

Estate Planning Timetable

Name of Client: Moore Money and Lotta Money

File No.: ICE09/00009

Action to be Taken	Comments	Date Completed
<ul style="list-style-type: none"> <li>• <b>Open File &amp; Begin Universal Data Base</b> Sufficient To Mail Letter.</li> </ul>		
<ul style="list-style-type: none"> <li>• <b>Schedule An Appointment</b> And Tell Client To Expect An Engagement Letter And A Short Letter Advising Client Of What To Do In Preparation For Meeting.</li> </ul>		
<ul style="list-style-type: none"> <li>• Prepare &amp; Send <b>1st Information Letter to Client.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• Prepare &amp; Send <b>Engagement Letter.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• If Client Requests It, Send "Estate Planning Techniques Letter."</li> </ul>		
<ul style="list-style-type: none"> <li>• Date Client has Given Us Enough Information to Complete Universal Data Base.</li> </ul>		
<ul style="list-style-type: none"> <li>• Complete Universal Data Base Prior To Appointment. Call To Get Any Needed Information.</li> </ul>		
<ul style="list-style-type: none"> <li>• Date Client has Given Us Enough Information to Begin Fiduciary Data Base.</li> </ul>		
<ul style="list-style-type: none"> <li>• Before Appointment Date, <b>Begin Fiduciary Data Base</b> By Filling In Information Obtained in Response to 1st Information Letter.</li> </ul>		
<ul style="list-style-type: none"> <li>• Date Client has Given Us Enough Information to Complete Asset Data Base.</li> </ul>		
<ul style="list-style-type: none"> <li>• Before Appointment Date, Complete Asset Data Base By Reference To Documents Clients Have Sent. Call If Necessary To Get Documents Prior To Appointment. <b>Print Pro Forma Financial Statement.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• First Appointment Date.</li> </ul>		

<ul style="list-style-type: none"> <li>• Immediately After Appointment, Complete Fiduciary Data Base.</li> </ul>		
<ul style="list-style-type: none"> <li>• *Complete EP Data Base.</li> </ul>		
<ul style="list-style-type: none"> <li>• When EP Data Base Is Complete, <b>Prepare Lists and Cover Letter to Client.</b></li> <li>• (1) List of Basic Documents in Estate Plan.</li> <li>• (2) List of Fiduciaries.</li> <li>• (3) List of Family.</li> <li>• (4) Cover Letter.</li> </ul>		
<ul style="list-style-type: none"> <li>• <b>Mail Lists and Cover Letter to Client.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• Make Any Changes Requested by Client After Lists Have Been Delivered.</li> </ul>		
<ul style="list-style-type: none"> <li>• Prepare—</li> <li>• (1) All Ancillary Documents, Powers of Attorney, Guardianship Directives, Directive to Physicians, etc., as Indicated in List.</li> <li>• (2) *Wills</li> <li>• (3) *Trusts</li> <li>• (4) Cover Letter</li> </ul>		
<ul style="list-style-type: none"> <li>• <b>Mail all Documents to Client.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• Call Client and <b>Schedule an Appointment to Sign.</b></li> </ul>		
<ul style="list-style-type: none"> <li>• Call Client and make sure there are no changes to make.</li> </ul>		
<ul style="list-style-type: none"> <li>• Document Execution Date:</li> </ul>		
<ul style="list-style-type: none"> <li>• Make Sure Engagement Letter is Signed.</li> </ul>		
<ul style="list-style-type: none"> <li>• Have Client Sign Ancillary Documents Supervised by Paralegal.</li> </ul>		
<ul style="list-style-type: none"> <li>• Make sure POA is initialed as to Scope of Power.</li> </ul>		
<ul style="list-style-type: none"> <li>• *Have Client Sign Trust, and then Will under Supervision of an Atty.</li> </ul>		

• <b>Review all Signatures</b> , Notarizations, and Initialing, Twice!		
• Record Guardianship Declarations.		
• Mail Anatomical Gift Declaration.		
• Prepare Beneficiary Designations and Letters to Institutions, if Requested In Writing By Client.		
• Prepare and <b>Mail Exit Letter</b> .		

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
2100 BURNETT PLAZA  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102-6898  
817/877-2800

Thursday, March 11, 1999

NOEL C. ICE  
ATTORNEY'S WEB SITE  
WWW.TRUSTSANDESTATES.NET

BOARD CERTIFIED ESTATE PLANNING AND PROBATE LAW  
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SECRETARY'S DIRECT DIAL  
(817) 878-2944

Our File No.  
ICE09/00009

**PLEASE READ VERY CAREFULLY**

CERTIFIED MAIL

RETURN RECEIPT NO.: dsfasdfsdf

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Estate Planning Disclosure and Engagement Letter\*

Dear Moore and Lotta:

Pursuant to firm policy, **and because I also think it is in your best interest**, I am sending you this engagement letter. The principal reason for the letter is the need for full disclosure in an area as sensitive as estate planning, particularly where I may be representing a husband and wife.

This letter is designed to set forth the terms of our engagement to perform estate planning for you. This engagement letter is designed to benefit us both. Among other things, it sets forth the scope of our mutual involvement in the estate planning process, so that neither of us will be undertaking obligations to each other that we did not intend to assume.

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\*I want to give credit to **Larry Gibbs** of San Antonio for a number of the ideas and a couple of the paragraphs in this engagement letter.

## SCOPE OF INVOLVEMENT AND TERMS OF ENGAGEMENT

When signed by you, this letter is a contract. Further, even if this letter is not signed — through oversight, or because it is misplaced, or other reason— you should understand that unless we otherwise agree in writing, any work I do for you will have to be subject to the terms set forth in this letter. The following is a list of what you and I agree to do and what we do not agree to do.

**1. Scope of Engagement.** The Firm is hereby engaged by you to provide advice and consultation, as and when specifically requested, regarding legal matters associated with estate planning. and specifically with regard to the drafting of an irrevocable trust designed to be able to invest in life insurance and to receive contributions that will qualify, within applicable limits, for the annual gift tax exclusion. Our engagement does not guaranty that the fiduciary can properly invest in life insurance, or that contributions to the trust will qualify for the annual exclusion, or that the assets in the trust will not be includable in your estate for estate tax purposes, given the inherent complexity of a trust of this nature, the uncertainties of the tax laws, and the fact that the IRS is not overly sympathetic towards this technique. Nevertheless, I will take such steps as I believe prudent and reasonable under the circumstances to achieve the desired ends, taking into account all of your intentions as expressed to me and the degree of risk you are willing to assume.

**2. Term of Engagement.** This contract may be terminated by either Attorney or Client at any time, without penalty. There is no implied representation that we can or will provide any further service beyond the engagement period and scope of service without first negotiating a new contract in writing. However, this agreement will control all future work except to the extent we have otherwise agreed in writing. As a general rule, the “engagement period” will end at the latest when the estate planning documents you ask us to draft have been signed, and, if applicable and if later, when any other undertaking we have specifically agreed to perform (e.g., beneficiary designation work, funding of trusts, etc.) has been completed to your satisfaction. (It is my general practice to send a letter signaling the completion of the initial undertaking and end of the engagement period.)

**3. Fees.** Unless otherwise agreed, all services will be billed at an hourly rate. Attorney time for a partner is generally between \$200 and \$240 an hour, or less. My hourly rate usually does not exceed \$225 an hour. Associate rates are less than partners, and generally range between \$100 and \$175 an hour, depending on the experience level of the associate and the nature of the work being done. Paralegal time is billed at approximately \$80 an hour. Ordinarily fees and expenses are billed monthly and are due within 30 days of receipt.

I want to emphasize that these rates vary in the discretion of the billing attorney, with the intent that you not be charged more than a reasonable fee for the services received. It is unusual for the costs of implementing a basic estate plan to exceed \$10,000, and a basic estate plan for a husband and wife with a taxable estate will often be under \$3,500, depending on the amount of work requested. My fee for an irrevocable annual withdrawal trust will usually run between \$1700 and \$2500. In order that you will have some rough idea of what various estate planning documents costs, and the amount of work involved, I am attaching a very approximate fee schedule. I am doing this in an attempt to be helpful, but at the risk that you will think estate planning documents are a commodity, which they are not. Costs, travel, delivery, and other reimbursable expenses will be billed separately as accrued.

**4. Coordinating Nonprobate Assets.** Nonprobate assets are assets that do not pass under a Will. Examples would include life insurance, joint tenancy bank accounts, IRAs and deferred compensation arrangements (such as a benefit under a qualified plan).

Planning for these assets may be incidental in some cases, and of primary importance in others. Life insurance proceeds are generally includible in the estate of the owner and insured no matter who is the beneficiary (unless special measures are undertaken to divest the insured of all incidents of ownership during life). Since the proceeds are includible in the estate, they are subject to estate tax. The same is true of IRA and qualified plan benefits. And if the benefits are community property, a spouse will have an interest that must also be considered and coordinated. The proper coordination of nonprobate assets can be particularly important in order to take full advantage of the marital deduction and to shelter the unified credit.<sup>1</sup>

Unfortunately, the proper coordination of nonprobate assets can be the most expensive part of an estate plan, and many clients are not willing to pay a lawyer to make sure that all of the beneficiary designations are properly coordinated and that all changes have been properly recorded and accepted by the company or other institution providing the benefits. Further, we do not usually know in advance how much time will be required. In the case of IRA and employee benefit plans especially, we are not even sure whether a beneficiary designation will be effective, even if accepted, and this is particularly true with respect to the community property interest of a nonparticipant spouse. The tax effects attendant to a distribution under an IRA or employee benefit plan are often unsettled and uncertain, under the present state of the law, and again, this is particularly true with respect to the community property interest of a nonparticipant spouse. For these reasons and others we are forced to limit the scope of our involvement, and we cannot guaranty results.

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<sup>1</sup>The exemption equivalent of the Unified Credit can be as much as \$600,000 for each taxpayer under present law, if no adjusted taxable gifts have been made during lifetime. However, this amount is subject to change at any time by Congress and can also be reduced by lifetime gifts and tax elections made in the administration of an estate.

We will **not** attempt to coordinate the beneficiary of your nonprobate assets with your overall estate plan, to the extent set forth below, unless you give us the information set forth below, and request such assistance in writing. However, even if you request our help, **this is one area where the scope of our involvement is definitely limited** and in which we cannot guaranty results. If you either do not get written confirmation from the insurance company or other institution that the change of beneficiary with respect to a particular policy or benefit has been made, or if you do not receive a copy of our letter attempting to make the change, it may be that the change has not been made, and, unless we hear from you in writing to the contrary, we will assume in that case that you do not wish for us to pursue the matter further on your behalf.

Because nonprobate assets can be an important part of the estate, our preference, but only if you request it in writing, is to handle these items as follows:

**a. Financial Accounts.** If you will provide us with a copy of the last monthly or other periodic statement from each institution in which you have an account (bank, savings and loan, brokerage firm, etc.) we will prepare a form letter for you to sign instructing the institution as to the preferred disposition of the account at death.

**b. Life Insurance.** If you will provide us with (i) a copy of each life insurance policy on your life, (ii) a copy of the last statement from the company showing current death benefits, cash values, etc., and (iii) a current beneficiary designation form, we will prepare the beneficiary designation for you to sign.

**c. IRAs and Employee Benefits.** If you will provide us with (i) a copy of the underlying document establishing each IRA or employee benefit plan in which you have an interest, (ii) a copy of the last statement or valuation showing your current benefit and (iii) a current beneficiary designation form, we will prepare the beneficiary designation for you to sign.

**In each case (a), (b) and (c),** if you request it in writing, we may agree to forward that letter or beneficiary designation to the institution on your behalf, via certified mail, under our letterhead. If you do not receive a copy of such a letter, you should assume that we have not agreed to perform this service. Most beneficiary designation forms are woefully inadequate for proper estate planning, and so our practice is often (but not always) to prepare a form of our own and attach it to the company form. If you do not bring us an approved form, we will prepare our own form and submit it to the company, if you request. In either case, it is sometimes difficult to tell whether or not the company or institution has accepted the change. It can sometimes take hours of work and months of time to get these matters resolved satisfactorily, since large institutions often have the traditional mentality and resistance to change usually associated with large bureaucracies.

**5. Not All Contingencies Will Be Covered By Estate Plan.** Estate planning can be a time consuming and expensive process. No estate plan is bullet proof or fail safe. Few clients can afford to pay a lawyer to cover absolutely every contingency that could conceivably be addressed. There are practical limits. And yet, there is a foreseeable statistical likelihood that some clients or their beneficiaries will incur taxes or otherwise have their interests adversely affected because of circumstances, law, or language in a Will or trust. With the benefit of

hindsight or otherwise, it will often be true that such outcome could have been avoided by more elaborate or different planning. Because the variety of events that could affect your estate plan is virtually without limit, whereas the time and cost that can reasonably be expended to plan for such events is definitely limited, the scope of our involvement cannot be open ended, and we expressly do not undertake to cover every issue that could affect your estate plan. Our commitment is to produce the documents that you actually sign. We do not commit to go beyond that, even if it turns out later that it would have been better if more work was done.

**6. Who is Our Client/Use of Pronouns.** Unless otherwise clearly indicated by the context, the words "Attorney," "the Firm," and all first person pronouns ("I", "we", etc.) used in this letter, refer to Noel C. Ice, Cantey & Hanger, L.L.P., and to any person employed by or in partnership with any of them in the practice of law.

The term "Client" or "you" refers to Moore Money and Lotta Money, unless only one of you sign this engagement contract, in which case the term "Client" will refer solely to the person signing. We will assume no duty whatsoever to any other person or enterprise, nor any other member of your family, not identified as the Client above.

Unless otherwise clearly indicated by the context, the words "Attorney," "the Firm," and all first person pronouns ("I", "we", etc.) used in this letter, refer to Noel C. Ice, Cantey & Hanger, L.L.P., and to any person employed by or in partnership with any of them.

We will not disclose any information whatsoever to anyone other than you except as specifically permitted by you or impliedly authorized in order to fulfill representation. We reserve the right to refuse disclosure of confidential and privileged information under any condition or circumstances.

**7. Not a Third Party Beneficiary Contract.** Our engagement to do estate planning for you is not for the benefit of third parties and is not a third party beneficiary contract, in favor of your descendants, beneficiaries, or anyone else. We will be working for you alone.

**8. Projected Schedule and Needed Documents/Estate Planning Workbook.**

- I am enclosing an Estate Planning Workbook or Questionnaire. The primary purpose of the Workbook is to assist us in preparing your Will and in formulating an appropriate estate plan for you and your family. In addition, however, the facts garnered could be invaluable in organizing your personal, financial, and family affairs in such a way that your estate will be in order and can be properly administered.

The Workbook consists of several parts:

- (1) The first part asks for basic background information about the family tree.
- (2) The second part requests financial information. This may be the most burdensome part of the form, but if you have a current financial statement, most, but not all, of the questions may be answered by reference to it. Finances are a personal matter that you may feel uncomfortable in divulging; nevertheless, I cannot do an adequate job of planning for the disposition of your property unless I know of what it consists.

(3) The third part of the questionnaire concerns fiduciary appointments. Here you will find questions about whom you want to serve as your executor or trustee. In a sense, this may be the most important part of the form.

(4) The fourth (and last) part of the questionnaire asks questions about how you want to have your property pass at your death. I urge you to defer completing this part of the questionnaire until our next meeting, as I hope to be of assistance in advising you with respect to these issues. If, however, you have already developed a fixed concept concerning these matters, you may wish to give preliminary answers to as many of these questions as you feel comfortable in answering now, on the understanding that after we visit and are able to discuss some of the tax and practical issues involved, some of your answers may change. In any event, you should review these questions prior to our meeting, in order to get some idea of some of the options available.

(5) **In order to get started, I need to have you complete Parts I and III (family tree and fiduciary appointments) at a minimum.** Please complete these sections even if you don't complete Parts II and IV.

If you are uncertain as to any response, we can discuss it when we meet in person. After you have completed the Workbook, please return it to me for review in advance of our next meeting. If you have any questions, please feel free to call.

Unless an appointment has already been scheduled, my secretary will be calling you shortly to schedule a mutually convenient time for our next meeting.

• You will return the Estate Planning Workbook to me within 2 weeks of receipt. At that time, I recommend that you also deliver to me a copy of each of the following:

1. Each **life insurance** policy on your life, and a copy of the last summary statement of the life insurance account from the insurance company respecting any such policy. Such statements will ordinarily reflect the present owner of the policy on the books and records of the insurance company, whether the policy is term or not, and if not term, the cash value and the status of any outstanding loans.
2. A copy of each outstanding **beneficiary designation** for all life insurance, bank and brokerage accounts, IRA and qualified plan benefits, and all other arrangements paying death benefits that allow for the designation of a death beneficiary.
3. A copy of the last monthly or other **periodic statement from each institution in which you have an account** (bank, savings and loan, brokerage firm, etc.).
4. A copy of **any plan of deferred compensation** (profit sharing plan, 401(k) plan, defined benefit plan, nonqualified plan, etc.) in which you have an interest, and a copy of the **Summary Plan Description** and latest **Individual Benefit Statement**.

5. A copy of each **IRA** (including SEP-IRAs) in which you have an interest. There should be both an adoption agreement and a copy of the IRA itself, so be sure to send me both.
6. A copy of the **deeds** to any real estate that you own.
7. A copy of each **buy-sell agreement**, partnership or joint venture agreement to which you are a party.
8. A copy of all **prior gift tax returns** ever filed by you.
9. A copy of your **last two year's income tax returns**.
10. A copy of **any existing trusts** of which you are the beneficiary or grantor.
11. A copy of your **prior wills**.

If you have already given me the copies requested, then you may ignore this letter to that extent and send me what I do not have. When you feel sure that I have everything on the list, please call my secretary at 878-2944 and tell her.

- Upon return of the Estate Planning Workbook and upon receipt of the items listed above (if received timely), and after any conferences that we schedule, I will prepare drafts of the estate planning documents that we have agreed upon, and will mail them to you for your review. I will try to have the documents completed and mailed to you within 3 weeks after our last conference or the signing of this letter, or the date you supply me with the information requested above, whichever is later, but I cannot promise you an exact date, and you agree that if the work is not done timely, the sole remedy will be a rebate of the bill, if any, rather than liability for any other consequences.

**9. Duty to Read and Review Documents.** You will review the documents carefully and thoroughly and will call me with any changes to make within a few weeks of receipt. If you wish to schedule an appointment to discuss the documents prior to the date of execution, we should meet within that period. I will make any changes that you request within **2-3 weeks** of your request if at all possible. (But again, I cannot promise you an exact time, and you agree that if the work is not done timely, the sole remedy will be a rebate of the bill, if any, rather than liability for any other consequences.) You will schedule an appointment or appointments through my secretary<sup>1</sup> to discuss the documents with me and to have them signed by you after they meet your satisfaction.

- The estate planning documents will be complex to read and understand. It will be your affirmative duty to give these documents a comprehensive review both before and after they have been signed and before the engagement ends, and to visit with me as to any document or provision you do not understand.

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<sup>1</sup>My secretary is Cindy Lee. Her direct line is 878-2944.

- By signing this engagement letter, you promise that you will read and review the documents thoroughly before they are signed. No attorney is error-proof. Your thorough review of the estate planning and transfer documents is important to insure that I have followed your directions and objectives and that we have properly recorded all essential information. Any changes made due to our error will be made without cost to you. You will never offend me by seeking a second opinion of an attorney qualified to review my work.

**10. Ownership of “the File.”** At your request, your papers and property given by you to us will be returned to you promptly upon receipt of payment for outstanding fees and costs. We will see to it that you have copies of all relevant correspondence and final legal documents that are connected with our representation of you. We will nevertheless, supply you with additional copies of correspondence and other documents previously given to you in the course of our representation, provided you reimburse us for the copying charges. It is agreed, however, that our own files, including notes, drafts, research materials, internal memoranda, and other lawyer work product, whether or not created during the course of our representation of you, will belong to the firm, and will not be subject to copying or delivery to you.

**11. Retention of Documents.** Any documents retained by the firm will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents or other materials retained by us within a reasonable time after the termination of the engagement.

At the conclusion of our initial representation period, we will discuss with you whether you prefer for us to retain any original estate planning documents. It is commonly the case that we will retain the original of your wills, for example. If you are retaining the originals, then they will be delivered to you at the conclusion of our initial representation period. If we retain any original documents, we will reserve the right to return them to you by delivering them to your last known address. **In this regard, you should be sure to provide us with a current address where you may be reached in case we are no longer able to keep the documents.** We may destroy any originals after ten years if we do not know of a mailing address where the documents may be returned at that time. We will retain photocopies of everything for at least five years. Although we may be retaining originals, we cannot assume responsibility for finding out whether or not there is a need to probate a will, deliver a document, etc., unless someone gives us actual notice of the need.

**12. Ethical Considerations and Conflicts of Interest.** In beginning and completing your work, we will assume that the family and financial information you provide is complete and correct. We will assume that there are no conflicts of interest, and you affirmatively promise to disclose any conflicts which develop during the course of our representation.

**Rules of Professional Conduct For Lawyers.** There is a brochure prepared by the State Bar of Texas that answers some of the common questions about the duties that an attorney has to a client and about what a client can do if a rule of professional conduct has been violated. Copies of this brochure are freely available at the front desk of our office.

**Joint Representation of Husband and Wife.** Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct provides that as a general rule “a lawyer shall not represent a person if the representation of that person (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or (2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.” This rule poses a nagging problem for the estate planning attorney, and experts have been agonizing for years over the resolution to the issue.

An argument can be made that in today’s litigious society —where lawsuits are frequent and where it is assumed that if anything in life goes wrong someone must be sued— that every husband and wife have an inherent conflict of interest in estate planning for their family. This argument strikes some (including me) as extremely cynical; but you must remember that court cases are argued by litigation attorneys, and their perspective of as well as their monetary interest in our system of justice is different from those of us with an office practice. We deal with real people in day to day situations where, unlike the litigation attorney, the exception is not the rule.

Are your interests materially and directly adverse to one another? They could be; it depends on your circumstances and your attitudes, as much or more than on the law. You must help me make this determination, and in many ways you are in a better position than I am to decide this issue. Although there are a number of property law and other legal issues involved in estate planning, the question of whether the interest of a husband and wife are materially adverse to one another is primarily one of common sense for which you, in many respects, are perhaps better qualified than I to evaluate. If you feel that your interests are “materially and directly adverse” to one another then you must disclose this to me and only one of you should sign this letter, because in that case, I will decline to undertake the joint representation of you both.

By both of you signing this letter you will be representing to me that your interests are not “materially and directly adverse.” If you are wrong in your conclusion regarding this issue, then by signing this letter you will be consenting to my joint representation of you both even if your interests are in fact materially and directly adverse.

If I undertake to represent you jointly it is because I reasonably believe my representation of each of you will not be materially affected by the conflict, if any. But I want you both, in any event, to be fully aware of the existence, nature, implication, and possible adverse consequences of the common representation and the advantages involved, if any. In this regard, I will send you, at the time I send the first draft of the estate planning documents, a diagram and memo that explains how property in Texas passes if a person does not have a Will. I am also enclosing an important memo entitled “Community Property Law in a Nutshell” that you should read. I think you will find it interesting and informative, unless you are already aware of how the Texas community property law system works.

