

**From:** [Frank Hill](#)  
**To:** [Melissa Anderson](#); [Darla Daniel](#); [Corina Gerety](#); [Lisa Hardin](#); [Richard Hess](#); [Mike Holder](#); [Stan Kent](#); [Alison Leary](#); [Marianne Luu-Chen](#); [Kevin Millard](#); [Lauren.Morris@wellsfargo.com](#); [Matthew Skotak](#); [Carl Stevens](#); [Tony Vaida](#); [Kirsten Waldrip](#); [Sonny Wiegand](#); [Carolyn Wiley](#); [Gene Zuspahn](#)  
**Cc:** [Rikke Liska](#); [Dave Kirch](#); [Connie Eyster](#)  
**Subject:** Next OBF CUTC Revisions Subcomm Mtg 11/9/2022  
**Date:** Tuesday, November 8, 2022 2:02:00 PM  
**Attachments:** [Chair's 11-8-2022 Status Report.pdf](#)  
[Education definition EPZ \(2022-11-04\).pdf](#)  
[Education Note on Use EPZ \(2022-11-04\).pdf](#)  
[Tst Amend \[2.5 2.6\] MDH \(2022-09-22\).pdf](#)  
[Tst Amend Note on Use MDH \(2022-11-08\).pdf](#)  
[\[Extract\] Appx A Gen and Adm Prov Notes on Use \(2022-11-08\).pdf](#)  
[\[Extract\] 0350-Rev Mar Ded Tst \(2022-10-11\).pdf](#)  
[\[Extract\] 0361-Mar Ded Will \(2022-10-11\).pdf](#)

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Dear Colleagues,

Our next meeting will be held (virtually) **TOMORROW AFTERNOON, Wednesday, November 9<sup>th</sup>, 2022 @ 1:00-2:30 PM** (MST). Virtual meeting access (via Zoom) provided by the CBA is as follows:

<https://cba-cle.zoom.us/j/89500805835?pwd=K1VybWNENXQwUnpoTlBnRzI3UExzZz09>

Meeting ID: 895 0080 5835

Passcode: 090355

Call-in: 1 253 215 8782

Find your local number: <https://cba-cle.zoom.us/u/kc4lE2ktv>

**New this year:** The Chair's Status Report is now an attachment to this email. Please **Read the Chair's Status Report First**. It summarizes for you where we are, how we got there, where we're headed, and serves as our agenda.

Attached please find [Chair's 11/8/2022 Status Report.pdf](#), [Education Definition\\_EPZ \(2022-11-04\).pdf](#), [Education Note on Use\\_EPZ \(2022-11-04\).pdf](#), [Tst Amend \[2.5 2.6\] MDH 2022-09-22\).pdf](#), [Tst Amend Note on Use\\_MDH \(2022-11-08\).pdf](#), [\[Extract\] Appx A\\_Gen and Adm Prov\\_Notes on Use \(2022-11-08\).pdf](#), [\[Extract\] 0350-Rev Mar Ded Tst \(2022-10-11\).pdf](#), and [\[Extract\] 0361-Mar Ded Will \(2022-10-11\).pdf](#). **Please use a color printer for the extracts.**

Respectfully submitted,

**Frank T. Hill**  
***Attorney at Law (Ret.)***

170 N. Oak Street, Apt 223

Gilbert, AZ 85233-5449

Phone: 303.517.8447

[fhill.com@outlook.com](mailto:fhill.com@outlook.com)

## MEMORANDUM

**From:** Frank Hill  
**To:** OBF CUTC Revisions Subcommittee  
**Subject:** Chair's 11/8/2022 Status Report

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This report covers actions of our subcommittee taken during our last (virtual) meeting on **10/12/2022**, as well as revisions made, and contributions received in preparation for our next (virtual) meeting on 11/9/2022.

