

## **IRREVOCABLE INSURANCE TRUSTS - QUESTIONS & ANSWERS**

- 1. Q. What is an Irrevocable Life Insurance Trust?**

A. A trust is a separate legal and taxable entity which is created by you, pursuant to your directions. It is truly an extension of yourself that allows you to protect your loved ones and to carry out those directions which you had made while you were alive.
- 2. Q. Why does the trust come into existence now? Why can't I wait until my spouse or I die before the trust is formed?**

A. The purpose behind the trust is to save money in estate taxes as well as to insure that your wishes are carried out. Waiting, until the death of you or your spouse, to create the trust, will not avoid the heavy burden of estate taxation, nor will it guarantee that your wishes are being carried out because the intentions of the survivor(s) of you and your spouse may well change.
- 3. Q. Why must the trust be irrevocable?**

A. If you were to create a trust, which would allow you to make changes as you saw fit during your lifetime, you would be in control of the life insurance at the time of your death and it would be included in your taxable estate.
- 4. Q. I thought life insurance was excluded from estate taxation?**

A. This is not the case. It is a common misconception that many people have that life insurance enjoys an automatic exclusion from estate taxation. Life insurance can be set up to avoid estate taxation, such as in the form of an Irrevocable Trust, but there is nothing automatic about it.
- 5. Q. Am I obligating myself to continue to make premium payments because the trust is irrevocable?**

A. No! You are not obligating yourself to any premiums whatsoever. Each premium payment is a separate and distinct voluntary act on your part and you may discontinue premium payments at any time you choose without notice to anyone.
- 6. Q. Can the trust be changed at future date?**

A. No it can not. To truly avoid estate taxation, the trust must be irrevocable.

- 7. Q. What if my spouse and I were to legally separate or divorce?**
- A.** If a divorce or legal separation were to occur, the terms of the trust would continue and the death benefit would still be paid when the second of you dies. If you were to want some other result, you should advise the attorney who is drafting the trust. A clause may be put in the trust which provides that if, at the time of death, there is a divorce in effect, the beneficiaries of the trust shall be changed.
- 8. Q. What if I choose at some later date to "disinherit" one of my children?**
- A.** If you choose, at some later date, to "disinherit" one of your children, additional Federal Estate Taxes will be imposed. You may, however, have your attorney include in the drafting of the document discretionary language for the Trustees to determine under what circumstances monies will be paid to your children. You may even include a "socially acceptable behavior" clause which defines certain unacceptable areas of behavior which will deny your children access to the trust fund.
- 9. Q. Who will make decisions on options ordinarily granted to the policy owner?**
- A.** All of these decisions will be made by the trustee(s).
- 10. Q. Who should the trustee(s) be?**
- A.** The trustee or trustees are those people or entities (banks) that you choose to manage the affairs of the trust.
- 11. Q. How many trustees must I appoint?**
- A.** You may appoint as many as you wish. It is always a good idea to appoint successor trustees just in case one of your original trustees becomes unwilling or unable to serve.
- 12. Q. Should my trustees be notified in advance of their appointment?**
- A.** Yes
- 13. Q. Are there any limitations as to who or how many trustees I select?**
- A.** There are no limitations, other than choosing individuals or entities that are legally competent to act as Trustees. In the case of an individual, it must be an adult other than you or your spouse. In the case of an institution, it must be an institution that enjoys the power to act as trustee under the appropriate state regulations.

