

# **ESTATE PLANNING OVERVIEW FOR THE GENERAL PRACTITIONER**

**JANUARY 2015**

**PRESENTED BY:  
TBA ESTATE PLANNING AND PROBATE SECTION**

**SPEAKERS:**

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## **ESTATE PLANNING OVERVIEW FOR THE GENERAL PRACTITIONER**

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## **I. WHAT EVERY CLIENT SHOULD KNOW ABOUT ESTATE PLANNING: AN OVERVIEW**

Every client, no matter how rich or how poor, can benefit from effective estate planning. Estate planning refers to the continuing process of coordinating an individual's financial affairs to secure the greatest economic security for the individual during his life and for his family at death. For some, estate planning may amount to little more than preparation of a simple will and a durable power of attorney. For others, an effective estate plan may involve a more complex scheme that includes trust instruments and inter vivos transfer of property. For all, however, an effective estate plan can bring peace of mind. By effectively planning an estate, a person can insure that his wishes for the disposition of property will be carried out both prior to and at death.

An estate plan should reflect the wishes of the estate owner, while doing the following:

1. Taking into account the need for income, especially retirement income;
2. Providing for the contingencies of mental or physical disability; and
3. Providing for the orderly transfer of assets at the estate owner's death.

The most simple estate plan likely will include the following documents: a Last Will and Testament, a Durable Power of Attorney, and some sort of health care directive. Some clients can also benefit from a Living Trust.

Although the worry about taxes is a major generator of interest in estate planning, a large segment of the population has no tax problem. In order to determine whether clients are going to have a tax problem either on the federal or state level, look at the value of all of the couple's assets and assume that they are going to die in a common disaster within the calendar year. If the couple's total assets exceed \$5,000,000.00, then there will need to be some sort of planning for both Tennessee and federal taxes.

More complex planning is also needed for people with small children, regardless of the size of the estate. People with small children will likely want to provide for those minor children through testamentary or inter vivos trusts. Likewise, people with small children generally have life insurance that is intended to provide for those children in the event of the death of a parent. Often, those people will also want to consider an Irrevocable Life Insurance Trust. In addition to being a valuable death tax planning tool, an Irrevocable Life Insurance Trust (or ILIT) can direct the use of life insurance proceeds for the benefit of a surviving spouse or minor children.

People with property in more than one state (or people who just want to avoid probate) may also want to consider a Revocable Living Trust. A Revocable Living Trust is a trust document wherein a person (the "Grantor") transfers his or her assets into trust while living with the terms of the trust governing how the assets will be managed by the person named as trustee for the benefit of the Grantor.

An estate plan can be as simple or as complex as the client's needs and desires dictate. The possibilities are virtually endless. These materials are designed to give a basic overview of some of the most basic of the documents, including the Last Will and Testament, the Durable Power of Attorney, Health Care Directives and the Living Trust.

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## **II. THE INFORMATION GATHERING PROCESS**

Prior to meeting with a new client, it is important to direct the client to start the information gathering process. Often, clients do not understand the relationship between the assets they own, the title of those assets, or the dispositions they want to make (or unknowingly have made). If the client has begun the information gathering process prior to the initial meeting, then the client can bring documents necessary to determine how best to proceed.

Additionally, married clients should be advised of the natural conflict that exists in planning for both of them. Couples do not always see eye-to-eye when it comes to the disposition of their assets. Mother may want things one way, while dad may want them another. This is especially common in second marriage situations. It can be embarrassing to both the attorney and the client if this issue is not raised prior to the initial face-to-face meeting.

A good rule of thumb is to provide new clients with a Client Data questionnaire that asks certain questions regarding the assets and raises the issue of conflicts prior to the initial meeting. Ideally, this document should be completed and returned along with the engagement letter.

A sample Client Data questionnaire is set forth on the following pages:

**PERSONAL DATA NEEDED FOR ESTATE PLANNING**

**A. GENERAL INFORMATION**

<hr/> Husband's Name	<hr/> Social Security Number	<hr/> Birthplace/Date of Birth
<hr/> Wife's Name	<hr/> Social Security Number	<hr/> Birthplace/Date of Birth
<hr/> Street Address	<hr/> Home Phone	<hr/> Date of Marriage
<hr/> City/ State/Zip	<hr/> Business Phone	<hr/> Place of Marriage
<hr/> County	<hr/> Business Phone (Wife)	
<hr/> Husband's Citizenship	<hr/> Wife's Citizenship	

**Mailing Address if  
Different From Above:**

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Street Address/ City/ State & Zip

CHILDREN'S NAMES	ADDRESS	PHONE #	SOC. SEC. #	BIRTH DATE
<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
<hr/>	<hr/>	<hr/>	<hr/>	<hr/>

(If by prior marriage of husband or wife, indicate with letters (PH) before the child's name for prior marriage of husband and (PW) for prior marriage of wife. If adopted or in process of adoption indicate with letter (A).)

**B. OTHER BENEFICIARIES: (INCLUDING DESIRED CHARITABLE GIFTS)**

<u>Name</u>	<u>Address</u>	<u>Relationship If Any</u>	<u>Amount</u>
<hr/>	<hr/>	<hr/>	
<hr/>	<hr/>	<hr/>	
<hr/>	<hr/>	<hr/>	

**C. PRIOR MARRIAGES: If husband or wife have previously married, describe any continuing obligations under the divorce decree. (Supply copy if available)**

- D. **COMMUNITY PROPERTY:** (Generally all property acquired by a husband and wife during their marriage from earnings of either spouse, while domiciled in a community property state, as well as property located in a community property state and acquired during marriage, is owned equally by them and is called community property.) If you or your spouse have resided, during marriage, in any community property law state(s) such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington or Wisconsin, specify the name of the state(s) and dates of residence.

STATE	DATE OF RESIDENCE

- E. **DOMICILE:** If your employment, vacation or other demands require that you spend more than a nominal amount of time in another state or country you may be deemed a domiciliary of that jurisdiction for estate tax purposes. If you feel that the question may apply to you, set forth below the name of the state or country, dates you were or will be present in such jurisdiction, where you vote, register your automobile and property owned in such jurisdiction.

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F. **MISCELLANEOUS:**

- Have you or your spouse made any gifts exceeding \$10,000.00 per year to any person or created any trusts? (Supply copies of gift tax returns and trusts.)  
☐ Yes ☐ No
- Do you or your spouse have a power of appointment or other interests under a Will or Trust of another person? (Supply copy of document, if available.)  
☐ Yes ☐ No
- If you or your spouse have any prospective inheritances give source and estimated amount.

4. If you or your spouse are or were employed, give details of any pension plan or other employee benefits to which you are or may be entitled.
  
5. If you or your spouse are self-employed or a member of a partnership, give details of any contracts or commitments to sell such interest at death or retirement, as well as any retirement plans or other benefits that will be payable by reason of your death. (Supply copies of any pertinent documents.)
  
6. If you or your spouse own stock in a closely-held corporation, give details of any stock redemption agreements, stock options, salary continuation, or other deferred compensation plans that may be applicable to you. (Supply copies of documents.)
  
7. Indicate the person(s) or institution you wish to appoint (if applicable) as your (a) executor; (b) trustee; and (c) guardian of minor children.

	<b>HUSBAND</b>	<b>WIFE</b>
A. Executor	1. _____ 2. _____	1. _____ 2. _____
B. Trustee	1. _____ 2. _____	1. _____ 2. _____

C. Guardian      1. \_\_\_\_\_      2. \_\_\_\_\_

8. Are there any special personal or financial concerns we should know about? For example - a handicapped child, hostility toward a family member, health problems, creditor problems, etc.

☐ Yes      ☐ No

If yes, please explain:

**G.      ASSETS: (ESTIMATED MARKET VALUE)**

	HUSBAND'S NAME	WIFE'S NAME	JOINT NAMES (or Community Property)
1. Real Estate: Residence			
Vacation Home			
Other Real Estate			
2. Stocks			
3. Bonds and Notes			
4. Value of Business Assets if self-employed or interest in partnership or closely-held corporation			
5. Savings Accounts, Savings Certificates, Savings Bonds, Money Market and Cash			



6.	Value of Interest in an Estate or Trust			
7.	Interest in Profit Sharing or Retirement Plans or Keogh Plans			
8.	Independent Retirement Plan (IRA)			
9.	Interest in Valuable stamp, Coin or Art Collections or Antiques			
10.	Annuities and Pensions			
11.	Miscellaneous Assets			
	TOTAL ASSETS			
	LESS: MORTGAGES, LOANS AND OTHER LIABILITIES			
	NET ASSETS			

### **LIFE INSURANCE**

TYPE OF INSURANCE (e.g., term, group, whole life, accidental death)	FACE AMOUNT OF DEATH BENEFIT	CASH SURRENDER VALUE	OWNER	PRIMARY BENEFICIARY	SECONDARY BENEFICIARY

- H. HEALTH CARE DOCUMENTS:** A Durable Power of Attorney for Health Care authorizes the person you name to make decisions about medical treatment for you whenever you are unable to make those decisions yourself. It may, but need not, include Living Will language that expresses your desire that no extraordinary measures be taken to prolong your life if there is no hope of a meaningful recovery.

If you would like a Durable Power of Attorney for Health Care and Living Will, please indicate the persons you wish to name as your agent and back-up agent for health care decisions.

**Agents for  
Husband:**

**1.** \_\_\_\_\_  
**Name**

\_\_\_\_\_  
**Street Address**

\_\_\_\_\_  
**City, State & Zip**

\_\_\_\_\_  
**Phone Number**

**2.** \_\_\_\_\_  
**Name**

\_\_\_\_\_  
**Street Address**

\_\_\_\_\_  
**City, State & Zip**

\_\_\_\_\_  
**Phone Number**

<hr/>		<hr/>	
	<b>Relationship</b>		<b>Relationship</b>
<b>Agents for Wife:</b>	1.		2.
	<b>Name</b>	<hr/>	<b>Name</b>
	<b>Street Address</b>	<hr/>	<b>Street Address</b>
	<b>City, State &amp; Zip</b>	<hr/>	<b>City, State &amp; Zip</b>
	<b>Phone Number</b>	<hr/>	<b>Phone Number</b>
	<b>Relationship</b>		<b>Relationship</b>

*I realize that the attorneys of Law Firm will rely on the information that I am providing in this questionnaire when they recommend and prepare my estate plan. I realize that if the information is incomplete or inaccurate the estate plan may be inappropriate as a result.*

*I understand that my dispositive wishes and the dispositive wishes of my spouse to each other or family, friends and charities may not be identical, and therefore that potential for a conflict of interest in representing both of us may exist. I nonetheless wish Law Firm to represent both of us. I acknowledge that I understand the possibility of a conflict of interest and have made an informed decision not to seek independent legal counsel at this time (retaining the right to do so any time hereafter). I understand that there are no confidences between Law Firm and me and my spouse, and that each of us is entitled to know any information or direction given by the other to Law Firm.*

<hr/>	<hr/>
<b>Signature</b>	<b>Spouse's Signature</b>

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### **III. THE LAST WILL AND TESTAMENT**

A Last Will and Testament is a document that directs the disposition of a person's assets and provides for the payment of his or her debts and estate administration expenses at death. In a Will, the maker (who is also known as the Testator or Testatrix) also appoints a Personal Representative (also known as the Executor or Executrix) to be sure that all of those matters are handled as directed by the Will.

In Tennessee, there is no requirement that a Will use any particular language; however, the intent of the person making the Will should be readily ascertainable by any reader of the Will. To make a Will, a person must be at least eighteen (18) years of age and must have testamentary capacity, which is defined as the ability to ascertain the extent of his or her assets and the natural objects of his or her affections. To ascertain the extent of a person's assets, a person need only to know generally what is his or hers. To ascertain the natural objects of a person's affections, he or she need only to be able to identify his or her family and friends.

Tennessee has formal requirements regarding the signing and witnessing of a Will. The Will must be signed in the presence of two disinterested witnesses who must also sign in the presence of each other and in the presence of the person making the Will. A Will may be "self-proved" at the time of its execution by the acknowledgement of it by the person making a Will and by the Affidavits of the witnesses in front of a Notary Public, who must also sign the document. With this acknowledgement, the Will can be admitted to probate without the presence of any of the witnesses at the probate hearing and without unnecessary delay.

In Tennessee, if a person dies without a Will, he or she is said to have died "intestate." In that event, the property will pass pursuant to the Tennessee Intestacy Statute, which is found in Tennessee Code Annotated § 31-2-104, and which has the following result:

(a) Share of Spouse.

1. If there are no surviving children, the spouse gets the entire intestate estate.
2. If, in addition to the spouse, there are surviving children of the decedent, the spouse takes either one-third, or a child's share of the entire intestate estate, whichever is greater.

(b) Share of Other Heirs (In Order of Distribution) When There is No Spouse.

1. To the issue of the decedent. If a child of the decedent is deceased with children surviving, then the children "stand in the shoes" of the parent. This is called per stirpes.

2. To the decedent's father and mother equally, or to the survivor of them, if any.
3. To the decedent's brothers and sisters and the descendants of the brothers and sisters by representation.
4. The estate shall be divided equally, one-half to the decedent's maternal grandparents and one-half to the decedent's paternal grandparents or to their issue.
5. To the State of Tennessee.

All property that is in the decedent's name alone will be disposed of by Will or through intestate succession. All other assets will pass outside of the Will. For example, property in joint names with rights of survivorship will pass to the survivor, and life insurance and retirement benefits will pass to the named beneficiaries.

In a Will, it is not necessary to name each individual piece of property that a person owns. However, if a person would like for a particular beneficiary to receive a specific item of property or a specific amount of money, such provision should clearly be expressed in a person's Will. A number of clients will request that they be able to do a handwritten list that they can add later. If you add such a provision, be sure that the Will states that the maker understands that this document does not have to be accepted by the probate court. This can be done by stating the following:

"I have attached a handwritten list, which is entirely in my handwriting and which is dated by me, which disposes of various items of my personal property. I understand that this document is not a part of my Will and does not constitute a Codicil; however, I request, but do not require, that my Personal Representative and all beneficiaries under this Will honor my wishes and allow the distribution of the personal property as set forth in the handwritten list by executing appropriate documents showing the same and filing said documents with the probate court in the jurisdiction in which my Will is offered for probate."

