NOTATIONS FOR FORM 105

This form is designed for use in the smaller estate in which a bypass trust may or may not be needed. The decision whether or not to create a bypass trust is made after death, by the surviving spouse. The form enables the spouse to shelter testator’s applicable exclusion amount by disclaiming part or all of the outright residuary devise and still receive benefits from the disclaimed property in the bypass trust.

Certain provisions of this form assume that there is a disinterested party acting as trustee or co-trustee under the will. FORM 109: WILL–Plural Trustees, operates to preclude a beneficiary who is acting as co-trustee from the exercise of powers which would have adverse tax consequences. A beneficiary should not act as sole trustee where the trustee may accumulate income or pay it to or spray it among a group which includes the beneficiary; see IRC §678(a)(1).

If it is desired to reserve apportionment rights for death taxes generated not only by marital trusts but also by other property passing outside the estate, substitute for first paragraph of FIRST:

FIRST: My executor shall pay all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering devises, and other proper charges against my estate (excluding debts secured by real property or life insurance). Except as hereinafter provided, my executor shall also pay all estate and inheritance taxes and generation-skipping taxes on direct skips which are assessed by reason of my death, including such taxes on property passing outside this will. Such payments, including interest and penalties on any tax, shall be charged against principal or income as provided by applicable state law. My executor shall make these payments from my estate without apportionment or reimbursement or charging any direct skip property. If any part of my residuary estate does not qualify for the federal estate tax marital deduction because of disclaimer, then the amount (if any) by which the estate and inheritance taxes assessed by reason of my death are thereby incurred or increased shall be paid from or charged against the disclaimed property.

My executor shall not pay death taxes caused by:

(a) Property over which I may have a power of appointment,

(b) Property in which I may have a qualifying income interest for life, unless for generation-skipping tax purposes the property has an inclusion ratio of zero and is treated as if the qualified terminable interest property election had not been made,

(c) Property constituting a direct skip for generation-skipping tax purposes which is caused by a disclaimer or which is from a trust not created or appointed by me,

(d) ____________________________ , and

[ List additional property passing outside the instrument against which tax apportionment rights should be asserted. ]

(e) ____________________________ .

The person holding or receiving the above-described property shall pay, either directly or to my executor, the amount, if any, by which the death taxes are increased as a result of the taxation of that property. If two or more properties cause an increase in a tax, the increase shall be allocated among the properties in proportion to their respective taxable values.

If there may be after-born children, add to SECOND:

2 I intend by this will to provide for all my children, including any hereafter born or adopted.

If there is community property, add to SECOND:

3 I intend by this will to dispose of my separate property and my share of our community property, and I confirm to my wife her share of our community property.
WILL

I, JOHN DOE, a resident of ________, ________, make this my will and revoke all prior wills and codicils.

FIRST: My executor shall pay all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering devises, and other proper charges against my estate (excluding debts secured by real property or life insurance). My executor shall also pay all estate and inheritance taxes assessed by reason of my death, including such taxes on property passing outside this will, except that the amount, if any, by which the estate and inheritance taxes shall be increased as a result of the inclusion of property in which I may have a qualifying income interest for life or over which I may have a power of appointment shall be paid by the person holding or receiving that property. Such payments, including interest and penalties on any tax, shall be charged against principal or income as provided by applicable state law. My executor shall make these payments from my estate without apportionment or reimbursement. If any part of my residuary estate does not qualify for the federal estate tax marital deduction because of disclaimer, then the amount (if any) by which the estate and inheritance taxes assessed by reason of my death are thereby incurred or increased shall be paid from or charged against the disclaimed property.

My executor’s selection of assets to be sold to make the foregoing payments or to satisfy any pecuniary devises, and the tax effects thereof, shall not be subject to question by any beneficiary.

My executor shall make such elections and allocations under the tax laws as my executor deems advisable, without regard to the relative interests of the beneficiaries and without liability to any person. No adjustment shall be made between principal and income or in the relative interests of the beneficiaries to compensate for the effect of elections or allocations under the tax laws made by my executor or by the trustee.