The advantages of joint representation include economy and the ability to coordinate a plan that obviously will affect you both but will also presumably be disclosed to each other as well as to me as your joint counsel. The disadvantages include the fact that by planning your estate jointly, one or both of you may feel compelled to adopt a plan that is different from what you might otherwise implement in the privacy that separate representation affords; and further, if

either of you owns separate property, an attorney that represents only you will be in a better position to further your interests in the event of a dispute over the proper characterization of the property as community or separate.

I am enclosing along with this letter a separate memorandum (entitled "Community Property Law in a Nutshell") that briefly describes some of the more important rules of community and separate property law in Texas to help you to understand some of the issues and potential conflicts that could affect your decision as to whether you feel joint representation is appropriate. I think you will find it interesting and informative, unless you are already aware of how the Texas community property law system works.

Note that either of you may ordinarily revoke or amend your Will or sign a new Will, without penalty or obligation. Occasionally clients execute what are known as election Wills or put provisions in a Will or trust for the benefit of a spouse contingent upon what the other spouse has done in his or her Will. If that is the case in the estate planning documents I prepare for you, I will take pains to make you aware of it. Each of you must assume the risk that the other may secretly revoke his or her Will or trust through the assistance of another lawyer, or that the surviving spouse will alter his or her estate plan after your death.

By both of you signing this letter each of you assumes the duty to report to me any fact or circumstance which may affect my impartial representation of you both, and any fact or circumstance that indicates that your interests are in conflict with one another.

Each of you are advised of the hazards of multi-party representation by one attorney. I cannot represent you both and be an advocate for one of you to the exclusion of the other. An attorney is required to be impartial, loyal, and to exercise independent judgment with regard to the client group as a whole. If I represent you jointly I may not promote the interest of one of you to the disadvantage of the other.

**Confidences.** If I undertake to represent you jointly, both of you will have free access to any documents I prepare for either of you, and **it must be understood that any communication that one of you makes to me will not be confidential with respect to your spouse.** This is a condition of my undertaking joint representation.

It is theoretically possible for a lawyer to undertake the *separate* (as opposed to joint) representation of a husband and wife after full disclosure and if consent is obtained, but I have found that this is not only awkward but that it lacks some of the principal advantages that joint representation offers, such as the advantage offered by full disclosure of a commonly understood plan.

Each member of a family may serve as the spokesman for all. I will assume in the absence of clear evidence to the contrary that each of you is communicating to the other respecting any conversations of a material nature that may occur between me and only one of you.

**13. Duty to Ask Questions and to Understand Estate Plan.** It is not uncommon for those who are passively involved in an estate planning endeavor to sign documents without thoroughly reading or understanding what they have signed. This cannot happen in this engagement. In signing this agreement, each of you affirmatively represents and promises that

you will read the documentation, will ask questions when in doubt as to the meaning of any document or term, and will not sign the documentation until you understand the documents and the estate or business plan.

**14. Retainer.** We require an initial retainer of **\$1000**. This retainer will be applied to the extent applicable and necessary for discharge of the last statement of the Firm following completion of our engagement, with any remaining amount of the retainer to be refunded to you immediately following the closing of the Firm's representation of you and completion of the billing and settlement of the account. However, a purpose of the deposited amount is to have on hand funds available for the discharge of past due billings, and if the deposited retainer is utilized for such purpose, an amount of at least the amount of the retainer will be required for the Firm to continue its representation of you. It is agreed that the retainer will be maintained by the Firm for your account, subject to the agreement for its utilization.

**15. Involvement of C.P.A.** You are advised that your Certified Public Accountant should be involved in this planning. The failure to involve the accountant could result in subsequent confusion, time and cost when the accountant is asked to review your plan for the first time during tax season and in the course of the preparation of the added income and gift tax returns which may result from your planning. It will be your affirmative duty to involve your accountant, whose services will be necessary to maintain the plan, in the planning process.

**16. Changes in the Law/Periodic Review of Estate Plan.** We represent many, many, estate planning clients. It is virtually impossible to advise all of our clients of changes in the law, even if those changes directly affect an estate plan or the legality and effectiveness of any document that we may have prepared. Many years ago this may have been feasible, but in recent decades the Congressional penchant for spawning new legislation and changing old legislation makes this task simply too daunting. Nor can we assume responsibility for probating your Will if no one engages us and actually informs us of the need to do so. This is true whether or not we retain the original signed estate planning documents.

Although we may from time to time, voluntarily contact you regarding your estate plan or the legality or effectiveness of a document that we may have prepared for you, we do not undertake to be legally bound to do so. Therefore, after a document has been signed, we will assume no further obligation with respect to it, whether or not we retain the original. This means, for example, that it will be necessary for you to keep in touch with us from time to time, if you wish for us to continue to represent you and if you wish to be informed of changes in the law and related matters.

Yours very truly,

Noel C. Ice, individually and on behalf of the  
Firm.

If you accept the terms of this engagement letter please sign either the original or the extra copy enclosed where indicated below, **initial each page** where indicated, and return it to me as soon as reasonably convenient. For your convenience in this regard, I am enclosing a stamped, self addressed, return envelope.

**TERMS OF AGREEMENT ACCEPTED  
BY CLIENT**

Date Signed: \_\_\_\_\_

\_\_\_\_\_  
Moore Money, Husband

Date Signed: \_\_\_\_\_

\_\_\_\_\_  
Lotta Money, Wife

NCI/ice

Enclosures: Extra copy of this letter  
Return envelope  
Memo entitled "Community Property Law in a Nutshell"  
Estate Planning Workbook  
Brochure entitled "What is an Estate Planning & Probate Law Board Certified  
Attorney?"  
Approximate Fee Schedule

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899

**Approximate Cost of Various Estate Planning Documents  
(Approximate Fee Schedule)**

I am often asked by clients what I charge for a particular estate planning document. Estate planning documents are not really a commodity, and so it is extremely difficult to price a document as if it were. The difference between a tailor made suit and one off the rack may be an apt analogy, except that a suit off the rack is more likely to fit a person than is an estate plan that is not tailored. If your estate planning desires are conventional with no special dispositive provisions, the following fee schedule may give you a rough estimate of what to expect.

I have been repeatedly advised by my colleagues not to show you this document, because lawyers are supposed to be different from the rest of the economic world. I doubt that we are all that different myself. Prices vary for lawyers services, just as they do for new cars and houses. What a lawyer does and can charge and still stay in business depends on the lawyer's abilities, experience and reputation and the quality of the work done. I have been planning estates since 1976 and am Board Certified in Estate Planning by the Texas Board of Legal Specialization. A considerable amount of my practice is devoted to estate planning alone. These facts are reflected in my fees. In short, I try to do better than average work and to charge a commensurately higher than average price for what I do.

You will note that the number of hours anticipated may not correlate with my normal stated hourly rate. There are a number of reasons for this, some of which include the degree of complexity of the document, the knowledge and special training required on my part in order to produce the document, whether the document is one we commonly prepare, as well as what people are generally willing to pay.

Please note the following fee schedule is at best very approximate. Further, I will occasionally commit to an approximate fee in advance, which may be lower or higher than the table suggests, depending on the circumstances.

<b>Name of Document</b>	<b>Work Required</b>	Approximate Attorney Time In Hours	<b>Approximate Fee</b>
<b>Simple Will For Single Person (Minimum Tax Planning)<sup>1</sup></b>	Set up file, interview, and basic correspondence  Preparation of Will with contingent trusts and disclaimer provisions. Proofing of Will.  Will execution ceremony and conference to go over estate plan. Preparation of letter enclosing copy of will and miscellaneous information. Close file.	5	\$600

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<sup>1</sup>It is not often that I prepare simple wills any more, since most of my clients have taxable estates for which a non tax planned will is not appropriate.

<b>Name of Document</b>	<b>Work Required</b>	Approximate Attorney Time In Hours	<b>Approximate Fee</b>
<b>Simple Wills For Married Couple</b>	Similar to above.	7	\$800
<b><u>ANCILLARY DOCUMENTS</u></b> Durable Power of Attorney Power of Attorney For Health Care Form Appointing Guardian Before the Need Arises Apointment of Guardian For Minor Children Directive to Physicians Regarding Life Support Funeral Instructions Anatomical Gift (no charge)	Preparation and proofing, letters to clerk recording guardianship directive, letter to Living Bank, if Anatomical Gift, etc.	2	\$400
<b>Ancillary Documents For Husband and Wife</b>	Similar to above.	3	\$500
<b>**Simple Will and all Ancillary Documents For Husband and Wife</b>		9	<b>\$1000</b>
<b>Simple Will and all Ancillary Documents For One Person</b>		7	\$800

Name of Document	Work Required	Approximate Attorney Time In Hours	Approximate Fee
<p><b>**Revocable Living Trust, With Tax Planning Provisions For Married Couple, Plus Pour-Over Wills and All Ancillary Documents</b></p>	<p>This includes marital deduction trusts, generation skipping exemption trusts, credit shelter trust, etc., where the payment of taxes and debts clauses are coordinated with pour-over wills.</p> <p>Also included ordinarily is a financial statement with a written analysis of any problem assets, and estate tax projections.</p> <p>Price and time are somewhat less if no GST planning and/or no marital trust.</p>	<p>15</p>	<p><b>\$3500</b></p>
<p><b>Individually Designed Beneficiary Designation For IRA With Disclaimer Provisions, and Tailored Minimum Distribution Election</b></p>	<p>Preparation and proofing of documents, and letters to IRA sponsor. Brief review of IRA document, if provided.</p> <p>Also included oftentimes, is a projection of IRA earnings and minimum distribution projections and analysis</p>	<p>4</p>	<p>\$700</p>
<p>Additional Individually Designed Beneficiary Designations For IRA</p>		<p>1</p>	<p>\$200</p>

Name of Document	Work Required	Approximate Attorney Time In Hours	Approximate Fee
<b>Irrevocable Trust For Spouse and Children</b> , Designed to Allow For Investment in Life Insurance if Desired, and Designed to Qualify Contributions to Trust For Annual Exclusion, With Special Tax Planning Provisions, Including Sample Withdrawal Notices, and Partition Agreement	Set up file, interview, and basic correspondence.  Preparation and proofing of documents, and letters describing in step by step detail tax issues and procedures.	12	\$2500
<b>Irrevocable Trust For Children, Where Spouse is Not a Beneficiary</b>	Same as where spouse is a beneficiary, but drafting and tax issues are much simpler to contend with and partition agreement is not necessary.	8	\$1900
<b>Family Limited Partnership With Limited Liability Company as General Partner</b>		30	\$7500
<b>Grantor Retained Annuity Trust (GRAT)</b>		10	\$2500
<b>Private Foundation</b>		30	\$7500
<b>Charitable Remainder Trust</b>		10	\$2500
<b>Charitable Lead Trust</b>		12	\$3000
<b>Marital Property Agreement</b>		20	\$4500

\* \* \* \*

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
2100 BURNETT PLAZA  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102-6898  
817/877-2800

Thursday, March 11, 1999

NOEL C. ICE

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ESTATE PLANNING AND PROBATE LAW  
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(817) 877-2800  
SECRETARY'S DIRECT DIAL  
(817) 878-2944  
Our File No.  
ICE09/00009

CERTIFIED MAIL

RETURN RECEIPT NO.: lkjlkjhgg

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Basic, Intermediate and Advanced Estate Planning and Asset Protection  
Techniques

Dear Moore and Lotta:

This letter is being sent pursuant to our phone conversation and at your request. The primary purpose of this letter is to give you a brief synopsis of some of the more common estate planning techniques, along with the approximate cost involved in implementing an estate plan. Regarding cost, I am enclosing an "Approximate Fee Schedule" (unless I have sent you one already) that may be of some help to you, but be advised that word "approximate" means just that.

So long as your combined estate (and the estates of your beneficiaries) will **always** remain under \$650,000 (the exemption equivalent in 1999), there may be no need to worry about estate taxes. However, in determining the size of an estate for estate tax purposes, one must consider life insurance proceeds, employee plan benefits, IRAs, and the possibility that one of you will inherit property in the future, including inheriting property from each other.

If there is a possibility of estate taxes being imposed in the estate of your primary beneficiary or beneficiaries, then a will with a credit shelter trust is the minimum recommended procedure. **In addition, there are a number of ancillary forms that we recommend everyone have, even if estate tax is not a concern.** Furthermore, I can say to you unequivocally that you should have a Will, even if only a *simple Will*, whether or not your estate is subject to estate taxes and whether or not you have a Living Trust that is intended to bypass probate.

“Estate Planning” is a broad term that can encompass many things. I have listed below some of the techniques that we consider basic, intermediate and advanced, including an approximate break down of the anticipated costs. After reviewing this simple list, you can let me know how much or how little you would like for us to do, how simple or how complex a plan you feel comfortable with, and how much money you can afford to spend.

### **BASIC ESTATE PLANNING DOCUMENTS**

- **Durable Powers of Attorney.** A durable power of attorney is used to invest someone whom you trust with the authority to act on your behalf.<sup>1</sup> A durable power of attorney could be indispensable should you become incapacitated. Since this form is likely to be readily recognized and accepted, more so as time goes by, we recommend that this form be used, and for this reason recommend that you sign a new Power of Attorney even if you have one already, if the one you have now was signed before the change in law.

- **Health Care Powers of Attorney.** There is a special statutory form that allows you to appoint a person to make health care decisions for you should you be unable to make such decisions for yourself. My recommendation is that whoever has your durable power of attorney have this power also.

- **Appointment of Guardian For Yourself Before the Need Arises.** This document is designed to give you some say so over who will be your guardian should the need ever arise. This is a matter that is otherwise determined by the Courts in accordance with a statutory preference order predetermined by the legislature. My recommendation is that whoever has your durable power of attorney have this power also.

- **Appointment of Guardian For Minor Children.** Texas Probate Code §117 gives the surviving parent of a minor child the right to designate the person who will serve as guardian of his or her children after the death of the parent. This designation is required to be in writing. If you have a minor child or children, I strongly recommend that you consider who you would prefer to be the child’s guardian in the event there is no surviving parent. In the absence of the appropriate written designation, the Courts will appoint a guardian in accordance with a statutory order of preference.

- **Directive To Physician (Living Will).** Under the Texas Natural Death Act, you have the right to express your desire not to have your life artificially prolonged where your attending physician determines that death is imminent or will result within a relatively short time without application of life-sustaining procedures. Many of my clients have asked to sign this form.

- **Anatomical Gifts.** Some people are inclined to make anatomical gifts of “any needed organs and tissues” or of certain specified organs. If this is something that interests you, please let me know and I will prepare the necessary forms free of charge.

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<sup>1</sup>The holder of a power of attorney is a “fiduciary.” A fiduciary is someone holding a special relationship of trust and confidence with another person. A fiduciary duty is the highest duty the law recognizes, and it would be a breach of that duty to use this fiduciary office in a manner that is adverse to the person to whom the duty is owed.

- **Standby Living Trust.** If you have a living trust in place, it may be that there will be no need for a guardianship in the event of incapacity. A living trust can be either presently funded or unfunded. However, if unfunded (a “standby trust”), the person holding the power of attorney can be authorized to fund the trust. A living trust is typically freely revocable and amendable by you during life. The trust can contain explicit instructions to take care of you during life, and can also be drafted to continue after death. In fact, the trust can contain within it most of the estate planning provisions normally found in a will. Your trust should appoint a trustee. My recommendation is that whoever has your durable power of attorney serve as trustee in the event of your incapacity. So long as you are alive and well, you may serve as your own trustee.

- **Pour Over Will.** A Pour Over Will simply provides that the portion of your estate not already in the trust will simply “pour over” into the trust at death. Unlike a Will, the provisions of a living trust are not a part of the public record. Your Will should appoint an executor. My recommendation is that whoever has your durable power of attorney serve as your executor.

- **Division of Trust Estate at Death.** If the combined value of your estate (including life insurance, IRA benefits, etc.) could exceed \$650,000 (the 1999 exemption equivalent), then I recommend that the living trust divide your estate into two or more shares. My recommendation is that the trust establish a **Marital Deduction Gift** and a **Credit Shelter Trust**.

- **The Credit Shelter Gift.** The Credit Shelter Gift is designed to shelter an amount equal to the available estate tax exemption equivalent (which can be as much as \$650,000 in 1999) so that no federal estate or generation skipping tax is ever paid at your generational level. The idea is that an amount equal to the exemption equivalent is either left to your descendants (outright or in trust), or, it can be placed in trust for the life of your spouse and then transferred to your descendants (either outright or in further trust), where, in either case, it will escape taxation in the estate of the surviving spouse.

This technique can be utilized during life or at death. Of course, if utilized during lifetime, the tax leverage can be many times greater, but there is a price: you have to be in a position to afford to part with the money, since you lose the right to use it after the gift is made. (If your spouse is a beneficiary, however, you may obtain some indirect benefits from a lifetime gift.)

The use of this technique can be expected to save at least \$250,000 in estate taxes in a taxable estate exceeding \$1.3 million. Of course, if the sheltered \$650,000 appreciates over the lifetime of the surviving spouse, the estate tax savings will be commensurately greater. This amount (\$650,000 plus post death appreciation), is not subject to estate tax in the estate of the person creating the trust, because it is less than the estate tax exemption equivalent, and it is not ever subject to estate tax again, so long as it is held in trust. It can be held in trust for a long time: as much as 21 years after the death of some person living at the death of the person creating the trust. This means estate tax can be skipped in your estate, your spouse’s estate, your children’s estates, and maybe even your grandchildren’s estates, particularly if you have grandchildren living at your death. If any of these people need access to the trust in the interim, then it will be there for them. If not, it will be available to the next generation free of estate tax.

- **The Marital Gift.** An estate tax deduction is available for certain gifts made outright or in trust to a spouse. The Marital Gift soaks up any assets not needed to fund the Credit Shelter Trust. This means that there will be no estate tax due in the estate of the first spouse to die. The marital deduction gift is frequently held in trust in order to give the spouse protection from creditors and to assure that the amount remaining in the trust will eventually pass to the children, or as otherwise directed by the first spouse to die.

- **Generation Skipping Transfer Tax Planning.** In an estate that might exceed \$1 million, the Marital Deduction Trust should further be divided into a **Generation Skipping Exempt Trust** and a **Nonexempt Trust**, if necessary. You and your spouse are each entitled to shelter \$1 million from the generation skipping penalty tax, and this division of the estate would preserve this benefit. A Generation Skipping Exempt Trust operates on the same principal as the Credit Shelter Trust, and is designed to skip estate taxes in lower generations.

This amount (up to \$1,000,000 plus post death appreciation), is not subject to estate tax or GST tax in the estate of the person creating the trust, to the extent it is less than the estate tax exemption equivalent (\$650,000), and it is not ever subject to estate tax again (or to GST tax at all), so long as it is held in trust. It can be held in trust for a long time: as much as 21 years after the death of some person living at the death of the person creating the trust. This means estate tax can be skipped in your estate, your children's estates, and maybe even your grandchildren's estates, particularly if you have grandchildren living at your death. If any of these people need access to the trust in the interim, then it will be there for them. If not it will be available to the next generation free of estate tax. The reason for the GST tax is to limit the use of this technique to trusts under \$1 million.

- **Trusts For Children For Life.** Instead of leaving your property outright to your children or other beneficiaries on the death of the surviving spouse, consider leaving it to them in trust for life. Each child can be appointed trustee of his or her own trust at whatever age you think appropriate; so the fact that the property is in trust will not mean that your children will not be able to enjoy the use of the property. **There are a number of advantages to this plan.** The separate property character of the estate can be preserved during the children's lifetimes and this can be an important advantage in the event of divorce. In addition, the property may very well be exempt from creditor's claims should a child fall on hard times. Finally, careful use of the generation skipping exemption may allow all or a part of the property to pass to your great-grandchildren someday, without being subjected to estate taxes in your children's estates.

- **Coordination of Nonprobate Assets with Overall Estate Plan.** It is important that nonprobate assets such as life insurance, joint tenancy bank accounts, IRAs and qualified plan death benefits pass in a manner that does not disrupt the estate plan. This can be a thorny and time consuming task. Suffice it to say that simply designating the surviving spouse as the beneficiary of all nonprobate assets can be disastrous.

In the case of life insurance, the best solution is often to name the trustee of a living trust as the death beneficiary. This solves most all of the problems.

In the case of IRAs and qualified plan death benefits, designating the surviving spouse as the death beneficiary is usually preferable for income tax planning purposes and may be the only alternative that avoids unnecessary complexity, but it may mean that the full credit shelter amount (\$650,000) is not available to fund the credit shelter trust, unless other assets are sufficient. (The completion of the designation should be carefully supervised by us, but it will be up to you to get us the necessary information, and to make clear to us the extent to which you want us to be involved in the beneficiary designation process.)

Large bank accounts, stock brokerage accounts, and certificates of deposit should seldom, if ever, be held in joint tenancy with right of survivorship or otherwise be payable to a third party at death.

- **Cost of Basic Estate Planning Documents.** The cost of a basic estate plan that contains the above documents, including an unfunded living trust with generation skipping provisions and a marital deduction trust, will vary depending on individual circumstances from between \$2000 and \$3500 for a married couple, plus the cost, if any, of attending to the coordination of nonprobate asset beneficiary designations, if this is desired. Whether the fee is at the high end or at the low end depends on whether the property is all community property, or is part community and part separate (and if the latter whether this property is to be identified), and whether or not much work is required in coordinating the nonprobate assets.

If the generation skipping tax will not be involved (combined estates *that are certain to be* less than \$1 million), the fee will be several hundred dollars less. If the marital deduction gift will not be in trust, the fee will also be lower.

The cost of a basic estate plan that contains the above ancillary documents, but no living trust and a simple will with no estate or generation skipping tax planning is generally around \$1000 for a married couple, plus the cost, if any, of attending to the coordination of nonprobate asset beneficiary designations, if this is desired. This plan is not recommended if your combined estate *could possibly* exceed \$500,000.

\* \* \* \*

### **BUSINESS ESTATE PLANNING DOCUMENTS**

As the owner of a closely held business, there are a number of concerns that must be addressed in any good estate plan.

- **Buy-Sell Agreement.** If you wish to keep the business in the family, it may be necessary to prepare a buy-sell agreement between the owners. This is not a simple matter. Recent changes in the law have made it difficult if not impossible to peg the price of a closely held business that will be recognized for estate tax purposes.

It may be that all you really need is an option to purchase the stock of the other owners on their deaths, since you can control the disposition of your stock under your will. On the other hand, a funded buy-sell agreement could provide your estate with necessary liquidity.

- **Funding the Buy-Sell Agreement.** Each owner must be assured that the funds will be available to fund the buy-sell agreement. Life insurance is the most effective vehicle for accomplishing this task.

- **Cost of Funding and Preparing a Buy-Sell Agreement.** This is hard to estimate since it could be very involved or fairly simple, depending on your concerns. It might be done for as little as \$1500, but it could be considerably more. To adequately collateralize and secure a cross-purchase agreement, I think you should be prepared to expend between \$5,000 and \$10,000.

\* \* \* \*

### INTERMEDIATE ESTATE PLANNING DOCUMENTS

Intermediate estate planning primarily involves the use of irrevocable trusts and life insurance.

