The Use of Joint Revocable Trusts for Married Couples

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The joint trust discussed in these materials is a revocable living trust created by a married couple where both spouses are the grantors of the trust. The trust usually provides that while both spouses are alive they are both beneficiaries of the trust and both hold powers of revocation and amendment. At the death of the first spouse, the trust assets are divided into the deceased spouse’s assets and the survivor’s assets, and the deceased spouse’s assets are held in further trust or distributed in a manner consistent with the deceased spouse’s intentions (including tax planning). At the death of the survivor, the trust agreement generally provides for distribution of the survivor’s assets (including holding in further trust) in a manner consistent with the survivor’s intentions. The joint trust is the primary estate planning document for the couple, and each spouse executes a pourover will that names the joint trust as the beneficiary of the estate.

Joint trusts have not been traditionally used in common law states. More common is the practice of creating a separate trust for each spouse. In community property states, however, it has been common practice for many years to implement a revocable living trust estate plan for married couples by using a joint trust rather than a separate trust for each spouse. In community property states, joint trusts are favored because the spouses own undivided interests in the community property, but in common law states the uncertainty of gift tax consequences and the possibility of adverse estate tax consequences caused practitioners to favor separate trusts. The increase in the exemption from federal estate tax, and the wave of state legislation allowing tenancy by the entireties property (which has favorable creditor protection) to be placed into trust have made joint trusts more attractive in common law states. These materials address the advantages and disadvantages of joint trusts in both common law and community property states and provide drafting suggestions.

I. Reasons for Using the Joint Trust

A. Community Property States:

Various features of community property make the joint trust more convenient.

1. Item theory of Ownership. Most community property states follow the “item” theory of property ownership, which means that each spouse is considered to own an undivided one-half interest in each community property asset. It is therefore not possible for one spouse to place his or her one-half interest in community property in an individual trust.
2. **Management.** Although the rules of management of community property vary significantly among the community property states, the authority of spouses to manage community property falls within three categories: equal management powers (i.e., either spouse can manage a community asset unilaterally), joint management powers (i.e., both spouses are required to join in any management of certain assets), and exclusive management powers (only one spouse has authority over an asset). The authority will depend on the type of the asset and the particular managerial system in place in the state. It is possible for one spouse to place certain community property into a revocable trust as long as the spouse has either exclusive or equal management authority and the trust term is coexistent with the marriage, but one spouse could not dictate dispositive provisions for the other spouse’s one-half interest in community property upon the end of the relationship by death or divorce. Also, most states require joint action of the spouses for certain property, such as community real property. Therefore, the use of a revocable trust as a central estate planning document will require the participation of both spouses.

In *Hanley v. Most*, 9 Wn.2d 429, 115 P.2d 933 (1941), Mr. Hanley had controlling interests in a fish cannery and a gold mining company, which were community property. As he grew older, he wanted to give management authority to his younger partner Joe Most and transferred his stock in the businesses into a voting trust, giving Mr. Most the right to vote his shares. The trust had a term of the sooner of ten years or the death, incapacity or resignation of Mr. Most. Mrs. Hanley sued to set aside the voting trust. The applicable law at the time gave exclusive management control to the husband, but neither spouse could make a unilateral gift of community property or devise more than his or her one-half of the community. The court held that the establishment of the voting trust was within the husband’s management power, but conceded that the trust may be invalidated to the extent that the trust term extended beyond the lifetime of the husband.

In *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968), the husband placed property over which he had exclusive management power into a revocable trust. The trust property was essentially the entire community estate, and the trust provided that on the husband’s death, the wife would receive the income and discretionary distributions of principal. The trust further provided for disposition of the remaining assets on the death of the wife. The wife successfully withdrew her one-half of the property when her husband died, under an “illusory transfer” theory.
In Katz v. U.S., 382 F.2d 723 (9th Cir. 1967), the California husband placed property into a revocable trust and his wife executed a consent. Upon the death of the husband, the government asserted that the trust property was 100% includable in his estate, and the wife argued that the property was community property and therefore only one-half was includable. The court held that, assuming the property was community, transfer of the property into the revocable trust was merely an exercise of the husband’s management power rather than a conversion of the property into his separate property. The case was remanded to determine whether the property was in fact community.

3. Segregation of Assets. A married couple in a community property state potentially has three categories of assets: community property and each spouse’s separate property. However, if separate property is commingled with community property sufficiently that tracing cannot establish what proportion is separate property, then the commingled property becomes community property. A revocable trust is a convenient way for a couple to identify the assets in the three different buckets and keep them separate. The sample form attached contemplates a couple with separate as well as community property.

4. Migrating Couples. A revocable trust is often recommended as a way for couples moving from a community property state to a common law state to preserve the community property status of existing property. This is advantageous because of the double step-up in basis for community property available under IRC § 1014(b)(6), which would be lost if the community property nature is not preserved. See Rev. Rul. 68-80, 1968-1 C.B. 348 (New Mexico community property sold and proceeds used to buy Virginia real property as tenants in common was no longer community property for purposes of § 1014(b)(6) because of local law).

B. Common Law States:

1. Creditor Protection in States allowing Tenancy by Entirety property to be held in trust. Twenty-six states recognize some form of tenancy by the entirety. A list of the states is attached to these materials as Exhibit A. Tenancy by the entirety is a form of property ownership available only to married couples. Each spouse owns an undivided whole of the property, so neither spouse can dispose of any part of the property without the consent of the other. Tenancy by the entirety property includes a right of survivorship, so upon the death of
one spouse, the survivor owns the property. The critical aspect of tenancy by
the entirety for purposes of joint trusts is that creditors of an individual spouse
may not attach the interest of that spouse in tenancy by the entirety property.
If both spouses are liable on a debt, however, the creditor can reach the
property.

