAL WAIVERS

- § 11:49 Introduction and definition [Prob C § 140]
- § 11:50 Rights of surviving spouse that may be waived [Prob C § 141]
- § 11:51 Requirements
- § 11:52 Enforceability under Probate Code § 143
- § 11:53 Enforceability under Probate Code § 144
- § 11:54 Revocation and amendment of waiver by agreement

II. CHECKLISTS

- § 11:55 Matters to consider in drafting will contract
- § 11:56 Disclosure of disadvantages to clients considering will contracts
- § 11:57 Alternatives to will contracts
- § 11:58 Disclosures to clients considering joint or joint and mutual wills
- § 11:59 Matters to include in transmutation agreement
- § 11:60 Matters to be included in premarital agreement

TABLE OF CONTENTS

- § 11:61 Matters to include in revocation or amendment of premarital agreement
- § 11:62 Matters to include in spousal waiver
- § 11:63 Matters to include in agreement revoking spousal waiver

III. FORMS

A. COMPLETE FORMS

- § 11:64 Disclosure letter that mutual wills do not prevent revocation or amendment of will
- § 11:65 General agreement to make will
- § 11:66 Agreement not to revoke wills
- § 11:67 Contract to make will in exchange for personal services
- § 11:68 General transmutation agreement
- § 11:69 Premarital agreement
- § 11:70 Amendment to premarital agreement
- § 11:71 Revocation of premarital agreement
- § 11:72 Cohabitation agreement
- § 11:73 Spousal waiver
- § 11:74 Revocation of spousal waiver

B. PROVISIONS

1. Transmutation Agreements

- § 11:75 Separate property of both spouses into community property of both spouses
- § 11:76 Community property of both spouses into separate property of both spouses
- § 11:77 Separate property of one spouse into separate property of other spouse
- § 11:78 Community property as to some assets and separate property as to others

2. Will Provisions

- § 11:79 Testator has not entered into contract to make or not to revoke will
- § 11:80 Testator has entered into contract to make or not to revoke will
- § 11:81 Disaffirmance of existence of personal service contract

Bibliography

CHAPTER 12. NATURE AND CLASSIFICATION OF TRUSTS

I. GENERAL CONSIDERATIONS

A. DEFINITIONS

1. Trust

- § 12:1 Restatement definition
- § 12:2 Probate Code definition
- § 12:3 Categories of trusts

2. Other Definitions

- § 12:4 Persons and entities
- § 12:5 Trust instrument

B. GOVERNING LAW

- § 12:6 California Trust Law
- § 12:7 Uniform laws
- § 12:8 Determining applicable law

C. CREATION OF TRUST

- § 12:9 Elements of valid trust
- § 12:10 Trust intention
- § 12:11 Trust property
- § 12:12 Trust purpose
- § 12:13 Beneficiary
- § 12:14 Methods of creation
- § 12:15 Compliance with statute of frauds
- § 12:16 Effect of merger doctrine

D. TRUSTEES

1. Appointing and Removing Trustee

- § 12:17 Eligible persons
- § 12:18 No named trustee
- § 12:19 Trustee's acceptance
- § 12:20 Trustee rejection
- § 12:21 Trustee's resignation
- § 12:22 Trustee's removal

2. Duties

a. General Duties

- § 12:23 Duty to follow instrument
- § 12:24 Duty to supervise cotrustee

TABLE OF CONTENTS

- § 12:25 Duty of loyalty
- § 12:26 Duty to notify
- § 12:27 Duty to report
- § 12:28 Duty to account
- § 12:29 Duty to preserve and manage trust property
- § 12:30 Duty to perform acts personally

b. Duty to Invest Trust's Assets

- § 12:31 Compliance with prudent investor rule
- § 12:32 Effect of terms in trust instrument
- § 12:33 Delegating duties
- § 12:34 Costs of investing

c. To Whom Duties are Owed

- § 12:35 Generally
- § 12:36 Person holding revocation rights

3. Powers

- § 12:37 Sources of power
- § 12:38 Sharing power with cotrustee
- § 12:39 Delegation of power to agent
- § 12:40 Power to pay expenses and claims
- § 12:41 Power to make and obtain loans
- § 12:42 Power to prosecute or defend action
- § 12:43 Power to hold and distribute property
- § 12:44 Power to deposit funds
- § 12:45 Power to act as shareholder
- § 12:46 Discretionary powers

4. Compensation

- § 12:47 Determination by instrument or court
- § 12:48 Procedure for increasing trustee's fee
- § 12:49 Attorney trustee
- § 12:50 Indemnification

E. PROTECTIVE TRUSTS

1. Types

- § 12:51 Spendthrift trust
- § 12:52 Trust for support
- § 12:53 Discretionary trust

2. Limitations

- § 12:54 Settlor not eligible for protective trusts
- § 12:55 Claims for child or spousal support
- § 12:56 Liability for public support
- § 12:57 Restitution judgments

- § 12:58 General claims of creditors
- § 12:59 Surplus income

F. ALLOCATION OF PRINCIPAL AND INCOME

1. Governing Law

- § 12:60 Development and applicability of UPAIA
- § 12:61 Purposes of UPAIA
- § 12:62 Definitions
- § 12:63 Trust income for federal tax purposes

2. Trustee's Duties Under UPAIA

- § 12:64 General fiduciary duties
- § 12:65 Power to adjust
- § 12:66 Notice of proposed action

3. Allocation at Beginning and End of Income Interest

- § 12:67 Determining beginning and end date
- § 12:68 Allocation at beginning
- § 12:69 Allocation at end
- § 12:70 Allocation of principal and income between specifically given property and remainder gifts

4. Allocation of Receipts During Trust Administration

a. Receipts From Entities

- § 12:71 Receipts from corporations or other entities
- § 12:72 Distributions from trusts or estates
- § 12:73 Cash receipts from business activities

b. Receipts Not Normally Apportioned

- § 12:74 Principal receipts
- § 12:75 Rental property
- § 12:76 Obligation to pay money
- § 12:77 Proceeds from insurance policies and similar contracts

c. Receipts Normally Apportioned

- § 12:78 Deferred compensation, annuities, and liquidating assets
- § 12:79 Receipts from interests in natural resources
- § 12:80 Receipts from transactions in derivatives, exercise of options, or payments from asset-backed securities

5. Allocation of Disbursements During Trust Administration

- § 12:81 Disbursements

TABLE OF CONTENTS

- § 12:82 Transfers
- § 12:83 Taxes

II. CHECKLISTS

- § 12:84 Elements essential for valid express trust
- § 12:85 Matters to consider when drafting trust instrument

III. OPTIONAL FORM PROVISIONS

A. TRUST ESTATE

- § 12:86 General description of trust estate
- § 12:87 Trust consisting of all property of settlor
- § 12:88 Reference to attached schedule
- § 12:89 Insurance trust
- § 12:90 Settlor's additions to trust
- § 12:91 Additions to trust approved by trustee
- § 12:92 Another person's additions to trust
- § 12:93 Addition of insurance policies to trust

B. DURATION, TERMINATION, AND EXTENSION OF TRUST

- § 12:94 General form of duration of trust
- § 12:95 Trust duration for fixed period
- § 12:96 Trust duration for life of beneficiary
- § 12:97 Trust duration until death of last beneficiary
- § 12:98 Trust duration for life of settlor
- § 12:99 Trust duration until happening of event
- § 12:100 Trust duration until trust purpose has been accomplished
- § 12:101 Trust duration for period allowed by law
- § 12:102 Termination of trust by beneficiaries
- § 12:103 Termination of trust by trustee
- § 12:104 Termination of trust prohibited during specified period
- § 12:105 Extension of trust by beneficiaries
- § 12:106 Extension of trust by trustee

C. APPOINTMENT, TENURE, AND SUCCESSION OF TRUSTEE

1. Appointment

- § 12:107 Appointment of individual trustee
- § 12:108 Appointment of corporate trustee
- § 12:109 Appointment of cotrustees
- § 12:110 Appointment of settlor and another as cotrustees

- § 12:111 Designation of cotrustees by named trustee
- § 12:112 Designation of managing cotrustee
- § 12:113 Trustee's acceptance of trust

2. Resignation and Removal

- § 12:114 Trustee's resignation
- § 12:115 Cotrustee's resignation
- § 12:116 Effect of resignation
- § 12:117 Removal of trustee by beneficiaries
- § 12:118 Removal of trustee by settlor
- § 12:119 Removal of corporate trustee by individual trustees

3. Succession

- § 12:120 Nontransferability of office of trustee
- § 12:121 Effect of trustee's death, resignation, or incapacity
- § 12:122 Effect of consolidation, merger or reorganization of corporate trustee
- § 12:123 Designation of successor trustee
- § 12:124 Appointment of successor trustee by settlor or beneficiaries
- § 12:125 Appointment of successor trustee by trustee
- § 12:126 Appointment of successor trustee by cotrustee
- § 12:127 Appointment of successor trustee by court
- § 12:128 Succession to independent trustees
- § 12:129 Succession following dissolution of corporate trustee
- § 12:130 Succession following removal of corporate trustee

D. COMPENSATION OF TRUSTEE

- § 12:131 Fixed sum
- § 12:132 Percentage of income
- § 12:133 Percentage of principal
- § 12:134 Percentage of income and principal
- § 12:135 Compensation fixed by court
- § 12:136 Customary and usual fees
- § 12:137 Compensation to be agreed on by settlor and trustee
- § 12:138 Limitation on compensation
- § 12:139 Waiver of compensation

