

Joint vs. Individual Trusts in Separate and Community Property States

Key Structuring Considerations, Identifying "Problem" Assets, Coordinating With Credit Shelter Trusts, Drafting GPOAs

THURSDAY, OCTOBER 1, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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EXAMPLE 1
SEE SLIDE 18

This **TRUST AGREEMENT** (“**Trust Agreement**”) is made and entered into this ____ day of _____, 20____, by and between the following:

(“**Husband**”) and (“**Wife**”), husband and wife, presently residing in _____County, _____, hereinafter called “**Settlors**;”

Husband and Wife, as Co-Trustees as to that property described in Schedule A attached as a part of this instrument, or which is the community property of Settlers;

Husband, as Co-Trustee as to that property described in Schedule B attached as a part of this instrument; or which is the sole and separate property of Husband;

Wife, as Co-Trustee as to that property described in Schedule C attached as a part of this instrument, or which is the sole and separate property of Wife; and

All of the foregoing hereinafter collectively referred to as the “**Trustee**”.

The Trustee shall hold in trust all of the property as set forth in Schedule A, Schedule B and Schedule C, or such property transferred to the Trustee as otherwise provided in this Agreement, in trust, nevertheless, upon the following terms:

EXAMPLE 2
SEE SLIDE 18

Settlors together or the Survivor may transfer and convey assets to the Trustee and may make the Trustee the beneficiary of life insurance policies. The assets initially transferred to the Trustee and the life insurance policies initially made payable to the Trustee may be listed on Schedules A, B and C which are attached hereto and by this reference incorporated herein. The ownership of said assets, together with any other assets which may be hereafter jointly or separately transferred to the Trustee by the Settlers or one Settlor and of life insurance policies, may be designated as separate property or community property on said Schedules. The separate property of Husband and Wife transferred to the Trust may be set forth on Schedules B and C, respectively. The community property of Settlers transferred to the Trust may be set forth on Schedule A. In addition, either of the Settlers may increase this Trust by devise, bequest or otherwise.

The assets transferred to the Trustee, together with all accumulated income therein shall constitute the trust estate (“**Trust Estate**”).

Assets, which are owned by the Settlers as community property or other form of joint ownership and are transferred to the Trustee, shall be held by the Trustee as the community property of the Settlers under the community property laws of the State of Arizona, whether or not such assets are actually listed on Schedule A. Assets, which are owned by either Settlor as separate property and are transferred to the Trustee and life insurance policies designated as the separate property of either Settlor, shall remain separate property, whether or not such assets are actually listed on Schedule B or Schedule C, respectively. Notwithstanding the foregoing, no provision of this Trust Agreement shall change the character of any community property or separate property or the rents, issues and profits thereof to other than the Settlers’ community property or separate property, as the case may be, unless otherwise agreed to in writing by Settlers.

Notwithstanding anything herein to the contrary, a Settlor transferring any property determined to be such Settlor’s sole and separate property under this Article shall, during such

Settlor's lifetime and capacity have the sole right and authority to act as Trustee with respect to such property

EXAMPLE 3

SLIDE 19

Signature of Trustee During the lifetime of both Settlor's, although the Trustees shall act by a unanimous vote, the signature of any Trustee to any document shall bind this Trust with respect to Settlor's community or joint property interests in the Trust Estate. However, each Settlor who is acting as a Trustee hereunder shall have the sole authority to bind this Trust with respect to such Settlor's respective sole and separate property interests in the Trust Estate. Notwithstanding the foregoing, unless otherwise provided under this Trust Agreement, any Successor Co-Trustees shall act by a unanimous vote and upon such vote, the signature of any Co-Trustee to any document shall bind this Trust. Relieving Trustee of Powers and Obligations Any Trustee, with the consent of all Co-Trustees then serving hereunder, may be relieved of any and all powers, duties and discretions in and by this Trust Agreement vested in or imposed upon him or her, by delivering to the Trustee, an instrument in writing delegating the same, or any part thereof, to such other Trustee, and any act done or decision made pursuant to such written instrument shall be binding upon and not subject to question or challenge by any person whomsoever. Notwithstanding anything herein to the contrary, the Co-Trustees, by an instrument in writing, may provide that only one of their number may exercise any and all powers, duties and discretions vested in them jointly. Any Co-Trustee who has been relieved of any duties, powers and discretions as provided for in this paragraph may be reinstated as to such powers by notification of such desire to any other Trustee then serving. Any person or entity dealing with the Trustee may accept the certificate of all the Co-Trustees hereunder relative to whether any Trustee has delegated such Trustee's authority as set forth above.

