



Planning for the Future:

Creating and Administering
a Law School Estate Planning Clinic



PLANNING FOR THE FUTURE:
CREATING AND ADMINISTERING
A LAW SCHOOL ESTATE PLANNING CLINIC

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INTRODUCTION

The Estate Planning Clinic at the WilmerHale Legal Services Center of Harvard Law School (the “Harvard EPC”) is one of the first and only clinics of its kind in the United States. Established in 1987 in response to the emerging AIDS epidemic, the clinic’s mission is twofold: to provide Harvard Law students with practical, comprehensive experience in the field of trusts and estates law, and to afford underserved members of the Boston community high quality legal representation in estate planning matters.

The purpose of this Article is to highlight the basic structure of the Harvard EPC in an effort to articulate a replicable model for law schools nationwide. The Article consists of four (4) parts. Part I outlines the philosophical and practical considerations in establishing and administering an estate planning clinic. Parts II, III and IV comprise an estate planning practice guide for clinical instructors and students. For the sake of clarity, the Parts are organized chronologically, beginning with an overview of the intake phone-call and initial client interview in Part II, moving on to a substantive discussion of the estate planning forms and drafting process in Part III, and concluding with a protocol for reviewing, executing and filing the estate planning documents in Part IV.

The practice guide is not intended as a substitute for comprehensive knowledge of both the laws of wills and trusts and the practical aspects of counseling. Rather, the guide is meant to supplement the clinical attorney or student’s existing knowledge by discussing the legal and practical issues as they relate to the common estate planning needs of low to moderate income clinical clients. Accordingly, the guide assumes a basic familiarity with the laws of wills and trusts.¹ To the extent that certain subcategories of the law do not apply to low to moderate income clients, they are not discussed herein. For instance, as the vast majority of client estates will be exempt from federal and state transfer taxes, we provide only cursory coverage of the laws regarding estate taxation. Topics such as the probate process, the advising of fiduciaries, and entitlement programs, though relevant to any estate planning practice (and thus alluded to herein), are not the focus this Article.

¹ For a clear presentation of this area of law, see generally Jesse Dukeminier, Stanley M. Johanson, James Lindgren & Robert H. Sitkoff, *Wills, Trusts, and Estates* (7th ed. 2005), William M. McGovern, Jr. & Sheldon F. Kurtz, *Wills, Trusts and Estates: Including Taxation and Future Interests* (3d ed. 2004), and state-specific practice guides, such as *A Practical Guide to Estate Planning in Massachusetts* (Jon E. Steffensen et al. eds., MCLE, Inc. 1996 & Supp. 2000) [hereinafter “A Practical Guide to Estate Planning”].

PRELIMINARY CONSIDERATIONS IN ESTABLISHING AND ADMINISTERING AN ESTATE PLANNING CLINIC

A. Why Establish an Estate Planning Clinic?

An assessment of the value of an estate planning clinic necessarily requires a brief overview of benefits that would seem germane to all law school clinics. In particular, by providing a practical context for substantive knowledge gained in the classroom, a clinic enhances students' understanding of theoretical concepts, helps them to further refine their career goals and prepares them for professional practice. At the same time, a clinic introduces students to the human aspect of the study and practice of law, allowing them to serve disadvantaged members of the community who might otherwise be unable to secure legal representation. Indeed, a clinic's value to law students in offering significant educational and professional development opportunities is rivaled only by its value to the community at large in providing benefits to traditionally underserved populations.

In addition to these general benefits of a law school clinic, an estate planning clinic offers value that is unique to a clinical program of its type. For instance, while students in a litigation-oriented clinic may only work on a discrete component of a case during the course of a semester, students in an estate planning clinic are usually involved in every step of the client matter. Many estate planning cases are opened and closed in the course of mere weeks, allowing students to work with multiple clients and complete upwards of fifteen (15) cases each semester. By working with a variety of clients, students are able to reinforce their understanding of fundamental rules and strategies while expanding their knowledge base to account for a client's unique needs and goals.

In developing close relationships with individual clients and their families, students in an estate planning clinic not only hone their understanding of legal concepts, but also refine their counseling and communication skills. As most practitioners would attest, knowledge of the law without a thorough understanding of case and client is customarily insufficient to secure a desired legal end. By definition, crafting an estate plan requires an open dialogue between lawyer and client regarding the intimate details of the client's personal life. Exploring the balance between empathy and efficacy, students quickly become proficient in crafting case and client theories, identifying strategies to best achieve client goals.

At a more general level, an estate planning clinic is a valuable learning and teaching tool to the extent that it provides students with exposure to a predominantly non-adversarial form of law practice. While much of the classroom work in law school is litigation-oriented, an estate planning clinic allows students to break out of the adversarial posture and assume a more conciliatory role of lawyer as family advisor and teacher. The characteristics of such a role may be more in line with a student's innate personality traits and skill-set and thus a welcome alternative to the "Law and Order" prototype.

Finally, an estate planning clinic adds inherent value to any existing clinical curriculum to the extent that cases originating in more traditional clinical practice areas consistently breed estate planning issues. As the Harvard EPC grows in size and stature, we continue to receive a steady stream of referrals from our fellow clinicians, both at the WilmerHale Legal Services Center and at other Harvard Law School clinics, in the areas of family law, housing law, corporate law and disability law. Clients who seek legal assistance for

seemingly unrelated matters ultimately find themselves in need of estate planning services to effectuate their goals. For instance, a divorcing spouse who enlists the assistance of the Family Law Clinic must ensure that her minor children are provided for upon her death by executing a will and revocable trust. A disabled tenant involved in a housing dispute must be certain that the proceeds of a settlement do not render him ineligible for Social Security benefits. The client is referred by the Housing Clinic to the Harvard EPC and a special needs trust is established to hold the settlement amount and preserve the government benefits. By ensuring that long-term client needs are met, an estate planning practice is thus a critical component of any clinical curriculum.

B. Addressing Philosophical Issues

There are a variety of philosophical issues to consider in establishing any law school clinic. For instance, do the benefits of a controlled environment in which instructors simulate fact patterns outweigh the value of a "genuine" neighborhood clinic in which students work with bona fide clients? Drawing on the Harvard EPC example, this Article presupposes a model in which students and attorneys provide legal services to real clients with real legal needs.

Another philosophical issue worthy of mention is the ever-present quality versus quantity debate. To a large extent, the volume of cases on which a student might work each semester depends on practical concerns such as the number of course credits a student devotes to his or her clinical work, the number of clinical instructors and the complexity of a client's needs. There is, however, a more philosophical question regarding the extent to which a supervisor should encourage a student to take on additional clients at the risk of decreasing the amount of time the student might devote to any pre-existing matters. On the one hand, repetition tends to reinforce a student's understanding of a given rule of law or legal strategy. On the other hand, an increase in quantity may discourage the student from conducting an exhaustive analysis of a given issue. Real world experience would tend to support a model emphasizing quantity and quality, an approach that is encouraged at the Harvard EPC. Of course, the practical results of such a theoretical approach may vary significantly across any given pool of students.

A final concern that should be considered at the planning phase of any law school clinic is the inherent tension between serving the clients and educating the students.² It is often the case that providing the student with the most comprehensive and instructive educational experience does not afford the client the most efficient and effective service. Too little supervision on the part of the instructor may impede the progress of a client matter. Excessive intervention, while increasing the likelihood of a swift and satisfactory resolution, may undermine the educational value of a case. It is thus important to find the appropriate balance in simultaneously meeting both client and educational objectives.

² See Ann Juergens, Teach Your Students Well: Valuing Clients in the Law School Clinic, 2 Cornell J.L. & Pub. Pol'y 339, 340-41 (1993).

C. Securing Approval

An estate planning clinic, like any new course offering, must be vetted before a law school's administrators and faculty members. While the approval process will vary across institutions, it will likely require an articulation of the clinic's broad goals, curriculum and proposed client base. Perhaps most importantly, the proposal must include a detailed analysis of the resources necessary for the clinic's establishment and maintenance. Where a law school offers other clinical programs, the proposed estate planning clinic may be able to tap into pre-existing resources, thus defraying significant start-up costs.

D. Establishing Internal Procedures for Case Acceptance and Case Management

More often than not, an estate planning clinic will be established at a law school with an existing clinical curriculum. Accordingly, in many cases, it may be most efficient for the estate planning clinic to adopt in part the procedures of a pre-existing clinical program. Recognizing that it may be unnecessary to "reinvent the wheel", we offer the approach of the Harvard EPC as a model that might be adopted piecemeal or wholesale depending on the unique circumstances at hand.

1. The Handbook

The Harvard EPC's standard operating procedure, as discussed below, is memorialized in a student handbook. In addition to articulating procedural conventions, the handbook provides a brief overview of the substantive material the students will encounter during their term at the clinic. Of course, this substantive overview is intended merely to supplement to the students' academic coursework in trusts and estates. Though students inevitably learn on the job, the manual is a useful reference guide that might be read in-depth at the beginning of the semester and consulted periodically as needed.

2. Drawing Potential Clients

Clients arrive at the Harvard EPC through multiple channels. Because the clinic prioritizes serving clients with chronic medical problems and the frail elderly, we have established close working relationships with local hospitals and community health centers such as the New England Medical Center, the Boston Medical Center and Brigham and Women's Hospital. We foster ongoing connections with medical care providers and social workers at such facilities through regular mailings and formal and informal onsite information sessions. We also receive a steady stream of referrals from local legal and social services organizations. Referrals from such external sources are complemented by an ever-increasing number of "in-house" referrals from other clinical programs at Harvard Law School. As our presence grows within the community, the number of walk-in and "word-of-mouth" clients continues to rise. In addition to the publicity generated by our current and former clients, we have increased community awareness by distributing leaflets, posting signs and advertising in local newspapers.

3. Creating the Waitlist

After implementing strategies for client development, the next hurdle in establishing an estate planning clinic is developing a procedure for coordinating initial client contact and work flow. At the Harvard EPC, a clinical instructor or student fields calls from potential clients and enters basic information into an online database. In particular, the database includes the potential client's name, contact information, time and date of call, and a brief description of his or her legal issues. Ordinarily, calls are returned in the order in which they are received and appointments are scheduled accordingly. In the event that the clinic is unable to accept a new case at the time of inquiry, a clinical instructor or student contacts the potential client and alerts him or her as to the approximate wait-time. When a call has been returned, the database is updated to reflect the status of the case.

4. Accepting Cases

As an estate planning clinic will likely receive inquiries involving a wide range of legal issues, it is advisable to establish a set of general boundaries regarding the type of cases the clinic will accept. For instance, as a general rule, the Harvard EPC does not accept cases in which the client's actual or anticipated net worth is in excess of the federal or state estate tax exemption amounts. Instead, we regularly refer such cases to private attorneys who target higher income clients. Focusing primarily on estate planning and probate for low to moderate income clients, we also routinely turn away cases involving allegations of breach of trust and fiduciary duty.

During the initial phone conversation with a potential client (discussed in greater detail in Part II(A), below), the clinical instructor or student might assess whether the requested services fall within the clinic's scope. However, in cases involving more complex legal issues, it may be advisable to engage the potential client in a more formal interview. Prior to accepting a case, the clinical instructor and student must also confirm that there is no conflict of interest that would preclude the clinic from representing the client on an estate planning or probate matter.³

5. Engagement Letters and Student Authorization Forms

Assuming a case is accepted, it is necessary to formalize the attorney-client relationship through a written engagement letter. The Harvard EPC has form engagement letters in English and Spanish that can be modified to detail the services to be provided and the fees to be assessed, if any.⁴ Clinical instructors and students are urged to be as precise as possible in articulating the legal work to be performed. The engagement letter also details the client's various responsibilities (e.g., communication, honesty), the extent to which Harvard Law students will be involved in any given case, and the circumstances under which representation

³ See generally Ann. Model Rules of Prof'l Conduct R. 1.9(a) (2007): "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

⁴ To avoid the unintentional distortion of information, a translator should be familiar (to the extent practicable) with general legal and basic estate planning concepts. At the Harvard EPC, we are fortunate to have a full-time, on-site translator who has worked in the legal profession for over a decade.

might be terminated. In cases involving complex issues of confidentiality and conflicts of interest, such as the clinic's representation of both partners to a second marriage with children from prior relationships, it is advisable to include in the engagement letter an explanation of the relevant ethical rules.

Regarding fees, the Harvard EPC has adopted a sliding scale schedule based on federal poverty levels.⁵ Of course, a clinic's approach to fees will depend in large part on the funding it receives from the law school with which it is affiliated, along with any state or federal grants. While it is assumed that the client will read the engagement letter in its entirety, it is important to walk through each provision with the client to confirm his or her understanding.

In addition to the engagement letter, each client is asked to sign a standard form authorizing student representation in matters before the probate court. The extent to which a student might represent a client in a civil action will vary from state to state.

6. Documentation of the Client-Matter

After the initial client interview (a substantive overview of which is provided in Part II(C), below), the student assigned to the case drafts a detailed opening memo, including a summary of the legal issues presented, the client's statement of goals, the student's first impressions, preliminary strategies, and outstanding questions for the clinical instructor. Where possible, a student will list contact information for the client's family members, potential beneficiaries and fiduciaries. The student stores the electronic copy of the memo in the client's online folder and places a hard copy in the case file.

During the course of a student's work on any given case, he or she drafts weekly notes to the client's online file, memorializing research and communications and providing general status reports. Upon completion of a client matter, the student composes a closing memo charting the ultimate disposition of the case. If a case is not completed prior to the end of the student's term at the clinic, he or she drafts a transfer memo to provide guidance to the student or clinical instructor assuming responsibility for the matter. As with the opening memo, electronic copies of the closing and transition memos are stored in the client's online folder and hard copies are placed in the case file.

INTAKE

After establishing a philosophical and procedural framework, the estate planning clinic may open its doors to students and clients alike. Part II provides a chronological overview of the first step in the estate planning process: client intake.

A. The Initial Phone Call

As discussed in Part I(D)(2), above, an estate planning clinic will receive referrals through a variety of channels. In response to an inquiry, the clinical attorney or student (hereinafter the "clinician") should contact a potential client by phone to identify his or her legal issues and to schedule an in-depth initial meeting. Any such communication should be prefaced by a so-called "limited assistance disclosure", a statement by the clinician that he or she does not represent that potential client and will in turn provide only limited assistance during the initial phone call.

Beyond allowing the clinician to assess whether the desired legal ends are within the clinic's mandate, the introductory phone call serves several other key purposes. First, it allows the clinician to provide a general overview of the estate planning process and establish a rapport with the potential client. Second, it is an opportunity to explain the purpose of the clinic and emphasize student participation in the planning and drafting processes. While some prospective clients will appreciate the academic aspect of the clinic, others may be uncomfortable with student involvement and opt for alternative means of assistance outside the clinic.

Third, during the course of the informal phone conversation, the clinician might assess any ethical concerns such as issues of confidentiality and conflicts of interest. Specifically, the clinician may ask whether the potential client intends to attend the in-depth meeting alone or with one (1) or more third parties (e.g., spouse, child, friend). In general, clinicians are ethically and legally bound to keep all client information confidential. However, "the presence of third parties during an attorney-client communication is often sufficient to undermine the 'made in confidence' requirement... or to waive the privilege."⁶ If a potential client wishes to attend the initial meeting with a third party, it is necessary to advise him or her as to the confidentiality issues such a scenario will raise. Information regarding third party involvement will also allow the clinician to tailor discussion points regarding conflicts of interest in estate planning. For instance, in general, where an attorney represents both parties to a marriage, each person waives the right to require that the lawyer keep disclosures made to the lawyer confidential from the other person.⁷ The clinician may even have an affirmative duty to disclose the information relayed by one client to such client's spouse. Where possible, the clinician might discuss such ethical rules prior to the in-depth meeting, thus informing the potential client's decisions regarding third party involvement and joint representation.

⁵ A sample fee schedule is included in the Appendix.

⁶ Cavallaro v. U.S., 284 F.3d 236, 246 (1st Cir. 2002).

⁷ See Ann. Model Rules of Prof'l Conduct R. 1.7 cmt. 30; see also Mass. Rules of Prof'l Conduct R. 1.7 cmt. 12 (1997) (amended 2008).

B. The Estate Planning Pamphlet and Questionnaire

Prior to the initial meeting, the clinician should send the potential client an estate planning pamphlet, describing the six (6) standard estate planning documents, (i.e., the will, the revocable trust, the health care proxy, the living will, the durable power of attorney, and the declaration as to remains).⁸ The pamphlet should also list in brief the decisions to be made for each document regarding dispositive provisions and fiduciaries. A sample estate planning pamphlet is included in the Appendix.

Before meeting with the clinician, the potential client should complete a detailed estate planning questionnaire, providing an overview of his or her financial and familial background. Such information will promote efficiency during the initial meeting and reduce the need for follow-up conversations (e.g., as when a client does not bring the address of a fiduciary or beneficiary to the meeting). If there are two (2) clients (e.g., a couple), each should fill out a separate questionnaire. A sample estate planning questionnaire is also included in the Appendix.

Beyond informing the ultimate estate plan, the questionnaire creates a snapshot of the potential client's finances for the clinician's file. If the individual dies or becomes incapacitated, this snapshot of bank accounts, life insurance policies, real estate and other assets may prove instructive to the executor and other fiduciaries. The process of completing the form is in itself helpful to the extent that it allows the potential client to privately reflect on highly sensitive and personal issues prior to meeting with the clinician.

Along with the completed questionnaire, the potential client should bring any existing estate planning documents to the initial meeting. If possible, he or she should also bring life insurance policies, mortgage documents, bank statements (the cover page of each, showing account numbers and values, is sufficient), deeds, employment benefits (such as pensions and IRA benefits), and account records for all brokerage and money market funds. If a client-matter is opened, the clinician will make copies of such documents for the file.

C. The Initial Meeting

The content of the initial meeting will be shaped in part by the clinician's prior contact, if any, with the potential client. Assuming there has been an introductory phone conversation, the clinician should nevertheless reiterate the confidentiality rules, explain the clinic's fee structure and summarize the package of estate planning documents offered. The potential client, in turn, should be given ample opportunity to discuss his or her legal issues and goals: Why is he or she seeking legal assistance? Was there any triggering event that caused him or her to seek legal advice? Is it an emergency situation requiring immediate attention? If and when the clinician accepts the case, the client should sign an engagement letter establishing the scope of representation and a student authorization form (see Part I(D)(5), above).

Drawing on the annotated templates in Part III, below, the clinician should provide a general description of each estate planning form, engaging the client in a discussion of the means through which he or she might secure the desired ends. In most cases, it is advisable to focus on how each document enables the client to achieve his or her goals, rather than provide the client with a line-by-line explanation of the forms. Those clients who have reviewed the estate planning pamphlet prior to the meeting may have made some preliminary decisions regarding fiduciaries, property distribution, beneficiary designations and other dispositive provisions in the estate planning documents. The clinician should discuss with the client his or her reasoning in arriving at such decisions, assess the viability and practicality of his or her choices, and provide additional information and explanation where necessary.

⁸ Of course, though this Guide articulates a set of six (6) standard estate planning documents, a clinician may determine that a different combination of documents best suits his or her client's needs.