- **Annual Exclusion Gifts/Educational Gifts/Gifts For Medical Care.** Under IRC §2503(b), each donor is allowed to make gifts, free of gift or other transfer tax, including generation skipping tax, each calendar year, to one or more persons, in an amount not exceeding \$10,000 with respect to each person. This limit applies separately with respect to a husband and wife, and there is no limit on the number of donees. The gift must ordinarily be of a present interest, which means it cannot be a gift in trust or a gift of any other future interest. There is an important exception to this rule in the case of annual withdrawal trusts discussed below.

IRC §2503(e) contains a separate exemption from the transfer tax, including generation skipping tax, for any amounts paid on behalf of an individual as tuition to certain educational organizations or to a person who provides medical care (within the meaning of the statute). This exception has a lot of potential for avoiding transfer tax, particularly in the case of grandchildren.

- **Crummey Trusts/Annual Withdrawal Trusts.** In order for the annual exclusion to apply (\$10,000 per donor/per donee) a gift is supposed to be made immediately and not in the future. For this reason an ordinary irrevocable trust will not qualify. However, the trust can contain a feature known as a withdrawal right that can cause gifts to the trust to qualify. As simple as this sounds, the tax effects of such a feature are very complex. With care, a trust can be drafted to qualify for the annual exclusion without attracting gift, estate or generation skipping taxes, but some drawbacks will have to be accepted as the price.

- **Annual Exclusion Gifts of Undivided Interests in Real Estate.** Making annual gifts of undivided interests in real estate is often a very effective technique. Because the gifts would be in undivided interests, a valuation discount should be available. If this technique is utilized it is extremely important to have a good appraisal of the value.

- **Annual Exclusion Gifts of Undivided Interests in a Family Business.** Making annual gifts of stock in your corporation to your children is another technique that should be considered. Because the gifts would represent a minority interest, a minority discount should be available. I would strongly recommend having an appraisal done before making such gifts.

- **Irrevocable Trust.** An irrevocable trust allows you to exercise some control over property that you give to your loved ones during life. By making a present gift during lifetime, all of the income and appreciation on the property from the time of the gift to the date of your death is effectively transferred tax free. In addition, the gift tax rates are substantially less than the estate tax rates (33% vs. 50% for example). Up to \$10,000 per donor/per donee can be transferred tax free each year.

By making the gift to a trust instead of outright, you can exercise some control over the use to which the property will be put (for example, by keeping it in the family), and in addition, you can give the beneficiary the added benefit of receiving a gift that can be protected to some extent from the beneficiary's creditors (including a spouse). If the gift is within the available generation skipping transfer tax exemption, another advantage is that it may pass to the donee's children (for example) without being subject to estate tax in the donee's estate.

**As an aside, it should be noted that by making irrevocable gifts in trust for your spouse and (or) children, you can provide for such things as their education and a modicum of support in advance, so that should your financial situation change, your family will have some asset protection.** Financial reversals can come about as a result of adverse business conditions, lawsuits against you, or other similarly unforeseeable events that could happen to anybody even though not anticipated now.

- **Life Insurance.** Life insurance is a perfect asset for an irrevocable trust, although an irrevocable trust will usually be funded with other types of property as well. The reason life insurance is so suitable is that it performs the function of providing the liquidity needed by an estate at death, and because the difference between the value of life insurance during life and at the moment of death is dramatic, meaning that the difference between the gift tax paid (if any) and the estate tax that would be paid is equally dramatic.

**There is no good reason that I have ever been able to think of for a person whose estate will be subject to estate tax to hold term life insurance outside of an irrevocable trust.**

If life insurance is transferred by the insured and the insured dies within three years, the proceeds of the policy will be includible in the insured's estate. If an irrevocable trust purchases a life insurance policy in the first instance (so that there is no transfer), the three year rule may be avoided.

- **Funding the Living Trust.** You may wish to transfer your property to the revocable living trust during life and while you are not incapacitated. This might save some probate costs, and is certainly advisable if you are at all concerned about becoming incapacitated for any extended length of time. The living trust need not be funded unless a need to do so is perceived. It may not be worthwhile to prefund a living trust in the case of the very young, but as you get older, it is an option to be taken seriously. It is also a good idea, no matter what your age, if you want to earmark and preserve your separate property.

- **Cost of Intermediate Estate Planning.** The cost of funding a living trust is similar to the cost of probating an estate. The process mainly concerns the transfer of legal title to your assets to yourself as trustee. Title to most assets can be transferred very easily without much legal expense. The record ownership of bank accounts and brokerage accounts are easily changed. Other assets are more troubling. The beneficiary of the property insurance may have to be changed too. These sorts of matters take time but must be attended to. However, to some extent they can be handled without a lawyer.

An irrevocable trust suitable to hold life insurance and containing sophisticated Crummey withdrawal powers can be prepared for under \$2500.

Assisting in stock transfers and preparing deeds to real estate can be done for \$400 to \$500. If appraisals are done by a third party there is that cost to consider.

\* \* \* \*

#### ADVANCED ESTATE PLANNING DOCUMENTS

- **Lifetime Funding of Bypass Trust.** By far the best advanced estate planning technique for persons who have a stable marriage and who can afford it, is to make a gift in trust now, for the benefit of the other spouse, remainder to the children, using the available unified credit exemption equivalent, which can be as much as \$650,000. All of the income and appreciation in the trust is removed from both spouse's estates. Ideally, the spouse would not invade the trust at all, but the option would be there. Although the property has been given away, if the marriage survives, the property is still available to at least one party to the marriage.

The trust must be funded with separate property, so what is really required if the donor spouse has no separate property, is to partition \$1.3 million of community property. The donor spouse gives away his or her half of this amount to the trust, and the donee spouse retains his or her half. The donee spouse now owns \$650,000 outright as separate property, and in addition is the beneficiary of a \$650,000 trust. The down side is that the donor spouse is now \$650,000 poorer in fact, and has lost control over the donee spouse's interest in an additional \$650,000.

It would be tempting to have the donee spouse transfer the other half of the \$1.3 million to a trust for the other spouse, but this is likely to cause the whole transaction to fail in its intended purpose, since the IRS will employ the reciprocal trust doctrine to uncross the trusts. Nevertheless, the donee spouse might make a similar gift years later under different terms, and this might be upheld if it is not part of a prearranged plan.

Consider what the \$650,000 trust might be worth at death, as a result of appreciation. In a large estate the appreciation factor would have been subject to a 50% or more estate tax if the gift was made at death rather than during life, as the following admittedly dramatic examples illustrate. If the trust quadrupled in value over the next 18 years (doubling every nine years), the \$650,000 gift would be worth \$2.6 million and the tax savings would be close to \$1 million. In nine more years the gift could be worth \$5.2 million and the tax savings would be over \$2 million.

(I suppose that if the donee spouse were given a power of appointment, it would be theoretically possible for the donee spouse to exercise it in favor of the spouse that established the trust, in the event the donor spouse outlived the donee. Of course, there could be no prearranged plan to this effect.)

- **Marital Agreements/Partitioning Community Property/Identifying Separate Property.** A marital agreement can be very important if it is desired to preserve and identify separate property. Separate and community property will have to be identified at death in any event; however, at that time it could be very difficult (if not impossible) to do.

Since both halves of community property are liable for the torts committed by or malpractice judgments against either spouse, **an agreement to convert community property into separate property is often employed as a simple asset preservation technique to protect the innocent spouse.** At the death of either party to a marriage, the basis in both halves of the community property gets stepped up (or down) to the fair market value of the property at date of death. The cost of an arrangement under which community property is converted into separate property is that the surviving spouse will lose the basis step up that might otherwise have been available had the property not been converted.

- **Grantor Trusts Where the Grantor In Effect Pays the Donee's Income Taxes.** The tax law requires that income on a trust established by a grantor be taxed to the grantor under certain conditions. That type of trust is called a "grantor trust." The grantor of a grantor trust has no choice but to pay the income tax on that trust for at least as long as the trust is in existence and the grantor is still living. Historically, the IRS has never treated this incident of the tax law as a gift. Lately the IRS has indicated that the grantor may be making a taxable gift when the grantor is forced by the IRS to pay the income taxes on the grantor trust, but most practitioners think that the IRS argument in favor of a gift is weak. It is possible that Congress may act to close this loophole in the future, but it has not done so to date.

By placing property in trust, and paying the income tax outside the trust, the trust becomes like an IRA: it grows at a compounded rate, as if tax free. If **\$2 million** is given to a trust on which someone else pays the taxes, earning approximately **10%** per annum, the trust will be worth close to \$15 million 20 years later, and will be **worth \$42 million in 30 years.** Astounding is the effect of tax free compounding of interest. The transfer tax cost to the donor could be around \$240,000 for a \$2 million gift by a married couple (or zero for a \$1.3 million gift by husband and wife), but the \$15 million to \$42 million in the trust can be sheltered from generation skipping and estate taxes for 100 years or more. Okay, I realize this all sounds so fantastic as to border on the ridiculous, but even accounting for the many vicissitudes that could affect the assumptions, you still get the point.

- **Grantor Retained Income Trusts/Gift of Remainder Interest.** A grantor retained income trust, or GRIT, is a technique under which you transfer a remainder interest in property and retain the income for a term of years. The gift of the remainder is valued for gift tax purposes at a substantial discount. **This technique is not permitted unless the beneficiary is someone other than a spouse or a descendant,** and even then only works well if the asset returns income at a rate less than the assumed rate of return. The idea is that by giving away the remainder interest in land or growth stock that has a low rate of return, the appreciation is, in effect, shifted to the remaindermen.

In order for this technique to be of any benefit, the grantor must survive the term of the trust, else the trust will be includable in the grantor's gross estate for estate tax purposes based upon the value of the trust at date of death.

- **Grantor Retained Annuity Trusts and Unitrusts/Gift of Remainder Interest.** If a gift of a remainder interest in a trust is made to a beneficiary who is a descendant, the asset must pay you a market rate of return during the term of the trust. In many cases, this takes most of the leverage out of the gift of the remainder. The retained interest must be an annuity interest based upon the original value (a grantor retained annuity trust, or GRAT), or a unitrust interest based upon the market value each year (a grantor retained unitrust, or GRUT).

As was the case with the GRIT, we are here valuing the gift based upon the value of the remainder interest discounted to present value. This value is based upon the length of the term of the GRAT, current interest rates (the adjusted Federal Mid-Term Rate), and the size of the annuity percentage. **Under the right circumstances, the value of the gift for transfer tax purposes can be close to zero.**

In this case, the strategy is the opposite of that of a GRIT. **Here, what is desired is a high rate of return that exceeds the assumed market rate.** Occasionally, a gift of a remainder interest in heavily discounted stock may yield striking tax savings, if the stock pays dividends in excess of the assumed rate of return. A GRAT is particularly attractive if it can be funded with stock in a pass through entity (S-corporation, limited liability partnership, etc.) with an historically low rate of dividends or distributions, that is expected to generate higher rates of return in the future.

A GRAT will be a grantor trust, which means that the grantor must pay income taxes on all of the income of the trust, not just the income used to pay the annuity. (See the discussion of grantor trusts above.) Consider this graphic example:

Closely held stock having a book value of \$2 million, but a fair market value of \$1 million (because of the minority interest discount), is transferred to a GRAT paying a guaranteed 8% annuity to the grantor for 20 years. The stock pays 8% of the book value as a dividend. 8% of book value is \$160,000 on the stock transferred to the GRAT (i.e., 16% of fair market value). If the income tax rate were 50% (which it has been in recent memory), then the donor would owe \$80,000 in tax. The GRAT is required to pay the donor 8% of \$1 million, or \$80,000, which the donor, in turn, uses to pay the income tax. As you can see, 20 years later, when the GRAT terminates, (a) the GRAT would have accumulated \$8 million if the stock in the GRAT consistently paid 8% of book (16% of fair market value), (b) the donor has paid virtually no transfer tax, (c) the donor's estate has not really been augmented at all by the annuity (since it went to pay income taxes), and (d) even if the stock appreciated not at all during this 20 years, the trust would still be worth \$10 million. **In effect, the donor will have transferred \$10 million dollars paying no transfer tax.** If the underlying value of the stock increases during this period, the results are even more striking. Perhaps this technique can be made even more attractive if the property continues to be held in trust (as a grantor trust) following the termination of the retained interest. (In that case, the \$10 million could become \$31 million in another 15 years, if it continues to grow tax free at 8%, *and you pay the income tax*— which (the income tax) could admittedly become quite a burden by that time.)

In the example just given, if the donor had done nothing, the donor could have simply transferred \$10 million to the children, and paid \$5 million in tax instead of nothing. So, even if the savings would have been substantially less than \$5 million, the potential savings may still be significant enough to make the game worth playing. It depends on the facts. You have to analyze the situation yourself. Obviously, the assumptions govern the outcome. **If the stock pays only 4% of book value or 8% of fair market value, then the donor will not have accomplished anything.** If it pays less, the donor will have accomplished worse than nothing. Further, it may only be a matter of time before the IRS and the courts begin to take into account other factors in the valuation process, such as the fact that the grantor is paying income taxes on property given away. Any time you see a tax result that looks like it is too good to be true, it just might be. You must be willing to take the risk. Some areas of the tax law are more certain than others. This technique is not in the more certain category.

Caution: As was the case with a GRIT, a GRAT will be of no benefit unless the grantor survives the term of the trust; otherwise, the trust will be includable in the grantor's gross estate for estate tax purposes based upon the value of the trust at date of death.

- **Making Gifts Less Likely to be Attacked On the Basis of Valuation Issues.** There are a number of techniques that can be employed to make it less likely that the IRS will challenge the value of a gift placed in trust. For example, one might give the children a pecuniary interest, expressed as a fraction, the numerator of which is 99.9% of the value you believe the gift to be worth, and the denominator of which is the value of the gift for gift tax purposes. The remainder goes to charity. If the value is challenged, it simply increases the size of the gift to charity rather than the tax.

- **Making Gifts Less Likely to be Scrutinized.** There are a number of techniques that can be employed to make it less likely that the IRS will scrutinize a gift to a trust. If the gift to the trust is cash, rather than property, then the cash gift is what is reported on the gift tax return. If the cash is then used to purchase, say, a minority interest in a closely held business, then perhaps there is less of a red flag effect. Of course, the purchase price would still need to be at fair market value, backed up by a thorough appraisal.

- **Additional Leverage Through Borrowing.** Further leverage can sometimes be obtained by having the trust for children (or GRAT) purchase property from the grantor (such as closely held stock) on an installment note secured by the property purchased.

- **Gift of Remainder Interest in Home Following a Term of Years.** This technique is known as a grantor retained income trust, or House GRIT. The technique contemplates that you will give your home away after a period of time, say 15 years. The gift takes place in the present, so that the value of the gift is only a fraction of the full value of the home, since the value is discounted by the value of your right to use the property during the term. There are significant downsides to this technique. For instance, what if at the end of the 15 year period you want to stay in the home? One solution would be to buy the house back at the end of the term.

- **Charitable Remainder Trusts.** Appreciated property can be transferred to charity without recognizing capital gain. In return, the charity can give you the right to annual payments of income based on the fair market value of the property, either as initially valued (a charitable remainder annuity trust) or as revalued annually (a charitable remainder unitrust). To the extent that the value of your right to the income is less than the value of the transferred property, you can get a charitable income tax deduction. **The grantor can serve as trustee of the trust!** Believe it or not, in addition to benefiting charity, this technique can sometimes be of economic advantage regardless of charitable intent, particularly if the property has a very low basis and does not produce much income.

- **Family Limited Partnerships.** This is a technique for investing and managing family wealth in a way that limits the ability of a third party creditor to disrupt the business. This technique can be very useful in preserving a business and other investments of the partnership, but is not intended and is ineffective to put the *value* of the business outside the reach of creditors of the individual partners. One significant feature of a family partnership is that it may very well have a transfer tax value that is much less than the value of the underlying assets!

- **Cost of Advanced Estate Planning.** Advanced estate planning can get expensive. If you are serious about advanced estate planning please let me know, at which time, the costs can be estimated.

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#### BASIC ASSET PROTECTION ISSUES

- **Liability of Marital Property In a Nutshell.** The rules of marital property liability can be briefly summarized as follows:

A person is personally liable for the acts of the person's spouse only if the spouse acts as an agent for the other spouse, or the spouse incurs a debt for necessities under the duty of support described in Family Code §4.02.<sup>1</sup> Except as provided by §5.61 of the Family Code, community property is not subject to a liability that arises from an act of a spouse.<sup>2</sup> A spouse does not act as agent for the other spouse solely because of the marriage relationship.<sup>3</sup>

A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are personally liable "by other rules of law."<sup>4</sup> The spouse's separate property and special community property may be liable under Family Code §4.031 for necessities or if the spouse is acting as agent for the other.<sup>5</sup> Each spouse owes a duty of support to the other spouse and to his or her minor children.<sup>6</sup>

Unless both spouses are liable under Family Code §4.031 (for necessities or as agent), the community property subject to a spouse's sole management, control and disposition (the spouse's "special community") is not subject to any liabilities of the other spouse incurred before marriage, nor for any nontortious liabilities that the other spouse incurs during marriage.<sup>7</sup>

The community property subject to a spouse's sole or joint management, control and disposition is liable for that spouse's liabilities, whether incurred before or during the marriage.<sup>8</sup>

**All community property is liable for torts committed during marriage by either spouse.<sup>9</sup>**

A spouse's separate property is basically liable to the same extent as a spouse's special community, except with respect to torts committed by the other spouse. A spouse's special community is liable for the torts of the other spouse. **A spouse's separate property is not liable for the torts of the other spouse.**

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<sup>1</sup>Tex. Fam. Code §4.031(a).

<sup>2</sup>Tex. Fam. Code §4.031(b).

<sup>3</sup>Tex. Fam. Code §4.031(c).

<sup>4</sup>Tex. Fam. Code §5.61(a).

<sup>5</sup>For an example of a case illustrating that the law is not always what it seems to say, see *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975). It is believed that the rule now found in Fam. Code §4.031 to the effect that a person is liable for the acts of the person's spouse only if acting as agent for the spouse, and that a spouse does not act as agent for the other spouse solely because of the marriage relationship, was passed, in part, in response to *Cockerham*. If the *Cockerham* fact pattern were to arise today, the application of this rule might very well alter the outcome.

<sup>6</sup>Family Code §4.02.

<sup>7</sup>Tex. Fam. Code §5.61(b).

<sup>8</sup>Tex. Fam. Code §5.61(c).

<sup>9</sup>Tex. Fam. Code §5.61(d).

Assuming the spouses agree, can one spouse's special community be made subject to the sole control and management of the other spouse? Must the property be "mixed" first? Apparently spouses may simply agree, either orally or in writing, that any community property will be subject to the sole control and management of one spouse or the other,<sup>1</sup> in which event, it follows that such property will ordinarily not be subject to the nontortious debts of the noncontrolling spouse.<sup>2</sup> Third parties are, however, entitled to rely upon certain presumptions as to who has control and management.

"During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership."<sup>3</sup> A third party is entitled to rely on the presumption in the absence of fraud or actual or constructive notice to the contrary.<sup>4</sup>

- **What Assets Are Exempt From Creditor Claims in Texas.**

**Homestead.** Art. §51 of The Texas Constitution defines the homestead:

§51. Amount and value of homestead; uses

"Sec. 51. The homestead, not in a town or city, shall consist of not more than **two hundred acres** of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots amounting to not more than **one acre** of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

The Constitution recognizes the existence of a business homestead as well as a residential homestead. The two are not mutually exclusive, and it should be possible to claim both.

An urban homestead need not consist of contiguous lots, and both residential and business properties are entitled to the exemption.<sup>5</sup> There are some very interesting possibilities in connection with the business homestead exemption that are sometimes overlooked.

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<sup>1</sup>Tex. Fam. Code §5.22(b) and (c).

<sup>2</sup>See *LeBlanc v. Waller*, 603 S.W.2d 265, 267 (Tex. Civ. App.-Houston [14th Dist.] 1980, no writ.)

<sup>3</sup>Tex. Fam. Code §5.24(a).

<sup>4</sup>Tex. Fam. Code §5.24(b).

<sup>5</sup>*Miller v. Menke*, 56 Tex. 539 (1882); *Ford v. Aetna Insurance Co.*, 424 S.W.2d 612 (Tex. 1968), rehearing denied; *O'Neil v. Mack Trucks, Inc.*, 542 S.W.2d 112, 114 (Tex. 1976).

**Exempt Personal Property.** Pursuant to Article 16, §49, of the Texas Constitution, the Legislature has enacted Texas Property Code §42.001 and §42.002. These sections exempt a wide range of personal property (household furnishings, vehicles, etc.) not to exceed \$60,000 in the case of a family or \$30,000 in the case of a single adult.

**IRAs and Qualified Plans.** In Texas, rollover and deductible IRAs are exempt from creditor claims.<sup>1</sup> Qualified plans are generally exempt from creditor claims under both Texas<sup>2</sup> and federal law.<sup>3</sup>

**Life Insurance and Annuities Are Exempt in Texas.** Article 21.22 of the Insurance Code provides an apparently unlimited exemption for life insurance and annuity benefits.

Art. 21.22. *Unlimited Exemption of Insurance Benefits and Certain Annuity Proceeds From Seizure Under Process.*

Sec. 1 Notwithstanding any provision of this code other than this article, all money or benefits of any kind, **including policy proceeds and cash values**, to be paid or rendered to the **insured** or any **beneficiary** under any policy of insurance *or annuity contract* issued by a life, health or accident insurance company, **including** mutual and fraternal insurance, **or** under any plan or program of **annuities** and benefits in use by any **employer or individual**, shall:

- (1) inure exclusively to the benefit of **the person for whose use and benefit the insurance or annuity is designated in the policy or contract**;
- (2) **be fully exempt from execution**, attachment, garnishment or other process;
- (3) be fully exempt from being seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability **of the insured or of any beneficiary**, either before or after said money or benefits is or are paid or rendered, and
- (4) be fully exempt from all demands in any bankruptcy proceeding of the insured or beneficiary.

Sec. 2 The exemptions provided by Section 1 of this article apply without regard to whether:

- (1) the power to change the beneficiary is reserved to the **insured**; or

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<sup>1</sup>Tex. Prop. Code §42.0021.

<sup>2</sup>Tex. Prop. Code §42.0021.

<sup>3</sup>ERISA §206(d). *Patterson v. Shumate*, 112 S. Ct. 2242 (S. Ct. 1992); CCH PPG ¶23,853W. *Youngblood v. FDIC*, Slip Op., No. 93-1403 (5th Cir. 1994).

(2) the insured or the insured's estate is a contingent beneficiary.

Sec. 3 The exemptions provided by Section 1 of this article do not apply to:

- (1) premium payments made in fraud of creditors subject to the applicable statute of limitations for the recovery of the premium payments; or
- (2) a debt of the insured or beneficiary secured by a pledge of the policy or its proceeds.

Sec. 4 This article does not prevent the proper assignment of any money or benefits to be paid or rendered under an insurance policy or annuity contract to which this article applies, or any rights under the policy or contract, by the insured, owner, or annuitant in accordance with the terms of the policy or contract.

