How often have you been working on a typical husband and wife revocable trust estate plan and wished you had a “magic wand” to instantly convert all of their jointly owned property into trust property — owned one half by each trust so as to assure maximum use of each of their unified credits and generation-skipping transfer tax exemptions? There is such a mechanism. It requires only three things:

(1) Husband and wife be trustees of each of their revocable trusts,
(2) The trust instruments authorize the trustees to hold title to trust property in their individual names without disclosing their fiduciary capacity, and
(3) Husband and wife execute a recordable document declaring that all properties registered in their joint names, whether presently so held or subsequently acquired, shall belong one half to each of their revocable trusts (as equal tenants in common). An example of such a joint declaration is set forth in Exhibit A.

Elimination of “True” Joint Ownership

A key benefit of having husband and wife act as two trustees of each of their revocable trusts and hold title in their joint names, without disclosing any trust involvement, is the ease with which that permits elimination of “true” joint ownership. Unless each spouse has at least $600,000 in separate property to fully fund a credit shelter trust if he or she dies first, even a small amount of jointly owned property will deprive the first to die of the opportunity to shelter the full unified credit equivalent in a credit shelter trust and will potentially cause needless tax of that joint property amount (at 37% to 60% tax rates) on the survivor’s death. Furthermore, if future generation-skipping transfer (“GST”) taxes are a concern, unless each spouse has at least $1 million (or, more accurately, $1.26 million before estate taxes) in separate property to fully fund one or more GST exempt trusts if he or she dies first, the existence of any true joint property holdings will, to that extent, prevent maximum use of the $1 million GST exemption of the first spouse to die.

Using the magic wand of a “joint declaration” of two revocable trust ownership as tenants in common (Exhibit A), the spouses can simply and instantly convert all of their joint property into trust owned property — one half in each trust — without having to disturb record titles, reissue stock certificates, change bank and broker account registrations or the like. While in fact becoming trust owned property in every legal sense (because of the declaration of trust ownership and the trust provisions), these properties and accounts will continue to appear to the public to be traditional jointly held properties and accounts. But they will, in fact, no longer be truly jointly owned properties and accounts for any tax or other legal purpose. Instead, they are truly trust properties thereafter. Execution of the declaration constitutes a transfer to the trusts. The unlimited marital deduction makes it unnecessary to even consider gift tax returns in making these changes in true ownership.

Each joint declaration of trust ownership does not have to be for equal tenants in common ownership by two trusts. It can instead be in some other proportions (e.g., 20%/80%) either way or, more commonly, all owned by just one trust (either husband’s or wife’s) assuming both are agreeable to that ownership. Likewise, instead of having one joint declaration covering all joint properties (now held or hereafter acquired), a joint declaration can be written to cover just one property or just certain kinds of property (e.g., all securities or all bank accounts). Often, where one spouse does not have sufficient property to take advantage of the full unified credit if that spouse should die first, a declaration that henceforth the jointly titled house shall belong to that spouse’s trust alone will solve the problem.

Other Advantages

In addition to eliminating true joint ownership, this magic wand technique, which might technically be called “joint tenancy undisclosed trustee titleholding,” offers many benefits.
essional clients, who are always concerned about possible malpractice lawsuits, particularly like this seemingly creditor proof titleholding method, usually with their spouses as the other trustee and title held by them together as apparently entireties property. However, they should be warned that if the property really belongs to the doctor's revocable trust (or one-half to each of their trusts), a creditor may institute discovery and turn up the true underlying revocable trust (or two revocable trust) ownership of the property, thus destroying the apparent creditor protection provided by the apparent entireties titleholding. In some states the assets of a revocable trust (e.g., the doctor's revocable trust's one-half interest) are subject to the claims of the settlor's creditors.

Fifth, joint tenancy undisclosed trustee titleholding also avoids the need to disclose the trust's involvement if one of the trustees should die. With title apparently held in the joint names of husband and wife, rather than in their names as trustees under specifically described trust instruments (the traditional trust titleholding method described below), the death of one of them leaves the survivor holding title with no need for probate or disclosure of the true trust ownership of the property. The survivor can transfer title to a new joint tenancy including the successor co-trustee (or to a nominee of the owner trust or trusts as noted below) without having to disclose on the record the true trust ownership of the property involved.

Some Caveats

In considering the use of a joint tenancy undisclosed trustee titleholding arrangement, there are a few caveats to keep in mind. Whenever out-of-state real estate is to be involved in any kind of joint titleholding, it is important to check local law to be sure that the wording in the joint tenancy deed will result in the property automatically passing to the survivor on the first death. Some states, like South Carolina, require special wording and others, like Texas, require a written survivorship agreement among the grantees (usually attached to or incorporated into the deed or oil and gas lease assignment). One or two states, like Louisiana, simply have no joint and survivor mechanism whatsoever.

