

Married Couple Trust Worksheet Planning For Your Surviving Spouse

Introduction & Overview

This write-up details the three different trust structures available to a married couple completing a trust together:

1. The “Disclaimer” Trust approach; or
2. The “AB” Trust approach; or
3. The “ABC” Trust approach.

For many years the AB & ABC trusts were the lockstep approaches and dominant offerings in the living trust arena (for a married couple). Indeed, our own law office long emphasized this staid approach. After many years of helping to administer Living Trusts however, some clear messages and trends emerged. We found that even under circumstances where it made sense, somehow a surviving spouse never seemed to share a lawyer’s or accountant’s opinion that administering an AB or ABC trust is “no big deal”. Further, from a tax standpoint, the ever-increasing estate exemption amounts can make an AB trust a totally unnecessary headache and hassle for many.

These facts led our law office to begin (around 1999) educating our clients on a little talked about third approach called the Disclaimer Trust Approach. As a matter of reference, since we have been offering and detailing the choices, we estimate that 90% to 95% of married couples are choosing the Disclaimer approach. This large percentage seems to reflect many spouses’ general desire to leave matters as flexible, simple and straightforward on their spouse as possible.

As for the tax issue, the "Disclaimer Trust Approach" has the exact same ability to pass the same amount tax free as the AB or ABC trust with the further advantage of being more flexible and adaptable than the AB or ABC trust. Instead of locking the surviving spouse into a course of action (like the AB), the Disclaimer approach is more of a “wait and see” strategy (the survivor can decide utilizing better information at the first spouse’s death).

Keeping in mind your own concerns, wishes, circumstances, and desires -- as well as understanding and answering a few questions regarding your own feelings on some basic issues -- will greatly help you sort through this document and make the choice that is right for you and your situation.

Couples That Fit The Profile for The “Disclaimer Trust Approach”

Is it your desire to make matters as easy, straightforward, uncomplicated, flexible, and simple on the surviving spouse as possible? As far as you are concerned, do you wish for your spouse to inherit all assets outright without restriction and complication -- meaning your spouse enjoys full ownership and unlimited use of all assets to do with as your spouse wishes? In the case of more sizeable estates, do you generally have faith in your spouse’s judgment to make the smart tax move if circumstances so warrant? Do the aforementioned goals reflect the circumstances you would like to be left with assuming you are the surviving spouse? If the answer to these questions is yes then you fit the profile of a couple who would normally choose the “Disclaimer Trust Approach”. This is because the other two approaches (AB & ABC Trusts) will impose significant restrictions, responsibilities, complications, accountability, irrevocability, paperwork, and required tax filings on the surviving spouse for the remainder of your spouse’s lifetime (discussed in this handout).

If Preserving Testamentary Intent Is A High Priority Consider The AB or ABC Approach

Some of you do however worry about what your spouse is going to do with your share after you are gone. You may be a “blended family” or have other valid reasons to be concerned about this issue (referred to as “preserving your testamentary intent”). This is where it gets tricky, because in making your choice, you have to ask yourself just how worried you are. That is because preserving your testamentary intent might be great in theory, but it is important that you also understand that it is not a free ride. Again, doing so requires you to impose many conditions, responsibilities, inflexibility, bookwork, accountings, tax filings, accountability and liability to others, reporting requirements, and other hassles on the surviving spouse for life. The legal community is often guilty of glossing over this, and as a result, many couples choose the AB or ABC approach without truly grasping these repercussions. Making clients highly aware of the significant bookkeeping, irrevocability, and other requirements that the AB & ABC trusts impose on the surviving spouse is a major point of this write up. Once clearly understood, it in fact gives major pause for many to force these conditions on their spouse.

That is why you each must carefully weigh just how much this concerns you. If it is just a small concern you may want to think twice before you impose such requirements. If it is a large and genuine concern to you then these measures may well be justified and appropriate for your situation. This is an individual choice. In weighing whether you desire to structure your trust to guard against this issue, remember – never lose sight of the fact that you may be the spouse who was worried about this issue, only to be the one left behind with your own self-created quagmire. There is no right or wrong in this decision, just philosophies and varying approaches to these issues. In the end you should always choose together what makes you comfortable and suits your situation.

We Will Go Over These Issues At Your Appointment

There is no need for you to become an expert at this. Just do your best to read through the material keeping in mind some of the guiding principles discussed in this overview. Rest assured that we will be happy to clarify, further explain, and answer your questions at any appointment. Our goal is simply to help you more fully understand your choices.