E. POWERS AND DUTIES OF TRUSTEE

1. Generally

- § 12:140 General provision
- § 12:141 Discretion in exercise of powers
- § 12:142 Powers as absolute owner of property
- § 12:143 Powers not limited to those enumerated
- § 12:144 Additional powers given by settlor

TABLE OF CONTENTS

- § 12:145 Approval or directions required regarding exercise of powers
- § 12:146 Joint and several exercise of powers by cotrustees
- § 12:147 Exercise of powers by majority of cotrustees
- § 12:148 Limitation on powers
- § 12:149 Limitation on powers of trustee who is also beneficiary

2. Investments

- § 12:150 General provision
- § 12:151 Standard for investment
- § 12:152 Discretion in exercising investment power
- § 12:153 Character of investments
- § 12:154 Retention of investments
- § 12:155 Prior approval by settlor or third person
- § 12:156 Waiver of statutory restrictions on investments

3. Management of Trust

- § 12:157 General provision
- § 12:158 Maintenance, alterations, and improvements
- § 12:159 Common management of multiple trusts
- § 12:160 Insurance
- § 12:161 Operation of business
- § 12:162 Incorporation
- § 12:163 Power to partition
- § 12:164 Transactions with settlor or settlor's estate
- § 12:165 Payment of expenses
- § 12:166 Payment of taxes
- § 12:167 Custody of trust property and records in corporate cotrustee

4. Sales, Leases, and Other Transfers of Property

- § 12:168 Sales
- § 12:169 Prohibition against sales
- § 12:170 Prohibition against sales without settlor's consent
- § 12:171 Leases
- § 12:172 Options
- § 12:173 Exchanges

5. Encumbrances

- § 12:174 Creation of encumbrances
- § 12:175 Prohibition against encumbrances
- § 12:176 Payment of encumbrances
- § 12:177 Enforcement of encumbrances

6. Accounting

- § 12:178 Accounting and reports

- § 12:179 Approval as discharge of trustee
- § 12:180 Failure to object to item in account
- § 12:181 Inspection of records

7. Reimbursement

- § 12:182 General provision for reimbursement
- § 12:183 Reimbursement for expenses by settlor or beneficiaries

8. Other Powers and Duties

- § 12:184 Contracts
- § 12:185 Borrowing money
- § 12:186 Employment of others
- § 12:187 Commencement and defense of litigation
- § 12:188 Compromise and settlement of claims
- § 12:189 Right to have controversies determined by legal or other proceedings
- § 12:190 Power to loan funds to beneficiary
- § 12:191 Powers applicable to accumulation income

F. POWERS RESERVED BY SETTLOR

- § 12:192 General revocation provision
- § 12:193 Revocation by joint settlors
- § 12:194 Execution of necessary instruments following revocation
- § 12:195 Amendment
- § 12:196 Amendment concerning trustee's obligations
- § 12:197 Direction of administration
- § 12:198 Disclaimer of power to revoke or amend
- § 12:199 Disclaimer of power to use property for settlor's benefit

G. RIGHTS AND INTERESTS OF BENEFICIARY

- § 12:200 Assignment of interest
- § 12:201 Revocation of trust
- § 12:202 Amendment of trust
- § 12:203 Management of trust estate
- § 12:204 Purchase of trust property
- § 12:205 Invasion of corpus
- § 12:206 Disqualification of trustee/beneficiary from participating in discretionary decision affecting his or her beneficial interest
- § 12:207 Right of beneficiary to withdraw principal at specified periods
- § 12:208 Right of minor beneficiary to withdraw principal at certain age

TABLE OF CONTENTS

- § 12:209 General spendthrift trust provision
- § 12:210 Direct prohibition against alienation
- § 12:211 Withholding of distribution
- § 12:212 Forfeiture of beneficiary's interest and alternative distribution

H. INCOME AND PRINCIPAL

1. Allocation

- § 12:213 General provision
- § 12:214 Allocation in trustee's discretion
- § 12:215 Proceeds from disposition of property
- § 12:216 Dividends
- § 12:217 Undistributed income
- § 12:218 Administrative expenses

2. Disposition

a. Income

- § 12:219 General provision for payment of income
- § 12:220 Designation of income beneficiaries
- § 12:221 Designation of income beneficiaries by named person
- § 12:222 Payment of income to or for beneficiary
- § 12:223 Effect of incapacity of settlor on payment of income
- § 12:224 General provision for accumulation of income
- § 12:225 Accumulation of income in trustee's discretion
- § 12:226 Accumulation of income prohibited
- § 12:227 Sprinkling of income among beneficiaries
- § 12:228 Accrued or undistributed income
- § 12:229 Deduction of advances
- § 12:230 Deficiency of income
- § 12:231 Payment for support of dependent
- § 12:232 Manner of payment in trustee's discretion
- § 12:233 Payment to beneficiary directly
- § 12:234 Commencement of payment
- § 12:235 Duration of payment
- § 12:236 Power to withhold income from minor beneficiary

b. Principal

- § 12:237 Invasion of corpus
- § 12:238 Invasion of corpus if income insufficient
- § 12:239 Invasion of corpus—Circumstances listed
- § 12:240 Limitation on invasion of corpus
- § 12:241 General provision for final distribution
- § 12:242 Final distribution in trustee's discretion
- § 12:243 Final distribution under power of appointment
- § 12:244 Final distribution of proceeds of sale

- § 12:245 Effect of death of beneficiary on final distribution
- § 12:246 Effect of invalidity of trust instrument on final distribution
- § 12:247 Time of final distribution
- § 12:248 General provision for designation of beneficiaries and distributees
- § 12:249 Right to withhold distribution from unworthy beneficiary

I. OTHER PROVISIONS

- § 12:250 Governing law
- § 12:251 Severability
- § 12:252 Common disaster
- § 12:253 Purpose of trust
- § 12:254 Recordation of trust instrument
- § 12:255 Forfeiture by contesting beneficiary
- § 12:256 Limitation of trustee's liability—General form
- § 12:257 Limitation of trustee's liability—Residential real estate

Bibliography

CHAPTER 13. MODIFICATION AND TERMINATION OF TRUSTS

I. OVERVIEW

- § 13:1 The Trust Law (Prob C §§ 15000 et seq.)
- § 13:2 Testamentary capacity versus contractual capacity
- § 13:3 Deficits in mental functions
- § 13:4 Division and combination of trust
- § 13:5 Drafting principles for irrevocable trust
- § 13:6 Jurisdiction to review
- § 13:7 Ethics require identification of client

II. METHODS AND CIRCUMSTANCES OF MODIFICATION AND TERMINATION OF TRUSTS

A. GENERAL CONSIDERATIONS

- § 13:8 Revocation by settlor
- § 13:9 Revocation or modification by attorney-in-fact
- § 13:10 Revocation of trust created by more than one settlor
- § 13:11 Conservator's right to revoke
- § 13:12 Modification generally
- § 13:13 Modification by judicial action
- § 13:14 Termination by operation of law

TABLE OF CONTENTS

| | |
|--|---|
| § 13:15 | Rule against perpetuities |
| § 13:16 | Trustee's powers on termination |
| B. SPECIAL RULES FOR FAMILY LAW TRUST | |
| § 13:17 | Joinder and consent |
| § 13:18 | Revocable trust property retains community property status |
| § 13:19 | Legal effect of retention of community character |
| § 13:20 | Tax effect of retention of community character |
| § 13:21 | Transmutation |
| § 13:22 | Agent may amend or revoke |
| C. CONSENT | |
| 1. For Modification of Irrevocable Trust | |
| § 13:23 | Consent of all beneficiaries |
| § 13:24 | Court order |
| 2. Compelling Modification or Termination | |
| § 13:25 | Consent of settlor and all beneficiaries |
| § 13:26 | Consent of settlor with objection of one beneficiary |
| § 13:27 | Consent of heirs |
| 3. Guardian Ad Litem | |
| § 13:28 | General considerations |
| D. CHANGED CIRCUMSTANCES | |
| § 13:29 | Petition to modify or terminate trust |
| § 13:30 | Spendthrift clause |
| E. TRUST WITH LOW PRINCIPAL | |
| § 13:31 | Where market value of trust low in relation to administrative costs |
| § 13:32 | Where market value of trust \$50,000 or less |
| § 13:33 | Spendthrift provision |
| F. WELL SPOUSE VERSUS ILL SPOUSE | |
| § 13:34 | General considerations |
| § 13:35 | Provisions for making gifts |
| G. TAX ASPECTS | |
| § 13:36 | Necessity of completed gift |
| § 13:37 | Use of powers of appointment |
| § 13:38 | Marital deduction trust |

§ 13:39 Charitable remainder trusts

H. CHECKLISTS

§ 13:40 Matters to consider when preparing trust
modification or termination

§ 13:41 Matters to consider on modification or termination of
irrevocable trust

III. FORMS

A. AMENDMENT OF REVOCABLE TRUSTS; COMPLETE AGREEMENTS

§ 13:42 Amendment of trust

§ 13:43 Amendment of trust replacing one provision with
another

§ 13:44 Amendment changing beneficiary

§ 13:45 Amendment and restatement of trust

§ 13:46 Extension of trust

B. REVOCABLE TRUST PROVISIONS REGARDING REVOCAION, TERMINATION, AND MODIFICATION

§ 13:47 Revocation, termination, or modification of trust

§ 13:48 Method of amendment, revocation, or termination

§ 13:49 Revocation, amendment, or termination by consent of
all beneficiaries of trust

