TENANCY BY THE ENTIRETIES ARTICLE

Sample Article for a Florida Joint Revocable Living Trust

[This is a sample article for a Florida joint revocable trust created by a married couple, with two companion provisions that belong in the sections of the trust agreement named below. Conform the article number and the term Trustmakers to the trust agreement it is added to.]

ARTICLE ____

TENANCY BY THE ENTIRETIES PROPERTY

Purpose; Precedence; Material Inducement

Notwithstanding anything to the contrary in this Trust Agreement, all terms of this Article apply to property conveyed to, held by, or distributed from the trust. To the extent there is any conflict between this Article and any other provision of this Trust Agreement or of any default provision of Florida law, the terms of this Article shall take precedence. The Trustmakers are married to one another and have been continuously married at all times material to this Trust Agreement.

It is the Trustmakers' express, material, and controlling intent that no transfer of property to this trust shall diminish, terminate, impair, or place at risk any exemption from creditor process that the property enjoyed immediately before the transfer, including without limitation the exemption afforded property held by the Trustmakers as tenants by the entireties. This Article is a material inducement to the creation and funding of this trust, and the Trustmakers would not have transferred any tenants by the entireties property to this trust in the absence of this Article.

Definitions

"Entireties Property" means (i) any property held by the Trustmakers as tenants by the entireties immediately before its conveyance to this trust or to the Trustee; (ii) any property acquired by the Trustee with the proceeds of Entireties Property or in exchange for Entireties Property; and (iii) all income, rents, issues, profits, appreciation, distributions, substitutions, and reinvestments of the foregoing. Entireties Property retains its character as Entireties Property notwithstanding any change in form, and the tracing of Entireties Property into substituted assets shall be liberally construed in favor of preserving entireties character. "Joint Lifetime" means the period during which both Trustmakers are living and remain married to one another.

Transfers of Entireties Property Are Conditional; Condition Precedent

Every transfer of Entireties Property to this trust, to the Trustee, or to any nominee, agent, custodian, or entity holding for the trust is made subject to, and expressly conditioned upon, the property retaining in full its character as tenants by the entireties property and the creditor exemption incident to that character. That condition is a condition precedent to, and a limitation upon, the estate purportedly conveyed. It is not a condition subsequent, a forfeiture, a divesting condition, a restraint on alienation, or a provision that operates upon or by reason of the insolvency, financial condition, or bankruptcy of either Trustmaker.

If a court of competent jurisdiction determines, or if it is otherwise established, that any property does not or did not possess all of the characteristics of tenants by the entireties property at any time during the Joint Lifetime, then, as to that property: (i) the condition shall be deemed to have failed as of the moment immediately preceding the purported transfer; (ii) the purported transfer shall be void ab initio and of no force or effect; (iii) the Trustee shall be deemed never to have taken, accepted, or held legal or equitable title; and (iv) title shall be deemed to have remained at all times in the Trustmakers, free of trust, as their tenants by the entireties property, as though the instrument of conveyance had never been executed, delivered, or accepted. Any such determination relates back to and is effective as of the date of the purported transfer.

The Trustee accepts delivery of Entireties Property only upon and subject to the foregoing condition. Any acknowledgment of receipt, schedule of trust property, or acceptance of delivery appearing elsewhere in this Trust Agreement or in any schedule or exhibit is qualified by, and subordinate to, this Article.

Presumption of Entireties Character; Statement of Intent; Unities Preserved

Any joint interest in property conveyed to the trust is to be presumed to be a conveyance of Entireties Property. All Entireties Property that is or becomes trust property, or that is held by the Trustmakers acting jointly as Trustee, shall remain tenants by the entireties property throughout the Joint Lifetime. This presumption shall not, however, operate to convert the separate or non-marital property of either Trustmaker into Entireties Property in the absence of that Trustmaker's express written direction.