Part 1

Minimizing Estate Taxes

The Tax Goal Is To Utilize Two Exemptions (If Needed):

For most, the driving force behind trust structure is a tax issue. Properly drafted, a Living Trust allows a married couple to take advantage of both the husband’s and the wife’s estate tax exemptions for a total of two exemptions. By combining the power of two exemptions married couples can effectively double the amount that can pass estate tax free. Any one of the trust approaches discussed here allows you to do that. As mentioned, the dominant approaches under pre-2000 law were the AB and ABC trust structures. But remember, those approaches were mainly designed around the prior law of lower exemptions where there was often an attitude of assumed need. Given the fluctuating and generally increasing nature of the exemption, that assumption may no longer be valid for many. As a result a more flexible approach may be appropriate. In fact, that is the exact nature of the “Disclaimer Approach”.

How Much You Can Pass Tax-free:

The Economic Growth and Tax Relief Reconciliation Act of 2001 raises the amount that taxpayers can exempt from estate taxes with increasing amounts phased in over the period 2002 through 2009. In 2010 the Estate Tax is scheduled to expire altogether.

<u>Year</u>	<u>Exemption</u> (per person)
Pre 2004	\$1 Million
2004 & 2005	\$1.5 Million
2006, 2007 & 2008	\$2 Million
2009	\$3.5 million
2010	\$ Unlimited b/c estate tax eliminated that year (repealed)
2011 and thereafter.	\$ Good Question (or \$1 Million if Congress does not act)

However, unless Congress and the President enact additional legislation before 2011, the Act returns the exemption to the pre-2004 level of \$1 million. None the less, these changing exemption amounts provide compelling reasons to consider a more flexible alternative to the traditional AB approach.

Responsibilities & Burdens of an AB or ABC Trust:

Some core reasons to strongly consider a more flexible approach center around the hassles a surviving spouse must live with given an AB or ABC trust. These include the fact that:

1) The B & C trusts become irrevocable and non-amendable upon the first spouse's death (meaning the surviving spouse cannot alter those trusts, or add, change, or remove beneficiaries or gifts from those trusts). **2) The surviving spouse's use of the assets in the B & C trust must be limited** to an ascertainable standard. **3) The surviving spouse is almost always the successor and as such the surviving spouse is responsible and answerable to the future "inheritors" of the B & C trusts for appropriately using the assets and at certain points must render accountings as well as provide a copy of the trust to the heirs and future beneficiaries.** **4) The surviving spouse must properly allocate, title assets in, obtain tax ID numbers for, and maintain the B & C trusts** after the first spouse's death. **5) During the surviving spouse's entire remaining lifetime they must continue to accurately track and keep records of the assets and transactions of each trust** and complete separate tax filings for the A,B, & C trusts each year.

Such Hassles May No Longer Make Sense

Even though many a surviving spouse has understood the upside and abided by these requirements, I haven't met one who has liked having to do it -- and few whose eyes didn't glaze over at the prospect of coping with having to follow such procedures on the heels of their spouse's death. Somehow, a surviving spouse never seems to share a lawyer's opinion that administering an AB or ABC trust is "no big deal". Yet under prior tax law, lawyers, accountants and clients alike simply accepted these as sensible tradeoffs. And while it is true that these may be worthwhile hassles under the right circumstances, it makes zero sense to endure them when they are not needed to pass the combined estate tax-free.

Structure Your Trust Around Current Law, Not Old

There is new tax law now -- and the circumstances that previously justified an AB & (C) trust may be rapidly evaporating for many. This isn't hard to understand when you realize that one exemption alone will pass \$2 Million tax-free by 2006, \$3.5 Million by 2009 and an unlimited amount in 2010. If you are not worth over \$2 Million in 2006 or \$3.5 Million in 2009, of what possible need are two exemptions when just one will cover it? Of what possible need are two exemptions ever if the estate tax has been eliminated? The answer is -- no need.

No Longer Justified? In the final analysis it is quite possible that for most, if not eventually all, there will be zero need for a surviving spouse to go through such a paperwork hassle and accountability in order to pass the estate tax-free. Let me say that again. **An AB or ABC structure may eventually**

leave the surviving spouse with a much more complicated structure and hassle than is really needed or justified for tax purposes.

Lost Income Tax Advantages: Further, you should be aware that there are eventual potential tax disadvantages to an AB structure if you don't end up needing it to pass your estate tax-free. For instance, a residence allocated to the B or C trust (after the first spouse's death) does not qualify for the surviving spouse to use the \$250,000 capital gains exclusion for a primary residence -- and the assets in the B or C trust do not receive a stepped-up income tax basis at the second spouse's death. Also, new stepped-up basis rules will apply if the estate tax is eliminated. Gifts left in some trusts for a surviving spouse will probably not qualify for the \$4.3 Million in allowed stepped-up basis. While these are justified tradeoffs where an AB otherwise enabled a tax-free transfer, it is a shame to lose such benefits when the AB is not needed to eventually pass the combined assets estate tax-free.