Sec. 5 Wherever any policy of insurance, annuity contract, or plan or program of annuities and benefits mentioned in Section 1 of this article shall contain a provision against assignment or commutation by any beneficiary thereunder of the money or benefits to be paid or rendered thereunder, or any rights therein, any assignment or commutation or any attempted assignment or commutation by such beneficiary of such money or benefits or rights in violation of such provision shall be wholly void. [Emphasis added.]

*Sec. 6 For purposes of regulation under this code, an annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal company, or under any plan or program of annuities or benefits in use by an employer or individual, shall be considered a policy or contract of insurance.<sup>1</sup> [Emphasis added.]*

**Limitations on Application of Statute.** It seems clear that the legislature intended by the amendment for the exemption to extend to the cash value of life insurance without a dollar limitation, in response to a case that had held that the prior version of the statute was limited by the overall exemption dollar limitation for personal property found in Property Code §42.001(a)(1). However, this question is still not free from doubt.

Article 21.22 was amended in 1991. When Section 1 was added in 1987 there was doubt as to whether it would be literally construed. At least one bankruptcy case held that Section 1 of Article 21.22 was limited by Property Code §42.001 which limits the exemption for personal property to \$60,000 in the case of a family and \$30,000 in the case of a single individual.<sup>2</sup> The 1991 amendment added the phrase "Notwithstanding any provision of this **code** other than this article" to the first sentence of section 1. My interpretation of this article is that it should not be read literally without limitation; however, in the context where the statute is found, the "code" is the Insurance Code and not the Property Code. Therefore, it is possible that contrary to the apparent intent of the legislature, a court may once again seek to limit the application of the statute.

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<sup>1</sup>Tex. Ins. Code § Article 21.22.

<sup>2</sup>*In re Brothers*, Bkrcty. N.D. Tex., 1988, 94 B.R. 82.

The Texas Attorney General considered this issue in Opinion No. DM-125, and concluded that “the total exemption provided for the cash value of a life insurance policy in article 21.22, section 1 of the Insurance Code to prevail over the limited exemption provided in sections 42.001 and 42.002 of the Property Code. Life insurance proceeds and cash values thus are wholly exempt from seizure under process.”

A 1993 bankruptcy case recognized that there is no limitation on the amount of life insurance exempted under 21.22, but held that **any exemption claimed under 21.22 will reduce the amount available under the personal property exemption found in the Property Code**, which is limited to \$60,000.<sup>1</sup>

**Note further that this exemption arguably does not apply to the owner as such, unless the owner is also the insured or a beneficiary.** The exemption applies to “policy proceeds and cash values, to be paid or rendered to the *insured* or any *beneficiary*.” Cf. *In re Gould* (*Gould v. Phillips*, 457 F.2d 393 (5th Cir. 1972); *Bartholow v. Garner*, 43 Bankr. 463 (N.D. Tex. 1984).

Private annuities were made exempt under the statute in 1993. The exemption for annuities was recognized by the 5th Circuit in a 1994 decision *Walden v. McGinnes* (5th Cir. 1994) Case No. 93-8207.

Query: What is an annuity? Traditionally an annuity was thought of as the opposite of a life insurance contract. Under the terms of a true, traditional life contingency only annuity, the annuitant received annuity payments at regular fixed intervals and in fixed amounts. On the death of the annuitant the annuity payments ceased. If the annuitant outlives his life expectancy, the annuitant wins; if the annuitant does not outlive his life expectancy, the annuity company wins: the opposite of life insurance. A common variation on the traditional theme is to put a term certain feature in the contract, thereby limiting the risk of premature death to the annuitant. There is a price for this—the periodic payments will be reduced somewhat to reflect this additional obligation of the annuity company. An annuity contract for the life of the participant or for ten years, whichever is longer, is a common annuity feature.

Modern annuity contracts, like life insurance contracts, are beginning to look more and more like investment contracts, little different from an investment in a mutual fund, in the case of certain variable contracts. The IRS has struggled with this issue for years, and periodically Congress responds with legislation such as that we have seen in recent years under TEFRA and TRA '86 where restrictions have been placed on single premium deferred contracts, modified endowment contracts and the like.

The question posed here is when is a contract that is defined as an “annuity” or “life insurance” under the contract what it purports to be under Art. 21.22. Perhaps the question could favorably be resolved by asking whether the contract is subject to regulation under the Insurance Code, which it probably is, in which case it ought to benefit from the exemption described by the Code.

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<sup>1</sup>*In Re Bowes*, Case No. 293-20135, Bkrtcy. N.D. Tex. (10/29/93).

• **Spendthrift Trusts Cannot Be Reached by Creditors of Third Party Beneficiary.** Assets in a trust established by a grantor for a beneficiary other than the grantor, as a rule, cannot be reached by the creditors of the beneficiary, if the trust contains language indicating that it is intended to be a “spendthrift trust.”

§112.035. Spendthrift Trusts

- (a) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.
- (b) A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by this subtitle.
- (c) A trust containing terms authorized under Subsection (a) or (b) of this section may be referred to as a spendthrift trust.
- (d) **If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest does not prevent his creditors from satisfying claims from his interest in the trust estate.<sup>1</sup>**  
[Emphasis added.]

Lifetime spendthrift trusts for children and spouses (especially children and spouses who are professionals) should be considered by virtually all testators disposing of substantial assets. Not only can a lifetime trust be utilized to achieve certain generation skipping tax objectives and to give protection in the event of divorce, but as a spendthrift trust it can afford considerable security by protecting the trust assets from the claims of the beneficiary's creditors (including, perhaps, their spouses).

If the only reason why a testator or a beneficiary would not want such a trust is because of the trustee's fees and fear that the beneficiary will not have sufficient control over the assets, consider appointing the beneficiary as trustee, or give the beneficiary the power to appoint and remove the trustee. Use an ascertainable standard relating to health, education, support and maintenance, and give the trustee discretion as to whether or not to consider other sources of support. This **ought** to be a valid spendthrift trust. The fact that the beneficiary is also the trustee with the power to make distributions to himself **ought not** to make any difference. Neither the Texas Trust Code nor the cases contain any language which should limit the application of the spendthrift trust doctrine in cases where the beneficiary was acting in a fiduciary capacity.

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<sup>1</sup>Texas Trust Code §112.035(a).

- **Spendthrift Trusts In Which the Grantor is a Beneficiary.** There is some uncertainty regarding the extent to which a creditor can reach the assets in a self-settled trust in which there are beneficiaries other than the settlor.<sup>1</sup> If the trust is discretionary, or subject to a standard, are the creditors limited to whatever the settlor might, in the exercise of trustee discretion, be entitled, or, instead, to whatever distributions the settlor could legally demand and receive? Is that which the settlor can demand or might receive the same as the settlor's "interest"? The settlor's interest may be greater than that which the settlor has the unqualified right to demand, but the creditors are entitled to this interest even if the settlor would not be<sup>2</sup>; however, what about the interests of the other beneficiaries? Can the creditor invade that interest too, simply because the settlor was a permissible beneficiary? The case law is wanting in clear examples.<sup>3</sup> If the settlor reserves a general power of appointment, whether inter-vivos or testamentary, the settlor's creditors will probably be able to reach the assets over which the power of appointment may be exercised.<sup>4</sup>

Under the Trust Code, the creditors can reach the settlor's interest in a self-settled trust, but it will ordinarily require a court to determine just what that interest is, and that fact alone may dissuade a creditor from pursuing the matter.

- **Fraudulent Transfers.** Any transfer made with the intent to delay, hinder or defraud any creditor, present or future, will be ineffective if made for less than equivalent value. Furthermore, the presence of a transfer under such circumstances can result in the denial of a discharge, in the event of bankruptcy. The Texas Fraudulent Transfers Act provides:

**§24.005. Transfers Fraudulent as to Present and Future Creditors**

- (a) **A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within a reasonable time before or after the transfer was made or the obligation was incurred, *if* the debtor made the transfer or incurred the obligation:**
  - (1) with actual intent to hinder, **delay, or defraud any creditor of the debtor; or**
  - (2) **without receiving a reasonably equivalent value** in exchange for the transfer or obligation, **and the debtor:**
    - (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

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<sup>1</sup>*Cf. Becknal v. Atwood*, 518 S.W.2d 593 (Tex. Civ. App.-Amarillo 1975, no writ); *Fewell v. Republic National Bank of Dallas*, 513 S.W.2d 506 (Tex. Civ. App.-Eastland 1974, writ ref'd n.r.e.).

<sup>2</sup>*Glass v. Carpenter*, 330 S.W.2d 530 (Tex. Civ. App.-San Antonio 1959, writ ref'd n.r.e.).

<sup>3</sup>See *Note-Trusts-Spendthrift Provisions-Validity of Restraint on Alienation Where Settlor is Beneficiary*, 14 SW. L.J. 552 (1960).

<sup>4</sup>*Bank of Dallas v. Republic Bank of Dallas*, 540 S.W.2d 499 (Tex. Civ. App.-Waco 1976, writ ref'd n.r.e.).

- (B) intended to incur, or **believed that the debtor would incur, debts beyond the debtor's ability to pay** as they became due.
- (b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:
- (1) the transfer or obligation was to an insider;
  - (2) the debtor retained possession or control of the property transferred after the transfer;
  - (3) the transfer or obligation was concealed;
  - (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
  - (5) the transfer was of substantially all the debtor's assets;
  - (6) the debtor absconded;
  - (7) the debtor removed or concealed assets;
  - (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
  - (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
  - (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
  - (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.<sup>1</sup>

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<sup>1</sup>Texas Business and Commerce Code, §§ 24.001-24.013.

**§24.006. Transfers Fraudulent as to Present Creditors**

- (a) **A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.**
- (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.<sup>1</sup>

Literally read, this statute is very broad indeed. A transfer, no matter when made, is defined to be fraudulent if it was done with intent to hinder or delay a future creditor whose claim, if it will arise at all, will arise many years after the transfer is made. Moreover, a gratuitous transfer is fraudulent, no matter when made, if at the time of the transfer the debtor believed that he would (might?) incur debts (in the indeterminate future?) beyond his ability to pay as they become due, notwithstanding a lack of intent to hinder creditors.

On the other hand, where the factors listed in §24.005(b) are not present, the donor is solvent, and the likelihood of future insolvency as a result of specifically foreseeable creditor claims is remote (though possible), I do not believe that the statute prohibits reasonable gifts. We are all aware that economic ruination can unexpectedly strike anyone at anytime. We are all generally concerned about the vicissitudes of fate, the general unpredictability of life, and anyone with any sense knows that the slings and arrows of outrageous fortune can impact anyone. Thus, it is my opinion that if a person seeks to insure that his family and those financially dependent upon him will not be left destitute and helpless in the event of an **unforeseeable** financial or legal disaster, it is not improper to make gifts for that purpose at a time when the client is solvent and has no reason to expect to be rendered insolvent in the foreseeable future.

\* \* \* \*

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<sup>1</sup>Chapter 24, Texas Business and Commerce Code, §24.005.

## POST MORTEM PLANNING USING IRC<sup>1</sup> §§2032A, 6166 and 303

There should be no estate tax to pay in the estate of the first spouse to die. However, eventually the tax piper must get paid. If the interest in a closely held business or farm or ranch exceeds a certain percentage of the estate, and if other conditions are met, it may be possible to either lower the estate taxes or to defer payment of the tax or both. The following discussion will only apply to the estate of the surviving spouse. Further, if you are able to keep your joint estate under \$1.3 million (using 1999 tax rates) you will not need to be concerned with §§2032A, 6166 and 303. It may be possible to keep your estate below \$1.3 million in 1999 by making annual exclusion gifts.

- **§2032A.** §2032A allows the estate to value property in accordance with its actual use value, rather than its fair market value. This can result in significant savings in the case of farm and ranch land that has a low yearly income relative to its fair market value. In order to qualify, the farm or ranch property must constitute a large percentage of the overall value of the estate, and there must be "qualified use" of the land and "material participation" by the decedent.

Summarizing §2032A is not an easy matter, since the application of the statute in the real world is very complex. The four main conditions, in simplified form are as follows:

- i. **50%** or more of the adjusted value of the gross estate must consist of the adjusted value of real **or personal** property which **on the date of the decedent's death** was being used for a "**qualified use**" by the decedent or a member of the decedent's family, and was acquired from or passed from the decedent to a qualified heir of the decedent.
- ii. **25%** or more of the adjusted value of the gross estate must consist of the adjusted value of **real property** which meets the requirements set forth in paragraph i above, and in paragraph iii below.
- iii. During the **eight year period** ending on the date of the decedent's death, there must have been periods aggregating **five years** or more during which the real property was owned by the decedent or a member of the decedent's family and used for "**qualified use**" by the decedent or a member of the decedent's family **and** there was "**material participation**" by the decedent or a member of the decedent's family in the operation of a farm or other business, and the property is designated in a special agreement with the IRS. If the decedent was receiving old-age benefits under Title II of the Social Security Act or was disabled, the eight year period shall end on the date such disability or retirement began.<sup>2</sup>

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<sup>1</sup>All references herein to the "IRC" are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

<sup>2</sup>IRC §2032A(b)(4).

**iv.** Such real property is designated in an agreement specified in IRC §2032A(d)(2).

- **§6166.** If the value of an interest in a closely held business exceeds **35%** of the adjusted gross estate, the executor may elect to pay all or a portion of the estate taxes in installments. Interest only can be paid for the first five years, with the tax being paid in up to ten annual installments thereafter. Interest is charged at only 4%. However, the 4% interest portion is only with respect to the tax on \$1,000,000, reduced by the unified credit. The tax on \$1,000,000, prior to the application of the unified credit is \$345,800. In 1987, the unified credit is \$192,800. Therefore, the 4% rate is limited to the first \$153,000 of estate tax liability.

There are a number of other special conditions and tests which must be met before IRC §6166 will be available. Passive assets cannot be considered in the application of the 35% test.<sup>1</sup> In the case of a sole proprietorship, only the assets of the business which are actually used in the enterprise will be counted for purposes of satisfying the 35% test. In order to qualify for §6166 treatment, the proprietorship, partnership or corporation must be an active trade or business.<sup>2</sup>

An interest in a corporation will qualify if either the corporation has 15 or fewer shareholders, or if the decedent held 20% or more in value of the voting stock.<sup>3</sup> If a husband and wife hold an interest as community property, as tenants in common, as joint tenants, or as tenants by the entirety, they are treated as one person for purposes of the numbers of owners tests.<sup>4</sup> Other provisions of §6166 provide for aggregation with certain members of a decedent's family under certain circumstances and for certain purposes. Business may be aggregated for purposes of meeting the 35% test if 20% or more of the total value of each is included in the decedent's gross estate.<sup>5</sup>

- **§303.** Under IRC §303, redemptions of corporate stock are generally treated as if they were dividends. If the conditions of IRC §303 are met, the redemption of stock out of an estate will instead be treated as the sale of a capital asset.

The stock must be included in the decedent's gross estate for federal estate tax purposes, and the value of all of the corporation's stock which is included in the decedent's gross estate must exceed 35% of the adjusted gross estate. Furthermore, the redemption proceeds cannot exceed the estate, inheritance and succession taxes payable by reason of the death of the decedent, plus the amount of funeral expenses and cost of administration deductible for federal estate tax purposes. The generation skipping tax is treated as a death tax if it occurs at the same time as or as a result of the decedent's death.<sup>6</sup>

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<sup>1</sup>IRC §6166(b)(9).

<sup>2</sup>See Rev. Ruls. 75-365, 75-366 and 75-367.

<sup>3</sup>IRC §6166(b)(1)(C).

<sup>4</sup>IRC §6166(b)(2)(B).

<sup>5</sup>IRC §6166(c).

<sup>6</sup>IRC §303(d).

The shareholder redeeming the stock must actually be liable for the tax.<sup>1</sup> Therefore, if the will provided that all of the taxes and expenses were to be paid by the residuary estate, and the stock is not a part of the residuary estate, §303 will not be available!

To an extent, it may be possible during life to take a few simple steps in order to meet the 35% test. For instance, operating assets owned by the decedent individually and leased to the corporation could be transferred to it, thereby increasing the value of the stock as a percentage of the gross estate. Charitable contributions, if made during lifetime will reduce the size of the adjusted gross estate, but if the same contributions are made at death, these gifts will be includible.

§303 is only important if a business has retained earnings and profits.

- **Cost of Analyzing.** It would take at least \$3000 worth of legal time and expense to adequately analyze and implement planning that would assure that §§2032A, 6166 and 303 will be available. The §2032A issue is complicated enough that if that issue were pursued to the fullest, even more expense could be involved. If you anticipate keeping your estate below the estate tax threshold or close to it, §§2032A, 6166 and 303 will not be that critical. I recommend that we consider these issues after a basic estate plan has been put in place.

\* \* \* \*

If it looks as if you are going to have a taxable estate after all nontaxable gifts are made, then you may want us to do a thorough analysis of §§2032A and 6166 as a means for reducing the burden of estate taxes.

\* \* \* \*

### **Recommendations**

I would initially recommend that you sign the basic estate planning documents soon, if you do not have a basic estate plan in effect already. I also recommend that you consider a means for keeping the life insurance proceeds out of your estate, if you have life insurance with significant death benefits. An irrevocable trust might be in order here. (See intermediate estate planning considerations above.) Anything beyond that would of course depend on your personal financial situation and preferences. After I have had a chance to visit with you and to review your assets and needs, we can decide on what, if any, further planning would be advisable.

Yours very truly,

Noel C. Ice

NCI/ice

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<sup>1</sup>IRC §303(b)(3).

Enclosures: Approximate Fee Schedule

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
2100 BURNETT PLAZA  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102-6898  
817/877-2800

Thursday, March 11, 1999

NOEL C. ICE

BOARD CERTIFIED  
ESTATE PLANNING AND PROBATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

ATTORNEY'S DIRECT DIAL  
(817) 877-2885

METRO LINE 429-3815  
TELEX 75-8631  
TELECOPY 817/877-2807  
FRONT DESK  
(817) 877-2800  
SECRETARY'S DIRECT DIAL  
(817) 878-2944  
Our File No.  
ICE09/00009

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Initial Estate Planning Meeting

Dear Moore and Lotta:

Thank you for allowing me the privilege of assisting you in the preparation of your estate plan.

**Estate Planning Workbook**

In order to help me with the information I need, I am enclosing an Estate Planning Workbook or Questionnaire. The primary purpose of the Workbook is to assist us in preparing your Will and in formulating an appropriate estate plan for you and your family. In addition, however, the facts garnered could be invaluable in organizing your personal, financial, and family affairs in such a way that your estate will be in order and can be properly administered.

You may find that completing the Questionnaire is time consuming and more than you bargained for. This is understandable, and it is up to you as to how much time you feel you can afford to spend on this matter; however, I want to impress upon you that in order to plan your estate properly, I need all of the facts.

The Workbook consists of several parts:

- (1) The first part asks for basic background information about the family tree.
- (2) The second part requests financial information. This may be the most burdensome part of the form, but if you have a current financial statement, most, but not all, of the questions may be answered by reference to it. Finances are a personal matter that you may feel uncomfortable in divulging; nevertheless, I cannot do an adequate job of planning for the disposition of your property unless I know of what it consists.

(3) The third part of the questionnaire concerns fiduciary appointments. Here you will find questions about whom you want to serve as your executor or trustee. In a sense, this may be the most important part of the form.

(4) The fourth (and last) part of the questionnaire asks questions about how you want to have your property pass at your death. I urge you to defer completing this part of the questionnaire until our next meeting, as I hope to be of assistance in advising you with respect to these issues. If, however, you have already developed a fixed concept concerning these matters, you may wish to give preliminary answers to as many of these questions as you feel comfortable in answering now, on the understanding that after we visit and are able to discuss some of the tax and practical issues involved, some of your answers may change. In any event, you should review these questions prior to our meeting, in order to get some idea of some of the options available.

(5) **In order to get started, I need to have you complete Parts I and III (family tree and fiduciary appointments) at a minimum.** Please complete these sections even if you don't complete Parts II and IV.

If you are uncertain as to any response, we can discuss it when we meet in person. After you have completed the Workbook, please return it to me for review in advance of our next meeting. If you have any questions, please feel free to call.

Unless an appointment has already been scheduled, my secretary will be calling you shortly to schedule a mutually convenient time for our next meeting.

To the extent you are able to do so without undue inconvenience, please deliver to my secretary, Cindy Lee (817/878-2944), prior to our initial meeting, as many of the following documents as you can reasonably locate, **unless, and except to the extent that, you have already done so. If you are able to get these documents to me in advance of our initial meeting, it will facilitate the process.** I will then be in a position to evaluate certain aspects of your estate ahead of time, and can make suggestions at the meeting regarding the recommended form of title, joint and survivorship provisions, and beneficiaries, without incurring the expense and lost time that delay necessarily entails. The documents that I would prefer to review **in advance of our meeting** are as follows:

1. A copy of the last monthly or other **periodic statement from each institution in which you have an account** (bank, savings and loan, brokerage firm, etc.). **This is very important.**
2. Each **life insurance** policy on your life, and a copy of the last summary statement of the life insurance account from the insurance company respecting any such policy. Such statements will ordinarily reflect the present owner of the policy on the books and records of the insurance company, whether the policy is term or not, and if not term, the cash value and the status of any outstanding loans.
3. A copy of each outstanding **beneficiary designation** for all life insurance, bank and brokerage accounts, IRA and qualified plan benefits, and all other arrangements paying death benefits that allow for the designation of a death beneficiary.

4. A copy of **any plan of deferred compensation** (profit sharing plan, 401(k) plan, defined benefit plan, nonqualified plan, etc.) in which you have an interest, and a copy of the **Summary Plan Description** and latest **Individual Benefit Statement**.
5. A copy of each **IRA** (including SEP-IRAs) in which you have an interest. There should be both an adoption agreement and a copy of the IRA itself, so be sure to send me both.
6. A copy of the **deeds** to any real estate that you own.
7. A copy of each **buy-sell agreement**, partnership or joint venture agreement to which you are a party.
8. A copy of all **prior gift tax returns** ever filed by you.
9. A copy of your **last two year's income tax returns**.
10. A copy of **any existing trusts** of which you are the beneficiary or grantor.
11. A copy of your **prior wills**.
12. A copy of your most recent **financial statement**.

\* \* \* \*

To give you some idea of what estate planning is all about, I have prepared the following list, in table form, of some of the documents that you might want us to prepare, depending upon your needs and desires. If you are interested in a more comprehensive description of the various estate planning techniques available to you, you may call my secretary (817/878-2944) and request a copy of my "**Estate Planning Techniques Letter**."

