

**To: New Jersey Law Revision Commission**  
**From: Jordan Goldberg**  
**Re: Project Related to Reducing Intestacy in New Jersey**  
**Date: November 21, 2013**

## MEMORANDUM

### Introduction

In the course of outreach to the local law schools, Executive Director Laura Tharney had the opportunity to discuss with Professor Reid Kress Weisbord from Rutgers Law School consideration of a project relating to reducing intestacy in New Jersey. Professor Weisbord, an expert on the issue of estate planning and wills, has written an article describing the status quo and proposing a few policy solutions. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877 (2012). According to Professor Weisbord and others, many and perhaps most people die intestate although they plan to create wills during their lives. See, e.g., Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 Elder L. J. 33, 33 (2008) (“Despite the relative certainty of mortality, most people die without having executed a valid will.”). Without a will, an individual’s wishes for the distribution of his or her assets after death cannot be determined or followed. Moreover, the law of intestacy, which governs the distribution of assets without a will, may be completely or partly inconsistent with what the individual would have desired. Further, current family structures and relationships are often not accounted for in the rules of intestacy, making such inconsistency very likely in some situations. See, e.g., Irene D. Johnson, *A Suggested Solution To The Problem Of Intestate Succession In Nontraditional Family Arrangements: Taking The “Adoption” (And The Inequity) Out Of The Doctrine Of “Equitable Adoption”*, 54 St. Louis U. L. J. 271 (2009). For example, New Jersey’s intestacy statutes recognize civil union partnerships but not unmarried committed cohabitants. See N.J.S. 3B:5-3 and -4.

Scholars such as Professor Weisbord have argued that there is a need for law reform that would enable more people to accomplish their goal of creating a will without some of the legal obstacles that currently exist. Commission Staff is seeking the Commission’s permission to explore whether there are options from within Professor Weisbord’s article and/or from other sources that could result in a Report from the Law Revision Commission that would recommend that the legislature adopt new legislation to help New Jersey citizens choose to create wills in larger numbers, rather than defaulting to intestacy. Professor Weisbord has generously offered to assist the Commission with this project if the Commission chooses to move forward with it.

### Background

The problem of mass intestacy has been identified by both states and academics for decades, if not hundreds of years. See Gerry W. Beyer *Statutory Will Methodologies—Incorporated Forms v. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 Dick. L. Rev. 231,

234 (1990) (noting that the low number of individuals who choose to draft a will has been recognized as a problem since at least the 1920s and potentially long before). Although there is no data on how many individuals in New Jersey die without a will, nationally the figure has been estimated to be as many as two-thirds of all Americans. *See id.* at 235 n.8. Mass intestacy causes a number of both personal and public problems: For individuals, dying without a will means that the individual has no ability to ensure that those he or she wishes to pass wealth or possessions to ultimately receive those gifts. Moreover, from the perspective of society, the law has long “abhor[ed] intestacy,” which imposes costs on courts and the legal system. *See, e.g., Tobler v. Moncrief*, 72 N.J. Super. 48, 52 (N.J. Super. 1962) (“The law abhors intestacy and presumes against it.”). These costs can be significant both financially and emotionally, such as in situations where there are minor children and the court must appoint a guardian. *See, e.g., Gerry W. Beyer, Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 Or. L. Rev. 769 (1993); Weisbord, *supra*, at 894-96. Moreover, there is a general public interest in “[t]he orderly disposition of property at death.” *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