Why Not Wait & See? – The Disclaimer Approach:

Whether or not an exemption sub-trust such as a B trust is appropriate is entirely dependent upon when the first spouse passes away and what the net worth and exemption amount are at that time. Fact is, we don't know when we are going to die, what our net worth will be at this uncertain point in the future nor what the tax exemption amounts will be at that time -- or even if there will be an estate tax. Yet the combined analysis of all of these data points are essential elements in deciding whether or not it makes sense to utilize and endure the hassle of an exemption sub-trust. At the very least any well written estate plan should still encompass the potential to utilize both spouse's exemptions. There is no argument about that. Problem is, many presentations and outdated assumptions wrongly lead folks to believe that the AB trust is the only road to potentially utilize both spouses' exemptions -- except such is not true. There is another road -- and in fact a far more flexible road. It is called the "Disclaimer Approach". Simply put, it allows any couple to wait until the death of the first spouse to decide whether it makes sense to use an exemption sub-trust. It's kind of a "best of both worlds", "wait and see" strategy.

AB & ABC Require the Trust To Be Split Even If It Isn't Needed Anymore

Remember, the traditional AB trust requires the trust to be split into sub-trusts when one spouse passes away. Unless you change the trust before the first spouse passes away, the surviving spouse is stuck with the AB trust format -- whether or not the B Trust is needed to eventually pass the combined estate tax-free. This of course requires the surviving spouse to comply with all of the previously discussed conditions and procedures -- even if it isn't truly needed for tax purposes.

Disclaimer Approach Lets You Wait & See

Unlike the AB & ABC trust, **the Disclaimer approach does not lock the surviving spouse into a course of action.** Instead of speculating, the Disclaimer approach permits the surviving spouse to make the determination according to the important data points as they actually exist at the first spouse's death. If it makes sense, the surviving spouse can trigger the funding of the exemption sub-trust through the use of disclaimers. This usually amounts to one piece of paper. If an exemption sub-trust does not make sense, then the surviving spouse simply does not exercise a disclaimer.

Disclaimer Approach Can Pass Just As Much Tax-free

Remember, the idea is to provide a vehicle for allowing the use of the deceased spouse's exemption (as well as the surviving spouse's exemption) -- if it ends up being needed. The Disclaimer structure does just that. **The Disclaimer approach has exactly the same ability to utilize both exemptions and exactly the same potential to pass as much tax free as the AB approach -- except it has far greater flexibility.** Unlike the AB & ABC approach -- the Disclaimer **does not** force you into using the exemption sub-trust whether you need it or not. The AB & ABC trust leaves no options. The Disclaimer method leaves your options open with a "wait and see" strategy.

Maybe It Is More Than Appropriate for The Surviving Spouse To Decide: Given the fact that the surviving spouse is the one who has to live with hassles of an exemption sub-trust an argument can certainly be made that she (he) should also appropriately be the one to decide whether or not it is used.

Keep Focused On Your Objectives:

Remember, the idea is to provide a vehicle for allowing the use of the deceased spouse's exemption (as well as the surviving spouse's exemption) -- if it ends up being needed. The Disclaimer structure does just that. Unlike the AB & ABC approach -- the Disclaimer does not force you into using the exemption sub-trust whether you need it or not.

The Best of Both Worlds: To many, the disclaimer approach seems the best of both worlds – and it's hard to disagree. It's flexible and it keeps your options open. We find that once couples understand, most greatly prefer and choose the flexibility of the Disclaimer approach. Indeed, we are often asked why anyone would want to close down their options and we can only think of very few reasons -- some which will be discussed next, and some later.

Evaluating The Surviving Spouse's Capabilities:

Tax wise, the only advantage of choosing an AB trust is if you have significant doubts about your or your spouse's capability to deal with these kinds of issues and exercise good judgment in this regards (within the allotted nine month time period after the first spouse's death). None of this necessitates that your spouse be financially and legally sophisticated. Rather, it entails a belief that your spouse will immediately (upon the first spouse's death) seek out competent legal and accounting advice -- and ultimately follow the reasonable course.

It is true that old age, confusion, indecisiveness, bad advice, incapacity, inability to properly evaluate and understand, and so on, are potential conditions and emotional states for a new widow or widower. On the other hand such cases tend to be the rare exception, not the rule. Any concerns over potential incapacity can be addressed with powers of attorney signed ahead of time or by seeking a conservatorship at that time. And remember, none of these issues matter for tax purposes if you don't end up needing both exemptions to pass the combined estate tax free.

Base Your Decisions On Likelihoods, Not Worst-Case Scenarios: At this time a few suggested guidelines may be in order. Hindsight will always be 20/20. But absent that, or a crystal ball, our suggestions are to make your decisions based on nearer term, likely probabilities, capabilities, and your own situation -- not worst-case possibilities or because you knew about something that happened to someone else. We don't get up and plan our day around the worst-case possibilities and it doesn't necessarily make sense to change that philosophy when it comes to your estate planning. For example, it's probably not yet time for a young or middle-aged couple to base their planning on the possible impaired judgment or dementia of very old age.

