

Topic Covered: **What is Marriage For? No Wonder Americans Weigh It Lightly.  
Wills, Trusts and Inheritance and Same-Sex Couples.**

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## **What is Marriage For? No Wonder Americans Weigh It Lightly. Wills, Trusts and Inheritance and Same-Sex Couples.**

### **QUESTION:**

Is state law failing when one must fight to preserve certain rights attributed to married people, when marriage is not offered to same-sex couples and one dies without a will?

### **STATUTE:**

California Probate Code §6401-6455. “the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent ... As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent ... As to separate property, the intestate share of the surviving spouse or surviving domestic partner ... [and] as follows: (1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister. (2) One-half of the intestate state in the following cases: (A) Where the decedent leaves only one child or the issue of one deceased child. (B) Where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them. (3) One-third of the intestate estate in the following cases: (A) Where the decedent leaves more than one child. (B) Where the decedent leaves one child and the issue of one or more deceased children. (C) Where the decedent leaves issue of two or more deceased children...”

### **I. PRELIMINARY ANALYSIS:**

Our Constitution of the United States of America requires our States to honor another State's public laws authorized by the following provision: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. Congress may by general laws, prescribe the manner in which such acts, Records and Proceedings shall be proved, and the Effect thereof.” (The Constitution of the United States, Article 4, § I). Our country is built upon liberty and justice. The gay and lesbian community does not accept conditions for more controversy, and the fight for basic rights must persevere. The California Constitution, § 1 and 7, Article 1, promises not to take away inalienable rights, thus supporting the role of this report.

Author Rose-Marie Chaperon, blogs “At its heart, bias behaviors, stereotyping and discrimination towards anyone or any group all stem from a lack of understanding or an unwillingness to address how the words and actions of one person can be offensive for another.” Chaperon, <http://searchwarp.com/swa457780-The-Fear-Of-The-Unknown.htm>, (March 31, 2009). And President Franklin D. Roosevelt acknowledges the issue during Inaugural Address March 4, 1933, and communicates to the American Public “the only thing we have to fear is fear itself.” Later, also quoted by President John F. Kennedy.

Americans have experienced a legacy of fighting to preserve life, liberty and equality. Discrimination coupled with racism fuels the world's fear-based values and conscious image of what should be. Given American's have the Freedom to Speak what they wish, creating a bubble of what the general public will believe to be the truth, we must offer another view. While addressing these issues at the grass roots level often contributes to an immediate community awareness<sup>1</sup>, it is also important to address these issues with legislation making resolution to conflict a regulated, mandated and therefore, supported by our Government.

Racism, by its simplest definition "is the belief that race is the primary determinant of human traits and capacities and that racial difference produce an inherent superiority of a particular race." Reverend Raymond J. Boland, *Racism in Our Society*, Diocese Kansas City March (2001)<sup>2</sup>. People with racist beliefs exhibit stereotype-based prejudices towards individuals and groups of people according to their race. When racism comes to mind, one must think of cultural discrimination, xenophobia, last but not least age, gender and sexual orientation discrimination. We have historically witnessed civil rights violations rooted by hate and discrimination. Organizations like the Ku Klux Klan dehumanize classes in order to advance their genocidal intent. Old Germany used differences in others as a crutch supporting hate and killing millions of jews and other social groups that did not fit Hitler's perception of the perfect race. Diversity enriches our lives and should be celebrated, not condemned. When we attack a person's difference as a political and religious stand; the disparate impact is undeniable and then justifiable to Americans.

### Marriage

Unfortunately same-sex couples face discrimination and moral scrutiny as they ask for the identical rights given to a wedded man and woman. Our state laws fail when we must fight with differing state laws on same-sex marriage in order to secure our estates and ourselves. A marriage recognized in every state traditionally has preserved certain rights on the spouse (right to inheritance, tax benefits, property rights, medical decision rights etc.)<sup>3</sup> This is where a couple of the same gender run into issues. Marriage

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<sup>1</sup> The Tribal Institute works for the Native American Indian offering education, research and justice in American Native Communities. <http://www.tribal-institute.org/>; Civil Rights Activists Ella Baker, Clara Barton, Pop Musicians Amy Ray and Emily Saliers of the Indigo Girls, Alice Stone Blackwell, Lisa Bloom and her mother Gloria Allred and many others fiercely stand for the protection and movement of women's rights; the National Association for the Advancement of Colored People (NAACP) is dedicated to support African Americans civil liberties and education; the Human Rights Campaign Fund raises awareness within Gay communities.

<sup>2</sup> [http://www.diocese-kcsj.org/\\_docs/Racism\\_In\\_Our\\_Society.pdf](http://www.diocese-kcsj.org/_docs/Racism_In_Our_Society.pdf)

<sup>3</sup> "On the order of 1,400 legal rights are conferred upon married couples in the U.S. Typically these are composed of about 400 state benefits and over 1,000 federal benefits. Among them are the rights to:

1. joint parenting;
2. joint adoption;
3. joint foster care, custody, and visitation (including non-biological parents);
4. status as next-of-kin for hospital visits and medical decisions where one partner is too ill to be competent;
5. joint insurance policies for home, auto and health;

should be treated as the universal right we as human beings and United States residents and citizens fundamentally comprise. (See *Moran v. Moran*, 188 Ariz. 139, 933 P.2d 1207, 1996 Ariz. App. LEXIS 167, 222 Ariz. Adv. Rep. 5, 116 No. 33 Ariz. Bus. Gaz. 31 (Ariz. Ct. App. 1996; [www.originalintent.org](http://www.originalintent.org)). The OriginalIntent.org advocacy group fights for bringing Republicans back to grass roots—Republican roots. So far, most republican organizations fight heavily against same-sex marriage and believe these kinds of marriages are voidable and invalid; even though they concede marriage is a basic right protected without interference. *Moran* explains the 1877 *Meister v. Moore* Supreme Court Case where the court decided when there is no statute voiding certain kinds of marriages, statutes requiring a marriage licenses in order for a marriage to be valid, should just stay a prescribed process and not a required method. (see *Moran*, at 144; *Meister v. Moore*, 96 U.S. 76, 1877).

The meaning of marriage has long been supported by national religious affiliations often quoting the passage in Matthew 19:4-6, quoting Genesis, “marriage is to be one man for one woman for life”. California Family Code §300 (a) states “[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.” Since then, California has enacted registered Domestic Partner laws (Stats. 2003, ch. 421, § 15), however, the benefits gained are still unmatched by a legal marriage and the definition including language is that between a woman and man has not changed. (See *In re Marriage Cases*, 43 Cal. 4th 757, 793 (Cal. 2008)).

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6. dissolution and divorce protections such as community property and child support;
  7. immigration and residency for partners from other countries;
  8. inheritance automatically in the absence of a will;
  9. joint leases with automatic renewal rights in the event one partner dies or leaves the house or apartment;
  10. inheritance of jointly-owned real and personal property through the right of survivorship (which avoids the time and expense and taxes in probate);
  11. benefits such as annuities, pension plans, Social Security, and Medicare;
  12. spousal exemptions to property tax increases upon the death of one partner who is a co-owner of the home;
  13. veterans' discounts on medical care, education, and home loans; joint filing of tax returns;
  14. joint filing of customs claims when traveling;
  15. wrongful death benefits for a surviving partner and children;
  16. bereavement or sick leave to care for a partner or child;
  17. decision-making power with respect to whether a deceased partner will be cremated or not and where to bury him or her;
  18. crime victims' recovery benefits;
  19. loss of consortium tort benefits;
  20. domestic violence protection orders;
  21. judicial protections and evidentiary immunity;
  22. and more...”