The balance of my estate which remains after the foregoing payments have been made or provided for shall be disposed of as hereinafter provided.

SECOND: My wife’s name is MARY DOE, and she is herein referred to as “my wife.” I have three children now living, namely:

JOHN DOE, JR., born ______ (date) ______;
DOROTHY DOE, born ______ (date) ______; and
DAVID DOE, born ______ (date) ______.
If special gifts of personal effects are desired, substitute for THIRD:

THIRD: I give (a) all my clothing and jewelry to my son, DAVID, if he survives me by 30 days, and (b) all my personal and household effects, automobiles, boats and collections not otherwise effectively disposed of by this will, and any insurance policies thereon, to my wife if she so survives me, otherwise to my children who so survive me to be divided equally among them as they agree. My executor shall sell any property as to which there is no agreement within 60 days after admission of this will to probate and shall add the proceeds to the residue of my estate.

If a separate writing identifying gifts of personal effects is desired and is permitted in your state, substitute for THIRD:

THIRD: I give all my personal and household effects, automobiles, boats and collections, and any insurance policies thereon, in accordance with a written statement which I shall have prepared prior to my death in conformity with state law. My executor may assume that no written statement exists if none is found within 30 days after admission of this will to probate. Except as otherwise provided in any such written statement, I give the aforementioned property to my wife if she survives me by 30 days, otherwise to my children who so survive me to be divided equally among them as they agree. My executor shall sell any property as to which there is no agreement within 60 days after admission of this will to probate and shall add the proceeds to the residue of my estate.

If the will elsewhere makes a special gift of personal effects (e.g., if a gift of furniture and furnishings is included with a gift of real estate), limit THIRD to those items “not otherwise effectively disposed of by this will.”

Tangible personal property not clearly described in THIRD (e.g., airplanes, tangible personality acquired for investment) should be specifically mentioned in the will.

If there may be minor children, add to THIRD:

If a child is a minor at the time of distribution, the guardian of or person in loco parentis to the child shall represent him or her in the division of the property, receipt for and hold his or her share or sell all or any part of it, and deliver the share or proceeds to the child when he or she reaches majority, or earlier if the guardian or person considers it to be for the child’s best interests.

If special gifts of money are desired, add the following after THIRD and renumber the succeeding articles:

FOURTH: I give
(a) $5,000 to my sister, JANE DOE, of _______, _______, if she survives me;
(b) $2,500 to the OLD PEOPLE’S HOME, of _______, _______, if in existence at my death; and
(c) $5,000 to each of my grandchildren who survives me; if a grandchild is a minor, payment may be made for the benefit of the grandchild to a custodian under a Uniform Transfers or Gifts to Minors Act.

No interest or share of income shall be paid on these devises.

If special gifts of property are desired, add the following after THIRD and renumber the succeeding articles:

FOURTH: If my wife survives me by 30 days, I give to her
(a) all my interests in our residences, including seasonal and vacation homes, and any insurance policies thereon, subject to any mortgage indebtedness and unpaid taxes and assessments on the properties;

OR

(b) all my transferable club memberships; and
(c) all my community property interests in any individual retirement plans in her name and any employee benefit plans in which she is a participant.

. . . , free of any mortgage indebtedness, which I direct shall be paid from my estate;
THIRD: I give all my personal and household effects, automobiles, boats and collections, and any insurance policies thereon, to my wife if she survives me by 30 days, otherwise to my children who so survive me to be divided equally among them as they agree. My executor shall sell any property as to which there is no agreement within 60 days after admission of this will to probate and shall add the proceeds to the residue of my estate.
In the simultaneous death sentence in first paragraph of FOURTH, determine whether husband or wife is the poorer spouse, and provide that such spouse is deemed to have died last. The estate planning documents of husband and wife should each provide that such spouse is deemed to have died last.

