**Woodland Hills Tax & Estate Planning Council, Inc**.

Jacey L. Hayes, February 2, 2022

Formula GPOAs, Aggregate Agreements, and More: How To Make The Most Of Your Estate Planning Documents

1. AB 1079 (See Attached)- Where both Trustors or the Surviving Trustor are/is incapacitated, 16061.7 Notice to beneficiaries, and accounting to beneficiaries.
   1. **Trust Language**:
      1. **Single Trustor Trust**: The provisions of Probate Code §15800(b) shall not apply to any trust being administered hereunder.  Specifically, but not by way of limitation, upon the Incapacity of the Trustor, the Trustee shall have no duty to provide notice under Probate Code §15800(b)(1), and the Trustee shall have no duty to account and to provide information to beneficiaries under Probate Code §15800(b)(2).
      2. **Joint Trust**: The provisions of Probate Code §15800(b) shall not apply to any trust being administered hereunder.  Specifically, but not by way of limitation, upon the Incapacity of both Trustors or of the Surviving Trustor, the Trustee shall have no duty to provide notice under Probate Code §15800(b)(1), and the Trustee shall have no duty to account and to provide information to beneficiaries under Probate Code §15800(b)(2).
   2. Where to Add New Language:
      1. Administration of Trust During Incapacity
      2. Reports and Accounts
      3. Incapacity determination provisions
   3. Transmittal Letter:

**Trust Provisions Confidential Until Death**

While you are both living the Trustee can use a Certification of Trust which sets forth the existence of the Trust but does not provide third parties with the dispositive provisions of the Trust.

At your death California law provides that the beneficiaries of a trust are entitled to receive written notification when: (i) a portion of the trust becomes irrevocable; or (ii) there is a change in the trustees of any irrevocable portion of the trust. The notice must be delivered to the beneficiaries, in writing, within 60 days of the event requiring notification. The notice lets the beneficiaries know that they are entitled to request a copy of the Trust.

In addition, under new rules established this year, if neither of you have capacity, then the beneficiaries are to receive a copy of the Trust and an account of the assets. I have waived this provision to the greatest extent possible.

**Accounting**

The Trustee does not have to account to a beneficiary unless the beneficiary requests an account (Section \_\_\_\_).  If a beneficiary requests an account, the beneficiary has 180 to contest the account (Section \_\_\_\_).  As discussed above, the Trust waives the requirement that a Trustee account to the beneficiaries when you are living but incapacitated.