The Trustmakers intend that Entireties Property retain every characteristic and unity of a tenancy by the entireties under Florida law, including the unities of possession, interest, title, and time, the unity of marriage, and the right of survivorship, to the same extent as if the property had remained titled in the Trustmakers' names as tenants by the entireties, and that the protections recognized in Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45 (Fla. 2001), and Section 736.0505, Florida Statutes, apply to that property. This instrument is to be construed in the manner most favorable to preserving the entireties character and immunities of that property.

A conveyance of any jointly owned interest that is characterized under Florida law not to be a tenancy by entirety interest prior to the conveyance will retain the form of ownership and the incidents, including any right of survivorship, that the interest possessed immediately before the conveyance, and shall not be severed or partitioned by reason of the conveyance unless the Trustmakers so direct in a signed writing.

No Partition, Severance, or Contrary Intent

A conveyance or transfer of Entireties Property to this trust, whether directly transferred or transferred to a nominee or agent on behalf of the trust, shall not be construed as a partition of the Entireties Property unless there is an express written agreement to that effect between the Trustmakers.

No such conveyance or transfer, and no instrument effecting it, shall be construed as an agreement between the Trustmakers to terminate or sever the tenancy by the entireties, as a disclaimer or waiver of entireties ownership, or as express language showing an intent contrary to continued entireties ownership. The designation of the Trustmakers as "Trustee" or "Trustees," rather than as "husband and wife" or "spouses," in any deed, assignment, account title, signature card, or other instrument shall not constitute or evidence any such contrary intent.

Exclusive Beneficial Ownership During the Joint Lifetime

During the Joint Lifetime, the Trustmakers, and only the Trustmakers, hold the entire beneficial and equitable interest in Entireties Property, and they hold that interest as tenants by the entireties and not otherwise. No person or entity other than the Trustmakers, including any other lifetime beneficiary, any remainder, contingent, successor, or residuary beneficiary, and any child or other descendant of either Trustmaker, shall have, acquire, or be deemed to have any interest of any kind whatsoever in Entireties Property during the Joint Lifetime, whether legal or equitable, present or future, vested or contingent, absolute or conditional, or any right to receive, demand, compel, restrain, object to, or be informed concerning any distribution, investment, or disposition of Entireties Property. No such person is a beneficiary of this trust with respect to Entireties Property during the Joint Lifetime, and the Trustee owes no duty, fiduciary or otherwise, to any such person with respect to Entireties Property during the Joint Lifetime.

Withdrawals and Reconveyance

While both Trustmakers are living, any withdrawals of Entireties Property from the trust shall be made only with the Trustmakers' joint consent. The Trustee shall re-convey the property to the Trustmakers as tenants by the entireties, promptly upon their joint written direction, without consideration, and without regard to the interest of any other beneficiary. Entireties Property withdrawn or removed from the trust will retain its character as tenants by the entireties property. Notwithstanding anything to the contrary in this Trust Agreement, no other lifetime beneficiary or any future contingent beneficiary shall have any interest of any kind, legal or equitable, present or future, vested or contingent, in the Entireties Property while either Trustmaker is alive.

Lifetime Powers; Joint Control Required

While both Trustmakers are living, the Trustmakers, acting jointly and only jointly, shall retain all rights, privileges, and obligations regarding Entireties Property as if that property were owned by them directly and free of trust, including without limitation the unrestricted rights of possession, use, occupancy, income, management, encumbrance, and disposition.

Neither Trustmaker acting alone shall have any power to sell, encumber, pledge, distribute, withdraw, revoke, amend, or otherwise deal with Entireties Property, nor any power to compel the other Trustmaker to do so, nor any power to reach or assign any interest in Entireties Property. Any purported unilateral act of either Trustmaker with respect to Entireties Property is void. Every power conferred on the Trustee elsewhere in this Trust Agreement is limited accordingly as it applies to Entireties Property.