Traditionally, the creditor protection was lost if the property was divided and
placed into separate revocable trusts, and creditor protection was unclear if
tenancy by the entirety property was transferred to a joint trust. Case law did
not clarify that ambiguity. In Bolton Roofing Company, Inc. v. Hedrick, 701
S.W. 2d 183 (Mo. App. 1985), tenancy by the entireties property transferred
to a joint trust was held to be beyond the reach of a creditor of one of the
spouses. However, in Security Pacific Bank Washington v. Chang, 80 F.3d
1412 (9th Cir. 1996), the court criticized Bolton and allowed a creditor to reach
tenancy by the entirety property that had been transferred to two separate
trusts.

In 2001, Virginia became the first state to statutorily authorize “qualified
spousal trusts” that allowed tenancy by the entirety property to be transferred
to a revocable trust and retain creditor protection. Virginia Code § 55-20.2B
states:

Any property of a husband and wife that is held by them as tenants by the
entireties and conveyed to their joint revocable or irrevocable trusts, or to
their separate revocable or irrevocable trusts, shall have the same
immunity from the claims of their separate creditors as it would if it had
remained a tenancy by the entirety, so long as (i) they remain husband and
wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues
to be their property.

This statute raises questions, however, because it includes irrevocable trusts and
separate trusts, and requires that the property remain “their property” after transfer
to the trust.

In 2010, Delaware and Maryland passed statutes authorizing similar trusts, and
Indiana, Illinois, Missouri, Hawaii, Wyoming and Tennessee have now joined that
group. Cites to the relevant statutes are in Appendix B. The statutes vary, and
some of the states seem to restrict disposition on the first spouse’s death. All of
the statutes seem to allow (or are silent or unclear about) a disposition of the
deceased spouse’s assets other than a direct gift to the survivor. This is discussed
further below, but qualifies spousal trusts offer the overall revocable trust benefits over outright tenancy by the entirety ownership, such as probate avoidance and privacy, while continuing creditor protection.

In a Florida Bar Journal article in 2013, it was suggested that joint trusts funded with tenancy by the entireties property and containing a statement that “the parties intend to create a TBE interest for all property transferred to the trust” could, under Florida state common law, obtain the creditor protection. R. Craig Harrison, Trusts: TBE or Not TBE, Fla. Bar J. May, 2013, vol. 87 no. 5.

2. Facilitating Funding the Credit Shelter Trust Where One Spouse has Insufficient Assets. If the wealth is owned primarily by one of the spouses, before portability some reallocation of assets was necessary to ensure that the poorer spouse’s exemption would be used, if that spouse died first. Portability has solved this problem for some couples, but a credit shelter trust is frequently preferred over portability for various reasons. Reallocation to give the poorer spouse assets to fund a credit trust can be done by a direct transfer, but a joint trust with a general power of appointment held by the first to die would achieve the same result. The tax consequences of this planning are discussed below.

3. Simplification and Maintenance of Joint Ownership. With a joint trust, property held jointly by the spouses does not need to be split between two trusts. The couple’s perception of joint ownership is retained. The joint trust also simplifies the estate plan where the couple have a unified intention to benefit the survivor and the couple’s descendants.

4. One Caveat: Divorce. In many common law states, at divorce property of the couple is classified as “marital property” and “non-marital property.” Non-marital property is not subject to division and is awarded to the owner spouse. Contributing property that would be considered “non-marital” to a joint trust may muddy the characterization of the property if the couple later divorces.

II. Drafting the Joint Revocable Trust

A. Power to Amend or Revoke While Both Spouses Living. Spouses may prefer that any amendments or revocation require the joint action of the spouse, but that restriction may create gift tax issues. Although a trust funded with only
community property or otherwise jointly held property would not trigger a gift to either spouse, arguably the spouse with shorter life expectancy may be considered to be making a gift to the younger spouse. Treas. Reg. § 25.2511-2(b) states that a gift is complete if the donor has no power to change disposition of the property, and Reg. § 25.2522-2(e) provides that the donor is not considered to have retained the right to revoke if that right is exercisable jointly with a person who has a substantial adverse interest. If there was a gift from one spouse to the other, it would not qualify for the marital deduction because the donor spouse would receive an interest if he/she survived the donee spouse (thus making it a terminable interest), and the donee spouse’s interest would likely not qualify for the marital deduction as a qualified terminable interest because there is no right to all of the income. See IRC 2523(b).

For community property states, the Uniform Trust Code solves this issue by prescribing the following rule for revocation and amendment of a revocable trust holding community property:

If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor’s contribution;

UTC § 602(b). Regardless of whether this provision has been adopted in the state, the trust agreement should contain a comparable provision. Another approach is to give each spouse the power to revoke or amend unilaterally but only with respect to their community one-half. Of course, in practice this would be difficult to carry out because revocation by one spouse alone would take out one-half of each asset then held in the trust. If the trust is a California trust, a revocation provision in the agreement similar to the UTC provision is necessary to preserve the community nature of the assets. Ca. Fam. Code 761.

For common law states, a power consistent with UTC § 602(b)(2) should solve the gifting issue. In addition, PLR 200101021 (10/2/2000) illustrates another satisfactory approach. The trust in that ruling was a joint trust, funded by tenancy by the entirety property owned by the grantors. Either grantor had the right to amend the trust, and either grantor had the power to terminate. Upon termination,
the trust property was to be delivered to the grantors as tenants in common. The IRS concluded that the each grantor’s power to terminate and receive his or her property back meant it was not a completed gift. Reg. § 25.2511-2. Note, however, that in this case each grantor made an equal transfer of property. If one spouse transfers a larger amount of property to the trust, then each spouse must receive what they put in at termination in order to fit within the letter ruling. If the clients prefer that the property be distributed equally on termination even if not equally contributed, there will be a completed gift but that gift would qualify for the marital deduction (assuming the recipient spouse is a citizen) as long as either spouse could terminate. Reg. 25.2523(e)-1(f)(6). Therefore, the trust should provide that each spouse has the unilateral right to terminate the trust, and the distribution of the property upon termination should be spelled out in the agreement. See PLR 200210051; PLR 200403094.