(Hyde, Henry J., House Committee on the Judiciary, General Accounting Office report identifying rights and privileges based on marriage, 1996; Lamda Legal Defense and Education Fund, <http://www.gao.gov/archive/1997/og97016.pdf>)

Marriage, in the eyes of the law is an establishment that provides special privileges and benefits; (i.e.) like a wedded couple's monetary affairs is often seen bounded together. Since 2004, being married, which is useful when it comes to granting taxation and inheritance for same sex couples, provided they have applied to obtain their domestic partnership recognized by the registration authority. Today, same-sex couples cannot rely on their own state's marriage and civil union laws to preserve their lives and legacies, but must also make certain to register in whatever state they may be in, if they want to cover their six. Without registering in every state, same-sex marriages are not recognized. In some cases, like divorce and re-marriage, couples should be fully knowledgeable of laws on Inheritance Tax as Estate and Gift Tax exempted in a spouse to spouse transaction. In this report, I will refer to the meaning of spouse as "one's husband or a wife by lawful marriage; a married person." (Black's Law Dictionary 1438, Deluxe 8th Ed. Thompson-West (2004)). Another important definition to highlight is a putative spouse; which is one "who has a good faith belief of the validity of [a lawful California marriage]"<sup>4</sup>.

In order for the husband or wife privilege, a legal marriage license must be provided, not a domestic partnership registration, according to California Statutory law. *Velez v. Smith* offers facts where two women sustaining a long-term relationship, registered as domestic partners with the city and county of San Francisco. After several years together, Velez fell sick with Muscular Sclerosis. After two years of her illness, Smith (Velez's domestic partner), filed a notice to terminate the domestic partnership. Since Velez and Smith shared joint accounts, health care benefits where Velez was under Smith's, and pension benefits Velez would befall the party harmed in this deal. Velez countered Smith's complaint with a motion to strike on the basis Velez detrimentally relied on Smith's partnership. The courts granted the motion on the basis Smith had no legal right to terminate a partnership that did not exist since Smith and Velez never registered with the State of California, a requirement under the Domestic Partner Rights and Responsibilities Act of 2003. Local rules and registration does not imply registration with the State, therefore their registration in the city and county of San Francisco did not satisfy State requirements. Because the court determined they were not in compliance, the court did not entertain other spousal complaints (Velez also requested standing as a putative spouse in order to preserve the current benefits she was receiving).

The gap here is Velez receives healthcare and other benefits because she is registered with Smith in their local county, but neither can exercise or enforce any power to maintain or to delete. This case supports the position, unless same-sex couples know and register with the requisite authority, even if they are registered with their local government, their registration is moot.

A 2005 California Supreme Court decision highlights "Section 15 of the California Domestic Partner Rights and Responsibilities Act of 2003 (CDPRRA) requires that the act be construed liberally in order to secure to eligible couples who register as

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<sup>4</sup> Cal. Fam. Code §2251; *Velez v. Smith*, 142 Cal. App. 4th 1154, \*, 48 Cal. Rptr. 3d 642, \*\*, 2006 Cal. App. LEXIS 1375, \*\*\*, 2006 Cal. Daily Op. Service 8631.

domestic partners the complete range of legal rights, protections and benefits, as easily as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses. Stats. 2003, ch. 421, § 15.” *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, \*; 115 P.3d 1212, \*\*; 31 Cal. Rptr. 3d 565, \*\*\*; 2005 Cal. LEXIS 8359. I am not clear in *Velez*, this concept applied. Had the law been applied liberally, courts could have found compliance in registration and could have at least been discussed.

Koebke fought against the Bernardo Heights Country Club for the identical rights the Country Club offered its heterosexual members – allowing member's spouses to golf and unrestricted access to the club. Koebke and her spouse (a woman) were denied this benefit even though they were registered with the State of California in compliance with the CDPRRA. Discrimination based on marital status, the principal complaint here, created a conflict since domestic partnership is not an expressed term listed in the Civil Rights Act and thus suspect. The action is implied, however, since the CDPRRA was created with intent domestic partners would retain all the benefits married persons have. Judge Moreno ruled to permit the introduction of a discriminatory action because facts were found that the Country Club inconsistently applied the spousal privilege and allowed partners of unmarried to golf there regularly, but denied this right to Koebke analogous to the African American “cut-in-line case” (*Koebke* quoting from *Everett v. Superior Court*, 104 Cal.App.4th 388 (2002)). Judge Werdegar concurred in part (agreeing with domestic partnership is not an observed class for discrimination under the Civil Rights Act), and dissented in part (that the Country Club discriminated under the earlier Act and the new revised one, which warranted a sexual orientation discrimination claim rather than a marital discrimination claim).

Without expressed terms and unambiguous meaning, our courts will freely interpret whatever just cause they can think up. While California statutes seemingly embraces the same-sex couple, you can see, even California laws do not bear the highest requirement same-sex couples desire, and that is to have the aforementioned rights and duties applied to married persons.

It is no wonder we have such high divorce rates, as how can Americans take Marriage seriously? Many can think of reasons why we find divorce, just as it is natural to realize the flaws in others. When Marriage is only offered under certain circumstances and upheld on the status of the institution and tradition, rather than love; why would even the most reasonable person see the significance and value Marriage brings? Because what we see in America today are Marriages of convenience, Marriages of money, Leave-It-To-Beaver-unrealistic and truly inauthentic behind the scenes. We are missing a spectrum of relationships built on love and examples of what Marriage is really about when we tighten constraints about who should be married and who should not. When the net is cast widely, we tend to catch more colorful fish and a wide variety that gives us a clearer picture of the world. We must allow people to marry who they wish, without constraint, and that should be the public view.

## Wills and Intestate Succession applied to Unmarried Persons

Wills have long served a resolution to specify a distribution of assets a deceased person intends, ((i.e.) when I die, my car goes to Iliana and her children, etc.). Most states have statutes defining and codifying Intestate Succession; determining distribution of a deceased person's assets should they die without a will or trust. It is in this scenario, same-sex couples also have serious concerns.

Wills (see Appendix B for sample) have long served a resolution to specify a distribution of assets a deceased person intends, ((i.e.) when I die, my car goes to Iliana and her children, etc.).

In a recent California case, a party, denied his spousal property because his marriage was considered null and void, filed a claim reviewed in the Appellate Court. (*Estate of DePasse*, 97 Cal. App. 4th 92; 118 Cal. Rptr. 2d 143; 2002 Cal. App. LEXIS 3287; 2002 Cal. Daily Op. Service 2762; 2002 Daily Journal DAR 3343). The facts here are a common and frequent scenario in comparable situations with same-sex couples. Ms. DePasse was very sick and hospitalized when she and Jack Harris married. Depasse and Harris lived together and when DePasse became terminally ill and hospitalized, through a holographic will<sup>5</sup> make her brother Executor of her Estate and donated her assets (about 4.5 million dollars, plus other expensive art and furniture pieces) to diverse organizations. DePasse did not mention Harris in her holographic will (handwritten by the testator, and unwitnessed will). The day before she died, the hospital chaplain performed the Harris-DePasse marriage ceremony, which they wanted since they had planned to marry anyway. The two never had a license issued since DePasse's illness was imminent; however facts seem sure of the couple's intent. After DePasse's death, Harris claimed one-half interest in DePasse's estate through a property petition, as a surviving spouse. DePasse's brother challenged the petition claiming their marriage was not valid because the two did not have a marriage license. The court ruled a properly registered license "was a prerequisite for a valid marriage in California and that Harris was not entitled to inherit as a putative spouse. Harris was not a putative spouse because he did not have an objectively reasonable, good faith belief that he was lawfully married." Judges Mihara, and O'Farrell agreed and affirmed the lower court's ruling.