14. **Q. When my spouse and I are both dead, must all of the sums be paid out immediately to my children?**
- A. No. The lump sum death benefit available, when the second of you dies, may continue to remain in trust for as long as you see fit, within certain reasonable limitations. It may be paid out immediately or over a period of years following the date of your death. You may even choose to have it paid to your beneficiaries upon the occurrence of an event, such as marriage, graduation from colleges, etc.
15. **Q. Who make the investment decisions on the trust fund?**
- A. These decisions are all made by the trustees.
16. **Q. Are trustees entitled to a fee?**
- A. Trustees are entitled to charge and receive compensation, which is usually referred to as "commissions", and are regulated by state laws. Commissions are generally calculated as a percentage of the total sum of money held in the trust. Some corporate (bank) trustees will have minimum fees in excess of these percentages. A local government authority should be consulted to determine the fees of trustees.
17. **Q. Because the trust is irrevocable, what happens if my children do not get along with the trustees or, for whatever reason, we want to change trustees?**
- A. You can reserve the right to terminate the services of an existing trustee at any time and appoint a successor. You will, however, be restricted as to who the successor can be (i.e. a disinterested third party such as a bank or Trust Company).
18. **Q. What types of investments may be properly made in a trust?**
- A. Virtually any prudent investment may be made. If you are concerned with the latitude given to a trustee, you may restrict the trustee's choice of investments to as narrow and as conservative a list as you deem appropriate.
19. **Q. What if all of the money in the trust is needed to pay taxes when we are both dead?**
- A. This may be handled in one or two ways. First, an outright lump sum distribution may be made to your beneficiaries who, in turn, may use it to pay taxes. Second, the trust can be designed to "buy" assets from your estate, which has the effect of putting cash into your estate to pay the necessary taxes.

20. **Q. May this trust be successfully attacked by my creditors?**
- A. No.
21. **Q. May this trust be successfully attacked by the creditors of my children, if they are in debt, when my spouse and I pass on?**
- A. No, so long as the assets remain in trust. Once the assets are distributed to your children, they can be pursued by the creditors of your children.
22. **Q. What filings are required in order for this trust to be valid?**
- A. No filing is required with Internal Revenue Service other than the trust's annual tax returns. There is no "qualification or approval letter" which is either offered or required by Internal Revenue Service.
23. **Q. If this trust a matter of public record like my will?**
- A. No. One of the major advantages of the irrevocable trust is the privacy it affords to the individuals, which is not the case with one's will.
24. **Q. Will the trust be part of my estate for the calculation of attorney's fees (i.e. part of my probate estate)?**
- A. No.
25. **Q. May the trust purchase additional life insurance policies other than this first one?**
- A. The trust may purchase additional policies or receive other existing life insurance policies at any time in the future, subject only to the consent of the trustees.
26. **Q. May this trust be used for assets others than life insurance policies?**
- A. Yes. Care should be taken by your attorney in drafting the document if this is something that may be anticipated in the future.

# **DURABLE POWERS OF ATTORNEY FOR HEALTH CARE INFORMATION**

## **I. WHAT IS A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?**

A Durable Power Of Attorney For Health Care (sometimes called Designation Of A Health Care Surrogate, a Medical Power Of Attorney, or a Health Care Proxy) is a written document authorizing someone you name (your "agent" or "attorney-in-fact") to make health care decisions for you in the event you are unable to speak for yourself. The document can also contain instructions or guidelines you want your agent to follow.

## **II. WHY IS IT USEFUL?**

If you should ever lose your capacity to make or communicate decisions because of a temporary or permanent illness or injury, a Durable Power Of Attorney For Health Care lets you retain some control over important health care decisions, by choosing a person to make and communicate these decisions for you. Without a formally appointed person, many health care providers and institutions will make critical decisions for you, not necessarily based on what you would want. In some situations, a court-appointed guardian may become necessary unless you have a Durable Power Of Attorney For Health Care, especially where the health care decision requires that money be spent for your care.

A Durable Power Of Attorney For Health Care can also include a statement of your wishes and preferences regarding specific medical decisions. The existence of the document can relieve some of the stress or conflict that otherwise might arise if family or friends have to decide on their own what you would want done when you cannot speak for yourself.

## **III. WHAT IS THE DIFFERENCE BETWEEN A DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND A "LIVING WILL"?**

A Living Will is a written statement of your wishes regarding the use of any medical treatments you specify. The statement is to be followed if you are unable to provide instructions at the time the medical decision needs to be made. Living Wills have been recognized by law in most states, but they are commonly limited to decisions about "life-sustaining procedures" in the event of "terminal illness."