§ 13:50 Restrictions on revocation, amendment, or
termination

§ 13:51 Delivery of property after revocation or termination

§ 13:52 Exercise of settlor's rights and powers to amend,
revoke, or terminate trust by others

C. WAIVER OF RIGHT TO REVOKE TRUST

§ 13:53 Waiver by settlor of right to revoke trust

§ 13:54 Release of right to revoke trust—Before fixed time

D. IRREVOCABLE TRUSTS

§ 13:55 Amendment of irrevocable trust to change trustee

§ 13:56 Amendment of trust by exercise of special power of
appointment

§ 13:57 Disclaimer of interest in trust in QTIP trust

§ 13:58 Termination of small corpus trust

§ 13:59 Termination of trust by trustee

§ 13:60 Approval of trustee account

§ 13:61 Receipt of beneficiary

TABLE OF CONTENTS

- § 13:62 Consent to termination of trust by beneficiary
- § 13:63 Addition of property to irrevocable trust

IV. DISPOSITION OF PROPERTY ON TERMINATION OF TRUST

- § 13:64 Revocation by settlor
- § 13:65 Consent of settlor and beneficiaries
- § 13:66 Trust instrument as expression of settlor's intent
- § 13:67 Duty to locate and identify beneficiaries
- § 13:68 Methods of distribution
- § 13:69 Termination of trust—Diminution of trust estate—
Trustee's sole discretion

V. NOTICES, ACCOUNTING, AND REPORTING

A. GENERAL CONSIDERATIONS

- § 13:70 Providing copies of trust to beneficiaries or heirs on
trust becoming irrevocable [Prob C § 16061.5]
- § 13:71 Required notice to beneficiary, heir, or Attorney
General of irrevocable trust; notice of right to
contest trust [Prob C § 16061.7]
- § 13:72 Notice to Department of Health Services
- § 13:73 Notice to county tax assessor
- § 13:74 Beneficiary's right to accounting or report
- § 13:75 Waiver of account or report
- § 13:76 Accounting requirements

B. CHECKLIST

- § 13:77 Matters to consider on final distribution

C. FORMS

- § 13:78 Trustees notification
- § 13:79 Letter to beneficiary regarding administration
- § 13:80 Notice to Department of Health Services
- § 13:81 Notice to Internal Revenue Service
- § 13:82 Release and waiver of accounting
- § 13:83 Release and approval of accounting
- § 13:84 Letter to beneficiary regarding final distribution

Bibliography

CHAPTER 14. INTER VIVOS TRUSTS

I. LEGAL CONSIDERATIONS

A. NATURE AND IMPORTANCE OF LIVING TRUSTS

- § 14:1 Terminology
- § 14:2 Irrevocable living trusts distinguished
- § 14:3 Development of living trusts
- § 14:4 Purposes and advantages of using living trusts
- § 14:5 Disadvantages of using inter vivos trusts

B. RECOMMENDING LIVING TRUSTS

- § 14:6 Client interview
- § 14:7 Conflicts of interest
- § 14:8 Fees

II. DRAFTING CONSIDERATIONS

A. TRUST DISTRIBUTION

- § 14:9 Identifying trust beneficiaries
- § 14:10 “End of the world” provisions
- § 14:11 Allocation and distribution of income and principal
- § 14:12 Mandatory or discretionary distribution
- § 14:13 Identifying trustee and successor trustees

B. OTHER CONSIDERATIONS

- § 14:14 Identifying tax consequences
- § 14:15 Spendthrift provisions
- § 14:16 Drafting styles

III. CHECKLISTS

- § 14:17 Initial interview
- § 14:18 Steps to be taken in transferring interests into trust

IV. FORMS

A. COMPLETE INSTRUMENTS

- § 14:19 Married couple’s living trust with bypass trust provisions, remainder to descendants
- § 14:20 Unmarried person’s living trust
- § 14:21 Pour-over will with nomination of guardian
- § 14:22 Trust for minors qualifying for annual gift tax exclusion

TABLE OF CONTENTS

§ 14:23 Irrevocable life insurance trust

B. ALTERNATIVE AND OPTIONAL TRUST PROVISIONS

1. Providing for Descendants

- § 14:24 Incorporation of CUTMA
- § 14:25 Family pot trust provisions for the benefit of children
- § 14:26 Generation-skipping trust provisions
- § 14:27 Limited power of appointment
- § 14:28 “Representation” defined
- § 14:29 Provisions benefiting guardian
- § 14:30 Provision benefiting guardian of CUTMA trust beneficiary
- § 14:31 Issue defined, including “technotots”

2. Providing for Parents

- § 14:32 Trust for parent for life, then to issue
- § 14:33 Trust for parents for life, then to issue

3. Incapacitated Beneficiaries

- § 14:34 Drug-dependent beneficiaries
- § 14:35 Financially irresponsible beneficiaries
- § 14:36 Temporarily impaired beneficiaries
- § 14:37 Medical treatment for transition
- § 14:38 Children in cults
- § 14:39 Special needs trust
- § 14:40 Alternative form of special needs trust

4. Funding Formulae

- § 14:41 Fixed amount funding formula
- § 14:42 “Maximum amount to minimize taxes” formula

5. Income Distribution

- § 14:43 Mandatory distributions
- § 14:44 Discretionary accumulations
- § 14:45 Sprinkling provision

6. Trustee Succession

- § 14:46 Successors appointed by trustees
- § 14:47 Successors appointed by court
- § 14:48 Power to change corporate trustees
- § 14:49 Appointment of trustee with successor provision

7. Trustee Incapacity Standards

- § 14:50 Determination by court
- § 14:51 Determination by physician

§ 14:52 Determination by committee

8. Powers of Appointment

§ 14:53 General power

§ 14:54 Limited power to designate remainder beneficiaries

§ 14:55 Limited power to designate charities

9. “End of the World” Provisions

§ 14:56 Named beneficiaries

§ 14:57 Limited power of appointment for the benefit of charity

§ 14:58 Heirs-at-law

10. Administrative Provisions

§ 14:59 “Lite” trust, trustee powers

§ 14:60 Provisions typically requested by corporate trustees

11. Death Tax Provisions

§ 14:61 Taxes and expenses paid out of residue

§ 14:62 Taxes and expenses prorated among beneficiaries

12. Schedule of Assets

§ 14:63 Identification of specific assets

§ 14:64 Transfer by general reference

13. Miscellaneous Provisions

§ 14:65 Life estate in residence

§ 14:66 IRA provisions

C. LETTERS

1. Complete Letters

§ 14:67 Cover letter to married clients explaining estate plan

§ 14:68 Letter explaining funding and administration of revocable living trust

§ 14:69 Conflicts letter to married clients

§ 14:70 Vesting instructions letter to married clients

§ 14:71 Letter requesting change in title to community property account

§ 14:72 Letter requesting change in title to separate property account

2. Alternative and Optional Provisions for Conflicts Letter to Married Clients

§ 14:73 Future representation of former client

§ 14:74 Each party keeps separate property

§ 14:75 Transmutation of equal separate property into community property

TABLE OF CONTENTS

§ 14:76 Disproportionate separate property holdings

D. COLLATERAL FORMS

§ 14:77 Community property agreement

§ 14:78 Abstract of trust

§ 14:79 Trustee certification of trust

§ 14:80 Delegation of authority

E. REAL PROPERTY TRANSFER FORMS

§ 14:81 Grant deed

§ 14:82 Quitclaim deed

§ 14:83 Assignment of deed of trust

F. TRUST ADMINISTRATION FORMS

§ 14:84 Affidavit of death of trustee

§ 14:85 Notification by trustee

Bibliography

CHAPTER 15. MARITAL DEDUCTION TRUSTS

I. LEGAL PRINCIPLES

A. INTRODUCTION

§ 15:1 Purpose

§ 15:2 Marital deduction prior to 1981

§ 15:3 Unlimited marital deduction

B. REQUIREMENTS FOR MARITAL DEDUCTION

1. General Considerations

§ 15:4 Overview

§ 15:5 Citizenship requirement

§ 15:6 Inclusion in gross estate

2. Surviving Spouse

§ 15:7 Valid marriage

§ 15:8 Valid dissolution of marriage

§ 15:9 Simultaneous deaths

§ 15:10 Passing to surviving spouse

3. Nondeductible Terminable Interests

§ 15:11 Interests subject to terminable interest rule in general

- § 15:12 Spousal award
- § 15:13 Other elements of terminable interest rule
- § 15:14 Executor-purchaser provision
- § 15:15 Tainted asset rule
- § 15:16 Survivorship

4. California Legislation Pertaining to
Construction of Marital Deduction Gifts

- § 15:17 Construction of marital deduction gifts as complying with Internal Revenue Code [Prob C §§ 21520 to 21526]

C. PLANNING CONSIDERATIONS

- § 15:18 Combined use of marital deduction and applicable credit amount
- § 15:19 Equalization of estates
- § 15:20 Lifetime gifts
- § 15:21 Nontax considerations

D. QUALIFIED TERMINABLE INTEREST
PROPERTY

1. General Considerations

- § 15:22 Selecting the form of trust
- § 15:23 Possible reduction in marital deduction if income may be used to pay administrative expenses
- § 15:24 Requirements
- § 15:25 Qualifying income interest for life
- § 15:26 Additional interests surviving spouse may be given in QTIP trust
- § 15:27 Disposition of qualifying income interest
- § 15:28 Annuity interests; interest in decedent spouse's IRA