DRAFTING THE ESTATE PLANNING DOCUMENTS

Ideally, after the in-depth client meeting, the clinician will have sufficient information to draft the documents necessary to fulfill the client's estate planning needs. To assist the clinician in the drafting process, we have included below an annotated template for each of the six (6) principal estate planning documents. Preceding each template is a summary of the key decisions the client must make with respect to such form.

Though the templates are based on the forms developed for the Harvard EPC in conformity with Massachusetts case and statutory law, the annotations highlight jurisdictional disparities and relevant Uniform Probate Code (hereinafter the "UPC") provisions. It follows that the forms should be reviewed by local practitioners and modified accordingly to ensure compliance with the laws of the state in which a clinic operates.

For the sake of clarity, it is advisable to adhere to certain stylistic conventions in drafting estate planning documents. In particular, to ensure that fiduciaries and beneficiaries are readily discernible, all names should appear in uppercase letters. The first time an individual is referenced in a document, his or her name should be followed by the city, county and state in which he or she resides. Where the person named in the document is related to the client, the familial relationship should be articulated (e.g., "my father, JOE SMITH"). Where an individual has already been referenced in a document, any additional reference should be preceded by the word "said" (e.g., "my said father, JOE SMITH"). Finally, where an individual is known by a moniker other than his or her legal name, the clinician should include an "a/k/a" parenthetical after the initial reference to the individual (e.g., "JOHN SMITH (also known as JIMMY SMITH)"). Inclusion of the moniker is intended to avoid situations where, for example, a bank officer refuses to give the executor access to the testator's account because the bank knows the testator by a different name.

In the Sections below, form provisions are bolded and optional language is bracketed and italicized. Provisions that require personalization are also bracketed and italicized (e.g., the name and domicile of the client).

A. The Will

A client who wishes to execute a will must make a number of decisions regarding fiduciaries and the distribution of property. In particular, the client must consider whom to nominate as executor and as guardian. The client must also name individuals and organizations as beneficiaries of his or her estate and determine how to divide assets among such beneficiaries.

FORM: WILL

1. Form: Name of Testator

LAST WILL AND TESTAMENT OF [NAME OF TESTATOR]

2. Form: Declaration of Last Will and Testament

I, [NAME OF TESTATOR], of [Testator's City, County and State of Residence], make this my last will revoking any previous will or codicil.

Comment: The purpose of this so-called publication clause is to identify the testator, revoke all prior wills and codicils and establish the testator's place of residence. In general, the laws of wills, trusts, and estates are state-specific. Because people are mobile and may own property in multiple states, choice of law issues can arise. Conflicts are settled by the following factors: (1) with respect to personal property, the applicable law is usually determined by the residence of the decedent;⁹ (2) regarding real property, the governing law is usually determined by the situs of such property;¹⁰ (3) explicit choice of law clauses in wills are usually respected by the courts;¹¹ (4) "sometimes the forum simply applies its own law. . . This is justified by the fact that it may be difficult to apply another state's rules, and the parties do not rely on them in entering transactions."¹² Note that more complex situations may arise where the testator owns property outside the United States.¹³

An individual need not execute a new will to revoke all previous wills. All states recognize several other methods of revocation, including destroying, burning or tearing the original will document.¹⁴ It is important to note that in many states, the revocation of a will may affect only probate assets (assets in the testator's own name) and not alter beneficiary designations on life insurance, joint accounts, IRA designations, retirement funds and similar designations.¹⁵

In the vast majority of states, divorce automatically revokes testamentary provisions for the testator's divorced spouse.¹⁶ These rules usually do not apply to nonprobate assets, although the UPC applies such rules to both probate and nonprobate transfers. In some states, such as Massachusetts, marriage revokes a previously executed will in its entirety unless the will was executed in contemplation of marriage and contains explicit language to that effect.¹⁷

⁹ McGovern, *supra* note 1, at 29; see also Restatement (Second) of Conflict of Laws §§ 260, 263-265 (1971).

¹⁰ McGovern, *supra* note 1, at 27; see also Cal. Civil Code § 755 (West 2008); Mass. Gen. Laws Ann. ch. 199, § 1 (West 2008).

¹¹ McGovern, *supra* note 1, at 25; see also UPC § 2-703 (1990) (amended 2003); Restatement (Second) of Conflict of Laws § 264(1).

¹² McGovern, *supra* note 1, at 32.

¹³ See generally, William H. Newton, III, *International Income Tax & Estate Planning*, ch. 2 (Shepard's/Mcgraw-Hill eds., 2d ed. 1993 & Supp. 2008).

¹⁴ Dukeminier, *supra* note 1, at 251-52; see UPC § 2-507 for typical statutory language.

¹⁵ For an in depth discussion of the distinction between probate and nonprobate assets, please see the Comments preceding CLAUSE SECOND of the will form, below.

¹⁶ Dukeminier, *supra* note 1, at 269.

¹⁷ Mass. Gen. Laws Ann. ch. 191, § 9; see also *Morse v. Alley*, 638 S.W.2d 284 (Ky. Ct. App. 1982).

3. Form: Fiduciaries, Fiduciary Bond

CLAUSE FIRST: I appoint [NAME OF EXECUTOR], of [Executor's City, County and State of Residence], to be Executor of this will. If [he/she] does not become or ceases to be Executor, I appoint [NAME OF BACKUP EXECUTOR], of [Backup Executor's City, County and State of Residence], to be Executor in [his/her] place.

I appoint my spouse, [NAME OF SPOUSE], of [Spouse's City, County and State of Residence], to be Guardian of the person and property of any minor child of mine who survives me; but if my said spouse does not survive me, I appoint [NAME OF BACKUP GUARDIAN], of [Backup Guardian's City, County and State of Residence], and [his/her] spouse, [NAME OF BACKUP GUARDIAN'S SPOUSE], or the survivor of them, to be such Guardians in [his/her] place.

I request that any person above appointed to be Executor also be appointed Temporary Executor upon appropriate application. No person above appointed to be Executor, [or] Temporary Executor, [or Guardian] shall be required to give surety on any bond.

Comment: The executor is charged with administering the testator's estate. The responsibilities of the executor include the following:

- Filing the decedent's will with the probate court and initiating the probate process;
- Collecting, appraising and managing the decedent's assets;
- Paying any debts of the decedent or claims against the estate;
- Filing income tax returns for the decedent and the decedent's estate, if necessary;
- Filing estate tax returns for the decedent's estate, if necessary;
- Making distributions to beneficiaries named in the decedent's will; and
- Closing the estate.

Though a few states have allowed a minor to act as executor, in most jurisdictions, the executor must be an adult.¹⁸ The age of majority is not uniform across all states. In Massachusetts, only individuals over eighteen (18) years of age may serve as executor.¹⁹ Under the UPC, an executor must be twenty-one (21) years of age or older.²⁰

The executor need not be related to the testator, though many clients choose to appoint a family member. The executor may also be a named beneficiary of the estate. Given the modest value of the average clinical client's estate, it is usually inefficient to appoint a professional executor, such as a bank, accountant or attorney.

If possible, the client should appoint an alternate executor in the event that the first person named is unwilling or unable to serve. In fact, many practitioners would advocate the appointment of a second alternate or a nomination committee to avoid probate court involvement in the event of a further vacancy.

¹⁸ 8 ALR 3d 590 (1966); 31 Am. Jur. 2d Executors and Administrators § 202 (2005).

¹⁹ Mass. Gen. Laws Ann. ch. 192, § 4.

²⁰ UPC § 3-203(f).

Because in most cases, multiple executors are required to act unanimously, it is inadvisable to name two (2) or more individuals to serve concurrently. Indeed, from a practical standpoint, securing the approval of two (2) or more co-executors may result in added expenses and unnecessary delays in the probate process.

Clients with minor children should also include guardian provisions in their wills. As with the executor, it is advisable to appoint a back-up guardian in the event that the first person named is unwilling or unable to serve. If the client chooses to appoint a married couple as co-guardians, he or she must determine how divorce or the death of one of the named individuals might impact his or her analysis.

The language in the template referencing "Temporary Executors" is a reflection of Massachusetts law.²¹ Because not all states have statutes authorizing the use of temporary executors, the template should be modified accordingly.

Regarding bonds, the general default rule is that the executor must file a bond with the probate court and give sureties thereon.²² As many clinical clients will appoint a family member or friend as executor, they may wish to avoid an added financial burden by waiving the sureties requirement in the will.²³ In some jurisdictions, including Massachusetts, the sureties requirement might also be waived for guardians of a minor's property.²⁴

4. Form: Disposition of Probate Assets

a. OPTION: Entire Estate to One (1) Beneficiary

CLAUSE SECOND: I give my entire estate, including specifically my tangible personal property, to [NAME OF BENEFICIARY], of [Beneficiary's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY], of [Alternate Beneficiary's City, County and State of Residence], if [he/she] survives me[, to keep what [he/she] wants and to distribute the rest as [he/she] sees fit].

²¹ Mass. Gen. Laws Ann. ch. 192, § 13. The Massachusetts statute was enacted to address the situation in which there is an immediate need to preserve and manage the assets of the estate pending the appointment of an executor.

²² 33 C.J.S. Executors and Administrators §§ 67, 71 (1994 & Supp. 2008); 3 Est. & Pers. Fin. Plan. § 30:12 (2001 & Supp. 2008); see, e.g., Mass. Gen. Laws Ann. ch. 192, § 4, ch. 205 § 1.

²³ 3 Est. & Pers. Fin. Plan. § 30:12.

²⁴ 31 C.J.S. Guardian & Ward § 31 (1994 & Supp. 2008), Mass. Gen. Laws Ann. ch. 205, § 5. Note, however, that under Massachusetts law, the probate court may, at any time, require the guardian to give a bond with sureties.

b. OPTION: Entire Estate to One (1) Beneficiary with Precatory Language

CLAUSE SECOND: I give my entire estate, including specifically my tangible personal property, to [NAME OF BENEFICIARY], of [Beneficiary's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY], of [Alternate Beneficiary's City, County and State of Residence], if [he/she] survives me, with the request, but not imposing a trust or legal obligation with respect to said request, that said [NAME OF BENEFICIARY] or said [NAME OF ALTERNATE BENEFICIARY] (as the case may be) distribute certain articles of tangible personal property in accordance with what [he/she] may understand to be my wishes, or taking into account any non-binding memorandum which I may leave. The decision of said [NAME OF BENEFICIARY] or said [NAME OF ALTERNATE BENEFICIARY] (as the case may be) as to the identification and division of my tangible personal property shall be final and binding on all parties, regardless of whether said [NAME OF BENEFICIARY] or said [NAME OF ALTERNATE BENEFICIARY] receives all or a share of said property.

Without limitation, the expression "tangible personal property" includes jewelry, furniture, objects of art, vehicles, equipment, collections, and the like, but excludes currency, bankbooks, commercial paper, documents and securities.

c. OPTION: Estate Divided Among Several Beneficiaries (Percentages)

CLAUSE SECOND: I give my entire estate, including specifically my tangible personal property, to the following persons in the following percentages:

A. I give _____ Percent ([]%) to [NAME OF BENEFICIARY 1], of [Beneficiary 1's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 1], of [Alternate Beneficiary 1's City, County and State of Residence], if [he/she] survives me.

B. I give _____ Percent ([]%) to [NAME OF BENEFICIARY 2], of [Beneficiary 2's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 2], of [Alternate Beneficiary 2's City, County and State of Residence], if [he/she] survives me.

C. I give _____ Percent ([]%) to [NAME OF BENEFICIARY 3], of [Beneficiary 3's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 3], of [Alternate Beneficiary 3's City, County and State of Residence], if [he/she] survives me.

D. I give _____ Percent ([]%) to [NAME OF BENEFICIARY 4], of [Beneficiary 4's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 4], of [Alternate Beneficiary 4's City, County and State of Residence], if [he/she] survives me.

If any of the beneficiaries named above fails to survive me and I have failed to name a successor beneficiary or the successor beneficiary has also failed to survive me, the bequest to such beneficiary [shall augment proportionally the bequests of the other named beneficiaries who survive me] [shall be divided in equal shares among such of the other named beneficiaries who survive me] [shall be divided as follows]:

d. OPTION: Specific Bequests/Legacies to Specific Beneficiaries

CLAUSE SECOND: To the persons listed below, I give the following items of personal and real property if owned by me at the time of my death and the legacies hereinafter set forth:

A. I give [Asset 1] to [NAME OF BENEFICIARY 1], of [Beneficiary 1's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 1], of [Alternate Beneficiary 1's City, County and State of Residence], if [he/she] survives me.

B. I give [Asset 2] to [NAME OF BENEFICIARY 2], of [Beneficiary 2's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 2], of [Alternate Beneficiary 2's City, County and State of Residence], if [he/she] survives me.

C. I give [Asset 3] to [NAME OF BENEFICIARY 3], of [Beneficiary 3's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE BENEFICIARY 3], of [Alternate Beneficiary 3's City, County and State of Residence], if [he/she] survives me.

All the rest, residue, and remainder of my property and estate, of whatsoever character, whensoever acquired and wheresoever situated, and to which I or my estate may be in any manner entitled at the time of my death, [including any property or estate as to which I may have any power of disposition or appointment,] I give to [NAME OF RESIDUARY BENEFICIARY], of [Residuary Beneficiary's City, County and State of Residence], if [he/she] survives me, and, if not, to [NAME OF ALTERNATE RESIDUARY BENEFICIARY], of [Alternate Residuary Beneficiary's City, County and State of Residence], if [he/she] survives me.

The Executor is authorized to pay the costs of collecting, securing and disposing of my tangible personal property (including, without limitation, costs of shipping any such property to its distributee), from the residue as an expense of administration.

e. OPTION: Tangibles to Spouse and Children; Residue to Revocable Trust

CLAUSE SECOND: I give all my tangible personal property, wherever situated, to my spouse, [NAME OF SPOUSE], if [he/she] survives me. If my said spouse does not survive me, I give all my tangible personal property to my children who survive me, to be divided among them by my Executor in shares as nearly equal in value as practicable, having due regard for the personal preferences of my children. If neither my said spouse nor any of my children survives me, I give the Executor the fiduciary power to distribute my tangible personal property among such of my family and friends (excluding himself or herself, however, unless he or she is a member of my family [or the family of my said spouse]) and in such proportions, or to dispose of it as part of the residue, as the Executor thinks I would have wished, being guided but not bound by any informal memorandum of my wishes which I leave.

Without limitation, the expression "tangible personal property" includes jewelry, furniture, objects of art, vehicles, equipment, collections, and the like, but excludes currency, bankbooks, commercial paper, documents and securities.

The Executor is authorized to pay the costs of collecting, securing and disposing of my tangible personal property (including, without limitation, costs of shipping any such property to its distributee), from the residue as an expense of administration.

I give all the residue of my estate, real and personal, in trust to the Trustee or Trustees (serving from time to time) of the so-called [NAME OF GRANTOR] 200[] REVOCABLE TRUST (as amended from time to time), a trust established under an instrument heretofore executed by me, as Grantor, on the ____day of _____, 200[], treating said Trust as a fact existing and having significance independently of this will. [I was the sole original Trustee of said Trust].

Provision is made in said Trust for my surviving children and surviving issue of any deceased child.

If any property directed to be distributed to the said Trustee or Trustees in accordance with the foregoing provisions cannot be so distributed under any then applicable rule of law or because the Trust shall have terminated before my death, then I give said property to the Trustee or Trustees who at the time of my death or upon such earlier termination were acting under said Trust, to hold and dispose of said property as Trustee or Trustees under this will in accordance with the provisions of said Trust as last amended.

The receipt of the said Trustee or Trustees shall be sufficient to discharge the Executor hereunder with respect to property distributable to the said Trustee or Trustees under this **CLAUSE SECOND.**

Comment: In addition to naming executors and guardians, a client must determine how he or she wishes to dispose of any so-called probate assets remaining upon death. Probate property, which may be disposed of under a will, should be distinguished from non-probate property, which passes outside of probate by operation of law. Non-probate assets include any property held in joint tenancy with survivorship rights, life insurance proceeds (where the beneficiary is a party other than the insured's estate), remainder interests in legal life estates, and property held in inter vivos trusts.

There are several benefits to transferring property outside of probate. In particular, a non-probate transfer avoids the costs and administrative hassles associated with probating an estate. Additionally, while a will is a public document, an instrument creating a nonprobate property arrangement is not subject to public review. Where a client places a premium on privacy, he or she may wish to explore in depth the options regarding nonprobate transfers.

In determining a disposition scheme for probate assets, the client may consider a variety of options such as leaving the entire estate to one (1) beneficiary, distributing percentages of the estate to several beneficiaries, or gifting specific assets (e.g., a television, clothing, or money) to particular beneficiaries. The client must also direct the disposition of assets in the event that a named beneficiary predeceases the client.

Another option for the client to consider is establishing a revocable trust to receive certain assets or the residue of his or her estate. To effect a basic estate disposition (e.g., everything to spouse, residue to charity X or everything in equal shares to adult siblings), a simple will without a trust is likely sufficient. It may be advisable, however, to establish a trust where a client wishes

to provide for a minor child, incompetent adult or any beneficiary lacking financial savvy or experience. The various circumstances under which a client may choose to create a revocable trust are discussed in greater detail in Part III(B), below.

On occasion, a client may wish to explicitly exclude an heir from the beneficial class. Though such "disinheritance" provisions are perfectly valid, clients should be encouraged to carefully consider the implications of disinheriting the so-called natural objects of their bounty. It is also advisable for the testator to state in the will his or her rationale for excluding an individual from the beneficial class (e.g., estrangement, independent wealth, adequate alternative provisions through nonprobate transfers).

In many states, where a spouse is not provided for in a will that was executed prior to the marriage, the surviving spouse is afforded an intestate share, unless it appears that the testator intended to omit the spouse from the beneficial class. Even where a premarital will explicitly excludes the future spouse, such spouse may take a so-called "forced share" of the predeceasing spouse's estate, "which is given to all spouses whether intentionally or unintentionally disinherited".²⁵ Assuming the surviving spouse is provided for under the predeceasing spouse's will, if the bequest or legacy is smaller than the forced share, the surviving spouse can renounce the will and take the forced share instead.²⁶

In the majority of states, where a child is not provided for in a will that was executed prior to such child's birth, the so-called "pretermitted child" receives a share of the decedent's estate.²⁷

5. Form: Ultimate Contingency Clause

CLAUSE THIRD: If each and every beneficiary of my estate should fail to survive me, I desire that my estate be distributed to [[NAME OF FRIEND] [NAME OF CHARITABLE ORGANIZATION] [pursuant to the intestacy laws of the State of [Testator's State of Residence]].

Comment: The ultimate contingency clause should be omitted where the residue of the estate pours into a revocable trust. By default, any property that has not been disposed under the will (because, for instance, the named beneficiary has predeceased the testator) passes pursuant to the intestacy laws of the state in which the will is probated. Typically, intestacy rules divide the property among the testator's spouse and descendants, or, if there are none, among his or her parents and more distant relatives.²⁸

25 Dukeminier, *supra* note 1, at 270; UPC § 2-301.

26 Dukeminier, *supra* note 1, at 270, 425.

27 *Id.* at 270; UPC § 2-302.