EXAMPLE 4
SEE SLIDE 19

Prior to the death of either Settlor, Settlers may withdraw their community property and joint property from the Trust Estate, or either Settlor, individually, may withdraw his or her community or joint interest in such property and his or her separate property from the Trust Estate, by a written instrument executed by Settlers or Settlor withdrawing any such property and delivered to the Trustee.

EXAMPLE 5

SEE SLIDE 22

Upon the death of Decedent, the Trust Estate shall be held and administered or distributed as follows:

A. All items of tangible personal property that are considered “**Furnishings**” shall remain with the “**Residence**” (as defined below) or “**Replacement Residence**” (as defined below). Furnishings shall include all articles, goods and effects of household use or ornament found in or on, or used at or in connection with, the Residence or the Replacement Residence, including but not limited to furniture, furnishings, artwork, books, bric a brac, silverware, chinaware, glassware, linens, and all policies of fire, burglary, property damage and other insurance on or in connection with the use of any of the above mentioned property. Any tangible personal property in the Trust Estate, including the Furnishings, that remains in the Residence or Replacement Residence, upon the death of the Survivor, shall be distributed in accordance with Paragraph A or Paragraph B of Article IX.

B. Subject to the provisions in Paragraph A of this Article, Settlor's personal residence, located at ____ (“**Residence**”), or any personal residence acquired to replace such property (“**Replacement Residence**”), or the proceeds from the sale of the Residence, as the case may be, together with all the Furnishings, shall remain in trust for the benefit of Survivor if Survivor survives Decedent for a period of 30 days to be administered and distributed as follows:

1. Survivor shall have the right to live in the Residence or Replacement Residence and utilize all Furnishings located in the Residence or Replacement Residence upon the death of Decedent, free of rent, for his or her lifetime, so long as he or she continues to pay all mortgage payments, real estate taxes, assessments, fire, casualty and liability insurance premiums, and he or she keeps the Residence or Replacement Residence properly maintained and repaired, subject to normal wear and tear. While Survivor is living in the Residence or Replacement Residence, the Trustee shall have no obligations to expend any portion of the Trust Estate for any matter related to the maintenance, care or upkeep of the Residence or Replacement Residence. Provided Survivor fulfills his or her obligations with respect to the Residence or

Replacement Residence, the Trustee shall not sell the Residence or Replacement Residence without Survivor's consent.

2. If Survivor chooses not to reside in the Residence or Replacement Residence, or does not fulfill his or her obligations under Paragraph B.1 of this Article, the Trustee may sell the Residence or Replacement Residence, and distribute the Furnishings pursuant to Paragraph A and B of Article IX, upon such terms and conditions that the Trustee determines are reasonable in the Trustee's sole discretion and hold the proceeds in trust for the benefit of the Survivor pursuant to Paragraph C of this Article.

3. In the event that the Residence or a Replacement Residence is part of the Trust Estate, upon the death of Survivor, Trustee shall sell the Residence or Replacement Residence, upon such terms and conditions that the Trustee determines are reasonable in the Trustee's sole discretion and distribute the proceeds pursuant to Paragraph C of Article IX.

C. During the lifetime of Survivor, the Trustee, may in the Trustee's sole and absolute discretion, distribute any part or all of the net income of the Trust Estate and such sums of principal of the Trust Estate as the Trustee determines shall be necessary or advisable from time to time for the health, support and maintenance of the Survivor, taking into consideration the Survivor's standard of living during Survivor's lifetime and all other income and assets available to Survivor for such purposes from all sources known to the Trustee. Upon the death of Survivor, the remaining Trust Estate shall be distributed pursuant to the provisions in Paragraph C of Article IX.

