To: All Policy-Issuing Agents and Direct Operations of WFG National Title Insurance Company
From: WFG Underwriting Department
Date: August 16, 2023
Bulletin No.: NB 2023-06
Subject: Distributions to Trustees Individually

When handling a sale by a trust or a cash-out refi, we are occasionally told "I don't have a trust checking account, will you please pay the proceeds to me (the trustee) individually."

We like to be accommodating, but this is almost always a bad idea for the escrow or closing officer and for the customer.

First, it puts the burden on the escrow or closing officer to determine if the trustee really has the authority to take major assets out of the trust for their personal benefit.

Obviously paying the trustee personally is improper if the trust is for someone else's benefit like the children or grandchildren of the settlor. The lawyers for the children or grandchildren can be relied on to sue the trustee, the escrow or closing officer and the title agency and use unflattering phrases like "breach of fiduciary duty," "fraud," "theft," "co-conspirator" or worse. They will also allege that since the trust didn't get paid its consideration for the sale, the trust still owns the property – which can make it a policy limits claim.

What to look for in the Trust Agreement:

Because it is such an unusual request to pay trust assets to the individual trustee, and a request that on its face appears to run afoul of the trustee's fiduciary duties, you need to examine the actual trust agreement and not rely solely on a Trust Certificate.

1. You want to confirm that the trust is a revocable trust (aka living trust) and that the party giving you direction actually has the rights to revoke or partially revoke the trust and redirect assets to themselves.

2. Every well-designed revocable trust eventually vests in some third party (usually the children). The event triggering the vesting is usually the death of one or both of the settlors, or the occurrence of some specific triggering event.

- When drafting a revocable trust for parties with children by a prior marriage it is not uncommon to make (at least part of) the trust irrevocable on the death of the first spouse – so that the surviving spouse can't redirect the trust assets away from the children of the first to die.

3. Make certain that there are no indications that the trust was structured for tax benefits. We are not tax experts, and it is possible to lose the desired tax advantages and trigger really bad tax consequences if assets are removed from the trust in the wrong way. While this list is not all inclusive, you need to be on the lookout for phrases like:

   - Qualified Personal Residence Trust -- QPRT
   - Grantor Retained Income Trust – GRIT (income from the specific asset)
   - Grantor Retained Annuity Trust – GRAT (Annuity based on value placed in trust)
   - Grantor Retained Unit Trust -- GRUT (payment adjusted periodically based on FMV of assets)
   - Intentionally Defective Grantor Trust -- IDGT

Why did you say: "It's often bad for the Customer?"

Your customer had specific goals in mind when they paid someone to set up the trust. While they may not be thinking of those goals at this exact moment in the current transaction, there was a reason they created a trust.

The primary reason people set up a revocable trust is to further their estate plan and avoid the delay and costs of probate. They may also use a trust as a tool to protect against creditor claims and for tax benefits.

The trust achieves these goals only if essentially all of the assets are owned by the trust, not the individuals.

An involved lawyer structuring a revocable trust will work with their clients to assure that all of the assets are properly "moved into" the trust and that their operating checking accounts are trust accounts. For smaller trusts, having a lawyer handle those mechanics can be costly, but the attorneys almost always have advised their clients on the importance of moving ALL their assets into the trust. (Whether the client actually moved all their assets or not is a different question)

When you pay the trustee personally, you are moving a usually substantial amount of money out of the trust and into their individual names. Once that happens, the assets may or may not be subject to a different disposition on death (for example if they have a different disposition in an old will, or no will at all), and depending on state law having that amount of non-trust assets may trigger a need for probate.

If the trust has "spendthrift" provisions protecting trust assets from creditor claims, paying the trustee individually may subject those assets to seizure by creditors.

And if the trust was tax structured, paying out the proceeds may lose the very tax benefit they wanted or worse yet trigger adverse tax consequences.

The Position of WFG in its Direct Offices

WFG has direct operations in seven Western States, and here are the policies we have adopted for them and the forms we are using.

- The escrow or closing officer is responsible for reviewing the terms of the Trust Agreement and completing the attached form
- Any request for a payment of trust proceeds to the trustee individually must be reviewed and approved by our Escrow Administration team - EscrowAdmin@wfgnationaltitle.com. (Senior escrow manager)
- Direct payment may be approved ONLY where all of the currently active trustees were the same as the settlors of the trust.
- Where it appears that a surviving settlor/trustee or successor has the unrestricted right to revoke the trust, additional legal review is triggered before a final decision is made.
- We backstop our internal review of the trust agreement with a Trustee's Certificate
- Written escrow and disbursement instructions are modified to direct payment to the trustee individually, and acknowledge that the payment to the trustee (as directed) will satisfy the duty to make payment to the trust under the purchase agreement.
- We advise the trustee in writing of the risks of moving assets out of the trust, and strongly encourage them to consult their legal and tax advisors. (Click Here for Form)

Most of the time, a simple reminder to the customer that they had reasons for setting up a trust in the first place, that transferring out substantial assets may confound those goals and cause other problems, and that they really should consult their legal and tax counsel first, triggers a reconsideration of the request.