2. QTIP Election

- § 15:29 Partial election
- § 15:30 Reverse QTIP election; consideration of generation-skipping transfer tax
- § 15:31 Estate tax on death of surviving spouse

E. OTHER EXCEPTIONS TO TERMINABLE
INTEREST RULE

- § 15:32 Life interests with powers of appointment [26 USCA § 2056(b)(5)]
- § 15:33 Charitable remainder trust interests

TABLE OF CONTENTS

F. ESTATE TRUSTS

§ 15:34 Estate trust as qualifying for marital deduction

G. QUALIFIED DOMESTIC TRUST (QDOT) [26 USCA § 2056A]

§ 15:35 Overview

§ 15:36 Requirements for QDOT; estate tax

II. STRUCTURING MARITAL DEDUCTION

A. INTRODUCTION

§ 15:37 Formula versus nonformula gift; use of disclaimers

§ 15:38 Overview of formula clauses: pecuniary amount and fractional share formulas

B. PECUNIARY FORMULA CLAUSES

§ 15:39 General characteristics; items of income in respect of decedent (IRD)

§ 15:40 Pecuniary marital formula (residuary bypass) in general

§ 15:41 Factors in computation of pecuniary marital formula

§ 15:42 Pecuniary bypass formula (residuary marital) in general

§ 15:43 Factors in computation of pecuniary bypass formula gift

C. FRACTIONAL SHARE FORMULA

§ 15:44 General characteristics

D. FUNDING THE PECUNIARY FORMULA GIFT

1. Introduction

§ 15:45 Overview

§ 15:46 Pecuniary bequest rule of Revenue Procedure 64-19

2. Date of Distribution (True Worth) Funding

a. Overview

§ 15:47 Use of date of distribution (true worth) funding in general

b. Advantages of Use With Pecuniary Marital Formula

§ 15:48 Flexibility in selection of assets

§ 15:49 Other advantages of date of distribution funding

c. Disadvantages of Use With Pecuniary Marital Formula

- § 15:50 Recognition of gain and loss
- § 15:51 Revaluation of assets
- § 15:52 Acceleration of income in respect of a decedent
- § 15:53 Distributable net income (DNI)

d. Use of Date Of Distribution Funding With Pecuniary Bypass Formula

- § 15:54 Advantages
- § 15:55 Disadvantages

3. Fairly Representative Funding

a. Overview and Advantages of Use With Pecuniary Marital Formula

- § 15:56 Use of fairly representative funding in general
- § 15:57 Advantages

b. Disadvantages of Use With Pecuniary Marital Formula

- § 15:58 Overfunding or underfunding of marital gift
- § 15:59 Revaluation of assets
- § 15:60 Restriction of flexibility in selection of assets

c. Use of Fairly Representative Funding With Pecuniary Bypass Formula

- § 15:61 Advantages and disadvantages

4. Minimum Worth Funding

- § 15:62 Use of minimum worth funding in general
- § 15:63 Advantages
- § 15:64 Disadvantages

E. FUNDING THE FRACTIONAL SHARE FORMULA GIFT

1. Introduction

- § 15:65 Overview

2. Pro Rata Funding

a. Advantages of Pro Rata Funding

- § 15:66 No recognition of gain and loss
- § 15:67 Apportionment of appreciation and depreciation
- § 15:68 Simplification of income tax issues
- § 15:69 No revaluation of assets

TABLE OF CONTENTS

| | |
|---------|---|
| | b. Disadvantages of Pro Rata Funding |
| § 15:70 | Lack of flexibility in selection of assets; possible overfunding or underfunding |
| § 15:71 | Administrative complexity |
| | 3. Non Pro Rata Funding |
| | a. Overview and Advantages of Non Pro Rata Funding |
| § 15:72 | Non pro rata funding in general |
| § 15:73 | Flexibility in selection of assets with no realization of gain or loss |
| § 15:74 | Simplification of income tax issues |
| § 15:75 | Ease of administration |
| | b. Disadvantages of Non Pro Rata Funding |
| § 15:76 | Revaluation of assets |
| § 15:77 | Overfunding or underfunding of marital gift |
| § 15:78 | Uncertainty in use of non pro rata funding |
| | F. SUMMARY OF FUNDING ISSUES |
| § 15:79 | Practice considerations |
| | III. CHECKLISTS |
| § 15:80 | Matters to consider in determining whether to use and how to draft marital deduction trusts |
| § 15:81 | Matters to consider in selecting funding methods |
| | IV. FORMS |
| | A. COMPLETE TRUST FORM WITH MARITAL (QTIP) SUBTRUST |
| § 15:82 | Revocable trust for married couple with survivors, marital (QTIP) and bypass subtrusts |
| § 15:83 | Marital deduction trust—Single trustor—Principal of marital trust paid to surviving spouse's estate |
| § 15:84 | Marital deduction trust—QTIP trust—Principal to donor's children on spouse's death |
| | B. MARITAL DEDUCTION PROVISIONS |
| | 1. Formula Provisions |
| § 15:85 | Pecuniary marital formula (residuary bypass) will provision |
| § 15:86 | Pecuniary marital formula (residuary bypass) trust provision |

- § 15:87 Pecuniary bypass formula (marital trust as residue) will provision
- § 15:88 Fractional share marital formula trust or will provision
- 2. QTIP Provisions
- § 15:89 Authorization for executor to make partial or total QTIP election
- § 15:90 Partial QTIP election trust provision
- § 15:91 Partial election under 26 U.S.C.A. § 2652(a)(3) trust provision
- 3. QDOT Provision
- § 15:92 QDOT trust provisions
- 4. Disclaimer Provision
- § 15:93 Disclaimer of marital trust

Bibliography

Volume 3

CHAPTER 16. CHARITABLE TRUSTS

I. LEGAL PRINCIPLES

A. INTRODUCTION

- § 16:1 Definition and types of charitable trusts
- § 16:2 Applicable California law
- § 16:3 Applicable tax law
- § 16:4 Creation of charitable trust
- § 16:5 Application of rule against perpetuities
- § 16:6 Supervision by California Attorney General

B. CHARITABLE REMAINDER TRUST (CRT)

1. General Observations

- § 16:7 Charitable remainder trust defined
- § 16:8 Limits on types of qualified noncharitable lead interests
- § 16:9 Remainder to qualified charity
- § 16:10 Availability and effect of IRS forms

2. Inter Vivos CRT

a. Charitable Remainder Annuity Trust (CRAT)

- § 16:11 Lead interest payable to noncharitable beneficiary

TABLE OF CONTENTS

| | |
|---|---|
| § 16:12 | Amount of annuity payment |
| § 16:13 | Time for payment of annuity |
| § 16:14 | CRAT term |
| b. Charitable Remainder Unitrust (CRUT) | |
| § 16:15 | Standard lead interest payable to noncharitable beneficiary |
| § 16:16 | “Income only” or “income plus make-up” variations to lead interest |
| § 16:17 | Reasons to consider NICRUT or NIMCRUT |
| § 16:18 | Defining “net trust accounting income” in NIMCRUT setting |
| § 16:19 | “Flipping” NICRUT or NIMCRUT to CRUT |
| § 16:20 | Redetermination of unitrust payment after incorrect valuation |
| § 16:21 | Proration of unitrust payment for short taxable year |
| § 16:22 | Additional contributions permitted |
| § 16:23 | Time for payment of unitrust amount |
| § 16:24 | Selecting valuation date |
| § 16:25 | CRUT term |
| c. Rules Applicable to All Inter Vivos CRTS | |
| § 16:26 | Impermissible to provide for return of trust assets if charitable deduction disallowed |
| § 16:27 | Charitable deduction available to donor |
| § 16:28 | Limitation on deductible amount; public charities |
| § 16:29 | Limitation on deductible amount; private nonoperating foundation |
| § 16:30 | Other income tax planning opportunities for donor |
| § 16:31 | Assignment of income issues |
| § 16:32 | Gift tax consequences for donor |
| § 16:33 | Estate tax consequences for donor |
| § 16:34 | Generation-skipping transfer tax consequences for donor |
| 3. Testamentary Transfers | |
| § 16:35 | Rules applicable to testamentary CRTS |
| § 16:36 | Income, gift, and estate tax consequences of testamentary CRT |
| § 16:37 | QTIP trust with qualified charity as remainder beneficiary vs. CRT with spouse as noncharitable lead beneficiary |
| § 16:38 | QDOT trust with qualified charity as remainder beneficiary vs. CRT with non-U.S. citizen spouse as noncharitable lead beneficiary |
| § 16:39 | Generation-skipping transfer tax consequences of testamentary transfers to CRT |