If all of the joint tenants should die, the declaration of trust ownership and the (or each) trust agreement itself would have to be brought forth and perhaps recorded, thereby establishing trust title ownership of the assets in the traditional fashion described below — with all the practical disadvantages of that arrangement.

Holding Title in Trustee Name Without Disclosing Fiduciary Capacity

The traditional manner in which a trust takes title to property is as follows:

- Inter vivos trust example: "James J. Jay and Mary M. Jay, trustees of the James J. Jay Trust UTA dtl. 01/04/73"
- Testamentary trust example: "John J. Doe, Jr., trustee of the residuary trust UW of John J. Doe, Sr., deceased"

This traditional titleholding method fully discloses the trust by referring specifically to the governing trust instrument (if more than one trust is created by that trust instrument, the specific trust must also be identified) and by identifying the titleholder as trustee. If the trust has more than one trustee, unless the trust instrument provides otherwise, all of the trustees' names must appear in the titleholding.

This traditional way of holding title to trust property involves a number of practical disadvantages. The fact of the trust's existence and its ownership of certain properties cannot be kept private. The trustee may have to furnish the other parties involved with a verified copy of the governing trust instrument, an unfortunate disclosure of confidential dispositive and trustee provisions. Whenever there is a change in trustees, all properties registered in the old trustee name or names should be retitled in the name or names of the subsequently acting trustee or trustees. Moreover, where a trust has more than one trustee and stock or other property titles are registered in the traditional manner, absent special provisions in the trust instrument, all of the then trustees must individually sign all pertinent documents.

The "magic wand" technique avoids disclosure of the fiduciary relationship and thus avoids the disadvantages of traditional trust titleholding. The law of trusts normally requires that a trustee keep the trust property separate from his or her own property and designate trust property as property of the trust. If the magic wand technique is to be used, the specific terms of the trust instrument must require the trustee to disclose the specific terms of the trust instrument (e.g., by authorizing the trustee to hold title to trust property in his or her individual name without disclosing fiduciary capacity).

If a trustee takes title as though the property were the trustee's own property, without disclosing to the outside world that the property is trust property, it will be important for tax, trust, inheritance and at least partial creditor protection purposes to have a written declaration, executed by the trustee in recordable form, identifying the trust property that is thus held in the trustee's individual names as being, in fact, trust property. An example of a single trustee declaration is set forth in Exhibit B (it is similar in purpose to the Exhibit A joint declaration). Only under unusual circumstances would such a trust ownership declaration be furnished to outsiders or recorded in order to establish trust title to the property in the traditional way (i.e., direct, fully disclosed trust ownership in the names of all trustees).

Potential Disadvantages in Undisclosed Titleholding

In states where dower and curtesy rights still exist, and sometimes in community property states where outsiders may be concerned as to the potential community prop-
The Nominee Titleholding Alternative

Another titleholding technique which overcomes the disadvantages inherent in the traditional method of holding title to trust assets, bank accounts, etc., is "nominee" titleholding. Although the law of trusts requires that a trustee not take title to trust property in the name of a third person, a trustee may nevertheless properly hold title in the name of a trust nominee if either the trust instrument contains a provision that specifically permits the use of nominees or there is a state statute having the same effect.

Only two states are known by the author to have restrictions on the use of nominees. Arizona law renders voidable any real property conveyance in which the grantor or grantee acts in a representative capacity (even as a trustee) unless the deed (or other recorded instrument) fully identifies all parties having any interest in the property, the extent of such interest, etc. New York law appears to permit the holding of securities in the name of a nominee only under certain circumstances (i.e., when the nominee is acting in behalf of a corporate fiduciary).

To establish a trust nominee, the trustees enter into a nominee agreement with the person, persons or entity that is to act as nominee. Corporations do not usually act as nominees because of state corporate and general tax law uncertainties. Individuals often hold title individually (if one person is acting as nominee) or as joint tenants with right of survivorship — just as two or more trustees might when holding title to trust property individually or jointly without disclosing fiduciary capacity — or by establishing what appears to be a partnership but is actually only a dummy (or nominee) name, to hold title for the trust.

The nominee agreement, which is executed by the trustees on the one hand, and the person or persons who are to act as nominees on the other, should make it clear that the nominees will hold title to trust property solely in that capacity, with no personal interest whatsoever. The agreement should also describe the nominees' rights and duties in connection with such titleholding, including identification by the trust for any liability growing out of such titleholding. From the nominees' point of view, the nominee agreement serves much the same purposes as does the trust agreement for the trustees.

Unless title is being taken in the name of a nominee partnership, an unrecorded (but recordable) declaration of the trust's ownership of the specific property or properties being held in the individual names of the nominees (similar to the declarations in Exhibits A and B) will also be needed for all the same reasons that such a declaration is needed when one or more trustees take title in their individual names.