Much of our work has been in the rev tst [Form 350], the will [Form 361], and the Appx A - Gen and Adm Prov - Notes on Use extracts (and in specific numbered paragraph selections taken from them). When parallel paragraph reference numbers are given below, the first one will be to the rev tst [Form 350] extract and the second one will be to the will [Form 361] extract. Within all extracts,

**BLACK** typeface: **Original text** as it currently exists in the Orange Book Forms (or in a contributor's proposal);

**GREEN** typeface: **Approved changes** made to that original text by the subcommittee; and

**RED** typeface: **Proposed changes** suggested to be made to original text or our prior work.

ONCE AGAIN, THIS MONTH, due to the enormous amount of interest developing around several HOT TOPICS, we're going to delve right into those hot topics first on our agenda. Then, after everyone has had a chance to weigh in on those, we'll turn to the more mundane review of approved past changes and then proceed with reviewing more mundane but essential proposed changes.

First up:

### **"Education" Definition (and Note on Use?)**

**16.6 & 11.6 Education:** Many months ago, Corina had suggested that our definition of "Education" was written in and for a different era. So, thinking that a Band-Aid might do, in both our rev tst and will extracts, I had inserted the word "electronically." This was unanimously received as woefully inadequate. So, to get the ball rolling on building a new definition that might be far more relevant to current conditions, Connie proposed a new abbreviated definition for our consideration.

Connie's 6/8/22 proposal:

EDUCATION: Under this agreement, distributions for education may, in trustee's discretion, include, but are not limited to, the cost of tuition, fees, books, supplies, living expenses, travel and other reasonable expenses related to study or instruction at public or private schools, colleges, trade schools or other institutions of learning.

Carl's 9/14/22 proposal for an additional sentence to be added to Connie's proposal, above:

A trustee may exercise discretion to distribute for unorthodox or untraditional educational opportunities in the best interests of the beneficiary.

Marianne's 9/14/22 proposal picked up the theme of "...the best education commensurate with a beneficiary's abilities and interests" from the "Guidelines to Trustee" paragraph in the "Family Trust" article:

Under this agreement, the trustee may make distributions for education to provide for the best education commensurate with a beneficiary's abilities and interests, such as payment of tuition, fees, books, supplies, living expenses, and travel.

If I were to summarize Gene's response to desire for simplicity and current cultural norms, he seems to be suggesting that our highest concern should be for safety as the "best practice." Meaning that, as a Bar Assn. sanctioned form book, we should probably defer to a more traditional definition in our forms, one that has been accepted as clearly supporting a tax-sensitive HEMS standard. And that if we would like to suggest more culturally current and simpler definitions, we could set those out in the accompanying Note on Use.

So, that's the first question: Which approach should we take? Second question: Once we've decided which approach to take, then what proffered definition get us closest to our chosen approach? See [Education Definition\\_EPZ \(2022-11-04\).pdf](#), and [Education Note on Use\\_EPZ \(2022-11-04\).pdf](#) attached.

### **Trust Amendments, Removals, and Revocations: "Sole" or "Exclusive" Method**

**2.5 & 2.6 Removal/Amendment/Revocation:** As Mike Holder points out in his attached observations, CUTC § 5-602(3) provides for quite a bit of latitude regarding amendment and revocation of a trust. He suggests that that kind of latitude, while convenient, may only lead to family discord and expensive litigation in the future. Perhaps we should consider, as a "best practice" for our readers, "tightening up" on just how settlors, (usually in their later years when they may be the most vulnerable to subtle pressure from family members) might be required to amend or revoke their trusts, for the protection of their previously-well thought-out estate plan.

That's the threshold question: Do we feel that OBFs should contain a "sole" or "exclusive" method? If so, what language do we want to use to implement that approach? See [Tst Amend \[2.5 2.6\] MDH \(2022-09-22\).pdf](#), and [Tst Amend Note on Use\\_MDH \(2022-11-08\).pdf](#), attached.

### **Trust Amendments, Removals, and Revocations: Trustee's "consent" required, or only "notice to"**

**2.6 Amendment and Revocation:** Marianne suggests that while we are considering the foregoing issue, we should probably revisit the issue of whether OBFs should require the trustee's "consent" for a settlor to amend his or her rev tst. She suggests that if posed to them, many clients might find that requirement at least burdensome, in some settings, inappropriate, and at worst, offensive. She suggests that they would feel "notice to" a trustee of a change to the terms of a trust should be sufficient; if the trustee doesn't like it, they can resign.

