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Creation of Trust* Product Details

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§5.1 I. ELEMENTS OF A TRUST

A revocable trust can be created by agreement, declaration, or exercise of a power of appointment. Prob C §15200. The essential elements of a trust are the following:

- A settlor (the owner of the property that will be subject to the trust) (Prob C §15200);
- The settlor's intent to create a trust (Prob C §15201);
- Trust property (Prob C §15202);
- A trust beneficiary (Prob C §15205); and
- A valid trust purpose (Prob C §§15203–15204).

A trust in relation to real property usually must be evidenced by a writing. Prob C §15206. In California, a trust may not be effective to accomplish its stated purposes if a beneficiary is a “disqualified

person” and there is a failure to obtain a certificate of independent review. Under Prob C §§21350–21351 the primary categories of “disqualified persons” are (1) drafters of donative transfer documents and persons closely associated with the drafters, and (2) a care custodian of a transferor who is a dependent adult. See §5.18A. For a discussion of the potential consequences of naming a “disqualified person” as a trustee, see §§5.14–5.15.

A settlor may be referred to as a “grantor” or “trustor.” “Settlor” is used in this book in conformity with the California Probate Code, Uniform Trust Code §103(14), and Restatement (Third) of Trusts §3 (2003).

§5.2 A. Trust Intent

A trust is created only if the settlor demonstrates an intent to create a trust. Prob C §15201. Generally, this is not an issue with express trusts as long as the trust document contains a schedule of initial trust property. See §5.38. However, problems frequently arise concerning possible subsequent revocation of a trust with respect to property not titled in the name of the trust or otherwise clearly shown to be trust property. Similarly, problems may arise when a settlor fails to transfer after-acquired property to a trust.

This book does not cover either resulting or constructive trusts. A resulting trust is one in which the settlor’s intent to create a trust is implied by law rather than expressly stated. The trust intent in a constructive trust is imposed by law regardless of actual intent. *Wells Fargo Bank v Greuner* (1964) 226 CA2d 454, 460, 38 CR 132. See CC §§2223–2225.

§5.3 B. Trust Property

No trust is created until there is an interest in property that is subject to the trust, although the interest can be a future interest. Prob C §15202. If a trust document is executed but no property is immediately made subject to the trust, the trust will come into existence when the property is later transferred to the trust. See Restatement (Second) of Trusts §26, Comment i (1959); Restatement (Third) of Trusts §16, Comment b (2003).

NOTE• The typical revocable trust comes into existence immediately on execution because it identifies trust property, declaring it to be subject to the trust (if the settlor is the trustee) or transferring it to the trustee (in the case of a third party trustee). See forms in §§5.19, 5.37. Some revocable trusts are not funded until death. Although it is common in such cases to see such a trust recite the

existence of a nominal and fictitious trust asset, such as \$100, this is unnecessary. See, *e.g.*, Prob C §§6300, 6321, 15200(c) (transfer to trust or trustee effective on settlor's death).

Any real or personal property or any legal or equitable interest can be held in trust if it constitutes a property interest and can be voluntarily transferred by its owner. See Restatement (Third) §§40–41. The property interest may be intangible, equitable, or even contingent, but it may not be a mere expectancy. See CC §§700, 1045. See also 13 Witkin, Summary of California Law, Trusts §31 (10th ed 2005). An interest may be held in trust even if it is subject to being divested. See *Wallace v Riley* (1937) 23 CA2d 654, 666, 74 P2d 807, disapproved on other grounds in *Estate of Propst* (1990) 50 C3d 448, 268 CR 114.

C. Beneficiary of Trust

§5.4 1. Definite Beneficiary Required

A trust fails unless there is a beneficiary or class of beneficiaries whose identity is ascertainable with reasonable certainty. Prob C §15205(b)(1). See *Chang v Redding Bank of Commerce* (1994) 29 CA4th 673, 35 CR2d 64. See also 2 Scott & Ascher on Trusts §12.10 (5th ed 2006). This requirement does not apply to charitable trusts. Prob C §15205(a). The trustee's (or other individual's) discretion to decide which members of a class of beneficiaries will take and in what proportions does not violate the requirement of definite beneficiaries as long as the class is sufficiently identified and its membership is definite. Prob C §15205(b)(2). See 2 Scott on Trusts §12.7. See §§19.10–19.11 on perpetuities savings clause.

NOTE• When the same person is sole trustee and sole beneficiary, legal and equitable titles are merged, and no trust is created. Restatement (Third) of Trusts §69 (2003). See *Nellis v Rickard* (1901) 133 C 617, 66 P 32; *Hill v Conover* (1961) 191 CA2d 171, 12 CR 522. No merger occurs, however, when the settlor is the sole trustee and sole beneficiary during his or her lifetime as long as the trust provides for one or more successor beneficiaries after the settlor's death. Prob C §15209. See Restatement §32, Comment b.

§5.5 2. Charitable Beneficiaries

Charitable beneficiaries are usually churches, arts organizations, schools, hospitals, civil rights organizations, and other institutions that serve the general social welfare of the community at large. The

requirement of definiteness (see §5.4) does not apply to charitable beneficiaries. *Estate of Bunn* (1949) 33 C2d 897, 206 P2d 635; *Fay v Howe* (1902) 136 C 599, 69 P 423. For definitions of charities for tax purposes, see IRC §§170(c) (income tax), 2055(a) (estate tax), 2522(a) (gift tax).

The attorney should describe charitable beneficiaries (or the person, including the trustee, who may designate the beneficiaries) and purposes as specifically and unambiguously as possible. Because many charities have similar names, the attorney should be careful in designating the charity selected by the settlor. To ascertain the charity's proper name, the attorney may:

- Refer to the settlor's receipt for past contributions or membership card;
- Call the charity to verify the correct designation;
- Refer to a copy of the charity's federal tax exemption letter; or
- Consult IRS Pub 78, Cumulative List of Organizations described in §170(c) of the Internal Revenue Code of 1986. If the charity has local as well as state and national chapters, the attorney should ask the settlor which chapter to designate as beneficiary.

WARNING• Great care must be exercised in drafting any trust that has both charitable and noncharitable beneficiaries if the settlor wants any part of the trust to qualify for a charitable deduction for federal estate tax purposes under IRC §2055. See chap 4.

§5.6 D. Valid Trust Purpose

A trust must have a purpose that is neither illegal nor against public policy. Prob C §15203. For instance, trusts that encourage divorce or defraud creditors will not be enforced. However, a trust for the care of a domestic or pet animal is for a lawful noncharitable purpose. Prob C §15212. For a complete discussion of invalid trust purposes, see 2 Scott & Ascher on Trusts §§9.2–9.8 (5th ed 2006); Restatement (Third) of Trusts §§28–29 (2003). See also 13 Witkin, Summary of California Law, *Trusts* §36 (10th ed 2005).