<b>Name of Document</b>	<b>Brief Description of Document and Important Considerations Concerning Its Use</b>
<b>Will</b>	<p>A Will is like a deed that takes effect at death. "Probating" the Will is a special procedure that means proving up the Will, so that others searching the title records can rely that the Will is effective. A probated Will is of public record.</p> <p>Opening an administration is a separate procedure that invests the person appointed as <b>executor</b> under your Will with the authority to act in your stead, with regard to paying your debts and estate taxes, and in seeing to it that the property described in the Will is delivered to the persons named in it.</p> <p>In Texas, as well as in many other Uniform Probate Code states, the executor can be, and usually is, made independent of court control. This does not mean that the court cannot get involved at all, but it does mean that, other than filing an inventory, the court will not get involved unless there is a special need for it to do so (e.g., if a beneficiary asserts a claim against the executor for malfeasance).</p>
<b>Revocable Living Trust</b>	<p>A trust is a legal concept developed under the English common law. The idea is that a trustee (who can be an individual or an institution) holds legal title to property <i>for the sole and exclusive benefit</i> of another person or persons (called <i>beneficiaries</i>).</p> <p>It is possible under some circumstances for the trustee and beneficiary to be the same. The trustee's powers and duties are described under the trust instrument and by statutes (such as the Texas Trust Code). The trust instrument describes the circumstances under which the trustee must make, or in its discretion may make, distributions to or for the benefit of the beneficiaries. Trusts can be made revocable or irrevocable, depending on the intent of the person who created the trust (the "maker").</p> <p>A revocable living trust is revocable and amendable during your lifetime. The portion of the trust that holds your interest in either community or separate property becomes irrevocable at your death. A living trust can be either presently funded or unfunded. If it is funded, it may be that there will be no need for a guardianship in the event of incapacity, and the assets in the trust will not go through probate. If, or to the extent that, the trust is unfunded (a "standby trust"), the person holding your power of attorney can be authorized to fund the trust.</p> <p>If the trust is funded during your life, the trustee is directed to make distributions to you for health, maintenance and support, or if you otherwise demand a distribution.</p>

You are entitled to appoint someone who will have the power to remove and replace the trustee. Initially, you will have this power.

Note that because the trust is revocable during life, the trust will be included in your estate for estate tax purposes, and will be subject to income taxation and the claims of your creditors, the same as if the trust did not exist. Although a revocable living trust can be useful during your life, if funded during life, it also can, and usually does, contain estate planning trusts or subtrusts that are created at death out of the trust corpus, including assets that pour over under your Will, in much the same way as a probate estate is divided (except that it can take place outside of the probate process). These trusts can be used to shelter your unified credit from tax in your spouse's estate, or to take advantage of the Generation Skipping Tax Exemption, or to secure the benefits of the marital deduction, to name only a few of the important techniques and deductions that may be available. If your estate plan takes advantage of these devices, a detailed explanation will be provided below.

**Durable  
Power of  
Attorney**

**Purpose of Form.** A durable power of attorney is used to invest someone whom you trust with the authority to act on your behalf. This person is called an attorney-in-fact, and is sometimes also referred to as the power holder or agent. A durable power of attorney could be indispensable should you become incapacitated. One of the most important powers the holder of a power of attorney has is the power to make transfers to your Living Trust.

**Limitations.** The Power of Attorney can be Universal, i.e., the holder of the power can do anything that you could do and which the law allows another to do on your behalf. Or, the power can be limited in accordance with your wishes.

**Springing Powers.** Texas law was amended in the fall of 1993 to allow the power to come into existence only if you become disabled, if the power of attorney so provides. This law is relatively new. The problem with a "springing" power of attorney is that the agent appointed must be able to demonstrate the existence of the conditions (such as disability) that allow the power to "spring" into existence. At the present time, I am not comfortable enough with the concept of a springing power to recommend it in most cases. Perhaps with time, as the law develops and as third parties become more used to the idea of springing powers, I will be ready to recommend their use. It is something you should consider, particularly if you have any concern at all that the person who is holding your power of attorney might exercise it without your knowledge and at a time when you are not incapacitated.

**Cautions.** The holder of your power of attorney is a fiduciary, and therefore owes you the highest duty of trust and confidence that the law recognizes. If the holder abuses the power, the law will hold him accountable. Nonetheless, it is possible to abuse the office and so you should not appoint someone unless you feel confident that the person will keep your best interest at heart. If a spouse is appointed as attorney-in-fact, then in the event of divorce or other marital discord, the power should be revoked. Even if the power is revoked, the power holder might still attempt to use the power illegally. If so, a third party who is unaware of the revocation might not be held accountable if the party acts in reliance upon the power still being valid.

**Revoking a Power of Attorney.** You always have the right to revoke a power of attorney previously granted. However, unless a third party knows about the revocation, the revocation may not be of any practical effect. If you are concerned that a former power holder might use a revoked power to your detriment, you should try to get possession of the original instrument granting the power which you are now revoking, and, in addition, you should file a notice of revocation with the county clerk.

**Durable  
Power of  
Attorney To  
Make Health  
Care  
Decisions**

There is a special statutory form that allows you to appoint a person to make health care decisions for you should you be unable to make such decisions for yourself. The Health Care Power of Attorney is a very useful concept in this age of advanced medical technology. The Health Care Power of Attorney should be coordinated with a Physician's Directive (Living Will) if you have one.

**Appoint-  
ment of  
Guardian  
Before the  
Need Arises**

This document is patterned after a form found at Probate Code §118A, and is designed to give you some say so over who will be your guardian should the need ever arise. Under this form, you are allowed to specify your preferences as to who will act as the guardian of your person, and who will act as the guardian of your estate, should you ever become incapacitated. You can also specify who you do **not** want to serve as your guardian. This is a matter that is otherwise determined by the Courts in accordance with a statutory preference order predetermined by the legislature. The Declaration of Guardian Before the Need Arises is not effective unless it is filed before a guardianship proceeding is taken out. This document can therefore be filed now, to be on the safe side; or, it can be filed later when the need for it becomes more apparent.

**Directive to Physicians Under the Texas Natural Death Act (Living Will)**

This form exercises your right under Texas law to express your desire not to have your life artificially prolonged where your attending physician determines that death is imminent or will result within a relatively short time without application of life-sustaining procedures.

**Anatomical Gift**

Some people desire to make anatomical gifts of "any needed organs and tissues" or of certain specified organs. This form is designed to accomplish this purpose. I prepare this form free of charge. We will send the completed form to the Living Bank or any other organ bank that you may prefer.

**Irrevocable Life Insurance Trust**

An Irrevocable Life Insurance Trust need not contain life insurance, but frequently it does. Contributions to an irrevocable trust may or may not be subject to gift tax, depending on the size of the gift (over \$10,000, for example) and the terms of the trust (withdrawal powers in the beneficiaries). The main purpose of an irrevocable trust is to avoid estate taxation of the trust corpus. It is likely that the corpus of the trust will be substantially larger at date of death than at date of gift, and this is the reason that using this type of trust is often thought attractive. This is particularly the case if the trust is funded with life insurance, which may have little present value compared to the value of the proceeds at death.

An Irrevocable (Life Insurance) Trust can achieve tremendous estate tax savings. An outright gift to the intended beneficiaries can accomplish much the same transfer tax savings as can a gift in trust, and it is a much simpler plan to implement. However, with a trust, some modicum of control over the gift can be built into the trust provisions, and this is not possible with an outright gift.

In the case of a gift of a cash value policy, you will be giving up the right to gain access to the policy value, which can be a real detriment. However, in the case of term insurance, the only real cost is the administrative cost of establishing and maintaining a trust, if a trust is used. **Since term insurance has little or no lifetime value, it is the perfect candidate for a gift** if your estate would otherwise be taxable, after taking the \$600,000 estate tax exemption equivalent into account.

**Family Limited Partnership**

A Family Limited Partnership (an FLP) is a partnership between you and your family members designed to achieve or promote a number of business and estate planning purposes. Entering into an FLP Agreement is a relatively sophisticated technique that is most often used in large estates. An FLP can be designed to promote or accomplish a number of business and estate planning objectives.

These objectives include the following:

- provide resolution of any disputes which may arise among the Family in order to preserve family harmony and avoid the expense and problems of litigation;
- maintain control of Family Assets;
- consolidate fractional interests in Family Assets;
- increase Family wealth;
- establish a method by which annual gifts can be made without fractionalizing Family Assets;
- continue the ownership of Family Assets and restrict the right of non-Family to acquire interests in Family Assets;
- possibly provide limited protection to Family Assets from claims of future creditors against Family members;
- prevent the transfer of a Family member's interest in the Partnership as a result of a failed marriage;
- provide flexibility in business planning not available through trusts, corporations, or other business entities;
- facilitate the administration and reduce the cost associated with the disability or probate of the estate of Family members; and
- promote knowledge of and communication about Family Assets.

•In addition, there is a distinct possibility that the value of an FLP will be substantially less than the value of the underlying assets placed in the FLP (30% or more). Achieving a discounted value on the assets can obviously result in reduced estate and gift taxes!

Entering into an FLP Agreement is a relatively sophisticated technique, which may or may not successfully achieve all of its intended purposes.

Please consider, in advance of our appointment, who you would prefer to appoint as initial and back up fiduciary under any of the above documents in which you might be interested.

Possible choices include the following, in any order or combination—

- Your Spouse.

- Yourself and Your Spouse (in the case of a revocable living trust).
- One or more adult children.
- A brother or sister or close friend.
- A Financial Institution that has a Trust Department. Such as—  
Bank One, Texas, N.A.  
NationsBank of Texas, N.A.  
Texas Commerce Bank, N.A.  
Overton Bank & Trust  
Central Bank and Trust

If you have already given me the copies requested, then you may ignore this letter to that extent and send me what I do not have. When you feel sure that I have everything on the list, please call my secretary, Cindy Lee, at 878-2944 and tell her.

**As soon as you receive this letter, please call my Secretary at (817) 878-2944, and give her the following information:**

- Full names and familiar names of you and your spouse.
- Name at birth of you and your spouse.
- Date and place of birth of you and your spouse.
- Social security numbers of you and your spouse.
- Date and place of marriage.
- Names, dates of birth, addresses, telephone numbers and social security numbers of your children and step-children (separately identified), if any
- Names, dates of birth, addresses, telephone numbers and social security numbers of anyone among the class of persons or individuals whom you might wish to appoint as a fiduciary, co-fiduciary or successor fiduciary.<sup>1</sup> (We can decide at the meeting who among this class to appoint, and in what order.)
- Business address and telephone no. of you and your spouse.
- Name, address and telephone no. of C.P.A.
- Year Texas domicile established of you and your spouse.
- Whether or not you or your spouse have any deceased children.
- Prior marital status of you and your spouse.
- If divorced, date and place of divorce.
- If widow(er), name and date of death of deceased spouse.

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<sup>1</sup>A *fiduciary* is a person or institution that is in a special relationship of trust and confidence with another person. Because of that relationship the fiduciary has a *duty* to treat that person with the utmost fairness in all dealings between them. An executor is in a fiduciary relationship to the estate and the beneficiaries of the estate, and as such owes them special duties. A trustee is in a fiduciary relationship to the trust and the beneficiaries of the trust, and as such owes them special duties. A partner owes a fiduciary duty to the partnership and to each of the other partners. A person holding a power of attorney (the agent) owes a fiduciary duty to the person granting the power (the principal). These special duties are called "fiduciary duties."

- Whether or not you or your spouse would like for us to prepare an Anatomical Gift form.
- Whether or not you or your spouse would like for us to prepare a Directive to Physicians (a so-called "Living Will").

If you will do this, there is a good chance that we can complete and sign a good many of the documents described above at our initial meeting. By being prepared in advance of our meeting in this regard, you will save on time and on costs.

Finally, I am enclosing a blank copy of the estate planning timetable that I use at the office to monitor the progress of the implementation of the estate plan. This will give you some idea of the process.

Yours very truly,

Noel C. Ice

NCI/ice

Enclosure: Estate Planning Timetable  
Estate Planning Workbook

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899

**Cindy, this is in order for us to check to see that Data has been entered properly. Review this carefully first. This does NOT go to the client.**

**Double Check Formatting of Dates**

**OUR INTERNAL CHECK OF DATA BASE INFORMATION IDENTIFYING CLIENT AND CLIENT'S IMMEDIATE FAMILY**

Name of Client As Used In Instruments	<b>Moore Money</b>
Has Moore Money been named as a possible fiduciary or trust protector?	Yes.
Gender "m" or "f"	m
Familiar Name	Moore
Name at Birth, if different	Morris Edward Money
AKA	Mo Money and M.E. Money
Date of Birth	10/1/29
Place of Birth	Desert City, Lion's Den County, Texas
Soc. Sec. No.	009-999-9999
Domicile	New Minglewood, Ripple County, Texas
County & State	Ripple County, State of Texas
Residence	2525 West L.A. Freeway, New Minglewood, TX 76999, (817) 999-9999
Citizenship	Moore Money is a citizen of the United States
his or her ( <b>m</b> )	his
him or her (m)	him
he or she (m)	he
Marital Status	Moore Money is married.
Prior Marital Status of Moore Money	Moore Money has not been previously married.
Spouse is "Husband" or "Wife" of Moore Money	Wife

Name of Spouse	<b>Lotta Money</b>
Has Lotta Money been named as a possible fiduciary or trust protector?	Yes.
Date of Marriage	1/1/50
Place of Marriage	Shotgun Point, Terrapin Station County, Texas
Spouse's Name at Birth	Lotta B. Goode
Spouse's AKA	B. Goode, Mrs. Lotta Money and Mrs. Moore Money
Spouse's Date of Birth	10/1/31
Spouse's Place of Birth	Crazy Fingers, Dark Star County, California
Spouse's Soc. Sec. No.	007-999-9999
Spouse's Domicile	New Minglewood, Ripple County, Texas
Spouse's Citizenship	Lotta Money is a citizen of the United States
his or her (f)	her
him or her (f)	her
he or she (f)	she
Prior Marital Status of Lotta Money	Lotta Money has not been previously married.

Identification of Children of Moore Money

Number of Children	two
Child or Children	children
Deceased Children w/ Issue	None
Names of Children	E. C. Money (Cosmic Charlie) Date of Birth: 1/2/1950 SSN: 999-99-9090
	Faith N. Money (Faith) Date of Birth: 1/2/1951 SSN: 999-99-9000

Different Children? Neither of Moore Money nor Lotta Money has a natural or adopted child that is not also the natural or adopted child of the other.

Names of Children of Moore Money that are not Children of Lotta Money None.

Names of Children of Lotta Money that are not Children of Moore Money None.

Names of Children that are children of both Moore Money and Lotta Money E. C. Money (Cosmic Charlie)  
Date of Birth: 1/2/1950  
SSN: 999-99-9090

Faith N. Money (Faith)  
Date of Birth: 1/2/1951  
SSN: 999-99-9000

Treat Children of Lotta Money as Children of Moore Money? N/A

Children Excluded From Inheriting From Moore Money **None.**

Treatment of Afterborn or After Adopted Children of Moore Money Automatically Included.

**Identification of Children of Lotta Money**

Treat Children of Moore Money as Children of Lotta Money, under Lotta's Estate Plan? N/A

Number of Children of Lotta Money two

Child or Children children

Deceased Children w/ Issue None

Names of Children of Lotta Money E. C. Money (Cosmic Charlie)  
Date of Birth: 1/2/1950  
SSN: 999-99-9090

Faith N. Money (Faith)  
Date of Birth: 1/2/1951  
SSN: 999-99-9000

Children Excluded From Inheriting From Lotta Money Under ICE09/00009's Estate Plan **None.**

LIST OF ACTUAL OR POTENTIAL FIDUCIARY APPOINTMENTS  
AND ANCILLARY DOCUMENTS UNDER THE ESTATE PLAN OF

*MOORE MONEY*

Below you will find a list of actual or potential fiduciaries that have been or will be appointed by you under your estate planning documents that have been or will be prepared by us.<sup>1</sup> The persons or institutions listed as fiduciaries should correspond to those listed in the final documents that you sign, unless changes have been made after this document was prepared. In any event, you should compare this list with the appointments actually made in the signed documents before relying upon it.

The person appointed as the “First” fiduciary has priority over the person appointed as the “Second” fiduciary. The lower the number the higher the preference. Thus the person appointed as the “Second Executor” will serve only if the “First Executor” is unable or unwilling to serve.

If more than one person is listed in the left hand column of the same row, this indicates that the persons are to serve simultaneously as co-fiduciaries. Generally, if there are co-fiduciaries appointed to serve at the same time, and one of the co-fiduciaries is unable or unwilling to serve, the remaining co-fiduciary(ies) will continue to serve as the sole fiduciary or as the remaining co-fiduciaries, as the case may be.

One of the reasons this Fiduciary Appointment List is being provided is so that you will be able to review it so that we will be able to correct any errors. **Therefore, if any of the information listed below is incorrect, you should bring it to our attention immediately.**

Before reviewing the list, here are some important terms you should know.

<b>Term</b>	<b>Definition</b>
<b>Fiduciary</b>	A <i>fiduciary</i> is a person or institution that is in a special relationship of trust and confidence with another person. Because of that relationship the fiduciary has a <i>duty</i> to treat that person with the utmost fairness in all dealings between them. An executor is in a fiduciary relationship to the estate and the beneficiaries of the estate, and as such owes them special duties. A trustee is in a fiduciary relationship to the trust and the beneficiaries of the trust, and as such owes them special duties. A partner owes a fiduciary duty to the partnership and to each of the other partners. A person holding a power of attorney (the agent) owes a fiduciary duty to the person granting the power (the principal). These special duties are called “fiduciary duties.”

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<sup>1</sup>The terms “us,” “we,” or other first person pronoun generally refers to the law firm of Cantey & Hanger, L.L.P. or to Noel C. Ice. The term “you” means Moore Money.

**Fiduciary Duty**

A *fiduciary duty* is the highest duty that the law recognizes.<sup>1</sup> Some of the more important fiduciary duties include: the duty of confidentiality; the duty not to self deal; the duty to avoid conflicts of interest; the duty to exercise care; the duty to exercise diligence and prudence; the duty to preserve and protect assets subject to the office (including the duty to diversify); the duty to maintain accurate records and account periodically to beneficiaries; the duty not to delegate responsibilities involving major judgments and discretion; the duty to offer certain business opportunities to the beneficiary, if the opportunity is in the same line of business as the enterprise that is the subject of the fiduciary relationship; and the duty to act in a timely manner.

**Executor**

An *executor* is the person appointed in the will of the decedent to carry out the desires of the decedent as expressed in that will and to administer the estate of the decedent. An *executrix* is the feminine gender of that word. However, the word “executor” can be used to denote both.

In a sense, the executor steps into the shoes of the decedent, for the purposes of paying debts and taxes. After this has been done and the administration expenses have been paid, the executor is to deliver the decedent’s property to the beneficiaries of the decedent’s will. In some cases, a beneficiary will be a trustee of a trust.

**Independent Executor**

Texas allows a person to appoint an *independent executor* who may function more or less free of court control and interference if the will so provides. In other cases, almost all of the executor’s duties and actions are subject to prior approval by the court. This is obviously a cumbersome and expensive process. An independent executor, however, generally does not need to seek court approval before or after undertaking actions that are in the best interest of the estate and that are in accordance with the terms of the will and the law.

(The fact that an independent executor may act without prior approval by the Court, does not mean that the executor’s freedom is not without limits in the administration of the estate. The office is a “fiduciary” office, and must be carried out in accordance with the law.)

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<sup>1</sup>In the often quoted words of one eminent jurist, “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” Cardozo, C. J., *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546.

<b>Guardian of Minor Children</b>	An orphaned minor child must have someone appointed, in a fiduciary capacity, to serve as that child's guardian. There can be a guardian of the person, and a guardian of the estate. These fiduciaries frequently are the same person, but this is not always necessary or desirable. The last parent to die has the right to designate a child's guardians, and the courts ordinarily will respect this designation.
<b>Self-Appointment of Guardian of Adult</b>	Texas law allows an adult to designate the person who will serve as guardian in the event that the adult becomes incapacitate. There can be a guardian of the person, and a guardian of the estate. These fiduciaries frequently are the same person, but this is not always necessary or desirable. The courts ordinarily will respect the designation.
<b>Trustee</b>	A trustee holds legal title to trust property, and is charged with the duty to hold, manage and distribute that property in accordance with the terms of the trust instrument solely for the benefit of the persons identified in the trust instrument as the beneficiaries of the trust, whether the beneficiaries are life tenants or remaindermen (the persons who will ultimately benefit from the trust on the death of the life beneficiary). A trustee is the quintessential fiduciary. The trustee is appointed under the instrument creating the trust. Often the trust instrument will provide a mechanism for removing the trustee or replacing a trustee that is no longer able to serve, or for directing the trust investments. This function is sometimes delegated to a "Trust Protector."
<b>Trust Protector</b>	A trust protector is a person who has been granted special powers under the trust instrument to remove or replace a trustee, and to direct trust investments with the consent of the trustee.
<b>Life Tenants and Remaindermen</b>	A life tenant (or life beneficiary) of a trust is a beneficiary who has a present right to receive distributions from the trust under the circumstances set forth in the trust instrument.
<b>Contingent Beneficiaries</b>	<p>The remaindermen are the persons who will ultimately receive the benefits of the trust property following the death of the life tenant.</p> <p>Often the remaindermen are "contingent beneficiaries," meaning that they will only benefit under the trust if they outlive the life tenant, or in the event of some other contingency.</p>

**Holder of Power of Appointment**

A person may be given a power of appointment over a trust. That power may be “general” or “nongeneral” (sometimes called a “special power of appointment”). A “testamentary” power (whether general or nongeneral) may only be exercised by will.

Property that is subject to a general power of appointment is taxable in the estate of the holder of the power for estate tax purposes. A general power is generally unrestricted. A special power is one that is restricted so that the power may not be exercised in favor of the power holder or his estate or creditors, and may be otherwise restricted. Often a nongeneral power may only be exercised in favor of the descendants (or their spouses) of the person granting the power.

A power of appointment is ordinarily not considered a fiduciary power. The holder of a power of appointment should be permitted to exercise or not exercise the power with impunity.

A power of appointment can be a very useful tool. There are times when the holder of the power may want to exercise it to keep property held in trust, in order to protect it against the improvidence of the remainderman who would otherwise take the property in default of the exercise of the power. Sometimes exercising the power can save taxes, especially if the power is a nongeneral power. The power holder should take care that the exercise or failure to exercise the power does not result in a generation skipping transfer tax, which might be the case if the beneficiary of the exercise or nonexercise is more than a generation removed from the original grantor or the power holder.

The following is a list of fiduciaries, **listed by name**. If a person(s) is listed, but there is nothing under the second column (Fiduciary Office Held), this indicates that the person(s) was a possible choice for one reason or another (such as family relationship), but that, for the time being, has not been appointed to any fiduciary office.

**Fiduciary Name, Address,  
Telephone and Social Security No.**

**Fiduciary Office Held**

**Moore Money**  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999  
009-999-9999

First Co-Trustee (jointly with Lotta Money)  
First Trust Protector (jointly with Lotta Money).