28 See UPC §§ 2-101—2-105.

6. Form: Payment of Debts; Tax Apportionment Clause

CLAUSE FOURTH: All of my debts, funeral expenses, and expenses of administration and all estate, inheritance and other death taxes, including all interest and penalties thereon, other than any such tax on generation-skipping transfers, payable during the administration of my estate by any person by reason of my death, shall be charged to and paid from the residue; except that to the extent any applicable apportionment statute so provides, such taxes so payable with respect to jointly owned property, insurance proceeds, powers of appointment, beneficial interests in trust and transfers in trust shall, if paid by the Executor, be apportionable in accordance with such statute. To the extent that the residue is insufficient then all other legacies, devises and bequests shall abate pro rata.

The foregoing provisions notwithstanding, no tax of any kind and none of my debts or the expenses of administering my estate shall be charged to, paid out of, or charged in reduction of any property with respect to which a deduction would otherwise be allowable for federal or state estate tax purposes, as a [marital deduction (if an appropriate election, if required, were made),] charitable deduction, or otherwise.

The Executor may allocate the so-called GST exemption provided under Section 2631 of the Code to any property with respect to which I am the transferor, passing under this will or otherwise, in such manner as in the Executor's sole discretion the Executor deems advisable. [In the case of property passing or directed to pass to or under any trust, before allocating said GST exemption as hereinabove provided the Executor may direct the Trustee or Trustees of such Trust (serving from time to time) to divide any trust fund established or directed to be established thereunder into separate shares (to be held, administered and accounted for as separate trusts), and to allocate property thereto in such manner (otherwise consistent with the provisions of said trust instrument) as in the Executor's sole discretion the Executor deems advisable.] [The Executor may make, or forbear from making, the special election for qualified terminable interest property under Section 2652(a)(3) of the Code in such manner as in the Executor's sole discretion the Executor deems advisable.] The Executor shall be exonerated from all liability in connection with any action taken in good faith pursuant to the provisions of this paragraph.

Comment: In 2009, the maximum federal estate tax rate, which applies to estates in excess of \$3,500,000, is 45%.²⁹ Though most states administer a separate estate tax,³⁰ many jurisdictions tie their exemption amounts to the federal exemption. Some states have "decoupled" from the federal estate tax. In Massachusetts, for instance, the estate tax exemption amount is \$1,000,000 in 2009 and will remain level indefinitely.

In addition to the federal and state estate taxes, a testamentary transfer to a grandchild or more remote descendant may be subject to the so-called generation skipping transfer ("GST") tax. The GST tax is a flat tax assessed at the highest estate tax rate. In 2009, each transferor has a

²⁹ The federal estate tax is scheduled to be repealed in 2010. If a person were to die in 2010, none of his or her property would be subject to estate taxes. However, if no additional action is taken by Congress, the estate tax repeal will lapse and a \$1,000,000 exemption will be reinstated on January 1, 2011. The gift tax has not been repealed, and the exemption amount for lifetime gifts is not scheduled to increase beyond the current \$1,000,000 exemption.

³⁰ A few states, such as Florida and New Hampshire, do not impose a state estate tax.

\$3,500,000 exemption from the GST tax, which is an aggregate exemption and not a per grandchild exemption.

CLAUSE FOURTH of the will template authorizes the executor to pay any applicable federal or state estate taxes first from the residue, and then pro rata from any other bequests. In the absence of such a provision, federal and state apportionment statutes would control, placing the tax burden on the beneficiary of the asset generating the tax. Note that the provision regarding GST taxes reflects the default rule under Code §2603(b), directing the executor to charge any such taxes from the property constituting the transfer. CLAUSE FOURTH contains other tax-related provisions regarding property qualifying for either a charitable or marital deduction.

As the value of the average clinical client's estate will be well below the federal and state estate tax exemption amounts, tax apportionment provisions may seem entirely inapposite. However, the clinician may wish to retain the boilerplate language to provide for the contingency that the testator receives a windfall (by inheritance, chance or otherwise) and dies prior to executing a new will.

If a client's estate is approaching the limit of the state or federal estate tax exemption amount, the clinician who is not familiar with estate tax planning should seek tax assistance or refer the client to a private attorney.

7. Form: Administrative Provisions

CLAUSE FIFTH: Regarding the administration of my estate:

A. Terminology.

1. A reference to the Executor shall be construed to refer in context to any fiduciary or fiduciaries in office at the relevant time, whether or not originally named.

2. A provision that a particular matter is to be included within a general category shall not be construed to limit the generality of the category. Use of any gender or number shall be construed to refer to any other gender or number unless such reference is plainly inconsistent with the context. The word "person" refers to individuals, corporations, partnerships, trusts, and estates. No distinction shall be made between a person related to another by reason of adoption, and a person otherwise so related, but only if the adopted person was adopted prior to his or her twenty-first (21st) birthday. A child in gestation who is later born alive shall be considered a living person for the purpose of determining whether a condition is satisfied, but he or she shall have no beneficial interest before his or her birth. The word "descendant" includes children and more remote descendants in any degree of kindred (including, without limitation, children and more remote descendants born by means of alternative method of fertilization and/or gestation, such as in vitro fertilization and children born of surrogate mothers) but excludes any person surrendered for adoption in an official court proceeding and all of the descendants of any such person. A person's "spouse" at any particular time shall be that individual (if any) (i) who is then either married to such person pursuant to a marriage (regardless if such marriage is recognized for federal purposes), or is such person's partner pursuant to a civil union, registered domestic partnership or other like arrangement recognized under a valid international, national, federal, state or local law, or (ii) who was such person's spouse (as hereinbefore defined) at the time of such person's death, regardless of the

spouse's subsequent marriage, civil union, domestic partnership or other like arrangement recognized under a valid international, national, federal, state or local law; notwithstanding the foregoing, the invalidity of the marriage of persons openly living together in good faith after the performance of a marriage ceremony shall be disregarded in construing the expression "spouse". The word "Code" refers to the Internal Revenue Code of 1986, as amended from time to time, and any reference to provisions of the Code shall be deemed to include successor or substitute provisions.

Comment: Subparagraph 2 includes definitional language memorializing the testator's intent with respect to certain key terms. Where such terms are not explicitly defined and the testator's intent cannot be discerned, the state intestacy rules may apply. As the language in the template was drafted in response to Massachusetts law, it should be reviewed in detail prior to its adoption by clinicians in other jurisdictions.

Note that in articulating a definition of "descendant", we have attempted to account for less traditional means of reproduction, such as in vitro fertilization and surrogacy. Of course, such language should be carefully reviewed with the client prior to execution and modified to suit a given set of circumstances.

The clinician should also be particularly cautious in drafting definitional language regarding adopted parties. The template expressly distinguishes between adopted children and adopted adults (with the age of majority set at twenty-one (21)). Adult adoptions are occasionally used as an estate planning tool for the purpose of granting intestacy rights to the adopted party. A person might adopt his or her partner or spouse so that he or she is deemed "issue" of the adopting party's ancestors, entitled to inherit from such ancestors through state intestacy laws or through a will or trust in which "issue" comprise a beneficial class. As the operative question is the intent of the testator or grantor, courts may be skeptical of such strategies that blur the line between child and spouse.³¹

3. For all purposes of this will, any beneficiary hereunder^[, other than my spouse,] who is not living on the ninetieth (90th) day following the date of my death shall be deemed to have predeceased me.

Comment: Under the survivorship clause, a named beneficiary must outlive the testator by approximately three (3) months. The clause reflects the general rule that a testator would not want a gift to be made to a beneficiary (or his or her estate) if such beneficiary dies shortly after the testator. Inclusion of survivorship language prevents the gift from passing to the beneficiary's heirs, legatees and devisees and avoids the administrative costs of a double probate. Note that in most cases, the italicized language will be used only if the spouses' wills include identical provisions regarding the disposition of property.

³¹ See, e.g., *In re Belgard's Trust*, 829 P.2d 457 (Colo. App. 1992) (holding that adopted adult spouse is not a proper beneficiary of her mother-in-law's trust despite language in the trust instrument defining a "child" to include "persons legally adopted by my son," but allowing adopted adult spouse to inherit from her husband-father as his child under the state intestacy laws); see also Unif. Adoption Act § 5-101(a)(1)(1994) (allowing adult adoption but prohibiting adoption of one's spouse).

B. Powers of Executor. The Executor shall have the following powers without leave of court and without limiting any other powers which may be conferred upon him or her in any other manner:

1. Powers Relating to Investments.

a. Authorized Investments. The Executor may retain, invest, and reinvest in real or personal property of any kind, amount or proportion for any length of time which he or she deems advisable, including mutual fund shares, stock of any corporate Executor of this will (or affiliate thereof), participations in any common trust fund of any such Executor (without prior notice to or assent of any interested person), and stock or other securities of any closely held corporation or trust owned by me at my death or subsequently acquired by the Executor.

b. Voting Rights. The Executor may vote stock or shares of any corporation or trust directly or by proxy in such manner as he or she deems advisable. He or she may vote any such stock or shares for his or her own election (or for the election of any employee or agent of the Executor) as officer, director, or trustee of such corporation or trust and he or she may vote in fixing his or her own compensation.

c. Use of Nominees. The Executor may hold any real or personal property of my estate in the name of a nominee or in street name, without disclosing the fact that it is property of the estate.

d. Authority to Make Transfers. No transfer agent, bank, or other person dealing with the Executor shall have any obligation to see to the application of any money or other property delivered to such Executor or to ascertain whether he or she has authority to make transfers.

e. Authority to Repair, Replace and Remediate Property. The Executor may at the expense of my estate make such repairs to property, and replace such property, as he or she deems advisable. The Executor may at the expense of my estate remove any hazardous or other substance from any property as he or she deems advisable, may employ such consultants, contractors, and others as he or she deems advisable in connection therewith, and may abandon property from which hazardous or other substances cannot be removed at reasonable expense.

f. Continuation of Business. The Executor may continue to conduct for such period and in such manner as he or she deems advisable any incorporated or unincorporated business or businesses in which I was engaged during my life, with power to organize or participate in the formation or operation of any corporation or other form of business organization for conducting any such business, but he or she shall not invest [substantial amounts] [_____ Dollars [\$]] of additional capital in any such business without leave of court.

2. Powers Relating to Disposition of Property.

The Executor may buy, sell, mortgage, pledge, lease (for any length of time), or otherwise deal with real or personal property on such terms as he or she deems proper; may take such action as he or she deems advisable regarding the sale or exchange of securities in connection with any reorganization or other change in capital structure; may borrow money and make loans to any legatee on such terms as he or she deems proper; may pay any debt or claim on the basis of such evidence as he or she deems sufficient, and may compromise any such debt or claim on such terms as he or she deems proper; and may execute, acknowledge, and deliver any deed, lease, or other instrument in such manner, in such form, and for such purpose as he or she deems proper.

If my estate includes insurance on the life of an Executor, however, the Executor so insured shall have no power in his or her capacity as Executor to change the insurance beneficiary and no other power constituting an incident of ownership for purposes of Section 2042(2) of the Code.

3. Powers Relating to Distributions to Legatees.

a. To determine income and principal. The Executor may make decisions by use of his or her best informed judgment with respect to determination of income or principal, including determination of what, if any, deduction shall be made from income for amortization, depletion, depreciation, or obsolescence.

b. To distribute property in kind. To satisfy nonspecific gifts the Executor may distribute money or property in kind to one or more legatees on account of their distributive shares on the basis of fair market values determined by the Executor as of the time of distribution, without distributing the same kind of property to others. He or she need not treat legatees equally or impartially with respect to the income tax basis of property distributed in kind.

4. Miscellaneous Powers.

The Executor may employ such attorneys, investment advisors, custodians, and other persons as he or she deems advisable and pay them reasonable compensation for their services from property with respect to which such services are rendered; may receive reasonable compensation for his or her own services; [*may sign joint income tax returns with my surviving spouse;*] and may take any other action which he or she deems necessary or advisable in connection with the administration of my estate.

Comment: Under Paragraph B, the testator grants the executor certain powers that would otherwise require prior probate court approval under Massachusetts law. By removing the probate court from the equation, these provisions facilitate greater ease of administration. Of course, such language must be tailored to the laws of the jurisdiction in which the testator is domiciled.

C. Beneficiary's Interest. The interest of each beneficiary under my will:

1. May be distributed directly to the beneficiary, whether or not legally incapacitated, or to the beneficiary's Conservator or Guardian; may be applied for purposes which are, in the Executor's judgment, for the beneficiary's benefit; may in the case of a minor beneficiary, if no custodian is specifically named in this document, or if he or she is unable, or unwilling to serve, be distributed to [*the beneficiary's parent or to*] any person [*other than the beneficiary's parent*] whom the Executor deems appropriate (including the Executor) as custodian for such minor under the Uniform Transfers to Minors Act (or comparable statute) of any appropriate jurisdiction, without restriction as to the amount that may be so distributed; or may be deposited at interest in any banking institution to the credit of the beneficiary (with or without an agreement restricting withdrawals); and the written receipt of any such distributee or institution shall be sufficient for all accounting purposes.

Comment: Subparagraph 1 explicitly authorizes the executor to transfer the interest of a minor beneficiary to a so-called UTMA ("Uniform Transfers to Minors Act") account. The client may name a custodian for such an account or place restrictions on whom the executor might appoint to serve in such capacity. An UTMA account may be advantageous to the extent that it allows the custodian to hold the property for the benefit of the minor until he or she reaches twenty-one (21) years of age. In contrast, under Massachusetts law, property transferred to the minor's guardian must be distributed outright to such child when he or she reaches eighteen (18) years of age.³² Some clients may not want a beneficiary to receive property outright until he or she reaches an older age (e.g., twenty-five (25) or thirty (30)). In such cases, a revocable trust may be an effective means of accomplishing the client's objectives (see Part(III)(B), below).

2. May not be anticipated, alienated or assigned, and shall not be subject to be reached or applied by any claimant or creditor.

D. Finality of Executor's Judgment; Executor's Liability. All powers and discretion given to the Executor shall be exercisable in his or her sole discretion, and all decisions and determinations made by him or her in good faith and in the exercise of a reasonable judgment shall be conclusive upon all interested persons, whether or not ascertained, in being, or under a disability. No Executor shall be personally liable for any good faith action or omission (including, without limitation, the sale of real property pursuant to a contract entered into in good faith, notwithstanding the existence of an offer to purchase the property at a higher price) or for the consequences of any investment made in good faith. The Executor shall be indemnified, exonerated and held harmless out of my estate with respect to any claim, loss or liability for or with respect to hazardous substances located on property included in my estate and for or with respect to any other condition affecting such property and giving rise to liability under any law. Each substitute or successor Executor shall have or share all the powers, authority and exemptions given to the Executor originally named.

Comment: While it is commonplace to relieve the executor of liability for actions taken in good faith, exculpatory clauses for anything beyond ordinary negligence may be void or deemed invalid by the probate court.³³

³² Melissa Langa, Esq., Janet Wilson Moore, Esq., Gifts to Children—Outright and in Trust, in 1 A Practical Guide to Estate Planning, supra note 1, at § 5.20.2(a).

³³ See generally Charles E. Rounds, Jr., Loring A Trustee's Handbook § 7.2.6 (Aspen Publishers, Inc. 2003 ed.).

E. **Allowance of Accounts Without Appointment of Guardians, etc.** Insofar as I may lawfully dispense with such appointment, I provide that no guardian ad litem or other person shall be appointed to represent the interests of unborn or unascertained persons or of minors or other legally incompetent persons in connection with the allowance of any account of the Executor.

F. **Access to Safe Deposit Boxes, etc.** Each Executor shall have access in person or by agent without the presence of any other person to all safe deposit boxes, and power acting alone (1) to sign checks or orders on funds deposited in any bank, (2) to endorse checks for deposit, and (3) to endorse certificates or execute powers for transfer of securities.

8. Form: No-Contest Clause (optional)

*CLAUSE SIXTH: If any beneficiary hereunder shall contest the probate or validity of this will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary [and his or her issue] are revoked and such benefits shall pass under my will as if the beneficiary [and his or her issue] had predeceased me.*³⁴

Comment: Where a client is concerned that a beneficiary may challenge the validity of the will, he or she might include a so-called “in terrorem” or “no-contest clause”. Such a provision conditions a beneficiary’s gift on his or her failure to contest the will’s validity. Note that if a beneficiary nevertheless contests the will and the probate court deems it invalid, the in terrorem clause fails and the intestacy rules govern the ultimate disposition of the estate. Most courts enforce in terrorem clauses, unless there is probable cause for a will contest.³⁵ From a practical perspective, a no-contest clause will only discourage a beneficiary from challenging the will where the testamentary gift is significant enough to make the risk of loss particularly unsettling: if the beneficiary was only to receive a token bequest, he or she will have nothing to lose in contesting the will.

9. Form: Signature Block and Attestation Clause

IN WITNESS WHEREOF at [Name of City], [Name of State], I do hereto set my hand and seal and in the presence of [_____] competent witnesses publish and declare this instrument written on [_____] numbered sheets, one side only of each being used and each sheet preceding the one upon which I sign having been initialed by me at the bottom to be my last Will this ____ day of _____, 200[].

[NAME OF TESTATOR]

³⁴ Michael R. Garfield, Esq., Susan Leonard Repetti, Esq., Miscellaneous Provisions, in Drafting Wills and Trusts in Massachusetts § 7.5 (Alette E. Reed et al. eds., MCLE, Inc. rev. ed. 2002 & Supp. 2004) [hereinafter “Drafting Wills and Trusts”].

³⁵ See Dukeminier, supra note 1, at 167; UPC §§ 2-517, 3-905; Restatement (Third) of Property: Wills and Other Donative Transfers § 8.5 (2003).

We, the undersigned witnesses, each do hereby declare in the presence of the aforesaid testator that the testator signed and executed this instrument as [his/her] last will in the presence of each of us, that the testator signed it willingly, that each of us hereby signs this will as witness in the presence of the testator, and that to the best of our knowledge the testator is eighteen (18) years of age or older, of sound mind and under no constraint or undue influence.

1. _____
Witness Date

Print Name Address

2. _____
Witness Date

Print Name Address

3.³⁶ _____
Witness Date

Print Name Address

Comment: In order to execute a will, the testator must be over eighteen (18) years of age³⁷ and have general testamentary capacity. Testamentary capacity requires that the testator know (a) the nature and extent of his or her property, (b) the natural objects of his or her bounty, (c) the nature of the testamentary act he or she is performing, and (d) how criteria (a), (b) and (c) fit together to form a coherent means of property disposition.³⁸ The threshold for testamentary capacity is significantly lower than that of contractual capacity (i.e., the degree of capacity required to enter into a contract during life). Testamentary capacity can be challenged on three (3) bases: insane delusion, undue influence and fraud. The language in the witness attestation is an explicit affirmation that the testator was of the requisite age and capacity at the time of execution.

It is important to note that the requirements for will attestation are state-specific and failure to comply with the requisite formalities could render the will invalid.

³⁶ Vermont is the only state to require three (3) witnesses.

³⁷ In most states, eighteen (18) is the age of majority. In many states, an individual who is under eighteen (18) years of age may execute a will if he or she is married or legally emancipated. Dukeminier, supra note 1, at 141.

³⁸ Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1.