Example: Spouses create a joint trust, funded with separately owned property of S1 valued at $500,000 and jointly owned property valued at $1.5 million. The trust agreement provides that either spouse acting alone has the unilateral right to revoke the trust during the joint lifetimes of the spouses, and upon such revocation the trust property would be distributed equally to each spouse. S1 contributed $1.25M to the trust ($500,000 plus one half of 1.5M), and S2 contributed $750,000. S1 would receive $1M if S2 revoked the trust during S1’s lifetime. S1 has therefore made a gift to S2 in the amount of $250,000. It is a completed gift upon funding of the trust, because S1 has given up the power to change disposition of half of S1’s separate property by exposing it to S2’s right to revoke. See Reg. 25.2511-2(e). The gift would qualify for the marital deduction, however, because S2 has a life estate with a power of appointment.

B. Distributions During Both Spouses’ Lives.

Any distribution to one spouse out of the other spouse’s separate share of the trust will be a completed gift to the recipient spouse but would qualify for the unlimited marital deduction.

C. Funding on the Death of the First Spouse.

1. Community Property State: On the death of the first spouse to die, the trust should be divided into two parts: the deceased spouse’s share of the community property (, plus any separate property of the deceased spouse and the deceased spouse’s share of any property added to the trust upon the
deceased spouse’s death (such as life insurance) would constitute one share; and the surviving spouse's share of the community property, plus the survivor’s separate property and the survivor’s share of any property added to the trust upon the deceased spouse’s death (such as the survivor’s community interest in life insurance) would make up the other share. The survivor’s share would then be placed into a separate trust share for the survivor, which would remain fully revocable and amendable by the survivor. The disposition of the deceased spouse’s share would depend on the tax planning appropriate for the couple. Generally, the agreement could be drafted to distribute the deceased trustor's share following the outright to spouse with a disclaimer trust plan, a Clayton-type plan, or a division into marital deduction and credit shelter portions.

The trust agreement must make clear that the survivor retains the right to revoke and amend the survivor's trust, in order to avoid a completed gift to the remainder beneficiaries of the survivor's share. In addition, there should be a direction that all taxes and expenses chargeable against the decedent's estate and debts of the decedent must be paid from the decedent's share to avoid a gift by the survivor to the remainder beneficiaries of the deceased trustor’s share.

One important caveat is to avoid the temptation to set up a trust from the deceased spouse's assets equal to the deceased spouse's remaining exemption equivalent amount and distribute the balance to the survivor's portion. This plan would be equivalent to a credit shelter trust with the marital portion being distributed outright to the spouse. This can be achieved in the joint trust, but distribution of the marital portion to the survivor's trust differs from an outright distribution to the survivor, even though the survivor's trust is fully revocable by the survivor, and may not be eligible for the marital deduction. If the intention is to end up with only a credit shelter trust and a survivor trust, or only a survivor trust with the possibility of a disclaimer trust, then either the survivor trust must qualify for the marital deduction or the gift is made to the spouse directly, who can then choose to place the deceased spouse's marital portion into the survivor trust. The typical distribution provisions of a revocable trust during the lifetime of the trustor may not qualify as a marital deduction trust, because they provide that the trustee distribute income and principal as the trustor directs, and during periods of the trustor's incapacity the trustee is directed to distribute income and principal sufficient for the trustor's support. The survivor trust provisions should, if funded with any of the decedent's share after the first death, either include a general power of
appointment or a requirement that all income be payable to the survivor and a prohibition against any distributions to persons other than the survivor, or other techniques to preserve the marital deduction.

In addition, the survivor’s ability to revoke or amend the survivor’s portion of the trust even if incapacitated should be protected. For example, the trust can provide that if the survivor is incapacitated, an attorney-in-fact for the trustor can exercise those powers. The UTC allows attorneys-in-fact to exercise revocation and amendment powers only if the trust agreement or power of attorney so provides, so specific language authorizing an attorney-in-fact should be included in the agreement.

2. **Common Law States.** As discussed above in the discussion on equalizing estates to fund the credit trust, the first spouse to die can be given a general power of appointment over all assets in the trust. If so, then all of the assets would be included in the first spouse’s estate, with no tax incurred, however, because of joint use of the exemption amount and the marital deduction. See PLR 200101021; TAM 93-08-002. However, care should be taken to preserve the eligibility for the marital deduction for the survivor’s trust that receives the marital deduction portion. See B.1 above. If a general power of appointment is NOT given to the first spouse, then care must be taken to fund the credit trust from the first spouse’s assets alone, or else section 2036 may cause inclusion of the credit trust in the second spouse’s estate. Tracing assets of the decedent spouse will also be necessary to claim a step up in basis if assets are sold during the survivor’s lifetime.

3. **Tax Clause.** Even though the joint revocable trust may be the principal estate planning document for the couple, the drafting lawyer should consider including the tax allocation clause and any waiver of liability for estate tax under IRC sections 2206 and 2207 in both the pourover Will and the revocable trust. Sections 2206 and 2207 both state “Unless the decedent directs otherwise in his will.” In some states, incorporation by reference is limited, so merely directing in the Will that tax liability is to be determined under the terms of the revocable trust may not be sufficient.