Probate Code §15204 states that a trust with an indefinite purpose is not invalid “if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose.” Section 15204 particularly applies to a trust with indefinite purposes that are not exclusively charitable. See Cal L Rev'n Comm'n Comment to Prob C §15204. A trust with wholly indefinite purposes will not be enforced under §15204. See, e.g., *Estate of Ralston* (1934) 1 C2d 724,

37 P2d 76 (devise to person “in trust” to distribute “as he may see fit” did not establish valid trust).

E. Trustee of Trust

§5.7 1. Naming Original Trustee

One of the most important decisions the settlor must make is the selection of the trustee. This decision is particularly significant when the trustee will be given broad discretionary powers. See chap 16. On selecting a trustee, see §§5.8–5.18.

The trustee holds legal title to trust assets and has a duty to deal with those assets for the benefit of the trust beneficiaries. Prob C §16000. Essentially, the trustee manages the trust property for the benefit of the persons whom the settlor has chosen as beneficiaries. The trustee’s duty is to fulfill the settlor’s purpose in creating the trust.

For a full discussion of the trustee’s duties and powers, see chap 17.

§5.8 2. Individual Trustee

In general, any adult who has the capacity to acquire title to property and to enter into contracts may be a trustee. See *Wallace v Riley* (1937) 23 CA2d 654, 74 P2d 807, disapproved on other grounds in *Estate of Propst* (1990) 50 C3d 448, 268 CR 114. Typically, the settlor is the original trustee of a revocable trust. See §5.10. If the settlor is in poor health, then a relative, friend, professional trustee, or corporation may be the trustee. Some settlors prefer the personal relationship between trustee and beneficiary that exists when a family friend or relative acts as the fiduciary. Disadvantages of individual trustees are the potential for the individual to lose interest or feel overly burdened as time passes after the death of the settlor, the unwillingness of the surviving spouse or domestic partner or other beneficiaries to hold a family friend or relative accountable, and the individual trustee’s own mortality.

Because individuals cannot provide the permanence of institutional trustees, a trust naming an individual as trustee should name or provide for designation of a cotrustee or one or more successor trustees (see chap 16) if the individual trustee becomes incompetent or dies before the termination of the trust. See forms in §§5.19, 5.37.

The settlor should carefully consider the proposed trustee’s ability to comply with reporting, recordkeeping, and ongoing administrative requirements, as discussed in chap 17. Delegating these administrative details to an individual who lacks the training or temperament to observe formalities and maintain records is a potential source of trouble. Formalities must be observed and records maintained in order

for administration to be transferred smoothly when a settlor dies. If these steps are not taken, finding a responsible successor trustee may be impossible or unduly expensive. Using a professional trustee from the outset may be advisable to assure proper administration, even though this increases the trust expenses during the settlor's lifetime.

§5.9 3. Corporate Trustee

Settlors may choose a corporate trustee, such as a bank or trust company. A corporation or an association (*e.g.*, a bank or a trust company) authorized to conduct a trust business in California may act as trustee in the same manner as an individual, but is not required to register with the Statewide Registry of conservators, guardians, and trustees. See Prob C §§83 (defining "trust company"), 300 (trust company may be appointed trustee), 2850(b) (nonprofit charitable corporation acting as private professional trustee under Prob C §2341(c) subject to registration requirement), 2854(f)(1) (trust companies exempted from registration requirement). See also Fin C §§106–107, 1580. No foreign corporation or association, except a national banking association or foreign (other state) state bank authorized to do trust business in California, may act as a trustee. Fin C §1503. A nonprofit corporation may act as a trustee when the trust is incidental to the corporation's principal objectives. Corp C §5140(k). Whether a California corporate fiduciary may deal with out-of-state real property depends on the law of the state in question. Often, corporate fiduciaries are unwilling to administer out-of-state real property because they thereby become subject to service of process on all matters in that state.

The advantages of having a corporate trustee are permanence, continuity of administration, professional management (and a likely greater understanding of the rules of the Uniform Prudent Investor Act (UPIA) (Prob C §§16045–16054) and the Uniform Principal and Income Act (UPAIA) (Prob C §§16320–16375), financial accountability, and (because of its status as an independent trustee) greater latitude in administering the trust without triggering undesirable tax consequences. See §§4.26–4.34 (see chaps 4, 7) for discussion of the tax-sensitive trustee. The disadvantages include substantially greater administrative costs, turnover of personnel, clients' fears about lack of personal attention, a more conservative investment philosophy, and occasional delays in making decisions because corporate procedures frequently require action by committees.

PRACTICE TIP• Before selecting a corporate trustee, the attorney should determine whether the value of the trust estate meets the institution's minimum requirements and warrants the fee charged

by the institution. If the value of the estate is not sufficiently high, the institution may decline to act or may later resign. For discussion of corporate and individual trustee as cotrustees, see chap 16.

§5.10 4. Settlor as Trustee: Advantages

A settlor is not prohibited from acting as trustee. See *Hill v Conover* (1961) 191 CA2d 171, 12 CR 522. Indeed, most settlors choose to act as their own trustees in order to maintain control over the management of their assets.

The advantages of having the settlor act as trustee include lower administration costs and greater flexibility in investment and other trust decisions. If the settlor serves as trustee or if the husband and wife who file joint returns are the settlors, a separate tax identification number is not needed for the trust, and a separate trust tax return does not have to be filed. Treas Reg §§1.671-4(b), 1.6012-3(a)(9), 301.6109-1(a)(2). See Rev & T C §17731. See chap 4.

If the settlor is the trustee, there is a significant risk that the settlor will not always handle trust assets and personal assets in ways that make it easy to distinguish whether a particular asset is subject to the trust. For a trust that is intended to transfer the bulk of a client's assets on death, this risk should be addressed by using a "pourover will" that will transfer the settlor's nontrust assets to the trust on death. This strategy usually deprives family members and other beneficiaries of a reason to contend that some items did not belong to the trust at the time of death. If the value of the assets "outside the trust" do not exceed \$100,000, all that is needed to change title is a declaration or affidavit under Prob C §13100; probate will not be necessary.

§5.11 5. Spouse or Partner as Trustee: Possible Disadvantages After First Death

Typically, both spouses or registered domestic partners will be the initial trustees of a joint revocable trust. Even if this is not the case, both spouses or partners have control of the community property assets of the trust during their joint lifetimes in the sense that either can revoke the trust with respect to those assets. This arrangement poses few problems as long as both are living and competent, but problems may arise at death or if a spouse or partner becomes incompetent. For example, a spouse or partner may lack the experience and skills necessary to administer the irrevocable trusts that come into being on the first death. Also, the survivor will be coping with the trauma of the loss of a spouse or partner at the same

time that complex trustee duties must be carried out, *e.g.*, accounting, division of assets, and dealing with a multitude of tax laws and regulations. Conversely, not naming a surviving spouse or registered domestic partner as trustee after the first death often generates ill will and resentment. Sometimes trusts provide for administration by cotrustees, including the survivor, after the first death. On creation of a trust for married settlors, see §§5.20–5.37. On creation of a trust for registered domestic partners, see §5.37A.