A Durable Power Of Attorney For Health Care is different from and more flexible than the Living Will in three important ways:

1. A Durable Power Of Attorney For Health Care designates a person to act as your agent, if you cannot act - generally a Living Will does not. The advantage of appointing an agent is that, at the time a decision needs to be made, your agent can participate in discussions and weight the pros and cons of treatment decisions in accordance with your wishes.
2. A Durable Power Of Attorney For Health Care applies to all medical decisions, unless you decide to include limitations. A Living Will normally applies only to particular decisions near the end of your life.
3. A Durable Power Of Attorney For Health Care can include specific instructions to your agent about any treatment you want done or what to avoid or about whatever issues you care most about.

In actuality, it probably makes sense to have both a Durable Power Of Attorney For Health Care and a Living Will.

#### **IV. IS A DURABLE POWER OF ATTORNEY FOR HEALTH CARE LEGALLY VALID IN EVERY STATE?**

The simple answer to that question is probably yes. No law or court has invalidated the concept of a Durable Power Of Attorney For Health Care, and an increasing number of statutes and court decisions support it. Yet, some uncertainty exists in a few states, primarily because of the lack of public experience with Durable Power Of Attorney For Health Care.

To understand the situation, a little history is required. A Durable Power Of Attorney For Health Care is a variation of an ordinary "power of attorney." Ordinary powers of attorney allow an individual (the "principal") to give legal authority to another (the "agent" or "attorney-in-fact") to handle business or property transactions for the principal. Originally, these powers of attorney for property were effective only as long as the principal was competent. They could not be used to manage the affairs of persons who were mentally incompetent.

During the last 20 years or so, every state, and the District Of Columbia, have enacted durable power of attorney statutes, which allow a power of attorney for property to remain in effect, even if the person later becomes mentally incapacitated. Yet, only recently has the idea of a Durable Power Of Attorney For Health Care emerged. The combination of advancing medical technology, an aging population, and growing concern about medical decisions, that serve only to prolong the dying process, have all triggered this emergency, just as they led to the emergence of Living Wills. Most, but not all legal scholars believe that existing durable power of attorney statutes are broad enough in principle to include health care decision making powers within their scope. But, to eliminate uncertainty and to build in protection for patients, an increasing number of states are enacting statutes that clearly recognize Durable Powers Of Attorney For Health Care, and many of these states provide special forms and procedures for creating such documents.

Even if the legal status of the Durable Power Of Attorney For Health Care is uncertain in some states, it is still important to consider having one, because it carries substantial "moral weight." Your written directive cannot easily be ignored by family and health care providers. And, if the courts become involved, they usually try to follow the values and preferences expressed by the patient. A Durable Power Of Attorney For Health Care may be the most convincing evidence of your wishes that you could create.

## **V. WHAT DOES A DURABLE POWER OF ATTORNEY FOR HEALTH CARE SAY?**

The most important part of a Durable Power Of Attorney For Health Care is the appointment of someone to make health care decisions for you, if you should be unable to do so. Nothing else has to be included. However, most persons will want to include additional statements to accomplish some or all of the following:

- \* Define the scope of your agent's powers or limitations.
- \* Provide guidelines for your agent to follow.
- \* Name alternate agents, should your primary agent become unable to act.
- \* Include other directions aimed at ensuring the effectiveness of the document.

## **VI. HOW DO I MAKE A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?**

How to make a Durable Power Of Attorney For Health Care depends upon where you live. A growing number of states have Durable Power Of Attorney For Health Care laws that provide special forms and signing procedures. Examples include Alaska, California, the District of Columbia, Idaho, Kansas, Illinois, Nevada, Oregon, Rhode Island, Texas, Utah and Vermont.