EXAMPLE 6

SEE SLIDE 24

If Husband and Wife are married when Husband dies, and if neither Husband nor Wife has filed a petition for dissolution, annulment or legal separation of their marriage which remains pending when Husband dies, then Husband shall leave to Wife the lesser of:

- i. \$250,000; or
- ii. Twenty (20%) of Husband's net worth as of the date of Husband's death. For the purpose of this subparagraph, net worth shall be based on liquidation of all Husband's assets by sale to realize cash, and deduction of all related sales costs and taxes, including but not limited to income or other taxes, attendant to liquidation and any estate or inheritance taxes. If Husband divests himself of property during the marriage through transfer to any trusts for the benefit of any of his children, that property shall be considered in the foregoing calculation, but only to the extent of the after tax then present value of Husband's continued beneficial interest in the trust.

Property Deemed to Satisfy Specific Devise. The specific devises set forth in paragraph blank shall be deemed satisfied in whole or in part through transfer to Wife of any of the foregoing:

- i. Proceeds of life insurance payable to Wife on Husband's death, whether Husband, Wife or any other person or entity was owner of the policy.
- ii. Transfer of cash to Wife.
- iii. Transfer of real or personal property to WIFE.
- iv. Gifts made to Wife by Husband during Husband's lifetime, valued at the time of the transfer; provided, however, the value of the following shall not be included in any such calculation: any engagement ring or wedding day gifts Husband transfers to Wife upon marriage, and any individual gift from Husband to Wife at any time which does not exceed \$2,500.00 in value at the time of the transfer.

EXAMPLE 7

SEE SLIDE 25

14. Gifts Upon Marriage and During Marriage.

(a) **Wedding Gifts.** Upon the marriage between Husband and Wife, Husband shall transfer to Wife the sum of \$25,000 within thirty (30) days following the wedding as a gift to her in honor of the marriage.

(b) **Annual Gifts.** Upon the marriage between Husband and Wife, then within thirty (30) days after each wedding anniversary, and continuing for fourteen (14) years, Husband shall transfer to Wife from his sole and separate property a gift in the amount of \$25,000.

15. Support During Cohabitation or Marriage. Except as otherwise set forth in this Paragraph 15, each party hereby irrevocably waives, relinquishes, and releases any and all rights, privileges, remedies and claims (whether legal or equitable) of any kind, nature or description that he or she may now have or hereafter acquire against the other for support during their cohabitation or marriage or for *pendent lite*/temporary or permanent alimony, spousal maintenance or spousal support (including by not limited to monies for “rehabilitation”) whether the claim arises prior to a marriage between Husband and Wife, or upon dissolution, separation or annulment of their marriage, under the present or future laws of any jurisdiction.

Notwithstanding the foregoing, during their continued cohabitation prior to marriage and during their marriage, provided neither party has filed a petition for annulment, legal separation or divorce of the parties, Husband shall pay from his sole and separate property such sums as he deems necessary and appropriate in his sole discretion, for the parties’ housing, transportation, utilities, food, clothing, provision of health insurance (if not provided by Wife’s employer), and common recreation and vacations. By establishment of this responsibility for Husband, Wife understands she has the opportunity to accumulate a separate estate for herself from her own earning, to the extent she chooses to do so.

In order to facilitate payment of the foregoing common expenses by either of Husband or Wife, Husband shall open, maintain and fund a joint checking account in the name of Husband and Wife on which either party may draw funds for the purpose of paying those expenses. Husband may also make available to Wife such credit cards as Husband deems appropriate to facilitate processing of common expenses, and the common expense credit card charges shall be paid either by Husband directly or from funds placed in the joint checking account funded by Husband. Notwithstanding any provision in this Agreement to the contrary, the funds in this joint checking account and any property purchased with funds from this account shall be held by the parties in equal shares as tenants in common.

Unless otherwise agreed to in writing by the parties, any expenditure made by one party toward the obligations or living expenses of the other party shall not create a right in the advancing party to reimbursement for the expenditure. Voluntary contributions by either party to the support of the other party, or any pattern of such contributions, shall not constitute an

assumption of a duty of support toward the other party or waiver of the provisions of this Paragraph 15 or any other provisions of this Agreement.