The problem of intestacy and the urge to create a legislative solution that would enable more people to choose to create wills has existed for many years – according to one scholar, a form will was created first in England in 1925 with the hope of encouraging more people to draft wills. *Id.* at 242, 249. The National Conference of Commissioners on Uniform State Laws at one time approved a Uniform Statutory Will Act, which would allow individuals to use a complete statutorily drafted form will, but only a few states adopted the Uniform Act or something similar. Weisbord, *supra*, at 919. A number of other states have adopted “fill-in” wills that allow individuals to create a will based on a state form with blank spaces for individualized information. *Ibid.* Other states have revised their estate planning laws to enable more types of wills to be considered valid, such as “holographic” (handwritten) wills and the excusal of “harmless error” in formally drafted wills. *See generally* Sean P. Milligan, *The Effect Of A Harmless Error In Executing A Will: Why Texas Should Adopt Section 2-503 Of The Uniform Probate Court*, 36 St. Mary's L.J. 787 (2005). Nonetheless, despite the creation of form wills and fill-in-the-blank wills, along with the expanded recognition of less formally drafted wills, intestacy is still the norm. Weisbord, *supra*, at 919.

New Jersey has not adopted a form will or statutory will, but has adopted other policy changes intended to broaden recognition of wills. Most recently, in 2004, the legislature broadened the recognition of “holographic,” or unwitnessed, handwritten wills, and expanded courts’ authority to recognize a range of “improperly” drafted wills so long as they are consistent with the testator’s intent to create a will. *See, e.g.* N.J.S. 3B:3-2<sup>1</sup> & -3.<sup>2</sup> These revisions appear

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<sup>1</sup> N.J.S. 3B:3-2 sets forth the requirements for a validly executed will:

a. Except as provided in subsection b. and in [N.J.S.3B:3-3](#), a will shall be:

(1) in writing;

to reflect the legislature's willingness to relax the formalities associated with will execution. Since then, New Jersey courts have recognized a variety of wills that did not comply formally with the requirements of N.J.S. 3B:3-2 or -3, but that were clearly intended as the testator's last will and testament. *See, e.g., In the Matter of the State of Richard D. Ehrlich*, 427 N.J. Super. 64, 70-74 (App. Div. 2012) (admitting to probate a copy of a will that was drafted by the testator, who was a wills and trusts lawyer, but was not signed, despite the fact that the original will with signature was never found, based on evidence from the will itself and from testimony indicating that the testator intended this to be his last will).

### **Professor Weisbord's Tax Proposal**

Professor Weisbord's proposal would create a new system in New Jersey whereby individuals in the state could create a will through the same process by which they file their New Jersey taxes. Professor Weisbord proposes that a "Schedule – Last Will and Testament" could be voluntarily appended to an individual's tax return and filed with the state in the same manner as a tax return.<sup>3</sup> Because the vast majority of Americans, including New Jersey residents, file taxes returns, appending an optional schedule containing a will form to the income tax return process could lead to a large increase in the proportion of New Jersey residents who are given

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(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

<sup>2</sup> N.J.S. 3B:3-3 relates governs the validity of wills that are not executed in compliance with N.J.S. 3B:3-2, and states:

Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

<sup>3</sup> An excerpt from Professor Weisbord's article, including this "Schedule – Last Will and Testament" has been appended to this memorandum

the opportunity to create a will. Professor Weissbord has developed a comprehensive proposal for this “Schedule – Last Will and Testament” including a proposed form. His article also addresses some of the major concerns that would arise in attempting to create this new system. Specifically, there appear to be two major concerns relating to will creation that are implicated by this proposal: (1) Whether it would jeopardize testators’ understanding of the serious nature of drafting a will, which is typically considered to be conveyed by the process of finding an attorney, writing the will, and gathering witnesses to sign it. *See* Mark Glover, *The Therapeutic Function Of Testamentary Formality*, 61 U. Kan. L. Rev. 139, 143, 147-53 (2012) (arguing that the formality associated with Will creation serves a therapeutic function for testators); (2) The need to verify the identity of the testator and prevent fraud, which is typically resolved by requiring two witnesses. Weisbord, *supra*, at 911.