6. Attorney as Trustee

§5.12 a. Ethical Considerations

Significant ethical issues confront an attorney who considers taking on the role of trustee, including professional rules on conflicts of interest and engagements adverse to a client or former client (*e.g.*, a trust beneficiary), the duty to maintain client confidences, and the duty to act competently. See *Layton v State Bar* (1990) 50 C3d 889, 268 CR 845 (standard of care not lessened when attorney is acting in fiduciary capacity). If a beneficiary is also a client, the attorney must reconcile the duties he or she owes to a client under the California Rules of Professional Conduct with the trustee duties under Prob C §§16001–16105, including the duties to deal impartially with all beneficiaries and to avoid conflicts of interest. See House & Ross, *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* §4.3.3 (2d ed 2008).

The attorney trustee is particularly susceptible to removal if the trust was drafted by that attorney or by someone from that attorney's firm. Prob C §15642. See §5.14.

For a complete discussion of ethical considerations, see chap 2.

§5.13 b. Restrictions on Dual Compensation

Unless the trust document provides otherwise, an attorney who is trustee may receive either the trustee's compensation or compensation for legal services performed for the trustee, but not both. Prob C §15687(a). This restriction does not apply if the trustee is related by blood or marriage to, or a cohabitant with, a settlor (Prob C §15687(c)), or if approval is obtained by court order or by no objection after notice from persons entitled to notice (Prob C §15687(d)). See also Prob C §15687(b) (restrictions against compensation for legal services performed for trustee by specified close relatives of trustee or law partnership or corporation in which trustee has specified interests).

7. “Disqualified Person” as Sole Trustee

§5.14 a. When Disqualified Person Is Subject to Removal

If a sole trustee is a “disqualified person” as described in Prob C §21350(a), and no exception applies, the trustee is subject to removal. Prob C §§15642(b)(6), 21351. See chap 16. The statute does not apply if the trustee is related by blood or marriage to the settlor, cohabitates with the settlor, or is the settlor’s California-registered domestic partner. Prob C §21351(a).

The removal provision also does not apply if the instrument is reviewed by an independent attorney who counsels the settlor about the nature of his or her intended trustee designation and signs and delivers to the settlor and the designated trustee a certificate in substantially the form set out in §5.15. The independent review and certification may occur either before or after the instrument has been executed, but unless the law is clarified, an attorney who is named as sole trustee who prepares a restatement of a trust incorporating the same provisions that were in the document covered by the previous independent review and certification should, nonetheless, see that the client obtains a new certification from an independent lawyer. An attorney whose written engagement signed by the client is expressly limited to preparing a certificate under this subdivision, including prior counseling, shall not otherwise be considered to represent the client. Prob C §§15642(b)(6)(B), 21351(b).

For further discussion of statutorily disqualified persons, see §§2.36–2.39. See also California Trust and Probate Litigation, chap 6A (Cal CEB 1999).

§5.15 b. Form: Certificate of Independent Review

5.15–1 Certificate of independent review

Certificate of Independent Review

I, *[name of attorney]* , have reviewed *[name of document]* and counseled my client, *[name of client]* , on the nature and legal effect of the designation as trustee of *[name of trustee]* in that document. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under Probate Code §15642(b)(6)

is clearly the settlor's intent, and that intent is not the product of fraud, menace, duress, or undue influence.

Date: _____ ___[Signature]___
 --_[Typed name]--
 Attorney for --_[name]--

8. Beneficiary as Trustee

§5.16 a. When Beneficiary May Act as Trustee

A beneficiary may act as trustee unless he or she is the sole beneficiary and the sole trustee. In that situation, the equitable and the legal estates are merged. See *Hill v Conover* (1961) 191 CA2d 171, 12 CR 522. See §5.4.

For discussion of beneficiary as cotrustee, see chap 16.

§5.17 b. Potential for Conflicts of Interest

Under Prob C §16004, the trustee generally has a duty not to do the following:

- Use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust; or
- Take part in any transaction in which a trustee has an interest adverse to the beneficiary.

See also Prob C §16002 (trustee's duty to administer trust solely in interest of beneficiaries).

When a beneficiary acts as trustee, conflicts of interest may arise in balancing his or her rights as a beneficiary against the rights of other beneficiaries. This situation occurs, for example, when a parent is a trustee and an income beneficiary and his or her children have remainder interests; when one sibling is trustee and all the siblings are beneficiaries; or when the trustee is a family member and runs the family business, which is a trust asset.

The risk of breaching the duty to avoid conflicts of interest when a beneficiary is a trustee may be addressed in several ways:

- The trust document may limit the trustee's duties. See chap 14.
- The trustee may receive some protection if the trust document recites the settlor's recognition of possible conflicts of interest and explicitly sanctions any of the trustee's decisions, even when they will affect the trustee's personal interest. See *Estate of Gilliland* (1977) 73 CA3d 515, 528, 140 CR 795; Restatement (Third) of Trusts §78, Comment c (2007). See form 16.28-1.

- Cotrustees or special trustees may be named and the powers divided among them, so that powers particularly affecting the beneficiary trustee are given only to other trustees. See discussion of cotrustees and special trustees in chap 16.

NOTE• The mere “potential” conflict of interest that exists when a trustee is also a beneficiary is not a bar to the individual’s serving as a fiduciary. This is in contrast to the prohibition, in California, against a lawyer’s being involved in a “potential” conflict with a client absent an informed written waiver. See chap 2.

§5.18 9. Particular Trustee Requirements

Sometimes special requirements have an impact on the choice of trustee. If, for example, the trust property will include shares of a professional corporation, the trustee must hold a license for the profession in question. For further discussion of this issue, see chap 19.

If a transfer is to be made to a trust for a surviving spouse who is not a United States citizen, the trust will not qualify for the federal estate tax marital deduction unless it is made in the form of a qualified domestic trust (QDOT). IRC §§2056(d), 2056A. A QDOT must meet specific requirements, including that at least one trustee be an individual U.S. citizen or a domestic corporation. IRC §2056A(a)(1). When no trustee is such an individual or corporation, a taxable event occurs at the time of transfer. IRC §2056A(b)(4). See chap 13 for further discussion of QDOT requirements. For a form for a qualified domestic trust, see §13.33.

If a trust has a corporate trustee and owns real property in a state where the trustee does not do business, it may be necessary to name a special trustee to manage the property.