Harris claimed to possess several items given to him as a gift. These categorized items listed as DePasse's items and were taken away. Again, another sad but normal occurrence among same-sex couples. A Judge and Court may yet gain some resolve, excuse, whatever you like to call it, to refute someone's marriage, unless the language of the law is changed. Moreover, without same-sex right to Marriage, a same-sex couple does not have the same expressed rights due to a Putative Spouse or Common Law Spouse.

The sole purpose we have litigation within the area of Wills and Intestacy is to respect a person's asset allocation and intent for those she left behind. In a grass roots

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<sup>5</sup> A holographic will is "a will that is handwritten by the testator." Blacks Law Dictionary, Deluxe 8th Edition Thompson-West (2004).



case, the court decided in *Estate of Russell v. Russell*, 43 Cal. App. 2d 319; 110 P.2d 718; 1941 Cal. App. LEXIS 659 (1941), “the surviving wife shall be entitled to her share of her deceased husband's estate as fully and completely as though he had died intestate.” I believe facts were persuasive of DePasse's intent, otherwise why get married at the final moment before death? I believe we should be looking to the Four Corners Doctrine supported by articulable facts, much like what happens in the Criminal Law case, in order to establish reasonable intentions. Laws today does not complete the gap of the deceased desired intent and therefore leaves those who have not registered a will, updated their will or provided some other form of verifiable intentions open to strangers interpretations. As applied to all persons, having an updated-detailed will is always the best option, in order to eliminate doubt.

### No Express Terms in the Statute Lead to a Court's Interpretation of Whatever They Want it to Be.

Only a few states have excluded the term marriage is ‘between man and woman’, allowing for all persons to marry, regardless if they are heterosexual or homosexual.<sup>6</sup> A statute codified for some intent our legislation needed to put in force may have ambiguous terms. “A court begins by examining the language of the initiative statute, giving the words their usual and ordinary meaning, viewed in the context of the statute as a whole and the overall statutory scheme. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs.” *Knight v. Superior Court*, 128 Cal. App. 4th 14; 26 Cal. Rptr. 3d 687; 2005 Cal. App. LEXIS 521; 2005 Cal. Daily Op. Service 2894; 2005 Daily Journal DAR 3889.

In this case, California citizens refuted the existence of the Domestic Partnership Act and request it be voided and the words relating to ‘one man and one woman’ be removed as the definition of marriage in Cal. Fam. Code 308.5. Without this expressed term the courts are left to interpret and add to the meaning excluding same-sex partnerships; even with the Domestic Partnership Act. Plaintiffs in *Knight* say when there is no expressed term allowing for same-sex persons included in the definition of marriage, there is ambiguity and left to interpretation which disparately impacts the gay and lesbian community. They rely on the Code of Civil Procedure §1858 “prohibited a court from interpreting an unambiguous statute in such a way as to cause it to conform to a presumed intent that was not expressed.” *Id.* The court here acknowledged that the Domestic Partnership Act was not an amendment to the Cal. Fam. Code and provides Domestic Partners the same benefits as married persons. Since there is no adverse effect of this act, the court denied the claim.

California is the most liberal state and still has yet to re-write the definition of marriage.

### **III. RIGHTS BEFORE DEATH.**

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<sup>6</sup> Today Massachusetts, Iowa, Connecticut and Vermont recognize same-sex unions (see *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, WL 874044 (Iowa 2009))



When a person cannot make medical decisions, an issue arises as to who has a valid authorization to make life-ending decisions without a power of attorney or Living Will. A Living Will (see Appendix A for sample) is “an instrument, signed with the formalities statutorily required for a will, by which a person directs that his or her life not be artificially prolonged by extraordinary measures when there is no reasonable expectation for recovery from extreme physical or mental disability.” Black’s Law Dictionary 653, Deluxe 8th Ed. Thompson-West (2004). This is also called a Durable Power of Attorney, or Medical Directive (see Appendix C for sample.) Deciding if one shall be allowed to die should be very personal, made by someone who is very close and dear, and someone who will reach that determination with the greatest interest in that person or to what that individual would want for themselves. More oft than not, in a same-sex couple, if one becomes ill, family only, is allowed to make medical decisions in general, unless a Medical Directive is in place. Thus, excluding the partner altogether. Even a spouse succumbs to a conflict against the family in the event there is no Medical Directive to get someone off life-support. (See Terry *Schiavo* Supreme Court case decision (04A825 *Schiavo*) *Ex Rel. Schindler v. Schiavo*, 544 U.S. \_\_\_ (2005).<sup>7</sup>

The very-visible *Schiavo* case, in the year 2004, health care professionals, spouses and families argued over this issue that they may require a document directing those in the health care profession should a time come where they could not advocate for themselves. Terry *Schiavo* collapsed with a heart attach at a remarkably young age. Due to the lack of oxygen to her brain, Terry lost brain activity and had to undergo feeding tubes. Terry's husband was placed as guardian. Terry's husband and parents were in an endless battle of whether Terry should remain on feeding tube or not. Terry's parents believed her husband was abusive and consequently should not stay in control of making those decisions. Since Terry had no Medical Directive, her husband could legally decide to withdraw the feeding tube, allowing Terry to die. The conflict between parents and husband went all the way to the Supreme Court, expending even more resources.<sup>8</sup> The Florida Supreme Court overturned the lower court’s decision to allow legislators to intervene in such a scenario, whereby Terry’s feeding tube was re-inserted, keeping her alive.

A Living Will is a good idea in order to list directions for what to do when you cannot speak for yourself or end up in a situation like Terry *Schiavo*. At a minimum you will have some say-so should you not be able to talk or communicate. In the event this issue arises when you are in your young twenties, it maybe difficult to actually realize this Directive is available, but a prolonged life may indicate a whole lot more than if maybe you are Eighty years old. These kinds of decisions, whether you want certain directives to occur if you are 20, versus 50 versus 80 years old; different care maybe desired, i.e the sum of funds spent by your family. Or, you may need to modify your directive every decade depending on your life changes. Significant issues like this should

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<sup>7</sup> [www.findlaw.com/legalnews/lit/schiavo](http://www.findlaw.com/legalnews/lit/schiavo)

<sup>8</sup> A judge ordered *Schiavo*’s attorney’s fees to Attorneys were to “George Felos, paid fees totaling \$358,434. A second attorney, Deborah Bushnell was paid \$80,309” allegedly paid by Medicare and Indigent Funds. (Hicks, Perry, *Death by Government*, GulfCoastNews.com, March 26, 2005).

be looked at and resolved in reference to the Medical Directive, thus having secured your intentions for yourself. (See Sample Living Will at then end of this report – Appendix A).

Domestic Partners and same-sex partners will not have access to essential healthcare information without a properly executed medical directive or durable power of attorney. The last thing a person wants to face when their partner is sick or incapacitated, is that they cannot get their health status or communicate their true intentions on their life. Another problem resolved should Marriage laws are expressly changed to include all persons.