In response to those concerns, Professor Weisbord’s makes several key points in support of his proposal to link the income tax return with a form will: First, the gravity with which individuals approach the making of their will is, if not identical, akin to the seriousness with which individuals approach their tax returns, thus eliminating the need for a corrective measure to ensure that individuals think carefully about what they are doing. Second, the information needed to consider making one’s will is very similar to the information needed to complete one’s tax returns – thus, when an individual has contemplated their financial picture for the year, they may be ready to consider their total assets and how they would like them distributed upon their death. Third, the mechanisms that exist for ensuring that individuals file correct tax returns are sufficiently personal and verifiable to stand in for the previously required attestation by witnesses – typically, individuals are asked to provide their previous year’s adjusted gross income as identification in order to be able to file the current year’s tax return. *See* IRS.Gov, Free File- Frequently Asked Questions, <http://www.irs.gov/uac/Free-File:-Frequently-Asked-Questions> (last visited Sept. 24, 2013).

### **Potential Avenues for Research and Outreach**

Professor Weisbord’s proposal is unique in the nation – no state has adopted a policy scheme that links the state’s income tax collection system with the process of will drafting. However, there are piecemeal schemes in various states that allow individuals to store their wills with various state or local entities. *See, e.g.*, Ala. Code § 45-2-83.40 (allowing residents of Baldwin County to file sealed wills with the county probate court). Further, many states and other nations have will registry systems similar to New Jersey’s (see below for more detail), which allow individuals to register the fact and location of a will but not to store the will itself.

In addition, a number of states permit individuals to register the existence of and their actual health care decision documents, such as living wills, advanced directives, and health care proxies. Arizona has a comprehensive program that allows individuals to file and store a range of health care documents, including advanced directives, living wills and health care proxies. *See* Ariz. Rev. State. Ann. §§ 36-3291 to 36- 3297. A number of states allow individuals to register

and store advanced directives. *See, e.g.*, Cal. Probate Code §4800; 18 Vermont Stat. Ann. § 9719. Washington State had a program similar to Arizona's, but it was discontinued due to lack of funding. *See* Washington State Department of Health, Living Will Registry <http://www.doh.wa.gov/AboutUs/ProgramsandServices/DiseaseControlandHealthStatistics/CentforHealthStatistics/LivingWillRegistry.aspx> (last visited Sept. 24, 2013). Washington State has transferred its existing participants into a private company's registry, called the U.S. Living Wills Registry. U.S. Living Wills Registry, <http://www.uslivingwillregistry.com/>. This company works with health care providers and some states to set up a system for storing, updating and accessing individuals' living wills, advance directives and health care proxies. U.S. Living Wills Registry, FAQs for Hospital and Health Care Providers, <http://www.uslivingwillregistry.com/hospfaq.shtm> (last visited Sept. 24, 2013).

If the Commission agrees to pursue this project, there are a number of specific areas that would need to be explored in depth, including but not limited to:

- Lack of attestation: Typically, and in New Jersey, a valid will must be witnessed by two people who sign the will in the testator's presence. N.J.S. 3B:3-2. By adopting an electronic filing system, this proposed law would be forced to remove the requirement for attestation. There are policy arguments both for and against attestation. *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. Mich. J. L. Reform 855, 888-89 (2012). It should also be noted that by removing the attestation requirement, other sections of New Jersey estate law would be impacted, such as the requirement that one of the witnesses of a will be available to testify in a case in which the will is being contested for reasons related to how it was executed. N.J.S. 3B:3-23. According to Professor Weisbord, however, such witnesses are often unavailable or dead at the time of the will contest.
- Potential hurdles relating to creating a new structure and storage system: This proposal would require the State of New Jersey to create a new schedule as part of the income tax return, ultimately both electronically and on paper. This might require the use of existing software to create a new form that would allow individuals to answer questions, the answers to which would then populate a form will. Moreover, these wills would need to be stored in some manner. As a result of a 2004 New Jersey estate law amendment, New Jersey already has a voluntary will registry, which permits New Jersey residents to register that they have completed a will. N.J.S. 3B:3-2.1; *see* New Jersey Secretary of State, Will Registry, [http://www.nj.gov/state/dos\\_will\\_registry.html](http://www.nj.gov/state/dos_will_registry.html) (last visited Sept. 16, 2013). The purpose of the Registry, a form of which exists in several states, is simply to allow individuals to register that they have completed a will and to provide some information about where the will is located so that their family or interested parties may locate the will. *See* Senate Committee Statement on Assembly Bill 1981, January 2005. For a fee of \$10, any New Jersey resident may register the existence of his or her will

