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# Northern Trust

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# Will and Trust Forms

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**First National Edition**

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**2014 Update**

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**Northern Trust Corporation**  
Wealth Management  
[www.northerntrust.com](http://www.northerntrust.com)

Arizona	Michigan
California	Minnesota
Colorado	Missouri
Connecticut	Nevada
Delaware	New York
District of Columbia	Ohio
Florida	Texas
Georgia	Washington
Illinois	Wisconsin
Massachusetts	

## NOTICE AND DISCLAIMER

Although the forms in this book are the product of much thought and effort, no form is a substitute for informed legal judgment. The attorney must make an independent determination as to whether a particular form in this book is generally appropriate for a client and, further, how it must be modified for state law and to meet any special circumstances and objectives of the client.

Northern Trust does not guarantee that the forms in this book effectively accomplish their purpose, and it assumes no responsibility for the forms or their use. By using a form from this book, the attorney acknowledges that the attorney (and not Northern Trust) is responsible for any document which the attorney prepares based on the form. **The attorney must customize the generic form for the law of the particular state.**

Northern Trust will not necessarily update this book.

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to use any part or all of the forms herein contained  
in the preparation of wills and trusts for clients.

## **INTRODUCTION**

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## **I. Organization of the Forms**

The forms are divided into four main series:

- 100 series:     Wills
- 200 series:     Revocable Trust Agreements for One Settlor  
                      (for use in common law property states)
- 300 series:     Revocable Trust Agreements for Community Property  
                      (for use in community property states)
- 400 series:     Miscellaneous Forms

The numbering of a particular form is consistent throughout the formbook. For example, the pecuniary amount marital trust is Will form 102, one settlor Revocable Trust form 202, and also community property Revocable Trust form 302.

For ease of use, each form has a right page – left page format. The basic document is on the right page. Alternative and optional material is located on the opposing left page.

Each form is only a starting point for the preparation of a particular legal document. In each case, the attorney must adapt the form to meet the special circumstances and tax situation of the client. In addition, see the following part II.

## II. Need to Customize Generic Forms For the Law of Your Particular State

These forms are designed to be used by attorneys in all 50 states, including both common law property states and community property states. The forms are generic and do not refer to the law of any particular state. The execution provisions seek to comply with the laws of all 50 states. For example, the revocable trust agreement forms include witnesses and an acknowledgment. If certain execution provisions are not required or desired in a particular state, those provisions can be omitted.

**The drafting attorney must check (and if necessary, modify) each form to ensure that it satisfies the legal requirements and customary practice of the particular state.** Things to check and possibly modify include:

*A. Legal Requirements.* The attorney should review the form to ensure that it satisfies the legal requirements for the document in the client's particular state. For example, Florida Statutes §737.111(1) provides that the testamentary aspects of a trust are invalid unless the trust agreement is executed by the settlor with the formalities required for the execution of a will. Accordingly, trust agreements in Florida should be signed with the formalities of a will.

In addition to execution requirements, the attorney should review the form for other provisions that may need to be modified for applicable state law. For example, the spendthrift provision in the formbook is general and concise. If the law of a particular state requires more detailed provisions for a spendthrift clause to be enforceable, the provision in the formbook should be modified as appropriate.

*B. Terminology.* Terminology in wills and trusts can vary from state to state. For example, in some states an "executor" is called a "personal representative." The formbook uses traditional terminology that is understood in all 50 states (e.g., per stirpes, executor). In preparing documents for clients, the attorney can change the terms if desired. For example:

executor	can be changed to	personal representative
devise	can be changed to	legacy

In many states, such a change is not required for legal validity. For example, Section 1-201(36) of the Uniform Probate Code provides that the term "personal representative" includes executor.

In other cases, changes in terminology may be desired and perhaps even legally required. For example, in the State of Wisconsin community property is called "marital property" and separate property is called "individual property." Particularly in states that have adopted the Uniform Probate Code, some attorneys may desire to use "by representation" rather than "per stirpes."

A state's particular practice can also be considered. For example, in the State of Texas it is customary for wills to use the term "independent executor" rather than "executor" throughout the will.

### III. Names of Northern Trust Entities

The forms in this book do not refer to a particular Northern Trust bank. Rather, the book just uses the generic term “Northern Trust.” In preparing a trust or will for a client, the attorney should not use this generic term. Rather, **the full name of the bank should be included in the instrument.**

A. As of October 1, 2011, Northern Trust reorganized the banking charters into a single bank with offices throughout the United States. As a result, the national bank and federal thrift charters merged into The Northern Trust Company. The Northern Trust Company of Delaware and The Northern Trust Company of Nevada remain separate legal entities.

The Northern Trust Company

Headquarters: Illinois

Arizona	Michigan
California	Minnesota
Colorado	Missouri
Connecticut	Nevada
District of Columbia	New York
Florida	Ohio
Georgia	Texas
Illinois	Washington
Massachusetts	Wisconsin

The Northern Trust Company of Delaware

Delaware

The Northern Trust Company of Nevada

Nevada

The address and telephone number of each Northern Trust location can be obtained from the Northern Trust website.