The maker of a Will can also specify persons who are not to share in the Estate. This is done by simply stating that the maker recognizes that a person is the natural object of his or her affection but that the maker desires not to include him or her in the distribution. Be advised, however, that a disinherited spouse can elect against a Will, with the share of the spouse being dependent upon the length of the marriage.

Finally, the maker of a Will should take care in selecting a personal representative. In addition to taking the Will for admission for probate, the personal representative is charged with being sure creditors are paid, providing for a spouse and minor children according to law, and distributing the assets of the estate to the beneficiaries.

The intricacies regarding Wills are numerous and must be tailored to meet each specific situation. Wills can contain provisions for testamentary trusts, for trusts to take advantage of the tax exemptions, for guardianships for minor children and trusts for disabled children or adults, and can address a variety of other situations.

The pages that follow contain a sample Will. The will is relatively simple, as it is for a client who is leaving all of his property to his spouse, or if she is not living, to his adult children.

The following is a sample Will for a client, JOHN DOE, who desires to leave his property to his spouse, JANE DOE, at death, or, if the spouse is not living, to his adult children, BILL DOE and SUE ROE:

#### LAST WILL AND TESTAMENT OF JOHN DOE

I, JOHN DOE, a citizen and resident of Any County, Tennessee, do make, publish, and declare this to be my Last Will and Testament, hereby revoking all Wills and codicils heretofore made by me.

#### ARTICLE I: PAYMENT OF TAXES AND ADMINISTRATION EXPENSES

All estate and inheritance taxes (including interest and penalties, if any), together with all administration expenses, payable in any jurisdiction by reason of my death (including those taxes and expenses payable with respect to assets which do not pass under this Will) shall be paid out of and charged generally against the principal of my residuary estate, without apportionment. I waive any right of reimbursement for, recovery of, or contribution toward the payment of those taxes and administration expenses, except my Personal Representative shall, to the maximum extent permitted by law, seek reimbursement for, recovery of, or contribution toward the payment of federal or state estate tax attributable to property in which I have a qualifying income interest for life, over which I have a power of appointment, or which is included in my gross estate by reason of Section 2036 of the Internal Revenue Code of 1986, as from time to time amended ("Code"), and which tax is not otherwise paid or payable. Any generation-skipping tax resulting from a transfer occurring under this Will shall be charged to the property constituting the transfer in the manner provided by applicable law.

#### ARTICLE II: DISPOSITION OF PERSONAL PROPERTY

A. I give all the tangible personal property that I own at my death, including any household furniture and furnishings, automobiles, books, pictures, jewelry, art objects, hobby equipment and collections, wearing apparel, and other articles of household or personal use or ornament, to JANE DOE ("my spouse"), if my spouse is then living on the date of my death, or, if my spouse is not living, then, and in such event, I direct that my personal property be divided between BILL DOE and SUE ROE if they are each living on the date of my death, in shares of substantially equal value, or as they shall otherwise agree; or, if they shall not agree within four months following the date of my death, as my Personal Representative shall determine. If either of my children shall predecease me but die with issue surviving, then his or her share of my tangible personal property shall be distributed to that child's issue, in shares of equal value.

B. All costs of safeguarding, insuring, packing, and storing my tangible personal property before its distribution and of delivering each item to the place of residence of the beneficiary of that item shall be deemed to be expenses of administration of my estate.

#### ARTICLE III: DISPOSITION OF RESIDUARY ESTATE

A. I give my residuary estate, which shall not include any property over which I have a power of appointment, to my spouse, JANE DOE, if living on the date of my death.

B. If my spouse is not then living, then and in such event, I direct that my residuary estate shall be divided between BILL DOE and SUE ROE in shares of equal value, per stirpes. If either of my children shall predecease me, then that child's share shall be divided among his or her issue, per stirpes.

#### ARTICLE IV: APPOINTMENT OF PERSONAL REPRESENTATIVE

A. I name my spouse, JANE DOE, as Personal Representative of this Will. If JANE DOE shall not survive me, or be for any reason unable or unwilling to qualify as my Personal Representative, or, having so qualified, should become incapacitated, die or resign, then I name BIG BANK as Contingent Personal Representative. No Personal Representative of this Will shall be required to furnish bond or other security as Personal Representative. No Personal Representative under this Will shall be required to make an inventory or an accounting to any court. As used in this Will, the terms "Personal Representative" and "Personal Representatives" designate the court-appointed fiduciaries or fiduciary of my estate from time to time qualified and acting in any jurisdiction.

B. In addition to all powers granted by Section Three, Chapter 11-49 of the Tennessee General Assembly of 1984, T.C.A. §35-50-109 and §35-50-110, to the extent applicable, I give my Personal Representative power, exercisable in the discretion of my Personal Representative and without court order, to retain, sell (at public or private sale), exchange, lease for any term (even though commencing in the future or extending beyond the date of final distribution of my estate), mortgage, pledge, or otherwise deal for any purpose with the property, real or personal, from time to time comprising my estate, for such consideration and on such terms (with or without security) as my Personal Representative shall determine; to borrow money for any purpose, at interest rates then and there prevailing, from any individual, bank, or other source, irrespective of whether that lender is acting as Personal Representative; to invest in any property whatsoever; to compromise or abandon any claims in favor of or against my estate; to hold any property in the name of a nominee or in bearer form; to employ accountants, depositories, attorneys, and agents (with or without discretionary powers); to execute contracts, notes, conveyances, and other instruments containing covenants and warranties binding upon and creating a charge against my estate, and containing provisions excluding personal liability; to make distributions wholly in cash or in kind, or partly in each; to allot different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries; and to determine the value of any property distributed in kind.

C. I empower my Personal Representative (i) to make such elections under the tax laws as my Personal Representative deems advisable, including an election to create a qualified terminable interest property for both estate and generation-skipping tax purposes or for estate tax purposes alone, and (ii) to allocate the unused portion, if any, of my GST exemption (as defined in this paragraph) to any property with respect to which I am the transferor for generation-skipping tax purposes (irrespective of whether such property passes under this Will) in such manner as my Personal Representative deems advisable, in each case without regard to the relative interests of the beneficiaries; however, my Personal Representative shall not make adjustments between principal and income, or in the interests of the beneficiaries, to compensate for the effects of such elections or allocation. Any decision made by my Personal Representative with respect to the exercise of any tax election or the allocation of my GST exemption shall be binding and conclusive on all persons. As used in this paragraph, the "GST exemption" means the exemption from generation-skipping tax allowed under Section 2631 of the Code.

#### ARTICLE V: DETERMINING WHO IS A DESCENDANT

For purposes of determining who is a descendant of mine or of any other person:

A. Legal adoption before the person adopted reached the age of eighteen (18) years shall be the equivalent in all respects to blood relationship; and

B. A person born out of wedlock and those claiming through that person shall be deemed to be descendants (i) of the natural mother and her ancestors, and (ii) if the natural father acknowledges paternity, of the natural father and his ancestors, in each case unless a decree of adoption terminates such natural parent's parental rights.

C. For purposes of this instrument, my "spouse" shall include JANE DOE, and my "child" or "children" shall include my children, who are BILL DOE and SUE ROE.

#### ARTICLE VI: SURVIVAL IN COMMON DISASTER

If my spouse, JANE DOE, and I shall die under such circumstances that there is not sufficient evidence to determine the order of our deaths, then it shall be presumed that she survived me; and my estate shall be administered and distributed, in all respects, in accordance with such presumption.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2015, and do publish and declare this to be my Last Will and Testament, in the presence of each and all of the subscribing witnesses whom I have requested to act as such by signing their names as attesting witnesses in my presence and in the presence of each other, and by signing the Affidavit below pursuant to the provisions of T.C.A. §32-2-110.

\_\_\_\_\_  
JOHN DOE

ATTEST TO EXECUTION OF WILL:

\_\_\_\_\_ OF \_\_\_\_\_

\_\_\_\_\_ OF \_\_\_\_\_

AFFIDAVIT OF ATTESTATION

We, the undersigned, being first duly sworn, make oath that JOHN DOE, on the day and date above-written, declared and signified to us that this instrument is his Last Will and Testament, that he then signed said instrument in our sight and in our presence; and that we, at his request and in his sight and presence and in the sight and presence of each other, then subscribed our names hereto, as attesting witnesses; that at the time of the execution, Testator was more than eighteen (18) years of age, of sound mind and disposing memory, and did not appear to be under any undue influence; and that the undersigned, each being more than eighteen (18) years of age, make oath and sign this Affidavit at the Testator's request on the day and date above-written.

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
WITNESS

STATE OF TENNESSEE        )  
                                          )  
COUNTY OF \_\_\_\_\_  )

Sworn to and subscribed before me, this the \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

\*\*\*NOTE: The Article which addresses survival in a common disaster should be flipped in the Wife's Will as follows:

If my spouse, JOHN DOE, and I shall die under such circumstances that there is not sufficient evidence to determine the order of our deaths, then it shall be presumed that I survived him; and my estate shall be administered and distributed, in all respects, in accordance with such presumption.

\_\_\_\_\_



#### **IV. DURABLE POWER OF ATTORNEY**

The Durable Power of Attorney authorizes an agent appointed by the maker to manage his financial affairs or to make personal care decisions and personal business decisions on the maker's behalf. It is designed to allow someone to act for the maker now and will continue even in a period of disability. It may "spring" into use when the maker becomes incompetent even if there has been no need to use it before.

Tennessee has adopted the Durable Power of Attorney Act, which adopts the civil law concept that a power of attorney that specifically adopts the "springing" concept can survive the maker's disability or incapacity. Its effectiveness continues despite the incompetence of the maker. Prior to the adoption of the Durable Power of Attorney Act, the ability to use a Power of Attorney ended with incapacity, making it necessary to petition the court to appoint a conservator.

Compared to conservatorship proceedings, the Durable Power of Attorney is relatively inexpensive. While a Durable Power of Attorney can cost very little, a conservatorship proceeding can cost several thousands of dollars or more. In addition to being expensive, the conservatorship proceeding can take several weeks or months to complete. In a conservatorship proceeding, all of the closest relatives of the disabled person must be notified, as set forth in the statute. Also, the court will appoint a guardian ad litem, who is the attorney for the disabled person, to investigate and determine whether or not a conservator should be appointed. Additionally, the proposed conservator must submit a Property Management Plan to the court. The Property Management Plan should outline the person's assets and the plan to use them for the benefit of the disabled person. Finally, a physician must certify in writing that the person for whom a conservator is sought is disabled and needs to have a conservator appointed. After a conservator is appointed, it is likely that the conservator will be required to file annual accountings with the court.

The Durable Power of Attorney can act as a substitute for a court-appointed guardian or conservator. In the past, if a person became unable to manage his or her affairs, it was necessary to petition the court to appoint a fiduciary to act on his or her behalf. This was - and is - a time-consuming and expensive procedure which becomes a part of the public court record and which requires a yearly accounting to be submitted to the court for approval. A Durable Power of Attorney can take the place of a conservatorship proceeding in many cases. While a Durable Power of Attorney may need to be recorded at the Register of Deeds Office in the county where the maker lives if it is ever needed to deal with real estate, no accounting to the court is ever required.

In a Durable Power of Attorney, the maker can authorize his or her agent to do almost anything he or she would have been able to do if he or she were able as long as it does not violate some provision of law. It basically ensures that a person's business and personal affairs will be handled in the event of disability. At any time when the maker is able to perform these services for himself, or if the maker desires to give someone else power to act on his behalf, he can revoke the Durable Power of Attorney in a written document, which may also need to be

recorded at the Register's Office.

The following is a sample Durable Power of Attorney:

THIS INSTRUMENT PREPARED BY:

LEE GULL, Attorney at Law

LAW FIRM NAME

LAW FIRM ADDRESS

**DURABLE POWER OF ATTORNEY**

STATE OF TENNESSEE            )  
                                                  )  
COUNTY OF ANY                )

KNOWN ALL MEN BY THESE PRESENTS, that I, JOHN DOE, of 100 Elm Street, Any City, Any County, Tennessee, do hereby revoke any prior Durable Power of Attorney executed by me and do hereby make, constitute and appoint JANE DOE of 100 Elm Street, Any City, Any County, Tennessee, my true and lawful attorney-in-fact for me and in my name, place, and stead, and on my behalf, and for my use and benefit:

1. To ask, demand, sue for, recover, and receive all manner of goods, chattels, debts, rents, interest, sums of money, and demands whatsoever, due or hereafter to become due and owing, or belonging to me, and to make, give, and execute acquaintances, receipts, releases, satisfactions, or other discharges for the same, whether under seal or otherwise;

2. To make, execute, endorse, accept, and deliver in my name or in the name of my said attorney-in-fact all checks, notes, drafts, warrants, acknowledgments, agreements and all other instruments in writing, in whatsoever nature, as my said attorney-in-fact may deem necessary to conserve my interest;

3. To execute, acknowledge, and deliver any and all contracts, deeds, leases, mortgages or deeds of trust, assignments of mortgage, extensions of mortgage, satisfaction of mortgage, releases of mortgage, subordination agreement of any kind or nature whatsoever in connection therewith, and affecting any and all property presently mine or hereafter acquired, located anywhere, which my said attorney-in-fact may deem necessary or advantageous for my interests;

4. To enter into and take possession of any lands, real estate, tenements, houses, stores, or buildings, or parts thereof belonging to me, that may become vacant or unoccupied, or to the possession of which I may be or become entitled, and to receive and take from me and in my name to use all or any rents, profits, or issues of any real estate belonging to me, and to use the same in such manner as my attorney-in-fact shall deem necessary and proper, and from time to time to renew leases;

5. To commence, and prosecute in my behalf, any suit or actions or other legal or equitable proceedings for the recovery of any of my lands or for any goods, chattels, debts, duties, demand, cause or thing whatsoever, due or to become due or belonging to me, and to prosecute, maintain and discontinue the same, if they shall deem proper;