#### IV. RIGHTS AFTER DEATH.

##### Inheritance.

An inheritance is the “property received from an ancestor under the laws of intestacy.” Black’s Law Dictionary 799, Deluxe 8th Edition Thompson-West (2004). Inheritances occur usually via a trust or will. Absent a will or trust, intestacy statutes in your state determines the deceased asset distribution. Cal. Prob. Code § 6214. In contrast, a gift<sup>9</sup> given inter vivos can cost you a lot of money if you give more than the annual exemption (as of 2008, \$1,000,000) and file a Gift Tax Return with the IRS. (See IRS Form Attached – Appendix D.)

Sometimes a couple has been together for a long while. Many believe if a couple has domiciled together for a specific amount of time, they can enjoy all the benefits of a lawful marriage, including in respect to inheritance tax; as Common-Law marriage provides. This does not pertain to same-sex couples. If one lives with a long term partner they have no right to the decedent's estate unless you specify in your will that they receive some, part or all of the decedent's estate.

The Federal Estate Tax is “a tax on your right to transfer property at your death. It consists of an accounting of everything you own or have certain interests in at the date of death.” United States Department of Treasury, Internal Revenue Service, [www.irs.gov](http://www.irs.gov).

When you die, you may gift your estate to your heirs and earn a tax, but transfers to spouses are exempt. Under present law, the federal estate tax will be repealed as of January 1, 2010. Today's law outlines exclusion amounts per Estate up to year 2010. Today’s law outlines exclusion amounts per Estate up to year 2010.<sup>10</sup> President Obama's plan is to abolish the Estate Tax measures extending it beyond year 2010.<sup>11</sup>

<sup>8</sup> “The voluntary transfer of property to another without compensation.” Black’s Law Dictionary 709, Deluxe 8<sup>th</sup> Thompson-West (2004).

<sup>10</sup> IRS Chart:

The exclusion amounts are as follows:

“Year of Death	Exemption
2002	\$1,000,000
2003	\$1,000,000

Married persons and Civil Partners are free from Inheritance Tax. A person's Estate passes with no tax to their wife, spouse upon their death in the state of California. (See *Estate of Carl Heim v. Commission of Internal Revenue*, 914 F.2d 1322 (1990) “The marital deduction permits transfer of property within the marital unit, and thus avoidance of taxation of that property in the estate of the decedent, only if the property passes outright to the surviving or donee spouse.”) Also, any gifts they make to their marriage or domestic partner will be free from tax. *Id.* But in the event that partner dies, the gifts passing to your partner can incur more tax than it would if passing on the matching gifts your children. “In community property states, each spouse is deemed to own one-half of the community property. Therefore, one-half of the community property generally is taxed in the estate of the first to die ...; the remaining one-half is taxed when transferred ... by the surviving spouse.” *Id.* Thus, property is then double-taxed.<sup>12</sup>

*Estate of Bond v. Commissioner*<sup>13</sup> quotes 26 U.S.C.S 2056 “As set forth in the statute, a terminable interest exists if three conditions are met. First, the interest must be one that will lapse or terminate upon the occurrence or nonoccurrence of an event, or upon the lapse of time; second, upon the failure of the interest of the surviving spouse.” Therefore, in a same-sex relationship, if they are not determined as spouses and not within a 'marital unit' as *Heim* suggests, the surviving partner will be tax blasted.

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2004	\$1,500,000
2005	\$1,500,000
2006	\$2,000,000
2007	\$2,000,000
2008	\$2,000,000
2009	\$3,500,000
2010	Repealed
2011	\$1,000,000

The maximum rates for the federal estate tax are as follows:

Year of Death	Maximum Tax Rate
2001	55 %
2002	50 %
2003	49 %
2004	48 %
2005	47 %
2006	46 %
2007	45 %
2008	45 %
2009	45 %
2010	0%
2011	55%”

(<http://www.irs.gov/formspubs/index.html>)

<sup>11</sup> <http://online.wsj.com/article/SB123172020818472279.html>

<sup>12</sup> See also *Tax Aspects of Divorce and Separation*, Robert S. Taft, Law Journal Press (1983).

<sup>13</sup> 104 T.C. 652

We deliver another reason here same-sex couples must go above and beyond what a married person must do in order to avoid a pitfall. Same-sex couples must know every state's policy to be sure they are registered appropriately, whereas a married couple simply enjoys the benefit that because they are married in Texas, no matter where they may move to, their marriage benefits travel with them and are honored by every state.

### Non- Common-Law States.

Texas, California and other states have a common-law marriage system. Other non-community property states, it's usually simple to determine which spouse owns what. Non-community states division laws determine if only your name is in the deed, registration certificate or alternative title paper, it's yours. You can leave your possessions to whoever you want, provided your spouse has a right to claim a certain share after your death.

The non-common law states say there is no requirement that property, acquired during marriage, owned by both spouses. To protect spouses from being disinherited, most of these states provide a surviving spouse the right to claim one-fourth to one-third of the late spouse's estate, no matter what the will provides. Cal. Prob. Code §142. As discussed earlier, whether the surviving spouse can claim property will depend on whether a lawful marriage exists, and sometimes how long the marriage lasted. These requirements can be enforced when the survivor goes to court and claims the percentage allowed by law. The surviving spouse can elect to use the widow's election or what is devised in the will.

*Example:* Husband's leaves \$580,000 in his will, to his fourth wife, Sally, then divides the remainder of his property, equaling \$900,000, to his three sons from a previous marriage. If Sally is happy with her inheritance, then no issues arise. If Sally wants more, she can choose to claim a portion of Husband's estate instead, and get more than \$580,000. If she does, Husband's three sons will take what's left.

If the title contains you and your spouse's names, each of you will own a half interest. You can give away or leave that half-interest depends on how you and your spouse share ownership. "The most important difference between a tenancy by the entirety and a joint tenancy or tenancy in common is that a tenant by the entirety may not sell or give away his interest in the property without the consent of the other tenant. Upon the death of one of the spouses, the deceased spouse's interest in the property devolves to the surviving spouse, and not to other heirs of the deceased spouse. This is called the right of survivorship. Tenants in common do not have a right of survivorship. In a tenancy in common, persons may sell or give away their ownership interest. Joint tenants do have a right of survivorship, but a joint tenant may sell or give away her interest in the property. If a joint tenant sells her interest in a joint tenancy, the tenancy becomes a

tenancy in common, and no tenant has a right of survivorship.” West Encyclopedia of American Law, 2nd Edition, Thomson Gale (2005).<sup>14</sup>

Only at a date of separation will you know for certain your property does not pass to the spouse. If one chooses to marry again, it is probably prudent to create a new will as normally a couple will acquire lots of property between each other which can constitute great value. A will ensures the allocation of your property is the direction you like it to go. The same-sex couple will not benefit in most states today, however. The majority do not recognize same-sex unions as a marriage and therefore the couple is not considered a spouse – who would benefit.

### Community Property States.

Rules are a relatively more involved in a Community Property State. Generally, in community property states, money earned by a spouse during marriage, and all property bought or acquired during marriage, with those earnings, are considered community property and owned 50/50% husband and wife. Debts acquired during marriage are generally debts of the couple. Cal. Prob. Code §13560. At the death of one spouse, the community property goes to the surviving spouse unless there is a will laying out the allocation of property.