A trustee must register with the Statewide Registry of conservators, guardians, and trustees maintained by the Department of Justice if the trustee is (Prob C §2850):

- An individual unrelated by blood, marriage, domestic partnership, or adoption to the settlor (see Prob C §2854(b)) who serves as trustee for the benefit of more than three people or more than three families (see Prob C §2854(c)); or
- A nonprofit charitable corporation acting as a private professional trustee (see Prob C §§2340(b), 2341(c), 2854(d)).

If a trustee does not register as required, the court “shall” remove the trustee. Prob C §2851(b). See also Prob C §17200(c). For further discussion of grounds for removal of trustees, see §16.36.

§5.18A F. Disqualified Beneficiaries

California law imposes special requirements in connection with documents that make donative transfers to persons who are identified as “disqualified persons.” Prob C §§21350–21356. Under Prob C §21350, the following persons may be “disqualified persons” unless an exception applies:

- The “drafter” of the transfer document;
- Persons and entities closely related to the “drafter,” including close relatives, cohabitants, and business associates;
- Conservators and other persons having a fiduciary relationship with the transferor who transcribes the document or causes it to be transcribed; and
- Care custodians of a transferor who is a dependent adult.

These persons will not be disqualified persons if (1) they are closely related to the transferor by blood or marriage, or (2) the transferor receives advice from an independent attorney who executes a “Certificate of Independent Review.” Other narrow exceptions apply. Prob C §21351.

If a transfer is made to a drafter who is a disqualified person, the transfer fails. If a transfer is made to some other disqualified person, the consequence is that the disqualified person has the burden of proving by clear and convincing evidence that the transfer is not the product of fraud, menace, duress, or undue influence. This proof cannot be based solely on the testimony of the disqualified person. (Under a literal reading of the confusing language of the statute, a person successfully satisfying this burden of proof is no longer a “disqualified person” because such a person is no longer a disqualified person by definition.) Prob C §21351(d).

Transfers made by trusts are subject to the disqualified person statutes. See definition of “instrument” in Prob C §45. As a practical matter, a certificate of independent review should be obtained whenever a trust benefits a person who might be a disqualified person. For a form, see §22.13. Particular care should be exercised whenever the settlor is elderly or infirmed, in which case a beneficiary may be a care custodian of a dependent adult. See *Bernard v Foley* (2006) 39 C4th 794, 47 CR3d 248. See also *Estate of Odian* (2006) 145 CA4th 152, 51 CR3d 390. An attorney who fails to advise the settlor that a certificate of independent review is needed may later be sued by the disappointed intended transferee. See *Orsonio v Weingarten* (2004) 124 CA4th 304, 21 CR3d 246.

For a discussion of the problems that may arise when a disqualified person is named as a trustee, see §§5.14–5.15.

§5.19 G. Form: Creation of Trust for Sole Settlor

5.19-1 Opening declaration

The __[Name of Trust]__ Trust

I, __[name of settlor]__, sometimes hereafter called “settlor,” residing in __[name of County]__, California, hereby create The __[Name of Trust]__ Trust, declaring:

5.19-2 Creation of trust

CREATION OF TRUST

Initial Trust Property. The property described in the attached listing of “Initial Trust Property,” marked “Exhibit A,” is __[now held by me/hereby transferred to the initial trustee(s) named below]__ in trust. This property and any other property later transferred to the trust is hereafter referred to as the “trust property” and shall be held, administered, and distributed as provided in this document and any subsequent amendments to this document.

5.19-3 Purposes, trustees, and family declarations

PURPOSES, TRUSTEES, AND FAMILY DECLARATIONS

A. Purposes of Trust. The primary purposes of this trust are:

1. **Care of Settlor.** To provide for my care and maintenance as long as I am living;

2. **Avoid Conservatorship.** To facilitate management of the trust property in the event of my incapacity; and

3. **Transfer Property at Death.** To facilitate transfer of the trust property on my death.

B. Initial Trustee. __[I am/][Name]__ is]__ the initial trustee of this trust.

C. Successor Trustees. When the initial trustee ceases to act, __[name of first successor trustee]__ shall become trustee. If this nominated successor fails to qualify or ceases to act, __[name of second successor trustee]__ shall become the trustee.

[If appropriate, add the following option]

[Option: Family information]

D. Family Information. In connection with the administration of this trust, the trustee may rely on the following family information:

1. Marital Status. I am not married and do not have a registered domestic partner.

2. Children. __ [I have no children/The names and birthdates of my children are __ [list names and birthdates]__]__.

3. Deceased Children. __ [I have no deceased children who are survived by issue now living/My child, __ [name]__, is deceased and is __ [not]__ survived by issue now living]__.

Comment: A typical trust name would be “The Mary C. Doe Revocable Trust.”

This form creates a trust that is effective immediately on execution as long as care is taken to include the referenced “Exhibit A.” See §5.38 for sample schedule of assets.

The list of trust purposes and family information in form 5.19–3 is optional. Family information declarations (1) protect the drafter by memorializing the information given by the settlor, (2) provide the possibility that the settlor will alert the drafter if the declarations are incorrect, and (3) provide information that will assist the trustee in administering the trust. For discussion of successor trustees, see chap 16. For an alternative form nominating successor trustees, see form 16.48–1. For a provision authorizing a trustee to nominate the trustee’s successor, see form 16.55–1.

II. CREATION OF TRUST FOR MARRIED SETTLORS

A. Trust Property Characterization

§5.20 1. Married Settlor Property Transfer

When married settlors transfer property to a revocable trust, questions arise concerning the consequences of the transfer with respect to the settlors’ legal rights in the transferred property: Does community property remain community property inside the trust even though the trust provides management rules that are different from the community property management rules under the Family Code? See §5.21. Does joint tenancy property stop being joint tenancy property? If so, what does it become? See §5.22. The answers to these questions may have important consequences in property distribution rights, taxes, and creditors’ rights.

Questions also arise about the possible desirability of identifying property as community property, separate property, and separate property that may be classified as quasi-community property if the settlors are domiciled in California at the time of death or dissolution of marriage. See §5.24. This is particularly true when the trust terms for management and distribution of separate property are significantly different from the terms for management and distribution of community property.

Finally, a preliminary identification of the character of property may reveal reasons that the settlors should “transmute” the character of that property, *e.g.*, to increase the basis of both halves of community property under IRC §1014(b)(6) or a desire to resolve a potential dispute over the character of property while both parties are alive and competent.

2. Basic Trust Marital Property Provisions

§5.21 a. Preservation of Community Property Character

Unless the trust document or the transfer document expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended before or after the transfer, provides that (Fam C §761(a)):

- The trust is revocable with respect to that property during the marriage; and
- The power, if any, to modify the trust with respect to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.