6. To take all steps and remedies necessary and proper for the conduct and management of my business affairs, and for the recovery, receiving, obtaining, and holding possession of any lands, tenements, rents or real estate, goods and chattels, debts, interest, demands, duties, sum or sums of money or any other thing whatsoever, located anywhere, that is, are, or shall be, due, owing, belonging to or payable to me in my own right or otherwise;

7. To make deposits and withdrawals from bank accounts, and to sell, to lease, to borrow, and to invest in my name as fully as if I could do so myself if I were capable of doing the same;

8. To have access to my safe-deposit box and the papers therein contained;
9. To sign tax returns on my behalf and to represent me or to obtain representation of me at a tax audit, as well as to execute on my behalf the Internal Revenue Service's own power of attorney forms for the calendar years 2004 through 2044;
10. To deal with my retirement plans, including making IRA contributions, rollovers, and voluntary contributions, as well as borrowing from the plan to provide for my care and maintenance;
11. To deal with life insurance on my life, including such actions as increasing coverage, using policy dividends for added insurance, and to borrow against the policy so that my assets will not be sold and so that I will not incur capital gains tax;
12. To complete my charitable pledges and to otherwise make gifts for me from my funds for estate planning or other purposes and to execute disclaimers on my behalf;
13. To re-direct my mail;
14. To cancel or continue my credit cards and charge accounts;
15. To resign offices and positions, both public and private, on my behalf;
16. To establish residence for me in a suitable nursing home, hospice or other like facility;
17. To arrange for my transportation and travel and to arrange for my recreation;
18. To purchase, store, repair, and dispose of my clothing, consumables, household goods, furnishings, and personal effects;
19. To employ, compensate, and discharge domestics, companions, and other medical and non-medical personnel on my behalf;
20. To arrange for the satisfaction of my religious and spiritual needs;
21. To fund or to revoke or otherwise deal with any inter vivos trust created by me; and
22. To appear, answer, and defend in all actions and suits whatsoever which shall be commenced against me and also for me and in my name to compromise, settle, and adjust with each and every person or persons, all actions, accounts, dues, and demands, subsisting or to subsist between ourselves and ourselves or any of them, and in such manner as my said attorney-in-fact shall think proper; hereby giving to my said attorney power and authority to do, execute, and perform and finish for me and in my name all those things which shall be expedient and necessary as fully as I, JOHN DOE, could do if personally present, hereby ratifying and confirming whatever my said attorney-in-fact shall do or cause to be done concerning my affairs, both business and personal.

This instrument shall be construed and interpreted as a durable power of attorney. The enumeration of specific items, rights, acts, or powers herein shall not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my said attorney-in-fact. I hereby incorporate by reference the language contained in T.C.A. 34-6-109, as though such language were set forth verbatim herein.

The rights, powers, and authority of said attorney-in-fact granted in this instrument shall commence and be in full force and effect on this the \_\_\_\_\_ day of \_\_\_\_\_, 2015, and such rights, powers, and authority shall remain in full force and effect thereafter until I, JOHN DOE, give notice in writing that such power is terminated. This power of attorney shall not be affected by subsequent disability or incapacity of the principal in conformity with T.C.A. 34-6-101, et. seq.

\_\_\_\_\_  
JOHN DOE

STATE OF TENNESSEE       )  
                                          )  
COUNTY OF ANY            )

Personally appeared before me, the undersigned authority, a Notary Public in and for the State and County aforesaid, the within named bargainor, JOHN DOE, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and seal at office, this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

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## V. THE LIVING TRUST

A Living Trust can be a legitimate approach to estate planning for some clients, but they are not for everyone. With a Living Trust, a client can transfer the ownership of his assets out of his name and into the name of the Living Trust. The term "Living Trust" is commonly used to refer to a revocable trust. "Revocable" means the client can transfer the assets back into his name if he so desires. Though a person does not technically own his assets if they are transferred to a Living Trust, he can still control them and get the benefit of them. Most clients name themselves as trustee and beneficiary of the Living Trust. At death, the assets pass according to the trust document; therefore, they do not go through probate because the decedent does not own them.

While Living Trusts are good for some clients, they are not for everyone. Living Trusts are most beneficial for the following persons:

1. Persons who own property in more than one state;
2. Persons with significant stock holdings;
3. Persons whose Wills are likely to be contested; and
4. Persons who may need future help in managing their assets.

Contrary to popular belief, a Living Trust does not help a client become eligible to have nursing home care paid for by Medicaid, does not reduce a client's taxes, and does not replace a Will.

A person with real or personal property in more than one state is a good candidate for a Living Trust. If property is held in the Living Trust, then it will not be necessary to probate in either state. While Tennessee's probate is relatively easy and while the costs are generally low, such is not the case in many other states.

A person whose Will is likely to be contested is another good candidate for a Living Trust. Challenges to a Will by unhappy relatives can greatly increase attorney fees in probate. The number of attorney hours spent in defending a Will can be significant, even though most cases are settled out of court. This is true whether or not the unhappy relatives win. A Living Trust may help avoid this problem. Unhappy relatives probably could not hold up the distribution of the trust assets. Their recourse would generally be to sue the persons who received the assets.

A client with disabilities that are likely to create the need for help managing his affairs in the future is another good candidate for the Living Trust. With the Living Trust, the client can appoint a person or institution to manage his or her affairs in the future while maintaining control as long as he is able.

A client with significant stock holdings may want to create a Living Trust. Generally, shares of stock can be more quickly sold or transferred from a Living Trust than from a probate estate.

Many people also want to set up Living Trusts to avoid probate. Probate is avoided only if every probate-type asset is in the trust at death. If something is left out, then it will be necessary to both administer the trust and go through probate. A probate asset is any asset that is in the client's name alone with no designated beneficiary.

The following pages contain a sample Living Trust:

## LIVING TRUST

Trust Agreement by and between

GRANTOR:	JOHN DOE
TRUSTEE:	JOHN DOE
SUCCESSOR TRUSTEES:	JANE DOE BILL DOE
NAME OF TRUST:	JOHN DOE LIVING TRUST

JOHN DOE, Grantor, has delivered to the Trustee ONE DOLLAR, and other assets, which, together with other assets which may from time to time be delivered to the Trustee from any source, the authority but not the obligation to accept the same being specifically given, shall be held, administered and distributed in accordance with the terms and provisions of this agreement, all for the benefit of the persons hereafter described.

Executed at Any City, Tennessee this \_\_\_\_ day of \_\_\_\_\_, 2015.

### **SECTION A: DISPOSITIVE PROVISIONS**

At the present time, Grantor's family consists of: Grantor's spouse, JANE DOE, and Grantor's children, BILL DOE and SUE ROE.

#### **I. DURING LIFETIME OF GRANTOR**

##### Grantor's Powers

Grantor reserves the power to amend or to revoke this trust at any time and from time to time by delivering or causing to be delivered to the Trustee a writing to that effect signed by Grantor; provided, however, that such writing shall refer to this power and, provided further, that no additional duty may be imposed upon the Successor Trustees without the consent of the Successor Trustees.

In the event of revocation, trust properties shall, to the extent of such revocation, forthwith revert to Grantor free of trust. Such instrument of amendment or revocation shall be effective immediately upon its proper execution by Grantor; but, until a copy has been received by a Trustee, that Trustee shall not incur any liability or responsibility either (i) for failing to act in accordance with such instrument, or (ii) for acting in accordance with the provisions of this Trust Agreement without regard to such instrument.

The Trustee shall distribute or retain the principal and income of the trust as the Grantor may direct from time to time.

The Grantor shall have the right to add to trust property at any time and the right to remove property in whole or in part, from the trust at any time.

### Disposition of Trust on Behalf of Grantor

Whenever a Trustee is empowered to act under the terms of this Trust Agreement to the exclusion of Grantor, Trustee shall distribute from time to time to or for the benefit of Grantor such part, or all, of the assets then contained in this trust as the Trustee, in Trustee's sole discretion, deems Grantor would wish:

For the health, support in reasonable comfort and education of Grantor.

For the discharge of any obligation which, in such Trustee's opinion, is legally enforceable against Grantor.

To carry out any plan or pattern of family or charitable gifts which apparently had been established or clearly contemplated by Grantor, for others than the Trustee exercising this discretion.

## II. SUCCESSION OF TRUSTEES

As to any Trustee, at such time as the Trustee, while actively serving as Trustee, has initiated or been the subject of any of the events described in the following subparagraphs, the next named Successor Trustee, able and willing to act, shall take and hold the trust assets and shall assume the duties of the Trustee to the exclusion of the serving Trustee:

1. Written resignation by a Trustee delivered to the other Trustees.
2. Determination by the Successor Trustee that a serving Trustee, by reason of illness or mental or physical disability, is unable properly to manage the trust.
3. The court appointment of a guardian of a serving Trustee's person or a conservator of his or her estate.
4. A Trustee's death.

Any third party dealing with any Trustee of this trust may act upon such trustee's own representation of its powers. Any action thereafter taken by the Trustee in accordance with such representation shall be binding upon the trust estate and such third party may rely conclusively thereon without further investigation into such powers.

## III. ON DEATH OF GRANTOR

Upon the death of Grantor, the trust shall become irrevocable, shall be known as the JOHN DOE IRREVOCABLE TRUST and shall be administered and disbursed as hereinafter provided.

### Payment of Taxes and Expenses

If Grantor leaves no probate estate or if Trustee is so directed by the Personal Representative of Grantor's probate estate, Trustee shall pay from the trust estate Grantor's funeral expenses, probate administration expenses and estate, inheritance, legacy, succession, transfer or similar taxes (excluding, however, any tax imposed under Chapter 13 of the Internal Revenue Code of 1986 on a generation skipping transfer which is not a direct skip), and any interest and penalties thereon, imposed by any domestic or foreign taxing authority with respect to all property taxable under applicable law by reason of Grantor's death, without apportionment, whether or not such property passes under this Trust Agreement and regardless of by whom and from whatever sources taxes would otherwise be payable.

The Trustee shall not use the proceeds from qualified pension or profit sharing plans, Keogh plans, individual retirement accounts, qualified employee benefit plans or any other assets to the extent those proceeds or assets are not included in the Grantor's gross estate for federal estate tax purposes in making any payments pursuant to the foregoing paragraph; however, if the Trustee makes the determination, in its sole and absolute discretion, that other assets are not available for payments pursuant to the foregoing paragraph, or that it is not economically prudent to use non-exempt assets for the payment of such expenses, it may then use such exempt proceeds.



Trustee is directed to follow tax related elections, choices and exemption allocations affecting the trust made by the Personal Representative of Grantor's estate. The Trustee, in its discretion, shall have the power to make all other tax related elections, choices and exemption allocations it deems appropriate, including the disclaimer of benefits receivable by any trust herein in any matter permitted by law or by a "transfer" meeting the requirements of Section 2518(c)(3) of the Internal Revenue Code.

If Grantor is survived by his spouse, this Trust shall continue for the benefit of Grantor's spouse for her lifetime. At the death of Grantor's spouse, the property remaining in Trust at the death of Grantor's spouse shall be distributed outright and free of Trust to Grantor's children, BILL DOE and SUE ROE, in shares of equal value, per stirpes. If one of them shall predecease Grantor and die with issue surviving, then his or her share shall be distributed to his or her issue, per stirpes.

If Grantor is not survived by his spouse, then the property remaining in the Trust at the death of Grantor shall be distributed outright and free of Trust to Grantor's children, BILL DOE and SUE ROE, in shares of equal value, per stirpes. If one of them shall predecease Grantor and die with issue surviving, then his or her share shall be distributed to his or her issue, per stirpes.

## **SECTION B: ADMINISTRATIVE PROVISIONS**

### **I. PAYMENTS**

The Trustee may make payments directly to any beneficiary or to any other person for the benefit of such one without the intervention of a guardian or permission of any court to make such application and without responsibility on the part of the Trustee to see to the application of such payments.

### **II. RIGHTS OF BENEFICIARIES**

No principal or income payable or to become payable under this trust shall be subject to anticipation or assignment by any beneficiary or to attachment by or to the interference or control of any creditor of such beneficiary, or to be taken by any legal or equitable process in satisfaction of any debt or liability of such beneficiary prior to its actual receipt by the beneficiary. No power of appointment nor power of withdrawal shall be subject to involuntary exercise.

### **III. DISCLAIMER**

Any beneficiary or others may disclaim, renounce or release, in whole or in part, any power or interest provided for in this Trust Agreement.

### **IV. ACCOUNTING**

After Grantor's death, the Trustee shall render to each adult beneficiary, at least yearly, a complete account of receipts and disbursements of the trust and a statement of assets and liabilities. Upon request of an adult beneficiary, the Trustee shall cause an audit to be made of the trust, which audit shall be paid for as part of the cost of administering such trust.

V. COMPENSATION OF TRUSTEE

The Trustee and any Successor Trustee shall receive reasonable compensation for services and shall be entitled to reimbursement for all reasonable expenses incurred or paid in connection with this trust.

VI. RESIGNATION REMOVAL AND APPOINTMENT OF TRUSTEES

A trustee may resign this trust by 60 days' notice in writing to the beneficiary or beneficiaries then entitled to income and to the next successor trustee. In the event of the resignation of a Trustee when no Successor Trustee remains, a Successor Trustee shall be appointed by a court of competent jurisdiction. The transferring of the trust to the Successor Trustee shall be at the expense of the trust. Any Successor Trustee shall be bound by the terms of this instrument in the same manner as the Trustee herein named.

VII. APPOINTMENT OF CO-TRUSTEE OR CUSTODIAN

Any individual trustee may appoint a bank having trust powers or a trust company as custodian of trust assets or as a co-trustee and may delegate to it any of the powers of trustee and may remove and replace any such custodian or co-trustee.