If principal encroachment for spouse alone is desired, substitute for second paragraph of SECTION 1 of FIFTH:

10 The trustee may also pay to my wife such sums from principal as the trustee deems necessary or advisable from time to time for her health and maintenance in reasonable comfort, considering her income from all sources known to the trustee.
FOURTH: All the residue of my estate, wherever situated, including lapsed devises, but expressly excluding any property over which I may have power of appointment at my death, I give to my wife if she survives me. For purposes of this will, my wife shall be deemed to have survived me if the order of our deaths cannot be proved.

If my wife does not survive me, or if my wife survives me but disclaims a part or all of my residuary estate, I give my residuary estate (or the disclaimed part of it) to NORTHERN TRUST [insert full legal name of applicable NORTHERN TRUST bank throughout the instrument], of ________, ________, as trustee. The trust shall be designated the “Bypass Trust.”

FIFTH: The Bypass Trust shall be held and disposed of as follows:

SECTION 1: If my wife survives me, then commencing with my death the trustee shall pay the income from the Bypass Trust in convenient installments, at least quarterly, to her during her lifetime.

The trustee may also pay to my wife such sums from principal as the trustee deems necessary or advisable from time to time for her health and maintenance in reasonable comfort, and for the health, support in reasonable comfort, and education (including postgraduate) of any child of mine who may be dependent upon her, considering the income of each of them from all sources known to the trustee. No payment made for a child of mine shall be charged against the share hereinafter provided for the child or his or her descendants.
If Bypass Trust is to be distributed upon the death of the surviving spouse, substitute the following for SECTION 2 through SECTION 6 and renumber the succeeding section of FIFTH:

11 SECTION 2: Upon the death of my wife, or upon my death if my wife does not survive me, the Bypass Trust shall be distributed in equal shares to such of my children as shall then be living, except that the then living descendants of a deceased child of mine shall take per stirpes the share which the child would have received if living, subject to postponement of possession as provided below.

If Bypass Trust is to be held as a single trust for children after the death of the surviving spouse and distributed when the youngest child has reached a specified age, substitute the following for SECTION 2 through SECTION 6 and renumber the succeeding section of FIFTH:

12 SECTION 2: After the death of my wife, or after my death if my wife does not survive me, the Bypass Trust shall be held and disposed of as hereinafter provided.

SECTION 3: Until the time hereinafter fixed for distribution, the trustee may pay so much or all of the income and principal of the Bypass Trust to any one or more of my children and the descendants of a deceased child of mine from time to time living, in equal or unequal proportions and at such times as the trustee deems best, considering the needs, other income and means of support, and best interests of my children and those descendants, individually and as a group, and any other circumstances and factors which the trustee deems pertinent, adding to principal any income not so paid. No payment of income or principal to a child or other descendant of mine shall be charged against the share hereinafter provided for the child or descendant or his or her ancestor or descendants.

SECTION 4: If upon or whenever after the death of the survivor of my wife and me there is no living child of mine under the age of 25 years, the trustee shall distribute the Bypass Trust in equal shares to such of my children as shall then be living, except that the then living descendants of a deceased child of mine shall take per stirpes the share which the child would have received if living, subject to postponement of possession as provided below.

If Bypass Trust is to be held as a single trust for children after the death of the surviving spouse and divided into shares when the youngest child has reached a specified age, substitute the following for SECTION 2 and renumber the succeeding sections of FIFTH:

13 SECTION 2: After the death of my wife, or after my death if my wife does not survive me, the Bypass Trust shall be held and disposed of as hereinafter provided.

SECTION 3: Until the time hereinafter fixed for division into shares, the trustee may pay so much or all of the income and principal of the Bypass Trust to any one or more of my children and the descendants of a deceased child of mine from time to time living, in equal or unequal proportions and at such times as the trustee deems best, considering the needs, other income and means of support, and best interests of my children and those descendants, individually and as a group, and any other circumstances and factors which the trustee deems pertinent, adding to principal any income not so paid. No payment of income or principal to a child or other descendant of mine shall be charged against the share hereinafter provided for the child or descendant or his or her ancestor or descendants.