Some of these laws include special witness requirements or restrictions on whom you can appoint as your agent (such as prohibiting a health care provider from being your agent). Follow these rules very carefully.

In states without special laws, follow the general rules for executing durable powers of attorney for property. Typically, states required only a notarized signature, but it is very important to check for special rules in your state. Even where witnesses are not required, consider using them anyway in order to reinforce the deliberate nature of your act and to increase the likelihood that the document will be recognized in other states.

## **VII. CAN I TERMINATE A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?**

Yes, you can put an end to your Durable Power Of Attorney For Health Care at any time by notifying your agent or health care provider of your decision to terminate it. Although you can do this in most any manner, it is best to notify your agent in writing of the termination, destroy the Durable Power Of Attorney For Health Care document itself, and notify your physician and any other health care providers, verbally and in writing.

## **VIII. WHAT DO I NEED TO CONSIDER BEFORE MAKING A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?**

There are at least four important questions to ask yourself:

### **1. What Are My Values?**

A Durable Power Of Attorney For Health Care may shape how you experience a period of disability or the very final stage of your life. You can help others respect your wishes if you take some steps now to clarify and communicate your personal values and attitudes. One possible way to do this is by developing your own "Values History" for medical decisions. This involves discussing your values and attitudes with loved ones or advisors and writing down your responses to questions such as...

- \* How do you feel about your current health?
- \* How important is independence and self-sufficiency in your life?
- \* What is the significance of illness, disability, dying, and death to you?
- \* How might your personal relationships affect medical decision making?
- \* What role should doctors and other health professionals play in such decisions?
- \* What kind of living environment is important to you?
- \* How should matters involving your personal or family finances be decided?
- \* What role do religious beliefs play in your life?
- \* What are your thoughts about life in general: your hopes and fears, enjoyments and sorrows?

## **2. Who Should Be My Agent?**

The choice of agent is the most important part of this process. Your agent will have great power over your health and personal care if you become incapacitated. There is normally no formal oversight or monitoring of their decisions. Speak to the person (and successor persons) you wish to appoint beforehand to explain your intentions and confirm their willingness to act on your behalf and their understanding of your wishes. Also be aware that some states prohibit certain persons (such as your health care provider) from acting as your agent. If you can think of absolutely no one you trust to carry out this responsibility, then you may be better off not creating a Durable Power Of Attorney For Health Care.

## **3. How Specific Should I Be?**

A Durable Power Of Attorney For Health Care need not provide directions or guidelines for your agent. However, if you have specific wishes or preferences, it is important to spell them out in the document itself and in discussions with your agent and health care providers. This helps ensure that your wishes, values and preferences will be respected. Especially think about your wishes regarding the use of artificial feeding (nutrition and hydration) since people differ widely in their views on this topic.

At the same time, be aware that no matter how much direction you provide, your agent will still need considerable discretion and flexibility, for it is impossible to predict all the circumstances you may face.

## **4. How Can I Reduce "Third-Party Reluctance"?**

Regardless of the legal status of Durable Power Of Attorney For Health Care in various states, some physicians, hospitals or other health care providers may still be unfamiliar with such documents or they may have personal views or values contrary to your stated desires. As a result, they may not want to recognize your Durable Power Of Attorney For Health Care.

The best way to avoid this problem is to talk to your physician and other health care providers ahead of time to make sure they understand the document and have no objections to following it. If objections arise, you need to work them out, or you can choose to change physicians. Once you sign a Durable Power Of Attorney For Health Care, be sure to give a copy of it to your attending physician.

## **IX. WHO CAN HELP ME CREATE A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?**

The advice of a lawyer could be very helpful, and very important to ensure that your document is legally effective. You probably will want to discuss this with your family, and particularly with the individual whom you wish to designate as your agent.

Some states have a statutory form. Remember that pre-printed forms may not meet all of your

individual needs. Take the time to consider all possibilities and seek competent legal advice, so that the document you develop meets your special needs. This is even more important in states with no statutory Durable Power Of Attorney For Health Care forms.