10. Form: Self-Proving Affidavit

STATE OF _____
COUNTY OF _____

We [NAME OF TESTATOR], [NAME OF WITNESS 1], [NAME OF WITNESS 2] and [NAME OF WITNESS 3], known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he/she] had willingly signed or directed another to sign for [him/her], and that [he/she] executed it as [his/her] free and voluntary act of the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his/her] knowledge the testator was at that time eighteen (18) years of age or older, of sound mind and under no constraint or undue influence.

[NAME OF TESTATOR]

[NAME OF WITNESS 1]

[NAME OF WITNESS 2]

[NAME OF WITNESS 3]

Subscribed and sworn to before me by the said testator and the said witnesses, this _____ day of _____, 200[].

Notary Public
My Commission Expires:

Comment: The self-proving affidavit, a brainchild of the UPC that has been adopted in most states, is an efficient means of proving that a will has been duly executed. Though failure to execute such an affidavit will not render a will invalid,³⁹ it will create an unnecessary administrative hassle when the will is submitted for probate. "Due execution of a will is usually proved after the testator's death by the witnesses testifying in court or executing affidavits. If the witnesses are dead or cannot be located or have moved away, a self-proving affidavit reciting that all the requirements of due execution have been complied with permits the will to be probated."⁴⁰ The UPC authorizes two (2) variations of the self-proving affidavit: the one-step affidavit (which combines the attestation

³⁹ Restatement (Third) of Property (Wills & Don. Trans.) § 3.1 (1999), Comment q.

⁴⁰ Dukeminier, supra note 1, at 217.

clause and self-proving affidavit) and the two-step affidavit. We have incorporated the two-step affidavit into our template as it is permitted in more states than the one-step affidavit.⁴¹ For further discussion of the formalities required in will execution, please see Part IV(B)(1), below.

B. The Revocable Trust

Though many clients will be able to achieve their objectives through the use of a simple will, some clients may require a combination pour-over will and revocable trust. A trust is a structure in which a trustee (or trustees) holds and manages property for the benefit of one (1) or more beneficiaries. The trustees hold legal title to the property, and often have wide powers to sell, invest, diversify and manage the trust assets. Each trustee owes a fiduciary duty to the beneficiaries who have equitable title to the property. This obligation includes a duty of loyalty (the trustee must administer the trust solely for the beneficiary; self-dealing is prohibited), a duty of prudence, a duty to remain impartial as between the beneficiaries, a duty to not commingle the trust property with the trustee's own property, and a duty to inform and account to the beneficiaries.⁴² The individual who funds the trust is called the settlor or grantor. If a trust is created during the grantor's lifetime, it is an inter vivos trust. If a trust is established upon a grantor's death, typically under his or her will, it is a testamentary trust. Where the grantor has reserved the right to amend or revoke the trust, he or she has created a revocable trust. Where the grantor has relinquished the right to change or repeal the trust, he or she has established an irrevocable trust.

In most cases, the clinician will use a revocable inter vivos trust to accomplish the client's estate planning goals.⁴³ By definition, a revocable trust affords greater flexibility than an irrevocable trust. The client may amend the terms of a revocable trust throughout his or her lifetime to reflect changing circumstances, needs and wishes. An inter vivos trust is often preferable to a testamentary trust for several reasons. To the extent that a testamentary trust is created under a testator's will, it is subject to continued oversight by the probate court. In contrast, the administration of an inter vivos trust does not require extensive probate court involvement, unless the trust instrument contains language requesting such oversight. It follows that administration of a testamentary trust can be more costly and burdensome than administration of an inter vivos trust. Privacy considerations also weigh in favor of creating an inter vivos trust over a testamentary trust. Because a will becomes a public record upon the testator's death, a testamentary trust created under a will is subject to public review. An inter vivos trust, however, remains a private document, both during the grantor's life and upon his or her death.

In determining whether to include a pour-over will and revocable trust in a client's estate plan, it is necessary to consider the five (5) significant benefits such a combination offers over a simple will alone. First, as mentioned above, in contrast to a will which becomes a public record upon a decedent's death, a trust instrument is a private document. Second, property held in a revocable trust prior to the grantor's death, though includible in the grantor's gross estate for estate tax purposes, is not subject to probate. Accordingly, such

⁴¹ Id., at 218.

⁴² See generally Unif. Trust Code, Article 8 (amended 2003).

⁴³ Though an inter vivos irrevocable trust may be used to decrease the value of the grantor's estate upon death, clinical clients will rarely have assets in excess of the state and federal estate tax exemption amounts.

property may be more readily available to trust beneficiaries than probate assets. Third, especially in the case of elderly clients, a revocable trust is an effective means of ensuring the protection and efficient use of the grantor's assets in the event of his or her incapacity. Where a revocable trust is funded during the grantor's lifetime, the trustees may make distributions of income and principal to provide for the grantor's needs, even where the grantor fails to direct such distributions due to incapacity. Fourth, a revocable trust can be structured to ensure that a beneficiary's creditors cannot attach the trust property: so long as the trustees have the power to exercise their discretion to retain the property in trust, the trust assets are insulated from the claims of a beneficiary's creditors (such as claims arising out of divorce).

Finally, contributing assets to a revocable trust is an effective means of making a gift to a beneficiary without affording him or her unfettered access to and discretion over such property. For instance, a trust may be advisable where a client wishes to provide for a minor or incompetent beneficiary, or for a young adult who lacks financial experience. In such cases, the beneficiary may not be legally able to manage the property, or it may not be in his or her best interest to do so. It follows that the assets could be held in trust until the beneficiary is financially responsible. Until that time, the trustees may be given wide discretion to make distributions of trust property to the beneficiary, while managing such property on the beneficiary's behalf.

A trust may also be advisable where a client wishes to provide for his or her surviving spouse while ensuring that any children born of the marriage are adequately supported. Where property is transferred outright to a surviving spouse upon the client's death, the surviving spouse may dispose of the assets in his or her absolute discretion, including gifting or bequeathing such property to a new spouse or children born of a second marriage (or subsequent relationship). By leaving property in trust for benefit of the surviving spouse and children, the client can control the disposition of such assets, both during the surviving spouse's lifetime and upon his or her subsequent death.

In establishing a revocable trust, the client must make a series of decisions regarding fiduciaries and disposition of trust property. In particular, the client must name at least one (1) trustee and successor trustee, and an individual or committee to appoint any additional or successor trustees after the client's death or incapacity. The client must also determine the members of the beneficial class, and instruct the trustees as to when and how the trust property should be distributed, both during the client's life and after his or her death.

FORM: REVOCABLE TRUST

1. Form: Trust Name

THE [NAME OF GRANTOR] 200[] REVOCABLE TRUST

2. Form: Declaration of Trust

I, [NAME OF GRANTOR], of [Grantor's City, County and State of Residence], hereby transfer Ten Dollars (\$10) in trust to myself, as Trustee, and to [NAME OF STANDBY TRUSTEE], of [Standby Trustee's City, County and State of Residence] (subject to the provisions of Article FIFTH(A)(2), below), as Standby Trustee, upon the trusts hereinafter set forth. Hereinafter any reference to "Trustees" shall be deemed to refer, without limitation, to any one or more Trustees serving hereunder from time to time.

Comment: The client is the grantor of his or her revocable trust. In most cases, the client will also serve as sole trustee of the trust during his or her lifetime. As sole trustee, the client has complete control over any assets that he or she may transfer to the revocable trust during his or her lifetime. The standby trustee will begin to serve only when the grantor (a) dies, (b) becomes incapacitated, or (c) requests that he or she begin to serve. The client will often name a trusted family member or friend as standby trustee. Note, however, that if the standby trustee is the sole beneficiary of the trust upon the grantor's death, the equitable and beneficial interests in the trust property will merge resulting in a termination of the trust.⁴⁴

A standby trustee should be distinguished from a successor trustee.⁴⁵ While a standby trustee accepts his or her appointment as trustee at the time the trust is established (but does not begin serving until a triggering event occurs), a successor trustee does not accept the appointment until a future date (and may choose to decline the appointment at that time). Accordingly, at the time the trust executed, it is not necessary to obtain the acceptance of the party named as successor trustee. In the clinical setting, it is advisable to appoint a standby trustee where the client has a short life-expectancy or is in poor health (and thus a triggering event is likely to occur in the near future). Including standby trustee provisions thus avoids the lapse that may occur when the original trustee (usually the client/grantor) ceases to serve due to incapacity or death and the successor trustee begins serving.

3. Form: During the Grantor's Lifetime

FIRST: During my lifetime:

A. The Trustees shall make such distributions to me or others as I direct in writing from time to time.

⁴⁴ Restatement (Second) of Trusts §§ 99, 341 (1959).

⁴⁵ Though commonplace with respect to Massachusetts trusts, the concept of a standby trustee may be outside the realm of standard practice in other jurisdictions.

B. The Trustees shall make such distributions, from time to time, to such one or more members of the class consisting of *[my spouse,]* my descendants and me, as the Trustees deem necessary or advisable for the distributee's health, education or support, giving first consideration to my needs *[and the needs of my spouse]*, even if I have failed (because of illness or otherwise) to direct such distributions.

4. Form: Upon the Grantor's Death

SECOND: Upon my death, *[and until division of the Trust Property into separate shares as provided in Article THIRD, below]* the Trustees shall hold all of the Trust Property (including, without limitation, any property the Trustees become entitled to receive by will or otherwise by reason of my death) as a single fund, and shall make such distributions, from time to time, to such one or more members of the beneficial class consisting of *[my said spouse and]* my descendants as the Trustees deem necessary or advisable *[for the distributee's health, education or support]*, giving priority to the needs and wishes of *[my spouse][my children]*, and they may so terminate the Trust, thereby extinguishing the remainder interests. *[In the case of distributions to my spouse, the Trustees may (but need not) first consider such spouse's other resources.]*

*[Upon the death of the survivor of *[my said spouse and]* my children, the Trustees shall distribute the remaining trust estate outright in equal shares among my then living issue, if any.]*

Comment: Article SECOND of the template establishes a so-called discretionary trust under which the trustees have the power to make distributions of trust assets in their absolute discretion. A discretionary trust should be distinguished from a mandatory trust under which the trustees must adhere to a fixed schedule in making distributions of trust property. Mandatory trusts are inadvisable to the extent that a compulsory distribution could be made at a time when a beneficiary prefers to have assets retained in trust, temporarily or indefinitely. As a general rule, the creditors of a trust beneficiary cannot force a distribution from a discretionary trust.⁴⁶ Note that the grantor of a discretionary trust may still express his or her preferences regarding the timing and nature of distributions, either in the trust instrument or in a side memorandum. Though the trustees may consider the grantor's wishes in exercising their discretion, they are not bound by such preferences. In turn, a creditor of a beneficiary could not invoke the precatory language to force a distribution in satisfaction of a claim.

In creating a discretionary trust, the grantor may give the trustees broad power to make distributions as they deem advisable, or may limit the trustees' discretionary power by a so-called ascertainable standard (e.g., distributions for the beneficiary's health, education or support). In order to (1) protect trust assets from the claims of any beneficiary's creditors, and (2) minimize the portion of trust property exposed to estate tax upon any beneficiary's death, only an independent trustee can have unlimited discretion to make distributions to the beneficiaries.⁴⁷ An independent trustee is

⁴⁶ Some states and the Uniform Trust Code recognize an exception to this general rule for child support and alimony claims; federal tax liens may also be an exception. Unif. Trust Code §§ 503, 504 (amended 2003).

⁴⁷ Where a non-independent trustee is given unlimited distributory discretion, such power may be characterized as a general power of appointment under § 2041 of the Internal Revenue Code (1994). In turn, any property remaining in trust upon the death of the non-Independent Trustee will be includible in his or her estate for estate tax purposes. While this will not be a problem where the estate of the non-Independent Trustee is below the federal and state estate tax exemption amounts, it is obviously impossible to predict the value of his or her estate with any degree of certainty.

a party who is not a present or future beneficiary of the trust property. Certain close relatives (e.g., the client's parents and siblings) and subordinate employees are also disqualified even if they are not present or future beneficiaries.

Under the most simple revocable trust instrument, the trust property will be held as a pooled fund for the trust's duration. The template provides that the trust will terminate upon the death of the survivor of the grantor's spouse and children. Of course, the termination provisions can be modified in accordance with the client's preferences.

In some instances, it may be advisable to divide the trust assets into separate share trusts upon the occurrence of some triggering event. The template includes the option of dividing the property in equal separate share trusts among the grantor's children upon the death of the survivor of the grantor and his or her spouse, if any, or, if later, whenever the grantor's youngest child is at least twenty-five (25) years of age (or any other age the grantor selects). The share of any child who is not then living would be further divided into equal shares among his or her living children, if any. So long as the property is held as a pooled fund, the trustees would have the flexibility to make disproportionate distributions among the grantor's children based on need. The primary reason to suggest keeping the trust property in a pooled fund until the grantor's youngest child reaches twenty-five (25) years of age is to give each child a reasonable opportunity to complete his or her formal education. Once separate shares have been set aside for each child, the trustees can establish investment and distribution policies for each such separate share suitable to each child's specific needs and circumstances. Where the value of the trust assets is sufficiently low, the costs of administering multiple separate share trusts may outweigh the benefits of such an arrangement.

If the client would like the property to be held as a pooled fund for the duration of the trust, Article THIRD of the template should be deleted and Articles FOURTH through SEVENTH renumbered accordingly.

5. Form: Principal Beneficiary Trusts

THIRD: Whenever *[after the death of my said spouse]* no living child of mine is less than twenty-five (25) years of age, and the Trustees have determined in their sole discretion that maintenance of the Trust Property as a single fund is no longer necessary or desirable for the health, education or support of my children, the Trustees shall divide all of the remaining Trust Property among my descendants living at the time such property becomes so subject, if any, in shares determined by right of representation. The Trustees shall hold and dispose of the share of each person (the "Principal Beneficiary") as a separate trust for his or her benefit (and the benefit of others) upon the following trusts:

A. During the life of the Principal Beneficiary, the Trustees shall make such distributions from the Principal Beneficiary's trust, from time to time, to such one or more members of the class consisting of the Principal Beneficiary and his or her descendants as the Trustees deem advisable *[for the distributee's health, education or support]*, giving primary consideration to the needs of the Principal Beneficiary, and they may so terminate his or her trust, thereby extinguishing the remainder interests. *[Without limiting the discretion of the Trustees, I express the desire that they exercise their discretion liberally in favor of the Principal Beneficiary and distribute outright to such Principal Beneficiary any property remaining in his or her trust when he or she reaches *[thirty-five (35)]* years of age, in the absence of affirmative*

reasons (including tax reasons) for retention of income or principal or continuation of the Principal Beneficiary's trust.] In exercising their discretion, the Trustees may be guided, but not bound, by any memorandum I may have left.

B. Upon the death of the Principal Beneficiary, the Trustees shall:

1. *Distribute any or all of the remaining trust estate as the Principal Beneficiary may appoint by a will which expressly refers to the power hereby given him or her, and explicitly exercises it to any person or to any not-for-profit organization, provided, however, that such property may not be appointed in favor of the Principal Beneficiary, his or her estate, his or her creditors or the creditors of his or her estate.*

2. Pay [any of] the trust estate [which is not so appointed] outright in equal shares to the Principal Beneficiary's then living descendants, if any, and, if none, among the then living descendants of the Principal Beneficiary's nearest ancestor who is a descendant of mine and who (whether or not he or she is then living) has descendants who are then living and, if there is no such ancestor, among my then living descendants, if any, in shares determined by right of representation in any case.

Comment: The client may wish to give each Principal Beneficiary a testamentary special power of appointment over property remaining in his or her separate share trust.⁴⁸ The template provides that any trust property not disposed of by the Principal Beneficiary would be subdivided into new trust shares among the Principal Beneficiary's descendants, if any, and, if none, among the grantor's remaining descendants.

6. Form: Perpetuities Period; Disaster Clause

FOURTH: Rule Against Perpetuities; Ultimate Contingencies

A. Notwithstanding any other provision of this instrument, if any property is still held in any trust ever established hereunder (or pursuant to the exercise of any power of appointment created hereunder) twenty-one (21) years after the death of the survivor of such of the persons referred to by name in this instrument and their descendants as are living whenever my reserved power of revocation is released, restricted or extinguished, the Trustees shall distribute all such property to the Principal Beneficiary thereof (or, in the case of property then held pursuant to the exercise of a power of appointment, free of trust, in equal shares to the persons then otherwise eligible to receive distributions therefrom).

B. If on any contingency the disposition of any property ever held in any trust ever established hereunder has not otherwise been provided for in this instrument then, on the happening of such contingency, such property shall be distributed [to the persons who would have inherited or succeeded to the same (and in the proportions in which they would have so inherited or succeeded) if I [and my said spouse] had [each] then died the absolute owner [of one-half (1/2)] thereof unmarried, intestate and domiciled in [Name of State in which Grantor is Domiciled]].

⁴⁸ In order to avoid adverse estate tax consequences, the Principal Beneficiary should not be given a general power of appointment. Any property subject to a testamentary general power of appointment would be includible in the Principal Beneficiary's estate for estate tax purposes. I.R.C. § 2041; see George T. Bogert et al., *Bogert's Trusts and Trustees* § 273.35 (3rd ed. 2005).

Comment: Paragraph A is a so-called "savings clause" intended to ensure that the trust does not extend beyond the common law perpetuities period (twenty-one (21) years after the death of a life in being at the time the trust becomes irrevocable (i.e., upon the grantor's death)). Under the common law rule, if it is not clear that a trust will terminate within the perpetuities period, the trust is deemed void. Many states, including Massachusetts, have replaced the harsh common law rule with the Uniform Statutory Rule Against Perpetuities (the "USRAP"). The USRAP provides that "an interest that is invalid under the common law rule because it may vest or terminate too remotely will be valid if it in fact vests or terminates within ninety (90) years after its creation."⁴⁹ As there is a lack of uniformity among the states in defining the perpetuities period, the template includes a savings clause that is effective in both common law and USRAP jurisdictions. Note that while a savings clause that terminates a trust after ninety (90) years will be effective in an USRAP state, it will not be effective in a common law jurisdiction. Practically speaking, the corpus of a trust created by a low to moderate income client will likely be exhausted well before the perpetuities period has run.

7. Form: Payment of Testamentary Legacies, Taxes, Debts and Expenses

FIFTH: Regarding death taxes, debts, and the expenses of administration: The Trustees are directed to pay promptly to the legally appointed representatives of my estate all sums that said representative shall request from them from time to time in writing within three (3) years after my death for the payment of any and all of my debts and funeral expenses, expenses of administering my estate, pecuniary legacies under my will and all codicils thereto, estate taxes occasioned by my death and inheritance taxes on property passing or accruing from me, whether or not any such taxes are attributable to the property passing hereunder. The Trustees need not inquire as to the correctness or propriety of any amount so requested by said representative and shall not be responsible for the application thereof, the receipt of said representative being a complete discharge to the Trustees for any such payment.

Comment: In the event that the revocable trust is funded prior to the grantor's death, it is advisable to include a clause instructing the trustees to pay any legacies, death taxes, debts and administrative expenses upon certification from the executor.