The revocation and amendment clauses in this book meet the requirements of this statute. See form 20.3–1. Nevertheless, it is generally desirable to expressly provide that community property transferred to the trust remains community property. See form 5.23–1.

If property is community property (presumably including community property with right of survivorship under CC §682.1 (real estate) or Prob C §5502 (securities)), it is usually the case that the property will receive a new date of death value income tax basis *for both halves of the community property* on the death of whichever spouse dies first. IRC §1014(b)(6). If the same property is owned as shares of separate property, whether as joint tenants, tenants in common, or otherwise, only the separate property interest of the deceased spouse receives a new basis at that time. Accordingly, it is generally important to ensure that community property transferred to a

trust will remain community property. Exceptions to this generalization abound. Sometimes property has lost value, with the result that a new date of death value basis will actually lower the income tax basis. Sometimes concerns about creditors' rights will be significant. But as a rule, the drafter simply desires to be sure that the transfer to the trust does not result in losing a tax benefit that would exist without the transfer.

§5.22 b. Severing and Transmuting Joint Tenancies

When property is transferred to a revocable trust, the settlors generally intend that it will be distributed as provided in the trust document. Trust distribution provisions are usually inconsistent with the survivorship right of a joint tenant, with the apparent consequence that making the joint tenancy property subject to the trust should sever the joint tenancy. *Estate of Powell* (2000) 83 CA4th 1434, 100 CR2d 501. To remove any doubt, particularly during the period before title to a joint tenancy asset is changed to the trustees, it is helpful to include an express provision in the trust document declaring that making property subject to the trust severs the joint tenancy. See form 5.23-1.

Severance of a joint tenancy raises questions about the character of the property after the severance. The initial joint tenancy title created a presumption that the property was owned as equal shares of separate property. The Fam C §2581 presumption that joint tenancy property acquired during the marriage is community property does not apply if there is no dissolution of marriage proceeding. A characterization that the property is held as equal shares of separate property is usually undesirable because of the possible loss of the IRC §1014(b)(6) new basis on death for both halves of the community property on the first death. To protect this treatment, the trust should usually provide that a transfer of joint tenancy property to the trust severs the joint tenancy and transmutes the property into community property.

Because joint accounts in a financial institution do not have to be owned equally (CC §683(c); see Prob C §5305), the drafter may wish to minimize the risk of an unintended gift by providing that there is a transmutation into community property only to the extent the parties' interests are equal. This limitation seems sufficient to avoid an implication that there is a waiver of any Fam C §2640 right of reimbursement for separate property contributions to community property if the parties' marriage is later dissolved. See form 5.23-1. In the less common case when it is desirable to provide that former

jointly owned property is to be treated as shares of separate property, the form can be modified accordingly.

Some practitioners believe it is better practice not to rely completely on the trust instrument to characterize or transmute the property. Instead, they advocate using a separate agreement, signed by the husband and wife, addressing these issues (such as the Fam C §2640 issue).

NOTE• The ethical issues facing the attorney who represents both spouses on property characterization and transmutation should not be ignored. See chap 2, §5.25.

§5.23 c. Form: Character of Trust Property

5.23–1 Character of trust property

A. Property Retains Character. Except as expressly provided in this document, all property becoming subject to this trust shall retain its character as community property, quasi-community property, or separate property after becoming trust property.

B. Exception: Joint Tenancy Property. No property now or hereafter subject to this trust is joint tenancy property or community property with right of survivorship. Any property that was joint tenancy property or community property with right of survivorship before becoming trust property shall become community property as a result of becoming trust property to the extent that the settlors' interests in the property were previously equal.

Comment: This clause preserves the character of community property transferred to the trust, severs any joint tenancies transferred to the trust, and provides for a limited transmutation of separate property into community property for interests in the former joint tenancies or community property with right of survivorship. See §§5.21–5.22. If a particular asset, perhaps a “dot.com” stock, has a market price below basis, it may be desirable to hold that particular asset as equal shares of separate property rather than as community property. See §5.21. This form can be modified accordingly.

Appendix A places the clause regarding character of trust property in the Miscellaneous Division in keeping with the general strategy of minimizing the number of technical clauses that appear before the trust disposition clauses. See chap 3.

See the discussion in §5.30 on options for including further clauses characterizing property transferred to the trust to make the characterization either nonbinding or binding.

B. Character Identification Issues

§5.24 1. Desirability of Characterization

When married settlors contribute property to a trust, issues arise about the desirability and feasibility of identifying the trust property as community property, separate property, and separate property that may be classified as quasi-community property. The issues are complex and require case-by-case evaluation. Expressly stating the character of property can assist the trustee in the administration of the trust both before and after death, particularly with respect to property distribution and proper tax reporting.

Conversely, characterizing property can generate unnecessary disputes between clients, significantly increase planning expenses, and expose the planner to malpractice claims that may or may not be justified. If, *e.g.*, the estate planner identifies an apparent separate property business as separate property with insufficient consideration of the possibility that personal services during the marriage may have created a community property interest, the estate planner may end up being sued for malpractice if the clients' marriage dissolves. The planner might similarly be sued for suggesting a transmutation of quasi-community property into community property if the planner knew that the clients might not remain domiciled in California and their marriage is later dissolved. On conflicts of interest in planning for married couples, see §5.25. On the duty of competence, see §5.26. For further discussion of characterization issues, see California Estate Planning, chap 4 (Cal CEB 2002).

2. Ethical Issues in Characterizing Trust Property

§5.25 a. Conflicts of Interest

Although planning estates for married couples poses various potential conflicts of interest, a typical joint revocable trust does not constitute a contract between the parties. Each party is free to revoke the trust at any time and in many cases each party retains a general power of appointment, which permits that party to unilaterally change the disposition of that party's share of the trust property at any time. If, however, the trust purports to identify the character of marital property, the trust may be a binding contract to that extent. It may also result in the transfer of property interests from one party to another. The contract and agreement may be important if the marriage is dissolved as well as changing the amounts of property that each party can transfer at death. As a consequence, an attempt to characterize that

property heightens concern about Cal Rules of Prof Cond 3–310, which reads in part:

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

....

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Even if the trust does not expressly characterize property, litigation may result if the trust contains a provision that arguably has the same consequence. In *Marriage of Starkman* (2005) 129 CA4th 659, 28 CR3d 639, for example, the court held that separate property stock transferred to a revocable trust was not transmuted into community property by a trust provision stating that the property transferred to the trust was community property unless identified as the separate property of either settlor. Therefore, the nontransferor spouse was not entitled to a share of the property on dissolution. See also *Marriage of Holtemann* (2008) 162 CA4th 1175, 76 CR3d 615 (agreement that purported to transmute separate property to community property subject to a specified revocable trust disposition on death resulted in division of property on dissolution). At a minimum, an attorney who chooses to document a characterization of the property interests of husband and wife must obtain both parties' informed written consent. Because the consent must be "informed," the consent must disclose the "relevant circumstances" and the "actual and reasonably foreseeable adverse consequences" of joint representation. Cal Rules of Prof Cond 3–310(A)(1). In most instances, the engagement letter will address the husband/wife conflict issues, but the attorney must be certain that is the case. For discussion of conflicts in joint representation, see chap 2.