**Lotta Money**

2525 Mars Hotel  
 999 West L.A. Freeway  
 New Minglewood, TX 76999  
 (817) 999-9999  
 007-999-9999

First Executor  
 First Co-Trustee (jointly with Moore Money)  
 First Guardian of Person  
 First Guardian of Estate  
 First Person Holding Durable Power of Attorney  
 First Person Holding Power of Attorney For Health Care  
 First Trust Protector (jointly with Moore Money)

**Infidelity Trust**

999 Sugar Magnolia Ave.  
 Gray Folded, CA 90111  
 (555) 551-5515

Second Executor  
 Second Trustee  
 Second Guardian of Estate  
 Third Person Holding Durable Power of Attorney  
 Second Trust Protector

**Faith N. Money (Faith)**

221B New Minglewood Avenue  
 Cucamonga, CA 90210  
 (900) 123-4567

Third Executor  
 Third Trustee  
 Second Guardian of Person  
 Third Guardian of Estate  
 Second Person Holding Durable Power of Attorney  
 Second Person Holding Power of Attorney For Health Care

\* \* \* \*

Here is another view of the fiduciaries, **listed by office**. The appointments are listed consecutively in numerical and descending order of preference. The lower the number the higher the preference. That is, the primary appointment is listed first. If the person listed first is unable or unwilling to serve, the person listed second (next) will serve instead. If the persons listed first and second are all unable or unwilling to serve, the person listed third (if any) will serve in their place. And so forth, if more persons are listed.

**APPOINTMENT OF INDEPENDENT EXECUTOR UNDER WILL**

1. Lotta Money.
2. Infidelity Trust.
3. Faith N. Money (Faith).

**APPOINTMENT OF TRUSTEE OF THE LOTTA MOORE MONEY FAMILY TRUST**

1. Moore Money and Lotta Money.
2. Infidelity Trust.

3. Faith N. Money (Faith).

**PERSONS HAVING THE POWER TO REMOVE AND REPLACE TRUSTEE OF THE LOTTA MOORE MONEY FAMILY TRUST (THE "TRUST PROTECTOR")**-This is a partial list and may be incomplete.

1. A person for whom a Protected Trust has been created, and who has attained 45 years of age or more, shall have a Removal and Replacement Power with respect to that trust following the death of Moore Money and Lotta Money.
2. Moore Money and Lotta Money.
3. Infidelity Trust.
4. Any trustee then serving.
5. The Beneficiaries, under limited conditions.
6. The presiding judge of the District Courts of Ripple County, Texas.

**APPOINTMENT OF ATTORNEY-IN-FACT UNDER DURABLE POWER OF ATTORNEY**

1. Lotta Money.
2. Faith N. Money (Faith).
3. Infidelity Trust.

**APPOINTMENT OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

1. Lotta Money.
2. Faith N. Money (Faith).

**APPOINTMENT OF GUARDIAN BEFORE THE NEED ARISES**

Guardian of the Person:

1. Lotta Money.
2. Faith N. Money (Faith).

Guardian of the Estate:

1. Lotta Money.
2. Infidelity Trust.
3. Faith N. Money (Faith).

You have expressly disqualified the following persons from serving as guardian of your person: **my son, Cosmic Charlie.**

You have expressly disqualified the following persons from serving as guardian of your estate: **my son, Cosmic Charlie.**

**APPOINTMENT OF GUARDIAN FOR MINOR CHILDREN**

You have no minor children for whom a guardian need be appointed.

**DIRECTIVE TO PHYSICIANS MADE UNDER THE TEXAS NATURAL DEATH ACT**

At your request, we have prepared a Directive to Physicians Under the Texas Natural Death Act. This document does not require the appointment of a fiduciary.

**ANATOMICAL GIFT**

At your request, we have prepared a document under which you have asked to make an anatomical gift to the Living Bank. This document does not require the appointment of a fiduciary.

\* \* \* \*

**IRREVOCABLE LIFE INSURANCE TRUST**

If we are preparing an irrevocable trust for you, it and the fiduciaries under it will be described in separate correspondence. If you do not receive separate correspondence on this point you may assume that we are **not** preparing such a trust.

IDENTIFICATION OF CLIENT  
AND  
CLIENT'S IMMEDIATE FAMILY

Name of Client As Used In Instruments	Moore Money
Other Names Known By	Named "Morris Edward Money" at birth, and also known as Mo Money and M.E. Money.
Date and Place of Birth	10/1/29 in Desert City, Lion's Den County, Texas
Soc. Sec. No.	009-999-9999
Domicile	New Minglewood, Ripple County, Texas
Residence	2525 West L.A. Freeway, New Minglewood, TX 76999, (817) 999-9999
Citizenship	You are a citizen of the United States
Marital Status—Identification of Spouse	You are married to <b>Lotta Money</b> , named "Lotta B. Goode" at birth, and also known as B. Goode, Mrs. Lotta Money and Mrs. Moore Money. You and Lotta Money were married on 1/1/50 in Shotgun Point, Terrapin Station County, Texas. <b>Lotta Money is a citizen of the United States.</b> Lotta Money was born on 10/1/31 in Crazy Fingers, Dark Star County, California. Her social security number is 007-999-9999. She is domiciled in New Minglewood, Ripple County, Texas. You have not been previously married to any other person.

Identification of Children	Neither you nor your Wife has a natural or adopted child that is not also the natural or adopted child of the other.  You have two children now living and no child now deceased leaving descendants now living. The following is a list of all your living children:  E. C. Money (Cosmic Charlie) Date of Birth: 1/2/1950 SSN: 999-99-9090  Faith N. Money (Faith) Date of Birth: 1/2/1951 SSN: 999-99-9000
Treatment of Afterborn or After Adopted Children	Your Will and Trust contain a generic definition of children that automatically includes any child or children hereafter born to or adopted by you.

List of Basic Estate Planning Documents Prepared or To Be Prepared By Cantey & Hanger,  
L.L.P. For

Moore Money

Name of Document	Brief Description of Document and Important Considerations Concerning Its Use	Will Document Be Prepared By Cantey & Hanger, L.L.P.? <sup>1</sup>
<b>Will</b>	<p>A Will is like a deed that takes effect at death. “Probating” the Will is a special procedure that means proving up the Will, so that others searching the title records can rely that the Will is effective. A probated Will is of public record.</p> <p>Opening an administration is a separate procedure that invests the person appointed as <b>executor</b> under your Will with the authority to act in your stead, with regard to paying your debts and estate taxes, and in seeing to it that the property described in the Will is delivered to the persons named in it.</p> <p>In Texas, as well as in many other Uniform Probate Code states, the executor can be, and usually is, made independent of court control. This does not mean that the court cannot get involved at all, but it does mean that, other than filing an inventory, the court will not get involved unless there is a special need for it to do so (e.g., if a beneficiary asserts a claim against the executor for malfeasance).</p> <p>Your Will is a Pourover Will. A Pourover Will simply provides that after the specific gifts set forth in the Will have been satisfied, the remainder of your estate not already in the trust will simply “pourover” into your Living Trust at death. Unlike your Will, the provisions of your Living Trust are not a part of the public record. Further, unlike a Will, you are <b>not</b> required to file an inventory (likewise of public record) listing the property held by the trust.</p>	<b>Yes.</b>

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<sup>1</sup>Under this portion of the table, “Yes” indicates that it is intended that Cantey & Hanger, L.L.P. prepare or have prepared the document indicated. “No” means that it is intended that Cantey & Hanger, L.L.P. **not** prepare the document indicated.

**Revocable  
Living Trust**

A trust is a legal concept developed under the English common law. The idea is that a trustee (who can be an individual or an institution) holds legal title to property *for the sole and exclusive benefit* of another person or persons (called *beneficiaries*).

**Yes.**

The **trustee** is appointed in the trust instrument by the maker of the trust. The person creating the trust is sometimes referred to as the “maker,” “settlor” or “trustor.” I prefer the term “maker” because it seems to me to be more descriptive and less archaic than the other two terms.

It is possible under some circumstances for the trustee and beneficiary to be the same. The trustee's powers and duties are described under the trust instrument and by statutes (such as the Texas Trust Code). The trust instrument describes the circumstances under which the trustee must make, or in its discretion may make, distributions to or for the benefit of the beneficiaries. Trusts can be made revocable or irrevocable, depending on the intent of the person who created the trust (the “maker”).

A revocable living trust is revocable and amendable during your lifetime. The portion of the trust that holds your interest in either community or separate property becomes irrevocable at your death. A living trust can be either presently funded or unfunded. If it is funded, it may be that there will be no need for a guardianship in the event of incapacity, and the assets in the trust will not go through probate. If, or to the extent that, the trust is unfunded (a “standby trust”), the person holding your power of attorney can be authorized to fund the trust.

If the trust is funded during your life, the trustee is directed to make distributions to you for health, maintenance and support, or if you otherwise demand a distribution.

Note that because the trust is revocable during life, the trust will be included in your estate for estate tax purposes, and will be subject to income taxation and the claims of your creditors, the same as if the trust did not exist. Although a revocable living trust can be useful during your life, if funded during life, it also can, and usually does, contain estate planning trusts or subtrusts that are created at death out of the trust corpus, including assets that pour over under your Will, in much the same way as a probate estate is divided (except that it can take place outside of the probate process). These trusts can be used to shelter your unified credit from tax in your spouse's estate, or to take advantage of the Generation Skipping Tax Exemption, or to secure the benefits of the marital deduction, to name only a few of the important techniques and deductions that may be available. If your estate plan takes advantage of these devices, a detailed explanation will be provided below.

**Assets That Should Not Be Transferred During Lifetime to a Revocable Trust**

Certain assets should not be transferred to a revocable trust during lifetime, absent compelling reasons. Assets that should generally not be transferred to a Revocable Trust during life include IRC §1244 stock, S Corporation stock, a beneficial interest in Qualified Subchapter S Trust, assets generating passive activity losses, assets subject to a lien or mortgage, assets subject to transfer restrictions, stock in a professional association or professional corporation, and homestead property.

**Durable Power of Attorney**

**Purpose of Form.** A durable power of attorney is used to invest someone whom you trust with the authority to act on your behalf.<sup>1</sup> This person is called an attorney-in-fact, and is sometimes also referred to as the power holder or agent. A durable power of attorney could be indispensable should you become incapacitated. One of the most important powers the holder of a power of attorney has is the power to make transfers to your Living Trust.

**Yes.**

**Limitations.** The Power of Attorney can be Universal, i.e., the holder of the power can do anything that you could do and which the law allows another to do on your behalf. Or, the power can be limited in accordance with your wishes.

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<sup>1</sup>The holder of a power of attorney is a "fiduciary." A fiduciary is someone holding a special relationship of trust and confidence with another person. A fiduciary duty is the highest duty the law recognizes, and it would be a breach of that duty to use this fiduciary office in a manner that is adverse to the person to whom the duty is owed.

**Springing Powers.** Texas law was amended in the fall of 1993 to allow the power to come into existence only if you become disabled, if the power of attorney so provides. This law is relatively new. The problem with a “springing” power of attorney is that the agent appointed must be able to demonstrate the existence of the conditions (such as disability) that allow the power to “spring” into existence. At the present time, I am not comfortable enough with the concept of a springing power to recommend it in most cases. Perhaps with time, as the law develops and as third parties become more used to the idea of springing powers, I will be ready to recommend their use. It is something you should consider, particularly if you have any concern at all that the person who is holding your power of attorney might exercise it without your knowledge and at a time when you are not incapacitated.

**Cautions.** The holder of your power of attorney is a fiduciary, and therefore owes you the highest duty of trust and confidence that the law recognizes. If the holder abuses the power, the law will hold him accountable. Nonetheless, it is possible to abuse the office and so you should not appoint someone unless you feel confident that the person will keep your best interest at heart. If a spouse is appointed as attorney-in-fact, then in the event of divorce or other marital discord, the power should be revoked. Even if the power is revoked, the power holder might still attempt to use the power illegally. If so, a third party who is unaware of the revocation might not be held accountable if the party acts in reliance upon the power still being valid.

**Revoking a Power of Attorney.** You always have the right to revoke a power of attorney previously granted. However, unless a third party knows about the revocation, the revocation may not be of any practical effect. If you are concerned that a former power holder might use a revoked power to your detriment, you should try to get possession of the original instrument granting the power which you are now revoking, and, in addition, you should file a notice of revocation with the county clerk.

<b>Durable Power of Attorney To Make Health Care Decisions</b>	<p>There is a special statutory form that allows you to appoint a person to make health care decisions for you should you be unable to make such decisions for yourself. The Health Care Power of Attorney is a very useful concept in this age of advanced medical technology. The Health Care Power of Attorney should be coordinated with a Physician's Directive (Living Will) if you have one.</p> <p>It is important that whoever holds the power have access to the document. Unless you tell me otherwise, I will assume that Lotta Money will retain the original.</p>	<b>Yes.</b>
<b>Appointment of Guardian Before the Need Arises</b>	<p>This document is patterned after a form found at Probate Code §118A, and is designed to give you some say so over who will be your guardian should the need ever arise. Under this form, you are allowed to specify your preferences as to who will act as the guardian of your person, and who will act as the guardian of your estate, should you ever become incapacitated. You can also specify who you do <b>not</b> want to serve as your guardian. This is a matter that is otherwise determined by the Courts in accordance with a statutory preference order predetermined by the legislature. The Declaration of Guardian Before the Need Arises is not effective unless it is filed before a guardianship proceeding is taken out. This document can therefore be filed now, to be on the safe side; or, it can be filed later when the need for it becomes more apparent.</p>	<b>Yes.</b>
<b>Guardian For Minor Children</b>	<p>This document is designed to allow the surviving parent of a minor child to designate who will be the child's guardian should that parent die before the child reaches age 18. The right to designate a guardian for an orphaned child belongs to the parent who lives the longest, and the designation is of no effect so long as at least one parent is living.</p> <p>In the absence of the appropriate written designation, the Courts will appoint a guardian in accordance with a statutory order of preference.</p>	<b>No.</b>
<b>Directive to Physicians Under the Texas Natural Death Act (Living Will)</b>	<p>This form exercises your right under Texas law to express your desire not to have your life artificially prolonged where your attending physician determines that death is imminent or will result within a relatively short time without application of life-sustaining procedures.</p>	<b>Yes.</b>

<b>Anatomical Gift</b>	Some people desire to make anatomical gifts of “any needed organs and tissues” or of certain specified organs. This form is designed to accomplish this purpose. I prepare this form free of charge. We will send the completed form to the Living Bank or any other organ bank that you may prefer.	<b>Yes.</b>
<b>Irrevocable Life Insurance Trust</b>	<p>An Irrevocable Life Insurance Trust need not contain life insurance, but frequently it does. Contributions to an irrevocable trust may or may not be subject to gift tax, depending on the size of the gift (over \$10,000, for example) and the terms of the trust (withdrawal powers in the beneficiaries). The main purpose of an irrevocable trust is to avoid estate taxation of the trust corpus. It is likely that the corpus of the trust will be substantially larger at date of death than at date of gift, and this is the reason that using this type of trust is often thought attractive. This is particularly the case if the trust is funded with life insurance, which may have little present value compared to the value of the proceeds at death.</p> <p>An Irrevocable (Life Insurance) Trust can achieve tremendous estate tax savings. An outright gift to the intended beneficiaries can accomplish much the same transfer tax savings as can a gift in trust, and it is a much simpler plan to implement. However, with a trust, some modicum of control over the gift can be built into the trust provisions, and this is not possible with an outright gift.</p> <p>In the case of a gift of a cash value policy, you will be giving up the right to gain access to the policy value, which can be a real detriment. However, in the case of term insurance, the only real cost is the administrative cost of establishing and maintaining a trust, if a trust is used. <b>Since term insurance has little or no lifetime value, it is the perfect candidate for a gift</b> if your estate would otherwise be taxable, after taking the \$650,000 estate tax exemption equivalent into account.</p>	<b>Yes.</b>
<b>Family Limited Partnership</b>	A Family Limited Partnership (an FLP) is a partnership between you and your family members designed to achieve or promote a number of business and estate planning purposes.	<b>No</b>

These objectives include the following:

- provide resolution of any disputes which may arise among the Family in order to preserve family harmony and avoid the expense and problems of litigation;
- maintain control of Family Assets;
- consolidate fractional interests in Family Assets;
- increase Family wealth;
- establish a method by which annual gifts can be made without fractionalizing Family Assets;
- continue the ownership of Family Assets and restrict the right of non-Family to acquire interests in Family Assets;
- possibly provide limited protection to Family Assets from claims of future creditors against Family members;
- prevent the transfer of a Family member's interest in the Partnership as a result of a failed marriage;
- provide flexibility in business planning not available through trusts, corporations, or other business entities;
- facilitate the administration and reduce the cost associated with the disability or probate of the estate of Family members; and
- promote knowledge of and communication about Family Assets.

In addition, there is a distinct possibility that the value of an FLP will be substantially less than the value of the underlying assets placed in the FLP (30% or more). Achieving a discounted value on the assets can obviously result in reduced estate and gift taxes!

Entering into an FLP Agreement is a relatively sophisticated technique, which may or may not successfully achieve all of its intended purposes.

\* \* \* \*

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
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801 CHERRY STREET  
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Thursday, March 11, 1999

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Our File No.  
ICE09/00009

CERTIFIED MAIL  
RETURN RECEIPT NO.: ;lkjjhg

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Important Information Concerning Your Estate Plan

Dear Moore and Lotta:

Enclosed are instruments listing in table form (1) the documents we are preparing for you, (2) a summary of the terms of those documents, (3) our understanding of the fiduciaries<sup>1</sup> appointed under those documents, and (4) background information identifying you and your family. Please let me know immediately if any of this information is incorrect or not in accordance with your wishes, *otherwise the information in these enclosures will be reflected **incorrectly** in the estate planning documents we are preparing.* You may call my secretary Cindy Lee at **878-2944**, or if the change is substantial you may of course call me directly.

Also enclosed is a copy of my notes regarding some of the special provisions that you have asked me to include in your estate plan that require special drafting. Please look these over and make any corrections that you feel are necessary. It is important that I understand your intent regarding the matters indicated.

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<sup>1</sup>A fiduciary is a person in whom you will be reposing a high degree of trust and confidence. A trustee, executor and agent under a power of attorney are all fiduciaries. A fiduciary owes a fiduciary duty to the persons on whose behalf the fiduciary is empowered to act. A fiduciary duty is the highest duty that the law recognizes as being owed by one person to another.

The information in the enclosures is intended to reflect your present intent as I understood it to be expressed at our last meeting or other conversation. However, it may well be that the information in the enclosures is inaccurate or does not correspond to your present wishes. This could happen for any one of a number of reasons, including my misunderstanding you or simply through typographical error. In order to make sure that my information and understanding is correct in certain particulars, I am sending you the enclosures for your review and approval prior to my preparation of the documents described. You should feel free at this time to treat the fiduciary list as a tentative list only, subject to change or approval by you, after you review it.

If you would like to change any of the fiduciary appointments or other matters reflected in the enclosures, it can be easily done at this stage, so don't hesitate to call in changes. Also, since the documents listed in the document list have not been prepared, it will be easy for me to eliminate any of them. However, even if you already have older versions of the instruments in the list, I believe that you would be better served by having them updated to reflect changes in the law, if for no other reason, and I have proceeded on that assumption. Feel free to call me if you have any questions.

I am also enclosing a very rough financial statement listing your assets and major liabilities of which I am aware. Please review this list carefully, **paying particularly close attention to my comments, if any**. If the financial statement is incomplete or incorrect, please let me know as soon as possible. I am going to have to rely on you to determine whether or not or the extent to which it is accurate. I may have made certain assumptions as to values, whether the property is community or separate, and who the death beneficiary is, but **these assumptions are for discussion purposes only, and are not meant to be relied upon**. I do not even so much as suggest that I necessarily have good reasons for making the assumptions that I made or that the list is complete or that the facts indicated are necessarily accurate; however, should you request it, I can give you a formal opinion regarding any of your assets you desire, but such an opinion would require careful consideration of a number of factors and reference to more information and documents than I presently have at my disposal.

One of the main purposes in sending you this letter is to make sure that **(1)** the fiduciaries are correct, **(2)** the information concerning you and your family (social security numbers, birth dates, names, etc.) is correct, **(3)** the documents we are preparing conform with your intent, **(4)** that the financial statement is essentially correct, and **(5)** that all names are **spelled correctly**. It will make it much easier on us if you would double check this information *before we prepare the final documents* (rather than after we have prepared them!). That way we can make any necessary changes in a timely and regular manner.

Unless I hear from you to the contrary, I will be preparing the final documents shortly, based upon the information contained in this letter and the accompanying enclosures. So, if I don't hear from you by next week, you may expect to receive a rather large notebook in which you will find the documents referred to in the basic document list, which documents will appoint the fiduciaries named in the fiduciary list, unless you have called in any changes in the meantime. My particular approach to estate planning is comprehensive, a fact you may have noted by now, so I am preparing you in advance in order that you know what to expect.

I am also enclosing a rough, preliminary diagram illustrating how the Living Trust is created and funded, and how it is designed to be divided into one or more trusts at death. This diagram has not been tailored to fit your situation exactly and it does not explain every aspect of the plan; nevertheless, I think that you will find it helpful in visualizing the estate plan, and at our next meeting, I can explain the diagram and how it may differ from the provisions as finally adopted in your Wills.

Finally, I am enclosing two pro forma documents representing mock federal estate tax returns, using the assumptions indicated. One shows what the tax would be without the credit shelter trust, and the other shows the tax with the credit shelter trust. These figures take into account the effect of income taxes on your retirement savings. This is not a matter that you can safely overlook. Because of the marital deduction, it is possible that there will be no estate tax in the estate of the first spouse to die, but the mock return assumes no marital deduction in the surviving spouse's estate. Please note that figures shown are rough estimates only. For one thing, the survivor's estate may be much larger or much smaller than indicated, but in any event, you should anticipate —and plan for— having to pay estate tax some day.

Please note that the preliminary, *pro forma*, financial statement, together with the mock estate tax calculation spread sheet, indicate that the estate tax in the survivor's estate could be around **\$543,000**, based on a gross estate of approximately **\$2,500,000**. These numbers, however, are at best approximate, and are no more than a "guesstimate," since the size of your estate will change over time, as will the laws. Further, I have not spent the time, and you have not incurred the expense, necessary to do a thorough going analysis of your finances, and so the financial statement and attendant calculations should not be relied upon, though they are suggestive, and therefore, I hope, will be of some use to you.

Finally, I am enclosing one or more spread sheets projecting what the growth in your retirement plan assets might be, using the assumptions indicated, and projecting the minimum distributions that will be required after age 70.

Yours very truly,

Noel C. Ice

NCI/ice

Enclosures: Financial Statement  
Identification Of Client And Client's Immediate Family  
List of Basic Estate Planning Documents  
Questions and Answers About Basic Terms of Specialized Estate Planning Documents  
List Of Important Fiduciary Appointments And Ancillary Documents  
Diagram Illustrating Division of Living Trust at Death  
Lawyer's Notes Regarding Certain Modifications to Basic Estate Plan That Will Require Special Drafting  
Mock Estate Tax Return  
Qualified Retirement Projections

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899

Questions and Answers About Basic Terms of Specialized Estate Planning Documents Prepared  
or To Be Prepared By Cantey & Hanger, L.L.P. For

Moore Money

Questions

Answers

**Basic Estate Planning Vehicles**

What is the basic estate plan vehicle?

Combination Pourover Will and Revocable Living Trust (The Lotta Moore Money Family Trust).

**Revocable Living Trust and Pourover Will**

What is a Pourover Will and Revocable Living Trust?

A **Revocable Living Trust** is a trust that is revocable and amendable during lifetime. While you are living, it may contain as little as \$10. Some people, however, transfer virtually all of their property to their Living Trust during life, in order to avoid probate or to allow their property to be managed by someone else in case of disability. The portion of the Living Trust that represents your separate and one-half community property interest becomes irrevocable at death.