[northerntrust.com](http://northerntrust.com)

## IV. Marital Deduction Formulas

Since the enactment of the unlimited estate tax marital deduction in the year 1981, the standard approach of a revocable estate planning instrument has been to shelter the client's applicable exclusion amount in a bypass trust and qualify the balance of the assets for the marital deduction. The American Taxpayer Relief Act of 2012 (ATRA) became effective January 1, 2013. Under ATRA, top gift, estate and generation-skipping transfer tax rates permanently increased to 40%. Gift, estate and generation-skipping transfer tax exclusions and exemption are permanently set at \$5,000,000, with portability for estate tax and inflation adjustments (for 2014, \$5,340,000). In addition, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 eliminated the state death tax credit under IRC §2011; as a result, many states have responded by "decoupling" their state estate tax from the federal system.

**A. Drafting in the Alternative.** When the attorney drafts a revocable instrument for a married client, it now is uncertain whether the federal estate tax will (or will not) be in effect at the death of the client in the future. The primary forms in the book give the trustee instructions for both possibilities.

- If the estate tax is in existence, the document's "reduce estate tax to zero" formula will apply.
- If the estate tax is not then in existence, the document allocates assets to the marital trust and bypass trust in percentages.

**B. De-coupling of State Death Taxes.** Since the 2001 Tax Act, a significant number of states have de-coupled their "pick up" state death taxes from the phase-out of the IRC §2011 credit. Some of these states continue to assess a pick up state death tax based on the full §2011 (a)(1) credit amount allowed under prior law, ignoring the phaseout of the credit in §2011(a)(2). Other states enacted a separate estate tax that is not based on any version of the state death tax credit in §2011(a)(1). The states also vary in the size of the applicable exclusion amount they recognize under their state death tax laws.

The bypass trust and marital deduction formulas in this edition of the formbook are being revised for this de-coupling. The formulas are designed for use both in states that have, and have not, de-coupled their pick up state death taxes. The death tax laws of the 50 states, however, are rapidly becoming more varied. The attorney should evaluate the impact of the particular state's death tax on the formula in client's estate planning document and modify the formula as needed.

1. In the prior edition of the formbook, the bypass trust formula gave the bypass trust

"... the largest pecuniary amount which will not result in or increase federal estate tax payable by reason of my death. In determining the pecuniary amount the trustee shall consider the credit for state death taxes only to the extent those taxes are not thereby incurred or increased ..."

This traditional formula funds the bypass trust with the full applicable exclusion amount (\$5 million indexed for inflation) and gives the balance of the assets to the marital trust. The formula also results in no state death tax being payable, if the state's death tax is a pick up tax based solely on the available IRC §2011 credit and the state has not de-coupled its estate tax from the phase-out of the credit.

2. If a state has de-coupled its state death tax from the phase-out of the §2011 credit and also has not fully recognized the increase in the applicable exclusion amount, or if a state has enacted a separate state estate tax, then the traditional formula in #B(1) can result in

- no federal estate tax payable at death, but
- some state death tax payable at death.

For example, the State of Illinois currently has frozen its state death tax based upon the §2011 credit in effect on December 31, 2001, but recognizing an exclusion amount of only \$4,000,000. When the traditional formula funds the bypass trust with a full \$5,000,000 indexed for inflation, the decedent will incur no federal estate tax but will incur some Illinois death tax.

3. To avoid the state death tax result in #B(2), **the bypass formula currently used in this edition of the formbook has been revised** to give the bypass trust

“... the largest pecuniary amount which will not result in or increase the federal or state estate taxes that would be payable by reason of my death, taking into account all allowable credits.”

This revised formula results in no federal estate tax and also no state tax payable at death. It assumes that most clients do not want to pay any death tax, federal or state, at the first death.

4. In many de-coupled states, this revised formula might result in the bypass trust not receiving the full applicable exclusion amount. In the above example, to avoid Illinois death tax at the first death, the formula would fund the bypass trust with only \$4,000,000.

In such case, the applicable exclusion amount can still be fully utilized, if desired, by post-mortem planning:

- a. The surviving spouse can disclaim part of the marital trust, and the disclaimed part will be added to the bypass trust.
- b. If the marital trust is a QTIP trust, the executor can elect to qualify only a part of the QTIP trust for the federal estate tax marital deduction.

If this is done, some state death tax may be incurred.

A handful of states (e.g., Massachusetts, Illinois, New York, Ohio, Washington, Maine,

Maryland, Minnesota, New Jersey, and Pennsylvania) allow a QTIP election for state death tax



purposes, even though a QTIP election for federal estate tax purposes has not been made. In those states, clients may want to consider using a state QTIP marital trust for flexibility in state death tax planning.

5. Some states (e.g., Florida, Texas) are not expected to de-couple their pick up state death taxes from the phase-out of the §2011 credit. For these states, the revised formulas in this edition of the formbook will fund the bypass trust with the full applicable exclusion amount, and no state death tax will be incurred.