VIII. ACTIONS BY CO-TRUSTEES

Whenever this trust is being managed by Co-trustees, except as may be specifically provided herein, Trustee actions shall require unanimity among the then Trustees of the trust involved, either by vote at a meeting (in person or by telephone) or by written concurrence. If one of the trustees of a trust hereunder gives written notice to the other trustee(s) of such trust of any action which such trustee proposes be taken, the failure of such proposing trustee to receive any written objection to such proposal from such other trustee(s), within 20 days after the effective date of such proposal notice, shall constitute the formal approval of such other trustee(s). Furthermore, any trustee of any trust hereunder, with the consent of the other trustee (or trustees) of such trust, may delegate at any time or from time to time any or all of his, her, or its rights, powers, duties, and authority, whether or not discretionary, to such other trustee(s) by an instrument executed by such delegating trustee and delivered to the other trustee, provided, however, that any such delegating instrument shall be revocable at any time by a similarly executed and delivered instrument and, provided further, that any right, power, duty, or authority which is expressly conferred by this trust agreement upon less than all of the trustees shall not be thus delegated (except to one or more other trustees upon whom such right, power, duty, or authority is expressly conferred by this trust agreement.)

Third parties shall have no responsibility to inquire as to a Co-trustee's authority to act alone. Any third party dealing with a Trustee of this trust may act upon such Trustee's own representation of its powers. Any action thereafter taken by the Trustee in accordance with such representation shall be binding upon the trust estate and such third party may rely conclusively thereon without further investigation into such powers. Each other then acting Trustee shall be exonerated from any and all liability with respect to such action or actions by the one Trustee.

Upon the resignation, death or incompetence of a Co-trustee, the other Co-trustee may serve alone without the appointment of a successor to fill the vacancy.

IX. TERMINATION

Notwithstanding any other provision of this instrument, this trust shall terminate not later than ninety years after the date of Grantor's death.

X. EARLIER TERMINATION

Whenever in the opinion of the Trustee it shall be in the best interest of the beneficiary or beneficiaries of a particular trust share to terminate the trust share for their benefit prior to the time it would otherwise terminate, whether due to the smallness of the trust, the unique circumstances, or any other reason, the Trustee, even if the Trustee is also a beneficiary hereunder, may terminate the same forthwith and shall pay the same to the beneficiaries free of all trust.

XI. BOND AND TRUST REGISTRATION NOT REQUIRED

To the extent that such requirements can legally be waived, no trustee hereunder shall ever be required to give bond or security as trustee, or to qualify before, be appointed by, or account to any court, or to obtain the order or approval of any court with respect to the exercise of any power or discretion granted in this instrument.

XII. TRUST PRIVACY

Grantor desires that the privacy of this trust be protected and in that regard, adopts the following provisions:

1. No purchaser from or other person dealing with Trustee shall be responsible for the application of any purchase money or other thing of value paid or delivered to it, but the receipt of Trustee shall be a full discharge; and no purchaser or other person dealing with Trustee and no issuer, or transfer agent or other agent of any issuer of any securities to which any dealing with Trustee should relate, shall be under any obligation to ascertain or inquire into the power of Trustee to purchase, sell, exchange, transfer, mortgage, pledge, lease, distribute or otherwise in any matter dispose of or deal with any security or any other property held by Trustee or comprised in this estate.

2. The certificate of the Trustee that it is acting according to the terms of this instrument shall fully protect all persons dealing with the Trustee.

3. The assertion by any Trustee hereinabove designated that (1) it is acting either alone or with another as a qualified Trustee, or (2) that it is acting with full delegated powers from a co-trustee, shall be sufficient on its face and no person shall be put to further inquiry into the right of such Trustee to so act.

Grantor directs that the Successor Trustees not record this trust agreement, it being Grantor's intent that it not be placed in the public record To the extent that questions remain as to the scope and nature of powers given to the Successor Trustees under the trust, the Successor Trustees are authorized to disclose or record the full text of Section C, POWERS OF TRUSTEE of the trust agreement

XIII. LIMITATION ON POWERS

Notwithstanding any other provision of this instrument, I hereby limit the general discretionary powers of the trustee so that (i) no trustee (other than Grantor or Grantor's spouse, if Grantor is deceased) shall participate in any decision that would cause any portion of the trust to be includable in the estate of the trustee for federal estate tax purposes as a result of Sections 2041 and 2514 of the Code, (General Powers of Appointment) and (ii) no trustee (other than Grantor or Grantor's spouse, if Grantor is deceased) may use trust income or principal to discharge the legal obligation of the trustee individually to support or educate a beneficiary hereunder.

**SECTION C:  
POWERS OF TRUSTEE**

In addition to the powers otherwise set forth or necessarily implied in this instrument, and in addition to those now or hereafter conferred upon Trustees by law, the Trustee shall possess the following powers, all of which shall be exercised in a fiduciary manner for the benefit of the respective beneficiaries:

1. The powers enumerated in the provisions of the statutes of the State of Tennessee, as codified in the Tennessee Code Annotated, including all subparagraphs thereof to the extent applicable. Said provisions (as in force on the date of execution of this Trust Agreement) are hereby incorporated by reference into this Trust Agreement as though fully copied verbatim, notwithstanding that said statute may be amended hereafter or repealed.

2. To receive, hold and manage all the property passing under this Trust, together with any property added hereafter by Grantor or others, by Will or otherwise, and made a part of this Trust, even though such assets might without this provision be deemed an improper concentration. The Trustee shall not be obligated to accept assets from others. The Trustee shall also have the power to sell, transfer or lease, to make expenditures for improvements and to exchange all or any part of the Trust Property, all as though the absolute owner thereof, and to collect, receive and recover the rent, issues, interest, income, royalties and profits thereof, and after deducting the fees of the fiduciary as herein provided and the proper and necessary expenses in connection with the administration of this Trust, to pay and apply the income and principal thereof in the manner and upon the terms and conditions herein provided.

3. To invest and reinvest money coming into its possession in such loans, stocks, bonds, including United States bonds purchased at a discount but redeemable at face value, securities, including common trust funds of the Trustee, real estate, life insurance, annuity or endowment policies, or combinations thereof, or any other investments it may deem proper, without being restricted to a class of investments which fiduciaries are or may be permitted to make by law.

4. To retain by way of investment any property or securities acquired by or transferred to it, regardless of the fact that this may result in a heavy concentration in any one security or property, without liability for depreciation. All conveyances executed and delivered by the Trustee shall be without covenants of warranty except as against the Trustee's own acts and to after-acquired title.

5. To cause any asset which may from time to time comprise the trust estate, or any part thereof, to be registered or held in the names of the Trustees or in the name of any one of the Trustees, either with or without designation as fiduciary, or in the name or names of their nominee or nominees, either with or without designation as fiduciary, or to take and keep the same, in whole or in part, unregistered, or to hold them, in whole or in part, in such conditions that they will pass by delivery.

6. To open checking and savings accounts and safe deposit boxes with any institution(s) empowered to accept the same, including any which may be a trustee hereunder, and cash and margin accounts with any brokerage firm(s), either in their names and on their signatures alone (with or without disclosing fiduciary capacity) or in the name of such trust (where an account is in the name of a trust, checks on that account and authorized signatures need not disclose the fiduciary nature of the account or refer to any trust or trustees) or in the name of its nominee, depositing therein any part or all of the funds of such trust and making withdrawals therefrom and having access thereto on the signature of any one or more of them with the right and power to authorize withdrawals and access on the sole signature of any agent or agents designated in writing by such trustees.

7. To determine whether money or property coming into the Trustee's possession shall be treated as principal or income, including the proceeds from the sale of unproductive property, and to charge or apportion expenses, including fees, or losses to principal or income, according as the Trustee shall deem just and equitable in its discretion. If the Trustee is in doubt as to the method that should be used for allocating or apportioning any receipt or disbursement, the doubt shall be resolved in favor of the beneficiary then entitled to distributions.

8. To borrow money from time to time upon terms acceptable to the Trustee from any person, corporation, trust or estate, including any bank or corporation which may then be serving as trustee, and its affiliates, to pledge or mortgage any property as security therefor, to renew any indebtedness incurred by the Grantor or by the Trustee, and to pledge or mortgage any trust property as security for any loans or indebtedness incurred by the Grantor.

9. To vote in person or by proxy all stock or other securities regarding which voting rights may exist at any and all meetings of stockholders or other security holders for any and all purposes. The fiduciary may participate in such manner and to such extent as the Trustee shall see fit in any merger, reorganization, receivership or any other action of similar nature as applied to any corporation in which the trust estate may hold stocks, bonds or other securities.

10. To employ and compensate, out of principal or income or both as the fiduciary shall deem proper, agents, accountants, attorneys and other professional assistants deemed by the fiduciary needful for the proper and

best administration of the trust estate, and to retain and compensate such persons for services rendered in the establishment of this Trust.

11. To hold and retain the principal of any separate trust share established hereunder undivided, making such separation on the books of the Trustee only, until actual division shall become necessary in order to make distribution to the beneficiaries.

12. To make allocations, divisions, and distributions of trust property in cash or in kind, or partly in each; to allocate different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or separate trusts, without liability for, or obligation to make compensating adjustments by reason of, disproportionate allocations of unrealized gain for federal income tax purposes; and to determine the value of any property so allocated, divided, or distributed.

13. To make such elections and allocations under the tax laws as the Trustee deems advisable without regard to the relative interests of the beneficiaries; the Trustee shall not make adjustments between principal and income, or in the interests of the beneficiaries, to compensate for the effects of such elections and allocations; and any decision made by the Trustee with respect to the exercise of any tax election or allocation shall be binding and conclusive on all persons.

14. To purchase property from, sell property or make unsecured or secured loans to, or otherwise deal without restrictions with the personal representative, trustee or other representative of any trust or estate in which any beneficiary hereunder has any interest, even though the fiduciary be such personal representative, trustee or representative, without liability for loss or depreciation resulting therefrom.

15. To act hereunder, through an agent or attorney-in-fact, by and under a power of attorney duly executed by the Trustee, in carrying out any of the powers and duties herein authorized.

16. To make or hold investments or any part of the Trust Property in common or undivided interests with other persons, corporations or trusts.

17. To demand, receive, receipt for, sue for, and collect any and all rights, demands, money, royalties, properties or claims to which this Trust may be entitled and to litigate, compromise, settle, arbitrate, or abandon any claim or demand in favor of or against this Trust, including claims for taxes, allocating amounts paid among the trust shares and paying the same out of principal or income as the Trustee shall deem just and equitable.

18. To abandon or to appoint Trust Property which Trustee deems of insufficient value to warrant the cost of administration or distribution.

In any judicial proceeding involving the Trust the then living beneficiary or beneficiaries shall be deemed to represent and any judgment entered shall be binding upon all unborn, unknown, and unascertained beneficiaries.

## **SECTION D MISCELLANEOUS**

### **I. DEFINITION OF CERTAIN TERMS**

#### **Descendants:**

For purposes of determining who is a descendant of mine or of any other person:

A. Legal adoption before the person adopted reached the age of 18 years shall be the equivalent in all respects to blood relationship; and

B. A person born out of wedlock and those claiming through that person shall be deemed to be descendants (1) of the natural mother and her ancestors, and (2) if the natural father acknowledges paternity pursuant to the statutes of the state of domicile of the person born out of wedlock, the person born out of wedlock and those claiming through that person shall be deemed to be descendants of the natural father and his ancestors, in each case unless a decree of adoption terminates such natural parent's parental rights.

Survivorship:

Except as between Grantor and Grantor's spouse, no person shall be considered to have survived another or to be living upon the death of another if he or she shall die within 90 days after the death of such other person.

Internal Revenue Code:

References to Code, Internal Revenue Code or IRC shall mean the Internal Revenue Code of 1986, as from time to time amended, unless otherwise indicated.

II. GOVERNING LAW

In all matters pertaining to this trust, the laws of the State of Tennessee shall control.

III. HEADINGS

The headings herein contained are for convenience and are not to be deemed part of the trust instrument.

IV. BINDING EFFECT

This agreement shall extend to and be binding upon the executors, administrators, personal representatives and successors, respectively, of the parties hereto.

EXECUTION

IN WITNESS WHEREOF, I have signed this agreement the day and year first above written.

Witnesses:

\_\_\_\_\_  
  
\_\_\_\_\_

\_\_\_\_\_  
JOHN DOE,  
Grantor and Trustee

STATE OF TENNESSEE        )  
                                      )       SS.  
COUNTY OF ANY            )

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2015, by JOHN DOE, Grantor and Trustee, and by \_\_\_\_\_ and \_\_\_\_\_, Witnesses.

\_\_\_\_\_  
Notary Public, \_\_\_\_\_ County, Tennessee  
My Commission Expires: \_\_\_\_\_

Drafted by:  
LEE GULL  
LAW FIRM  
LAW FIRM ADDRESS

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## **VI. HEALTH CARE DIRECTIVES**

### **A. TENNESSEE HEALTH CARE DECISIONS ACT**

The Tennessee Health Care Decisions Act (the "THCDA"), which became effective July 1, 2004, expanded the law regarding advance planning for health care decisions and instructions by patients and for health care decision making for patients without advance medical instructions who are unable to make those decisions for themselves. It is important to note that the THCDA does not repeal earlier Tennessee law on advance directives, but merely supplements the living will and durable power of attorney for health care laws. Advance directives drafted and properly executed prior to July 1, 2004 are still valid and effective. Living Wills and Durable Powers of Attorneys for Health Care may still be prepared based on prior law.

The THCDA extends the use of advance directives, including living wills and durable powers of attorney for healthcare, to any "individual instruction or ...written statement relating to the subsequent provision for health care." Thus, an individual's instructions may be written or oral. The THCDA simplifies the formal requirements for advance directives and makes it easier for patients to provide instructions for medical decisions. Unlike the Living Will or Durable Power of Attorney for Healthcare statutes, there are no language requirements with the THCDA, and the requirements for execution are much more relaxed. Thus, many directives that were previously invalid due to improper execution may now be valid under the THCDA. Living wills or durable powers of attorney for health care executed under the previous law will still be given effect provided they comply with the prior law.