So, that's the first question, trustee's "consent" required, or only "notice to"? Follow-up question: If only "notice to," how do we want to revise ¶ 2.6 to accomplish that change in policy?

### **New Single Signature Problem**

**15.11 & 9.13 Custody:** During our 9/14/22 mtg, **we approved** the inclusion of the definition of "Professional fiduciary" as it appears in C.R.S. § 15-23-103(14). See ¶¶ 16.13 and 11.12 in the "General Provisions" articles in the 10/11/22 extracts of the rev tst and will forms attached.

In addition, during our 9/14/22 mtg, **we decided** to use that new term in the first sentence, which is the only sentence actually addressing "custody."

The second sentence addresses signature authority and, as written **now conflicts with our new 15.9 & 9.11 Single Signature Facility** which, in the absence of a written delegation agreement among cotrustees, gives a professional fiduciary single signature authority **only over the trust's bank account**.

Since none of the representatives of professional fiduciaries who are members of our subcommittee were in attendance, we decided to table the blanket removal of this second sentence till our next meeting. Alison said she would try to reach out to some of them for their input. We hope that Carl and Gene who seem to have strong views on this issue will also weigh in on this discussion.

## **Removal of Trustee and Replacement of Trustee Appx A – Gen and Admin Prov – Note on Use 22**

**Appx A - Note on Use 22:** In Appendix A – General and Administrative Provisions – Note on Use 22 has been one of the longest Notes on Use in the OBF running some two and a half pages. While it touches on an important issue, it was originally proffered for use in the OBFs back during a time when we were living under the shadow of Rev. Rul. 79-353 and its progeny. The result was a mini law review article, well beyond the mission of an OBF Note on Use, i.e., comment on suitability, alternate approaches, or raise an issue for the drafter’s attention, and recommend where the drafter could get more in-depth treatment of the issue.

During our 10/12/22 mtg, **we approved** Tony’s proffered revision “ginning down” the Note on Use. He successfully preserved the kernel of the discussion of the crucial issue which is the center of its focus. Apparently, however, there is some question over whether should have deleted or left in place the paragraph at the top of Pg. 6 beginning, “Because with few exceptions ...” With that one exception still under review, see the final approved version of Note on Use 22 in the 11/8/22 extract of Appx A, attached.

### **“First Tier” QBs and “First Tier *Plus*” QBs Appx A – Gen and Admin Prov**

**Please check your own Appx A Note on Use to see if it should be modified in view of our recent decision to limit notice to “First Tier *Plus*” QBs and action to “First Tier” QBs.**

**15.12 & 9.14 Release of Powers:** Because the Chair’s use of extracts, this provision was inadvertently overlooked in previous months in the flurry of discussion about giving notice to the qualified beneficiaries or just to First Tier and First Tier *Plus* qualified beneficiaries. During our 9/14/22 mtg, **we approved** the proposed revision to ¶ 15.12 in the 9/12/22 extract of the rev tst, except that **we also decided** to delete the rest of the first sentence after “, or if none ...,” as well as the entire last sentence. See the final version in the 10/11/22 extract of the rev tst, attached.

Also, during our 9/14/22 mtg, **we approved** the exact same changes to be made to ¶ 9.14 in the 9/12/22 extract of the will form. However, **we also decided** not to change the reference in the will version from “fiduciary” to “trustee,” but to leave it as is. See the final version in the 10/11/22 extract of the will form, attached.

Also, Alison opined that perhaps a Note on Use regarding the tax implications of this provision may be appropriate, so she volunteered to compose one for us.

### **“Professional Fiduciary” definition, and its Ramifications**

**16.13 & 11.12 Professional fiduciary:** During our 9/14/22 mtg, **we approved** the inclusion of the definition of “Professional fiduciary” as it appears in C.R.S. § 15-23-103(14). See ¶¶ 16.13 and 11.12 in the “General Provisions” articles in the 10/11/22 extracts of the rev tst and will forms attached.