Finding legal help depends on where you live. You should consult your own lawyer if you have one. If you do not have a lawyer, you can contact the bar association for your state or locality. Their lawyer referral service may be able to refer you to an attorney who handles this type of matter.

## TYPICAL A-B TRUST PROVISIONS

A typical revocable living trust agreement, using an "A-B" trust plan, is often used in a situation for a married man whose wife and children are living. Such a plan would allow the husband to split his total estate into Trust A, known as the marital deduction trust, and Trust B, known as residuary credit shelter trust. Here are the prominent features and benefits of such a plan.

- I. Such a revocable trust agreement might provide for the appointment of a trustee who is not the grantor himself. The main reason for this is that the trust is intended to continue after the death of the grantor. The trust is revocable during the life of the grantor, but become irrevocable after his death. (However, as times change, most husbands and wives own everything jointly - often they create a joint revocable trust, naming themselves as the trustees.)
  - A. One paragraph would establish the trust estate consisting of the property listed on Schedule A, which is attached to the trust agreement and made a part thereof.
  - B. The grantor would give the trustee authority to receive additional property by gift, will, or otherwise, from persons other than the grantor.
  - C. The grantor would reserve the right to alter and revoke the trust at any time, without the consent of the trustee or any beneficiary. At the same time, upon the grantor's death, the trust would become irrevocable and couldn't then be altered, amended, changed, or terminated.
  - D. During the lifetime of the grantor, all the income of the trust would be paid to the grantor; any income not paid to the grantor would be added to the principal. In the event the grantor became incapacitated or incompetent, the trustee would be authorized to pay the entire income to the grantor during the period of incapacity. The grantor would also reserve, unto himself, the right to invade the principal of the trust as necessary for himself and his family.
  - E. After the grantor's death, the corpus would be divided into two trusts. Trust A would be designed to qualify for the marital deduction in the grantor's estate, and is generally known as marital deduction trust. Trust B would be designed to escape taxation in the wife's estate, and is known as residuary credit shelter trust. This plan would be employed to achieve maximum federal estate tax economy.
  - F. All the income from Trust A would be payable to the wife during her lifetime. She would also have the right to invade the principal of trust A for her support and maintenance. Upon the wife's death, she would have the general power of appointment on the principal and all the accumulated income of Trust A. She could dispose the assets of Trust A through her will, in any manner she might wish. In the

event she dies without exercising this power of appointment, the assets of Trust A would be merged with the assets of Trust B and would be disposed of in the manner described below. In addition, the wife would have a limited lifetime power of appointment over the assets of Trust A. She would receive, each year, \$5,000 or five per cent of the total value of the principal, whichever is greater, from Trust A.

- G.** With regards to Trust B, the grantor's wife would receive income from it during her lifetime. She would also have the right to invade the principal of Trust B for her support, maintenance, or health. This would be in addition to her right to invade the assets of Trust A. However, she couldn't invade Trust B assets, until the assets of Trust A had been exhausted. Further, she would receive from Trust B, each year, \$5,000 or five per cent of the total value of Trust B assets, whichever is greater.
- H.** The purpose of Trust B would be to establish a trust for the benefit of the children. So, upon the death of the grantor's wife, the trustee would be directed to pay the principal of the trust to the grantor's then-living children, in equal shares. The trust agreement would also provides for gradual distribution of these assets to the children, in the event that they had not reached the age of 30 (or whatever age is designated) at the time of the death of the wife.
- I.** If the children had not reached the age of 30, the trustee would be directed to pay necessary amounts for the education, support, maintenance, or health of each of such children from the net income of the trust. The trustee could also provide for discretionary distribution of net income. Any balance of the income would be accumulated along with the balance of the principal.
- J.** When a child reached the age of 25, he or she would receive a portion of the trust principal, and would receive the next share upon reaching the age of 30. If the grantor had two children under the age of 25, each would receive 1/4 of the trust assets upon reaching the age of 25, and the other 1/4 of the assets upon reaching the age of 30. The total trust would be divided equally between the two children. The trust would be terminated when the youngest child attained the age of 30.
- K.** The trust would also contains a survivorship clause. If the order of death of the grantor and his wife couldn't be established by proof, his wife shall would be deemed to have survived the grantor. This provision would enable the grantor's estate to make a marital deduction; it may also result in an overall tax saving depending on the size of both estates.
- L.** The trust would also provide for payment to the guardian of the minor or any person having care or custody of the minor, in lieu of paying to the minor.
- M.** The trust would contain the customary spendthrift clause, which would prohibits the beneficiaries from pledging the assets of the trust against creditors' claims or other