Most notable with the THCDA is the recognition of surrogates, other than a patient's agent or guardian, to make health care decisions for a patient. Prior to the adoption of the THCDA, there was no Tennessee statutory authority for "surrogate decision making." If a patient had not executed an advance directive and the patient lacked capacity to make his or her own health care decisions, the physician typically consulted with the "next-of-kin" although Tennessee law provided no authority for such a practice. The THCDA adopts a provision that permits surrogate decision making in the event the patient has no guardian or designated health care agent and is unable to make decisions for himself or herself. A surrogate must be an adult who has exhibited special care and concern for the patient, is familiar with the patient's personal wishes, is reasonably available, and willing to serve. In order of preference, the physician may consider the patient's spouse (unless legally separated), the patient's adult child, any other adult relative, or any other adult who satisfies the requirements of special care and concern for the patient. The surrogate can make all decisions that a patient could make on his or her own behalf. If a surrogate is designated by the physician, there are limitations on withholding or withdrawal of artificial nutrition or hydration.

If no surrogate is reasonably available, the designated physician may make health care decisions for the patient after consultation with the hospital's "ethics mechanism" or the concurrence of a second physician who is not directly involved in the patient's care. The right to make health care decisions does not deem the designated physician a "surrogate" unless the physician is a relative of the patient or the requirements to serve as a surrogate are met.



The health care providers and institutions must comply with individual instructions unless they are contrary to "reasons of conscience" or "require medically inappropriate health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution" and, in the case of institutions, the policy which is based on "reasons of conscience" was timely communicated to the patient or person authorized to make decisions for the patient. Providers and institutions may decline to comply if the patient or authorized representative is promptly informed. In this instance, the patient is provided continuing care until a transfer can be effected. If a transfer cannot be arranged, the provider or institution is not required to comply.

Providers and institutions that act in good faith and in accord with generally accepted, applicable health care standards are not subject to civil or criminal liability or to discipline for unprofessional conduct. Individuals, agents, and those who identify surrogates in good faith are not subject to civil or criminal liability if they act in good faith.

Providers, institutions and individuals who intentionally violate the THCDA or intentionally falsify, forge, conceal, deface, or obliterate an advance directive or revocation of an advance directive, or who coerce or induce an individual to give, revoke, or not to give an advance directive are subject to liability for damages of \$2500 or actual damages, whichever is greater, plus reasonable attorneys fees and costs.

## **B. ADVANCE CARE DIRECTIVE AND UNIVERSAL "DO NOT RESUSCITATE" ORDER**

The Tennessee Department of Health recently issued model forms for the Appointment of Health Care Agent and for the Advance Care Plan. Use of these forms is not mandatory, but they are intended to provide a model with which patients can work.

The form for Appointment of a Health Care Agent provides only for the appointment of an agent and a successor agent to make any health care decisions that the incapacitated individual could make if he were capable. The form for Advance Care Plan also appoints an agent and a successor agent, but it goes further to allow the individual to make decisions about "unacceptable" quality of life conditions, such as permanent unconsciousness, permanent confusion, and end-stage illnesses. With the Advance Care Plan, the individual authorizes the withholding of certain kinds of treatment, including CPR, life support or other artificial support and tube feeding, under those unacceptable quality of life conditions. The Advance Care Plan also provides the individual the opportunity to give other instructions related to burial arrangements, hospice care and organ donation.

The THCDA differs from the prior law significantly in that it requires less formal execution than is required by the living will and durable power of attorney for health care statutes. An Advance Care Plan or Appointment of Health Care Agent needs only to be witnessed by either a notary or two witnesses...not both. The witnesses must be competent adults, neither of whom is appointed agent by the document. At least one of the witnesses must be unrelated to the individual by blood, marriage, or adoption and cannot be entitled to any portion of the individual's estate upon the individual's death by will or by intestacy.

The forms for the Appointment of Health Care Agent and Advance Care Directive can be found at [www2.state.tn.us/health/Boards/AdvanceDirectives/index.htm](http://www2.state.tn.us/health/Boards/AdvanceDirectives/index.htm).

Health care providers are under standing orders to deliver CPR to a patient in the event of cardiac or pulmonary arrest. If a determination has been made by the patient's physician that CPR is not appropriate for a particular patient because it would be medically futile, such a standing order can be revoked by a "Do Not Resuscitate" Order (or DNR). A DNR Order merely authorizes the withholding of CPR. It does not authorize the withholding of other medical interventions such as intravenous fluids, oxygen or other therapies necessary to provide comfort or alleviate pain. Traditionally, DNR Orders are intra-institutional only, meaning that they are not universally recognized and are not transferable. They do not cover situations where a patient with a standing DNR Order at one health care facility is discharged to another facility (such as a nursing home) or is discharged to the home (and emergency responders are called for a later crisis).

The THCDA introduces the concept of a "universal" DNR Order, which is a written order signed by the patient's physician and continues to apply regardless of the treatment setting. Also, it specifically authorizes emergency responders and other caregivers to follow the universal DNR Order that is available to them in a form provided by the Board for Licensing Health Care Facilities. The THCDA requires health care facilities to communicate the existence of a universal DNR Order to the receiving facility prior to transfer and must send a copy with the patient during transport.

The form for the Universal DNR can be found at the Tennessee Department of Health website at [www2.state.tn.us/health/Boards/AdvanceDirectives/index.htm](http://www2.state.tn.us/health/Boards/AdvanceDirectives/index.htm).

### **C. THE LIVING WILL AND DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

The Living Will is statutory in Tennessee and allows a person to determine and express his wishes with regard to the withdrawal of feeding tubes and organ donation while that person is still competent and able to make those decisions. In the Living Will, a person, during a period of normal mental capacity, determines that he does not want physicians or hospitals to use "heroic measures" or artificial means in order to sustain his physical existence when death has become inevitable. Specific provisions of a Living Will require that a person's attending physician has diagnosed and certified in writing that he or she is afflicted with a terminal condition with no reasonable chance of recovery. Upon that determination, if a person has signed a Living Will, the doctors and the hospitals have an affirmative obligation to withdraw extraordinary equipment such as feeding and hydration tubes. Failure to sign a Living Will may place the physicians and hospitals in a situation where they have no alternative but to utilize every medical device at their disposal to sustain a person's life regardless of the terminal condition of his health.

The Durable Power of Attorney for Healthcare is designed to work in concert with a

Living Will. It allows a person to make decisions regarding the healthcare while he is still competent and able to make those decisions. The Durable Power of Attorney for Healthcare authorizes a proxy chosen by the maker to make healthcare decisions in compliance with the maker's directions in the event that he becomes incapable of acting on his own behalf. The agent or proxy chosen by the maker to make healthcare decisions for him, upon the advice of the maker's attending physician, directs that actions be taken on the maker's behalf. Generally, the Durable Power of Attorney for Healthcare will incorporate the Living Will by reference so that the appointed agent can direct the medical providers in accordance with the Living Will's directives.

Please note that healthcare directives are generally state-specific. Tennessee will recognize a Living Will or Healthcare Power of Attorney from another state if the document complies with the Tennessee witness/signature/language requirements for healthcare directives or if the person attempting to use the document is a resident of the other state. Accordingly, if a person has a healthcare directive from another state but moves to Tennessee, he should either have it evaluated by a Tennessee attorney or consider executing one prepared in Tennessee. Failure to do so could be costly both monetarily and emotionally.

The following pages contain a sample Living Will in Tennessee:

## LIVING WILL

STATE OF TENNESSEE       )  
                                          )  
COUNTY OF ANY            )

I, JOHN DOE, of Any County, Tennessee, willfully and voluntarily make known my desire that my dying shall not be artificially prolonged under the circumstances set forth below, and do hereby declare:

If at any time I should have a terminal condition and my attending physician has determined there is no reasonable medical expectation of recovery and which, as a medical probability, will result in my death, regardless of the use or discontinuance of medical treatment implemented for the purpose of sustaining life, or the life process, I direct that medical care be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medications or the performance of any medical procedure deemed necessary to provide me with comfortable care or to alleviate pain.

### ARTIFICIALLY PROVIDED NOURISHMENT AND FLUIDS:

By checking the appropriate line below, I specifically:

\_\_\_\_\_ Authorize the withholding or withdrawal of artificially provided food, water or other nourishment or fluids.

\_\_\_\_\_ DO NOT authorize the withholding or withdrawal of artificially provided food, water, or other nourishment or fluids.

### ORGAN DONOR CERTIFICATION:

Notwithstanding my previous declaration relative to the withholding or withdrawal of life prolonging procedures, if as indicated below I have expressed my desire to donate my organs and/or tissues for transplantation, or any of them as specifically designated herein, I do direct my attending physician, if I have been determined dead according to Tennessee Code Annotated Section 68-3-501(b), to maintain me on artificial support systems only for the period of time required to maintain the viability of and to remove such organs or tissues.

By checking the appropriate line below, I specifically:

\_\_\_\_\_ Desire to donate my organs and/or tissues for transplantation.

\_\_\_\_\_ Desire to donate my \_\_\_\_\_.

(Insert specific organs and/or tissues for transplantation.)

\_\_\_\_\_ DO NOT desire to donate my organs or tissues for transplantation.

In the absence of my ability to give directions regarding my medical care, it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical care and accept the consequences of such refusal.

The definitions of terms used herein shall be set forth in the Tennessee Right to Natural Death Act, Tennessee Code Annotated Section 32-11-103.

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

In acknowledgment whereof, I do hereinafter affix my signature on this the \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
JOHN DOE, Declarant

We, the subscribing witnesses hereto, are personally acquainted with and subscribe our names at the request of the declarant, an adult, whom we believe to be of sound mind, fully aware of the action taken herein and the possible consequence.

We the undersigned witnesses, further declare that we are not related to the declarant by blood or marriage; that we are not entitled to any portion of the estate of the declarant upon the declarant's decease under any will or codicil thereto presently existing or by operation of law then existing; that we are not the attending physician, employees of the attending physician, or employees at a health facility in which the declarant is a patient; and that we are not persons who, at the present time, have a claim against any portion of the estate of the declarant upon the declarant's death.

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
WITNESS

STATE OF TENNESSEE       )  
                                          )  
COUNTY OF ANY         )

Subscribed, sworn to and acknowledged before me by JOHN DOE, the Declarant, and subscribed to and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_, Witnesses, on this the \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

The following is a sample Durable Power of Attorney for Health Care:

TENNESSEE DURABLE POWER OF ATTORNEY  
FOR HEALTH CARE  
**WARNING TO PERSON EXECUTING THIS DOCUMENT**

This is an important legal document. Before executing this document, you should know these important facts.

This document gives the person you designate as your agent (the attorney-in-fact) the power to make healthcare decisions for you. Your agent must act consistently with your desires as stated in this document.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other healthcare decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objections, and healthcare necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment service or procedure to maintain, diagnose or treat a physical or mental condition. This power is subject to any limitation that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make healthcare decisions for you if your agent: (1) authorizes anything that is illegal, or (2) acts contrary to your desires as stated in this document.

You have the right to revoke the authority of your agent by notifying your agent or your treating physician, hospital or other healthcare provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to: (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic, educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

I hereby certify by my signature that I have read the foregoing warning, or have had the same read to me and do hereby understand the contents of said warning.

This the \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
PRINCIPAL

I, JOHN DOE, hereby revoke any Durable Power of Attorney for Healthcare that I have previously given to any other person and appoint and authorize JANE DOE, of 100 Elm Street, Any City, Any County, Tennessee, telephone numbers: (555) 555-1234 (home), (555) 555-2345 (work), and (555) 333-1234 (cell), as my attorney-in-fact to make healthcare decisions for me as authorized in this document, if, and only if, I am incapacitated or otherwise unable to make such decisions for myself. The definitions of "healthcare" and "healthcare decision" contained in T.C.A. § 34-6-201 are incorporated into this document by reference.

**1. EFFECTIVE DATE AND DURABILITY.** By this document, I intend to create a durable power of attorney for healthcare effective upon, and only during, any period of incapacity in which, in the opinion of my attorney-

in-fact and attending physician, I am unable to make or communicate a choice regarding a particular healthcare decision. Pursuant to T.C.A. § § 34-6-102 and 105, this power of attorney shall not be affected by my subsequent disability or incapacity if such occurs.

**2. ATTORNEY-IN-FACT'S POWERS.** I grant to my attorney-in-fact full authority to make healthcare decisions for me and to have access to my medical information. In exercising this authority, my attorney-in-fact shall follow my desires as stated in this document or my living will (if I have a living will) or otherwise known to my attorney-in-fact. In making any decision, my attorney-in-fact shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my attorney-in-fact cannot determine the choice I would want made, then my attorney-in-fact shall make a choice for me based upon what my attorney-in-fact believes to be in my best interests. My attorney-in-fact's authority to interpret my desires is intended to be as broad as possible.

**3. SUCCESSORS.** If the attorney-in-fact named by me shall die, become legally disabled, resign, refuse to act, or be unavailable, then I name BILL DOE, of 211 Commerce Drive, Any City, Any County, Tennessee, telephone numbers: (555) 555-9876 (home), (555) 555-8765 (work), and (555) 444-9876 (cell), as my attorney-in-fact, with the powers enumerated herein.

**4. PROTECTION OF THIRD PARTIES WHO RELY ON MY ATTORNEY-IN-FACT.** No person who relies in good faith upon any representations of my attorney-in-fact shall be liable to me, my estate, my heirs or my assigns for relying upon the attorney-in-fact's authority.

**5. NOMINATION OF GUARDIAN OR CONSERVATOR.** If a guardian or conservator of my person should for any reason be appointed, pursuant to T.C.A. § 34-6-104(b), I nominate my then-serving attorney-in-fact to serve as such guardian or conservator.

**6. ADMINISTRATIVE PROVISIONS.**

A. This durable power of attorney for healthcare is intended to be valid in any jurisdiction in which it is presented.

B. My attorney-in-fact shall not be entitled to compensation for services performed under this durable power of attorney for healthcare, but my attorney-in-fact shall be entitled to reimbursement for reasonable expenses incurred as a result of carrying out any provision of this document.

C. The powers delegated under this durable power of attorney for healthcare are separable, so that the invalidity of one or more powers shall not affect any other powers.