4. Rules Applicable to Inter Vivos and Testamentary CRTS

a. Limitation on Tax Deductions Available to Donor-Decedent

§ 16:40 Loss of charitable deduction if transfer taxes payable from CRT

§ 16:41 Fifty-and ten-percent tests

b. Disallowance of Deduction or Reformation

§ 16:42 Consequences of failure to meet ten-percent test

§ 16:43 Reformation of CRT to comply with tax laws

§ 16:44 Reformable interest

§ 16:45 Time for reformation proceedings

c. Value of Charitable Transfer

§ 16:46 Valuation of property transferred to CRT

§ 16:47 Special rules for valuation of “hard to value” assets

§ 16:48 Valuation of remainder interest in CRAT

§ 16:49 Valuation of remainder interest in CRUT

d. Taxation of CRT

§ 16:50 Income taxation of CRT

§ 16:51 Private foundation excise and termination taxes on CRT

§ 16:52 Self dealing between disqualified persons and CRT

§ 16:53 Excess business holdings of CRT

§ 16:54 Jeopardy investments and taxable expenditures by CRT

e. Taxation of Distributions From CRT

§ 16:55 Distributions to noncharitable lead beneficiary

§ 16:56 Distributions to qualified charity during lead interest

f. Other Matters

§ 16:57 Investment of trust funds

5. Pooled Income Funds

§ 16:58 Definition and features

§ 16:59 Avoidance of recognition of gain on contributed asset

§ 16:60 Determination of charitable deduction

§ 16:61 Income taxation of pooled funds

C. CHARITABLE LEAD TRUST (CLT)

1. General Observations

§ 16:62 Definition and creation

TABLE OF CONTENTS

| | |
|---|---|
| § 16:63 | Qualifying CLT |
| § 16:64 | Nonqualifying CLT |
| 2. Inter Vivos CLT | |
| a. Charitable Lead Annuity Trust (CLAT) | |
| § 16:65 | Lead interest payable to qualified charity limited to annuity |
| § 16:66 | Remainder interest passes to noncharitable beneficiary |
| § 16:67 | CLAT term |
| § 16:68 | Additional contributions permitted |
| b. Charitable Lead Unitrust (CLUT) | |
| § 16:69 | Lead interest payable to qualified charity limited to unitrust payment |
| § 16:70 | Method of accounting and valuation date |
| § 16:71 | Remainder interest to noncharitable beneficiaries |
| § 16:72 | CLUT term |
| § 16:73 | Additional contributions permitted |
| c. Qualifying Inter Vivos CLT | |
| § 16:74 | Income tax charitable deduction for qualifying grantor CLT |
| § 16:75 | Creation of grantor CLT for income tax purposes; excluded from grantor's gross estate for estate tax purposes |
| § 16:76 | Charitable deduction for grantor CLT |
| § 16:77 | Recapturing deduction |
| § 16:78 | Income taxation of nongrantor CLT |
| § 16:79 | Provisions allocating sources of income for payment of charitable lead benefit |
| § 16:80 | Taxation of CLT with UBTI |
| § 16:81 | Private foundation excise taxes on qualifying CLT |
| § 16:82 | Termination tax on CLT |
| § 16:83 | Self dealing by CLT |
| § 16:84 | Excess business holdings by CLT |
| § 16:85 | Jeopardy investments and taxable expenditures by CLT |
| § 16:86 | Gift tax consequences for donor |
| § 16:87 | Splitting lead interest between charity and noncharitable beneficiary |
| § 16:88 | Disposition of income exceeding guaranteed annuity or unitrust payment |
| § 16:89 | Payment of lead interest to qualified charity |
| § 16:90 | Completed transfers |
| § 16:91 | Estate tax consequences for donor |
| § 16:92 | Generation-skipping planning through use of CLT |

- § 16:93 Inter vivos CLT included in donor's gross estate
- § 16:94 Allocation of GSTT exemption to CLT

d. Nonqualifying CLT

- § 16:95 Federal gift and estate tax deduction unavailable
- § 16:96 Structuring inter vivos CLT as incomplete transfer
- § 16:97 Gift tax treatment of payments from CLT if incomplete transfer
- § 16:98 Gift and estate tax consequences of release of power causing incomplete transfer
- § 16:99 Structuring inter vivos CLT as completed transfer
- § 16:100 Income taxation of nonqualifying CLT

3. Testamentary Transfers

- § 16:101 Estate tax charitable deduction for qualifying CLT
- § 16:102 Terms of qualifying testamentary CLT
- § 16:103 Income and generation-skipping taxation of testamentary CLT

4. Rules Applicable to Inter Vivos and Testamentary CLTS

a. Valuation of Charitable Transfer

- § 16:104 Valuation of property transferred to CLT
- § 16:105 Valuation of lead interest in CLAT
- § 16:106 Valuation of lead interest in CLUT
- § 16:107 Valuation of income interest in nonqualifying CLT

b. Other Issues

- § 16:108 Reformation of CLT to comply with tax laws
- § 16:109 CLAT or CLUT
- § 16:110 Inter vivos or testamentary
- § 16:111 Grantor or nongrantor CLT
- § 16:112 Qualifying or nonqualifying CLT

D. ISSUES RELEVANT TO CRTS AND CLTS

1. Funding Trusts

- § 16:113 Overview
- § 16:114 Using individual retirement account to fund inter vivos CRT or CLT
- § 16:115 Use of IRA to fund testamentary CRT
- § 16:116 Use of IRA to fund testamentary CLT

2. Substantiation of Charitable Deduction

- § 16:117 Overview
- § 16:118 Cash contributions

TABLE OF CONTENTS

- § 16:119 Assets worth \$250 or more
- § 16:120 Assets worth over \$500
- § 16:121 Assets worth more than \$5,000
- § 16:122 Nonpublicly traded stock, certain publicly traded securities, and contributions by C corporations
- § 16:123 Records that must be maintained
- § 16:124 Qualified appraisal; appraisal summary; partial appraisal summary
- § 16:125 Qualified appraiser; appraisal fee
- § 16:126 Special procedure for artwork

II. CHECKLISTS

- § 16:127 Matters to consider in selecting appropriate trust vehicle
- § 16:128 Matters to consider in establishing CRT
- § 16:129 Matters to consider in filing tax returns for CRT
- § 16:130 Matters to consider in drafting CLT
- § 16:131 Matters to consider in filing tax returns for CLT
- § 16:132 Substantiation of charitable deduction

III. FORMS

- § 16:133 Basic inter vivos CRAT with single donor; single annuity interest
- § 16:134 Basic inter vivos CRAT with single donor; term of years
- § 16:135 IRS Form 5227—Split-interest trust information return
- § 16:136 CRAT or CRUT alternate provision; donor reserves power to change charities [Rev Rul 76-8, 1976-1 CB 179]
- § 16:137 CRAT or CRUT alternate charitable deduction savings clause
- § 16:138 Inter vivos CRAT with single donor, single annuity interest funded with interest in business entity operated by donor
- § 16:139 Inter vivos CRAT with joint and survivor life annuity interest
- § 16:140 Inter vivos CRAT—Two lives, consecutive interests
- § 16:141 CRAT created by testamentary transfer, single life annuity interest
- § 16:142 Testamentary CRAT—Two lives, consecutive interests
- § 16:143 Basic testamentary CRAT with single donor; term of years
- § 16:144 Testamentary CRAT joint and survivor annuity interest to noncharitable lead beneficiaries
- § 16:145 Inter vivos charitable remainder unitrust—One life

- § 16:146 —Concurrent and consecutive interest for two measuring lives
- § 16:147 —Consecutive interest for two measuring lives
- § 16:148 —Term of years
- § 16:149 Testamentary charitable remainder unitrust—One measuring life
- § 16:150 —Two lives, concurrent and consecutive interests
- § 16:151 Testamentary charitable remainder unitrust—Term of years
- § 16:152 Testamentary charitable remainder unitrust—Two lives, consecutive interests
- § 16:153 Petition to “flip” NIMCRUT [Prob C § 17200]
- § 16:154 Inter vivos nongrantor charitable lead annuity trust—Based on Rev. Proc. 2007-45
- § 16:155 Inter vivos grantor charitable lead annuity trust—Based on Rev. Proc. 2007-45
- § 16:156 Testamentary charitable lead annuity trust—Based on Rev. Proc. 2007-46
- § 16:157 Inter vivos qualifying nongrantor CLUT
- § 16:158 CLUT created by testamentary transfer
- § 16:159 Pooled income fund declaration of trust [Rev Proc 88-53, 1988-2 CB 712 section 4]
- § 16:160 Pooled income fund transfer; one life [Rev Proc 88-53, 1988-2 CB 712 section 5]
- § 16:161 Pooled income fund transfer; two lives, consecutive interests [Rev Proc 88-53, 1988-2 CB 712 section 6]
- § 16:162 Pooled income fund transfer; two lives, concurrent and consecutive interests [Rev Proc 88-53, 1988-2 CB 712 section 7]

Bibliography

CHAPTER 17. SPECIAL NEEDS TRUSTS

I. LEGAL PRINCIPLES

A. OVERVIEW

- § 17:1 Purpose of special needs trust
- § 17:2 Types of special needs trusts
- § 17:3 Government benefits in general

B. SSI AND MEDI-CAL RULES SUMMARY

1. SSI Rules

- § 17:4 Social Security benefits independent of assets and income limitations
- § 17:5 Social Security benefits with asset and income limitations