4. **How Not to Draft a Joint Trust.** In *Ike v. Doolittle*, 61 Cal. App. 4th 51, 70 Cal. Rptr.2d 887 (1998), the joint revocable trust at issue had an impressive number of drafting errors. First, the wife had significant separate assets, and the trust specified that the separate and community assets of the spouses retain
their character, but the spouses also signed an agreement the same day purporting to convert all of their property to community property. Next, the trust was to be divided on the death of the first spouse into Trust A (the survivor's trust) and Trust B (up to the unified credit amount available to the decedent). However, the revocation and amendment provision stated that after the death of the first Trustor, the survivor would have the power to revoke or amend "the Trust" rather than limiting the survivor's right to revoke or amend to the survivor's share of the trust. This threatened to include Trust B in the survivor's estate.

An additional error was a provision directing that Trust B (the credit shelter portion from decedent) be merged into Trust A (the survivor’s trust) upon the death of the survivor: “upon the death of the Surviving Trustor, Trust ‘B’ shall terminate and the undistributed net income and principal of Trust ‘B’ shall be merged with the undistributed net income and principal of Trust ‘A’...” Trust B was already includable in the Survivor’s estate because of the faulty revocation clause, but the merger clause presented an additional reason for inclusion in the survivor’s estate, since the survivor controlled the remaindermen of Trust A even if the revocation clause did not apply to Trust B.

The most problematic drafting error was in the provisions providing for distribution on the deaths of both Trustors. Mr. Ike and Mrs. Ike had different remainder beneficiaries that they intended to benefit. Mr. Ike had sons from a prior marriage whom he named as remainder beneficiaries and Mrs. Ike had 11 designated beneficiaries, including a nephew. She excluded several other family members who would be her intestate heirs. In the section directing distribution on the death of the surviving trustor, the agreement stated “If [Mr. Ike] is the Surviving Trustor,” his separate property and his one-half interest in the community shall be distributed to his sons, and it provided that if Mrs. Ike was the survivor, her separate property and her one-half of the community would be distributed to her 11 beneficiaries. This provision presented several problems. First, the trustors’ intention was that upon the death of the survivor, whoever that may be, Mr. Ike’s share of the property be distributed to his sons, and Mrs. Ike’s share be distributed to her named beneficiaries. Mr. Ike was the surviving trustor, so his sons were entitled to his share of the assets, but the trust agreement did not say who was to receive Mrs. Ike’s share of the assets. Also, at Mrs. Ike’s death, i.e, the first to die, the assets had been divided as follows: $600,000, which constituted all of her separate property and a portion of community sufficient to equal $600,000, was placed into
Trust B, the credit shelter trust. The remainder of the community property and Mr. Ike’s separate property (which was nominal) went into Trust A. It is unclear whether any of the community that went into Trust A had been part of Mrs. Ike’s share. However, the distribution language did not take into account that the property would no longer be identifiable as separate or community as of the survivor’s death.

And there was another problem: the trust agreement also contained a clause that gave any portion of the trust not disposed of to the “legal heirs of each Trustor.” It apparently did not specify how that would be divided between the two sides of the family. Based on this clause, the intestate heirs of Mrs. Ike had made claims to the assets. Fortunately, California law gave the court sufficient authority to reform the trust instrument to carry out the trustors’ actual intent.

III. Administration Issues.

A. During both Spouses’ Lifetimes. As discussed above, it is critical to keep the assets of each spouse labeled as such, so schedules should be kept up to date as assets are reinvested. As for assets held in the trust and jointly owned by the spouses, for K-1 purposes the name of the trustee and the SSN of one spouse is sufficient. An EIN for the trust can still be avoided. But see Reg. 1.671-4(b)(2)(i)(A), (b)(3) and (b)(8) if the spouses do not file jointly.

B. Double Step-up in Basis in Community Property Preserved After One Spouse Dies. Rev. Rul. 66-283, 1966-2 C.B. 297 clarified that community property transferred into a revocable trust by a married couple retains its community character for purposes of IRC § 1014(b)(6). One-half of the assets were includable in the first spouse’s estate, and the assets in the trust received the double step-up in basis.

C. Controversy over Step-up in Basis through GPA Upon Death of First Spouse. Some commentators argue that if the first spouse to die has a general power of appointment over all of the assets in the trust, then to the extent that the trust property passes to a credit shelter trust the assets would receive a step-up in basis because the assets were included in the decedent’s estate. Section 1014(e), however, provides that property acquired by the decedent within 1 year of death that passes to the donor from the decedent does not get the step-up. The commentators do not believe this section applies because the property does not return to the donor (the surviving spouse) because it goes instead to the credit
trust. The IRS has disagreed. TAM 93-08-002. PLR 90-26036 (Mar. 28, 1990); PLR 200101021; PLR 200210051.

For the trust in the example above (unilateral revocation power resulting in equal division of assets), then a step up in basis could arguably be available for $250,000 of S1’s assets if S2 dies first, because of the completed gift on funding of the trust. This could be a method of equalizing estates and getting a full step up for half the couple’s assets without having to make outright gifts.

D. Amendments to Survivor’s Trust. Frequently, upon the death of the first trustor, the survivor chooses to amend his or her portion of the trust. In some cases, it may be as a result of the survivor’s decision to treat the children differently than the original plan contemplated. If the survivor remarries, it is likely the survivor will want to make provision for the new spouse. Having the assets in the revocable trusts helps in the remarriage setting to keep the assets segregated, but the amendments to the original joint trust can become cumbersome.