Special care is needed if a client resides in a state that has not de-coupled (e.g., Florida) but also owns some property that has a taxable situs in another state that has de-coupled (e.g., vacation real estate in Illinois). In such case, the client may wish to fund the bypass trust with the full applicable exclusion amount, even if a small amount of state death tax is incurred in that other state. See the following paragraph.

6. Some clients in a de-coupled state may want to fund the bypass trust with the full applicable exclusion amount, even though it results in some state death tax payable at the first death. In that case, the traditional formula in #B(1) can be used in client's estate planning instrument.

The formula article might contain an additional statement that the client wants to fund the bypass trust with the full applicable exclusion amount, and the client is willing to incur state death tax at the first death to accomplish that goal. Also, the attorney might obtain written documentation for the file that the attorney counseled the client about an alternative approach that would result in no state death tax, but the client selected this approach.

**C. Selection of a Marital Formula.** The three basic marital formulas in the book are:

- Fractional Share Marital Trust
- Pecuniary Amount Marital Trust
- Residuary Marital Trust with pre-residuary bypass trust

Each formula can be used to obtain the unlimited marital deduction after sheltering the client's applicable exclusion amount. All three formulas will give the same amount of property to the marital trust and bypass trust, if the estate remains constant in value after the death of the client. Each formula has advantages and disadvantages.

A pecuniary amount formula allows for easier selection of assets. It is more flexible and easily understood and administered than the fractional share formula. Its main disadvantages are that (i) funding the pecuniary amount may cause realization of capital gains or income in respect of a decedent and (ii) it may over-leverage the residuary trust, because all post-death depreciation and appreciation is borne by, and inures to the benefit of, the residuary trust. To avoid over-leveraging, compare the relative sizes of the marital trust and the bypass trust, and have the smaller of the two trusts be the pecuniary amount trust.

The fractional share marital formula has many advantages. It works satisfactorily in most situations, in all sizes of estates. It treats contentious beneficiaries (e.g., second spouse and children of first marriage) more equitably, because the marital trust and bypass trust share proportionately in the post-death appreciation or depreciation of the estate. Because the trust property is fractionalized, in funding the marital trust there is no realization of income in respect of a decedent or capital gains for federal income tax purposes.

The main disadvantage of the fractional share marital formula is that it is more difficult to administer than a pecuniary amount formula. Usually each asset is fractionalized, allocating part to the marital trust and part to the bypass trust. That treats both trusts equitably, but it also can create undivided interests in non-marketable assets (e.g., real estate, closely held stock). Fractionalization of each asset can be avoided in the instrument, however, by (i) specifically allocating certain assets to one trust or the other, or (ii) authorizing the trustee to make disproportionate allocations between the two trusts. This book has sample language for this, respectively, on the left page and right page of the forms.

*General Guidelines for Selecting a Marital Formula:*

1. If the marital trust will be smaller than the bypass trust, consider the pecuniary amount marital formula (Forms 102, 202, 302).
2. If the marital trust will be larger than the bypass trust, consider the residuary marital trust with pre-residuary bypass trust (Forms 103, 203, 303).
3. The fractional share marital formula (Forms 101, 201, 301) works satisfactorily in most situations, and it also works best in some specific situations (e.g., no realization of IRD or capital gains on funding, treats contentious beneficiaries equitably).

**D. Simpler Plans With No Marital Formula.** In smaller estates, rather than creating a marital trust and a bypass trust for the surviving spouse, a single trust may be appropriate if the spouse is to be the sole beneficiary during his or her lifetime. The Single Fund Marital Trust (Forms 104, 204, 304) is a single QTIP trust. The client's applicable exclusion amount is sheltered by electing only part (or none) of the trust estate as qualified terminable interest property for federal estate tax purposes.

As the applicable exclusion amount has increased and may increase again in future years, some clients with smaller estates may be uncertain whether to create a bypass trust at all. The book includes a form of Outright With Disclaimer Trust (Forms 105, 205, 305). 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 client's applicable exclusion amount by disclaiming a part or all of the outright distribution to the spouse and still receive benefits from the disclaimed property, which is allocated to a bypass trust.

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This edition of the formbook does not contain some miscellaneous forms which were included in prior editions of the formbook but were used infrequently. If desired, the attorney can retain the prior edition of the formbook as a reference for those forms.

The formbook no longer contains a Power of Attorney to Transfer Assets to Trust. The power of attorney statutes of the 50 states are so different, and execution requirements are so varied, that a single generic power of attorney form is not practicable. The attorney should obtain power of attorney forms from a local state source. The Percentage Marital Formula has been deleted, because clients no longer want to give the marital trust a percentage of the adjusted gross estate. The Multiple Marital Trust form is no longer included; as the bypass trust increases in size, the marital trust becomes smaller, and there is less need to divide the marital trust into two separate trusts (general power of appointment trust and QTIP trust). Finally, because of lack of usage, the Estate Marital Trust form is no longer included in the formbook.