8. Form: Trust Administration

SIXTH: Regarding the administration of the trusts established by this instrument, in general:

A. Trustees' Identity.

1. A reference to "Trustee" or "Trustees" shall be construed to refer to the Trustees in office with respect to any particular trust hereunder at any time, whether originally named or appointed later, except as otherwise required by the context. Whenever there is a vacancy in the office of Trustee, such of the remaining Trustee or Trustees as are not prohibited from holding such powers shall have all the powers of the Trustees. Any action may be taken by the Trustees if they act unanimously, unless there are more than two (2) Trustees, in which case they may act by vote of a majority (with or without a meeting or notice to other

⁴⁹ Eric P. Hayes, Esq., *Rule Against Perpetuities*, in *Drafting Wills and Trusts*, supra note 34, at § 19.29.

Trustees). A Trustee may delegate any part or all of his or her powers to another Trustee to the extent specified in an instrument signed by the delegating Trustee and delivered to the other, provided that this subparagraph shall not authorize any Trustee to participate by delegation in the exercise of a power which he or she would otherwise be prohibited from holding. Each additional or successor Trustee under this instrument shall have or share all the powers, authority, and exemptions given to the Trustees originally named without any formality of conveyance. A Trustee may resign (without leave of court or the consent of the beneficiaries) upon thirty (30) days' (or less, with the consent of the recipient) prior written notice to me, to another Trustee, or to any other person then entitled to participate in the appointment of such resigning Trustee's successor.

2. Notwithstanding any other provision of this trust instrument, said [NAME OF STANDBY TRUSTEE] (hereinafter the "Standby Trustee") shall have no active duties or powers as Trustee hereunder prior to the occurrence of the first of the following events:

a. Receipt by such Standby Trustee of a written instrument signed by me requesting that such Standby Trustee commence acting as Trustee (which notice may contain a date upon which the power of such Standby Trustee shall expire (subject to subsequent reappointment) or other conditions regarding such Standby Trustee's duties and responsibilities);

b. Receipt by such Standby Trustee of conclusive notice of my incapacity (for which purpose the appointment of my guardian or conservator, or the certificate of a licensed physician stating that he or she has examined me within five (5) days prior to the date of the certificate and that I am unable properly to care for my property by reason of advanced age, mental weakness, mental illness, or physical disability, shall be deemed to be conclusive notice of my incapacity); or

c. Receipt by such Standby Trustee of conclusive notice of my death.

No Standby Trustee shall have any affirmative duty concerning my health or circumstances prior to the time at which such Standby Trustee commences acting as Trustee hereunder. Prior to the occurrence of the first of the above-described events, such Standby Trustee shall not have any right or duty to take and keep possession of the trust property, any power with respect to transfers of trust property, and any of the usual attributes of a Trustee. The sole object of naming any such Standby Trustee is to secure such Standby Trustee's acceptance without awaiting the occurrence of one of the above-described events.

3. [Subject to subparagraph 2, above, if said [NAME OF STANDBY TRUSTEE] fails to become or ceases to serve as Trustee hereunder, [NAME OF SUCCESSOR TRUSTEE], of [Successor Trustee's City, County and State of Residence], shall become Trustee upon delivery of [his/her] signed acceptance to another Trustee, if any, and if none, to any person (other than [him/her]self) then entitled to designate (or to participate in designating) successor Trustees hereunder.]

4. The person, if any, designated in a writing signed by me, when I am alive and competent, shall become Trustee (as a successor Trustee or as an additional Trustee) upon delivery of his or her signed acceptance of these trusts to me during my lifetime.

5. [Whenever I am not alive and competent, the person, if any, designated in a writing signed by my said spouse, if [he/she] is then alive and competent, shall become a successor to a Trustee who dies, resigns or becomes incompetent, upon delivery of his or her signed acceptance of these trusts to my said spouse during [his/her] lifetime.]

6. [The person, if any, designated in a writing signed by the Principal Beneficiary of any trust set aside under Article THIRD, above, if such Principal Beneficiary is then at least twenty-five (25) years of age and competent, shall become a successor to a Trustee of such Principal Beneficiary's trust who dies, resigns or becomes incompetent, upon delivery of his or her signed acceptance to such Principal Beneficiary during such Principal Beneficiary's lifetime. [Without limitation, such Principal Beneficiary may designate himself or herself to fill any such vacancy in the office of Trustee, by delivering his or her signed acceptance to another Trustee, if any, and, if none, to any person (other than himself or herself) then entitled to designate (or to participate in designating) successor Trustees hereunder.]]

7. Whenever there is an appropriate occasion for the appointment of a successor Trustee or of an additional Trustee, and none is appointed as provided in subparagraph [3, 4, 5 or 6], above, the person designated in a writing then signed by a majority of the Beneficiary Representatives shall become Trustee upon delivery of his or her signed acceptance of these trusts to one of the signers of such designation. As used herein, the term "Beneficiary Representatives" shall mean my adult children who are then living and legally competent or under guardianship or conservatorship. If a child of mine is then under guardianship or conservatorship, his or her vote shall be exercised by such guardian or conservator, as the case may be. If a child of mine is then deceased but represented by then living descendants, his or her vote shall be exercised by a majority of such of his or her descendants, if any, in the most senior generational class of such descendants having one or more living members, as is or are of full age and legally competent or under guardianship or conservatorship (such guardian or conservator to exercise the vote on behalf of his or her ward), and if no member of such generational class is of full age and legally competent or under guardianship or conservatorship, such child's line of descendants shall have no vote. The designation of a successor or additional Trustee as provided in this subparagraph shall represent a determination by the persons signing it that there is an appropriate occasion for the appointment, and their determination in that regard shall be conclusive and binding upon all persons whether or not ascertained, in being, or under a disability. It shall be the duty of the persons designating a successor or additional Trustee as provided in this subparagraph to have first consulted such members of my family as they deem appropriate concerning the selection of any Trustee and the need for any additional Trustee, but their breach of this duty shall not impair the validity of any appointment. [Without creating any enforceable rights or duties, I express the desire that there always be at least one (1) Trustee who is a member of my family.] I may nominate one or more candidates for future appointment as Trustee by an informal and nonbinding memorandum given to a Trustee or a person eligible to appoint (or to participate in appointing) Trustees hereunder.

8. I expect that it may be appropriate from time to time for a person (or persons) to be appointed successor or additional Trustee (or Trustees) of one or more separate trusts under this instrument without being so appointed with respect to the other such trust or trusts, and accordingly I expressly authorizes the making of such appointments under subparagraphs [3 through 7], above. Unless otherwise expressly provided in the instrument of appointment or under this instrument, as amended, any person appointed as Trustee shall serve as such with respect to all trusts hereunder.

9. I may remove from office any Trustee serving at any time hereunder (with or without cause), if I am alive and competent, upon delivery to him or her of a written notice of removal signed by me.

10. *[Whenever I am not alive and competent, any Trustee serving at any time hereunder may be removed from office (with or without cause) by my said spouse, if said spouse is then alive and competent, upon delivery to him or her of a written notice of removal signed by my said spouse; provided, however, that notwithstanding any other provision of this trust instrument, any person appointed to succeed any Trustee so removed must be an Independent Trustee as defined below, and may not be a related or subordinate party (as defined in Section 672(c) of the Code) with respect to any beneficiary hereunder. The expression "Independent Trustee" refers to a Trustee who has no present or future beneficial interest hereunder, does not owe a duty of support to any person having such an interest, and is neither the transferor of any property held in trust hereunder nor a related or subordinate party (as defined in Section 672(c) of the Code) with respect to any such transferor.]*

11. Each Trustee, and each person given the power to appoint or remove Trustees hereunder, or to participate in the appointment or removal of Trustees hereunder, shall be deemed competent until the receipt by any Trustee hereunder of conclusive notice of such person's incapacity, for which purpose the appointment of a guardian or conservator of such person, or the certification of a licensed physician stating that he or she has examined the person within five (5) days prior to the date of the certification and that such person is unable properly to take care of his or her property by reason of advanced age, mental weakness, or mental illness, shall be deemed to be conclusive notice of such person's incapacity. Upon receipt of such a certification regarding a then serving Trustee, such Trustee shall cease to serve as a Trustee hereunder.

12. *[When neither I nor my said spouse is alive and competent, [a majority of my competent adult descendants who are beneficiaries hereunder][a majority of the adult competent beneficiaries hereunder] may request the resignation of a Trustee by a signed written instrument. Such a request will not be binding upon the Trustee in question, but it is my wish that it be given great weight by such Trustee and by any court in which proceedings for the Trustee's removal are pending.]*

Comment: Under Paragraph A, above, the grantor has the power to appoint and remove additional or successor trustees of the revocable trust. The template includes optional provisions allowing the grantor's spouse to appoint successor trustees and remove trustees upon the grantor's death or incapacity. The client may also wish to give appointment powers to the Principal Beneficiary of any separate share trust. Any further additional or successor trustees may be

appointed by the individual or committee of the client's choosing. Articulating a mechanism for such appointments obviates the need for probate court involvement. The template provides for a trustee succession committee composed of the grantor's adult children (or the adult children of any deceased child of the grantor).

B. Trustees' Powers. The Trustees shall have the following powers without leave of court and without limiting any other power which may be conferred upon them in any other manner:

Comment: Though some trustee powers are granted by common law or state statute, the template includes an explicit list to avoid ambiguity, increase efficiency and obviate the need for probate court involvement. These provisions should be adjusted based on the client's wishes and should be reviewed to ensure compatibility with state law.

1. **Powers Relating to Investments and Disposition of Property.**

They may buy, sell, mortgage, pledge, lease (for any length of time) or otherwise deal with real or personal property on such terms as they deem proper; they may take such action as they deem advisable regarding the sale or exchange of securities in connection with any reorganization or other change in capital structure; they may borrow money and make loans to a beneficiary or to my estate on such terms as they deem proper; they may pay any debt or claim on the basis of such evidence as they deem sufficient, and they may compromise any such debt or claim on such terms as they deem proper; they may execute, acknowledge, and deliver a deed, lease, or any other instrument in such manner, in such form, and for such purpose as they deem proper; and they may authorize one or more of their number to sign checks and engage in other banking or security transactions. They may make contracts binding on the trust estate and without assuming personal liability.

Comment: At common law, the trustees did not have an implied power to sell trust property.⁵⁰ In states where such sale power is conferred by statute, it may be limited to the disposition of personal property.⁵¹ Accordingly, the template affords a broad power to dispose of trust assets that can be tailored according to the relevant state statute, if any, and the grantor's wishes.

2. **Powers Relating to Distributions to Beneficiaries.**

a. **To Determine Income and Principal.** They may make decisions by use of their best informed judgment with respect to the determination of income or principal, including the determination of what, if any, deduction shall be made from income for amortization, depletion, depreciation or obsolescence.

⁵⁰ Restatement, Second, Trusts, § 190.

⁵¹ See, e.g., Mass. Gen. Laws Ann. c. 203, § 19.

b. To Distribute Property in Kind. They may distribute property in kind to one or more beneficiaries on account of any distribution, on the basis of fair market value determined by the Trustees as of the time of distribution, without distributing the same kind of property to others. The Trustees need not treat beneficiaries equally or impartially with respect to the income tax basis of property distributed in kind, or with respect to property constituting income in respect of a decedent. The power to distribute property in kind includes power to authorize a beneficiary to occupy, use or possess real or tangible personal property whose ownership is retained by the Trustees.

c. To Determine Source and Extent of Distributions. Whenever the Trustees are authorized to make distributions without indication as to whether the distributions are to be made from income or principal, they may be made in whole or in part from current net income, from accumulated income, or from principal, as the Trustees deem advisable, and unless otherwise expressly provided, the authority to make distributions from principal includes authority to distribute all of the principal.

d. To Terminate Small or Economically Inefficient Trusts. Without limitation, the Trustees in their discretion may terminate any trust by complete distribution of the trust property, thereby extinguishing the remainder interests, if the Trustees have in good faith determined that the costs of continuing to maintain such trust outweigh the benefits of such continued maintenance.

e. To Manage Separate Trusts Together. They may commingle the property of separate trusts under this instrument, but they must maintain accounts showing the interests of each trust in the commingled fund.

f. To Dispose of Minor's Interests. Whenever any property is distributable to a minor, the Trustees may (1) deposit the same in a bank in the minor's name (with or without making an agreement restricting withdrawals), (2) deliver it to the minor, to his or her legal guardian, to either of his or her parents, to any other person having custody of the minor, or to any person (including any Trustee) whom the Trustees deem appropriate as Custodian for such minor under the Uniform Transfers to Minors Act (or under the comparable statute of any appropriate jurisdiction), without restriction as to the amount that may be so distributed, and the written receipt of any such person shall be sufficient for all accounting purposes, or (3) retain the property in trust for the minor, making such distributions to or for the benefit of the minor as they deem advisable from time to time during his or her minority, and distributing any remaining property to the minor whenever he or she reaches the age of majority, or to his or her estate in the event of his or her earlier death.

g. Eligible Beneficiaries. For purposes of this instrument (a) no distinction shall be made between a person related to another by reason of adoption and a person otherwise so related, but only if such adopted person was adopted prior to his or her twenty-first (21st) birthday; (b) a child in gestation who is later born alive shall be considered a living person for the purpose of determining whether a condition is satisfied, but he or she shall have no beneficial interest before his or her birth; (c) "descendants" includes children and more remote descendants in any degree of kindred (including, without limitation, children and more remote descendants born by means of alternative method of fertilization and/or gestation, such as in vitro fertilization and children born of surrogate mothers) but excludes any person

surrendered for adoption in an official court proceeding and all of the descendants of any such person; (d) a person's "spouse" at any particular time shall be that individual (if any) (i) who is then either married to such person pursuant to a marriage (regardless if such marriage is recognized for federal purposes), or is such person's partner pursuant to a civil union, registered domestic partnership or other like arrangement recognized under a valid international, national, federal, state or local law, or (ii) who was such person's spouse (as hereinbefore defined) at the time of such person's death, regardless of the spouse's subsequent marriage, civil union, domestic partnership or other like arrangement recognized under a valid international, national, federal, state or local law; notwithstanding the foregoing, the invalidity of the marriage of persons openly living together in good faith after the performance of a marriage ceremony shall be disregarded in construing the expression "spouse"; (e) a living person shall be a member of a class of beneficiaries if he or she fits the description regardless of when he or she was born, adopted, married to any beneficiary, or otherwise qualified as a member of such class; (f) for purposes of Chapter 13 of the Code, any beneficiary hereunder[, *other than my spouse,*] who is not living on the ninetieth (90th) day following the date of the transfer of an interest passing to or for such beneficiary shall be deemed to have died before such transfer was completed; and (g) whenever property is to be distributed to (or divided among) a person's descendants by right of representation, such person's children (whether or not living at the time of distribution or division) shall be treated as the original stocks, each such stock shall have allocated to it an equal portion of such property, and a further equal subdivision of each such portion shall be made at each succeeding generation.

Comment: Note that the provisions regarding distributions to minors in subparagraph f, above, and the definitional language in subparagraph g, above, mirror the language in the will template.

3. Regarding Additional Trust Property. The Trustees may, but need not, accept any kind of additional property in trust hereunder at any time from any source.

4. Miscellaneous Powers. The Trustees may employ such attorneys, investment advisors, custodians and other persons as they deem advisable (including any law firm (and its affiliates) of which a Trustee is a partner or member) and pay them reasonable compensation for their services from property with respect to which such services are rendered; may receive reasonable compensation for their own services; and may take any other action which they deem necessary or advisable in connection with the administration of any trust established by this instrument.

The Trustees shall have the power to accept and act upon the recommendations of such investment counsel and advisors, and at any time and from time to time to delegate to any investment counsel and advisors such ministerial or discretionary powers and authority with respect to the investment and reinvestment of the property held hereunder as the Trustees may from time to time deem to be necessary or advisable.

The time, place, subject matter and content of any legal advice obtained by the Trustees with respect to the proper administration of the trust shall be confidential and free from any duty to account (except for disclosure of any disbursement for counsel fees and expenses) or other duty of disclosure.

Comment: While it is improper for a trustee to delegate the entire administration of a trust, he or she may seek the assistance of professionals and delegate certain administrative responsibilities. The right to delegate may be an implied trustee power but it is nevertheless prudent to include explicit language in the trust instrument.⁵²

Regarding trustee compensation, in some states, fees are set by statute. Other states, such as Massachusetts, adhere to a “reasonableness” standard.⁵³ To maximize flexibility, the template provides for an assessment of “reasonable compensation” rather than payment based on a formal fee schedule.

C. Finality of Trustees’ Judgment; Trustees’ Liability; Trustees’ Bond; Restriction on Discretionary Powers. All powers and discretion given to the Trustees shall be exercisable in their sole discretion, and all their decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) made in good faith and in the exercise of a reasonable judgment shall be conclusive upon all persons, whether or not ascertained, in being, or under a disability. No Trustee under this instrument shall be personally liable for any good faith action or omission or for the consequences of any investment made in good faith. Without intending to limit the generality of the preceding sentence, each Trustee shall also be indemnified, exonerated and held harmless out of the trust estate for or with respect to (1) any claim, loss or liability for or with respect to hazardous substances located on property held in any trust hereunder, or (2) any other condition affecting property held in any trust hereunder and giving rise to liability under any law.

No Trustee shall be required to give surety on any bond.

Notwithstanding any other provision of this instrument, no Trustee who is not an Independent Trustee shall have authority to make discretionary distributions, except for distributions for the health, education, maintenance or support of a beneficiary to whom such Trustee owes no duty of support. The preceding sentence shall not apply to me when I am a Trustee. [The expression “Independent Trustee” refers to a trustee who has no present or future beneficial interest hereunder, does not owe a duty of support to any person having such an interest, and is neither the transferor of any property held in trust hereunder nor a related or subordinate party (as defined in Section 672(c) of the Code) with respect to any such transferor.]

Comment: The provisions regarding trustee liability and fiduciary bonds are analogous to the provisions in the template will.

Paragraph C of the trust template includes a so-called “stripper clause” limiting the distributory discretion of a non-independent trustee by an ascertainable standard to ensure that a trustee who is also a beneficiary does not have a general power of appointment.⁵⁴

D. Restraint on Alienation of Beneficial Interests. No beneficiary shall have the power to anticipate, alienate or assign any beneficial interest given him or her under this instrument, and no such beneficial interest is subject to being reached or applied by any creditor or other person in satisfaction of any claim against the beneficiary thereof.

Comment: Paragraph D, a so-called “spendthrift clause,” is included to prevent alienation of a beneficial interest, either voluntarily through sale or gift or involuntarily to satisfy a creditor’s claim. While many states have enacted legislation upholding the validity of spendthrift trusts, “[a] few statutes contain significant departures from the [general] rules...such as by allowing restraints on income but not principal interests or otherwise limiting the extent of the protection allowed (e.g., to the beneficiary’s support). Some statutes make all trusts spendthrift trusts unless the settlor provides otherwise, or restrain involuntary but not voluntary alienation with respect to all trusts.”⁵⁵ It follows that the clinician must be familiar with state law regarding spendthrift restraints and tailor the trust instrument accordingly.

E. Accounts. Without limitation, the Trustees’ duty to account shall be discharged as to each year for which they shall have rendered a written account in good faith (1) to me during my lifetime, and (2) to the competent beneficiaries and any parent, duly appointed guardian, or conservator of any beneficiary under a legal disability after my death, if the persons to whom such account is rendered approve it, or none of them objects to it with particularity and in writing within three (3) months after delivery (including mailing by registered or certified mail to the last known address of the person to whom delivery is to be made).