**7. REVOCATION.** I understand that after executing this durable power of attorney for healthcare:

A. I may revoke the appointment of my attorney-in-fact, by notifying my attorney-in-fact, orally or in writing; or

B. I may revoke the authority granted to my attorney-in-fact to make healthcare decisions by notifying the healthcare provider orally or in writing.

**8. HIPAA AUTHORITY.** I intend by this power of attorney to designate the individual or individuals who shall have authority to act on my behalf in making decisions related to my health care. In exercising such authority, my attorney-in-fact shall constitute my "personal representative" (as defined in 45 C.F.R. § 164) and be treated as I would for all purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d and 45 C.F.R. §§ 160 and 164, and as such shall (1) have access to all my "individually identifiable health information" (as those terms are defined in the regulations under HIPAA), whether verbal or written; (2) possess, without limitation, my right of access to inspect and obtain copies of protected health information about me as required by HIPAA; and (3) possess, without limitation, my right to an accounting of disclosures of protected health information as required by HIPAA. My attorney-in-fact's exercise of powers granted in this paragraph should not be deemed events: (1) in which treating my attorney-in-fact as personal representative could endanger me for purposes of 45 C.F.R. § 164.502, or (2) in which it is not in my best interest for my attorney-in-fact to be treated as my "personal representative" for purposes of 45 C.F.R. § 164.502. This authority applies to any information governed by HIPAA and may not be revoked except by revocation of this document as provided herein, which revocation may not be made by an extrinsic document unless such document specifically refers to this durable power of attorney for healthcare.

This instrument is to be construed and interpreted as a durable power of attorney for healthcare and is intended to comply in all respects with the provisions of Tennessee Code Annotated, Section 34-6-201, et seq.; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2015.

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JOHN DOE, PRINCIPAL

We, the undersigned witnesses, declare under penalty of perjury under the laws of Tennessee, that JOHN DOE, is personally known to us to be the principal; that the principal signed and acknowledged this Durable Power of Attorney for Health Care in our presence; the principal appears to be of sound mind and under no duress, fraud, or undue influence; that neither of us is the person appointed as attorney-in-fact by this instrument; and that neither of us is a healthcare provider, an employee of the healthcare provider, the operator of a healthcare institution, or an employee of an operator of a healthcare institution. We further declare under penalty of perjury under the laws of Tennessee that we are not related to the principal by blood, marriage, or adoption; and that, to the best of our knowledge, we do not, at the present time, have a claim against any portion of the estate of the principal upon the principal's death; and that to the best of our knowledge, we are not entitled to any part of the estate of the principal upon the death of the principal under any will or codicil of the principal existing as of the date of this instrument, or by operation of any existing law.

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WITNESS

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WITNESS



STATE OF TENNESSEE       )  
                                          )  
COUNTY OF ANY            )

Subscribed, sworn to and acknowledged before me by JOHN DOE, the Principal, and subscribed, sworn to and acknowledged before me by \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_

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## VII. SPECIAL CONSIDERATIONS IN ESTATE PLANNING: THE ELDERLY CLIENT

Issues regarding the attorney-client relationship and confidentiality often arise when the client is elderly, disabled or otherwise vulnerable. Many times, the elderly client will insist that younger family members be present at discussions with the lawyer, that the lawyer communicate with the younger family members, or that the family members be permitted to review an elderly client's estate planning documents. Other times, the younger family members feel like it is their responsibility and obligation to direct the relationship with the lawyer and inform the lawyer as to the elderly client's desires.

Clients need to be made to understand that this is a dangerous practice that should be avoided. Such practices often blur the lines as to who is the client. It should be made clear from the outset that the elderly person is the client and that family members, as a general rule, should not be present during discussions with the attorney.

When representing the elderly client, in general and particularly in the area of estate planning, the careful lawyer will anticipate a Will contest. Most grounds for challenging a Will find additional support of the decedent was very old at the time of execution of document and lacked capacity to execute the document. Therefore, it is wise to anticipate a challenge to an elderly client's testamentary capacity. In order to make a Will, a client must know: (1) the nature and extent of his or her property, (2) the natural objects of his or her bounty, (3) understand how the Will distributes the property, and (4) have the ability to make a rational plan of distribution. The careful lawyer will document the ability of the elderly client to meet each of these requirements on the day of execution of an estate plan. The best way to judge the degree of cognitive impairment, if any, is to engage the client in conversation and listen. Persons with cognitive impairment become excellent at responding to verbal or situational clues. In order to avoid this, ask a number of open-ended questions and document the responses. If you get conflicting answers, be alert and dig deeper, perhaps even seeking an evaluation of the client.

The booklet, "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers," was produced in April 2005 by a collaborative effort between the American Psychological Association and the ABA Commission on Law and Aging. It addresses all aspects of the dilemma facing lawyers who regularly deal with elderly clients. Additionally, consider using the Short Portable Mental Status Questionnaire (SPMSQ). It is used widely in medical settings and is based upon the work of E. Pfeiffer and reported in E. Pfeiffer, "A Short Portable Mental Status Questionnaire for the Assessment of Organic Brain Deficit in Elderly Patients," 3 J.A.M. GERIATRICS SOC. 23 (1975). Its questions are as follows:

1. What is the date today?
2. What day of the week is it?
3. What is the name of this place?
4. What is your telephone number?
5. How old are you?
6. When were you born?
7. Who is the President of the United States?
8. Who was the President just before him?

9. What was your mother's maiden name?
  10. Subtract 3 from 20, and keep subtracting the number 3 all the way down.
- The scoring scale is as follows:
- 0-2 errors: normal mental function
  - 3-4 errors: mild cognitive impairment
  - 5-7 errors: moderate cognitive impairment
  - 8 or more errors: severe cognitive impairment.

Additionally, witnesses to an estate plan should be told to pay attention, ask questions, remain present and do whatever is necessary to remember the events and their reactions to the client.

The lawyer for the elderly client should also anticipate possible allegations of undue influence and also be alert to its actual occurrence. The elements of undue influence are, generally, susceptibility of the elderly client, confidential relationship between the elderly client and the alleged influencer, and the use of a confidential relationship to create or change an estate plan. Susceptibility requires a showing of diminished mental capacity such as dementia, alcoholism, or a physical ailment that makes an elderly person susceptible to undue influence.

The following is a discussion of the Tennessee Rules of Professional Conduct (effective as of March 1, 2003) ("Rule" or "Rules"), which are applicable in the representation of the elderly client:

#### **Rule 1.4 Communication**

**(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.**

**(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

Often, the elderly client will request that a family member be involved because the elderly client perceives that he or she will not understand the wording and the meanings in the legal documents. It is necessary to ascertain when a family member will stop being a support system for the elderly client and will start being a target for later claims of undue influence.

The Comments to Rule 1.4 provide some guidelines.

#### **Explaining Matters**

**[2] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent that the client is willing and able to do so. ...**

**[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, where the client is a child or has a mental disability. See RPC 1.14.**

Representation under the revised Rules of Professional Conduct is more practical than it used to be under the old rules. Under the previous Rule DR 4-101(A), a lawyer was required to maintain confidentiality for the client's "confidences and secrets." The revised rules are broader as to the character and type of things that should be the subject of confidentiality and allow for representation that respects the attorney-client privilege while recognizing the need for practicality in dealing with the elderly client.

### **Rule 1.6 Confidentiality**

**(a) Except as provided below, a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.**

**(b) A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes disclosure is necessary:**

**(1) To prevent the client from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited by Rule 3.3;**

**(2) To secure legal advice about the lawyer's compliance with these Rules; or**

**(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.**

**(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer believes disclosure is necessary:**

**(1) To prevent reasonably certain death or substantial bodily harm;**

**(2) To comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or**

**(3) To comply with Rules 3.3, 4.1 or other law.**

As with the previous rules, the revised Rules of Professional Conduct allow the lawyer to reveal information related to the representation of a client if the client gives his or her consent. The revised Rules go further to allow the lawyer to reveal information which the client has "impliedly authorized" to be revealed. The revised Rules also allow an exception for communications that, if revealed, would prevent death or substantial harm to the client. This is especially important, as many elderly persons suffer from depression. Depression in the elderly is evidence by a depressed attitude, irritability or anxiety, all of which the client may deny. Other manifestations include lack of self-confidence, low self-esteem, poor concentration and memory, social withdrawal, hopelessness, increased dependency, and recurrent thoughts of death or suicide. If a lawyer feels that an elderly client is depressed to the extent he or she may potentially take his or her own life, then the Comments to the revised Rules give guidance as to what the lawyer should do.

**[16] Paragraph (c)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to eliminate the threat. ...**

Any lawyer who represents the elderly on a fairly regular basis will be faced at some point with a situation where the client is disabled or becomes disabled during the representation. Often, the lawyer will receive a telephone call from a family member of an elderly person requesting a Will, Power of Attorney, Healthcare Power of Attorney or Living Will for the elderly person. In such a situation, it will be necessary for the lawyer to meet with the elderly person one-on-one to determine competency and to ascertain whether the elderly person is being unduly influenced. If the lawyer believes that the elderly client has capacity and is not being unduly influenced, then the lawyer can proceed with the representation.

Lawyers who represent elderly clients on a regular basis are often faced with another dilemma: what to do with the client who is apparently laboring under a disability which makes it questionable whether the lawyer should continue the representation or should take steps which may have been traditionally considered in conflict with the duty of loyalty and confidentiality. Dementia is a common problem with elderly clients. Dementia's most common symptom is short-term memory loss. The client understands today's conversation but has no recollection (or a confused recollection) of what was discussed yesterday. Other symptoms include inability to find a correct word when speaking. Dementia is also evidenced by mood swings, changes in personality, uncharacteristic acts and exhibiting greater confusion when placed in new surroundings.

While the Tennessee's old rules remained silent as to the issue of representing the client with diminishing capacity, the revised rules give guidance in these situations. The Rule and Comments are set forth in their entirety:

**Rule 1.14**  
**Client Under a Disability**

(a) When a client's ability to make adequately considered decisions in connection with representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

**Comments**

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or has a mental disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client has a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as a defacto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware the guardian is active adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* RPC 1.2(d).

#### *Disclosure of the Client's Condition*

[5] Rules of procedure in litigation generally provide that minors or persons having a mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interest. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

#### *Emergency Legal Assistance*

[6] If the health, safety, or financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a lawyer-client relationship or is unable to express or make considered judgments about the matter, when the disabled person or another acting in good-faith on the person's behalf has consulted the lawyer. Even in such a situation, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the disabled person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[7] A lawyer who acts on behalf of a disabled person threatened with imminent and irreparable harm should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the disabled person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such actions taken on behalf of a disabled person.

## VIII. ESTATE PLANNING AND TRANSFER TAX UPDATE (2015)

### I. TENNESSEE TRANSFER TAX IS STILL GOING AWAY:

- A. **Retroactive Repeal of the Tennessee Gift Tax:** Effective as of January 1, 2012, the Tennessee gift tax is repealed: T.C.A. §§67-8-101 *ff.*, §67-8-409(g) and T.C.A. §67-8-605.
- B. **Phased-In Repeal of the Tennessee Inheritance Tax:** The Tennessee exemption from inheritance tax is currently \$5,000,000 in 2015; and repeal of the inheritance tax will be effective January 1, 2016. T.C.A. §§67-8-314 and 67-8-316(b).
- C. **The Tennessee Estate (“Pick-Up”) Tax is Not Repealed.**

### II. ON FEDERAL TRANSFER TAXES – TAXPAYER RELIEF ACT OF 2013 MADE CHANGES IN 2010 PERMANENT:

- A. Here are the federal estate tax free amounts in effect from and after **June 7th, 2001:**

1977 - \$120,000	1986 - 500,000
1978 - 134,000	1987 - 1997: 600,000
1979 - 147,000	1998 - 625,000
1980 - 161,000	1999 - 650,000
1981 - 175,000	2000 - 2001: 675,000
1982 - 225,000	2002 - 2003: 1,000,000
1983 - 275,000	2004 - 2005: 1,500,000
1984 - 325,000	2006 - 2008: 2,000,000
1985 - 400,000	2009 - 3,500,000

**2010 - \$5 Million; unless an election is made for the tax-free amount to be UNLIMITED (but with carry-over basis)**

**2011 - \$5,000,000** with a 35% rate on the excess  
**2012 - \$5,120,000** with a 35% rate on the excess  
**2013 - \$5,250,000** with a 40% rate on the excess  
**2014 - \$5,340,000** with a 40% rate on the excess  
**2015- \$5,430,000** with a 40% rate on the excess  
**2016 and beyond:** same as 2013 with inflation adjustments each year

- B. The federal gift tax free amount for all taxable gifts is a cumulative lifetime total of **\$5,430,000 per donor in 2015**; each donor has a **\$14,000 per person annual gift tax exclusion** (indexed for inflation).



- C. The **unlimited marital deduction** for certain types of gifts to a spouse during lifetime and at death; and the **unlimited charitable deduction** for certain types of gifts to charitable organizations **are both still applicable for gift tax purposes, and for federal death tax purposes.**
- D. The **exemption from the generation-skipping transfer (GST) tax is \$5,430,000 as well.**
- E. The **rate of federal estate, gift and GST tax is 40% in 2015.**
- F. **Portability has now become a mandatory issue to discuss.**
1. The amount a married couple can pass on tax-free is, under Code Section 2010(c): (1) the “**applicable exclusion amount**” (\$5 million, indexed for inflation from the 2010 amount, beginning in 2012); **plus** (2) for a decedent who is a surviving spouse, the “**Deceased Spousal Unused Exclusion Amount**” or **DSUEA**.
  2. **What is the DSUEA?** The amount of the deceased spousal unused exclusion is **the lesser of** the applicable exclusion amount (\$5 million as indexed) or the **last** predeceased spouse’s unused exclusion amount.
  3. **No statute of limitations:** Under **Code Section 2010(c)(5)(B)**, the IRS is entitled to examine the predeceased spouse’s estate tax return **at any time** for the purpose of determining the amount of the predeceased spouse’s unused exclusion amount that will be available for use by the surviving spouse.
  4. **The first-death filing requirement:** In order to qualify for a DSUEA amount, the **executor of the estate of the first spouse to die must timely file a federal estate tax return and make an election to use portability.**
  5. **Only the most recently-wed spouse’s DSUEA can be used:** This will be the case even if the last deceased spouse either had no unused exclusion, or did not make a timely election (in which case the DSUEA would be zero).
  6. **The privity requirement:** A surviving spouse cannot use the DSUEA of his or her deceased spouse if the survivor remarries. For example, if Bernie dies leaving \$3 million to his children, and the rest was jointly owned with his surviving wife Mabel, who elects and claims Bernie’s unused \$2 million DSUEA, then Mabel would herself have \$7 million that she could theoretically leave tax-free upon her death. But if Mabel later marries Frank and Frank then dies, leaving his entire \$5+ million to **his** children, the maximum amount that Mabel can leave tax-free is back down to \$5+ million, not the \$7 million she had going into her remarriage.