TABLE OF CONTENTS

| | |
|---|--|
| § 17:6 | Asset characterization and limits |
| § 17:7 | Earned and unearned income |
| § 17:8 | Items not considered income |
| § 17:9 | In-kind support and maintenance |
| 2. Medi-Cal Rules | |
| § 17:10 | Medi-Cal eligibility |
| § 17:11 | Medi-Cal asset characterization and limits |
| § 17:12 | Spouse in long-term care |
| C. LITIGATION SETTLEMENT TRUST FOR MINOR OR PERSON WITH A DISABILITY | |
| § 17:13 | Overview [Prob. Code §§ 3600 to 3613] |
| § 17:14 | Person with a disability |
| § 17:15 | Required findings [Prob C § 3604(b)] |
| § 17:16 | Court's continuing jurisdiction |
| § 17:17 | Provisions required for Medi-Cal qualification |
| D. INHERITANCE BY DISABLED PERSON | |
| 1. Inheritance From Someone Other Than Recipient's Spouse | |
| § 17:18 | No need for "payback" provisions |
| § 17:19 | Drafting for SSI recipient |
| § 17:20 | Distributions causing loss of benefits |
| § 17:21 | Planning to minimize loss of benefits |
| § 17:22 | Distributions not causing loss of benefits |
| § 17:23 | Drafting for Medi-Cal recipient |
| § 17:24 | Effect of transfer of assets on benefits |
| § 17:25 | Reformation of trust in will |
| 2. Inheritance From Well Spouse | |
| § 17:26 | Drafting for spouse in long-term care |
| § 17:27 | Medi-Cal alternatives to long-term care |
| E. TRANSFERS BY DISABLED PERSON | |
| § 17:28 | Penalty only for long-term care |
| § 17:29 | Transfers not resulting in penalty |
| § 17:30 | By married person |
| F. GOVERNMENT CLAIMS | |
| § 17:31 | Overview |
| § 17:32 | Medi-Cal reimbursement claims |
| § 17:33 | Restrictions on claims |
| § 17:34 | Notice |

- § 17:35 When statute requires reimbursement [Prob C § 15306]

G. SELECTION OF TRUSTEE

- § 17:36 Required skills
- § 17:37 Settlor's specific instructions for trustee

II. CHECKLISTS

- § 17:38 Information to include in petition for disbursement of funds after settlement into special needs trust
- § 17:39 Public benefits
- § 17:40 Information to include in special needs trust
- § 17:41 Types of special needs trusts requiring payback provisions (self-settled trusts established on or after October 1, 1993)

III. FORMS

A. COMPLETE TRUST PROVISIONS

- § 17:42 Special needs trust provisions for disabled child
- § 17:43 Sprinkling trust—Revocable living trust for developmentally disabled child—Parents as settlors

B. ALTERNATIVE AND OPTIONAL PROVISIONS

- § 17:44 Litigation settlement trust introductory paragraph
- § 17:45 Payback provisions required in self-funded special needs trusts
- § 17:46 Special power of appointment on death of beneficiary

Bibliography

CHAPTER 18. ASSET PROTECTION TRUSTS

I. GENERAL LEGAL PRINCIPLES

A. OVERVIEW

- § 18:1 In general
- § 18:2 Self-settled trusts
- § 18:3 Treatment of settlor's retained interest
- § 18:4 Exceptions to prohibition against self-settled trusts
- § 18:5 General validity of protective or spendthrift trusts
- § 18:6 Fraudulent and other invalid trusts
- § 18:7 Beneficiary's behavior affecting protection against creditors

TABLE OF CONTENTS

B. TYPES OF ASSET PROTECTION TRUSTS

1. Spendthrift Trusts

- § 18:8 In general
- § 18:9 No protection against child and spousal support
- § 18:10 Creditor's ability to reach interest

2. Discretionary Trusts

- § 18:11 In general
- § 18:12 Extent of protection
- § 18:13 Permissive trustee powers required
- § 18:14 Mere power over timing of distributions insufficient
- § 18:15 Trustee abuse of discretion
- § 18:16 Assignability of interest
- § 18:17 Limitations on protection of discretionary trusts

3. Support Trusts

- § 18:18 When to use a support trust
- § 18:19 Protection afforded a support trust
- § 18:20 Inclusion of spendthrift provisions

4. Personal Trusts

- § 18:21 In general
- § 18:22 Legal principles

5. Shifting Trusts

- § 18:23 Legal principles
- § 18:24 Protecting trust assets by terminating beneficiary's interest
- § 18:25 Protection for trust interests in bankruptcy
- § 18:26 Protection when interest is retained
- § 18:27 Shift with retained interest
- § 18:28 Suspension of distributions on specific conditions

C. GOVERNING PRINCIPLES

1. Specific California Provisions

- § 18:29 Governing law
- § 18:30 Exemption from enforcement of money judgments
- § 18:31 Homestead exemption
- § 18:32 Non pro rata allocation of community property
- § 18:33 One-year statute of limitations
- § 18:34 Allocation of decedent's property to asset protection trusts
- § 18:35 Surviving spouse's community property
- § 18:36 Disclaimers as protective device

2. Tax Aspects

- § 18:37 Tax liability of beneficiary of U.S. sitused trusts

- § 18:38 Where beneficiary's trust interest constitutes a property right
 - § 18:39 Discretionary trusts
 - § 18:40 Termination of interest
 - § 18:41 Shifting interest trusts
- 3. Beneficiary Liability**
- § 18:42 Claims for provision or enhancement of beneficiary's interest
 - § 18:43 Debts to settlor or settlor's estate
 - § 18:44 Beneficiary's liability for breach of trust and loans
- 4. Loss of Protection**
- § 18:45 Prohibition against sole beneficiary as sole trustee
 - § 18:46 Beneficiary's unfettered discretion and excessive control

II. CHECKLISTS

- § 18:47 Destruction of protective trusts
- § 18:48 Uses and types of protective trusts
- § 18:49 Anticipating preferential claims
- § 18:50 Other drafting considerations
- § 18:51 Trusts for settlors
- § 18:52 Ineffective protective trusts

III. FORMS

A. COMPLETE FORMS

- § 18:53 Irrevocable asset protection discretionary trust for children with spendthrift provisions
- § 18:54 Revocable trust agreement

B. FORM PROVISIONS

1. Spendthrift Trust

- § 18:55 Spendthrift provision
- § 18:56 —Treatment of beneficiary's alcoholism
- § 18:57 Alternative spendthrift provisions where trust qualifies for the unlimited marital deduction

2. DISCRETIONARY POWERS

- § 18:58 Provision granting trustees discretionary power
- § 18:59 Subject-to-standard discretionary trust provision
- § 18:60 Discretionary trust provision permitting suspension of distributions

3. SUPPORT TRUSTS

- § 18:61 Current beneficiary's needs most important

TABLE OF CONTENTS

- § 18:62 Alternative support trust provision where remaindermen's needs are expressly secondary to needs of beneficiary
4. PERSONAL USE OF PROPERTY BY BENEFICIARY
- § 18:63 Personal trust provision allowing beneficiary to occupy property
- § 18:64 Personal trust provision allowing beneficiary to use property
5. SHIFTING TRUST POWERS
- § 18:65 Termination of beneficiary's interest
- § 18:66 Shifting trust provision for termination of beneficiary's interest at beneficiary's death
- § 18:67 Shifting trust provision converting spendthrift trust into discretionary trust
- § 18:68 Alternative shifting trust provision designating other beneficiaries
6. GOVERNING LAW PROVISIONS
- § 18:69 Change of controlling law
- § 18:70 Change of controlling law and amending trust to conform to new situs
7. DISTRIBUTION PROVISIONS
- § 18:71 Discretion to distribute property to probate estate
- § 18:72 Authority to make non pro rata distribution in kind

Bibliography

CHAPTER 19. INTRODUCTION TO WILLS AND WILL DRAFTING

I. LEGAL PRINCIPLES

A. GENERAL CONSIDERATIONS

1. Definition and Purpose

- § 19:1 Will defined
- § 19:2 Purpose of will

2. Governing Law

a. Overview

- § 19:3 Legislative control over testation
- § 19:4 Public policy and conditional devises
- § 19:5 Law governing validity of will execution

- § 19:6 Law governing meaning and effect of will
 - b. Family Protection and Restrictions on Testation
 - § 19:7 Overview
 - § 19:8 Exempt property
 - § 19:9 Probate homestead
 - § 19:10 Family allowance
 - § 19:11 Child support
 - § 19:12 Small estate set-aside
 - § 19:13 Protection from unintentional disinheritance
 - § 19:14 Exceptions to pretermission
 - § 19:15 Waiver of family protection
- 3. Property Subject to Disposition by Will
 - § 19:16 Overview
 - § 19:17 Separate property
 - § 19:18 Community property
 - § 19:19 Quasi-community property
- 4. Who May Take Disposition by Will
 - § 19:20 Overview
 - § 19:21 Limitations
- 5. Form and Type of Wills
 - § 19:22 Overview
 - § 19:23 Joint and mutual wills; contract to make will or not revoke will
 - § 19:24 Conditional wills
 - § 19:25 Pour-over wills
 - § 19:26 Nonprobate transfer to trustee named in will (“nonprobate wills”)
- 6. Components of Will
 - § 19:27 Integration
 - § 19:28 Incorporation by reference
 - § 19:29 Independent significance
 - § 19:30 Republication by codicil
 - § 19:31 Strikeouts and interlineations
- 7. Capacity to Make Will
 - § 19:32 Persons who may make will
 - § 19:33 Requirement of testamentary capacity
 - § 19:34 Mental disorder
 - § 19:35 Fraud and undue influence