Typically, **the Living Trust is divided into one or more separate trusts or portions at death.** Frequently, a portion of the trust is set aside for the benefit of the surviving spouse, in a form qualifying for the marital deduction, and another portion equal to the available unified credit is set aside in a special trust designed to escape estate taxes in the spouse's estate. Ultimately, the property will frequently pass to descendants, either outright or in special Protected Trusts. These issues, as they apply to your individual situation, are discussed in greater detail below.

A **Pourover Will** is a simple will that provides that the bulk of your probate estate will pass to your Living Trust at death. This technique allows you to place most of the important and dispositive terms of your estate plan in the Living Trust, which is not of public record, rather than in the Will.

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### Use of Marital Deduction Gift

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Does Will and trust attempt to secure the benefits of the marital deduction to any extent to save at least some estate taxes if spouse survives?

Yes, if Lotta survives you, **the Living Trust is divided and all or a portion of your interest will be set aside for the benefit of Lotta** in a form designed to qualify for the estate tax marital deduction.

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### Type of Marital Deduction Gift

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What is the size of the Marital Deduction Gift?

The size of the Marital Deduction Gift varies depending upon the size of your taxable estate, the extent of the taxable gifts made during lifetime, and the size of the gifts made outside your will and trust (such as life insurance not payable to the trustee). If your taxable estate is less than the exemption equivalent of the unified estate and gift tax credit (\$650,000 in 1999, though it will change), then there may be no need to fund the Marital Deduction Gift.

What is the type of Marital Deduction Gift employed under this estate plan?

Net **Residuary** Marital Deduction Gift,<sup>1</sup> of all of the net residuary estate (i.e., not a fractional share), computed under a formula designed to achieve the optimum marital deduction needed to reduce estate taxes to zero (to the extent possible) in the estate of the first spouse to die.

Is the Marital Deduction Gift Held in Trust?

Yes.

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<sup>1</sup>The net residuary estate is generally what is left after all debts, taxes and expenses have been paid and all specific or other general gifts have been satisfied.

Are there any advantages to holding the Marital Deduction Gift in a Trust?

Yes. There is little or no estate tax advantage at your generational level in using a trust instead of making an outright gift, since a marital deduction is available whether the property is left to a QTIP trust or outright to the spouse, free of trust. However, if you are interested in excluding property passing to your heirs on your spouse's death from estate tax in their estates, a QTIP trust could be of advantage to the extent of approximately \$400,000, because \$1 million can be excluded from the generation skipping tax. The Credit Shelter Trust will only shelter \$650,000 (in 1999). Other good reasons for using a QTIP trust are to protect the assets from the surviving spouse's judgment creditors, and to assure that the remainder interest will stay in the family.

### **Terms of Marital Deduction Trust**

How is the trust designed to qualify for the estate tax marital deduction?

The marital deduction trust is a trust that will last for the life of your Wife if she survives you, that is designed to qualify for an estate tax marital deduction under IRC §2056(b)(7) as a Qualified Terminal Interest Property Trust, commonly known as a "QTIP" trust.

Is all the income to be distributed to your<sup>1</sup> spouse at least annually?

Yes. This is a requirement of a QTIP Trust.

What is the standard for making principal distributions from The Marital Deduction Trust?

Principal distributions **may** be made by the trustee in order to provide for Lotta's health, education, maintenance, and support in reasonable comfort in the manner of living to which she has become accustomed at the date of your death.

In making distributions of principal from The Marital Deduction Trust, shall the trustee consider other sources of support available to your Wife?

In making principal distributions, if any, the trustee **may, but need not**, consider other sources of income, principal and support available to Lotta, as to which the trustee has knowledge.

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<sup>1</sup>All second person references (you or your) refer to Moore Money. All references to "your spouse" or to "your Wife," or to the "Surviving Spouse" are to Lotta Money, if she survives you.

Will Lotta have a “5 & 5” Power of Marital Deduction Trust?

Yes. If Lotta Money is living on the last day of the calendar year, she shall have the absolute right to withdraw from the principal of The Marital Deduction Trust the greater of (a) \$5000 or (b) 5% of the aggregate value of the trust estate of that trust.

Where does the property in The Marital Deduction Trust go on the death of your Wife?

On Lotta’s death (assuming she survives you), The Marital Deduction Trust will terminate, and the property in the trust will be distributed for the benefit of your then living descendants, by right of representation, subject to the exercise of the Nongeneral Testamentary Power of Appointment, described in the trust. Note carefully that notwithstanding the above, Lotta has been granted a nongeneral testamentary power of appointment to alter the distribution scheme just described. The class of permissible appointees, however, is limited to a class consisting of **the descendants of a grandparent of a Maker or a spouse of such descendant.**

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#### Use of Credit Shelter Gift

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Do the Will and trust attempt to shelter from estate taxation in Lotta’s estate the amount that can pass under your Will and Trust free of estate tax by virtue of the unified estate and gift tax credit?

Yes, if Lotta survives you, **the Living Trust is divided and all or a portion of your interest will be set aside for the benefit of Lotta and ultimately your descendants.**

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#### Credit Shelter Gift

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What is the purpose of the Credit Shelter Gift?

The idea behind this gift is to set aside (and shelter) a certain portion of your estate so that it will not be taxed in Lotta’s estate if she survives you (although this tax result cannot be guaranteed). By placing the gift in trust, Lotta can have the use of the gift if there is need, without necessarily (we hope) causing the gift to be includible in her estate where it would be taxed on her death.

What is the size of the Credit Shelter Gift?

The size of the Credit Shelter Gift can vary, depending on the extent to which the unified credit has been used up during lifetime, as a result of your having made taxable gifts, or other factors, including changes in the law, and depending on whether any other gifts are made at death that do not qualify for the marital deduction.

Theoretically, the Credit Shelter Gift could be as large as the exemption equivalent of the unified estate and gift tax credit (\$650,000 in 1999, though this will change). There are various factors and elections made during the course of an estate administration that can cause this amount to be reduced.

What type of Credit Shelter Gift is employed, if your Wife survives you?

**Pecuniary**<sup>1</sup> Credit Shelter Gift.

Is the Credit Shelter Gift held in Trust?

Yes. If Lotta survives you, the Credit Shelter Gift passes as a part of The Money Irrevocable Family Trust on your death.

### **Terms of Credit Shelter Trust**

What is the name of the Credit Shelter Trust?

The Credit Shelter Trust is also known as the Tax Shelter Trust or more formally as The Money Irrevocable Family Trust. Because it is hoped that the assets in the Credit Shelter Trust will bypass estate taxes in the estate of the surviving spouse (although this cannot be guaranteed), this type of trust is sometimes referred to as a bypass trust.

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<sup>1</sup>“Pecuniary,” means that the gift is a gift of a dollar amount, as opposed to a gift of the residuary estate or of a fractional share of the residuary estate.

What is the standard for making distributions from the Credit Shelter Trust?

The trustee **may** distribute to Lotta for life (if she survives you), at whatever intervals the trustee determines, so much of the trust estate of The Money Irrevocable Family Trust as will reasonably provide for her health, education, maintenance and support in reasonable comfort in the manner of living to which she has become accustomed at the date of your death.

It is strongly suggested in the trust instrument, but not mandated, that the trustee make **no** distributions from the Credit Shelter Trust to Lotta, unless all of the corpus, if any, of The Marital Deduction Trust has first been exhausted.

In making distributions of principal from the Credit Shelter Trust, shall the trustee consider other sources of support available to the Surviving Spouse?

In making distributions from the Credit Shelter Trust the trustee **may, but need not**, consider other sources of support available to the Surviving Spouse.

Where does the property in the Credit Shelter Trust go on the death of your Wife?

On the death of Lotta Money, The Money Irrevocable Family Trust will terminate, and the property in the trust will be distributed for the benefit of your then living descendants, by right of representation, subject to the exercise of the Nongeneral Testamentary Power of Appointment, described in the trust. Note carefully that notwithstanding the above, Lotta has been granted a nongeneral testamentary power of appointment to alter the distribution scheme just described. The class of permissible appointees, however, is limited to a class consisting of **the descendants of a grandparent of a Maker or a spouse of such descendant**.

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#### Distributions To Your Descendants If Lotta Does Not Survive You

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To whom will your residuary estate pass if Lotta does not survive you?

In general, your residuary estate will pass *for the benefit of* your descendants, by right of representation, if Lotta does not survive you.

**Where Does Your Estate Go in the Event Neither Lotta Nor Any of Your Descendants are then Living**

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Where does your estate go in the event neither Lotta nor any of your descendants are then living?

The final alternate distribution of your residuary estate, or of any trust (in default of appointment) in the event neither Lotta nor any of your descendants are then living, shall generally be made as follows:

1/2 to your heirs-at-law and 1/2 to Lotta's heirs-at-law, all of these heirs-at-law being determined under the laws of descent and distribution of the state of Texas as if each had died intestate, orphaned and single.<sup>1</sup> These distributions will either be in fee simple or to a protected trust for the beneficiaries.

If this is not satisfactory, let us know.

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<sup>1</sup>As a general (but not invariable) rule, if you are unmarried, and die intestate without surviving issue (descendants), your property will pass in equal shares to your parents if both are living, but if one or both are deceased (e.g., you are orphaned), the share that would otherwise have passed to your parent or parents will pass to your surviving brothers and sisters (or their descendants) on a representational basis.

### Distributions To Protected Trusts

Are distributions (on termination of The Marital Deduction Trust and the Money Irrevocable Family Trust or otherwise) to pass directly to your beneficiaries free of trust?

**No.** The Living Trust is divided at your death. Likewise, The Marital Deduction Trust and the Money Irrevocable Family Trust may be divided into shares to be distributed to or for the benefit of your descendants or others at the death of Lotta, if she survives you.

A distribution that is to be made to or for the benefit of a person shall not be paid directly to such person, but shall instead be paid to the trustee of a **Protected Trust** for that person. (This rule does not apply to a periodic or discretionary distribution subject to a standard such as support or maintenance.)

A Protected Trust (or for that matter, the Marital Deduction Trust and the Tax Shelter Trust) will be further subdivided into Exempt and Nonexempt Trust versions, so that your fiduciary will be able to allocate your generation skipping transfer tax exemption (\$1 million per spouse to the extent not used during life), to specially designed Exempt and Nonexempt Trusts.

**When does a Protected Trust for a beneficiary terminate?**

If a beneficiary has received his share of the estate in trust, that trust will generally **not terminate** until it is required to terminate by law or by a similar period under the Maximum Duration Rule described in detail in Part II of the Trust.

**One of the possible benefits of this arrangement is that the interest of the beneficiary in the trust might be free from claims of third parties (spouses, creditors, etc.) and might also escape estate taxation in the estate of the beneficiary (subject perhaps to the generation skipping tax).**

However, a person for whom a Protected Trust has been created, and who has reached **45 years** of age or more, may remove or replace a trustee of that trust, and, unless expressly prohibited by the trust, may serve as his or her own trustee.

### Generation Skipping Planning

Does your estate plan contain any special provisions designed to shelter your estate from the Generation Skipping Transfer Tax?

Yes.

What is the Generation Skipping Transfer Tax?

In addition to the normal transfer (estate and gift) tax, a Generation Skipping Transfer Tax is imposed at the maximum federal estate tax rate on all transfers to a grandchild or someone in a similar or more remote generational relationship to you. If the transfer comes from a trust or trust equivalent, whether the trust is established during life or at death, the tax will be imposed either upon the creation, distribution or termination of the trust, depending upon the generational assignment of the beneficiaries.

Does each person have an exemption that can be allocated to property so that a transfer of the property will not be subject to the Generation Skipping Transfer Tax?

**Yes.** Each person is allowed a **lifetime Generation Skipping Transfer Tax exemption of \$1 million.** The Protected Trusts and the Marital Deduction Trust, and even the Tax Shelter Trust) are divided into Exempt and Nonexempt versions, so that your fiduciary will be able to allocate your generation skipping transfer tax exemption (\$1 million per spouse to the extent not used during life), to specially designed Exempt and Nonexempt Trusts.

### Survivorship Property

Does your estate plan contain any special provisions dealing with “survivorship property”?

**Yes.**

What is Survivorship Property?

“Survivorship property” includes such things as a (joint) bank or brokerage account, with a provision that on your death another person (or the surviving account holder) will automatically own the account without reference to your will. Another species of survivorship property would be real estate, stock, or other property held as “joint tenants with right of survivorship.”

### What is Wrong With Holding Survivorship Property?

Although it may be convenient and sometimes even desirable to hold property of negligible value in this form, I generally advise against it in most cases. The reason is that there may be confusion as to whether you really intended to pass the property to a third party without reference to your will, or whether you named a third person as your beneficiary or successor in interest as a matter of convenience only, not really intending that he or she should actually own the property.

Ownership of survivorship property can also lead to abuses, as where one party, acting under a power of attorney or otherwise, manages to facilitate a transfer of your property into an account which that party will automatically own at your death.

Like insurance<sup>1</sup> and IRA benefits, survivorship property” is a type of nonprobate asset because it passes outside your will. Since survivorship property passes outside of your will and trust, it passes outside of the estate plan we are discussing, and may adversely affect it. For instance, it often happens that the property passing under your will and trust is insufficient to fund your credit shelter trust because of the existence of nonprobate assets, such as survivorship property.

### What Special Requirements Apply to Survivorship Property Under the Trust?

For at least some of these reasons, it is contemplated that your trust will require that anyone taking benefits under it must first relinquish any rights to survivorship property, or will have the value of such rights offset other benefits.

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<sup>1</sup>Life insurance, though it is a nonprobate asset, is not “survivorship property.”

What Should Be Done With Survivorship Property?

In order to avoid confusion, therefore, it would be best if you do not create any new survivorship property, and that you remove any survivorship feature from any property that you already own, if it would not be too inconvenient.

Lawyer's Notes Regarding Certain Modifications to Basic Estate Plan That Will Require Special Drafting

Instruct Faith that, in the event of death of both Morre and Lotta, to be sure and lock up the medicine cabinet before Cosmic Charlie arrives from California.

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
**2100 BURNETT PLAZA**  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102-6898  
817/877-2800

Thursday, March 11, 1999

NOEL C. ICE  
ATTORNEY'S WEB SITE  
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Our File No.  
ICE09/00009

CERTIFIED MAIL

RETURN RECEIPT NO.: sadfsadf

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Estate Planning Documents, Including Your Wills and The Lotta Moore Money  
Family Trust

Dear Moore and Lotta:

Enclosed is a green three ring estate planning notebook. You should keep this notebook in a safe place since it contains important information about your estate plan. I advise you to insert this letter and all of our prior and future correspondence behind the correspondence tab. To make that easier, I have three-hole punched this letter and others that I send to you. In the future, should you or your family need to understand the estate plan, they should be able to do so by referring to the notebook alone. Although there will be a lot in it, at least it will be organized and in one place. After the documents have been signed, signed copies will be placed behind the tabs by us, and the book returned to you. **Please bring this notebook with you to our next meeting.**

Inside the notebook you will find the following tabs:

- Correspondence.
- Engagement Letter.
- Diagram-Death Without a Will.
- General Explanation of Estate Plan.
- Diagram-Estate Plan.
- Will-H.
- Will-W.

- Revocable Trust.
- Irrevocable Trusts.
- Power of Attorney.
- Power of Attorney Health Care.
- Guardian For Self.
- Directive to Physician.
- Anatomical Gifts.
- Deeds.
- Life Insurance Policies.
- Life Insurance Beneficiary Designations.
- IRA and Q-Plan Beneficiary Designations.
- Bank Account Agreements Signature Cards.
- Brokerage Account Signature Cards.
- Partition Agreement.
- Marital Agreement.
- General Partnership Agreements.
- Limited Partnership Agreements.
- Buy-Sell Agreements.
- Family Tree-Family Data.
- Financial Information.
- Business Interests.
- Fiduciary Appointments.
- Miscellaneous Data.
- Data Base Worksheet.
- SS-4.
- Billing Statements.
- Funeral Instructions.

You will note that there is nothing behind many of the tabs at the present. This is because certain tabs describe items that are not yet part of your estate plan, either because of limitations of time and expense, or because of your choice unrelated to expense. I am leaving the tabs as place holders, in order that the relevant material or legal instruments may be completed and inserted at a later date, should you desire. You may put information that you think important behind the appropriate tabs.

You will, however, find originals or drafts of the following in the notebook:

- Diagram-Death Without a Will.
- General Explanation of Estate Plan.
- Funeral Instructions.
- Wills
- Revocable Living Trust.
- General and Universal Power of Attorney.
- Directive To Physician.
- Power of Attorney For Health Care Decisions.
- Donor Form Under the Uniform Anatomical Gift Act.
- Appointment of Guardian Before the Need Arises.

- Irrevocable (Life Insurance) Trust.

The enclosed documents are my only paper copies. I did this to save on photocopying costs. (I have a magnetic copy on my computer, however.) Unless changes are made, the enclosed drafts can eventually be used as originals, but they should not be signed outside of my office.

I grant you that the Wills and Trust are long, but they are also comprehensive. I feel that in an estate such as yours, this additional attention to detail is justified. It is impossible to cover everything in a will or trust, but one of the reasons for the length is to avoid construction problems with respect to issues we have no way of knowing about now. **Note that Part II is identical in the Wills and the Trust. Therefore, it is found in the enclosed materials three times in identical form, which makes the materials seem more complicated than they really are.** I am enclosing only one copy of Part II. You will find it behind the trust. Just note for now that an identical copy will be reproduced for both of the Wills at the time of signing.

The Wills, Trust, powers of attorney, physician directives, etc., have been prepared in accordance with what I understood to be your intent, but can still be changed. **Please do not be overly concerned with understanding all of the provisions of the Wills and Trust until we have had a chance to meet and go over the terms.** It is much easier to explain these documents in person than it is in writing; however, I think a useful function is served in sending you a draft in advance of our meeting. At our next meeting I will spend some time in going over and explaining the Wills and Trust, and will make sure that you fully understand the plan contained in the Wills and Trust before they are signed. **Further, if you will concentrate on the "General Outline" found on the first few pages of the Wills and Trust, I think you will be able to say with confidence that you fully understand the plan, because all of the essentials are previewed here.** You will also find materials in the last mailing summarizing the terms of the documents.

Your Wills are very simple. Your Wills basically direct that your residuary estate shall pass to the trustee of The Lotta Moore Money Family Trust. The Lotta Moore Money Family Trust is a revocable amendable trust that can be as complex or as simple during lifetime as you want it to be. Initially, it will be funded with \$10 contributed by each of you. In fact, you may decide not to put anything else in the Trust during life.

The Lotta Moore Money Family Trust is very flexible so long as you are alive. The Trust uses the concept of subtrusts during life in order to receive and preserve any of the five types of community and separate property recognized under Texas law: the separate property of husband, the separate property of wife, the sole management community property of husband, the sole management community property of wife, and the joint management community property. Some people find that a trust like this can serve a useful lifetime function. Property can be transferred into it so that in the event of disability, the property can be managed by someone you trust. Further, on death, title will not need to be transferred because the property will already be in the Trust. Also, the property will not go through probate. This last consideration is not as important in Texas as in other states. For now, I am merely contemplating that the Trust will be initially only nominally funded, and the primary purpose of the Trust is to receive property at death. Also note that your Will is public, the Trust is not. This privacy feature is one advantage that a pour over trust has over a will.

At the death of the first Maker to die (the “decedent”), the Trust is split into multiple trusts. The survivor (i.e., the one of you who lives the longest) will retain his or her share of any property contributed to the Trust during life. The decedent’s share of the Trust will be augmented by any property passing to the Trust under the Will. This share will be in irrevocable form. It is not until this point that any real complexity occurs. Here, for estate tax and other reasons, the decedent’s share is further divided into a Tax Shelter Trust and a Marital Deduction Share. These trusts are best explained in the General Outline of the Trust Plan, described below.

Not every problem that might arise during the administration of a probate estate can be solved in advance in a Will or Trust. There are practical limits involved. Nevertheless, I have addressed in your Wills and Trust some of the more common issues that tend to arise in this connection. Because of this, and because the Living Trust contains a number of subtrusts and estate tax savings provisions, the entire package is, of necessity, somewhat bulky. I assure you, however, that each provision in your Wills and Trust serves a valid and useful purpose and has been included for a reason.

The Wills and The Lotta Moore Money Family Trust are divided into three Parts. Part I of the Wills and Part I of The Lotta Moore Money Family Trust contain most of the key variable provisions. (Most references in this letter to the Wills or Trust are to Part I unless otherwise indicated.) Part II contains a number of standardized provisions and definitions, although some of these provisions are very important and have been tailored. Part II does double duty. In order to decrease the complexity at least in part, Part II has been drafted so that an identical copy may serve for both your Wills and for The Lotta Moore Money Family Trust as well. Part III merely contains the signature provisions and I am not enclosing that part now. Because your dispositive plans are similar, The Lotta Moore Money Family Trust serves as the receptacle for property passing under both Wills. To recapitulate: the plan calls for two Wills which pour over into The Lotta Moore Money Family Trust, with Part II of the Wills and the Trust being identical.

The first page of your Will and the first page of the Trust contain a general outline of your testamentary and trust plans. **Please take the time now to review the first page of the draft of Part I of the Wills and Part I of the Trust.** If you will do this now, and concentrate on the general outline before trying to understand the rest of the documents, I think you will be less likely to feel overwhelmed. I consider the general outline to be one of the most important provisions in the instruments. If the general outline does not reflect your intent, then changes will need to be made.

Article II to the Will s and Trust lists various names by which you may be known. This provision may be particularly helpful in case any documents of title are in a name other than Moore Money or Lotta Money. Please review the "also known as" names for accuracy and let my secretary know if there is another version of your name which should be included in this list.

Article II contains various background information which should be of aid in identifying you and your family. Please review this information and if you find any omissions or inaccuracies, I should be informed immediately.

Your Wills contain a special provision giving the survivor a special power of appointment to appoint the remainder of the Residuary Trust to such of your descendants as the surviving spouse chooses. In the absence of the exercise of this special power of appointment, the interest in the Residuary Trust will pass to your descendants by right of representation, subject to the Contingent Trust provisions.

**Please review the fiduciary appointments (executors and trustees) found in Article III, to make sure these appointments are consistent with your wishes.** If they are different from any list I have given you previously, it should be because of a change you requested, but in any event, please take a moment to make sure that Article III suits you.

Part II contemplates that you might appoint your trustee as the beneficiary of life insurance policies, IRA benefits and (or) retirement plan proceeds. In this case, the trustee will pay the surviving spouse his or her community one-half interest in such proceeds, if any, and will generally allocate the remainder of the assets in a manner similar to the estate plan otherwise described under your Wills. You would ordinarily not want to appoint the trustee as beneficiary of an IRA or retirement plan without careful weighing of the alternatives and the tax consequences, but **you may well wish to appoint the trustee as either the primary beneficiary of life insurance or, at a minimum, as the secondary beneficiary, should your spouse not survive you.** Note that, for this purpose, whoever is your executor shall be the "trustee" for purposes of collecting the life insurance proceeds. Under this approach, the "trustee" collects the life insurance proceeds and distributes them to the beneficiaries under your Will, but the proceeds are not technically a part of your probate estate and thus, should be (we hope) exempt from the claims of third parties (creditors). To the extent that the surviving spouse has a community property interest in the life insurance policy, the spouse will receive his or her community property share of the proceeds regardless of whether he or she is otherwise a beneficiary under the Will.