The same issue arises here as mentioned before with same-sex couples. Until all States recognize a same-sex union as a marriage, same-sex couples will not be protected and observe the same benefit in a community property state that does not recognize the marriage.

### Intestate Succession according to California Probate Code.

When a person dies without a will or trust, they die intestate and the laws of intestate succession apply to who will inherit the estate. Usually the division is as follows:

1. a. Is the decedent married?

If NO:

To the decedent's children, who take in equal shares if they are in the same generation.

- 
- b. Is the decedent a California registered domestic partner?<sup>15</sup>

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<sup>14</sup> [www.enotes.com/wests-law-encyclopedia](http://www.enotes.com/wests-law-encyclopedia); <http://www.answers.com/topic/tenancy-by-the-entirety-2>

<sup>15</sup> California Probate Code § 37 states

“a) Domestic partner means one of two persons who have filed a Declaration of Domestic Partnership with the Secretary of State pursuant to Division 2.5 (commencing with Section 297) of the Family Code, provided that the domestic partnership has not been terminated pursuant to Section 299 of the Family Code.

(b) Notwithstanding Section 299 of the Family Code, if a domestic partnership is terminated by the death of one of the parties and Notice of Termination was not filed by either party prior to the date of death of the

- If NO: decedent's partners children get nothing.
2. If no children or other issue (grandchildren, great-grandchildren, etc.) living, the estate goes  
     To the decedent's parents.
  3. If no parents living,  
     To the estate is distributed to the issue of the parents (decedent's brothers/sisters).
  5. If there no brothers or sisters,  
     To the decedent's grandparents will inherit the estate.
  6. If no grandparents, then  
     To the issue of the grandparents will inherit the estate (aunts, uncles, cousins).
  7. If there are no cousins  
     To next of kin in equal degree, usually 2nd and 3rd cousins.

In summary of the Intestate succession laws, a same-sex couple hits another brick wall, even if they are registered or legally married in another state. California law specifically mentions being registered in the state of California.(Cal. Prob. §37 (a)), thus is not encompassing in any other state's acknowledgements.

## **V. CONSTRUCTIVE TRUST AS A REMEDY.**

A constructive trust is a “trust by operation of law which arises contrary to intention and against the will, declared against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.” Ballentine's Law Dictionary, 3rd Edition; 54 Am J1st Trusts 218. The harmful effects applying Family Law Code in a contractual manner deems intimate situations of a lesser good. Not only is inheritance impacted, but also adoption, child custody, disability reliances and medical decision-making. Since in most cases, same-sex relationships in dissolution will not have remedies and rights available as married couples have, courts are looking to apply Constructive Trust law to alleviate unjust enrichment factors. A 1976 case involved a married couple who decided to separate, but still live together which raised the issue of how property should be distributed thereafter. *Marvin v. Marvin*, 18 Cal. 3d 660; 557 P.2d 106; 134 Cal. Rptr. 815; 1976 Cal. LEXIS 377. After seven years of living together, the couple accumulated property. Upon separation, plaintiff asked for half the property. Agreements involving living expenses and other services provided they are not sexual should be upheld. The court's decision stated “In the absence of an express contract, the courts should inquire

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decedent, the domestic partner who survives the deceased is a surviving domestic partner, and shall be entitled to the rights of a surviving domestic partner as provided in this code.”

into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.” *Id* at 686.

“Parties seeking to enforce a ‘Marvin’ contract can only do so in a regular civil proceeding because, by definition, the Family Law Act does not apply to unmarried persons.” *In re Marriage of Gagne*.<sup>16</sup> Here it is distinguished a Marvin contract does not apply to a pre-marital agreement to payback a loan. Marvin also does not apply to the period couples lived together before marriage. *In re Marriage of Hebring*.<sup>17</sup>

Supporting the equitable remedy Harvard Law Review member writes “Given the legal refusal to recognize same-sex marriage, there is no mechanism whereby lesbian and gay can subject themselves to equitable judicial determination of their rights at dissolution.” Laura Reinreb, *Reconstructing Family: Constructive Trust at Relational Dissolution*, Harvard Civil Rights-Civil Rights Law Review (1998).<sup>18</sup> Rienreb offers a new and alternate way to close the gaping gap lying between same-sex dissolved relationships and divorce.

While this remedy tries to fill the gap so non-marital relationships are not left unjustly enriched, the solution is still left to the courts to interpret. “The provisions of the Family Law Act ... do not govern the distribution of property acquired during a non-marital relationship. Such a relationship remains subject solely to judicial decision.” Again, leaving wiggle room for a decision to go either way.

## CONCLUSION

Today, the gay and lesbian fight for equality gains momentum and the pendulum is steadily swinging our way. The journey has been a long road of hard work, courage and hope. “It does not come with a bull whip; it is not persuaded with your hand son your hips...”<sup>19</sup> The fight takes individual support, community support and great leaders. State laws without expressed terms as to who can legally marry should be stricken or altered. State laws without expressed terms to include same-sex couples under the definition of marriage is unconstitutional and prohibited by the Constitution’s Full Faith and Credit Provision recognizing each state’s laws.

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<sup>16</sup> 225 Cal. App. 3d 277

<sup>17</sup> 207 Cal. App. 3d 1260

<sup>18</sup> [http://www.law.harvard.edu/students/orgs/crcl/vol37\\_1/weinrib.pdf](http://www.law.harvard.edu/students/orgs/crcl/vol37_1/weinrib.pdf).

<sup>19</sup> Lyrics from Pendulum Swinger, Indigo Girls (2007).



I respect and appreciate attempts made to circumvent these laws with constructive trust remedies and domestic partner acts, however I stand for full Constitutional rights we all deserve. What does discrimination teach our children? Behaviors and how we treat others are all learned. If we teach our children to behave differently or treat certain groups differently, the legacy of hate and discrimination will only grow and develop. I have a ten-year old little girl depending on me to teach her the world. We've overcome society's degrading of the American Indian, slaves and women. The time is now for change and I will not stand for anything but what is right; even if it is not so popular – there is too much at stake.

## Appendix A.

# Living Will Sample

*This is only a suggested format for a Living Will. (See Legal Forms at forms.FindLaw.com).*

### DECLARATION

I,           name of declarant          , being of sound mind, willfully and voluntarily make this declaration to be followed if I become incompetent. This declaration reflects my firm and settled commitment to refuse life-sustaining treatment under the circumstances indicated below.

I direct my attending physician to withhold or withdraw life-sustaining treatment that serves only to prolong the process of my dying, if I should be in a terminal condition or in a state of permanent unconsciousness.

I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment.

In addition, if I am in the condition described above, I feel especially strongly about the following forms of treatment:

I do do not want cardiac resuscitation.

I do do not want mechanical respiration.

I do do not want tube feeding or any other artificial or invasive form of nutrition (food) or hydration (water).

I do do not want blood or blood products.

I do do not want any form of surgery or invasive diagnostic tests.

I do do not want kidney dialysis.

I do do not want antibiotics.

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I realize that if I do not specifically indicate my preference regarding any of the forms of treatment listed previously, I may receive that form of treatment.

Other instructions:

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I do do not want to designate another person as my surrogate to make medical treatment decisions for me if I should be incompetent and in a terminal condition or in a state of permanent unconsciousness.

Name and address of surrogate (if applicable):

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Name and address of substitute surrogate (if surrogate designated above is unable to serve): \_\_\_\_

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I made this declaration on the \_\_\_\_\_ day of \_\_\_\_\_ (month, year).