You May Be The Survivor Living With The Repercussions: Spouses often tend to analyze these issues from the one-dimensional angle within themselves as if they will be the first spouse to go. We think it is equally important to view it from the other side and not forget to ask yourself which approach you would want if you were the surviving spouse. You may well be the spouse who was worried about these issues only to end up being the one left with its repercussions (because you are the survivor).

Don't Forget The Income Tax Disadvantages: Also, if you are thinking of embarking on what you feel is a "play-it-safe" AB Trust strategy -- don't forget to weigh in the potential income tax disadvantages of an AB approach if it doesn't end up being necessary to pass an estate tax-free. (For example no step-up in basis for B assets and the potential disqualification for the \$250,000 capital gains shelters for personal residences.)

An AB Is No Guarantee: Finally, it may well be an illusion to think that an AB safely insures the use of two exemptions. While you may be worried about the surviving spouse's potential failure to exercise a disclaimer under appropriate circumstances, you should realize that they can just as easily fail to properly follow the AB requirements and formalities. It happens all the time. Every lawyer can tell you that despite the strongest advice otherwise, many surviving spouses neglect, or pay little or no attention to the AB requirements – and there are many others who never even bother to seek legal advice after the first spouse's death. Some spouse's even blatantly refuse and state that they are not going to pay attention to the AB. Absent the beneficiaries taking the surviving spouses to court, there is nothing that can be done to force the surviving spouse to follow procedure. And there aren't too many children willing to sue or sic lawyers on their parents.

Disclaimer or AB Unless It Is More Than A Tax Issue To You!

Clients often ask which version I would choose if I were them. I, in turn, ask if they are highly concerned with what their spouse does with their share after they are gone. If the answer is no, I will not attempt to hide the fact that I believe the Disclaimer approach is an excellent choice for such couples. And under all circumstances I know it's the one I'd want if I were the surviving spouse. But **that is just an opinion and a philosophy, not a directive. In the end I always advise anyone to do what makes them feel comfortable and best fits their situation.** And in all fairness, this can be more than a tax analysis for some couples. If you are highly concerned with what your spouse does with your share, trust structure becomes much more than a tax issue and enters a whole new realm called preserving testamentary intent. The ABC approach discussed in the next section is applicable to couples for which preserving testamentary intent is a larger issue. It should be pointed out that the ABC trust doesn't allow any more to be passed tax-free than either the AB or Disclaimer approach. In other words **an ABC trust does not gain you any tax advantage over the other two choices.** If you are not all that concerned with what your spouse eventually does with your share it's probably not very important for you to understand an ABC trust.

Part 2

The Testamentary Intent Issue

The ABC Trust -- Preserving Testamentary Intent

This would not be a balanced or inclusive discussion without providing for the fact that there are some couples who have more than just tax concerns. For various reasons some spouses are very concerned about what their surviving spouse ultimately does with their share.

All Assets of The Deceased Spouse Are Held In Irrevocable Trusts After The First Death:

Rather than giving any assets outright to the surviving spouse, the ABC trust structure calls for all of the deceased spouse's assets to be held in trust regardless of net worth. (The B trust is designed to handle up to the exemption amount. The C trust is there to catch any overage.) Leaving the deceased spouse's assets in trust prevents the surviving spouse from changing the ultimate beneficiaries and puts definite limitations on the use of the assets by the surviving spouse. As previously discussed, the **B & C trusts become irrevocable and non-amendable** at the first spouse's death and that means: 1) the **surviving spouse may only use the assets on him or her self** – not a new boyfriend, girlfriend, spouse or anyone else and 2) **The surviving spouse cannot change the beneficiaries** who will ultimately inherit the balance of the B & C trusts (at the surviving spouse's death). In legal circles this concept is called "preserving your testamentary intent".

Preserving Testamentary Intent Is Not A Free Ride

Understand however, that preserving your testamentary intent is not a free ride -- as it involves forcing the use of the B & C trusts primarily as a testamentary intent preserving tool, rather than as a tax tool. **The forced use of the B & C trusts shouldn't be invoked lightly in that each spouse should keep in mind the conditions, responsibilities, inflexibility, bookwork, accountings, tax filings, accountability and liability to others, reporting requirements, and other hassles that they will be imposing on the surviving spouse for life. Also, don't forget about the tax disadvantages to this structure if it is not needed to pass the estate tax-free. Remember too, that the same inability to change beneficiaries will still apply even if a child harasses or threatens the surviving spouse or becomes an ax murderer.**