The case of Manary v. Anderson, 176 Wn.2d 342, 292 P.3d 96 (2013), illustrates the problems that can be encountered if a revocable trust is not properly administered after the death of the first spouse. Mr. and Mrs. Greene established a joint revocable trust and transferred their community property residence into the trust. The trust provided that upon the death of the first spouse, the trust estate would be divided, the deceased spouse’s share would be placed in the “Family Trust,” which would be irrevocable, and the survivor’s one-half would be placed in the revocable Survivor’s Trust. Mrs. Greene died, but Mr. Greene as successor sole trustee did not create the two separate trust shares. He amended the trust to replace the original remaindermen with his sister. A longtime family friend, Mr. Anderson, then became Mr. Greene’s “companion and caretaker,” and Mr. Greene executed a Will leaving the residence to Mr. Anderson. He did not refer to the trust in his Will or acknowledge that the residence was held in the trust. After Mr. Greene died, Mr. Anderson was appointed executor of the estate and he took possession of the residence. Mr. Greene’s sister sued Mr. Anderson, claiming she was entitled to the residence as remainder beneficiary of the trust. The gift in the Will would not be recognized as a valid trust amendment but Mr. Anderson claimed that the gift in the Will was valid under the Washington Superwill statute. That statute, RCW 11.11, allows a testator to change the beneficiary of certain types of nonprobate assets in a later-executed Will. The Washington supreme court held that Mr. Greene’s interest in the trust was a nonprobate asset within the meaning of the Superwill statute, and that he had met the requirements of the statute, so Mr. Anderson was entitled to Mr. Greene’s interest in the residence.
The court did not directly address who was entitled to Mrs. Greene’s one-half interest in the residence but implied that the decision applied only to Mr. Greene’s interest. Apparently the original remaindermen, who would be entitled to the one-half portion directed to be placed in the irrevocable portion upon the first spouse’s death, were not party to this lawsuit, although the caption identified “unknown John Does 1-5” as additional defendants.

Appendix A: Bibliography

Howard Zaritsky, Revocable Inter Vivos Trusts 860 T.M. (with forms).

California Legal Forms: Transaction Guide ch. 70 (includes forms; available on LEXIS)


Beth A. Turner, Joint Revocable Trusts: New Flexibility in an Old Form, 19 Probate & Property 48 (July/Aug 2005).


## APPENDIX B

**List of Tenancy by the Entirety States and Qualified Spousal Trust states**

*Note: the link to a more complete chart, prepared by Robert Kirkland, is listed in Appendix A*

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<td>Virginia</td>
<td>yes</td>
<td>Va. Code Ann. § 55-20.2</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Yes</td>
<td>W.S. 4-10-402(c)-(e)</td>
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APPENDIX C
REVOCABLE LIVING TRUST FOR MARRIED COUPLE – ALL COMMUNITY PROPERTY (ONE-LUNG QTIP-ABLE TRUST)

[This form is intended for illustration purposes only. In making use of this form, you are responsible for the form’s applicability, validity and tax and nontax consequences.]

[Please note that this form contemplates the share of the first spouse to die to be placed into a trust eligible for the QTIP election, with the intention that a determination of what portion, if any, of the trust will be subject to such election to be made at the death of the first to die, taking into account the size of the estate, the DSUE amount, state estate tax considerations, and other considerations. Note that Rev. Proc. 2001-38 indicated, in very different circumstances, that a QTIP election would be disregarded if not necessary to reduce estate taxes in the first spouse’s death.]

THIS IS AN AGREEMENT between [**] [****] and [***] [****] ("Trustors") and [**] [****] and [***] [****] ("Trustee").

1. **TRUST ASSETS.** Trustors have transferred, or intend to transfer soon, to the Trustee the property described on Schedule A, which is attached hereto and incorporated herein by this reference. This property constitutes community property of the Trustors. It, together with other property which hereafter may be added to this trust, shall be administered and distributed by the Trustee as hereinafter provided. This trust shall be known as the "[**] and [***] [****] Revocable Living Trust."

2. **DEFINITIONS.**
2.1 **Trustors.** The first Trustor to die is hereafter called "the Deceased Trustor." The surviving Trustor is called "the Survivor."

2.2 **Gender and Number.** Unless the context otherwise requires, wherever herein the masculine or feminine form is used and wherever the singular or plural form is used, it shall be deemed to include the other. Wherever used herein in the singular or plural, the words "child," "descendant" and any words of like import, shall be deemed to include persons now or hereafter born and persons now or hereafter adopted.

2.3 **Incapacity.** As used herein, the term "incapacity" with respect to a Trustor or Trustee means that such person is unable to manage his or her financial affairs, whether because of physical or mental condition, or for any other reason. The determination with respect to incapacity shall be made in writing by such individual's spouse, if available, and such individual's regular attending physician.

2.4 **Survivorship.** As used herein, the term "survive" means living for 90 days following the death of the person in question.

3. **DISTRIBUTION DURING TRUSTORS' LIVES.** So long as both Trustors are living, the Trustee shall distribute to Trustors so much of the net income and principal of the trust as either Trustor directs. During any period in which either Trustor is incapacitated, the Trustee shall distribute for the benefit of the Trustors so much of the net income and principal of the trust as the other Trustor directs. During any period in which both Trustors are incapacitated, the Trustee shall distribute for the benefit of the Trustors, or either of them, so much of the net income and principal of the trust as the Trustee deems
appropriate for the Trustors' health, support and comfort, and for the health, support and comfort of any person dependent upon them.

4. **DISTRIBUTION AT DEATH OF A TRUSTOR.** Upon the death of the first of the Trustors to die, the Trustee shall divide the trust assets into two equal shares. One share shall be combined with (a) assets subsequently added to the trust by the terms of the Deceased Trustor's Will, and (b) the Deceased Trustor's interest in other assets added to the trust by virtue of his or her death. These combined assets (hereinafter collectively referred to as the "Deceased Trustor's assets") shall be distributed as provided in sections 5.2 below. The other share shall be combined with the remaining assets added to the trust by virtue of the Deceased Trustor's death (hereinafter the "Survivor's assets"), and shall be distributed as provided in section 5.1 below.