The provisions in Part II are too numerous to describe in this letter, and I will cover these provisions at our next meeting. However, each subsection is preceded by a heading generally describing the matter that is being addressed.

Part II defines some of the terms that are used in the Wills. There are many terms which are in common usage but which have nevertheless spawned litigation as to their meaning. The definition section is designed to avoid some of the more common issues that might arise in the interpretation of the terms used in your Wills.

Your Wills and Trust have not been drawn as a result of any contract between you and your spouse or anyone else, and thus, each of you is free to make any kind of Will you want, and to alter, amend or revoke your Wills at any time, without the consent of the other. Before the Wills are signed, I want to be assured that the provisions are satisfactory to each of you.

**Potential Contest.** Your Will and Trust contain a provision that purports, under certain conditions, to cause a forfeiture of the interest of any beneficiary who unsuccessfully contests the document. This provision may or may not be effective, but will be of little utility unless the beneficiary stands to lose something by bringing a contest. There is no end to the lengths you can go to in an attempt to thwart a contest; the decision as to how much time, effort and money to expend in this endeavor is up to you.

One very effective method is to make a gift to the potential contestant at the same time the Will is signed, under prearranged circumstances such that the acceptance of the gift will be evidence of your capacity and freedom from undue influence. Another technique is to video tape the will execution ceremony. Under appropriate circumstances, a medical examination and written report, made contemporaneously with the execution of the Will, can be helpful.

My favorite technique —because it is uncomplicated and can be highly effective— is to simply amend and republish your Will and Trust frequently. Any contestant will then be required to set aside each prior document to which the contestant objects.

Under the tab for Funeral Instructions you will find a form for you to fill out and sign on your own, at your option. If you choose to make use of this form, please make sure that it is completed prior to our next meeting so that we can retain a copy in our files.

At your earliest possible convenience, after you have reviewed the enclosed drafts, please give my secretary a call at 878-2944, and schedule an appointment to make any necessary changes and to get the Wills and Trust signed. If you want to call me directly at 877-2885 in advance of the meeting to discuss changes which may be substantive, please feel free to do so.

**Please make sure that well in advance of our next meeting I have a copy of the following, if I do not have a copy already:**

1. Each **life insurance** policy on your life, and a copy of the last summary statement of the life insurance account from the insurance company respecting any such policy. Such statements will ordinarily reflect the present owner of the policy on the books and records of the insurance company, whether the policy is term or not, and if not term, the cash value and the status of any outstanding loans.
2. A copy of each outstanding **beneficiary designation** for all life insurance, bank and brokerage accounts, IRA and qualified plan benefits, and all other arrangements paying death benefits that allow for the designation of a death beneficiary.
3. A copy of your last **bank or brokerage house statement** from each bank or brokerage house with which you have an account.
4. A copy of **any plan of deferred compensation** (profit sharing plan, 401(k) plan, defined benefit plan, nonqualified plan, etc.) in which you have an interest, and a copy of the **Summary Plan Description** and latest **Individual Benefit Statement**.
5. A copy of each **IRA** (including SEP-IRAs) in which you have an interest. There should be both an adoption agreement and a copy of the IRA itself, so be sure to send me both.
6. A copy of the deeds to any real estate that you own.

If you think that there are any documents listed above that I do not have, please send me the missing items.

Finally, I am enclosing a financial statement listing your assets and major liabilities of which I am aware. Please review this list carefully. If it is incomplete or incorrect, please let me know as soon as possible.

Note that your Will and Trust provide that if a person is named as the beneficiary of "Survivorship Property," that person will have to deliver that property to the trustee to be administered and distributed as a part of the residuary trust estate where it will be integrated with the overall estate plan. For this purpose, the term "Survivorship Property" includes any savings account, checking account, money market, stock, bond, real estate or Certificate of Deposit. The term "Survivorship Property" expressly does not include death benefits under a life insurance policy, annuity, IRA, retirement plan or similar arrangement.

The reason for this provision is that I have seen instances of abuse or mistake, where — often shortly prior to death— large amounts of property was transferred to survivorship bank accounts, sometimes with, but often without, the understanding and consent of the decedent. If effective, such a transfer can significantly disrupt an orderly estate plan. Frequently, the issue becomes the subject of costly litigation over whether the survivorship provision should or should not be given effect. The provision under discussion is intended to solve some of these problems, but it could, of course, raise new ones. In order to lessen the likelihood of dispute, it would be best to simply not maintain any survivorship type accounts.

Please bring the estate planning notebook with you to our next meeting.

Yours very truly,

Noel C. Ice

NCI/ice

Enclosures: Diagram-Death Without a Will  
General Explanation of Estate Plan  
Funeral Instructions  
Financial Statement  
Wills  
Revocable Living Trust  
Directive To Physician  
Power of Attorney For Health Care Decisions  
Donor Form Under the Uniform Anatomical Gift Act  
Appointment of Guardian Before the Need Arises  
Irrevocable (Life Insurance) Trust  
General and Universal Power of Attorney

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899

**CANTEY & HANGER**  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
**ATTORNEYS AT LAW**  
2100 BURNETT PLAZA  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102-6898  
817/877-2800

Thursday, March 11, 1999

NOEL C. ICE  
ATTORNEY'S WEB SITE  
WWW.TRUSTSANDESTATES.NET

BOARD CERTIFIED ESTATE PLANNING AND PROBATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

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SECRETARY'S DIRECT DIAL  
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Our File No.  
ICE09/00009

CERTIFIED MAIL  
RETURN RECEIPT NO.: dsfsdaffd

Mr. and Mrs. Moore Money  
2525 Mars Hotel  
999 West L.A. Freeway  
New Minglewood, TX 76999  
(817) 999-9999

RE: Your Wills, Trust and other Estate Planning Documents.

Dear Moore and Lotta:

Please excuse the fact that I am mailing this letter certified mail. The reason is because this letter contains a number of important documents, and I want to be sure you receive them and that I have a record that you have received them. I hope that this does not cause any inconvenience.

I am enclosing an original or copy of most all of the estate planning work we have recently done for you. These documents are found in the enclosed green three ring estate planning notebook. Keep this notebook in a safe place, since it contains important information about your estate plan.

Inside the notebook you will find the following tabs:

- Data Base Worksheet.
- Lawyer's Notes.
- Correspondence.
- Engagement Letter.
- Diagram-Death Without a Will.
- General Explanation of Estate Plan.
- Diagram-Estate Plan.
- Fiduciary Appointments.
- Will-H.

- Will-W.
- Revocable Trust.
- Irrevocable Trust.
- Power of Attorney.
- Power of Attorney Health Care.
- Funeral Instructions.
- Guardian For Self.
- Directive to Physician.
- Anatomical Gift.
- Deeds.
- Life Insurance Policies.
- Life Insurance Beneficiary Designations.
- IRA and Q-Plan Beneficiary Designations.
- Bank Account Agreements Signature Cards.
- Brokerage Account Signature Cards.
- Partition Agreement.
- Marital Agreement.
- General Partnership Agreements.
- Limited Partnership Agreements.
- Buy-Sell Agreements.
- Family Tree-Family Data.
- Financial Information.
- Business Interests.
- Miscellaneous Data.
- SS-4.
- Billing Statements.

You will note that there is nothing behind many of the tabs at the present. This is because certain tabs describe items that are not yet part of your estate plan, either because of limitations of time and expense, or because of your choice unrelated to expense. I am leaving the tabs as place holders, in order that the relevant material or legal instruments may be completed and inserted at a later date, should you desire.

You will, however, find either originals or copies of the following in the notebook:

- Prior correspondence between us relating to your estate planning
- Diagram-Death Without a Will
- General Explanation of Estate Plan
- Funeral Instructions.
- Diagram-Estate Plan
- Wills
- Revocable Living Trust
- General and Universal Power of Attorney
- Directive To Physician
- Power of Attorney For Health Care Decisions
- Donor Form Under the Uniform Anatomical Gift Act
- Appointment of Guardian Before the Need Arises

- Irrevocable (Life Insurance) Trust
- Financial Statement

You specifically elected for us **not** to prepare the following documents:

- Family Limited Partnership Agreement

You should review the enclosed documents at your leisure to make sure that they conform with your intent in every respect. If you have any questions or wish to make any changes, be sure to call. If any of the fiduciary appointments or other terms vary from what was recorded in the tables I sent you earlier that listed the fiduciary appointments and terms it is because you requested a change. If they are different and you did not request a change, please let us know as soon as possible.

In order to keep track of who has these documents and what needs to be done with them, I have constructed the following table:

<b>Name of Document</b>	<b>Who Has the Original</b>	<b>Comments and Statement of Action to Be Taken</b>
<b>Wills</b>	We have retained the original Wills.	<p>If your Will cannot be located at your death, Texas law provides that it will be presumed that you revoked it, so long as it was last seen in your possession. For this reason it is important not to keep the Will somewhere where it might be lost or taken. We will return the original to you at any time you request it.</p> <p>Be advised that you may change your Will at any time by executing a new Will or a Codicil. This can be done without destroying the original or any copy. However, a subsequent Will (as opposed to a Codicil) will revoke a prior Will, and if a subsequent Will is thereafter revoked, the prior Will will <b>not</b> become effective again. You are also advised that the Will may not be amended by interlineation (marking through words, sentences, etc.) or by simply adding changes to the original. Any changes must be undertaken with the formalities otherwise required for execution of a Will.</p>

**Financial  
Statement**

The latest original version is enclosed.

**Please do not rely on the information contained in this document without verifying it yourself.** I use this document for discussion purposes only, so that you and I can discuss each asset listed, should you desire, and with the benefit of your comments and insights, I am thereby in a better position to make recommendations. It is up to you to correct values and spot omissions. The beneficiary designation listed may not be accurate and, in the case of accounts and titled assets, often cannot be determined in the absence of a detailed investigation. Likewise, whether property described as community or separate property is so or not, is a matter that even courts can disagree on, and ultimately turns on the facts. Again, this document is for discussion purposes only, but if there are any serious omissions or errors of which you are aware or can determine, it would be most helpful for you to make me aware of them.

**Trusts**

We have retained the original of The Lotta Moore Money Family Trust. We will deliver the original to you at any time at your request.

Please note that if any assets are transferred to the Living Trust (The Lotta Moore Money Family Trust), the title to the assets should reflect the new ownership, and any insurance policies covering the property should also be updated to reflect the transfer and to show the trust as the beneficiary.

Because the trust is revocable and amendable it is considered a "Grantor Trust" under §676 of the IRC.<sup>1</sup> This means that for most tax purposes the existence of the trust is ignored, and you will be taxed as if the assets were not held in trust.

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<sup>1</sup>All references herein to the "IRC" are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

Name of Document	Who Has the Original	Comments and Statement of Action to Be Taken
Trust (cont.)		<p>Further, for so long as a Maker of the trust is serving as trustee, a tax return (Form 1041) for the trust need <b>not</b> be filed for years in which you file a joint return, <b>provided</b> that you complete and give to the trustee (yourself) a Form W-9, and that, as trustee, you furnish “the name and taxpayer identification number (TIN) of the grantor or other person treated as the owner of the trust, and the address of the trust, <b>to all payors</b> during the taxable year.”<sup>1</sup> Although you need not obtain a separate tax identification no. for a grantor trust that is not filing a Form 1041, if the trust is funded and produces income, or if you do not file a joint return, I recommend that the trust have its own separate tax identification number.</p>
<b>How to Transfer Property to the Trust</b>		<p>You may transfer property to the trust in any way that manifests your intent to make the transfer, including (a) having the property titled or retitled in the name of the trust, (b) delivering the property to the trustee, (c) changing the name or title of an account (including a bank or brokerage account) to the name of the trust, or (d) opening an account in the name of the trust and transferring property into it. For example, in most cases it would be appropriate for the document of title to an asset owned by the trust to show the owner of the revocable trust as “The Lotta Moore Money Family Trust,” or as “The Lotta Moore Money Family Trust, Moore Money and Lotta Money, trustee.”</p> <p>It would be best to check with me before attempting to transfer title on your own.</p>

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<sup>1</sup>Treas. Reg. §1.671-4(b)(2)(i)(A).

Name of Document	Who Has the Original	Comments and Statement of Action to Be Taken
<b>Assets That Should Not Be Transferred During Lifetime to a Revocable Trust</b>		<b>Certain assets should <b>not</b> be transferred to a revocable trust during lifetime</b> , absent compelling reasons. Assets that should generally not be transferred to a Revocable Trust during life include IRC §1244 stock, S Corporation stock, a beneficial interest in Qualified Subchapter S Trust, assets generating passive activity losses, assets subject to a lien or mortgage, assets subject to transfer restrictions, stock in a professional association or professional corporation, and homestead property.
<b>Trust Identification No.</b>		At the present time, our records indicate that The Lotta Moore Money Family Trust does <b>not</b> have a tax identification number of its own. If The Lotta Moore Money Family Trust does have a tax identification number now, or if it receives one later, please let me know so that I may update my records.
<b>Durable Power of Attorney</b>	We will retain the originals for the time being.  However, I will deliver the original Power of Attorney to you should either of you request it.	A Durable Power of Attorney will continue to be effective in the event of disability.  The Power of Attorney can be revoked, either by destruction or by executing a new power revoking the old. However, unless revocation is filed with the County Clerk of Ripple County, the revocation will be ineffective as to third parties who rely on the old power.

**Power of  
Attorney For  
Health Care**

I am enclosing the original of your Health Care Power of Attorney.

The holder of a health care power has special statutory authority to make certain health care decisions for you in the event you are unable to make those decisions for yourself.

It is important that whoever holds the power have access to the document. **Therefore, you should deliver the enclosed copy of the signed originals to your spouse** (the person named as holder of the Power). I will retain a copy of the signed original.

Name of Document	Who Has the Original	Comments and Statement of Action to Be Taken
<b>Directive to Physicians (Living Will)</b>	We are returning the original to you for delivery to Lotta Money.	This instrument reflects your intentions regarding the withdrawal of life support under certain conditions. Nothing further needs to be done with this document at this time. You should keep this document in a safe place, but one that is also accessible to others. You may wish to go ahead and deliver a copy to your family physician.
<b>Appointment of Guardian Before the Need Arises</b>	We will retain the originals. Of course, if you request, we will deliver the originals to you and will retain a copy.	Under Tex. Prob. Code §679(d), the Declaration of Guardian Before the Need Arises “may be filed with the Court at any time after the application for appointment of a guardian is filed and before a guardian is appointed.” <b>It is probable that it must be filed within that period in order to be effective.</b>
<b>Funeral Instructions</b>	You will retain original form.	This is an optional form provided for your possible use. If you have already completed this form on your own, then we will retain a copy.
<b>Life Insurance</b>	You will retain original life insurance policies, <i>if any</i> . If the beneficiary designation is being changed, the insurance company should return the beneficiary designation form to you, if they accept it. <b>If they do not accept it, you should notify us, otherwise we will assume that everything is in order.</b>	You did not retain us to change the beneficiary of any of your life insurance to your Living Trust. Unless we hear from you in writing to the contrary, we will assume that you do not wish to change the old designation.

Name of Document	Who Has the Original	Comments and Statement of Action to Be Taken
<b>IRAs and Qualified Plan Beneficiary Designations</b>	The IRA or Plan sponsor will retain the original beneficiary designation form.	If we have attempted to change the beneficiary of an IRA or qualified plan, then you will have a copy of the correspondence in this regard in your file; otherwise you may assume that we have not assumed this responsibility.

If you have any reason to believe that the beneficiary designation that has been accepted by the IRA or Plan sponsor is not acceptable, you should let us know; otherwise we will take for granted that the form is acceptable to you. As with life insurance, **this is an area where the scope of our involvement is limited** and in which we cannot guaranty results. Further, we do not assume responsibility for seeing to it that the IRA or Qualified Plan Sponsor properly records or accepts the changes. **You must see to this for yourself.**

Please note that the law requires that distributions from any IRA or qualified plan must commence no later than April 1 of the year following the year in which the owner/participant attains age 70 $\frac{1}{2}$ , or shortly after death if sooner. **The penalty tax for taking less than what is required is 50% of the amount that should have been distributed.**

The amount that is required to be distributed at and after the RBD (or after death, as the case may be) is a function of (a) who is named as the death beneficiary (i.e., who will be entitled to the interest at the death of the owner/participant), and of (b) the elections made as to how life expectancy is to be calculated. These determinations become irrevocably fixed on April 1 of the year following the year in which the owner/participant attains age 70 $\frac{1}{2}$  in the sense that any changes made in the beneficiary designation after that date can only accelerate the income taxes that will be owed.

**Bank and  
Brokerage  
Accounts**

The Bank usually retains the original signature cards and deposit agreements.

If we have attempted to change the form of a bank or stock brokerage account to add or remove a survivorship feature, then you will have a copy of the correspondence in this regard in your file; otherwise you may assume that we have not assumed this responsibility.

**This is another area where the scope of our involvement is limited** and in which we cannot guaranty results. If we have mailed a letter to an institution, you should confirm that the change requested has in fact been made.

Confirming any change is particularly important in the case of a bank or brokerage account that is not subject to Texas law, such as might be the case with a bank or brokerage house that is not domiciled in Texas, or which has an out of state mailing address. Any written direction to such an institution regarding the intended form of the account may be ineffective. Therefore, you may have to actually open a new account in order to change the survivorship features, if a change is desired by you. This is something that you should handle yourself, at least initially; however, I will be glad to review the documentation in connection with any change you initiate.

Let me caution you in general against establishing bank accounts or stock brokerage accounts in survivorship form,<sup>1</sup> or against holding evidence of title (such as a certificate of deposit, real estate, etc.) in such form, unless we have discussed the matter thoroughly first. This can be a convenient way to dispose of small bank balances if properly handled, but if large amounts are involved it could seriously disrupt your estate plan, if not planned for. Moreover, unless the language establishing the survivorship provision has been carefully drafted, and unless certain legal procedures have been closely followed, the survivorship provision will be ineffective, or worse yet, in doubt, which may require a court determination with respect to its validity. The cases in this area are legion, and yet the banks and other institutions continue to offer their customers deposit agreements that are ambiguous or ineffective as to survivorship rights.

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<sup>1</sup>By survivorship form, I mean that the form of the account or form of title provides that the property will pass to your spouse or to a third party on your death.



<b>Name of Document</b>	<b>Who Has the Original</b>	<b>Comments and Statement of Action to Be Taken</b>
<b>Beneficiary Designations and Change of Ownership- Assumption of Risk</b>		If you either do not get written confirmation from an insurance company, qualified plan or IRA sponsor, or a bank or stock brokerage firm, as the case may be, that a change of beneficiary or ownership with respect to a particular policy or account has been made, you must assume the risk that the change has not been made, and, unless we hear from you in writing to the contrary, we will assume in that case that you do not wish for us to proceed further to assure that the old designation has been changed.
<b>Irrevocable (Life Insurance) Trust</b>	We are delivering the original of the Irrevocable (Life Insurance) Trust to the first trustee appointed under that instrument, under a separate cover letter. We will retain a copy and are enclosing a copy for you.	There is a separate cover letter that addresses the concerns that are peculiar to this trust.

<b>Name of Document</b>	<b>Who Has the Original</b>	<b>Comments and Statement of Action to Be Taken</b>
<b>Family Limited Partnership</b>	We did <b>not</b> prepare, and consequently, are not enclosing a Family Limited Partnership Agreement.	A Family Limited Partnership (an FLP) is a partnership between you and your family members designed to achieve or promote a number of business and estate planning purposes.

These objectives include the following:

- provide resolution of any disputes which may arise among the Family in order to preserve family harmony and avoid the expense and problems of litigation;
- maintain control of Family Assets;
- consolidate fractional interests in Family Assets;
- increase Family wealth;
- establish a method by which annual gifts can be made without fractionalizing Family Assets;
- continue the ownership of Family Assets and restrict the right of non-Family to acquire interests in Family Assets;
- possibly provide limited protection to Family Assets from claims of future creditors against Family members;
- prevent the transfer of a Family member's interest in the Partnership as a result of a failed marriage;
- provide flexibility in business planning not available through trusts, corporations, or other business entities;
- facilitate the administration and reduce the cost associated with the disability or probate of the estate of Family members; and
- promote knowledge of and communication about Family Assets.

In addition, there is a distinct possibility that the value of an FLP will be substantially less than the value of the underlying assets placed in the FLP (30% or more). Achieving a discounted value on the assets can obviously result in reduced estate and gift taxes! However, if the discount is later found to have been unwarranted, which is always a possibility, gift tax penalties and interest may be owed the IRS.

Entering into an FLP Agreement is a relatively sophisticated technique, which may or may not successfully achieve all of its intended purposes.

Before executing any new beneficiary designations or deposit agreements you should probably check with me first. The importance of making sure that the death beneficiary designation on these accounts is properly coordinated with your estate plan and Will cannot be overemphasized. Proper coordination of these benefits is a delicate and technical matter.

If you are retaining the originals, then they are enclosed. If we are retaining the originals, we reserve the right to return them to you by delivering them to your last known address. In this regard, you should be sure to provide us with a current address where you may be reached in case we are no longer able to keep the documents. We may destroy any originals ten years (or later) from now, if we do not know of a mailing address where the documents may be returned at that time.

Unless it is indicated above that we will be retaining an original, it should be assumed that we are only retaining a copy. We will retain photocopies of everything for at least five years. Although we may be retaining originals, we cannot assume responsibility for finding out whether or not there is a need to probate a will, deliver a document, etc., unless someone gives us actual notice of the need.

You should be sure to let me know of any changes in your family or financial situation, as this may affect your estate plan. For example, should you inherit property, should your marital status change by death or otherwise, or should you have or adopt any more children, I should be advised.

**Changes in the Law/Periodic Review of Estate Plan.** We represent many, many, estate planning clients. It is virtually impossible to advise all of our clients of changes in the law, even if those changes directly affect an estate plan or the legality and effectiveness of any document that we may have prepared. Many years ago this may have been feasible, but in recent decades Congress has been in the habit of changing the law too frequently for us to assume this task. Nor can we assume responsibility for probating your Will if no one engages us and actually informs us of the need to do so. This is true whether or not we retain the original signed estate planning documents.

Although we may from time to time, voluntarily contact you regarding your estate plan or the legality or effectiveness of a document that we may have prepared for you, we do not undertake to be legally bound to do so. Therefore, after a document has been signed, we will assume no further obligation with respect to it, whether or not we retain the original. This means, for example, that it will be necessary for you to keep in touch with us from time to time, if you wish for us to continue to represent you and if you wish to be informed of changes in the law and related matters.

Finally, I want to thank you for allowing me to represent you in such an intimate and personal area as the planning of your estate. I have enjoyed working with you both, and hope that you will allow me to advise and assist you and your family in the future, should the need arise.

Yours very truly,

Noel C. Ice

NCI/ice

Enclosures are listed above

cc: G. O. Numbers, C.P.A.  
3141592 Golden Road  
Unlimited Devotion, TX 76999  
(123) 456-7899