1. Formula General Power of Appointment (GPOA) for optimal basis – brings assets held in the Exemption Trust or Descendants Trust back into the spouse’s/beneficiary’s estate to receive a step-up in basis IF inclusion in the taxable estate would not cause an increase in the estate or GST tax.
   1. **Trust Language (original credit to Clary Redd):** **Contingent General Power of Appointment for Income Tax Basis Adjustment**. At my spouse’s death, the Trustee shall distribute, as my spouse may have appointed, a ratable portion of such amount, in value, of the remaining trust property that may be included in the value of my spouse’s gross estate without causing an increase in all estate and generation-skipping transfer taxes imposed because of my spouse’s death.  For purposes of this Paragraph, a ratable portion shall be based on the proportionate relationship between the value, as finally determined in the federal estate tax proceedings in my spouse’s estate, of the property composing the trust under this instrument and the value, as finally determined in the federal estate tax proceedings in my spouse’s estate, of such property and all property not passing under this Paragraph with respect to which my spouse would hold a general power of appointment if my spouse’s holding such a power would not cause an increase in all estate and generation-skipping transfer taxes imposed because of my spouse’s death.  Such ratable portion shall be composed, in cascading order, of assets, or portion thereof, having a cost basis for federal income tax purposes as of the day before my spouse’s date of death that is the smallest percentage of fair market value of such asset as of my spouse’s date of death.  Despite any other provision in this Paragraph, such ratable portion shall not include any asset having a cost basis for federal income tax purposes as of the day before my spouse’s date of death that equals or exceeds fair market value of such asset as of my spouse’s date of death.  The Trustee shall incur no liability for making a determination under this Paragraph in reliance on any written certification provided by the Personal Representative of my spouse’s estate as to whether such an increase will be so caused.  Such amount may be appointed only to or for the benefit of such one or more creditors of the estate of my spouse, in such proportions and in such manner as my spouse specifies.  If any Trustee has no beneficial interest in the income or principal of the trust, my spouse’s power of appointment under this Paragraph shall be exercisable only with the written consent of each such Trustee.  Such consent shall be signified, if at all, before the death of my spouse and in the same instrument in which such power of appointment is sought to be exercised.  For purposes of this Paragraph, the term “creditors” does not include any person from whom my spouse did not receive full and adequate consideration when the creditor relationship was established.
2. Outright vs. Lifetime Trusts:
   1. Beneficiary sole Trustee with power to appoint successors.
   2. Broadest limited power of appointment (LPOA).
   3. Formula GPOA.
   4. Lifetime Trust Additions:
      1. Special Needs Language?
      2. Trust Protector Language?
3. Aggregate Agreement For Retirement Plan and Trust Assets– for greater flexibility in trust funding.
   1. Add it to your transmittal letter.
   2. Add it to your No-Contest Clause.
   3. **Trust Language**: With respect to the allocation of the Trust Estate on the death of the Deceased Trustor, the Trustee is instructed to adhere to that certain Aggregate Property Agreement executed by the Trustors on even date herewith. Pursuant to the Aggregate Property Agreement, all of the community property and quasi-community property of the Trustors, including community property and quasi-community property that is held outside of the Trust Estate, may be divided on the basis of a non-pro rata division of the aggregate value of the community property and quasi-community property, rather than on the basis of a division of each individual item of the community property and quasi-community property.
   4. Property Agreement Language:
      1. The Parties intend to treat the interest of a participant spouse in a Retirement Plan as the community property of the Parties upon the death of the Deceased Spouse, despite case law that may be to the contrary.
      2. The Parties agree that all of their assets which are community property or quasi-community property shall be held under the aggregate theory as provided in California Probate Code Sections 100(b) and 101(b). Thus, the Parties agree that upon the death of the Deceased Spouse, all their community property and quasi-community property, specifically including all Retirement Plans, whether such property is held in the names of both Parties, in the name of one Party, or in the name of the (insert Trust name), may be divided based upon a non-pro rata division of the aggregate value of such community property and quasi-community property, rather than on the basis of a division of each individual item of such community property and quasi-community property. In so allocating such property, the aggregate fair market value of assets allocated to the Deceased Spouse’s share of such property will equal one-half of the aggregate fair market value of all community property and quasi-community property assets of the Parties, determined as of the date or dates of distribution, and the aggregate fair market value of assets allocated to the Surviving Spouse’s share of such property will equal one-half of the aggregate fair market value of all community property and quasi-community property assets of the Parties, determined as of the date or dates of distribution.
   5. Transmittal Letter: Since retirement plans currently comprise a large portion of your assets, the Aggregate Agreement will allow the Trust property to be divided in the aggregate between the Survivor’s Trust and Exemption Trust regardless of whether the asset is held in the Trust or not. As an example, assume your total estate is approximately $4,000,000 including your retirement plan assets valued at approximately $1,000,000. Without an Aggregate Agreement, the retirement plan assets would not be included in the calculation to fund the Exemption Trust and the Exemption Trust could only be funded with ½ of the Trust assets, or $1,500,000. With the Aggregate Agreement, the Exemption Trust can be funded with $2,000,000.
4. Odds and Ends
   1. Start with a Chart.
   2. HIPAA/ CMIA Authorization – 14 point font
   3. Incapacity provisions (Trust and DPOA)
      1. Physician plus Health Care Agent (instead of 2 physicians)
      2. Include HIPAA Release
         1. **Trust Language**: **HIPAA/CMIA Release**. When in the process of determining Incapacity, all individually identifiable health information and medical records may be released to any person or entity who is a personal representative for purposes of the Standards for Protection of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996, 42 USC Section 1320d, et seq., and 45 CFR Parts 160-164, as amended from time to time (“HIPAA”), including without limitation the Trustor’s Agent under the Trustor’s Advance Health Care Directive. Each such personal representative who is not a health care provider may redisclose any released information to any person or entity designated to determine incapacity, including without limitation any written opinion relating to Incapacity that the person or entity so designated may have requested. This release authority applies to any information governed by HIPAA and California’s Confidentiality of Medical Information Act, California Civil Code Section 56, et seq., as amended from time to time (also known as CMIA).
      3. Trustee to make payments for medical care.
         1. **Trust Language:** **Payments for Medical Care**. The Trustor has named one or more individuals to act as health care agent to make health care decisions on the Trustor’s behalf under an Advance Health Care Directive (such document is hereinafter referred to as a “Directive” and the individual or individuals serving as agent under such Directive is hereinafter referred to as a “health care agent”). The Trustor hereby directs the Trustee to distribute such sums as are necessary to pay for any medical treatment approved by the Trustor’s health care agent, and the Trustee is authorized to rely on directions from a health care agent regarding the sums needed for such medical treatment. The Trustee shall incur no liability for any action taken in reliance on such directions from a health care agent
   4. Cryptocurrency, NFTs
      1. Include in your definition of Digital Assets
      2. Exclude in your definition of Tangible Personal Property
   5. Exclusion in General Assignment:
      1. **Trust Language**: (to be placed at the end of your General Assignment) Notwithstanding the foregoing, the Trustor specifically does not transfer: life insurance policies, unless the ownership of a policy is transferred to the Trust by a separate instrument that specifically refers to the policy; corporate and self-employed (Keogh) pension, profit­sharing, and stock bonus plans; qualified retirement plans; commercial annuities; Section 1244 (small business) stock; and any property, the transfer of which would result in the immediate recognition of income subject to income or other taxes, would result in the loss of a homestead exemption, or would violate a restriction on transfer agreement; and assets securing a promissory note, mortgage or other debt instrument if the due date for all or part of the principal balance of such debt will be accelerated by virtue of the assignment of the security to the Trust.