with the state. For another \$10 fee, any “interested party” may search that registry to find whether a family member or other party has created a will. However, the registry does not include the text of the will, merely the fact that the will exists. *Id.* at (a) (“The registry shall not contain a copy of the will.”). Therefore, the existing will registry would not be sufficient for these purposes. However, New Jersey also has several different electronic filing systems for taxes, including one that allows individuals to freely file their income tax online. <http://www.state.nj.us/treasury/taxation/pcfile/njwebfile.shtml>. If this project is undertaken, additional research should be pursued to determine how those systems are funded and regulated, and whether the software is sufficiently developed that a new testamentary schedule could be created and the wills stored without imposing substantial new costs. Notably, as Professor Weissbord points out in his article, related electronic registration systems exist in other parts of New Jersey law: for example, although organ donation and drivers licenses are at best tangentially related, the organ registry process is orchestrated through the Motor Vehicle Commission and in fact the legislature has ensured that “Any information technology system adopted by the commission after the effective date of P.L.2008, c. 48 (C.26:6-66 et al.) shall accommodate the inclusion of donor information into the database and the on-going operation of the Donate Life NJ Registry.” N.J.S. 39:3-12.4. As noted earlier, there are a number of state interests in encouraging individuals to create wills, which may merit the burden of creating and paying for a new system of registration and storage. Moreover, the state could charge a small fee for storage.

- Privacy and confidentiality: Wills are often kept private by individuals during their lifetime and there would need to be the assurance that wills filed with the state would also be confidential.

Because this is a wholly new proposal, there are several options for where it could be placed in the New Jersey statutes. It could be placed into the Title 54A, the New Jersey Gross Income Tax Act, since that Act governs individual income taxes and the returns that individuals must file. N.J.S. 54a:1 through 54a:10. Alternatively, it could be placed within N.J.S. 3B:3, the Administration of Estates. In either case, there are a number of state agencies whose work and statutory sections would be implicated. Therefore, it would seem be advisable to reach out to those entities early in the process, to ensure that the Commission understands their perspectives and incorporates their feedback into initial drafts. At least the following agencies are implicated, as well as at least these additional interested parties:

- The Secretary of State
  - Will Registry
- The Department of the Treasury
  - The Division of Taxation
- Judiciary

- Civil Practice Division, Administrative Office of the Courts (where probate cases are handled)
- New Jersey Bar Association
  - Real Property, Trust and Estate Law Section
  - Taxation Law Section

### **Conclusion**

With the Commission’s permission, Staff would like to move forward with additional research regarding the different parts of Professor Weisbord’s proposal, including by conducting outreach to the relevant members of the bar, judiciary, and state agencies.

**Appendix – Professor Weisbord’s “Schedule – Last Will and Testament”, excerpted from Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877, 946-52 (2012).**

### **TESTAMENTARY SCHEDULE--LAST WILL AND TESTAMENT**

#### **DESCRIPTION.**

1. This form will serve as your Will. Use this document to identify the beneficiaries who will receive your property at death, appoint a guardian and custodian for minor children, appoint an executor to handle your estate, and declare your preferences regarding organ donation and the disposition of final remains. If you do not understand this form, consult an attorney for assistance.
2. This form has no effect on jointly held assets, retirement plan benefits or life insurance policies.
3. If you expect your estate to exceed [\$5 million, or the state’s inheritance tax exemption] or if you have made substantial lifetime gifts, then you should consult an attorney for tax planning advice first.
4. You may revoke this form at any time by executing the attached Revocation form, a new Testamentary Schedule, or a new Will.
5. You may not submit this form on someone else’s behalf without consent. Submission of an unauthorized form is a crime punishable by imprisonment.