F. Miscellaneous. A provision that a particular matter is to be included within a general category shall not be construed to limit the generality of the category, and the use of any gender or number shall be construed to refer to any other gender or number unless such reference is plainly inconsistent with the context. The word “person” refers to individuals, corporations, partnerships, trusts, and estates. The word “Code” refers to the Internal Revenue Code of 1986, as amended from time to time, and any reference to provisions of the Code shall be deemed to include successor or substitute provisions.

9. Form: Amendment and Revocation

SEVENTH: Regarding revocation and amendment:

A. I reserve the power to amend or add to this instrument, from time to time, but only with the written consent of the Trustees, and to revoke the trusts established hereunder. Said powers are exercisable only by a signed writing delivered to a Trustee while I am living. No exercise of these powers shall exhaust them.

B. After my death or while I am under guardianship or conservatorship the Trustees shall have the power to amend or add to the provisions of this instrument, from time to time, by one or more instruments in writing signed by all of them, provided that:

⁵² See Austin Scott, Law of Trusts § 171.2 (discussion of right to delegate particular acts), §§ 225-225.1 (liability of fiduciary for actions of an agent) (4th ed. 1988).

⁵³ See Grimes v. Perkins School for the Blind, 494 N.E.2d 406 (1986).

⁵⁴ See supra note 47.

⁵⁵ Restatement (Third) of Trusts § 58 (2003).

1. No Trustee who is not an Independent Trustee as defined in [Insert Article, Paragraph and Subparagraph], above, shall participate in the exercise of the said power nor shall his or her signature be required.

2. No such amendment or addition shall have any effect except to the extent that it:

- a. clarifies the meaning or reference of an expression or provision of this instrument,
- b. changes or adds to the administrative provisions of this instrument, without any resulting material alteration of beneficial interests, or
- c. results in better conformity between this instrument and the applicable provisions of federal and state tax laws, without any resulting material alteration of beneficial interests.

3. A purported exercise of the Trustees' power to amend or add provisions under this Paragraph B shall represent a determination by them that such exercise is within the scope of their power, and their good faith determination in that regard in the exercise of a reasonable judgment shall be conclusive upon all persons, whether or not ascertained, in being, or under a disability.

Comment: As grantor and sole trustee, the client may unilaterally amend or revoke the trust during his or her lifetime. Upon the grantor's death or incapacity, the independent trustees have limited powers of amendment with respect to the administrative provisions of the trust. The dispositive provisions of the trust become irrevocable upon the grantor's death.

10. Form: Governing Law, Situs

EIGHTH: The trusts established under this instrument are sometimes referred to herein as a "trust," in the singular, and they may be referred to as the [NAME OF GRANTOR] 200[] REVOCABLE TRUST. This instrument and the trusts established hereunder shall be construed in accordance with [Name of State] laws and governed thereby. Each trust established hereunder shall have its situs in [Name of State] unless the Trustees shall have adopted a situs elsewhere within the United States with the written consent of a majority of such of the adult competent beneficiaries of such trust as are then eligible to receive distributions.

Comment: As the situs of the trust property, the place of administration and the domiciles of the grantor, trustees and beneficiaries may be different at the time the trust is created and change over time, it is good practice to formalize the grantor's intent regarding governing law as to (1) the interpretation and (2) the validity of the trust.⁵⁶ In general, the grantor's intent regarding the state law which should govern questions of trust interpretation will be respected by the courts.⁵⁷ Regarding trust validity, the grantor's choice of state law will generally be upheld by the courts only

⁵⁶ Susan Leonard Repetti, Esq., Governing Law, in Drafting Wills and Trusts, supra note 34, ch. 19-12.
⁵⁷ See Austin W. Scott & William F. Fratcher, The Law of Trusts § 575 (4th ed.1989).

if there is a significant connection between the designated state and the trust.⁵⁸ Note that language in the trust instrument regarding governing law will not necessarily determine the residence of the trust for income tax purposes.

EXECUTED in duplicate at [City], [State], under seal this ____ day of _____, 200[].

[NAME OF GRANTOR], Grantor

Comment: As a general rule, it is advisable for the grantor to execute two (2) or three (3) copies of the trust instrument so that the grantor and each of the trustees (including each of the standby trustees) may retain an original. Of course, the language preceding the signature line should be modified to reflect the number of original copies.

STATE OF _____
COUNTY OF _____

On this ____ day of _____, 200[], before me, the undersigned notary public, personally appeared [NAME OF GRANTOR], personally known to me or proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the foregoing document, and acknowledged to me that [she/he] signed it voluntarily for its stated purpose.

Notary Public
My Commission Expires:

The undersigned hereby acknowledges delivery of the foregoing instrument to [him/her], as Trustee, and accepts the trusts thereunder this ____ day of _____, 200[].

[NAME OF TRUSTEE], Trustee

The undersigned hereby acknowledges delivery of the foregoing instrument to [him/her] as Standby Trustee and accepts the trusts thereunder this ____ day of _____, 200[].

[NAME OF STANDBY TRUSTEE],
Standby Trustee

⁵⁸ Id. §§ 591, 598.

C. The Health Care Proxy

A health care proxy designates an agent to make health care decisions on the principal's behalf should he or she become unable to make or communicate such decisions (e.g., approve surgery, request maximum pain relief medication, terminate life support). In making decisions under the proxy, the agent must act in accordance with the principal's wishes, rather than doing what the agent thinks is best. A health care proxy can be revoked at any time by the principal, though the prescribed methods of revocation vary from state to state.⁵⁹

In the absence of a properly executed health care proxy, decision-making authority regarding health-related matters generally defaults to a person's "next of kin," often the spouse or the closest adult biological family member. The health care proxy vests control in an individual explicitly chosen by the patient, thus increasing the likelihood that the patient's wishes regarding health-related matters will be honored. Subject to certain limitations (which vary across jurisdictions), a person is free to choose any competent adult to serve as health care agent.⁶⁰

To promote the widespread use of health care proxies, many states have statutory forms that can be adopted in whole or in part. The template health care proxy reflects Massachusetts law and should be modified to comply with the requirements of the state in which it is intended to operate.

In executing a health care proxy, a client must determine whom to appoint as health care agent and alternate agent (in the event that the original person named is unwilling or unable to serve). The client must also determine the scope of the agent's power to make health care decisions.

⁵⁹ See Bretton J. Hortter, A Survey of Living Will and Advanced Health Care Directives, 74 N.D.L. Rev. 233 (1998) (examining the laws of each state); see also 63 Am. Jur. Trials § 35 (1997) ("Some statutes outline methods of revocation very similar to the requirements for revocation of a will disposing of property. Many, however, merely indicate that a declarant may revoke a directive and have no formal revocation requirements, such as a writing. Unless the principal specifies to the contrary, the appointment of a spouse as an agent is generally revoked upon divorce, annulment, or dissolution of the marriage, or at the time of a legal separation. Separation without legal formality, however, usually will not in and of itself serve to revoke the appointment of a spouse as a health care agent.").

⁶⁰ In many states, for instance, an employee of the health care facility providing services to the principal may not serve as health care agent. See, e.g., Mass. Gen. Laws Ann. ch. 201D, §§ 2, 3.

FORM: HEALTH CARE PROXY

HEALTH CARE PROXY OF [NAME OF PRINCIPAL]

TO ALL PEOPLE CONCERNED WITH MY MEDICAL CARE:

A. APPOINTMENT

I, [NAME OF PRINCIPAL], residing at [Principal's Address], being a competent adult of at least 18 years of age, of sound mind, and under no constraint or undue influence, hereby appoint the following person to be my HEALTH CARE AGENT under the terms of this document:

NAME:
Address:
Telephone:

If my original Health Care Agent is unable or unwilling to serve, I hereby appoint the following person as my Health Care Agent:

NAME:
Address:
Telephone:

In so doing, I create a Health Care Proxy according to [Chapter 201D of the General Laws of Massachusetts]. I hereby give my Health Care Agent the authority to make any and all health care decisions on my behalf, subject to any limitations that I state in this document, in the event that, in the future, I should become incapable of making health care decisions for myself.

Comment: From a practical standpoint, it is inadvisable to name two (2) or more health care agents to serve concurrently. Especially in emergency situations, two (2) or more parties may be unable to communicate with each other, let alone agree on a course of treatment. The Massachusetts statute implies that only one (1) person may serve as agent at a given time.⁶¹

B. POWERS OF HEALTH CARE AGENT

1. I give my Health Care Agent full authority to make any and all health care decisions for me, including decisions about life-sustaining treatment, subject only to any limitations that I state below.

⁶¹ Mass. Gen. Laws Ann. ch. 201D, § 2.

2. My Health Care Agent shall have authority to act on my behalf only if, when and for so long as a determination has been made that I lack the capacity to make or to communicate health care decisions for myself. This determination shall be made in writing by my attending physician according to accepted standards of medical judgment [and the requirements of Chapter 201D of the General Laws of Massachusetts].

3. The authority of my Health Care Agent shall cease if my attending physician determines that I have regained capacity. The authority shall recommence if I subsequently lose capacity and consent for treatment is required.

4. My Health Care Agent shall make health care decisions for me only after consultation with my health care providers and after consideration of acceptable medical alternatives regarding diagnosis, prognosis, treatments, and their side effects.

5. My Health Care Agent shall make health care decisions for me in accordance with [his/her] assessment of my wishes, my moral or religious beliefs, or, if such factors are unknown, then in accordance with my Health Care Agent's assessment of my best interests.

6. If I object to a health care decision made by my Health Care Agent, my decision shall prevail unless it is determined by court order that I lack capacity to make health care decisions.

7. The decisions made by my Health Care Agent on my behalf shall have the same priority as my decisions would have if I were competent over decisions by any other person, except for any limitation I state below or a specific court order overriding this proxy.

8. Nothing in this proxy shall preclude any medical procedure deemed necessary by my attending physician to provide comfort care or pain alleviation including but not limited to treatment with sedatives and pain-killing drugs, non-artificial oral feeding, suction, and hygienic care.

Comment: Paragraphs 1-8, above, are included in strict compliance with the Massachusetts statute and may be modified or deleted entirely in accordance with state law.⁶² For instance, some practitioners would assert that Paragraph 2, above, imposes an excessively burdensome limitation on the health care agent's powers. Indeed, in the event of an emergency, it may be quite difficult to obtain a written declaration of incapacity from an attending physician, especially if the principal in question is home-bound. In addition, Paragraph 6 with its requirement of a court order in the event of a dispute between principal and agent raises concerns regarding the delays and costs associated with a probate court proceeding. Accordingly, where such provisions are not required by state law, clinicians may wish to include less restrictive language.

[9. I direct that the following persons, in addition to my immediate family members, be given unrestricted access to visit me if I am inpatient or resident in any hospital, rehabilitative or long term care facility, hospice, or other health care facility:]

⁶² Mass. Gen. Laws Ann. ch. 201D §§ 5, 6, 13.

Comment: Visitation protocols are determined by health care facilities. In most cases, only immediate family members are granted visitation rights. A patient, however, may wish to grant access to his or her partner or friend, or restrict the access of a close relative.

C. COURT APPOINTED GUARDIAN

If it is deemed necessary to seek the appointment by a probate court of a guardian of my person, I hereby nominate the persons named herein as my appointed Health Care Agent and alternate Health Care Agent, successively, in the order named, for appointment by such court to serve as such fiduciary.

Comment: Generally speaking, there are two (2) kinds of guardianships: "a guardianship affecting personal interests, known as a guardianship of the person, and a guardianship affecting property interests, known as a guardianship of the estate."⁶³ Like a health care agent, a guardian of the person is appointed to make health care decisions on the principal's behalf if such principal is unable to make or communicate informed decisions due to incapacity or illness.⁶⁴ A person may only be placed under a guardianship if he or she is deemed incompetent by the probate court. Of course, the definition of incompetence for purposes of imposing a guardianship will vary from state to state. As a guardian can only be appointed by the probate court and is subject to continued judicial oversight, guardianships are administratively and financially burdensome. They are also considered significantly more invasive of individual rights than health care proxies.⁶⁵ Even where an individual has a valid health care proxy, a hospital may nevertheless require a health care agent to seek a guardianship in order to authorize a particular course of treatment. For instance, in many hospitals in Massachusetts, a health care agent cannot authorize psychiatric hospitalization or the administration of antipsychotic medication.⁶⁶ The template provides that in the event a guardianship becomes necessary, the principal nominates the health care agent to serve as such guardian, if he or she is willing and able to serve, and if not, the alternate health care agent.

D. HIPAA RELEASE AUTHORITY

I hereby grant my Health Care Agent release authority that applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, as now in effect, and as such law may from time to time hereafter be amended. I intend that my Health Care Agent be treated as I would be, with respect to my rights regarding the use and disclosure of my individually identifiable health information and/or other medical records. I hereby authorize any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other covered health care provider, any insurance company or healthcare clearinghouse that has provided treatment or services to me, that has paid for or that is seeking payment from me for such services, to give, disclose and release to my Health Care Agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition.

⁶³ 39 Am. Jur. 2d Guardian and Ward § 1 (2006).

⁶⁴ See, e.g., Mass. Gen. Laws Ann. ch. 201, § 6.

⁶⁵ Robert H. Weber, Esq., Substitute Personal Decision Making, in 1 Estate Planning for the Aging or Incapacitated Client in Massachusetts § 3.8 (Donald N. Freedman & Emily S. Starr eds., MCLE, Inc. rev. ed. 1998 & Supp. 2002).

⁶⁶ Id.

The authority given to my Health Care Agent under this Section D supersedes any prior agreement that I may have made with my health care providers with respect to disclosure of my individually identifiable health information.

As long as this Health Care Proxy remains in full force and effect, the HIPAA release authority given under this Section D has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

E. REVOCATION

This Health Care Proxy shall be revoked upon any one (1) of the following events:

1. My execution of a subsequent Health Care Proxy;
2. [My divorce or legal separation from my spouse where my spouse is named as my Health Care Agent];
3. My notification to my Health Care Agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the Health Care Proxy.

Comment: Note that under the Massachusetts statute, a principal is "presumed to have the capacity to revoke the health care proxy unless determined otherwise pursuant to a court order."⁶⁷ In states that have not adopted this presumption, the clinician might include language requiring a capacity assessment by an attending physician to validate a revocation.

SIGNATURE OF PRINCIPAL

Witness my hand and seal this _____ day of _____, 200[].

[NAME OF PRINCIPAL]

WITNESSES:

We hereby declare that said principal signed the foregoing Health Care Proxy in the presence of both of us, as witnesses, and did so willingly, being eighteen (18) years of age or older and of sound mind and free of constraint or undue influence, and that we have signed below in the presence of the principal and in the presence of each other.

- | | |
|----------------------------|---------|
| 1. _____
Witness (Sign) | _____ |
| _____ | Date |
| Print Name | _____ |
| _____ | Address |
| 2. _____ | _____ |
| Witness (Sign) | Date |
| _____ | _____ |
| Print Name | Address |

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200[], before me the undersigned notary public, personally appeared [NAME OF PRINCIPAL], personally known to me or proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is subscribed to this instrument and acknowledged that [he/she] executed it voluntarily and for its stated purpose.

Notary Public
My Commission Expires:

Comment: It is advisable for the principal to execute three (3) copies of the health care proxy. As discussed in Part IV(C)(2), below, the principal and the agent should each retain an original and the third copy should be given to the principal's regular physician.

⁶⁷ Mass. Gen. Laws Ann. ch. 201D, § 7.

D. The Living Will/Directive to Physicians

A living will (also known as an advanced directive or directive to physicians) operates in tandem with the health care proxy. In its simplest form, a living will contains a statement of an individual's wishes regarding the use of medical treatment to artificially prolong the process of dying. The health care agent will rely on the living will in making end-of-life health care decisions on the principal's behalf. Like a health care proxy, a living will can be revoked at any time, though the permissible methods of revocation are jurisdiction-specific.⁶⁸

The legal status of living wills varies from state to state.⁶⁹ At least thirty-five (35) states have enacted statutes acknowledging the validity of such documents. In other states, there is case law upholding an individual's right to make a living will.⁷⁰ Even in jurisdictions where living wills are not legally binding, such directives may constitute relevant evidence of a patient's intent regarding life-sustaining treatment.

It is significant to note that some practitioners incorporate broad living will language into the health care proxy. From a practical standpoint, this approach avoids confusion as to the effect of revocation of the health care proxy on the validity of the directive and vice versa. It also reduces the number of documents of which the client and the health care agent must keep track. A significant disadvantage to the single document approach is that it likely increases the number of parties who might view the living will language and in turn debate the principal's intent in any given medical situation. Where the living will is a separate and distinct document, it can be addressed solely to the health care agent and need not be introduced to the principal's medical record. As ethicist George Annas has submitted, creating an advanced directive outside the four corners of the health care proxy avoids possible legal disputes that may arise if the principal's agent, family members and health care providers were all attempting to construe the principal's wishes. Under such an approach, the health care agent "can keep [the directive] in a drawer and pull it out if it supports his case."⁷¹ Note that in some states, statutory forms and/or custom may ultimately dictate the appropriate approach.

In executing a living will, the client must consider whether he or she would want to be kept alive through artificial means if such medical treatment would not reverse but may otherwise prolong the act of dying. Some clients may wish to receive some forms of treatment and not others (e.g., artificial nutrition but not artificial respiration). Some clients may wish to receive treatment for a specific period of time and reject such treatment thereafter. The template reflects the more typical client's desire to accept medical treatment that will relieve pain, but refuse intervention that will merely prolong inevitable death.

⁶⁸ See Hortter, *supra* note 59 (examining the laws of each state).

⁶⁹ 22A Am. Jur. 2d Death § 547 (2003).

⁷⁰ See, e.g., *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Matter of Conroy*, 98 N.J. 321 (1985).

⁷¹ See E. Rosenthal, "Filling the Gap Where A Living Will Won't Do," *N.Y. Times*, Jan. 17, 1991, at B9; see also Vicki L. Shemin, Esq., *Durable Powers of Attorney and Health Care Proxies*, in 2 *A Practical Guide for Estate Planning*, *supra* note 1, § 8.4.10.

FORM: LIVING WILL

LIVING WILL OF [NAME OF DECLARANT]

I, [NAME OF DECLARANT], of [Declarant's City, County and State of Residence], being of sound mind, willfully and voluntarily make this statement as a directive to be followed in the event that I become unable to give directions and make decisions regarding my medical care.

I wish to live as long as reasonably possible and to enjoy life fully, but I do not wish to receive medical treatment that will provide minimal or no benefit to me and that will prolong my inevitable death or irreversible coma.

To that end, if I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of meaningful recovery, I direct my attending physician(s) to withhold or withdraw treatment that merely prolongs my dying, and to limit treatment to measures that are designed to keep me comfortable and to relieve pain.

I desire that my wishes be carried out through the authority given to my Health Care Agent, [NAME OF HEALTH CARE AGENT], of [Health Care Agent's City, County and State of Residence], or [his/her] successor, [NAME OF ALTERNATE HEALTH CARE AGENT], of [Alternate Health Care Agent's City, County and State of Residence], as my Health Care Proxy, in keeping with this document, despite any contrary feelings, beliefs, or opinions of members of my family, relatives, or friends. I expect these people to regard themselves as legally and morally bound to act in accordance with my wishes and in doing so to be free of any legal liability for having followed my directions.