5.1 **Survivor's Trust.** The Survivor's assets shall be held in a separate trust known as the "Survivor's Trust." The Trustee shall distribute for the benefit of the Survivor so much of the net income and principal of this trust as the Survivor shall direct. The Survivor may at any time after the death of the Deceased Trustor add assets to this trust. During any period in which the Survivor is incapacitated, the Trustee shall distribute for his or her benefit so much of the net income and principal of this trust as the Trustee deems appropriate for the Survivor's support in his or her accustomed manner of living, and shall distribute to the Survivor so much of the net income and principal of this trust as the Survivor’s attorney-in-fact may direct, provided that the attorney-in-fact is authorized under the power of attorney to direct such distributions. Upon the death of the Survivor, the Trustee shall distribute the remaining assets of this trust as provided in Article 7 below.
5.2 **Residuary Trust.** The Deceased Trustor's assets shall be held in a separate trust, to be known as the "Residuary Trust," and shall be administered and distributed as follows:

5.2.1 **Distribution During Survivor's Life.**

The Trustee shall distribute to the Survivor all of the net income of the Residuary Trust, at least annually, including all of the net income from the Deceased Trustor's assets accumulated from the date of his or her death.

If such net income is not sufficient to provide for the health, support, and maintenance of the Survivor, the Trustee shall distribute to or for the benefit of Survivor such portions of the principal of the Residuary Trust as the Trustee, in the Trustee's discretion, deems appropriate for such purposes.

5.2.2 **Limited Power of Appointment.** The Survivor shall have a limited power to appoint the principal of this trust, by written instrument during his or her lifetime or by specific reference to this power in his or her Will upon his or her death, to Trustors' descendants, equally or unequally, outright or in trust, on such terms and in such amounts as the Survivor shall determine.

5.2.3 **Qualification for Marital Deduction.** In the event that the Personal Representative of the Deceased Trustor’s estate or the Trustee hereof elects the marital deduction be allowed for federal estate tax purposes for only a portion of the property placed in this Residuary Trust, then the trustee shall divide the Residuary Trust into separate shares: one share with the property to which no marital deduction election has been made, and the other share with the property to which a marital deduction
election has been made. The separate shares shall be held and administered as separate trusts, but may be managed and invested as separate shares of a single trust, to be held, administered and distributed as herein directed. To the extent the Personal Representative of the Deceased Trustor's estate or the Trustee hereof elects the marital deduction allowed for federal estate tax purposes, the assets distributed to the Residuary Trust shall be only those which qualify therefor. The powers and discretions of the Personal Representative and Trustee with respect to the administration of this trust shall not be exercised except in a manner consistent with such election.

5.3 **Remainder.** Upon the Survivor's death and to the extent he or she has not exercised the power of appointment given to him or her above, the remainder of the Residuary Trust shall be distributed to the Trustee of the Descendants' Trust established in Article 7 below to be administered and distributed as provided therein; provided, unless the Survivor's Will directs otherwise, the Trustee shall pay from the Residuary Trust to the Personal Representative of the Survivor's estate the amount of the increase in all death taxes payable by reason of the Survivor's death which results from the inclusion of any assets of the Residuary Trust in the Survivor's estate for such tax purposes.

5.4 **Taxes.** The Trustee shall pay out of the principal of the Residuary Trust all estate or other death taxes, together with interest and penalties thereon, assessed by reason of the Deceased Trustor's death (hereinafter "the death taxes") whether attributable to property passing under this Trust or outside it, without proration among the beneficiaries of the trust; provided, to the extent such payment of the death taxes from the
Residuary Trust would increase the amount of the death taxes, they shall be paid first from that portion of the Residuary Trust that has not.

5.6 Debts and Expenses. The Trustee shall pay all of the Deceased Trustor's debts, funeral expenses, administration expenses and expenses of last illness first from the principal of the Residuary Trust.

6. DEATH OF THE SURVIVOR. Upon the death of the Survivor, from the then remaining assets of the Survivor's Trust the Trustee shall pay the Survivor's debts, funeral expenses, administration expenses and expenses of last illness, and all death taxes, together with interest and penalties thereon, assessed by reason of the Survivor's death, whether attributable to property passing under this trust or outside it (other than death taxes paid pursuant to section 5.2.4. above), without proration among the beneficiaries of the trust. After the foregoing payments, the Trustee shall distribute the remaining assets in the Survivor's Trust to the Trustee of the Descendants' Trust established under Article 7 below, to be administered and distributed as provided therein.

7. DESCENDANTS' TRUST. The assets distributed to the Descendants' Trust as provided above shall be held, administered and distributed as follows:

7.1 Division into Shares. The Trustee shall divide the assets distributed to this trust estate into equal shares, as follows: one share for each then living child of Trustors and one share in the name of each then deceased child of the Trustors with any descendant then living. Each trust share so created shall be administered and distributed as provide in this Article 7.
7.2 **Outright Distribution to Surviving Children.** The share for each of Trustor’s Children who survives the Survivor shall be distributed outright to each such child.