#### **GENERAL INSTRUCTIONS.**

1. Complete the form by filling in the blanks. If an item does not apply, leave it blank.
2. Sign and date the form. If you complete this form electronically, you may use an electronic signature. No witnesses are required.
3. File this form with the State Department of { \_\_\_\_ } . You may do so with your state income tax return. This form will be treated as private and confidential, just like your income tax return.

**1. WILL.** This is my Will. I revoke all prior Wills and Codicils.

**a. FULL NAME**

WILL OF

*Full Name (First, Middle, Last)*

**b. AUTHENTICATION**

*To authenticate yourself, enter the following information from your current state income tax return:*

[Tax Return Item 1]: \_\_\_\_\_

[Tax Return Item 2]: \_\_\_\_\_

**2. BEQUESTS.**

**a. PRIMARY BENEFICIARIES**

*This section identifies the Primary Beneficiaries of your estate. Primary Beneficiaries will receive all your property unless you choose different beneficiaries for your personal residence, specific tangible items, or cash gifts (see Sections 2.b, 2.c, or 2.d). Indicate Primary Beneficiaries below by placing your initials next to the desired selection and, if applicable, identify the beneficiaries by name.*

1. My spouse if s/he survives me. If my spouse dies before me, then my descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me.
2. My descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me. (I leave nothing to my spouse.<sup>a1</sup>)
3. The following person, charity, organization, or trust:

Beneficiary:

You may select alternate beneficiaries to inherit if the person listed above dies before you:

Alternate 1:

Alternate 2:

Alternate 3:

4. The following persons, charities, organization, or trusts in the following shares: [Percentage shares must add up to 100%.]

Footnotes

- a1 *[For states with an elective share statute]* State law protects your surviving spouse or domestic partner from outright disinheritance. If you are married or partnered at death and select this option, your surviving spouse or domestic partner may file a petition in court to obtain a spousal elective share. This will reduce the amount passing to your selected beneficiaries.

<b>Name:</b>	<b>Percent Share:</b>
Beneficiary 1:	%
Beneficiary 2:	%
Beneficiary 3:	%
Beneficiary 4:	%
Beneficiary 5:	%
Beneficiary 6:	%

**b. SPECIFIC GIFT OF PERSONAL RESIDENCE--OPTIONAL.**

*This section identifies beneficiaries of your personal residence at death subject to mortgages and liens. Use this section only if you want to give your personal residence to someone other than the Primary Beneficiaries selected in Section 2.a. Indicate Personal Residence Beneficiaries below by placing your initials next to the desired selection and, if applicable, identify the beneficiaries by name.*

- 1. My spouse if s/he survives me. If my spouse dies before me, then my descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me.
- 2. My descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me. (I leave nothing to my spouse.<sup>a1</sup>)
- 3. The following persons, charity, organization, or trust:

Beneficiary:

You may select alternate beneficiaries to inherit if the person listed above dies before you:

Alternate 1:

Alternate 2:

Alternate 3:

- 4. The following person, charities, organization, or trusts in the following shares: [Percentage shares must add up to 100%.]

Footnotes

a1 *[For states with an elective share statute]* State law protects your surviving spouse or domestic partner from outright disinheritance. If you are married or partnered at death and select this option, your surviving spouse or domestic partner may file a petition in court to obtain a spousal elective share. This will reduce the amount passing to your selected beneficiaries.

<b>Name:</b>	<b>Percent Share:</b>
Beneficiary 1:	%
Beneficiary 2:	%
Beneficiary 3:	%
Beneficiary 4:	%
Beneficiary 5:	%
Beneficiary 6:	%

**c. SPECIFIC GIFTS OF PERSONAL ITEMS--OPTIONAL.**

*This section identifies beneficiaries of specific personal items, such as automobiles, household furnishings, jewelry, or personal effects owned at death. Use this section only if you want to give a personal item to someone other than the Primary Beneficiaries selected in Section 2.a. For each item, provide a brief description, the beneficiary's name, and (if desired) an alternate beneficiary should the original beneficiary die before you.*

<b>Item</b>	<b>Brief Description</b>	<b>Beneficiary</b>	<b>Alternate Beneficiary</b>
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

11.