assignments.

- N. The trustee's powers would be spelled out in detail and these powers would be granted in addition to the powers granted under any applicable state law. The grantor would expressly waive the requirement of posting a bond of the trustee.
- O. The trust agreement would provide for the appointment of a successor trustee in the event the trustee refuses to serve or is unable to serve for any reason. Finally, the trust agreement would provide for the trust agreement to be construed and governed under the laws of a state of your choice.

**Caution:**

Drafting an "A-B" revocable living trust requires complex estate planning and tax considerations and should only be done by a qualified professional.

# USING REVOCABLE LIVING TRUSTS FOR TAX AVOIDANCE

## A-B TRUST

Generally speaking, one of the main benefits of a revocable living trust is to avoid the probate process. However, such trusts can also be used as an excellent estate planning tool, specifically to avoid the second tax.

### **Illustration:**

Let's look at a hypothetical situation. The husband has an adjusted gross estate of \$1.2 million dollars. He has made no lifetime gifts. He dies in 1995. His wife has no estate of her own. Let's analyze the tax consequences.

Due to the unlimited marital deduction, there will be no federal estate tax on the husband's death. On the wife's subsequent death (after the unified credit, but ignoring the state death tax credit) federal estate tax will be levied in the amount of approximately \$235,000.00. The total taxes paid on the estates of both spouses, therefore, will be \$235,000.00.

In a situation like this, an A-B trust plan, in the form of a revocable living trust (which becomes irrevocable upon the death of the first spouse) can be used to reduce death taxes and maximize the amount which will eventually go to the children or other heirs.

In a typical A-B trust plan, upon the death of the husband, the portion of the husband's estate which equals the optimum marital deduction goes into Trust A and the balance of the estate (that is, the non-marital deduction portion of the husband's estate) goes into Trust B. Let's discuss in further detail the application of A-B trust plan.

Under the current law, due to the unlimited marital deduction, a person can leave his entire estate to his spouse, and not have any federal estate tax on his or her death, but, as the above illustration points out, such an outright bequest of the entire estate to the surviving spouse does not result in minimizing the total estate tax paid upon the death of both spouses.

The lowering of the overall estate tax by using an A-B trust arrangement can be shown by the following example.

Imagine that the husband's estate is \$1.3 million. By utilizing the unlimited marital deduction, if the entire estate were to go to his wife, there will be an estate tax imposed upon the wife's subsequent death in the amount of \$298,500. However, if an A-B trust plan were to be used, this tax could be reduced substantially. Under one plan, if the optimum marital deduction bequest is used, the equivalent exemption of \$600,000 would be allocated to trust B, and the balance of the estate, i.e., \$750,000 (\$1.35 million minus \$600,000) would be allocated to trust A. Under this estate plan, there will be no estate tax on the husband's death, and a tax of only

\$55,000 on the wife's subsequent death.

The assets contained in Trust A, will be included in the wife's estate upon her death, but the Trust B assets will pass to the eventual beneficiaries (such as the children) without further taxation. The wife can have the lifetime benefit of Trust B assets, including the right to receive all income during her lifetime, and the power to invade the assets under certain circumstances.