If a joint tenancy (of the persons who are acting under a separate nominee agreement) is used to hold title to trust assets, or one person (i.e., a nominee or one of the nominees) is holding title without disclosing the trust, and if the trust for which title is being held is a revocable trust as to which the settlor is a trustee, it is appropriate to give the settlor's Social Security number (regardless
of who the titleholder may be) and simply report the income, deductions and credits on the settlor's own Form 1040. If the trust is not such a nonreporting revocable trust, one or the other of the two alternative tax reporting and identification number procedures described above will apply.

EXHIBIT A

Example Joint Declaration of Two Revocable Trust Ownership as Tenants in Common

Joint Declaration of Trust Ownership

The undersigned hereby declare that, solely as the trustees of and for the benefit of the following trusts:

A. John J. Doe Trust, a revocable trust existing under a certain trust agreement executed on 12/28/89 by John J. Doe as settlor and by John J. Doe and Jane S. Doe as the initial trustees; and

B. Jane S. Doe Trust, a revocable trust existing under a certain trust agreement executed on 12/28/89 by Jane S. Doe as settlor and by Jane S. Doe and John J. Doe as the initial trustees,

they are, pursuant to the provisions of section 9.1 of each of said trust agreements, holding and will hold solely and exclusively for and in behalf of said trust, as tenants in common, the John J. Doe Trust having an undivided 1/2 share and the Jane S. Doe Trust having an undivided 1/2 share, the following: any and all properties of all kinds, whether presently owned or hereafter acquired (regardless of the means by which acquired), including, without limitation:

[Example Kinds of Properties]

which now and at any time after the date of this instrument are registered in their joint names with right of survivorship or in their names as tenants by the entireties (whether that survivorship or entireties aspect is specifically mentioned in the title or is implied in law by the circumstances and regardless of whatever variation of their names may be employed).

The undersigned hereby further affirm and declare that, from and after the date hereof:

1. All properties of any kind appearing to be owned by them jointly or by the entireties are in fact held and will be held by them solely and exclusively for and in behalf of said trusts as true owners (subject to any and all instructions from the then trustee(s) of said trusts),

2. They will not hold title to any properties in their joint names or as tenants by the entireties except those which in fact belong to said trusts,

3. Any and all properties now or hereafter held by them in their joint or entireties names shall and will belong to said trusts and not to the undersigned or either of them individually,

4. Except to the extent of beneficial interests provided to them under the terms and provisions of said trust agreements (as now written and as the same may in the future be amended), they have and shall have no personal interest in any properties now or hereafter held in their joint or entireties names, and

5. All liabilities which relate in any way to the acquisition of or which are a lien upon any of the properties governed by this declaration, whether such liabilities are in the name of either or both of the undersigned, shall be borne by the two trusts which thus own such properties as tenants in common in the same proportions as they own such properties.

This declaration of exclusive trust ownership and waiver of interest is intended to be and shall be binding upon the undersigned's heirs, administrators, executors, and assigns and shall be revocable only by written instrument executed by 1 or more of the then trustee(s) of either of said trusts (with or without indicating such fiduciary capacity) with all of the same formalities as accompanied the execution of this instrument.

This declaration is intended to revoke all prior declarations of ownership, if any, with respect to any and all properties governed by this declaration, whether executed by either or both of the undersigned.

[The remainder of this form is the standard execution boilerplate.]

EXHIBIT B

Example Declaration of Trust Ownership by an Individual

Declaration of Trust Ownership

The undersigned hereby declares that, solely as a trustee of and for the benefit of the following trust:

John J. Doe, Jr. Trust, a revocable trust existing under a certain trust agreement executed on 01/05/85 by John J. Doe, Jr. as settlor and by John J. Doe, Jr. and Mary A. Doe as the initial trustees, the undersigned is, pursuant to the provisions of section 6.1 of said trust agreement, now holding and will hold, solely and exclusively for and in behalf of said trust, the following:

[Example Kinds of Properties]

which now and at any time after the date of this instrument are registered in the name of John J. Doe, Jr. (regardless of whatever variation
of his name may be employed).

The undersigned hereby further affirms and declares that, from and after the date hereof:

1. All properties described above will be held by the undersigned solely and exclusively for and in behalf of said trust as true owner (subject to any and all instructions from the then trustee(s) of said trust).

2. Except to the extent of beneficial interests provided to the undersigned under the terms and provisions of said trust agreement (as now written and as the same may in the future be amended), the undersigned has and shall have no personal interest in any of the properties described above, and

3. All liabilities which relate in any way to the acquisition of or which are a lien upon any of the properties governed by this declaration shall be borne by the trust which, pursuant to this declaration, owns such properties.

This declaration of exclusive trust ownership and waiver of interest is intended to be and shall be binding upon the undersigned's heirs, administrators, executors, and assigns and shall be revocable only by written instrument executed by 1 or more of the then trustee(s) of said trust (with or without indicating such fiduciary capacity) with all of the same formalities as accompanied the execution of this instrument.

This declaration is intended to revoke all prior declarations of ownership, if any, with respect to any and all properties governed by this declaration heretofore executed by the undersigned.

[The remainder of this form is the standard execution boilerplate.]