EXAMPLE 8

SEE SLIDE 25

A. During Settlor's lifetime and capacity, the assets constituting the Trust Estate shall be held and administered in trust for the benefit of Settlor as follows:

1. The net income from the Trust Estate shall be paid to Settlor in quarterly or other convenient installments.

2. In addition to the net income of the Trust Estate, the Trustee shall distribute to Settlor so much of the principal of the Trust Estate up to the whole thereof as Settlor shall request.

B. During Settlor's lifetime and incapacity, the assets comprising the Trust Estate shall be held and administered in trust as follows:

1. The Trustee shall be fully authorized to pay, or apply for the benefit of Settlor, such sums from the principal of the Trust Estate as the Trustee, in its sole discretion, determines shall be necessary or advisable from time to time for the health, support and maintenance of Settlor, taking into consideration all other income available to Settlor for such purposes from all sources known to the Trustee.

2. The Trustee shall distribute \$25,000 to Wife as a gift from Settlor, outright and free of trust, which began 30 days after Settlor's and Wife's first wedding anniversary, and continues on each anniversary for 14 years, to be used in Wife's discretion. Such distribution shall be made only if neither Settlor or Wife has filed a petition for annulment, legal separation, or divorce related to the other. Upon Settlor's death, this distribution shall cease.

3. The Trustee, in the Trustee's sole discretion, may distribute or pay for Wife's benefit sufficient funds pursuant to Paragraph 15 of the Prenuptial Agreement to provide for Wife's housing, transportation, utilities, food, clothing, provision of health

insurance (if not provided by Wife's employer), common recreation and vacations. Any distributions to or for the benefit of Wife set forth in this Paragraph B3 are to be made only if (i) Settlor and Wife have continually cohabited during their marriage, and (ii) neither has filed a petition for annulment, legal separation, or divorce related to the other (**"Marital Conditions"**).

4. As long as Settlor is able and willing to live in any personal residence owned by the Trust (**"Settlor's Residence"**), he may continue to do so until his death or until such time as Settlor is unable or unwilling to do so. If Settlor is able and willing to live in Settlor's Residence, the Trustee may not sell Settlor's Residence while Settlor is able and willing to live in Settlor's Residence. During Settlor's lifetime, Wife may continue to cohabit with Settlor in Settlor's Residence upon the terms and conditions set forth in this Paragraph B.

5. Notwithstanding anything herein to the contrary, the Trustee may, in the Trustee's sole discretion, sell Settlor's Residence if funds in the Trust Estate are insufficient to provide for Settlor pursuant to the provisions set forth in Paragraph B1 of this Article, after taking into consideration all of Settlor's assets available for such purposes, and use the net proceeds from the sale to provide for Settlor's needs, pursuant to the provisions set forth in Paragraph B1 of this Article. In the event the Trustee sells Settlor's Residence as set forth in this Paragraph B5 and reinvests funds in a less expensive residence to allow funds to be available for the purposes set forth in Paragraph B1 of this Article, any replacement residence shall be approved by Settlor, and if Settlor lacks capacity to provide such approval, such approval will be provided by Wife so long as the Marital Conditions have been satisfied. For purposes of this Paragraph B, the term "Settlors Residence" may also include any replacement residence purchased for Settlor to reside in as set forth in in this Paragraph B5.

6. If Settlor is unwilling or unable to live in Settlor's Residence due to Settlor's incapacity or other health condition, and the Marital Conditions have been satisfied until Settlor's departure from Settlor's Residence, Wife may continue to reside in Settlor's Residence upon the following terms and conditions:

a) Subject to Paragraph B5 of this Article, as long as Wife desires to live in Settlor's Residence, the Trustee may allow Wife to live in Settlor's Residence, in the Trustee's sole discretion, and have full use of the Furnishings (as defined below).

b) Notwithstanding the foregoing, in the event the Trustee determines, in its sole discretion, that there are insufficient funds to adequately provide for Settlor's health, support, and maintenance, Trustee may sell Settlor's Residence and purchase another less expensive replacement residence, approved by Wife, that will allow for sufficient funds to provide for Settlor's health, support, and maintenance. If such residence is purchased, the Trustee shall hold and administer such residence in trust for Wife to occupy alone, along with the Furnishings.

c) In the event Wife is living in Settlor's Residence at the time of a sale as set forth in Paragraph B6 of this Article, and in the event a replacement residence is not purchased pursuant to the provisions set forth in Paragraph B6b of this Article, Wife shall leave Settlor's Residence and find alternative housing

d) The Trustee shall allow Wife 30 days prior to listing Settlor's Residence for sale to find alternative housing, and Wife may continue to live in Settlor's Residence until Settlor's Residence is sold.