If the characterization of property changes the surviving spouse's share of community property or quasi-community property, query whether Prob C §§140–147 (waiver of rights) would apply. It is unclear whether someone other than a spouse (*e.g.*, his or her children after his or her death) may use Prob C §§140–147 to void an

agreement the spouse made during his or her lifetime. If the provisions do apply, joint representation creates the additional risk that the agreement will be unenforceable because the surviving spouse did not have independent counsel. Prob C §143(a)(2).

§5.26 b. Duty of Competence

An attorney has a duty to perform legal services competently. Cal Rules of Prof Cond 3–110. See chap 2. Some estate planning attorneys have considerable family law experience; others do not. Often, the character of the clients' assets is relatively obvious. In others, the task of characterizing property presents complex issues resulting from multiple domicile changes, exceptionally difficult tracing issues, or the use of community property services in connection with the development of a separate property business. In such situations, attorneys who do not have family law experience should consider associating qualified counsel. For an excellent discussion of family law/estate planning cross-over issues, see Moore, *Your Client is Getting a Divorce: Selected Family Law Issues for Estate Planning Lawyers*, Estate Planning 2004, chap 3 (Cal CEB 2004); Moore, *Transmutation of Separate Property to Community Property: Family Code Section 2640 Lays a Trap for the Unwary*, 5 Cal Trusts & Estates Q 11 (Summer 1999).

§5.27 3. Cost of Determining Character

The expense of determining the character of property can vary considerably. In some situations it will be obvious that all property is community property, except perhaps for a recent inheritance that has not been commingled. But consider the situation of a husband and wife who lived in New York until moving to California following retirement. Only one spouse was employed during the marriage. That spouse also inherited property. Before that spouse arrived in California all of that spouse's property was separate property and there was no reason to segregate property that would be quasi-community property in the event of death while domiciled in California. Even if financial records are sufficient to trace the quasi-community property, it is quite possible that the clients will be unwilling to incur the legal and accounting expenses necessary for the tracing—particularly if there is no assurance that they will still be domiciled in California at death.

§5.28 4. Potential Disputes Between Clients

The effort to characterize a particular asset may sometimes be more trouble than it is worth because of the potential for creating a dispute. For example, if the revocable trust provides that all tangible personal property will pass to the survivor, it may not be necessary to decide whether the husband's gift of an expensive piece of jewelry to the wife converted the community property purchase money into the wife's separate property. (For an example of the possible complexity of the issue, see *Marriage of Steinberger* (2001) 91 CA4th 1449, 111 CR2d 521, construing Fam C §852(c). This statute provides that the usually applicable writing requirement for a valid transmutation does not apply to certain gifts of personal property that are "not substantial in value taking into account the circumstances of the marriage." Fam C §852(c). For these purposes, the term "marriage" should be read to include a domestic partnership under Fam C §297.5.)

Similarly, the often sensitive issue of whether there is a community property interest in a separate property business may eventually disappear if the property will pass to the spouse. In these situations, it is often best to leave the characterization issue unresolved. Insistence on characterization may result in the clients' failing to complete the estate plan, or it may result in one spouse or registered domestic partner acquiescing in a settlement of the issue, which has the effect of making a gift that the spouse or partner did not want to make. Furthermore, if a dispute later arises (either before or after a spouse's death), there is a possibility that the "agreement" concerning character will be unenforceable if the spouse or partner challenging the characterization did not have independent counsel. Prob C §143(a)(2).

C. Character Identification Strategies

§5.29 1. Planning Alternatives

The practitioner can adopt various strategies to deal with the identification issues discussed in §§5.24–5.28. No particular approach is always correct. In each case it is necessary to weigh the benefits of property characterization against the problems presented.

No provisions characterizing property. Often a drafter makes no effort to memorialize the character of property. This approach may be appropriate when all or most of the property will pass to the surviving spouse, the separate property is negligible, the cost of characterizing property is high, the risk of dispute is high, and the provisions for distribution of the trust estate in the event of incompetence do not distinguish between separate property and community property. Even then, practitioners might instead consider a hybrid solution in which

the character of some assets is identified in either the trust or a separate document.

Nonbinding characterization. Another strategy is to make a tentative identification of the character of property, but to expressly provide that the identification is not binding and does not transmute the character of any property. The tentative identification protects the trustee—particularly a third party trustee—allowing the trustee to administer the trust in accordance with the identification. This approach minimizes both the risk of an unintended gift and the risk of a characterization mistake by the attorney. For a form of nonbinding characterization, see Alternative 1 in form 5.30–1.

Binding characterization. Whether included in the trust document or in a separate document, or both, a binding agreement that characterizes trust property and complies with the Fam C §852 transmutation statute can provide various benefits, depending on the relevance of the characterization in the particular circumstances. These benefits may include:

- Reduction in the potential for future disputes between the settlors or among trust beneficiaries;
- Reduction in the potential for future disputes with the IRS on the tax consequences involving trust property; and
- Protection of the trustee when distribution rights or tax planning decisions depend on the character of trust property.

The attorney must be careful to avoid unintended gifts or putting one spouse into a situation in which he or she feels pressured to make a gift that he or she does not wish to make merely because the attorney has suggested possible tax benefits. Under Fam C §852, a written “express declaration” is usually required for a valid transmutation of property other than certain tangible property of a personal nature. While courts have held that no particular form of words is required by the statute, it is often preferable to use the word “transmute” to avoid potential litigation. See *Estate of MacDonald* (1990) 51 C3d 262, 272 CR 153; *Estate of Bibb* (2001) 87 CA4th 461, 104 CR2d 415. See also *Marriage of Benson* (2005) 36 C4th 1096, 32 CR3d 471. For a form of binding agreement, see Alternative 2 in form 5.30–1.

Hybrid strategies. It is often appropriate to combine strategies. For example, it may be absolutely clear that a large block of stock is separate property, but it may be unclear whether any of the dividends from that stock are traceable. It may well be appropriate to confirm that the stock is separate property, but not address the tracing issue.

§5.30 2. Form: Characterization of Trust Property in Exhibit A

5.30-1 Characterizing trust property

[Add one of the following alternatives]

[Alternative 1: No binding agreement]

Character of Trust Property. The attached listing of trust property does not constitute a binding agreement between the settlors with respect to the character of that property as community property, separate property, or quasi-community property, but the trustee may rely on any characterizations of the trust property in that listing until such time as an interested party notifies the trustee that a characterization in the listing is disputed or incorrect.