Declarant's signature:

---

Declarant's address:

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The declarant or the person on behalf of and at the direction of the declarant knowingly and voluntarily signed this writing by signature or mark in my presence.

Witness' signature:

---

Witness' address:

---

Witness' signature:

---

Witness' address:

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## Appendix B.

# Will Sample

*This is only a suggested format for a Basic Will. (See Legal Forms at forms.FindLaw.com).*

**I, Tess Tatrix, residing at 1 Wilthereza Way, any town, any state, declare this to be my Will, and I revoke any and all wills and codicils I previously made.**

The opening sentence should make it clear that this document is intended to be your will, give your name, place of residence and revoke any previous wills and **codicils** (amendments to previous wills). This can help avoid a court battle if someone should produce an earlier will.

### **ARTICLE I: Funeral expenses & payment of debt**

**I direct my executors to pay my enforceable unsecured debts and funeral expenses, the expenses of my last illness, and the expenses of administering my estate.**

By law, debts must be paid before other assets are distributed. This clause gives your executor authority to pay the funeral home, court costs, and hospital expenses. Using the term "enforceable" prevents creditors from reviving debts you are no longer obliged to pay, usually those discharged in bankruptcy. And the term "unsecured" prevents a court from interpreting this clause to mean that your estate must pay off your mortgage or other secured debts that you probably don't want immediately paid off. Note: in some states, the executor is required by law to pay enforceable unsecured debts. In these states, this clause is unnecessary and may create problems.

### **ARTICLE II: Money & Personal Property**

**I give all my tangible personal property and all policies and proceeds of insurance covering such property, to my husband, Tex. If he does not survive me, I give that property to those of my children who survive me, in equal shares, to be divided among them by my executors in their absolute discretion after consultation with my children. My executors may pay out of my estate the expenses of delivering tangible personal property to beneficiaries.**

This gives your personal property to your spouse. If there are particular items that you want to go to other people (such as heirlooms, jewelry, professional equipment, and so on) you should enumerate them and the person you want them to go to in a separate clause (e.g., "I give my Beatles albums to my friend William Shears"), and note that Article II excludes those items. Some people will use separate clauses for **legacies** (disposition of money) and **bequests** (disposition of tangible personal property). Note the important clause that accounts for the possibility that your spouse will die first. The clause on insurance means that if some property you owned was destroyed (perhaps in

the event that caused your death, like a car wreck), your heirs will receive the insurance proceeds, not the mangled car.

### **ARTICLE III: Real Estate**

**I give all my residences, subject to any mortgages or encumbrances thereon, and all policies and proceeds of insurance covering such property, to my husband, Tex. If he does not survive me, I give that property to \_\_\_\_\_.**

Most people want their spouse to keep the family home. In some states, particularly community property states, it's sometimes preferable to leave your residence to your spouse in a marital trust.

### **ARTICLE IV: Residuary Clause**

**I give the rest of my estate (called my residuary estate) to my husband, Tex. If he does not survive me, I give my residuary estate to those of my children who survive me, in equal shares, to be divided among them and the descendants of a deceased child of mine, to take their ancestor's share per stirpes.**

Usually, the residuary clause begins "I give all the rest, residue, and remainder of my estate...." because lawyers are afraid to change tried-and-true formulas, and for decades, legal documents never used one word when a half-dozen would do. However, this plain-English form will also work. This clause covers any property you own or are entitled to that somehow wasn't covered by the preceding clauses.

### **ARTICLE V: Taxes**

**I direct my executors, without apportionment against any beneficiary or other person, to pay all estate, inheritance and succession taxes (including any interest and penalties thereon) payable by reason of my death.**

One common mistake by people who use a living trust as well as a will is to make the beneficiary of the estate different from the people benefiting from the trust. The same problem exists when there are significant specific gifts and the residuary beneficiaries are different from the recipients of the specific gifts. In such cases those paying the taxes are not those who receive the most property, an arrangement that can unfairly saddle some beneficiaries with the whole tax bill, and at worst can even bankrupt the estate. The goal should be to see that the taxes are paid by those who benefit from gifts. Often, a provision apportioning taxes to taxable transfers is used to make sure that each recipient of a taxable gift pays his or her fair share. Additional language is sometimes used to apportion credits.

### **ARTICLE VI: Minors**

**If under this will any property shall be payable outright to a person who is a minor, my executors may, without court approval, pay all or part of such property to a parent or guardian of that minor, to a custodian under the Uniform Transfers to**

**Minors act, or may defer payment of such property until the minor reaches the age of majority, as defined by his or her state of residence. No bond shall be required for such payments.**

This clause gives your executors discretion to make sure any gift to a minor will be given in a way that's appropriate to his or her age. The "no-bond" language is intended to save the estate money.

#### **ARTICLE VII: Fiduciaries**

**I appoint my spouse, Tex, as Executor of this will. If he is unable or unwilling to act, or resigns, I appoint my daughter, Ellie Mae, and my son, Jethro, as successor co-executors. If either co-executor also predeceases me or is unable or unwilling to act, the survivor shall serve as executor. My executor shall have all the powers allowable to executors under the laws of this state. I direct that no bond or security of any kind shall be required of any executor.**

If you set up a trust in the will, you could name the trustees in this clause as well. The "bond or security" clause is designed to save the estate money.

#### **ARTICLE VIII: Simultaneous Death Clause**

**If my spouse and I shall die under such circumstances that the order of our deaths cannot be readily ascertained, my spouse shall be deemed to have predeceased me. No person, other than my spouse, shall be deemed to have survived me if such person dies within 30 days after my death. This article modifies all provisions of this will accordingly.**

This clause helps avoid the sometimes time-consuming problems that occur if you and your spouse die together in an accident. Your spouse's will should contain an identical clause; even though it seems contradictory to have two wills each directing that the other spouse died first, since each will is probated by itself, this allows the estate plan set up in each will to go forward as you planned. The second sentence exists to prevent the awkward legal complications that can ensue if someone dies between the time you die and the time the estate is divided up. Instead of passing through two probate processes, your gift to a beneficiary who dies shortly after you do would go to whomever you would have wanted it to go had the intended beneficiary died before you did. Most such gifts go into the residuary estate.

#### **ARTICLE IX: Guardian**

**If my husband does not survive me and I leave minor children surviving me, I appoint as guardian of the person and property of my minor children my uncle Ernest Entwistle. He shall have custody of my minor children, and shall serve without bond. If he does not qualify or for any reason ceases to serve as guardian, I appoint as successor guardian my cousin Kevin Moon.**

**I have signed this will this \_\_\_\_ day of \_\_\_\_, 20\_\_ .**



## Appendix C.

# Medical Directive Sample

*\*\*this is only a sample format. Your medical directive should be detailed with your specific personal wishes.*

### Directive to Physicians

Directive made this \_\_\_th day of \_\_\_\_\_ in the year \_\_\_\_\_.

I, \_\_\_\_\_, being of sound mind, willfully and voluntarily make known my desire that my life shall not be artificially prolonged under the circumstances set forth in this directive.