7. For as long as (i) Wife is able and willing to live in Settlor's Residence, (ii) Wife is living alone in Settlor's Residence without Settlor, and (iii) Settlor's needs, as set forth in Paragraph B1 of this Article, are adequately met, the following provisions apply to any time that Wife is living in Settlor's Residence:

a) The Trustee, in the Trustee's sole discretion, may provide for the timely payment of all expenses related to Settlor's Residence, including without limitation mortgages, real estate taxes, homeowners' association fees, repairs, maintenance, pest control, yard care, pool care, utilities, assessments, fire, and casualty and liability insurance premiums.

b) Wife shall be responsible to maintain Settlor's Residence and its grounds in good and orderly condition so that the value of Settlor's Residence is not diminished ("**Maintenance Obligations**"). If funds are needed to pay for the Maintenance Obligations, Wife shall inform the Trustee and the Trustee shall provide for said funds from the Trust Estate.

c) All items of tangible personal property that are considered "**Furnishings**" (as defined in Paragraph C1a of Article X) shall remain with Settlor's Residence.

d) Wife may live in Settlor's Residence only if living alone, and is denied the use of Settlor's Residence should she decide to cohabit with another person, including, without limitation, Wife's immediate family members.

e) Wife must provide the Trustee with evidence, upon the Trustee's request and in the form the Trustee requires, that she is continuously occupying Settlor's Residence, unless she is on vacation or unable to do so for health reasons ("**Evidence of Occupancy**").

f) The Trustee has the right to inspect Settlor's Residence at any time and Wife must cooperate with such request to inspect. The Trustee must give Wife at least ten day's written notice of its intent to inspect, other than in the case of an emergency situation or a situation in which Settlor's Residence is abandoned or in significant disrepair and such condition(s) would result in a reduction in value of the property.

g) The Trustee may require Wife to provide evidence reasonably requested by the Trustee that Settlor's Residence is being adequately maintained and that Wife is keeping her Maintenance Obligations.

h) Subject to Paragraph B5 of this Article, provided Wife fulfills her Maintenance Obligations with respect to Settlor's Residence, and provides Trustee with Evidence of Occupancy, pursuant to the provisions set forth in Paragraph B7e of this Article, the Trustee shall not sell Settlor's Residence, while Wife is living in Settlor's Residence, unless there are insufficient funds in the Trust Estate to provide for Settlor's needs, pursuant to the provisions set forth in Paragraph B1.

i) In the event Wife (i) chooses not to live in Settlor's Residence for any reason, (ii) fails to maintain Settlor's Residence in good order, (iii) fails to provide Trustee access to Settlor's Residence for inspections, (iv) fails to provide Evidence of Occupancy upon Trustee's request, or (v) dies while living in Settlor's Residence, the Trustee has the right to evict Wife from Settlor's Residence, if she is living, and the Trustee shall sell Settlor's Residence, upon her eviction or death, and add the net proceeds from the sale to the Trust Estate to be held and administered for Settlor, pursuant to Paragraph B1 of this Article. Any Furnishings that remain in Settlor's Residence at the time of sale shall be distributed by the Trustee pursuant to the provisions set forth in Paragraph A or Paragraph B of Article X if a replacement residence has not been purchased in accordance with the provisions of Paragraph B of this Article.

EXAMPLE 9

SEE SLIDE 26

A. The Residence Trust shall be created only if at the time of Settlor's death (i) Wife and Settlor are married, (ii) neither Settlor nor Wife has served on the other a petition for dissolution or legal separation of their marriage, (iii) Settlor and Wife have been cohabitating for at least a consecutive period of six months, and (iv) Wife survives the Survivor for a period of 30 days.