B. FORMAL REQUIREMENTS

1. Witnessed Wills

- § 19:36 Overview

TABLE OF CONTENTS

| | |
|---------|---|
| § 19:37 | Testator's signature or acknowledgment |
| § 19:38 | Witnesses' attestation and signatures |
| § 19:39 | Interested witnesses |
| | 2. Holographic Wills |
| § 19:40 | Requirements |
| § 19:41 | Testamentary intent |
| | 3. Statutory Wills |
| § 19:42 | Nature and purpose; governing law |
| § 19:43 | Who may execute |
| § 19:44 | Content generally; form of will |
| § 19:45 | Effect of addition or deletion |
| § 19:46 | Limited utility |
| § 19:47 | Appointment of custodian |
| § 19:48 | "120-hour" survival requirement |
| § 19:49 | Execution requirements; effect of Prob. Code, §§ 6110, 6226(c) |
| § 19:50 | Revocation and amendment; use of codicils |
| | 4. International Will |
| § 19:51 | Purpose |
| § 19:52 | UIWA requirements generally |
| § 19:53 | Requirements of form under Prob C § 6383 |
| § 19:54 | Certificate attached to will |
| § 19:55 | Will registry |

II. DRAFTING CONSIDERATIONS; WILL PRACTICE

A. PROFESSIONAL RESPONSIBILITY

| | |
|---------|--|
| § 19:56 | Attorney competence |
| § 19:57 | Maintaining confidentiality |
| § 19:58 | Avoiding conflicts of interest; disqualified persons |
| § 19:59 | Evaluating testator's capacity |

B. PARTICULAR LEGAL PRINCIPLES GOVERNING WILL DRAFTING

| | |
|---------|---|
| § 19:60 | Testator's intent expressed in will controls |
| § 19:61 | Every expression given effect |
| § 19:62 | Preference for interpretation that prevents intestacy |
| § 19:63 | Will construed as whole |
| § 19:64 | Words given their ordinary meaning; technical words |
| § 19:65 | Mistakes and ambiguities |

C. PRELIMINARY DRAFTING CONSIDERATIONS

| | |
|---------|--|
| § 19:66 | Determining testator's intent; information gathering |
|---------|--|

§ 19:67 Will organization

D. INTRODUCTORY PROVISIONS

1. Prefatory Language

§ 19:68 Personal information

§ 19:69 Funeral and burial instructions

§ 19:70 Characterization of property

2. Executor and Administrative Provisions

a. Selecting Executor

§ 19:71 Statutory qualifications

§ 19:72 Corporate versus individual executor

§ 19:73 Coexecutors

§ 19:74 Alternate executor

§ 19:75 Attorney as executor

b. Executor's Compensation

§ 19:76 Statutory commissions

§ 19:77 Compensation provided in will

c. Bond Requirement

§ 19:78 Generally

§ 19:79 Waiver of bond

d. Executor's Role in Probate Process

§ 19:80 Overview

§ 19:81 General court supervision

§ 19:82 Independent administration of estates

e. Executor's Powers and Duties

§ 19:83 Power of sale

§ 19:84 Discretion as to cash invested

§ 19:85 Authority to retain assets

§ 19:86 Broad investment powers

§ 19:87 Employment of investment counsel

§ 19:88 Employment of attorney for estate

§ 19:89 Continuation of business

§ 19:90 Authorizing self-dealing

§ 19:91 Non pro rata and in-kind distributions

§ 19:92 Exculpation for breach

E. GUARDIANSHIP PROVISIONS

§ 19:93 Nomination of guardian

§ 19:94 Appointment of guardian of person

§ 19:95 Appointment of guardian of estate

TABLE OF CONTENTS

F. RESIDUARY PROVISION

§ 19:96 Overview; avoiding intestacy

G. CONSTRUCTIONAL AND DEFINITIONAL PROVISIONS

- § 19:97 Survivorship requirements
- § 19:98 No-contest provision
- § 19:99 Disinheritance provision
- § 19:100 Distribution to issue
- § 19:101 Adopted children and stepchildren
- § 19:102 No contract provision

H. EXECUTION PROVISIONS

- § 19:103 Testator's signature
- § 19:104 Witness attestation and signature
- § 19:105 Self-proving will

I. WILL SIGNING

- § 19:106 Suggested procedures for executing witnessed will
- § 19:107 Adjusted procedures for blind, impaired or illiterate clients
- § 19:108 Special precautions for deathbed wills
- § 19:109 Non-English speaking clients

J. WILL SAFEKEEPING

- § 19:110 Retention by client
- § 19:111 Retention by attorney
- § 19:112 Destruction of prior will

III. CHECKLISTS

- § 19:113 Information to ascertain before drafting will
- § 19:114 Matters to consider in drafting will
- § 19:115 Steps to complete in executing and safeguarding will

IV. FORMS

A. COMPLETE WILL FORMS

- § 19:116 Will for single person
- § 19:117 Will for married person
- § 19:118 Will with family pot trust
- § 19:119 Pour-over will
- § 19:120 Joint and mutual will—Estate to survivor and to children on death of survivor

- § 19:121 Mutual will with contingent charitable bequest
- § 19:122 Will executed pursuant to contract—All property to beneficiary furnishing personal services for testator
- § 19:123 Certificate of review for gifts excluded from presumption of undue influence or fraud

B. OPTIONAL PROVISIONS

1. Marital and Family Status

- § 19:124 Dissolution of marriage contemplated
- § 19:125 Contemplated marriage not to revoke will
- § 19:126 Devise to future spouse conditioned on marriage at testator's death
- § 19:127 Listing of children from prior and current marriages

2. Funeral and Burial Instructions

- § 19:128 General directions

3. Designation and Compensation of Executors

- § 19:129 Individual executor
- § 19:130 Coexecutors
- § 19:131 Coexecutors and alternate
- § 19:132 Multiple alternates
- § 19:133 Receipt of compensation intended

4. Powers of Executors

- § 19:134 Independent administration permitted
- § 19:135 Operation of business
- § 19:136 Selection of assets for distribution
- § 19:137 Retention of assets and exculpation for resulting losses
- § 19:138 Determining manner of distribution to minors and others
- § 19:139 Acquiring estate property for own account
- § 19:140 Payment of encumbrances
- § 19:141 Appointment of ancillary executor
- § 19:142 Employment of investment counsel

5. Nomination of Guardians

- § 19:143 Single guardian of minor's person and estate
- § 19:144 Separate guardians of minor's person and estate
- § 19:145 Additional powers granted to guardian of minor's person [Prob C § 2108(a)]
- § 19:146 Additional powers granted to guardian of minor's estate [Prob C § 2108(b)]

6. Class Gifts

a. Determination of Beneficiaries

- § 19:147 General provision

TABLE OF CONTENTS

- § 19:148 Adopted persons included
- § 19:149 Adopted persons excluded
 - b. Distribution Among Beneficiaries
- § 19:150 Distribution under intestate distribution system
- § 19:151 Distribution per stirpes (by right of representation)
- § 19:152 Distribution per capita at each generation
- 7. Survival Requirements and Disinheritance
- § 19:153 Condition that beneficiaries survive testator by prescribed period
- § 19:154 Disinheritance of future spouse
- § 19:155 Disinheritance of children
- 8. Execution and Attestation Provisions
- § 19:156 Signature by mark
- § 19:157 Adoptive signature
- § 19:158 Attestation where testator acknowledges instrument or signature
- § 19:159 Attestation where will is read to testator

Bibliography

CHAPTER 20. DEVICES

I. LEGAL PRINCIPLES

A. INTRODUCTION

- § 20:1 Definitions; current use of terms
- § 20:2 Classifications of devises

B. PROPERTY SUBJECT TO DEVISE

- § 20:3 In general
- § 20:4 Separate and community property
- § 20:5 Powers of appointment
- § 20:6 Property passing outside of will

C. PERMISSIBLE RECIPIENTS OF DEVICES

- § 20:7 Beneficiaries who may receive devises
- § 20:8 Class devises
- § 20:9 Devises to heirs
- § 20:10 Devises to minors
- § 20:11 Devises to trustees
- § 20:12 Limitations on devises to drafters and other disqualified persons

D. DEVICES SUBJECT TO CONDITIONS

- § 20:13 Conditional devises

- § 20:14 Survivorship
- § 20:15 Lapsed devises
- § 20:16 Disclaimers
- § 20:17 Rule against perpetuities

E. ADEPTION, ADVANCEMENT AND EXONERATION

- § 20:18 Ademption
- § 20:19 Advancement
- § 20:20 Exoneration

F. ABATEMENT

- § 20:21 Statutory order of abatement

G. INTEREST, INCOME AND EXPENSES ON DEVICES

- § 20:22 Interest
- § 20:23 Income during administration
- § 20:24 Expenses attributable to tangible personal property

H. ESTATE TAX ALLOCATION

- § 20:25 Statutory rule of equitable proration
- § 20:26 Rights of reimbursement under federal law
- § 20:27 Alternate allocations directed by will

II. DRAFTING CONSIDERATIONS

- § 20:28 Intent of testator
- § 20:29 Description of devise
- § 20:30 Identification of devisee
- § 20:31 Incorporation of statutory rule in will

III. CHECKLISTS

- § 20:32 Matters to consider when drafting specific and general devises
- § 20:33 Specific devise of tangible personal property to individual—Papers, letters and writings—Including privacy request
- § 20:34 Matters to consider when drafting residuary devises