That is why you must each carefully weigh just how much this concerns you. If it is just a small concern you may want to give pause before you impose such requirements (and just resort to old-fashioned threats of haunting). If it is a large and genuine concern to you then maybe it is justified. Such is an individual choice. In weighing whether you desire to structure your trust to guard against this issue, remember – **what is good for the goose is good for the gander. Never lose sight of the fact that you may be the spouse who was worried about this issue, only to be the one left behind with your own self-created quagmire.**

Profiles, Issues & General Guiding Principles For Deciding on an ABC

On the surface, a married couple with a long marriage and 100% common children and community property don't generally fit the profile of a couple who are worried about testamentary intent as much as a couple with a short marriage, blended family, separate property and different kids from different marriages. Yet we have couples with one marriage and common children who vehemently want the ABC and couples with different children who in no way want to bind their spouse with the hassles of an ABC, even knowing the survivor has the power to later disinherit their separate children. Again, this is a very individual choice and depends on your own worry, trust, value, and comfort levels. It is worth noting however, that if you have common children, **most surviving spouses seem internally motivated to continue to leave their estate to their own children.**

Surviving Spouses Retain Separate Property Rights Even Upon Re-Marriage

If a surviving spouse remarries you should be aware that there is no legal obligation to leave any property to the new spouse. It surprises many people to learn that by law, property brought into the marriage remains the sole and separate property of the surviving spouse. Stated again, property that you bring into a marriage does not automatically become community property. Though we advise a pre or post-nuptial agreement in such cases, even without one, any good family law attorney can instruct a surviving spouse how to properly track and manage such assets so they will remain entirely the separate property of the surviving spouse. Such a strategy will allow any spouse who remarries the continued unfettered and uncontested right to leave this property to their own children.

Part 3 **Further Guiding Principles**

Whether you are just worried about the tax issue or considering an ABC, we continue with some thoughts in helping you decide. We reiterate our suggestion to make your decisions based on nearer term, likely probabilities, capabilities, and your own situation -- not worst-case possibilities or because you knew about something that happened to someone else. Since you may well be the one living with the repercussions we continue to encourage you to also ask which version you would want of if you were the surviving spouse – kind of a “do unto others as you would have them do unto you” view. Also

keep in mind the potential income tax disadvantages of an AB&C approach if it isn't necessary to pass an estate tax-free. (That is no step-up in basis for B & C assets and the potential disqualification for the \$250,000 capital gains shelters for personal residences.)

Avoid The Temptation to Rule from the Grave: Most of you have worked very hard for your assets and gained much wisdom and insight just as a result of living. This often gives rise to a natural temptation and inclination to “rule from the grave”. That is, to try to manage, direct, and control the use and consumption of assets, and to whatever degree, people’s lives and destinies – long after their dear departed souls have left this world. Lawyers, clients, and others differ in their opinions about this. There is no right or wrong in this regards, there is only a philosophy about it. We find attempts to manage and control things past death often causes more problems than they will solve. Further, **you will eventually lose control no matter what you do** – and any amount of time you are able to exercise it, usually a generation at best, will not even amount to a blink in the cosmic sense of things. These are just some of the reasons that we espouse a philosophy of avoiding the temptation to rule from the grave.

In The End, Do What Makes You Comfortable

There is no right or wrong in this decision, just philosophies and attempts to address these issues on what is surely less than full information about the future. That is why in the end you should always choose together what makes you comfortable and suits your situation. Just be sure it is a choice made with your eyes open. And don't let old habits be the reason. Make sure you are choosing or continuing with an AB or ABC approach for your own good reasons -- not because you are stubbornly clinging to long held but potentially outdated maxims. It is just an unfortunate fact that the long time prevalence and momentum of the AB approach has caused its own lingering mindset in legal/financial circles, literature, and among married couples and clients -- keeping many locked into or choosing a strategy they may eventually find regretful, inappropriate, or unnecessary.

A Final Note For Non-U.S. Citizens Only: Non U.S. citizens often believe they always require special provisions in their trust. Truth is, those special provisions are only needed when the deceased spouse’s estate exceeds the exemption amount. This means that a couple with all community property would have to have a combined net worth over \$2 Million in 2002, \$3 Million in 2004, \$4 Million in 2006, \$7 Million in 2009, etc. However, if it turns out that the surviving spouse is not a U.S. Citizen (at the first spouse’s death) there are safety clauses built in to whichever trust version you choose. These safety clauses either allow or automatically direct the necessary amounts into a Qualified Domestic Trust thereby qualifying a non-citizen spouse for any needed marital deduction.

Following Appendix

The appendix consists of 4 pages. The first page of the appendix discusses the trust language and standards – and surviving spouse’s powers as successor trustee. **Please initial this page.** The balance of the appendix pages each diagram and summarize the Disclaimer, AB, and ABC approach respectively. **Please sign the version you want where it says “Choose”. Please initial the versions you decline where it says “Decline”.** Note: Our examples use a tax-free amount of \$1,000,000 for illustration. Once you understand the concept you can plug in appropriate year numbers or whatever numbers you wish to use or assume (the same principles apply).