Consent During Incapacity

If either Trustmaker is incapacitated, the joint consent required under this Article for any withdrawal, conveyance, encumbrance, or other transaction affecting Entireties Property may be given on behalf of the incapacitated Trustmaker by the incapacitated Trustmaker's agent under a durable power of attorney or by the incapacitated Trustmaker's court-appointed guardian, but only for a transaction made for the benefit of one or both of the Trustmakers. Consent so given is deemed the consent and act of the incapacitated Trustmaker, and a transaction taken with that consent is a joint act of both Trustmakers and is not a unilateral act voided by the Section of this Article entitled "Lifetime Powers; Joint Control Required."

Preservation of Exemptions; Section 736.0505(1)(a), Florida Statutes

This is a revocable trust. Consistent with section 736.0505(1)(a), Florida Statutes, the property of this trust is subject to the claims of a Trustmaker's creditors during that Trustmaker's lifetime only to the extent the property would not otherwise be exempt by law if owned directly. The Trustmakers are co-settlors of this trust, and every contribution of Entireties Property is made by them jointly in their capacity as a married couple. Accordingly, the exemption to be tested under section 736.0505(1)(a) with respect to Entireties Property is the exemption that the property would enjoy if owned directly by the Trustmakers as tenants by the entireties, and Entireties Property is not subject to the claims of the creditors of only one Trustmaker; section 736.0505(1)(a) applies to Entireties Property held in this trust only as to the Trustmakers' joint creditors.

The Trustmakers intend that every exemption available under Florida law be preserved in full as to all trust property, including without limitation the homestead exemption under Article X, Section 4 of the Florida Constitution, the tenancy by the entireties exemption, and the exemptions afforded by chapter 222, Florida Statutes. No provision of this Trust Agreement shall be construed to waive, disclaim, or limit any such exemption.

Schedule and Separate Accounting

Property conveyed to the trust as tenants by the entireties property should be listed on Schedule TBE. The omission of property from Schedule TBE does not overcome the presumption that property jointly conveyed to the trust is Entireties Property. The Trustee shall account for Entireties Property separately from each Trustmaker's separate property and shall not commingle Entireties Property with separate property.

Dissolution of Marriage

If the Trustmakers' marriage is dissolved, all Entireties Property then held in the trust will be deemed severed as of the date of dissolution and will thereafter be held for the Trustmakers' benefit as tenants in common, each Trustmaker holding an equal, separate one-half interest as that Trustmaker's separate property, unless a court order or a written agreement between the Trustmakers provides otherwise.

Conveyance Upon the First Death; Disclaimer; Continued Administration

Upon the death of the first Trustmaker to die, the entire beneficial interest in Entireties Property shall belong to the surviving Trustmaker by operation of law and outside the terms of this trust, free of any interest of any other beneficiary, and shall not be subject to administration in the estate of either Trustmaker.

The conveyance of the deceased Trustmaker's interest to the surviving Trustmaker on the first death is subject to the surviving Trustmaker's right to disclaim all or any part of that interest under chapter 739, Florida Statutes. To be effective under chapter 739, the disclaimer must be in writing, declare itself a disclaimer, describe the interest disclaimed, be signed by the surviving Trustmaker and witnessed and acknowledged in the manner provided for deeds, and be delivered to the then-serving Trustee. For the disclaimer also to be a qualified disclaimer for federal tax purposes under Section 2518 of the Internal Revenue Code, it must be an irrevocable and unqualified refusal delivered within nine months after the deceased Trustmaker's death and before the surviving Trustmaker accepts the interest or any of its benefits. Any interest so disclaimed does not pass to the surviving Trustmaker and shall instead be administered as the deceased Trustmaker's trust property and distributed under the trust-share provisions of this instrument. If the surviving Trustmaker disclaims, the surviving Trustmaker's interest in the same Entireties Property shall be treated as the surviving Trustmaker's separate property.

Unless and to the extent the surviving Trustmaker disclaims as provided above, the surviving Trustmaker shall be deemed, upon the earlier of the surviving Trustmaker's written waiver of the right to disclaim or the expiration of nine months after the deceased Trustmaker's death, and without any further act, instrument, deed, assignment, or probate proceeding, to have contributed the property to this trust as the surviving Trustmaker's separate property, to be thereafter administered and distributed under the Articles that follow. Until that time, the Trustee shall continue to hold title to the property and may administer it in a fiduciary capacity, and no act of the Trustee in that capacity shall be treated as the surviving Trustmaker's acceptance of the deceased Trustmaker's interest or its benefits.