12.

13.

14.

15.

**d. CASH GIFTS--OPTIONAL.**

*This section identifies beneficiaries of cash gifts. Use this section only if you want to give a cash gift to someone other than the Primary Beneficiaries selected in paragraph 2.a. For each cash gift, provide the amount and beneficiary's name.*

<b>Item</b>	<b>Cash Amount</b>	<b>Beneficiary</b>
1.	\$	
2.	\$	
3.	\$	
4.	\$	
5.	\$	
6.	\$	
7.	\$	
8.	\$	
9.	\$	
10.	\$	

**3. GUARDIAN OF MINOR CHILDREN AND CUSTODIAN OF PROPERTY--OPTIONAL.**

*If you are survived by a minor child who has no other adult guardian, a court may appoint an individual to care for the child and his or her property. A guardian has the same authority with respect to the child as a parent with legal custody. A custodian has power to manage the child's property. Use this section to select a guardian and custodian.*

**a. GUARDIAN.**

Preferred Guardian:

First Alternate:

Second Alternate:

**b. CUSTODIAN.**

Preferred Custodian:

First Alternate:

Second Alternate:

**4. EXECUTOR--OPTIONAL.**

*Use this section to appoint an executor to handle the administration of your estate. The executor will have important administrative duties, such as taking an inventory of your property, filing estate papers in court, and distributing gifts in accordance with this Will. The law protects estate property by requiring the executor to post bond, but you may waive this requirement by signing below.*

a. NOMINATION. I select the following individual, bank or trust company as my executor:

Preferred Executor:

First Alternate:

Second Alternate:

**b. BOND.**

My signature below means the executor is not required post bond before handling my estate:

\_\_\_\_\_

No bond shall be required.

**5. ORGAN DONATION AND FINAL REMAINS--OPTIONAL.**

a. ORGAN DONATION: *Use this section to record your organ donor status. Indicate your preference by placing your initials next to the appropriate line.*

1. I wish to donate any needed organ or tissue.

2. I wish to donate only the following organs or tissue: .

3. I do not wish to donate my organs or tissue.

b. FINAL REMAINS: *Use this section to record your preference regarding final remains. Indicate your preference by placing your initials next to the appropriate line.*

1. Burial

Cemetery (optional):

2. Cremation

With delivery to (optional):

3. Donation for scientific research

Hospital or University (optional):

## 6. SIGNATURE AND DATE

Signature

Date

END OF WILL

## TESTAMENTARY SCHEDULE--REVOCATION FORM

### DESCRIPTION OF FORM.

1. This form will revoke all Wills and Codicils. If you do not understand this form, consult an attorney for assistance.

2. You may not submit this form on someone else's behalf without consent. Submission of an unauthorized form is a crime and punishable by imprisonment.

### GENERAL INSTRUCTIONS.

1. Complete the form by filling in the blanks.

2. Sign and date the form. If you complete this form electronically, you may use an electronic signature. No witnesses are required.

3. File this form with the State Department of { \_\_\_\_ }. You may do so with your state income tax return. This form

will be treated as private and confidential, just like your income tax return.

**1. REVOCATION OF ALL WILLS AND CODICILS.**

I hereby revoke all prior Wills and Codicils.

a. FULL NAME

*Full Name (First, Middle, Last)*

b. AUTHENTICATION

*To authenticate yourself, enter the following information from your current state income tax return:*

[Tax Return Item 1]: \_\_\_\_\_

[Tax Return Item 2]: \_\_\_\_\_

**2. SIGNATURE AND DATE**

Signature

Date

END OF FORM