7. **Portability applies for gift tax purposes, too: Code Section 2505(a)(1)** provides that the applicable credit amount includes the DSUEA, so that amount will also be included in the calculation of the gift tax exemption amount. This means that if the widow decides to marry the millionaire next door, she should consider using her DSUEA with gifts to her kids before the wedding day, so that she does not lose it if her new husband predeceases her. (This is a good idea anyway in case the basic exclusion amount goes down).
8. **Portability does not apply for GST tax purposes:** This (among other reasons) is why it's still a good idea to divide up a wealthy couple's assets in estate planning if they want to take advantage of a generation-skipping design.
9. **Portability has been made "permanent" and will not sunset on its own without Congressional action to remove it.**
10. One interesting feature of portability is that **there appears to be no limit to the number of times a surviving spouse can use his or her predeceased spouse's DSUEA for gift tax purposes:** Although this does appear to be the case, there is a recapture trap that appears to exist in the law . . .
11. Without a credit shelter trust, with full use of portability, **all appreciation in all assets of the couple will be taxed at the second spouse's death.** However, there is a full basis step up.
12. **Tennessee doesn't have portability:** Non-use of Tennessee's soon-to-disappear exemption at the first death could cost a couple a significant inheritance tax if both of them die before 2016; moreover, it's a real shame if the first spouse dies with an estate plan without a Tennessee GAP Trust, and the surviving spouse lives to 2016, because all inheritance tax might be eliminated.

### III. ESTATE PLANNING IN THE CURRENT TAX ENVIRONMENT:

#### A. Let's review the A/B Plan . . .

1. In Tennessee the A/B Plan directs the lesser of the Tennessee tax-free amount (currently \$5,000,000) and the federal tax-free amount (\$5,430,000) to the Family Trust, or the credit-shelter trust, and the amount over the tax-free amount to the Marital Trust.
2. By sending the first spouse-to-die's tax-free amount to the Family Trust, married couples make sure to utilize the tax-free amount of the first spouse

to die, allowing the couple to maximize their tax savings. Without such planning, the first spouse-to-die's tax-free amount would be wasted.

3. For the amount held in the Marital Trust, the personal representative may elect to take a marital deduction to defer any death taxes until the second spouse dies, giving time for the surviving spouse to spend down or gift away her taxable assets before she dies.
4. The assets in the Family Trust receive a step up in basis at the date of the first spouse's death, but the assets do not receive a second step up in basis at the death of the second spouse. However, the appreciation on such assets is not includible in the second surviving spouse's estate; therefore, both the assets and the appreciation on such assets held in the Family Trust escape death taxes.

**B. Doesn't Portability offer some of those benefits? What are the benefits of Portability Planning . . .**

1. **Simplicity:** The main advantage to portability is simplicity. For couples that wish to keep their planning simple, they may now continue to own their assets jointly with the right of survivorship, name each other as beneficiary, make assets payable on death to each other, and use "I Love You Wills" without losing the benefit of the first spouse-to-die's estate tax exemption. The surviving spouse can "simply" file a federal estate tax return (Form 706), thereby electing to port the first spouse-to-die's unused exemption.
2. **Additional basis step-up:** The primary tax benefit to portability is that assets passing to the surviving spouse will receive another step-up in basis at the surviving spouse's death.
3. **Use with depreciating assets:** If the decedent's estate contains assets that likely will depreciate in value, then passing those assets to the surviving spouse may be preferable to using them to fund a credit shelter trust.
4. **Retirement accounts:** With portability, the surviving spouse can avoid the choice between maximizing estate tax benefits and maximizing income tax benefits.
5. **Residence:** A residence, particularly the primary residence, is another asset that may be a poor candidate for use to fund a credit shelter trust.

**C. Before you scrap the A/B Plan, let's look at the **benefits of Credit Shelter Trust Planning:****

1. **All growth and income sheltered:** The DSUE amount is not indexed for inflation. A credit shelter trust creates the opportunity for future appreciation and income to increase the value of assets outside the estate.
2. **Generation-Skipping Tax Planning:** There is no portability of GST exemption. With a credit shelter trust, a couple can essentially double the amount that will pass to their descendants.
3. **Tennessee Tax Planning:** – At least through 2015, the only way to maximize a couple’s Tennessee tax free amounts is to continue using planning involving credit shelter trusts.
4. **Impact of remarriage:** A risk of portability is that the surviving spouse will lose some or all of the DSUE amount if he or she remarries and the second spouse also predeceases him or her.
5. **Protective benefits of a trust:** These include spendthrift protections (i.e., protection against a surviving spouse’s creditors); protection in the case of remarriage of the surviving spouse. With a **blended family situation**, the credit shelter trust can also insure the passage of assets to the first spouse-to-die’s children at the death of the second spouse.
6. **Avoiding potential audit issues:** Portability extends the time for the IRS to review the valuation of the first spouse-to-die’s assets; thus, if the credit shelter trust is funded with non-publicly traded assets that are difficult to value, the estate avoids the risk of audit at the second spouse’s death.
7. **Control over family business:** Credit shelter trusts allow family to isolate voting control of closely-held business interests, or divide a controlling interest so voting control does not end up in the hands of the surviving spouse.

**D. Planning options under current law:**

1. In Tennessee, we are still using credit shelter GAP plans for wealthy, elderly clients.
2. **Disclaimer Plan:** The estate plan leaves the assets of the first spouse to die outright or in a marital trust for the surviving spouse, but provides that if the surviving spouse disclaims, the assets will pass to a credit shelter trust. With portability, this type of plan has lost some of its purpose; plus, the surviving spouse often won’t disclaim.
3. **Single Fund Marital Trust:** We call this the “One-Lung” Trust; it provides a couple with a simpler credit shelter plan; only the surviving spouse benefits during her lifetime.

4. **Community Property Trusts:** Community property is an ancient property ownership system derived from Spanish civil law that vests each spouse with a one-half interest in the couple's community property. Community property may be subject to creditor claims of either spouse and may be divided other than equally in the case of divorce. Upon the first death, each community property asset is divided equally between the surviving spouse and the deceased spouse's estate. Also at the death of the first member of the community, the entire value (not just half) of each community asset receives a new basis equal, generally, to the fair market value of the asset as of the date of death.

Tennessee enacted legislation a few years ago that allows for elective community property treatment of assets a couple contributes to a Community Property Trust (CPT). The unspoken purpose of the legislation was to permit full basis "step-up" for appreciated assets. There are many considerations to be made before using these trusts, so be careful ...

5. **Tenants By the Entirety (TBE) Trusts:** Tennessee's new marital asset protection trusts might be the perfect way for a married couple to spice up their estate planning and to renew their vow to plan well. Section 6 of Public Chapter Number 829 (2014) creates a new section in the Creditor's Claims portion of the Tennessee Trust Code (TCA §35-15-510), providing that "[a]ny property of a husband and wife ... conveyed [beginning July 1, 2014] as tenants by the entirety to the trustee or trustees of one (1) or more trusts ... shall have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety." There are five requirements for the protection to be available: (1) the spouses remain married; (2) the property or its proceeds remain in the trust(s); (3) the trust(s) is (are), while both settlors are living, revocable by either settlor or both settlors acting together; (4) both spouses are permissible current beneficiaries of the trust(s) while living; and (5) the trust instrument, deed or other instrument of conveyance provides that this section applies to the property or its proceeds.
6. However, a **TBE Trust cannot be married to a Community Property Trust:** Tenn. Code Ann. Section 35-17-106(a) specifically provides that the separate creditors of one spouse may reach that spouse's one-half interest in Community Property Trust assets, a result inconsistent with the rules for TBE Trusts. Married couple must choose between TBE Trust treatment and elective Community Property Trust treatment.
7. **Irrevocable Life Insurance Trusts (ILITs):** Clients with large life insurance policies or who wished to purchase large life insurance policies

often set up irrevocable trusts to shelter the value of such policies from inclusion in their gross estates upon their deaths. ILITs provided the insured's family with death tax free (if the insurance policy had been transferred to the ILIT at least three years before his death) and income tax free funds to insure liquidity to pay death taxes and/or to provide for the insured's family during the surviving spouse's lifetime and/or the children's lifetimes.

**Do we still need the ILIT?** While the tax advantage is still there, it may have become somewhat irrelevant by the increased death tax exemption amounts; however, the asset protection that ILITs may offer is still very much a plus to this planning tool. By leaving life insurance proceeds to a lifetime trust for a spouse and/or children, such proceeds are protected from the beneficiaries' creditors and spouses (including potential ex-spouses).

8. Is it hard to **terminate or modify an Irrevocable Trust**? Under the Uniform Trust Code, we have a variety of options to modify or terminate an old, out-of-date irrevocable trust; some of the options are fairly simple but require agreement among the Trustee(s) and/or beneficiaries, and some are much more complicated, but may provide a way to modify even with uncooperative beneficiaries.
9. **Retirement Account Trusts (RATs):** While portability has allowed spouses the freedom to choose maximizing income tax savings over estate tax savings, meaning that they can continue to name each other as the outright beneficiary of their retirement accounts, RATs maintain their importance in blended family situations as well as with non-spouse beneficiaries.

Several things happen when you name an individual outright as the beneficiary of a retirement account: (i) the spouse has the option to roll over the account to her retirement account, which means that her beneficiaries will become the new beneficiaries of the funds – this is okay if the account owner's children and the spouse's children are the same, but it may not be okay if the children are not the spouse's children; (ii) the spouse and non-spouse beneficiaries have the option to receive the retirement account as an inherited IRA; each beneficiary of an inherited IRA must take required minimum distributions; however, such distributions are stretched over each beneficiary's lifetime – again, the beneficiary of an inherited IRA names his or her own beneficiaries of the inherited IRA; and (iii) the spouse and non-spouse beneficiaries have the option to receive the retirement account as a lump sum, which will generate a significant tax consequence and allow the beneficiary to use the funds immediately in any manner that they choose.

In light of recent case law and the way Tennessee law is currently written, an inherited IRA does not receive the same asset protection as the retirement account receives in the hands of the original owner or the spouse who elects to roll the fund over. **The benefits of RATs are** to insure that the balance of the retirement accounts (after the surviving spouse dies) passes for the benefit of the original owner's children, in a blended family situation, or for the benefit of the original owner's grandchildren rather than the child's spouse and to insure continued asset protection for such accounts even in the hands of the non-spouse beneficiaries.

10. **Gun Trusts:** There are numerous regulations related to the ownership of guns, and such regulations can have a substantial effect on the estates of a disabled or deceased gun owner as well as on those named to serve in fiduciary roles under the gun owner's Powers of Attorney and Will or revocable living Trust. In light of such regulations and their impact on a person's estate, gun ownership and the use of Gun Trusts should be considered in the estate planning process. **What is a Gun Trust?** Gun trusts vary in how they operate depending on the drafter, but the general idea is as follows: A gun owner, or prospective gun owner, will sign a gun trust agreement creating the trust. The gun owner will transfer his gun or guns into the trust, and/or purchase them as the trustee of the trust. There can be several different types of gun trusts, depending on a client's needs and state trust laws. Anything ranging from a simple trust to pass along an owner's guns once they are gone to complex generation-spanning trusts can be drafted. When attorneys first created a trust specifically for guns, they figured out that a trust with special provisions unique to the gun trust would avoid some of the more restrictive requirements for NFA guns (Title II weapons) while also providing substantial benefits for dealing with death, inheritance, and incapacity for all firearms. Gun trusts can be set up to provide benefits to the beneficiary, while allowing the trustee(s) to possess and use the guns.

#### IV. TRENDING ISSUES

- A. **Older Clients and Driving:** One issue concerning many families is whether or not Mom and/or Dad should still be driving and whether the kids could be personally liable if the elderly parent has an accident. It may be a good idea to check the auto liability insurance policy for the parents. If a doctor has advised the parent not to drive, the policy may not cover any accident involving the parent. Tennessee has not yet enacted legislation to impose additional requirements for older adults when they renew their driver's license. Some indications that it is time to talk to Mom and/or Dad about their driving include the occurrence of scratches, dings and fender benders, traffic violations and getting lost. Physical illness or decline, cognitive impairment, vision and hearing loss and the use of medications with certain side effects should also signal that

driving is no longer safe. Crucial Conversations for Older Adults: Driving, Monica J. Franklin, *Tennessee Bar Journal*, Oct. 2014.