In exercising the authority given to my Health Care Agent or successor Health Care Agent herein, [he/she] should try to discuss with me the specifics of any proposed decision regarding my medical care and treatment if I am able to communicate in any manner, even by blinking my eyes. Should I become unable to communicate my instructions as stated above, my Health Care Agent or successor Health Care Agent shall give or withhold such consent for me, including the authorization to withdraw such treatment, based on the treatment choices that I have expressed while competent, whether under this document or otherwise. This document should be treated as valid and in full force and effect.

In addition, I direct the use of pain-relieving drugs of any type, or other surgical or medical procedures calculated to relieve any pain even though the use of them may lead to permanent physical damage, addiction, or even hasten the moment of (but not intentionally cause) my death.

I authorize the delivery of this document to any physician and/or medical care facility that renders treatment to me. I also authorize any physician and/or medical care facility to release any and all of my medical information and records to any persons appointed to carry out the wishes in this document.

FORM: DURABLE POWER OF ATTORNEY

DURABLE POWER OF ATTORNEY
OF
[NAME OF PRINCIPAL]

I, [NAME OF PRINCIPAL], of [Principal's City, County and State of Residence], appoint [NAME OF AGENT], of [Agent's City, County and State of Residence], my attorney.

If said [NAME OF AGENT] is unable or unwilling to serve as my attorney, I hereby appoint [NAME OF ALTERNATE AGENT], of [Alternate Agent's City, County and State of Residence], my attorney, and [he/she] shall have all the powers, authority and exemptions given to the attorney originally named.

I appoint my attorney with power for me and in my name to act generally as my attorney deems proper in the management and disposition of all my property and affairs of every kind and for every purpose for which the law will permit an attorney in fact or at law to be appointed, to the same extent as if I were acting personally, and specifically, but without limitation, my attorney shall have power:

1. To receive property and give receipts and releases.
2. To sign and endorse checks, notes and other instruments.
3. To buy, sell, pledge, mortgage, lease and transfer on any terms, including gratuitously, real estate and personal property, including securities.
4. To have access to safe deposit boxes.
5. To execute and file state, federal and local tax returns, refund claims, and other instruments in connection with taxes.
6. To accept service of any proceeding before any court or administrative body, to appear on my behalf and represent me in any such proceeding, to consent to the disposition of any such proceeding and to execute all other instruments in such connection.
7. To employ and compensate attorneys or agents on my behalf in furtherance of such powers.
8. [To transfer any of my property to the Trustees (from time to time serving) of the [NAME OF THE PRINCIPAL'S REVOCABLE TRUST] (as amended from time to time).]
9. To make distributions, from time to time, constituting gifts qualifying for the gift tax annual exclusion under §2503(b) and for payment of medical expenses and tuition under §2503(e) of the Internal Revenue Code of 1986, as amended from time to time, to or for any one or more of my issue as my attorney in

[his/her] sole discretion deems advisable; provided, however, that the power conferred hereunder may not be exercised so as to discharge any obligation of support owed by my attorney to any of my issue].

Comment: Consider deleting the italicized language at the end of Paragraph 9 if the attorney-in-fact is not serving as (and is not likely to become) guardian of any issue of the principal.

My attorney shall have full power by written instrument to delegate any or all such powers from time to time to any person and similarly to revoke such delegation.

[The authority of said [NAME OF AGENT] or said [NAME OF ALTERNATE AGENT] as my attorney to execute any and all of the powers herein granted shall commence upon the determination by my attending physician, in writing, that I lack the capacity to manage my property and affairs.]

Comment: The above paragraph is optional and should be included only if the client wishes to create a springing durable power of attorney.

This is a durable power of attorney and shall not be affected by my subsequent disability or incapacity.

All powers given to my attorney shall be exercisable in my attorney's sole discretion, and all my attorney's decisions and determinations made in good faith and in the exercise of reasonable judgment shall be conclusive upon all persons, whether or not ascertained, in being, or under a disability. My attorney shall not be personally liable for any action or omission undertaken in good faith and in the exercise of reasonable judgment.

Comment: Because the majority of clinical clients will appoint a friend or family member as attorney-in-fact, the paragraph above creates a low standard of liability for the named individual. The client may wish to impose a higher standard where a professional fiduciary (e.g., a lawyer or accountant) is named as attorney-in-fact.

This power is to continue in full force with respect to any person dealing in good faith with my attorney until such person has received actual knowledge of the termination of this power; and any person dealing with my attorney shall be entitled to rely, without any inquiry or investigation, on the representation of authority, by affidavit or otherwise, by my attorney to act in my behalf in any manner, and it shall be conclusively presumed as to any such person that any action taken by my attorney is authorized.

I hereby declare that in the event of express revocation or of my death this power of attorney shall as to all actions which may after such event be taken by my attorney by virtue or under color or in pursuance hereof, be as binding upon me and upon my Executor and Administrator as the same would have been had such event not occurred; my attorney shall have no liability for any such action, unless my attorney had, before its taking, received reliable intelligence of such event so as effectually to apprise [him/her] that [his/her] authority hereunder had terminated.

F. The Declaration as to Remains

The declaration as to remains specifies the declarant's wishes as to the disposition of his or her bodily remains. It also appoints a person to assume control of the remains and to carry out the declarant's wishes regarding disposition.

At common law, the next of kin were granted control over the decedent's body.⁷⁶ Today, in the majority of states, there is some form of statutory obligation to respect the preferences of the deceased, to the extent they are known.⁷⁷ Some states authorize the appointment of an agent to make decisions concerning burial and funeral arrangements ("agent designation" statutes),⁷⁸ and others require that the written wishes of the deceased be honored ("personal preference" statutes)⁷⁹. Many states have codified both agent designation and personal preference laws.⁸⁰ Even in states that have not adopted such statutes, "a survey of state cases reflects that in almost every jurisdiction, courts first look to the wishes, if any, of the deceased."⁸¹ Accordingly, no matter where an individual is domiciled at the time of death, a declaration as to remains is an important component of a clinical client's estate plan.⁸² To summarize, in executing a declaration as to remains, a client should consider his or her wishes (if any) regarding burial or cremation, funeral arrangements, and memorial or religious services. The declaration can be as general or specific as the client desires. In addition, the client should name an agent to carry out his or her wishes regarding disposition.

⁷⁶ "The common-law right of the next of kin to perform a ceremonious and decent burial of the nearest relative is called the 'right of sepulcher' in some jurisdictions." 22A Am. Jur. 2d Dead Bodies § 20 (West 2008); see also 54 A.L.R.3d 1037 (1973).

⁷⁷ Funeral Consumers Alliance, Personal Preference Laws for Body Disposition, at <http://www.funerals.org/your-legal-rights/funeral-decision-rights/46-your-legal-rights/125-who-has-the-right-to-make-decisions-about-your-funeral> (last visited August 1, 2008).

⁷⁸ See, e.g., R.I. Gen. Laws § 5-33.2-24 (2006); 35 Pa. Cons. Stat. tit. 20, § 305 (Supp. 2007); Ohio Rev. Code Ann. § 2108.70 (LexisNexis 2007).

⁷⁹ See, e.g., S.D. Codified Laws § 34-26-1 (1994); Fla. Stat. § 732.804 (2005); Wash. Rev. Code § 68.50.160 (Supp. 2007).

⁸⁰ See, e.g., Or. Rev. Stat. § 97.130 (2005); N.C. Gen. Stat. § 90-210.124 (2003); Cal. Health & Safety Code § 7100 (Deering 2007); see generally, Funeral Consumers Alliance, Personal Preference Laws for Body Disposition, <http://www.funerals.org/your-legal-rights/funeral-decision-rights/46-your-legal-rights/125-who-has-the-right-to-make-decisions-about-your-funeral> (last visited August 1, 2008).

⁸¹ Ann M. Murphy, Please Don't Bury Me Down in That Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains, 15 Elder L.J. 381, 401 (2007).

⁸² In some jurisdictions, a separate and distinct Declaration as to Remains document may not meet the state's statutory requirements. For instance, under New Jersey law, preferences regarding the disposition of remains and the agent to oversee such disposition must be articulated in the Will. N.J. Stat. Ann. § 3B:10-21.1 (West 2003). It follows that in adopting the template, the clinician must be familiar with the relevant statutes and/or case law of the state in which the clinic operates.

FORM: DECLARATION AS TO REMAINS

**DECLARATION AS TO REMAINS
OF
[NAME OF DECLARANT]**

To my family, my physicians, my attorney, any medical facility in whose care I may hereafter be, any individual who may become responsible for my health, welfare or affairs, and to any court having jurisdiction over my person or property:

I, [NAME OF DECLARANT], of [Declarant's City, County and State of Residence], being of sound mind, hereby make the following declaration of my carefully deliberated wishes and intentions:

I hereby direct that [NAME OF APPOINTEE], of [Appointee's City, County and State of Residence], shall have control over my bodily remains. I further direct that if said [NAME OF APPOINTEE] is unable or unwilling to carry out my wishes as articulated in this document, [NAME OF ALTERNATE APPOINTEE], of [Alternate Appointee's City, County and State of Residence], shall have control of my bodily remains and shall carry out my wishes as expressed herein. Control over my bodily remains shall include, but not be limited to, decisions concerning the disposition of my remains and arrangements for funeral and/or memorial services, but may only be carried out in keeping with my carefully deliberated wishes as articulated below.

- 1. I direct that my bodily remains be [buried/cremated].**

Comment: If the client wishes to be cremated, the declaration should include explicit language that the appointee may authorize cremation (i.e., "I specifically permit [NAME OF APPOINTEE] or [his/her] successor, [NAME OF ALTERNATE APPOINTEE], to authorize cremation of my bodily remains").

- 2. I further direct that, if possible, my bodily remains be buried in [Name of Cemetery], [City, County and State of Cemetery].**
- 3. Declarant's further wishes regarding funeral services, memorial services and burial.]**

Witness my hand and seal this _____ day of _____, 200[].

[NAME OF DECLARANT]

WITNESSES:

We hereby declare that said principal signed the foregoing Declaration as to Remains in the presence of both of us, as witnesses, and did so willingly, being eighteen (18) years of age or older and of sound mind and free of constraint or undue influence, and that we have signed below in the presence of the principal and in the presence of each other.

- | | | |
|----|----------------|---------|
| 1. | _____ | _____ |
| | Witness (Sign) | Date |
| | _____ | _____ |
| | Print Name | Address |
| 2. | _____ | _____ |
| | Witness (Sign) | Date |
| | _____ | _____ |
| | Print Name | Address |

STATE OF _____
COUNTY OF _____

On this ____ day of _____, 200[], before me the undersigned notary public, personally appeared [NAME OF DECLARANT], personally known to me or proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is subscribed to this instrument and acknowledged that [he/she] executed it voluntarily and for its stated purpose.

Notary Public
My Commission Expires:

REVIEWING, EXECUTING AND STORING THE ESTATE PLANNING DOCUMENTS

A. Reviewing the Documents, Contacting Fiduciaries

After completing the estate planning drafts, the clinician should review each document line-by-line for substance and style. It is important to examine even the boilerplate language, as the details of a case may require changes to the standard provisions.

The clinician should also review the drafts with the client prior to execution to ensure that (1) the client understands the substance of each document, and (2) the provisions are in accordance with his or her wishes.

In some cases, the client may ask to review the documents prior to his or her follow-up meeting with the attorney. If the clinician sends the client drafts via regular mail or email, it is imperative to stress to the client that he or she should not attempt to execute the documents without the assistance of an attorney. To avoid confusion, where the attorney sends the client hard copies of the documents by mail, he or she should mark each copy with a "draft" label.

Prior to execution, the clinician should advise the client to contact any fiduciaries named in the documents (executor, trustee, guardian, attorney-in-fact, health care agent, agent with authority over remains, etc.) to ensure that they would be willing to serve, if able. Where possible, the clinician should assist the client in communicating with potential fiduciaries and explaining the obligations and duties of each role.

B. Executing the Estate Planning Documents

1. The Will

The procedural requirements for executing a will vary from state to state. Accordingly, a will that is executed properly in one state may not comply with the statutory requirements of another jurisdiction. This discrepancy could pose a problem if the testator executes the will in one state and dies a resident of another. Fortunately, most states have statutes recognizing the validity of a will that does not comply with the state's execution requirements, but satisfies the formal requirements of the state in which it was executed.⁸³ Nevertheless, clinicians are encouraged to adhere to the following procedure to ensure the validity of the will in all fifty (50) states.

- If the will consists of more than one (1) page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. The template used by the Harvard EPC includes the page number and the number of total pages in the footer of every page.
- The lawyer should confirm that the testator has reviewed the will and understands its contents.

⁸³ Dukeminier, supra note 1, at 216.

- The lawyer, the testator, three (3)⁸⁴ disinterested witnesses (i.e., individuals who are neither named beneficiaries nor the testator's heirs at law), and a notary public should be brought together in a room from which everyone else is excluded. If the lawyer is a notary, an additional notary is unnecessary. The door to the room should be closed. No one should enter or leave the room until the ceremony is finished. The lawyer should ask the testator the following three (3) questions:
 - a. Is this your will?
 - b. Have you read it and do you understand it?
 - c. Does it dispose of your property in accordance with your wishes?
- After each question the testator should answer "yes" in a voice that is audible to the three (3) witnesses and the notary. It is not necessary for the witnesses to know the terms of the will. If, however, the lawyer foresees a possible will contest, added precautions might be taken at this time.
- The lawyer should ask the testator if he or she would like the witnesses to witness the signing of his or her will (in so doing, the lawyer should refer to each witness by name). The testator should answer "yes" in a voice that can be heard by the witnesses.
- The witnesses should be able to see the testator sign. For purposes of identification and to prevent subsequent substitution of pages, the testator should sign his or her name on the margin of each page of the will. The testator should then sign his or her name at the end of the will.
- One (1) of the witnesses should read aloud the attestation clause, affirming that all of the foregoing things were done.
- Each witness should then sign and write his or her address next to his or her signature. The will template includes lines for both the business and home addresses of the witness.
- A self-proving affidavit, typed at the end of the will, swearing before a notary public that the will has been duly executed, should then be signed by the testator and the witnesses before the notary public, who in turn should sign and attach his or her official seal.⁸⁵

2. The Revocable Trust, the Health Care Proxy, the Living Will, the Power of Attorney and the Declaration as to Remains

The execution requirements for the remaining estate planning documents will also vary from state to state. While some of the procedural formalities for will execution may not be required in executing these documents, the clinician may wish to adopt the protocol articulated in subsection 1, above, for all estate planning forms. Of course, to ensure the validity of such documents, the clinician should nevertheless be well-versed in the jurisdiction's procedural rules.

⁸⁴ Though Vermont is the only state to require three (3) witnesses, "even in states requiring two witnesses, using three witnesses is common – among other reasons, to reduce the harm should an interested witness be among the three." Dukeminier, *supra* note 1, at 216 n. 11.

⁸⁵ Dukeminier, *supra* note 1, at 216-217.

C. Storing the Estate Planning Documents

At the Harvard EPC, we entrust the original documents to the client and retain copies for the file. While this policy is imperfect to the extent that a client runs the risk of losing his or her original documents, there are several rationales that support such a system. First, by sending the client home with original documents, we are openly reaffirming the notion that our representation has ended.⁸⁶ Second, if the original documents were housed at the clinic, the client's appointed fiduciaries might have difficulty accessing them in the event of an emergency. Such a situation could arise in spite of our best efforts to encourage the client to speak to his or her appointed fiduciaries about the documents (as discussed in Part IV(A), above). Finally, given the vast number of clients we assist over the course of a semester, space constraints render long-term storage of original documents impracticable.

In furnishing the client with original documents or copies, it is good practice to provide oral and written instructions regarding storage. A template memo summarizing the EPC's suggested storage protocol is included in the Appendix.

All of the estate planning documents should be filed in a safe but relatively accessible place, such as a fire-proof filing cabinet or desk. Contrary to popular belief, it is inadvisable to store such documents in a bank safety deposit box as a bank may be closed at the time of an emergency. Additionally, if the safety deposit box is in the client's name alone, family members may be impeded from accessing its contents in the event of the client's death or incapacity.

1. The Will and the Revocable Trust

It is advisable to inform the executor as to where the will is being stored. The client need not, however, provide the executor with a copy of the will nor disclose the will's dispositive provisions.

With respect to the revocable trust, the client should give a copy to any co-trustee. It is also good practice to give a copy to any standby trustee.

2. The Health Care Proxy and the Living Will

The client should give original copies of the health care proxy to his or her health care agent and regular physician. It is also advisable to provide the health care agent with contact information for the principal's regular physician.

As mentioned in Part III(D), above, to avoid disputes among the agent, family members and health care providers over interpretation of the living will language, we do not advise clients to include the living will in a medical record. The client should, however, give a copy of the directive to his or her health care agent and discuss with such individual the client's wishes regarding medical treatment and care under various circumstances. Although it is impossible to predict all possible future medical scenarios, it is helpful for the health care agent to have the best possible understanding of the client's intentions.

⁸⁶ If a former client's appointed executor requests our assistance in probating the estate at a later date, we are under no continuing obligation to represent him or her, but may do so at will.

3. The Durable Power of Attorney

Assuming the client trusts the attorney-in-fact to use the document only when authorized by the client, it may be advisable to inform the attorney as to the location of the document.⁸⁷

4. The Declaration as to Remains

To ensure that the client's wishes are understood and fulfilled, he or she should discuss his or her preferences with the appointee. The client may also wish to give a copy of the declaration to the designated agent.

D. Additional Instructions

Prior to closing an estate planning case, the clinician should advise the client to review the estate plan whenever significant family, financial, or legal events occur or are anticipated (e.g., marriage, divorce, birth, adoption, inheritance, death of a third party, etc.). Even absent such an event, the clinician should encourage the client to revisit his or her estate plan every five (5) to seven (7) years.

In addition, the clinician should advise the client of the dangers of modifying the estate planning documents on his or her own, and stress the importance of enlisting the assistance of a professional.

⁸⁷ Of course, misuse is less of a concern with a "springing" power which is valid only upon determination (by a treating physician) of the principal's incapacity.

1. TEMPLATE ESTATE PLANNING PAMPHLET

Thank you for contacting the [NAME OF CLINIC] regarding your estate plan. This guide provides an introduction to the estate planning services we offer. While it does not constitute legal advice, it is meant to assist you in thinking about the type of estate plan that is best-suited to your unique circumstances.

Why Do I Need An Estate Plan?

Take Control of Your Life: You do not need a lot of money or assets to make an estate plan. By putting a plan in place, you ensure that your wishes regarding medical care, financial decision-making and property distribution (during your lifetime and upon your death) are memorialized and respected.

Make Life Easier for Family and Friends: By memorializing your wishes in estate planning documents, you prevent unnecessary confusion and conflict among family members and friends who might otherwise disagree as to what you may have wanted.

Relieve Stress: Most people feel a sense of relief when they sign their estate planning documents. We understand that it is difficult to think and talk about these issues, and we will do our best to help you. It is better to make an estate plan early. If you wait until you are ill or incapacitated, it may be too late to put the necessary documents in place.

What Happens If I Do Not Make an Estate Plan?