7.3 **Distribution to Descendants of Deceased Child.** With respect to the share for any child of Trustors who either dies before the division of the trust estate into shares as provided in section 7.1 above, leaving any living descendant, or dies before complete distribution of such deceased child’s trust share leaving any living descendant, the Trustee shall distribute the remaining portion of such deceased child’s share to or in trust for the benefit of such person or persons among my descendants and their spouses, including such deceased child’s own spouse, in such manner as such child appoints by will, specifically referring to this power of appointment. In default of such appointment, the remaining portion of such child’s trust share shall be distributed to her descendants by right of representation; provided, however, that if any such descendant is then under the age of 25 such property shall be held in trust by the Trustee until such descendant reaches the age of 25, when one-half of the trust shall be distributed to him. The remaining assets of the trust shall be distributed outright and free of trust, when the descendant reaches the age of 30 years. While such share is being held in trust, the Trustee shall use so much of the net income and principal for such descendant’s support, health and education as the Trustee deems appropriate for those purposes when taking into account all other resources available to the beneficiary. The assets of this trust are not to be used to assist anyone who is legally obligated to support any beneficiary in this trust. The Trustee shall add to principal any annual net income not so used. In the alternative, the Trustee may distribute said descendant’s trust share to a custodian selected by the Trustee for the...
benefit of such descendant under the Uniform Transfers to Minors Act, or similar legislation, of any state. If any such descendant should die before reaching the age of 30 years, any part then so held by the trustee shall be distributed to his estate.

8. **ADMINISTRATION.**

8.1 **Trustee's Powers.** The Trustee shall have all rights, powers and duties given by law, including those set forth in the Washington Trust Act (currently codified in RCW 11.88). In addition, the Trustee shall have full power and authority to:

A. Retain so long as the Trustee deems advisable, without liability for so doing, any assets received by the Trustee from any source (other than through investment or reinvestment by the Trustee), regardless of whether the property so retained be of a kind and quality which the Trustee would ordinarily purchase for trust accounts, and regardless of whether the property so retained constitutes a larger proportion of the trust estate than would ordinarily be advisable; provided, to the extent a marital deduction has been claimed and allowed for federal estate tax purposes with respect to unproductive property interests in any trust established hereunder, if the Survivor so requests, the Trustee shall divest the trust of such assets or make such assets productive;

C. Determine what is principal or income, and what charges are allocable to either, which authority shall specifically include the right to make any adjustments between principal and income for premiums, discounts, depreciation or depletion. In making such determinations the Trustee may, but shall not be required to, apply the Washington Principal and Income Act; provided, to the extent a marital deduction has been claimed and allowed for federal estate tax purposes with respect to
property interests in the Residuary Trust, the Trustee shall not allocate any receipt to principal or any expense to income if such allocation would result in the Survivor receiving less than all of the net income to which the Survivor would be entitled under any applicable rule of law;

D. Employ agents and attorneys in and about the execution of this trust without liability for their omissions or neglect, but using reasonable care in their selection, and to rely with acquittance on advice of such attorneys;

E. Borrow money with or without security and to repay any such borrowings;

F. Acquire, sell, manage, invest and reinvest the trust assets as the Trustee shall determine to be prudent under circumstances then prevailing, but without being limited in the character of investments by any statutory or other governmental limitation on the investment of trust funds;

G. Hold any property, real or personal, in the Trustee's name or in the name of a nominee or in such other form as the Trustee deems best, without disclosing the trust relationship;

H. Buy, sell and trade securities, commodities or commodity futures, securities options, puts and calls, and other securities or similar assets on margin or otherwise; and

I. Guarantee debts and obligations of the Trustors and pledge assets of the trust as security for payment of any debts or obligations of the Trustors.
8.2 **Accrued Income.** Income accrued or unpaid on trust property when received into the trust estate shall be treated as any other income. Income accrued or held undistributed by the Trustee at the termination of any interest or estate under this Trust shall be distributed to the beneficiaries entitled to the next eventual interest in the proportion in which they take such interest; provided, to the extent a marital deduction has been claimed and allowed with respect to property interests qualifying for the marital deduction for federal estate tax purposes, any accrued or unpaid income on such property interests shall be paid to the Survivor’s estate.

8.3 **Restraint on Alienation.** No interest in any portion of the trust estate shall vest in any beneficiary until actual payment to such beneficiary by the Trustee, and no part thereof shall be liable for the debts of any beneficiary or be subject to the right on the part of any creditor of any beneficiary to reach the same by any proceeding at law or in equity. No beneficiary shall have any power to dispose of, encumber, or anticipate any portion of said trust estate.

8.4 **Consideration of Other Resources.** The Trustee, in exercising the discretion granted in making payments hereunder, may take into consideration the reasonable use of all resources known by the Trustee to be available to or for the use of the respective beneficiary. The Trustee may request and rely upon a signed statement from such beneficiary or his or her parent or guardian, satisfactory to the Trustee, as to such resources, and may, in the Trustee’s sole discretion, suspend benefits hereunder for such beneficiary during any period in which a requested statement is not furnished.
8.5 **Selection and Distribution of Assets.** The Trustee alone shall select the assets for distribution from the trust to the trusts herein established. The Trustee's decision shall be final and conclusive; provided, to the extent the Deceased Trustor's Personal Representative or the Trustee hereof has claimed a marital deduction for federal estate tax purposes, the Trustee shall not distribute to the trust for which such deduction is being claimed any assets with respect to which no such deduction is allowable for federal estate tax purposes. All such assets shall be allocated to the Credit Bypass Trust, irrespective of whether such allocation would exceed the amount of the distribution specified in section 5.2 above. Upon the termination of any interest in any trust created herein, the Trustee may distribute assets in kind, including undivided interests therein, and may do so without regard to the income tax basis of specific property allocated to any beneficiary (including any trust). The Trustee shall not be required to distribute assets of the trust estate, or interests therein, pro rata to the beneficiaries receiving such distribution, but may, in the exercise of the Trustee's discretion, make non-pro rata distributions so long as the respective distributees receive assets of equal value.

8.6 **Significant Non-Routine Transactions.** The Trustee of any trust herein established is hereby relieved from the duties to obtain an independent appraisal and to sell in an open market transaction, as might otherwise be required by law or by the provisions of RCW 11.80.140, as amended; provided, the Trustee shall comply with the other requirements of such statute.