B. Subject to the conditions set forth in Paragraph C2 of this Article, Wife shall have the right to live in the Residence or any Additional Residences, as she desires, pursuant to the provisions set forth in this Paragraph B, and utilize all Furnishings, free of rent, for her lifetime, so long as she continues to pay all real estate taxes, assessments, fire, casualty and liability insurance premiums, and any existing mortgage payments, and so long as she keeps the Residence or any Additional Residences properly maintained and repaired, subject to normal wear and tear ("**Maintenance Obligations**").

C. The following conditions apply to any time in which Wife resides in the Residence or any Additional Residences:

1. Wife may live in the Residence or any Additional Residences only if living alone and is denied the use of Settlor's Residence or any Additional Residences should she decide to co-habit with another person.

2. Wife must provide the Trustee with evidence, upon the Trustee's request and in the form the Trustee requires, that she is continuously occupying the Residence or any Additional Residences, unless she is on vacation or unable to do so for health reasons ("**Evidence of Occupancy**").

3. While Wife is living in the Residence or any Additional Residences, the Trustee shall have no obligation to expend any portion of the Trust Estate for any

matter related to the Maintenance Obligations for the Residence or any Additional Residences, but all Maintenance Obligations for the Residence or any Additional Residences shall be Wife's responsibility.

4. The Trustee has the right to inspect the Residence or any Additional Residences at any time and Wife must cooperate with such request to inspect. The Trustee must give Wife at least ten day's written notice of its intent to inspect, other than in the case of an emergency situation or a situation in which the Residence or any Additional Residences is abandoned or in significant disrepair and such condition(s) would result in a reduction in value of the Residence or any Additional Residences.

5. The Trustee may require Wife to provide evidence reasonably requested by the Trustee that the Residence or any Additional Residences is being adequately maintained and that Wife is keeping her Maintenance Obligations.

6. Provided Wife fulfills her Maintenance Obligations with respect to the Residence or any Additional Residences and provides Trustee with Evidence of Occupancy, the Trustee shall not sell the Residence or any Additional Residences, while Wife is living in the Residence or any Additional Residences, without Wife's consent.

7. Wife will execute a Quit Claim Deed in favor of the Trust, within 30 days of Settlor's death, for the Residence or any Additional Residences, then owned by the Trust, if she desires to live in the Residence or any Additional Residences. Such Quit Claim Deed(s) shall be held by the Trustee and recorded with the appropriate county recorder's office only if:

- a) Wife fails to provide the Trustee with Evidence of Occupancy or fails to fulfill her Maintenance Obligations;
- b) Wife cohabits with another individual while residing in the Residence or any Additional Residences; or
- c) Wife remarries if married to Settlor at the time of his death.

8. In the event Wife is living, but (i) chooses not to live in the Residence or any Additional Residences for any reason, or (ii) is unable to live in the Residence or any Additional Residences for any reason, the Trustee shall sell the Residence or any Additional Residences, as applicable, upon such terms and conditions as the Trustee determines are reasonable in the Trustee's sole discretion, and hold and administer the proceeds from such sale in the Residence Trust for Wife's benefit, pursuant to the provisions set forth in Paragraph D of this Article. Notwithstanding the foregoing, upon the sale of the Residence or any Additional Residences, Wife may direct the Trustee to purchase a new residence for her benefit. For purposes of this Article, any such new residence shall be referred to as an Additional Residence and be held and administered pursuant to the provisions set forth in this Article.

9. In the event a Quit Claim Deed is recorded for the Residence or any Additional Residences, as set forth above, the Trustee has the right to evict Wife from the Residence or any Additional Residences, and the Trustee shall sell the Residence or any Additional Residences, as applicable, and equally augment the shares to be held and administered for the benefit of Settlor's Children, pursuant to the provisions set forth in Paragraphs G2, G3, G4, G5, G6, and G7 of Article X, with the net proceeds from any such sale or sale(s). Any Furnishings that remain in the Residence or any Additional Residences at the time of sale shall be distributed by the Trustee pursuant to the provisions set forth in Paragraph B of Article X.