[Alternative 2: Binding agreement and transmutation]

Character of Trust Property. The settlors agree that the characterizations of trust property as community property, separate property, and quasi-community property made in the attached listing of trust property are true and correct, and the settlors hereby convey and transmute their interests in the listed property to conform with those characterizations.

Comment: If the listing of trust property will identify the character of some or all of the trust property, the trust document should clarify the extent to which the settlors intend that the identification constitutes their binding agreement with respect to the character of the property. The forms in the appendixes use Alternative 1. If the drafter prefers to use Alternative 2, consideration should also be given to the use of a separate contract between the settlors settling their property rights. For discussion, see §5.29.

The clauses above may be appended to either form 5.37-2 (declaring that property in Exhibit A is trust property) or form 5.23-1 (declaring trust property retains previous character except for joint tenancy property). In Appendix A, these clauses are placed in Division I, Creation of Trust.

D. Quasi-Community Property Considerations

§5.31 1. Nature of Quasi-Community Property

Separate property acquired by persons domiciled outside California may become “quasi-community property” for specified purposes if their domicile changes to California. Generally, the quasi-community

property classification is relevant only in connection with dissolution of marriage (and similar) proceedings and the right to transfer property on death. Fam C §125(a); Prob C §66. A possible exception to this generalization is Fam C §912, which treats quasi-community property as community property for debt liability purposes. The constitutionality of §912 is open to debate because the state's need to infringe on the vested rights of property owners is less clear than in marital dissolutions. See *Addison v Addison* (1965) 62 C2d 558, 43 CR 97, upholding the constitutionality of quasi-community property in marital dissolutions. See also *Estate of Thornton* (1934) 1 C2d 1, 33 P2d 1, in which the court struck down a 1917 statute that purported to treat quasi-community property as community property for all purposes. For the argument in favor of constitutionality, see 17 Cal L Rev'n Comm'n Reports 1, 12 n14 (1984) and Comment to Fam C §912.

For purposes related to the treatment of property at death, Prob C §66 provides that quasi-community property includes the following:

- “All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition” and;
- “All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.”

§5.32 2. Surviving Spouse's Rights to Quasi-Community Property

Under Prob C §101(a), half of the decedent's quasi-community property belongs to the surviving spouse and half belongs to the decedent's estate. *This statute applies only if the decedent, at death, was both married and domiciled in California.* The decedent's half of all quasi-community *personal* property, wherever located, and half of all quasi-community *real* property in California are subject to the decedent's testamentary disposition (Prob C §6101) and, in the absence of testamentary disposition, goes to the surviving spouse (Prob C §6401).

NOTE• The division of quasi-community property on death is radically different from the division of regular community property on death. When regular community property is divided on death, the property subject to division includes the property earned by *both* spouses. When quasi-community property is divided, only the property earned by the decedent is divided and the survivor retains all property earned by the survivor. The result of a division of quasi-community property at death resembles a division of community property only when all earnings during marriage were earned by the first spouse to die. Accordingly, when identifying the character of trust property in a trust document, it is insufficient to label an item of property as “quasi-community property” without indicating which spouse is the owner of that item.

The surviving spouse is not required to make an election between the will and statutory rights to quasi-community property (see Prob C §101(a)), although he or she may be required to do so by the express provisions of the deceased spouse’s will or revocable trust.

§5.33 3. Treatment as Separate Property During Joint Lifetimes of Spouses and for Estate Tax Purposes

For federal tax purposes, quasi-community property is treated as separate property. *Estate of Frank Sbicca* (1960) 35 TC 96. If the settlors do not file joint income tax returns, income from the property is reported on the owner’s return. On death, all of the decedent’s quasi-community property is included in the decedent’s estate, and that property is entitled to a new income tax basis under IRC §1014. A federal estate tax marital deduction is allowed for any share belonging to the surviving spouse by operation of Prob C 101(a) or otherwise passing to the spouse.

§5.34 4. Restoration of Transferred Quasi-Community Property to Surviving Spouse

If the decedent made specified types of living transfers to a third party of quasi-community property without substantial consideration, the surviving spouse may require the transferee to restore to the decedent’s estate half of that property if the transferee retains the property or, if not, half of its proceeds or (if none) half of its value at the time of transfer. Prob C §102. Apparently because of concerns about the constitutionality of limiting a person’s ability to make gifts

solely because of a change in domicile (see, e.g., *Estate of Thornton* (1934) 1 C2d 1, 33 P2d 1, and other authorities discussed in §5.31), this power is extremely limited, generally applying only when the decedent retained an interest in the transferred property until death.

The effect of §102 is to emphasize that, in the absence of marital dissolution proceedings, the right to a share of the other spouse's quasi-community property is a mere expectancy. It is conditioned on survival, on California domicile at death, on the absence of an outright inter vivos gift, and, possibly, on the absence of a conversion of the assets into real property in a separate property state. Nevertheless, it is generally prudent to obtain a spouse's consent when making a large gift of property that might later be subject to a claim under the statute.

§5.35 5. Trust Drafting Issues

If one or both spouses own significant amounts of quasi-community property, as frequently occurs with mobile business executives, retired military personnel, and older couples who have recently changed their domicile to be near younger family members, the trust drafter faces several issues.

First, it may be desirable to transmute the quasi-community property into true community property—at least to the extent that the spouses are contributing equally to the property that will become community property. Such a transmutation may increase the property that will receive a new income tax basis on the first death under IRC §1014. Without the transmutation, the quasi-community property of the surviving settlor will not receive a new basis on the first death. There may, however, be nontax reasons to avoid such a transmutation. The spouse with the longer life expectancy may benefit from preservation of the status quo, which allows the survivor to retain his or her separate property while being entitled to at least half of the decedent's quasi-community property. To the extent that the values of each spouse's quasi-community property assets are different, a conversion to community property may generate a significant gift that the party with more property does not want to make. Also, the owner of the quasi-community property may be unwilling to give up inter vivos separate property benefits that may include management rights and rights to make gifts that are greater than will be enjoyed if the property is converted to community property.

Another concern of the drafter is to make sure that the trust document does not *inadvertently* provide for a distribution of quasi-community property that is contrary to Prob C §101. The forms in this book accomplish this objective by providing that the survivor's half interest in quasi-community property is to be allocated to the

Survivor's Trust. If that arrangement is not acceptable to the settlor who owns the quasi-community property, he or she may choose to force the other spouse to make an election between the statutory right to half of the decedent's quasi-community property and survivor's rights under the trust. (When a forced election is involved, it is common to establish a separate trust for the settlor who intends to force the election.) For example, a settlor with children by a previous marriage might compel the survivor to choose between receiving half of the quasi-community property or receiving an income interest for life in 100 percent of that property. If there is to be an agreement waiving a spouse's quasi-community rights, the agreement is subject to Prob C §§140–147 and may therefore be unenforceable in the absence of complete financial disclosure and the advice of independent counsel.