Expenses and Claims at the First Death

Property that passes to the surviving Trustmaker by right of survivorship under this Article is not subject to administration for, and shall not be used to pay, the deceased Trustmaker's individual expenses, claims, or death taxes. Notwithstanding any provision of this instrument directing the payment of debts, expenses, or taxes, those items shall be paid from the deceased Trustmaker's separate property and from any other property properly chargeable under the administrative provisions of this instrument.

Homestead Held as Tenants by the Entireties

If the Trustmakers' homestead is conveyed to this trust as Entireties Property, the Trustmakers intend that it retain the exemption from forced sale under Article X, Section 4 of the Florida Constitution, together with the rights preserved by the permanent-residence provisions of this instrument, and that on the first death it pass to the surviving Trustmaker outright, consistent with the constitutional restrictions on the devise of homestead property.

Alternative Construction; Merger

If, notwithstanding the Section of this Article entitled "Transfers of Entireties Property Are Conditional; Condition Precedent," a court of competent jurisdiction determines that Entireties Property was effectively transferred to and is held by this trust during the Joint Lifetime, then the Trustmakers intend, and it shall be construed, that the legal title held by them as Trustee and the entire equitable title held by them as the sole beneficiaries of Entireties Property merge, so that the Trustmakers hold the Entireties Property in fee simple as tenants by the entireties, free of trust. To that end, and for the avoidance of doubt, no person other than the Trustmakers holds any beneficial interest in Entireties Property during the Joint Lifetime.

Instruments of Conveyance; Titling of Accounts

Every deed, assignment, account agreement, signature card, brokerage or depository account title, membership certificate, or other instrument by which Entireties Property is conveyed to or held for this trust shall, wherever practicable, identify the Trustmakers as husband and wife serving jointly as Trustee, and shall recite that the property is conveyed and held subject to this Article, the terms of which are incorporated in that instrument by reference. The Trustee shall record or file such instruments as the Trustmakers jointly direct. The absence of any such recital or designation from any instrument shall not be construed as evidence of an intent contrary to this Article.

Construction; Severability; Purpose

The sole purpose of this Article is to preserve exemptions that existed before any transfer of property to this trust and to which the Trustmakers are entitled under Florida law, and this Article shall be liberally construed to preserve the entireties character of Entireties Property and every exemption incident to it. No provision of this Article shall be construed to hinder, delay, or defraud any creditor of either Trustmaker. If any provision of this Article is held invalid or unenforceable, the remaining provisions shall continue in full force and effect, and the invalid or unenforceable provision shall be reformed to the minimum extent necessary to render it enforceable and to carry out the intent expressed in the Section of this Article entitled "Purpose; Precedence; Material Inducement."

COMPANION PROVISIONS

Addition or Removal of Trust Property (reserved-powers section)

Either of us may add property to our trust. Both of us, acting jointly may remove any property from our trust. Each of us, acting alone, may remove our own separate property from our trust. Tenants by entireties property removed from our trust will retain its character as tenants by entireties property.

Trust Property After the First Death (trust-property definitions section)

After the first of us dies, the surviving Trustmaker's separate property and one-half of any tenants by entireties property disclaimed by the surviving Trustmaker in the manner prescribed herein after the death of the deceased Trustmaker will be referred to as the surviving Trustmaker's trust property. The surviving Trustmaker's trust property will be referred to as the Survivor's Trust, and our Trustees shall administer the Survivor's Trust as provided in [Survivor's Trust Article].

The deceased Trustmaker's separate property and one-half of any tenants by entireties property disclaimed by the surviving Trustmaker in the manner prescribed herein after the death of the deceased Trustmaker will be referred to as the deceased Trustmaker's trust property.