1. If at any time I should have an incurable or irreversible condition caused by injury, disease, or illness certified to be a terminal condition by two physicians, and if the application of life-sustaining procedures would serve only to artificially postpone the moment of my death, and if my attending physician determines that my death is imminent or will result within a relatively short time without the application of life-sustaining procedures. I direct that those procedures be withheld or withdrawn, and that I be permitted to die naturally.
2. In the absence of my ability to give directions regarding the use of those life-sustaining procedures, it is my intention that this directive be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from that refusal.
3. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive has no effect during my pregnancy.
4. This directive is in effect until it is revoked.
5. I understand the full import of this directive and I am emotionally and mentally competent to make this directive.
6. I understand that I may revoke this directive as any time.
7. I request that only comfort care be provided to me, no antibiotics, no artificial nutrition, no mechanical ventilation, and no hydration. It is my strong preference to be allowed to die outside of a care facility if possible, even if that preference is determined by my physician to shorten my period of dying. The only condition under which I desire these preferences for end of life care to be altered is in the case of possible organ and tissue donation. I request that any and all organs and tissue that may be salvaged be provided for transplant. My remains may then be cremated.

Signed \_\_\_\_\_ in the City of \_\_\_\_\_ etc.

I am not a person designated by the declarant to make a treatment decision. I am not related to the declarant by blood or marriage. I would not be entitled to any portion of the declarant's estate on the declarant's death. I am not the attending physician of the declarant or an employee of the attending physician. I have no claim in against any portion of the declarant's estate on the declarant's death. Furthermore, if I am an employee of the health care facility in which the declarant is a patient, I am not involved in providing direct patient care to the declarant and am not an officer, director, partner, or business office employee of the heath care facility or of any parent organization of the health care facility.

Witness \_\_\_\_\_

Witness \_\_\_\_\_

# Appendix D. IRS Gift Tax Return.

Form <b>709</b>		<b>United States Gift (and Generation-Skipping Transfer) Tax Return</b>		OMB No. 1545-0020	
Department of the Treasury Internal Revenue Service		(For gifts made during calendar year 2008)		<b>2008</b>	
▶ See separate instructions.					
1 Donor's first name and middle initial		2 Donor's last name		3 Donor's social security number	
4 Address (number, street, and apartment number)			5 Legal residence (domicile)		
6 City, state, and ZIP code			7 Citizenship (see instructions)		
Part 1 - General Information	8 If the donor died during the year, check here <input type="checkbox"/> and enter date of death .....			Yes	No
	9 If you extended the time to file this Form 709, check here <input type="checkbox"/>				
	10 Enter the total number of donees listed on Schedule A. Count each person only once. ▶				
	11a Have you (the donor) previously filed a Form 709 (or 709-A) for any other year? If "No," skip line 11b . . . . .				
	b If the answer to line 11a is "Yes," has your address changed since you last filed Form 709 (or 709-A)? . . . . .				
	12 Gifts by husband or wife to third parties. Do you consent to have the gifts (including generation-skipping transfers) made by you and by your spouse to third parties during the calendar year considered as made one-half by each of you? (See instructions.) (If the answer is "Yes," the following information must be furnished and your spouse must sign the consent shown below. If the answer is "No," skip lines 13-18 and go to Schedule A.)				
	13 Name of consenting spouse		14 SSN		
	15 Were you married to one another during the entire calendar year? (see instructions) . . . . .				
	16 If 15 is "No," check whether <input type="checkbox"/> married <input type="checkbox"/> divorced or <input type="checkbox"/> widowed/deceased, and give date (see instructions) ▶				
	17 Will a gift tax return for this year be filed by your spouse? (If "Yes," mail both returns in the same envelope.)				
18 Consent of Spouse. I consent to have the gifts (and generation-skipping transfers) made by me and by my spouse to third parties during the calendar year considered as made one-half by each of us. We are both aware of the joint and several liability for tax created by the execution of this consent.					
Consenting spouse's signature ▶			Date ▶		
Part 2 - Tax Computation	1 Enter the amount from Schedule A, Part 4, line 11 . . . . .			1	
	2 Enter the amount from Schedule B, line 3 . . . . .			2	
	3 Total taxable gifts. Add lines 1 and 2 . . . . .			3	
	4 Tax computed on amount on line 3 (see Table for Computing Gift Tax in separate instructions) . . . . .			4	
	5 Tax computed on amount on line 2 (see Table for Computing Gift Tax in separate instructions) . . . . .			5	
	6 Balance. Subtract line 5 from line 4 . . . . .			6	
	7 Maximum unified credit (nonresident aliens, see instructions) . . . . .			7	345,800 00
	8 Enter the unified credit against tax allowable for all prior periods (from Sch. B, line 1, col. C) . . . . .			8	
	9 Balance. Subtract line 8 from line 7 . . . . .			9	
	10 Enter 20% (.20) of the amount allowed as a specific exemption for gifts made after September 8, 1976, and before January 1, 1977 (see instructions) . . . . .			10	
	11 Balance. Subtract line 10 from line 9 . . . . .			11	
	12 Unified credit. Enter the smaller of line 6 or line 11 . . . . .			12	
	13 Credit for foreign gift taxes (see instructions) . . . . .			13	
	14 Total credits. Add lines 12 and 13 . . . . .			14	
	15 Balance. Subtract line 14 from line 6. Do not enter less than zero . . . . .			15	
	16 Generation-skipping transfer taxes (from Schedule C, Part 3, col. H, Total) . . . . .			16	
	17 Total tax. Add lines 15 and 16 . . . . .			17	
	18 Gift and generation-skipping transfer taxes prepaid with extension of time to file . . . . .			18	
	19 If line 18 is less than line 17, enter balance due (see instructions) . . . . .			19	
	20 If line 18 is greater than line 17, enter amount to be refunded . . . . .			20	
Sign Here	Under penalties of perjury, I declare that I have examined this return, including any accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than donor) is based on all information of which preparer has any knowledge.				
	Signature of donor		Date		
Attach check or money order here.	May the IRS discuss this return with the preparer shown below (see instructions)? <input type="checkbox"/> Yes <input type="checkbox"/> No				
	Preparer's signature		Date	Check if self-employed <input type="checkbox"/>	
	Preparer's SSN or PTIN		Preparer's EIN		
Paid Preparer's Use Only	Firm's name (or yours if self-employed), address, and ZIP code		Phone no. ( )		

For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see page 12 of the separate instructions for this form. Cat. No. 16783M Form 709 (2008)

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Page 2

**SCHEDULE A** Computation of Taxable Gifts (Including transfers in trust) (see instructions)

A Does the value of any item listed on Schedule A reflect any valuation discount? If "Yes," attach explanation . . . . . Yes  No

B  Check here if you elect under section 529(c)(2)(B) to treat any transfers made this year to a qualified tuition program as made ratably over a 5-year period beginning this year. See instructions. Attach explanation.

**Part 1—Gifts Subject Only to Gift Tax.** Gifts less political organization, medical, and educational exclusions. (see instructions)

A Item number	B • Donee's name and address • Relationship to donor (if any) • Description of gift • If the gift was of securities, give CUSIP no. • If closely held entity, give EIN	C	D Donor's adjusted basis of gift	E Date of gift	F Value at date of gift	G For split gifts, enter ½ of column F	H Net transfer (subtract col. G from col. F)
1							
<i>Gifts made by spouse—complete only if you are splitting gifts with your spouse and he/she also made gifts.</i>							

**Total of Part 1.** Add amounts from Part 1, column H . . . . . ▶

**Part 2—Direct Skips.** Gifts that are direct skips and are subject to both gift tax and generation-skipping transfer tax. You must list the gifts in chronological order.