Upon your death, state law would determine how your property would be distributed and who would be in charge of your estate. In most cases, your closest living family members would receive the property and be appointed by the probate court to wind up your affairs.

Who Will Create My Estate Plan?

Your case will be handled by a student advocate under the supervision of an attorney. All documents prepared for you will be reviewed by this attorney. Please be assured that we will keep your personal information private.

The Basics of An Estate Plan

Estate plans can be very simple or more complex, depending on the situation. We will help you figure out a plan that works best for you. Your estate plan will be flexible and can be changed if your life situation changes.

Most estate plans are made up of several different documents. The most common documents include:

Will: document under which you:

- (1) designate how you would like your property to be distributed upon your death.
- (2) nominate a Guardian to take care of your minor children, if any.
 - The Guardian can be anyone who is of the age of majority.
 - You may name a couple to serve as Co-Guardians. Consider what should happen if the couple divorces or a member of the couple predeceases you.
 - It is okay if the Guardian is one of the people to whom you wish to leave assets.
 - If possible, you should choose a back-up Guardian in the event that the first person named is unable or unwilling to serve.
- (3) appoint an Executor to administer your estate (file your will with the probate court and ensure that your property is distributed to the people you designate).
 - The Executor can be anyone who is of the age of majority.⁸⁸
 - The Executor can be related to you, but does not have to be.
 - It is okay if the Executor is one of the people to whom you wish to leave assets.
 - Serving as Executor may be time-consuming.
 - Though the Executor may be responsible for paying filing fees, he or she does not pay for such expenses out of pocket. Such expenses will be paid out of your estate.
 - If possible, you should choose one (1) Executor, and at least one (1) back-up Executor.

Revocable Trust: an entity that:

- (1) is created during your lifetime.
- (2) may be funded with assets both during your lifetime and upon your death.
- (3) is often established for the benefit of a child or children (the “beneficiary” or “beneficiaries”). Assets are held in trust until child is an adult and/or financially responsible.
- (4) is administered by a Trustee who is responsible for making distributions of trust property to the beneficiaries.
 - The Trustee can be anyone who is of the age of majority.
 - The Trustee need not be a lawyer.
 - The Trustee should be someone who is financially responsible and someone who you trust.
 - You should name a second person to be a back-up or “Standby” Trustee if your first choice is unable to serve.

Health Care Proxy: document under which you name a friend or family member as your “Health Care Agent” to make health care decisions for you if you are unable to make those decisions for yourself. For example, if you are in a coma and cannot communicate your wishes to your doctor, this document gives someone the power to make decisions about your medical care based on what he or she believes you would want.

- The Health Care Agent can be anyone who is of the age of majority.
- The Health Care Agent should be someone who knows you well and who will honor your wishes.
- You should name a second person to be a back-up Health Care Agent if your first choice is unable to serve.

Living Will: document that provides further guidance to your Health Care Agent regarding end-of-life medical treatment. Specifically, it allows you to specify whether you want to be kept alive through artificial means such as respirators and feeding tubes if you are in a “terminal and irreversible condition” with no reasonable prospect of recovery (as determined by your doctor). Of course, you do not need to include this document in your estate plan if it goes against your personal or religious beliefs.

- Your Health Care Agent will be responsible for seeing that your wishes as expressed in your Living Will are respected.

Durable Power of Attorney: document under which you appoint a friend or family member as your “Attorney-in-Fact” to have control over your financial matters. For instance, the person appointed may make withdrawals from your bank account, write checks, cash your social security check and/or sign your tax return.

- The Attorney-in-Fact can be anyone who is of the age of majority.
- The Attorney-in-Fact need not be a lawyer (in spite of the confusing language).
- The Attorney-in-Fact should be someone you trust.
- If possible, you should name a second person to be a back-up Attorney-in-Fact if your first choice is unable to serve.
- The power conferred by the document can be as broad or limited as you like.

Declaration as to Remains: document under which you express your wishes for the disposition of your bodily remains (i.e., what happens to your body after you die) and nominate a friend or family member to carry out your wishes. You can be as general or as specific as you want in expressing your wishes.

⁸⁸ See supra notes 19 and 20.

- Questions to Consider:
 - Do you want to be buried or cremated?
 - If you want to be buried, do you know where?
 - If you want to be cremated, what would you like loved ones to do with your ashes?
 - Do you want a funeral or memorial service held in your honor? If so, do you have specific wishes about the funeral or memorial service?
- Who Should You Nominate as “Agent” to Carry Out Your Wishes?
 - The Agent can be anyone who is of the age of majority.
 - The Agent should be someone who you believe will honor your wishes.
 - The Agent will not be in charge of paying for your cremation or burial—just making sure your wishes are carried out. The cost of carrying out your wishes will normally be taken out of your estate. If you are worried there will not be enough money for this, we can suggest various options for covering costs.
 - If possible, you should name a second person to be a back-up Agent if your first choice is unable to serve.

What Do I Need to Bring to My Estate Planning Meeting?

Included below is a list of information we will need to draft each estate planning document. Please note that you need only bring the information listed under the documents you would like to include in your estate plan.

Will:

- Name and address of Executor
- Name and address of back-up Executor
- Paperwork for cars, bank accounts, and any other significant items you own
- If you have children under the age of majority:
Name(s) and address(es) of Guardian(s) for children
Name(s) and address(es) of back-up Guardian(s) for children
- Names and addresses of all people/organizations to whom you would like to leave property
- If you own a home, please bring a copy of your deed (if you can't find the deed, please call us before your meeting and we will help you find a copy online)
- If you have a life insurance policy, 401(k) plan, or similar policy or plan, please bring any relevant documentation

Revocable Trust:

- Name and address of the Trustee
- Name and address of the Standby Trustee
- Names and addresses of all people whom you would like the Trust to benefit

Health Care Proxy:

- Name, address and phone number of Health Care Agent (person to make your health care decisions if you are unable to do so)
- Name, address and phone number of back-up Health Care Agent

Living Will:

- You do not need to bring any additional information for this document

Durable Power of Attorney:

- Name and address of Attorney-in-Fact (person to handle your finances)
- Name and address of back-up Attorney-in-Fact

Declaration as to Remains:

- Name and address of Agent (person in control of your bodily remains)
- Name and address of back-up Agent
- If you want to be buried: Name and address of cemetery
- If you want to be cremated: Information as to where and how you want your ashes to be scattered
- If you would like a memorial service: Information as to where you would like your memorial service to be held

2. TEMPLATE ESTATE PLANNING QUESTIONNAIRE

Personal Information

1. Full legal name: _____
2. Home address: _____
3. Occupation: _____
4. Business address: _____
5. Email address: _____
6. Home phone: _____ Work phone: _____
 May we call you at work? Yes _____ No _____
 May we leave a message at home? Yes _____ No _____
7. Social Security Number: _____ - _____ - _____
8. Date of Birth: _____
9. Other names by which you have been known: _____
10. Do you currently have a will, trust, health care proxy, living will, power of attorney or declaration as to remains?

Spouse/Partner & Children

1. Marital Status:
 Single _____ Married _____ Divorced _____ Widowed _____ Separated _____
2. Full name of Partner _____ or Spouse _____: _____
3. Date of marriage, if ever married: _____
4. Have you ever been divorced? Yes _____ No _____
 If yes, please note below the name of the person(s) from whom you were divorced, the date and the place where the divorce was granted.

5. Do you have any minor children? Yes _____ No _____
 Do you have any adult children? Yes _____ No _____

Child's Name & Address	Under 18?	Other Parent's Name	Do You Have Custody?

Other Relatives

	Name & Address	Minor?
Mother		
Father		
Sibling		

Is there specific information about any of your family members which we should consider in preparing your estate planning documents (e.g., information about a family member who may challenge your wishes or who you do not want to benefit under any circumstances)? Please provide details. _____

Other Possible Beneficiaries of Your Estate

Name and Address	Relationship to You	Minor?

Income

- Are you presently employed? Yes _____ No _____
 If yes, what is your current salary? \$_____ per _____
- Do you receive any alimony? Yes _____ No _____
 If yes, what is the amount received? \$_____ per _____
- Do you receive any child support? Yes _____ No _____
 If yes, what is the amount received? \$_____ per _____
- Do you receive any government "income-type" benefits?
 Yes _____ No _____
 If yes, please explain what benefits you receive:
 Social Security Disability Income (SSDI): \$_____ per _____

Social Security Income (SSI): \$_____ per _____
 Food Stamps: \$_____ per _____
 Veteran's Benefits: \$_____ per _____
 State Disability Insurance: \$_____ per _____
 EAEDC/Welfare: \$_____ per _____
 Aid to Families with Dependent Children: \$_____ per _____

- Do you receive Medicaid? Yes _____ No _____
- Do you receive Medicare? Yes _____ No _____
- Do you have a Medicaid spend-down? Yes _____ No _____
 If yes, how much is your spend-down? _____
- Have you ever worked for a government agency? Yes _____ No _____
 If yes, which agency and what were the dates of employment? _____
- Have you ever been in the military? Yes _____ No _____
 Branch: _____ Dates: _____
 Veterans Administration Claim Number: _____
- Do other persons share your household? If so, please list the names of those persons: _____
- Do you receive any private income or benefits? (e.g., private disability insurance, rent from rental property or investments, etc.) For all other income or benefits please list the source(s) and amount(s):
 Source of benefit: _____ \$_____ per _____
 Source of benefit: _____ \$_____ per _____

Assets

Real Estate

Do you own your own residence? Yes _____ No _____
 If yes:
 Address: _____
 Name(s) on title: _____
 How is title held? Jointly _____ Tenants in Common _____ One Name _____
 Date of purchase: _____
 Purchase price: _____
 Amount of mortgage remaining, if any: _____
 Current value: _____
 Mortgage paid to: _____
 Do you have mortgage life insurance? Yes _____ No _____ Unsure _____

If yes, in what amount? _____
 Who is the beneficiary of the mortgage life insurance: _____
 Have you ever filed for a homestead exemption? Yes _____ No _____
 If no, are you interested in filing for an exemption that protects your home from creditors?
 Yes _____ No _____
 Do you own other real estate? Yes _____ No _____
 If yes, please supply similar information for each holding on a separate sheet.

Bank Accounts

Checking/Savings/CD	Bank	Name(s) on Account	Survivor Beneficiary?	Account #	Current Balance

Investments

Please list all investments such as stocks, bonds, mortgages owned, etc. and identify anyone who shares ownership with you.

Investment	Other Owners?	Value

Retirement Funds

Do you have an IRA, 401(k), or similar savings plan? Yes _____ No _____
 If yes, please note below the holder, account number, and value of each: _____

Do you have a pension fund through your present or former employment? Yes _____ No _____
 If yes, please provide information: _____

Personal Items

Do you have any valuable personal items (e.g., car, stereo, furniture, jewelry, etc)? For cars or boats, please list make, model, and year, and name(s) on title.

Item	Estimated Value

Intangible Property

Do you own any intangible property, such as copyrights, patents, etc.? Yes _____ No _____
 If yes, please list below. _____

Life Insurance

Do you have life insurance? Yes _____ No _____ Unsure _____
 If yes:
 Insurance Company: _____
 Policy Number: _____
 Beneficiary: _____
 Amount: \$ _____
 Is the policy provided by your employer? Yes _____ No _____
 Do you make any payments for the policy? Yes _____ No _____

Can you apply for a disability waiver of your premium? (Look at your policy to find out)

Yes _____ No _____

If you have more than one life insurance policy, please provide this information for each one on a separate sheet.

Expenses

1. Rent: \$_____ per _____
Do you receive a subsidy? Yes _____ No _____
If yes, how much and from whom? _____
2. Electric: \$_____ per _____
3. Gas: \$_____ per _____
4. Phone: \$_____ per _____
5. Cable: \$_____ per _____
6. Other Expenses: (List all other monthly expenses including unreimbursed monthly health care costs, transportation, etc.)
Source of expense _____ \$_____ per _____
Source of expense _____ \$_____ per _____
Source of expense _____ \$_____ per _____
Source of expense _____ \$_____ per _____
7. Are you having any problems meeting your expenses? Yes _____ No _____
If yes please explain: _____
8. Do you have a case manager or a service provider for accessing meals programs, transportation services, basic services, etc.? Yes _____ No _____ Not applicable _____
If yes, which agency provides these services to you and/or who is your case manager? _____
If no, would you like a referral? Yes _____ No _____

Debts and Liabilities

1. Are you responsible for paying alimony? Yes _____ No _____
If yes, to whom paid: _____
Amount per month: \$_____
2. Are you responsible for paying child support? Yes _____ No _____
If yes, to whom paid: _____
Amount per month: \$_____
3. If you are thinking of declaring bankruptcy or need assistance with debt management, list below all current debts and bring in copies of the most recent bills.

Creditor	Amount Owed

4. Do you have any court-ordered payments (from a lawsuit or collection of debt)?
Yes _____ No _____
If yes, to whom is the debt paid? _____
Which court issued the order? _____
Date of order _____ Amount per month: \$_____
5. Do you owe any back taxes? Yes _____ No _____
If yes, to whom do you owe back taxes? (i.e. IRS, DOR, other state tax)
Please explain: _____
6. Do you have any outstanding student loans? Yes _____ No _____
If yes, to whom? Please explain: _____

3. TEMPLATE POST-EXECUTION MEMO FOR CLIENT

Attached please find execution copies of the following estate planning documents:

1. Will
2. Revocable Trust
3. Health Care Proxy
4. Living Will
5. Power of Attorney
6. Declaration as to Remains

We have articulated below a summary of the above-mentioned documents and a storage protocol.

General Note About Storage

All of the estate planning documents should be filed in a safe but relatively accessible place, such as a fire-proof filing cabinet or desk. It is inadvisable to store such documents in a bank safety deposit box as a bank may be closed at the time of an emergency. Additionally, if the safety deposit box is in your name alone, family members may be unable to access its contents in the event of your death or incapacity.

Will

Under your Will, you name [NAME OF EXECUTOR] as Executor, and [NAME OF SUCCESSOR EXECUTOR] as successor Executor.

You appoint [NAME OF GUARDIAN] as Guardian of your minor children, and [NAME OF SUCCESSOR GUARDIAN], as successor Guardian, if [NAME OF GUARDIAN] predeceases you.

You instruct the Executor to distribute your property as follows: [DESCRIBE DISPOSITION SCHEME].

The remaining provisions in your Will are administrative, and are intended to minimize the time and expense incurred in settling your estate.

It is important to advise the Executor as to where your Will is being stored. If possible, you should keep your Will in a place that is accessible to the Executor (e.g., if you keep your Will in your desk at home, the Executor should have access to your apartment). You do not need to discuss the contents of your will with the Executor, or anyone else, but you may do so if you wish.

Revocable Trust

You are the “Grantor” of your Revocable Trust. As Grantor, you may amend or revoke your trust at any time. During your lifetime, you will serve as sole Trustee of your trust. As sole Trustee, you have complete control over any assets that you may transfer to your trust during your lifetime.

You name [NAME OF STANDBY TRUSTEE] as your Standby Trustee. [He/she] will not begin serving as Trustee until you (1) die, (2) become incapacitated, or (3) so request.

Upon your death, the trust property will be held and disposed of as follows: [DESCRIBE DISPOSITION SCHEME].

You should store your Revocable Trust with your Will in a safe and accessible place. It is good practice to give a copy of the Revocable Trust to your Standby Trustee.

Durable Power of Attorney

Under the Durable Power of Attorney, you give your agent or “Attorney-in-Fact” the power to enter in financial transactions on your behalf. You name [NAME OF ATTORNEY-IN-FACT] as your Attorney-in-Fact.

We have written this document so that it [takes immediate effect. You and your Attorney-in-Fact may wish to take the document together to any office in which you have regular business dealings (e.g., your bank, mortgage company, etc.). Some banks require that you complete an additional form authorizing your Attorney-in-Fact to engage in financial matters on your behalf.] [takes effect only upon a doctor’s written determination of your incapacity. You and your Attorney-in-Fact should agree to keep it in a safe location, to which your Attorney-in-Fact should have access.]

Health Care Proxy

Under the Health Care Proxy, you give your Health Care Agent the power to make medical decisions on your behalf, only in the event that you are unable to make or communicate such decisions yourself. You name [NAME OF HEALTH CARE AGENT] as your Health Care Agent and [NAME OF ALTERNATE HEALTH CARE AGENT] as your Alternate Health Care Agent.

You should give copies of the Health Care Proxy to your treating physician and your Health Care Agent. It is important to discuss with your Health Care Agent your wishes regarding medical treatment and care under various circumstances. Although it is impossible to predict all possible future medical scenarios, it is helpful for your Health Care Agent to have a comprehensive understanding of your intentions.

Living Will

Under the Living Will, you provide that if you were suffering from a terminal illness or an irreversible coma and further medical intervention would serve only to prolong the process of dying, [you would not want to be kept alive through artificial means (nutrition, respiration etc.)] [you would want to be kept alive through artificial means (nutrition, respiration, etc.)].

To avoid disputes among family members, friends and health care providers over interpretation of the language in the Living Will, you should not include this document in your hospital or medical record. You should, however, give a copy to your Health Care Agent, and discuss with him or her the significance of the document, and your wishes as expressed in it.

Declaration as to Remains

Under the Declaration as to Remains, you appoint [NAME OF APPOINTEE] to carry out your wishes regarding the disposition of your bodily remains. If [he/she] is unable or unwilling to serve, you appoint [NAME OF ALTERNATE APPOINTEE] to serve in [his/her] place. To ensure that your wishes are understood and fulfilled, you should discuss your preferences with your Appointee and alternate Appointee. You may wish to give a copy of the Declaration to your Appointee and alternate Appointee. You may also want to disclose the contents of your Declaration to your family, if you believe that knowing your wishes in advance would make it more likely that your family will respect your wishes without opposition.

Reviewing your Estate Plan

Generally, you should review your estate plan whenever significant family, financial, or legal events occur or are anticipated (e.g., marriage, divorce, birth, adoption, inheritance, death of a third party, etc.). Even absent such an event, we encourage you to revisit your estate plan every five (5) to seven (7) years.

4. TEMPLATE FEE SCHEDULE

HOUSEHOLD SIZE	GROSS YEARLY INCOME		
	BETWEEN 0-200% FPL*	BETWEEN 200-300% FPL*	BETWEEN 300-400% FPL*
1	0 – 21,660	21,661 – 32,490	32,491 – 43,320
2	0 – 29,140	29,141 – 43,710	43,711 – 58,280
3	0 – 36,620	36,621 – 54,930	54,931 – 73,240
4	0 – 44,100	44,101 – 66,150	66,151 – 88,200
5	0 – 51,580	51,581 – 77,370	77,371 – 103,160
6	0 – 59,060	59,061 – 88,590	88,591 – 118,120
7	0 – 66,540	66,541 – 99,810	99,811 – 130,080
8	0 – 74,020	74,021 – 111,030	111,031 – 148,040
Fee	\$0	\$200	\$400

For households with more than 8 members: add \$4,680 per additional person, and then multiply as appropriate to obtain the desired multiple of the 100% level.

The fee for households with cash or other liquid assets in excess of \$8,000 is \$200 for at all income levels.

* FPL is Federal Poverty Level, officially known as the Federal Poverty Guidelines, published at Fed. Reg., Vol. 74, Number 14 (Jan. 23, 2009), pp 4199-4201.