IV. FORMS

A. SPECIFIC AND GENERAL DEVICES

1. Specific Devises of Tangible Personal Property

- § 20:35 Specific devise of tangible personal property to individual

TABLE OF CONTENTS

- § 20:36 Specific devise of tangible personal property to children, with division determined by the executor
- § 20:37 Specific devise of tangible personal property to children, with division determined by alternating selection
- § 20:38 Direction to sell item of tangible personal property and devise of sale proceeds
- 2. Specific Devises of Real Property**
- § 20:39 Specific devise of real property
- § 20:40 Specific devise of residence
- § 20:41 Specific devise of real property with alternate gift of proceeds of sale
- § 20:42 Specific devise of cemetery plot
- § 20:43 Specific devise of option to purchase real property
- 3. Devises of Money and Accounts**
- § 20:44 General pecuniary devise
- § 20:45 General pecuniary devise to custodian for minor
- § 20:46 General pecuniary devise to class
- § 20:47 Demonstrative devise from bank account
- § 20:48 Reduction of pecuniary devise for lifetime gifts
- § 20:49 General pecuniary devise to charity
- § 20:50 Devise establishing annuity
- § 20:51 Devise of proceeds of life insurance
- 4. Devises of Business Interests**
- § 20:52 Specific devise of sole proprietorship
- § 20:53 Specific devise of stock of publicly traded corporation
- § 20:54 Specific devise of stock of closely held corporation
- § 20:55 Specific devise of general partnership
- § 20:56 Specific devise of limited partnership interest
- § 20:57 Specific devise of interest in limited liability company
- § 20:58 Specific devise to spouse of community interest in spouse's professional practice
- § 20:59 Specific devise to spouse of community property interest in spouse's retirement benefits
- § 20:60 Direction to carry out stock restriction agreement
- § 20:61 Devise of law practice and law office equipment
- 5. Devises of Intellectual Property Rights**
- § 20:62 Specific devise of patent
- § 20:63 Specific devise of copyrighted work
- § 20:64 Licensing or royalty interest
- § 20:65 Specific devise of website domain name
- 6. Devises Subject to Conditions**
- § 20:66 Specific devise subject to condition of continued employment

§ 20:67 Specific devise subject to condition that parties are married

7. Other Devises

§ 20:68 Devise forgiving debt

§ 20:69 General devise for care of pet

§ 20:70 Exercise of power of appointment

§ 20:71 Bequest free of taxes

B. RESIDUARY DEVISES

§ 20:72 Residuary devise to individual

§ 20:73 Residuary devise to heirs per capita

§ 20:74 Residuary devise to heirs by right of representation

§ 20:75 Residuary devise to trustee of testator's revocable trust

§ 20:76 Residuary devise to trustee of testator's irrevocable trust

§ 20:77 Residuary devise to trustee of testamentary trust

§ 20:78 Residuary devise to spouse with gift over to disclaimer trust

§ 20:79 Residuary devise stated in percentages

§ 20:80 Allocation of specific property to share of residue

§ 20:81 Reciprocal gift of residuary estate

C. MISCELLANEOUS PROVISIONS AFFECTING DEVISES

1. Survivorship

§ 20:82 Requirement that devisee survive for stated period

2. Lapse

§ 20:83 Direction not to apply anti-lapse statute

3. Interest on Devises

§ 20:84 Direction that no interest on devises should be paid

4. Estate Tax Allocation

§ 20:85 Incorporation of statutory rule of equitable proration

§ 20:86 Direction to pay estate tax out of residue on all property passing under will

§ 20:87 Direction to pay all estate tax out of residue on all property included in taxable estate

Bibliography

CHAPTER 21. TESTAMENTARY TRUSTS

I. LEGAL PRINCIPLES

A. OVERVIEW

- § 21:1 Use of testamentary trusts
- § 21:2 Governing law
- § 21:3 Trust requirements
- § 21:4 Naming and powers of trustee
- § 21:5 Valid will requirements
- § 21:6 Modification and revocation of trust
- § 21:7 Form drafting principles

B. TAX CONSEQUENCES

- § 21:8 In general
- § 21:9 Income tax
- § 21:10 Estate tax
- § 21:11 Gift tax
- § 21:12 Generation-skipping transfer tax

II. CHECKLISTS

- § 21:13 Matters to consider in drafting testamentary trust
- § 21:14 Tax matters to consider in drafting testamentary trust

III. FORMS

A. COMPLETE TESTAMENTARY TRUST FORMS

- § 21:15 Basic testamentary trust
- § 21:16 Married person's will with contingent testamentary trust for children
- § 21:17 Trust of residue to nieces and nephews

B. FORM PROVISIONS

1. Provisions for Spouse and Children

- § 21:18 Trust for support, maintenance, and education of children
- § 21:19 Separate trusts for children or issue
- § 21:20 Accumulation trust for children
- § 21:21 Surviving spouse's trust income withheld to extent of family allowance
- § 21:22 Trust provision for spouse with limited power of appointment
- § 21:23 Trust provision for spouse with remainder to issue partly outright and partly in trust

- § 21:24 Trust provision for spouse with secondary trust for children and general power of appointment
- § 21:25 Trust provision for children with limited powers of appointment
- § 21:26 Provision for after-born children
- § 21:27 Spousal disclaimer trust provisions
- § 21:28 Trust for former spouse pursuant to property settlement

2. Other Provisions

- § 21:29 Devise in trust for payment of annuity with reversion to residuary estate
- § 21:30 Devise in trust for benefit of person caring for testator
- § 21:31 Devise in trust for perpetual care of cemetery plot
- § 21:32 Devise in trust for payment of insurance premiums from income during lifetime of insured with remainder to named person
- § 21:33 Devise in trust for maintenance of pets
- § 21:34 Devise in trust of business interest for benefit of named person and employees
- § 21:35 Sprinkling trust provision
- § 21:36 “Pour over” to living trust
- § 21:37 Termination of trust to avoid violation of rule against perpetuities
- § 21:38 Special benefits trust provision
- § 21:39 Common disaster clause

Bibliography

CHAPTER 22. CODICILS, REVOCATION, AND REVIVAL OF WILLS

I. LEGAL PRINCIPLES

A. CODICILS

- § 22:1 Definition and purpose; governing law
- § 22:2 Formal witnessed codicils
- § 22:3 Holographic codicils
- § 22:4 Appropriate use of codicil

B. REFERENCE TO MATTERS OUTSIDE OF WILL

- § 22:5 Doctrine of incorporation by reference
- § 22:6 Doctrine of independent significance
- § 22:7 Doctrine of integration distinguished
- § 22:8 Revocable trust and pour-over will combinations

TABLE OF CONTENTS

C. REVOCATION, REVIVAL, AND REPUBLICATION OF WILLS

1. Revocation

- § 22:9 Overview
- § 22:10 Revocation by destruction
- § 22:11 Presumption of destruction with intent to revoke
- § 22:12 Revocation by subsequent writing
- § 22:13 Revocation as result of application of statute governing omitted spouse
- § 22:14 Revocation as result of application of statute governing omitted child
- § 22:15 Revocation as a result of dissolution or annulment
- § 22:16 Revocation as a result of termination of a domestic partnership
- § 22:17 Partial revocation
- § 22:18 Dependent relative revocation

2. Revival

- § 22:19 Overview

3. Republication

- § 22:20 Overview

II. CHECKLIST

- § 22:21 Matters to consider when drafting codicil

III. FORMS

A. COMPLETE CODICIL

- § 22:22 First codicil to will
- § 22:23 Codicil reviving revoked will
- § 22:24 Codicil to joint and mutual will

B. CODICIL PROVISIONS

1. Introductory Provisions

- § 22:25 Introductory provision where there is no prior codicil
- § 22:26 Introductory provision where there is prior codicil

2. Provisions Changing Will

- § 22:27 Provision substituting new provision
- § 22:28 Provision adding new provision
- § 22:29 Provision exercising testamentary power of appointment

3. Revocation Provisions

- § 22:30 Provision revoking prior will

- § 22:31 Provision revoking prior codicil
- § 22:32 Provision revoking article of will
- § 22:33 Provision revoking provision of will
- § 22:34 Provision expressing intent that contemplated marriage will not revoke will
- § 22:35 Provision expressing intent that contemplated divorce will not revoke will

4. Provisions Republishing Will

- § 22:36 Provision republishing will
- § 22:37 Provision republishing will as modified by prior codicil

5. Execution and Attestation Provisions for Codicils

a. Signature and Attestation Provisions

- § 22:38 Signature provision for codicil
- § 22:39 Attestation provision for codicil

b. Execution by Mark and Attestation Provisions

- § 22:40 Provision for signature of codicil by mark
- § 22:41 Attestation provision for signature by mark

c. Execution Per Substituted Judgment Order and Attestation Provisions

- § 22:42 Provision for signature per substituted judgment order
- § 22:43 Attestation provision for signature per substituted judgment order

C. REFERENCE TO MATTERS OUTSIDE OF WILL

1. Incorporation by Reference

- § 22:44 Provision for distribution of personal property pursuant to incorporated memorandum
- § 22:45 Nonbinding statement that items be distributed in accordance with memorandum

2. Reference to Letter of Instruction

- § 22:46 Provision for distribution of personal property pursuant to written instructions

3. Distribution of Personal Property as Another Decides

- § 22:47 Provision for distribution of personal property as another decides

TABLE OF CONTENTS

4. Pour-Over Provisions

- § 22:48 Pour-over provision for residue to trustee of revocable trust executed concurrently with will
- § 22:49 Pour-over provision for residue to trustee of revocable trust executed before will and amended concurrently with will
- § 22:50 Default provision incorporating trust by reference

Bibliography

Table of Laws and Rules

Table of Cases

Index