By our signatures below we certify that we have read the “Married Couple Trust Worksheet” (consisting of 8 pages plus the 4 page appendix).

(Husband's Signature)

(Wife's Signature)

Surviving Spouse's Powers Over Any Sub-Trust

The surviving spouse is permitted to be (and virtually always is) the successor trustee over all trusts – and therefore will (after the first spouse's death) **maintain complete signature power and control over all assets to buy, sell, loan and encumber any asset in any trust**. There is no loss of management control at any time. The surviving spouse is completely within his or her rights to sell (or buy) any asset such as a house at any time regardless of which trust it is in (this is changing the form of the asset, not using it up). Aside from any trust being irrevocable and non-amendable, the only real limitation is on the consumption of assets in an irrevocable trust (also fully allowable as long as it is for the "health, education, and support to maintain the accustomed manner of living of the surviving spouse"). If you are interested in the option of designating someone other than the surviving spouse as successor trustee we will have to schedule additional appointments (at added cost) and/or even refer you to other counsel if we ascertain that you need advice or services beyond the scope of what this office provides.

Endless Variations, Complications, & Permutations

You need to be aware that there are endless variations and conditions that you can impose in a trust – and that includes conditions for your spouse which further restrict or expand their rights and/or the use and availability of what you leave in trust for them. For instance, you could insist that they use their half before they touch your half – or – say that they are only entitled to income – or – allow them to shift interests among a named class of beneficiaries -- or you could, even at your death, give your assets to someone other than your surviving spouse. The potential variations are endless. Obviously, it would be wholly impractical (for any law office) as well as prohibitively expensive to discuss every possible variation in trust language and standards with every client (and it would scare most folks away from ever completing a trust). Instead, law offices (regardless of the price) generally choose and then routinely utilize certain language and standards that have proven themselves to work well over and over again in the real world. We have watched our chosen customary language, standards, and trusts perform very well time after time over the years (functioning as a near perfect middle ground in our opinion). Our chosen "ascertainable standard" allows the surviving spouse to use the assets in any irrevocable trust for their health, education, and support to maintain their accustomed manner of living.

It isn't that we are trying to force everyone into the same mold. It's just that we tend to stick with what we have seen work well so many times. It is possible you have a unique situation that calls for some special tailoring but please understand our reluctance to alter the language and/or standards without very lengthy and thorough discussions as to the implications. If you are interested in pursuing such options we will have to schedule additional appointments (at added cost) and/or even refer you to other counsel if we ascertain that you need advice or services beyond the scope of what this office provides.

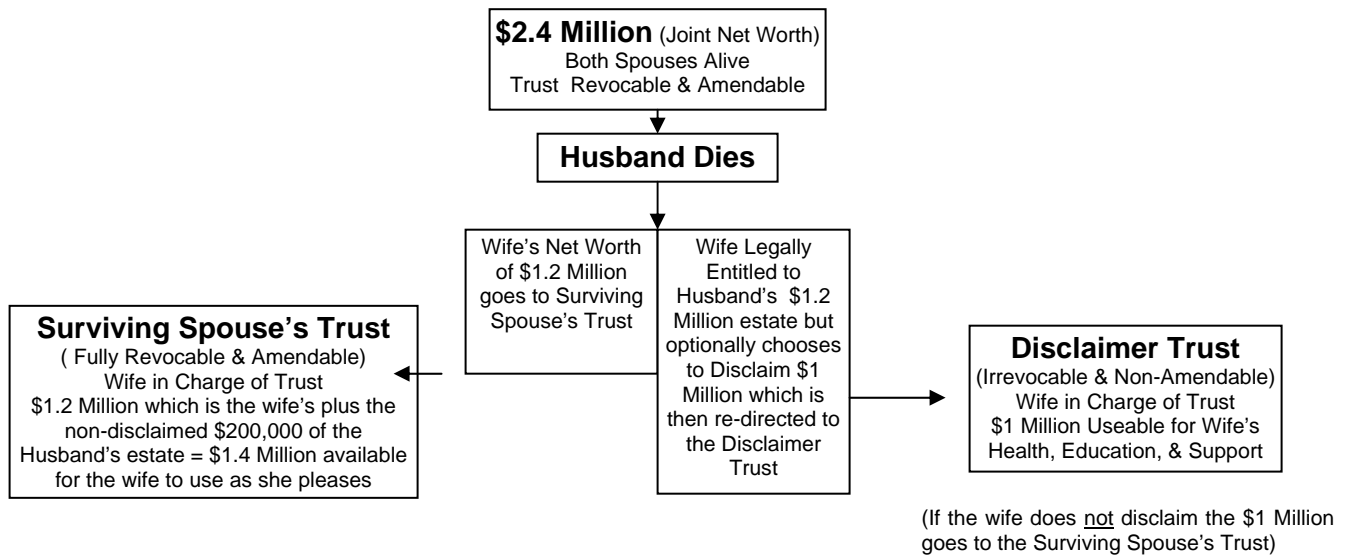
Otherwise, by your initials below you accept and agree to the language and standards set forth in our trusts -- and agree that the surviving spouse shall be the first successor trustee.