For discussion of the ethical considerations for an attorney who is advising a couple with quasi-community property issues, see §5.25.

§5.36 E. Separate Property in Joint Trust

When one or both settlors own a significant amount of separate property, the drafter must consider whether it would be preferable to establish a separate trust for separate property. A separate trust is usually desirable if the provisions concerning distributions in the event of incompetence during the settlors' joint lifetimes are significantly different for separate property than for community property. Similarly, a desire to have a different trustee for separate property during the owner's incompetence suggests the desirability of a separate trust. A separate trust can also be a useful device for avoiding commingling of separate and community property. A separate trust can be unilaterally amended by the settlor. Further, the owner of separate property may simply feel more comfortable having a separate trust.

For ethical considerations in advising the client about using a joint trust or a separate trust, see chap 2.

§5.37 F. Form: Creation of Married Settlor Trust

5.37–1 Opening declaration

OPENING DECLARATION

The __[Name of Trust]__ **Trust**

We, __[name of settlor]__ **and** __[name of settlor]__,
sometimes hereafter called "settlors," residing in __[name of

county] __, California, hereby create The __ [Name of Trust] __ Trust, declaring:

5.37-2 Creation of trust

CREATION OF TRUST

Initial Trust Property. The property described in the attached listing of "Initial Trust Property," marked "Exhibit A," is __ [now held by us/hereby transferred to the initial trustee(s) named below] __ in trust. This property and any other property later transferred to the trust is hereafter referred to as the trust property and shall be held, administered, and distributed as provided in this document and any subsequent amendments to this document.

5.37-3 Purposes, trustees, and family declarations

PURPOSES, TRUSTEES, AND FAMILY DECLARATIONS

A. Purposes of Trust. The primary purposes of this trust are:

1. **Care of Settlers.** To provide for our care and maintenance as long as either of us is living;

2. **Avoid Conservatorship.** To facilitate management of the trust property in the event of the incapacity of one or both of us;

3. **Transfer Property at Death.** To facilitate transfer of the trust property on our deaths; and

4. **Tax Planning.** To provide opportunities for reducing and/or postponing taxes which might be imposed as a result of our deaths.

B. Initial Trustee. __ [We are/ __ [Name] __ is] __ the initial trustee(s) of this trust.

C. Successor Trustees. __ [If either of us ceases to be a trustee of this trust, the other shall become the sole trustee.] __ **If the trustee resigns or ceases to be trustee,** __ [name of first successor trustee] __ **shall become trustee. If this nominated successor fails to qualify, resigns, or ceases to act,** __ [name of second successor trustee] __ **shall become the trustee.**

[If appropriate, add the following option]

[Option: Family information]

D. Family Information. In connection with the administration of this trust, the trustee may rely on the following family information:

1. Marriage. We are husband and wife and were married in __[city and state of marriage]__ on __[date of marriage]__.

2. Citizenship. __[We are both/We are not/][Name of settlor]__ is a citizen of the United States. __[Name of settlor]__ is not a]__ citizen(s) of the United States.

3. Children. The names and birthdates of our children are: __[List names and birthdates]__.

[Add one of the following alternatives]

[Alternative 1: No deceased children]

4. Deceased Children. Neither of us have deceased children who are survived by issue now living.

[Alternative 2: Both settlors]

4. Deceased Children. Our child, __[name]__, is deceased and is __[not]__ survived by issue now living.

[Alternative 3: One settlor]

4. Deceased Children. __[Name of settlor]__'s child, __[name]__, is deceased and is __[not]__ survived by issue now living.

Comment: A typical trust name would be “The John and Mary C. Doe Revocable Trust.”

This form creates a trust that is effective immediately on execution as long as care is taken to include the referenced “Exhibit A.” See §5.38 for sample schedule of assets.

The list of trust purposes and family information in form 5.37–3 is optional. Family information declarations protect the drafter by memorializing the information given by the settlor, provide the possibility that the settlor will alert the drafter if the declarations are incorrect, and provide information that will assist the trustee in administering the trust. Citizenship is significant because the regular IRC §2056 federal estate tax marital deduction is not available if a surviving settlor is not a United States citizen. For discussion of noncitizen settlors, see §5.18, chap 13. For discussion of successor trustees, see also chap 16. For an alternative form nominating

successor trustees, see form 13.30–1. For a provision authorizing a trustee to nominate the trustee’s successor, see form 16.55–1.

§5.37A III. CREATION OF JOINT TRUST FOR DOMESTIC PARTNER SETTLORS

The considerations discussed in §§5.20–5.37 generally also apply to a jointly settled trust in which the settlors are registered domestic partners. See Fam C §297.5. Of course, considerations relating to the estate tax marital deduction do not apply to same-sex domestic partners. In addition, the IRC §1014(b)(6) new basis on death for both halves of community property does not apply to same-sex domestic partners for federal income tax purposes. See §4.41. For a detailed discussion of estate planning for domestic partners, see California Estate Planning §§4.41–4.63 (Cal CEB 2002).

§5.38 IV. FORM: SAMPLE SCHEDULE OF ASSETS (EXHIBIT A)

5.38–1 Schedule of assets

THE __ *[Name of Trust]* __ TRUST

Exhibit A

Initial Trust Property

The initial trust estate consists of all right, title, and interest of the __ *[settlor/settlors or either of them]* __ in or to any and all of the following property.

[Edit as appropriate]

- 1. The residence commonly known as __ *[street address]* __.**
- 2. The contents of that residence.**
- 3. All other real property.**
- 4. All bank, stock brokerage, and other financial and securities accounts of any kind.**
- 5. All stocks, bonds, and other securities of any kind.**
- 6. All intangible property, including any indebtedness of any person or entity.**

[Add if appropriate]

7. Vehicles, boats, __[other known tangible property]__.

[8]. Small business interest: __[Identify]__.

Despite the foregoing, the initial trust estate does not include the following property: __[Specify]__.

Comment: This list is appropriate for a trust that will include substantially all of the settlor's currently transferable assets except, perhaps, tangible personal property. A client may wish to pass a particular item of property at death using an existing joint tenancy or pay on death title, in which event that property should be expressly excluded. Note that form 5.23-1 expressly severs joint tenancies. Many practitioners use far more detailed property lists than the one shown here. For settlors of a joint trust who are spouses or registered domestic partners, the list may indicate the character of some or all of the trust property as community property, each spouse's or partner's separate property, and whether a particular item of separate property is to be treated as quasi-community property. For a detailed discussion of the advantages and disadvantages of indicating the character of trust property, see §§5.24-5.28.