Trust A can be structured in one of several ways. In a typical arrangement, the Trust A could provide that the wife is to receive all of the net income, have the unlimited right to withdraw principal at any time during her life, and give her, upon her death, a general testamentary power of appointment, which, if not exercised, will result in the remainder passing to Trust B. The part of the total estate going into Trust A will not be taxable on the husband's death because of unlimited marital deduction; whatever remains of these assets on the wife's subsequent death, will be included in her estate for death tax purposes.

(In the above discussion, we have assumed that the husband is the first spouse to die and the wife is the survivor. However, the results would remain the same if the order of death was reversed.)

In order for Trust B to qualify as a bypass trust, the wife may be given substantial rights and benefits, but she may have no general power of appointment over the principal. The following discussion applies to the structuring of Trust B.

## **TRUST B**

In a bypass trust arrangement, the assets of Trust B pass to the ultimate beneficiaries without being taxed in the estate of the surviving spouse. In a qualifying bypass trust, the wife may be given substantial benefits and rights - but not have Trust B included in her estate. The following is a summary of those benefits and rights.

- 1.** She can receive all the income during her lifetime.
- 2.** The trustee can spend any amount of principal necessary for her reasonable support, medical care, and maintenance.
- 3.** She can withdraw on a noncumulative, annual basis, the greater of \$5,000 or five per cent of the trust.
- 4.** She can be given a special power of appointment, which will allow her to leave the trust property to anyone, except herself, her estate, her creditors, or the creditors of her estate.

The following discussion goes into more detail regarding these benefits and rights.

## **Power To Invade Under An Ascertainable Standard**

The wife may have a right to invade principal, limited by an ascertainable standard relating to her support, maintenance, health, or education. Such a power is considered a special or limited power of appointment which does not cause taxation in the wife's estate. Precise language should be used in the drafting of the power, so as to avoid it being construed as a general power of appointment. Here are some suggestions:

This is satisfactory: "My wife shall have the right to invade, for the purposes of her health, education, support and maintenance in her accustomed manner of living."

This is not satisfactory: "My wife shall have the right to invade for her comfort, welfare or happiness."

A power to invade for the holder's "accustomed manner of living" is not satisfactory language.

A power to invade for the holder's "support in her accustomed manner of living" is satisfactory language.

The power to invade "in cases of emergency" will is not satisfactory language.

## **\$5,000 Or Five Per Cent Power**

The wife may also be given the power to invade principal for any purpose (without being limited to an ascertainable standard), so long as the right is limited to the greater of five thousand dollars or five per cent of the principal per calendar year, on a noncumulative basis.

Under the "five and five" power, the most that will be included in the wife's estate will be the value of the unexercised right in the year of her death. All the amounts which had lapsed in the preceding years will not be included in her estate.

## **Special Power To Appoint To Third Parties**

In addition to her other powers, the wife may be given a special power of appointment allowing her to dispose of the assets in Trust B to anyone except herself, her creditors, or the creditors of her estate, either during her life or upon her death. The estate owner may limit the permissible donees, by the provisions of the trust, to a class of beneficiaries, such as the couple's children, or he may give the wife broad powers to appoint the property to anyone she chooses.

## **What's A Bypass Trust?**

A bypass trust is simply a means of transferring property so that it will escape taxation upon

the death of the transferee. For example: a married person's estate can be structured by using a bypass trust so that the surviving spouse will receive the benefit of a portion of the deceased spouses's estate, but it will not be included in the surviving spouses's estate.

A qualified terminable interest property (QTIP") trust is the most popular and effective way to accomplish this result. The trust property is includable in the surviving spouse's estate only to the extent an election is made to claim the marital deduction in the estate of the first spouse to die. The balance of the property bypasses the surviving spouse's estate. A QTIP trust is one form of a bypass trust. The surviving spouse is commonly given a life income interest in the trust and may be given a limited power to invade corpus of the trust and a special testamentary power of appointment.