Husband's Initials: _____

Wife's Initials: _____

The “Disclaimer” Trust Approach

This approach allows the surviving spouse to choose (at the first spouse’s death) whether or not (and to what extent) she wants to use an exemption sub-trust. This sub-trust is called a “Disclaimer Trust”. (This Disclaimer Trust is already written into your trust but only becomes activated if the surviving spouse chooses to at the first spouse’s death). Under this approach the living trust states that the surviving spouse is to inherit all assets outright -- yet the law allows her up to 9 months to “refuse” (disclaim) all or part of the inheritance (in which case the disclaimed assets are re-directed into the irrevocable Disclaimer Trust governed by the exemption sub-trust rules previously discussed). Even though the couple does not specify an A-B Trust ahead of time, for up to 9 months after the first spouse’s death it essentially leaves the surviving spouse the option to turn it into an “A-B” trust (if circumstances warrant). Actually it would be better to call the “Disclaimer Trust” the “Backdoor B Trust” with the 9 month option to variably fund it to whatever level makes sense. **Warning: If the surviving spouse takes ownership of the deceased spouse’s assets (&/or starts treating them as her/his own) – or -- fails to exercise a qualified disclaimer within nine months (of the first spouse’s death) – the ability to exercise a disclaimer will be lost (negating any potential use of the deceased spouse’s exemption). If this is the approach you choose, we highly advise seeking immediate competent legal and financial guidance immediately upon the first spouse’s death.**



We have read the material and **CHOOSE** a “Disclaimer” Trust: _____
(Husband’s Signature)

 (Wife’s Signature)

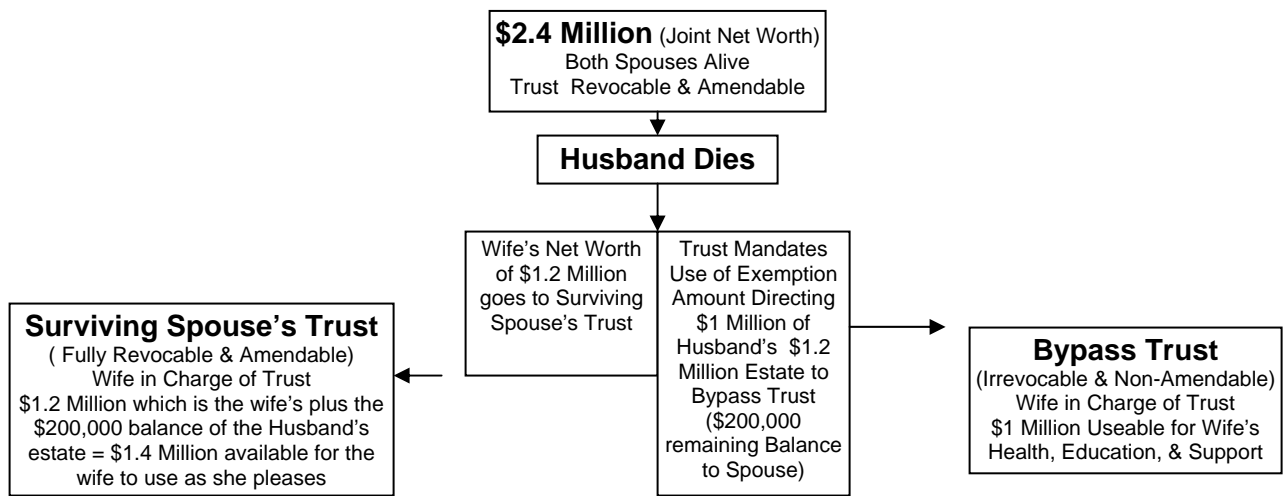
or

We have read the material & **DECLINE** a “Disclaimer” Trust: _____
(Husband’s Initials)

 (Wife’s Initials)