SECTION 4: If upon or whenever after the death of the survivor of my wife and me there is no living child of mine under the age of 25 years, the trustee shall divide the Bypass Trust into equal shares to create one share for each then living child of mine and one share for the then living descendants, collectively, of each deceased child of mine.

Each share created for the descendants of a deceased child shall be distributed per stirpes to those descendants, subject to postponement of possession as provided below. Each share created for a living child shall be held as a separate trust and disposed of as hereinafter provided.

If Bypass Trust is held as a single trust for children and principal encroachment is desired to enable a child to enter a business or acquire a home, add to alternate SECTION 3 of FIFTH:

14 In addition, to the extent that the trustee determines that the interests under the preceding paragraph of my other children and descendants of a deceased child of mine will not thereby be jeopardized, the trustee may pay to a child of mine who has reached the age of 25 years such sums (not exceeding the child’s presumptive share) from the principal of the Bypass Trust as the trustee deems necessary or advisable to enable the child to enter into or remain in a business, vocation or profession in which the trustee believes the child will have reasonable prospects of success, to assist the child in acquiring or furnishing a home, or for any similar purpose which the trustee considers to be in the best interests of the child. Each payment to a child of mine under this paragraph shall be treated as an advancement and charged without interest against the share hereinafter provided for the child or his or her descendants.
SECTION 2: Upon the death of my wife, or upon my death if my wife does not survive me, the trustee shall divide the Bypass Trust into equal shares to create one share for each then living child of mine and one share for the then living descendants, collectively, of each deceased child of mine.

Each share created for the descendants of a deceased child shall be distributed per stirpes to those descendants, subject to postponement of possession as provided below. Each share created for a living child shall be held as a separate trust and disposed of as hereinafter provided.
If minor child, add to first paragraph of SECTION 3 of FIFTH:

15 . . . ; except that while the child is under the age of 21 years, the trustee may pay to or for the benefit of the child so much or all of the income from his or her share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, adding to principal any income not so paid.

If a child’s share is of sufficient size to warrant withdrawal in three stages, substitute for SECTION 4 of FIFTH:

16 SECTION 4: After division of the Bypass Trust into shares and after a child has reached any one or more of the following ages, the child may withdraw from the principal of his or her share at any time or times not to exceed in the aggregate:

- 1/3 in value after 25 years of age;
- 1/2 in value (after deducting any amount subject to withdrawal but not actually withdrawn) after 30 years of age; and
- The balance after 35 years of age.

The value of the share shall be its value as of the first exercise of each withdrawal right, plus the value of any subsequent addition as of the date of addition. The trustee shall make payment without question upon the child’s written request. The right of withdrawal shall be a privilege which may be exercised only voluntarily and shall not include an involuntary exercise.

If mandatory distribution of a child’s share is desired, substitute the following for SECTION 4 through SECTION 6 and renumber the succeeding section of FIFTH:

17 SECTION 4: When a child reaches the age of 25 years, or upon division of the Bypass Trust into shares if he or she has then reached that age, the trustee shall distribute to the child 1/2 in value of the principal of his or her share then held hereunder; the trustee shall forthwith distribute to the child 1/2 in value of any subsequent addition to his or her share; and when a child reaches the age of 30 years, or upon division of the Bypass Trust into shares if he or she has then reached that age, the trustee shall distribute to the child the balance of his or her share.

SECTION 5: If a child dies before receiving his or her share in full, then upon the death of the child his or her share shall be distributed per stirpes to his or her then living descendants, or if none, then per stirpes to my then living descendants, subject to postponement of possession as provided below, except that each portion otherwise distributable to a descendant of mine for whom a share of the Bypass Trust is then held hereunder shall be added to that share.
SECTION 3: The income from a child’s share shall be paid in convenient installments, at least quarterly, to the child until complete distribution of the share or his or her prior death.