- B. Whether to Begin Drawing Social Security at age 62, 66 or 70:** The decision about whether to begin drawing Social Security early or wait until full retirement age or later is one that is of great concern to many individuals. Folks are often working longer and “retiring” later. Sometimes this decision is financial, such as whether the individual will have enough income to sustain their standard of living if they retire early or if they will have to keep working until they reach age 65 or even 70. Often the decision involves the individual wanting to stay active, both mentally and physically. A worker can begin collecting Social Security benefits as early as age 62 or as late as age 70 or at any age in between. If a client begins drawing social security before full retirement age, their benefits will be permanently reduced from what you would receive at full retirement age. In addition, if a person begins collecting Social Security benefits early (before full retirement age) but continue to work and earn income, their Social Security benefits may be further reduced as a result of the excess earnings tax. This decision is one that involves careful consideration of all of the factors involved.
- C. Executor Duties and Compensation:** There are a number of duties an executor of an estate is responsible for completing. Executors are entitled to reasonable compensation for their time and efforts on behalf of the estate. The amount of the executor’s compensation may be adjusted up or down based upon a number of factors. These factors include: the total value of the estate; the complexity of the estate; the time spent by the executor in the discharge of their duties; the skill displayed by the executor in the administration of the estate; the degree of care exercised by the executor; and the results of the administration and any investments made by the executor. The preparation of accounts, income tax returns, management of investments, and other estate administration are the duty of the executor. In appropriate cases, these functions can be delegated to qualified experts (accountants, lawyers, property managers, etc.) and the cost of such experts will be paid in addition to the executor’s compensation.
- D. Identity Theft:** Identity theft has become a significant problem, particularly in the IRS. Recently, five men were indicted by a federal grand jury in Erie, Pennsylvania, on charges of conspiracy to commit wire fraud and aggravated identity theft in a scheme in which the IRS paid out approximately \$10 million in tax refunds. The five men allegedly submitted fraudulent federal tax returns in the names of individuals whose identities the conspirators stole. They then obtained false driver’s licenses and Social Security cards and used those to open bank accounts in Washington, DC, Michigan, New Jersey, Pennsylvania and other states. The indictment alleges that approximately \$21 million in fraudulent tax refunds was sought from the IRS, causing the IRS to pay approximately \$10 million in fraudulent refunds. According to reports, the men spent some of the ill-gotten gains, and a portion of the stolen tax refunds was reportedly sent to Nigeria. (!)



- E. Basis Step-Up Planning in Administering Trusts:** The increased applicable exclusion and GST exemption will lead to other new, and seemingly radical, thinking. The higher exclusion increases the number of situations where a family member who is an existing beneficiary of a trust will have a taxable estate significantly less than the applicable exclusion. If the trust has appreciated assets, it may be desirable to distribute those assets to the primary beneficiary of the trust, in order to obtain a basis step-up for the assets at the beneficiary's death. This raises a whole host of fiduciary issues.

## **V. UPDATE ON SAME-SEX MARRIAGE IN ESTATE PLANNING:**

- A. U.S. Supreme Court:** As most of you know, in the case of *E.S. Windsor* (2013-2 USTC ¶150,400), decided in June of 2013, the U.S. Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA) as unconstitutional. That Section defined "marriage" as limited to the union of one man and one woman under federal law:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The result of the Supreme Court's opinion in *Windsor* is that same-sex couples who are married in a state that recognizes same-sex marriages are now recognized as married under federal laws and regulations, whether the couples reside in a state in which their marriage is so recognized or not. The requirement is that their marriage must be celebrated or solemnized in a state that recognizes their union. However, the Supremes confined their 5-4 holding to "lawful marriages," which means that registered domestic partnerships, civil unions and similar relationships that may be recognized in any given jurisdiction will probably not be considered to be marital relationships under federal law.

### **B. What does this mean . . . federally?**

1. **Cautionary points:** The comments below refer to federal "benefits" and rules and regulations that apply only to those individuals who are in a **married** same-sex relationship; a civil union or registered domestic partnership does not carry the same status. (The Social Security Administration has apparently encouraged couples in such relationships to go ahead and apply for benefits if they believe they would otherwise be eligible.)

Many federal programs are available to couples who are married in a state which recognizes same-sex marriage under the so-called “Place of Celebration” or POC rule, regardless of their state of residence; whereas some programs require not only a legal marriage celebration but also that the applicants reside in a state that recognizes their union (pursuant to the “Place of Domicile” or POD rule).

2. **Bankruptcy:** The Department of Justice announced in a memorandum issued on February 10, 2014, by Attorney General Eric Holder, that all laws, regulations, and policies enforced, administered or interpreted by the Department of Justice will recognize the marriages of same-sex couples regardless of their domicile. This specifically applies to bankruptcy proceedings enabling same-sex married couples to file jointly for bankruptcy regardless of their domicile.
3. **Federal Employees:** The Office of Personnel Management agreed to extend the following benefits to all same-sex spouses of federal annuitants and employees, regardless of their domicile: retirement and flexible spending accounts, long-term care insurance, health insurance (including dental and vision insurance), and life insurance. Retired federal employees have been afforded two years in which to elect changes to benefits for their newly-recognized marital status.
4. **Department of Labor:** The Family Medical Leave Act provisions related to the availability of leave to care for a spouse will be applied to same-sex couples based on the POD rule, according to the Department of Labor. In contrast, however, the Department of Labor has issued guidance that ERISA and HIPAA benefits, when such benefits are offered to heterosexual couples, must be afforded to same-sex couples as well based on the POC rule, not the POD rule. Go figure.
5. **FAFSA:** The application under the Federal Student Aid (FAFSA) program will be processed for same-sex couples according to the Department of Education, regardless of where the couples resides (under the POC rule).
6. **Immigration:** The Department of State and the Department of Homeland Security have announced they are using the POC rule in considering marriages in connection with the issuance of visas and awarding of immigration benefits. Thus, US citizens or permanent residents may sponsor a same-sex spouse for obtaining a green card if all other requirements are met.
7. **Medicaid:** The federal Medicaid program is administered in a partnership between the federal government and the various states. The Department

of Health and Human Services has tried to encourage all states to use the POC rule in administering the Medicaid program; it is still permissible for a state that does not recognize same-sex marriage to administer the Medicaid programs under the POD rule. Furthermore, Medicaid eligibility is sometimes determined using SSI (Social Security Supplemental Income) rules; thus, the Social Security Administration will be the final arbiter in determining what rule will be used to determine Medicaid eligibility. Guidance has not yet been issued from Social Security on this point.

8. **Medicare Spousal Protections:** The federal government is now processing claims for Medicare benefits for surviving same-sex spouses based on the POD rule. And according to the latest update on Medicare Advantage Plans, a same-sex spouse must be given access to equal coverage for care in a nursing home where his or her partner lives if the partner has a Medicare Advantage plan.
9. **Military Spousal Benefits:** According to the Department of Defense, the POC rule will be applied to determine benefits available to same-sex spouses, and leave is granted for service members to travel more than 100 miles from a place where they live in order to get married in a same-sex jurisdiction. The Survivor Benefit Program benefits are available on the POC rule, and the Federal Retirement Thrift Investment Board is using the POC rule to confirm whether a participant is married. National Guard units are all now offering benefits to same-sex spouses.
10. **Veterans' Spousal Benefits:** The Department of Justice, according to the Attorney General's letter to Congress, will not enforce Title 38, which defines marriage as strictly between a man and a woman. However, the Veterans Administration has responded that it will continue to enforce Title 38 until the VA is ordered to stop doing so.
11. **Social Security Spousal and Family Protections:** The Social Security Administration is processing same-sex spousal claims based on the POD rule, but the issues can be quite complicated.

#### **C. What about on the State level?**

1. **A Little History:** The first state to decide that same-sex couples have the constitutional right to marry was Massachusetts. In *Goodridge v. Dept. of Public Health*, 798 N.E.2d 942 (2003), the Massachusetts Supreme Judicial Court held that the state could not “deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.”

2. **Section 2 of DOMA:** The U.S. Supreme Court in the *Windsor* case did not address the issue of Section 2 of DOMA, which provides that the states are not required to give effect to same-sex marriages performed in other states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.

3. **States that Recognize Same-Sex Marriage:** The following 36 states, along with the District of Columbia, allow same-sex marriage either through state law or court decisions: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and D.C.

Our home state of Tennessee amended the state Constitution in 2006, providing that marriage between one man and one woman is the sole valid marital contract in this state. (Tennessee Constitution, Article XI, Section 18.) However, in a recent decision Judge Aleta Trauger (United States District Court for the Middle District of Tennessee) required Tennessee to recognize the legal same-sex marriages of three couples who wed in other states pending a final decision on the constitutionality of Tennessee's ban on same-sex marriage.

4. **States that Permit Civil Unions:** Four states — Colorado, Hawaii, Illinois and New Jersey — provide state-level spousal rights to same-sex couples through the concept of civil unions. In Colorado, Hawaii and Illinois, civil unions are recognized along with same-sex marriages. The state court decision in New Jersey that recognizes same-sex marriage may have an effect on New Jersey's civil unions.
5. **States that Honor Domestic Partnerships:** Nevada, Oregon and Washington recognize domestic partnerships, although effective June 30, 2014, domestic partnerships in Washington will be limited to couples who are 62 years of age or older (!?). In Hawaii, Maine, Wisconsin and D.C., some state-level spousal rights are provided to unmarried persons in domestic partnerships.

6. **Divorce is a Particular Difficulty for Same-Sex Couples:** The main problem stems from the fact that there is typically little to no residency requirement for obtaining a same-sex marriage, but there is typically a significant residency requirement for obtaining a divorce in most jurisdictions. The difficulties in obtaining a divorce for a same-sex couple go beyond the scope of this presentation, but one beneficial site (though not entirely impeccable) is:

<http://www.legalmatch.com/law-library/article/same-sex-divorce.html>.

**D. What effect does this have on taxes and estate planning?**

1. **Income Taxes: IRS REVENUE RULING 2013-17:** This Revenue Ruling tells us that, for federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” now include an individual married to a person of the same sex. The persons must be lawfully married under the law of any state in the U.S., as well as any domestic or foreign jurisdiction with legal authority to sanction marriage. This definition will apply even if the same-sex couple does not live in a jurisdiction that recognizes same-sex marriage. However, the Ruling is clear that individuals who are not married but who have entered into a registered domestic partnership, civil union or other similar formal relationship recognized under state law will not be considered to be married for federal tax purposes. Thus, the IRS Ruling adopts the “Place of Celebration” or POC rule.
2. **Gift and Estate Tax Opportunities:** The federal gift tax law permits married couples to make gifts to each other without tax consequences during their lifetimes, and married couples have a special election for gifting called “gift splitting” which allows them to treat all gifts made to third parties as being made equally by both of them. At the death of one spouse, he or she can leave unlimited funds to the surviving spouse without immediate federal estate tax (although when the survivor dies, his or her estate in excess of the exemption, which is now \$5,430,000 **per person**, will be subject to federal estate tax).

Moreover, if one spouse does not use his or her \$5.43 million exemption, the surviving spouse can elect to carry over the unused balance and use it when he or she later dies - “portability.”

Until the Supreme Court’s decision in *Windsor*, same-sex couples had none of the above advantages. Now, the only issue is whether that decision will be applied to same-sex spouses who do not live in states that do not recognize same-sex marriage. (New York was the state of residence of Edith Windsor and her spouse, and that state does recognize same-sex marriage.) Thus, greater amounts may be transferred both during lifetime and at death for same-sex couples. Estate plans for same-

sex couples should be reviewed with these new advantages in mind, regardless of their state of residence.

3. **Marriage Planning:** For those clients who are not yet married, care must be taken to analyze the best state to choose in which to be married. Not all of the 32 states that recognize same-sex marriage currently offer same-sex divorce without either a significant residency period, or some other restrictions or limitations. Also, the decision of whether to execute a pre-marital agreement must be addressed, particularly when there is a disparity of wealth between the partners, when children are involved, when prior divorces have been experienced by one or both partners, etc. Finally, there are significant income tax advantages and disadvantages that will be encountered, depending upon the current and future relative earning capacities of the partners.
4. **Retirement Account Planning:** All retirement accounts and their beneficiary designations must be reviewed for same-sex couples to be sure that they have considered any newly-available joint and survivor annuity elections may be available and how to take advantage of the opportunities that were not possible before the DOMA decision.
5. **Life Insurance Options:** Same-sex couples may have previously purchased life insurance policies to provide liquidity with which to pay anticipated death taxes, and those policies may not now be necessary to maintain. If necessary, “second-to-die” policies may need to be considered to replace the prior policies.
6. **Amended Tax Returns:** Contact should be made with the accountants for previously-married same-sex couples, to examine whether the filing of amended federal estate, gift and income tax (and perhaps state) returns would be appropriate.
7. **Immigration Issues:** Until the *Windsor* decision, non-citizen spouses did not qualify for citizenship or permanent residency on the basis of their marriage to a spouse of the same sex who was a U.S. citizen. Now, however, such immigration issues need to be considered, although it is not always the right decision to obtain U.S. citizenship for numerous tax and non-tax reasons.

## IX: WRAPPING UP

After the client signs the documents, it is advisable to have a follow-up letter that directs the client as to the disposition of those documents, the importance of safekeeping, and the fact that the client is responsible for review of the documents and consulting the attorney regarding changes in the law.

The following is a sample letter to clients to conclude the representation:

Mr. John Doe  
Main Street USA  
Any City, TN 55555

Re: Estate Planning Documents

Dear Mr. Doe:

Enclosed please find the following of your documents:

1. The original and three (3) copies of your Durable General Power of Attorney;
2. The original and five (5) copies of your Durable Power of Attorney for Healthcare;
3. The original and five (5) copies of your Living Will; and
4. The original and three (3) copies of your Last Will and Testament.

Please place your original documents in a safe deposit box or some other sort of fireproof box. I also suggest that you keep one copy of each document with your important personal papers at home. Also, I recommend that you note on each copy where the original is located. You will need to give copies of your Durable Power of Attorney for Healthcare and Living Will to each person named as attorney-in-fact or successor attorney-in-fact in your Durable Power of Attorney for Healthcare. Please give copies to your primary care physician and any other physician that you have as well.

Also, I recommend that you review the documents annually to determine whether or not they need to be updated. For example, if one of your children dies, marries, gets divorced, has a child or has a financial hardship, you may want to update your documents. Additionally, you should be mindful that the estate tax laws are subject to change. Please give me a call each year so that we can determine if you need to come in to update your documents due to changes in the law. Please do not rely on our office to advise you any time the law changes.

If you have any questions or if you need anything further, please do not hesitate to call. I have very much enjoyed working with you.

Best regards,

LEE GULL

Enclosures

**NOTE: All forms used in these materials are included as samples only. Neither the speakers nor the Tennessee Bar Association warrant the efficacy of these forms for any given client. Any user of these forms must determine the applicability to their particular client situation.**