The A-B Trust Approach

If there is doubt in your mind about being able to depend on your spouse (or yourself) to take proper action and make smart decisions within the allotted time (**and your projections anticipate the need to use an exemption sub-trust**), then you should consider using an “A-B” trust (forcing the issue). Forcing the issue with a “A-B Trust” approach helps protect against inadvertent or purposeful neglect of the issue. **Using the A-B Trust also has the secondary advantage of helping to preserve your testamentary intent -- up to the exclusionary amount** (the excess of that goes to the surviving spouse). Committing to the “B” trust (if you think you will be worth over the exclusionary amount) is the traditional conservative course of action. Under this approach however, the surviving spouse will still be stuck with the responsibility and hassle of maintaining the “B” trust -- even if it turns out the second tax exemption isn’t needed. Also, assets in the B will not receive a stepped-up income tax basis at the second death and any real estate allocated to the B trust will not qualify for the \$250,000/\$500,000 capital gains exclusion. Again, this decision may have nothing to do with trusting your spouse and everything to do with their capability to deal with these kinds of issues when you pass away. (Note: The “A” Trust is actually called the “Surviving Spouse’s Trust” and the “B” Trust is actually called the “Family Bypass Trust”.)



We have read the material and **CHOOSE** an “A-B” Trust: _____
(Husband's Signature)

 (Wife's Signature)

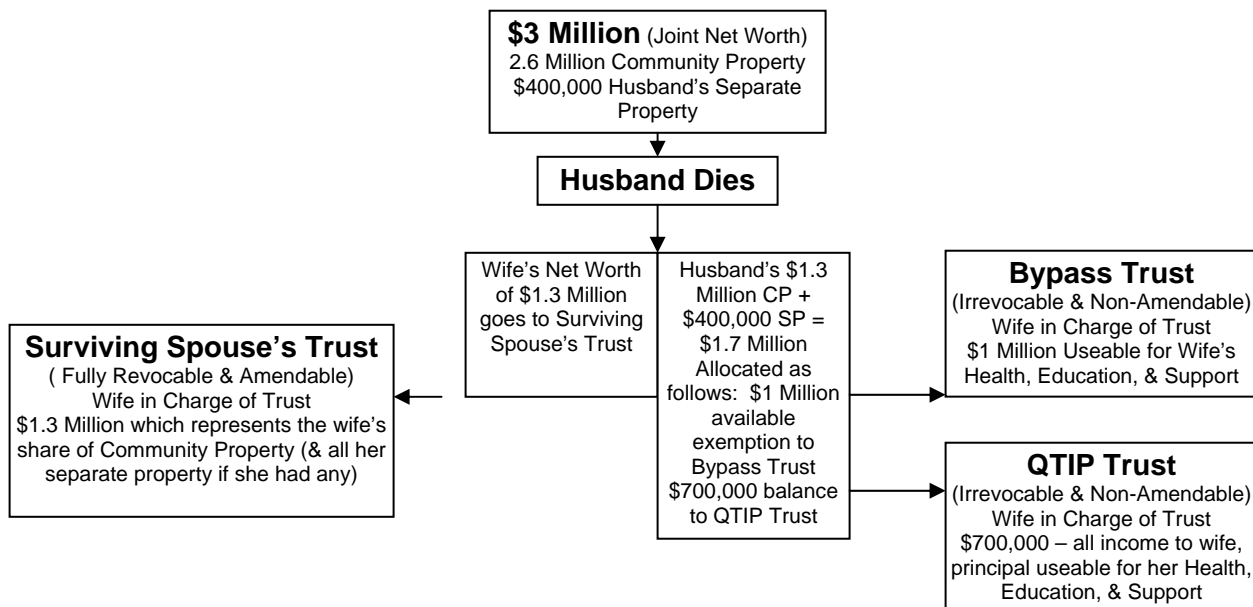
or

We have read the material & **DECLINE** an “A-B” Trust: _____
(Husband's Initials)

 (Wife's Initials)

The A-B-C Trust Approach

This approach is generally only applicable to those of you who are **highly concerned with the issue of preserving testamentary intent**. If your share exceeds the exemption amount (i.e. \$1 Million) the excess will spill over into yet another irrevocable sub-trust (“C” Trust) – preventing the excess from going outright to your surviving spouse (yet still qualifying for the marital deduction -- meaning no taxes will have to be paid until both spouses have passed away at which time it is taxed as part of the survivor’s estate). The “C” trust (actually called the Martial Qualified Terminable Interest Property Trust or QTIP Trust) specifies that all the income is payable to the surviving spouse annually (a requirement) -- and as written the principal will continue to be available for health, education, and support. This approach necessitates the legal maintenance of yet another irrevocable trust after the first spouse’s death. Also, assets in the B & C trusts will not receive a stepped-up income tax basis at the second death and any real estate allocated to the B or C trust will not qualify for the \$250,000/\$500,000 capital gains exclusion. Note: In any sub-trust allocation your share is defined to include ½ of the community property plus 100% of your separate property (if any).



We have read the material and **CHOOSE** an “A-B-C” Trust: _____
(Husband’s Signature)

 (Wife’s Signature)

or

We have read the material & **DECLINE** an “A-B-C” Trust: _____
(Husband’s Initials)

 (Wife’s Initials)