8.7 **Consolidation of Trusts.** If the Trustee is at any time holding property in trust for the benefit of any beneficiary named herein under terms substantially
similar to the terms of any trust created by any other person, the Trustee is authorized, in the Trustee's sole discretion, to consolidate this trust and such other trust, and to administer them as a single trust.

8.8 Division Into Shares. Wherever it is provided in this trust that a trust estate shall be divided into separate shares, each such share shall be considered a separate trust. The Trustee shall not be required to make physical segregation of the assets to effectuate such division.

8.9 Accounting. To the extent permitted by law, the Trustee of any trust herein established shall be relieved from the provisions of the Trustee's Accounting Act of the State of Washington, any successor statute of similar import, and/or any amendments thereto. The Trustee's books and records shall be available for reasonable examination by the beneficiaries of any trust, however, during all business hours, and the Trustee shall render statements of account, at least annually, to the beneficiaries then currently entitled to receive income distributions from the trust.

8.10 Successor Trustee.

A. If either [**] [***] or [***] [****] fails or ceases to serve as Trustee of any trust herein established, the other of them shall serve as sole Trustee. If at any time [**] [***] or [***] [****] is serving as sole Trustee of any trust herein established, he or she may request that _____________ and/or a corporate Trustee serve as Co-Trustee or as Successor Trustee. If a Co-Trustee is serving as Trustee of any trust herein established at the time of the Survivor's death, such Trustee shall serve as sole
Trustee. If at any time there would otherwise be a vacancy in the position of Trustee of any trust herein established, then ___________________ shall serve as Trustee.

B. If at any time a corporate Trustee is serving, such Trustee may be removed without court proceedings by delivery to it of a written notice of removal signed by a majority of the beneficiaries who are then income beneficiaries of the trust. Upon the removal or the resignation of a corporate Trustee, the majority of the then income beneficiaries shall without court proceedings select a successor corporate Trustee. For this purpose, the Guardian of a beneficiary under a disability shall be entitled to act on behalf of such beneficiary.

C. A Co-Trustee or Successor Trustee may accept a predecessor's accounting without independent review or audit, and shall not be liable for any loss sustained during or attributable to the period in which a predecessor served as Trustee.

8.11 Separate Trusts. Notwithstanding any other provision of this Trust Agreement, if property which is not exempt for federal generation-skipping tax purposes ("non-exempt property") is directed to be included with property that is exempt for such purposes in one trust, or if nonexempt property is directed to be added to a trust that is exempt for such purposes, the Trustee may instead administer the nonexempt property as a separate trust with provisions identical to the exempt trust or may create a separate share within such trust for the nonexempt property.

9. PROTECTION OF ESTATES.

9.1 Purchase of Assets. The Trustee is authorized, if in the Trustee's judgment it would be in the best interest of the beneficiaries of the Trust, to purchase from the
Personal Representative of the estate of either Trustor, and retain as an investment, securities or other property in said estate; and the Trustee is authorized to make loans or advancements, secured or unsecured, to such Personal Representative, even though the Trustee is also the Personal Representative.

9.2 Collection of Intangibles. If either Trustor has no probate estate, the Trustee is authorized to apply for or demand, and to receive, administer and distribute as provided herein any debt, claim, refund, premium, dividend, or other thing of value to which the deceased Trustor's successor is entitled.

10 POWER TO AMEND OR REVOKE. Either of Trustors, during their joint lives, may at any time revoke this Agreement in whole or in part. Each Trustor, during his or her lifetime, shall have the power to amend this Agreement; provided such amendment shall affect only his or her own share of the community property in the trust. Following the death of the Deceased Trustor, the Survivor shall have the power to amend or revoke the Survivor's Trust. In all such instances, such amendment or revocation must be made by written instrument delivered to the Trustee or by specific reference to this trust in said Trustor's Will.

DATED: _________________, 20--.

__________________________________________
, TRUSTOR

__________________________________________
, TRUSTOR

TRUSTEE:
APPENDIX D
SAMPLE PROVISIONS FOR JOINT TRUST IN COMMON LAW STATE

I. Right to Amend or Revoke:

1. During Joint Lifetimes:
   a. Right to amend: while we are both living, this instrument may be amended by a written instrument signed by both of us, referring to this instrument and delivered to the trustee.
   
   b. Right to Revoke: While we are both living, this instrument may be revoked by a written instrument signed by either of us, referring to this instrument and delivered to the other and to the trustee. On revocation, the trustee shall deliver the trust property to us as joint tenants with right of survivorship. The trust property shall retain its character as marital property.

2. After Death of first to die: After the death of the first of us to die, the surviving spouse may amend or revoke the Survivor’s Trust at any time by written instrument signed by the surviving spouse, referring to this instrument and delivered to the trustee. If the surviving spouse revokes the Survivor’s Trust, the trustee shall deliver the assets of such trust to the surviving spouse or as the surviving spouse directs.

II. General Power of Appointment:

On the death of the first of Trustor’s to die (such person hereinafter being referred to as the “deceased spouse”), any power of revocation or termination shall cease and the trustee shall distribute the Lifetime Trust [define it to mean all of the property then in the joint trust] to any one or more persons or organizations (including the deceased spouse’s estate) as the deceased spouse appoints by will, specifically referring to this general power of appointment. A testamentary power of appointment granted under this instrument may be exercised only by a will specifically referring to the power. The appointment may be either outright or subject to such trusts and conditions as the holder of the power designates. The holder of the power may grant further powers of appointment to any person to whom principal may be appointed. In determining whether a testamentary power of appointment has been exercised, the trustee may rely on an instrument admitted to probate in any jurisdiction as the will of the holder of the power or may assume the power of appointment was not exercised in the absence of actual notice of the holder’s will within three months after the holder’s death.
SCHEDULE A

REVOCABLE LIVING TRUST