The trustee may also pay to the child such sums from the principal of his or her share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, considering the income of the child from all sources known to the trustee.

SECTION 4: After division of the Bypass Trust into shares and after a child has reached the age of 25 years, the child may withdraw any part or all of the principal of his or her share at any time or times, but not to exceed in the aggregate 1/2 in value thereof prior to reaching the age of 30 years. The value of the share shall be its value as of the child’s first exercise of his or her withdrawal right, plus the value of any subsequent addition as of the date of addition. The trustee shall make payment without question upon the child’s written request. The right of withdrawal shall be a privilege which may be exercised only voluntarily and shall not include an involuntary exercise.

SECTION 5: If a child dies before receiving his or her share in full, then upon the death of the child his or her share shall be held in trust hereunder or distributed to or in trust for such appointee or appointees, with such powers and in such manner and proportions as the child may appoint by his or her will making specific reference to this power of appointment, except that any part of the child’s share not subject to withdrawal prior to the death of the child may be appointed only to or for the benefit of any one or more of the child’s surviving spouse, the child’s descendants and their respective spouses and my descendants (other than the child) and their respective spouses. For purposes of this will, the term “spouse” shall include a widow or widower, whether or not remarried.
If it is desired to provide for contingent distributees in the event of a failure of descendants, insert the following after SECTION 6 and renumber the succeeding section of FIFTH:

18 SECTION 7: If upon the death of the survivor of my wife and me, or at any time thereafter but prior to complete distribution of the Bypass Trust, there is no living descendant of mine, any trust property then held under this article and not vested or effectively appointed shall be distributed 1/2 to my heirs-at-law and 1/2 to my wife’s heirs-at-law, the heirs-at-law and the proportions which they shall respectively take to be determined in each case according to the present laws of descent of the state of my domicile as if my wife and I had both died at that time.

If a retained share is of sufficient size to warrant distribution in two stages, substitute for SECTION 7 of FIFTH:

19 SECTION 7: Each share of the Bypass Trust which is distributable to a beneficiary who has not reached the age of 30 years shall immediately vest in the beneficiary, but the trustee shall retain possession of the share as a separate trust, paying to or for the benefit of the beneficiary so much or all of the income and principal of the share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, adding to principal any income not so paid (except that after the beneficiary has reached the age of 21 years, the trustee shall pay to him or her all the income from the share in convenient installments, at least quarterly), and distributing 1/2 in value of the principal of the share to the beneficiary if he or she has then reached or at such time thereafter as he or she reaches the age of 25 years and the balance to the beneficiary when he or she reaches the age of 30 years or to the estate of the beneficiary if he or she dies before receiving the share in full.
SECTION 6: Upon the death of a child any part of his or her share not effectively appointed shall be distributed per stirpes to his or her then living descendants, or if none, then per stirpes to my then living descendants, subject to postponement of possession as provided below, except that each portion otherwise distributable to a descendant of mine for whom a share of the Bypass Trust is then held hereunder shall be added to that share.

SECTION 7: Each share of the Bypass Trust which is distributable to a beneficiary who has not reached the age of 21 years shall immediately vest in the beneficiary, but the trustee shall (a) establish with the share a custodianship for the beneficiary under a Uniform Transfers or Gifts to Minors Act, or (b) retain possession of the share as a separate trust, paying to or for the benefit of the beneficiary so much or all of the income and principal of the share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, adding to principal any income not so paid, and distributing the share to the beneficiary when he or she reaches the age of 21 years or to the estate of the beneficiary if he or she dies before receiving the share in full.

For ADMINISTRATIVE PROVISIONS, TRUSTEE POWERS, GUARDIAN APPOINTMENT, EXECUTOR APPOINTMENT, EXECUTOR POWERS and EXECUTED TRUSTS, TESTIMONIUM, ATTESTATION and AFFIDAVIT, refer to FORM 101: WILL-Fractional Share Marital Trust.