A Item number	B • Donee's name and address • Relationship to donor (if any) • Description of gift • If the gift was of securities, give CUSIP no. • If closely held entity, give EIN	C 2632(b) election out	D Donor's adjusted basis of gift	E Date of gift	F Value at date of gift	G For split gifts, enter ½ of column F	H Net transfer (subtract col. G from col. F)
1							
<i>Gifts made by spouse—complete only if you are splitting gifts with your spouse and he/she also made gifts.</i>							

**Total of Part 2.** Add amounts from Part 2, column H . . . . . ▶

**Part 3—Indirect Skips.** Gifts to trusts that are currently subject to gift tax and may later be subject to generation-skipping transfer tax. You must list these gifts in chronological order.

A Item number	B • Donee's name and address • Relationship to donor (if any) • Description of gift • If the gift was of securities, give CUSIP no. • If closely held entity, give EIN	C 2632(c) election	D Donor's adjusted basis of gift	E Date of gift	F Value at date of gift	G For split gifts, enter ½ of column F	H Net transfer (subtract col. G from col. F)
1							
<i>Gifts made by spouse—complete only if you are splitting gifts with your spouse and he/she also made gifts.</i>							

**Total of Part 3.** Add amounts from Part 3, column H . . . . . ▶

(If more space is needed, attach additional sheets of same size.)

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**Part 4—Taxable Gift Reconciliation**

1	Total value of gifts of donor. Add totals from column H of Parts 1, 2, and 3 . . . . .	1		
2	Total annual exclusions for gifts listed on line 1 (see instructions) . . . . .	2		
3	Total included amount of gifts. Subtract line 2 from line 1 . . . . .	3		
<b>Deductions</b> (see instructions)				
4	Gifts of interests to spouse for which a marital deduction will be claimed, based on item numbers . . . . . of Schedule A . . . . .	4		
5	Exclusions attributable to gifts on line 4 . . . . .	5		
6	Marital deduction. Subtract line 5 from line 4 . . . . .	6		
7	Charitable deduction, based on item nos. . . . . less exclusions . . . . .	7		
8	Total deductions. Add lines 6 and 7 . . . . .	8		
9	Subtract line 8 from line 3 . . . . .	9		
10	Generation-skipping transfer taxes payable with this Form 709 (from Schedule C, Part 3, col. H, Total)	10		
11	<b>Taxable gifts.</b> Add lines 9 and 10. Enter here and on page 1, Part 2—Tax Computation, line 1 . . . . .	11		

**Terminable Interest (QTIP) Marital Deduction.** (See instructions for Schedule A, Part 4, line 4.)

If a trust (or other property) meets the requirements of qualified terminable interest property under section 2523(f), and:

- a. The trust (or other property) is listed on Schedule A, and
- b. The value of the trust (or other property) is entered in whole or in part as a deduction on Schedule A, Part 4, line 4,

then the donor shall be deemed to have made an election to have such trust (or other property) treated as qualified terminable interest property under section 2523(f).

If less than the entire value of the trust (or other property) that the donor has included in Parts 1 and 3 of Schedule A is entered as a deduction on line 4, the donor shall be considered to have made an election only as to a fraction of the trust (or other property). The numerator of this fraction is equal to the amount of the trust (or other property) deducted on Schedule A, Part 4, line 6. The denominator is equal to the total value of the trust (or other property) listed in Parts 1 and 3 of Schedule A.

If you make the QTIP election, the terminable interest property involved will be included in your spouse's gross estate upon his or her death (section 2044). See instructions for line 4 of Schedule A. If your spouse disposes (by gift or otherwise) of all or part of the qualifying life income interest, he or she will be considered to have made a transfer of the entire property that is subject to the gift tax. See *Transfer of Certain Life Estates Received From Spouse* on page 4 of the instructions.

**12 Election Out of QTIP Treatment of Annuities**

Check here if you elect under section 2523(f)(6) not to treat as qualified terminable interest property any joint and survivor annuities that are reported on Schedule A and would otherwise be treated as qualified terminable interest property under section 2523(f). See instructions. Enter the item numbers from Schedule A for the annuities for which you are making this election ► .....

**SCHEDULE B Gifts From Prior Periods**

If you answered "Yes" on line 11a of page 1, Part 1, see the instructions for completing Schedule B. If you answered "No," skip to the Tax Computation on page 1 (or Schedule C, if applicable).

A	B	C	D	E
Calendar year or calendar quarter (see instructions)	Internal Revenue office where prior return was filed	Amount of unified credit against gift tax for periods after December 31, 1976	Amount of specific exemption for prior periods ending before January 1, 1977	Amount of taxable gifts
1	Totals for prior periods . . . . .	1		
2	Amount, if any, by which total specific exemption, line 1, column D, is more than \$30,000 . . . . .	2		
3	Total amount of taxable gifts for prior periods. Add amount on line 1, column E and amount, if any, on line 2. Enter here and on page 1, Part 2—Tax Computation, line 2 . . . . .	3		

(If more space is needed, attach additional sheets of same size.)

**SCHEDULE C Computation of Generation-Skipping Transfer Tax**

**Note.** Inter vivos direct skips that are completely excluded by the GST exemption must still be fully reported (including value and exemptions claimed) on Schedule C.

**Part 1—Generation-Skipping Transfers**

A Item No. (from Schedule A, Part 2, col. A)	B Value (from Schedule A, Part 2, col. H)	C Nontaxable portion of transfer	D Net Transfer (subtract col. C from col. B)
1			
Gifts made by spouse (for gift splitting only)			

**Part 2—GST Exemption Reconciliation (Section 2631) and Section 2652(a)(3) Election**

Check here  if you are making a section 2652(a)(3) (special QTIP) election (see instructions)

Enter the item numbers from Schedule A of the gifts for which you are making this election ▶ .....

1	Maximum allowable exemption (see instructions) . . . . .	1
2	Total exemption used for periods before filing this return . . . . .	2
3	Exemption available for this return. Subtract line 2 from line 1 . . . . .	3
4	Exemption claimed on this return from Part 3, column C total, below . . . . .	4
5	Automatic allocation of exemption to transfers reported on Schedule A, Part 3 (see instructions) . . . . .	5
6	Exemption allocated to transfers not shown on line 4 or 5, above. <b>You must attach a "Notice of Allocation."</b> (see instructions) . . . . .	6
7	Add lines 4, 5, and 6 . . . . .	7
8	Exemption available for future transfers. Subtract line 7 from line 3 . . . . .	8

**Part 3—Tax Computation**

A Item No. (from Schedule C, Part 1)	B Net transfer (from Schedule C, Part 1, col. D)	C GST Exemption Allocated	D Divide col. C by col. B	E Inclusion Ratio (subtract col. D from 1.000)	F Maximum Estate Tax Rate	G Applicable Rate (multiply col. E by col. F)	H Generation-Skipping Transfer Tax (multiply col. B by col. G)
1					45% (.45)		
					45% (.45)		
					45% (.45)		
					45% (.45)		
					45% (.45)		
Gifts made by spouse (for gift splitting only)							
					45% (.45)		
					45% (.45)		
					45% (.45)		
					45% (.45)		
					45% (.45)		
Total exemption claimed. Enter here and on Part 2, line 4, above. May not exceed Part 2, line 3, above . . . . .			<b>Total generation-skipping transfer tax.</b> Enter here; on page 3, Schedule A, Part 4, line 10; and on page 1, Part 2—Tax Computation, line 16 . . . . .				

(If more space is needed, attach additional sheets of same size.)