**14.3 & 8.2 Designation of Additional Trustee:** During our 9/14/22 mtg, **we decided** to delete references to *any* type of trustee. See updated versions of these paragraphs in the 10/11/22 extracts of the rev tst and will forms attached.

**14.5 & 8.4 Rights of Successor Trustee:** During our 9/14/22 mtg, **we decided** to delete references to *any* type of trustee in the first sentence. Furthermore, **we decided** not only to use the new term in the second sentence, but also to *retain* the second sentence lest succeeding to the trust business of a professional trustee through purchase, merger, whatever be regarded as an event triggering a move down to the next successor trustee. See updated versions of these paragraphs in the 10/11/22 extracts of the rev tst and will forms attached.

**14.8 & 8.7 Replacement of Trustee:** During our 9/14/22 mtg, **we decided** to delete the last sentence entirely, eliminating the need to describe *any* type of trustee in the paragraph. See updated versions of these paragraphs in the 10/11/22 extracts of the rev tst and will forms attached.

**9.17 Ancillary Fiduciary:** We ran out of time before we could get to this one. We need to either approve use of our new term in the second sentence, or simply delete the second sentence as we have done with so many of these paragraphs above, on the grounds that it is not necessary to describe *any* type of fiduciary to be an ancillary PR.

### **Important Clean Up as the End of This Project Begins to Appear in the Distance**

**Clean-Up #1: “Appoint” vs. “Designate”:** Throughout our rev tst form and our will form, when speaking of naming someone to act for the trust, we currently rather inconsistently interchange the terms “appoint” and “designate.” But in CUTC, there is no such inconsistency. CUTC uses:

“Appoint”      *Always used when an actor (be it settlor, testator, another trustee, court, or authorized beneficiaries) is naming someone to act for the trust as trustee, successor trustee, or additional trustee. (Never “designate.”)*

“Designate”      *Always used in the past tense when referring to someone who has been named in an instrument (will, agreement, terms of the trust, court order) as trustee, successor trustee, or additional trustee to act for the trust. (Never “appointed.”)*

I suggest that we should be scrupulously consistent with the use of these terms in our rev tst and will forms, and also be consistent with CUTC’s use of those terms (follow CUTC’s lead). Accordingly, please see these suggested revisions in the 10/11/22 rev tst and will extracts:

14.1 & 6.4	Designation of Successor Trustee
14.3 & 8.2	Designation of Additional Trustee
14.8 & 8.7	Replacement of Trustee

### **Next Month**

Yours truly simply ran out of time (and knew that you all would have run out of patience with me ) to continue with the list of clean-ups still crying out for our attention. So, I won’t go into them in detail, here, just list them so you’ll know where I think we should be headed:

**Clean-Up #2: “Act” vs. “Serve”:**

**Clean-Up #3: “Record” vs. “Writing”:**

**Clean-Up #4: “Trustee” vs. “Then-acting Trustee”:**

**Clean-Up #5: Plain English vs. Legalese:**

**Clean-Up #6: Restructure & Reorganize Administrative Articles:**

Stay tuned as, together, we continue to bring CUTC’s improvements and best practices to the administrative articles of our OBF will and trust forms.

## *Education definition\_EPZ (2022-11-04).docx*

This is the definition as it now exists in rev tst Form 350

EDUCATION: Under this agreement, distributions for education may, in trustee's discretion, include the cost of tuition, fees, books, supplies, living expenses, and travel, to the extent they are reasonable. The term "education" means:

- a) Study or instruction at, or under the auspices of, an accredited educational institution (the term "accredited educational institution" means a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; if such school, college, university, trade school, or other institution provides an academic curriculum, employs a full-time faculty, offers classes on a campus, and enjoys a currently effective accreditation from a generally recognized accreditation board); and
- b) Study or instruction which trustee, in its discretion, considers appropriate for a beneficiary who has special needs or abilities which are not likely to be served by an accredited educational institution.

I find it useful to start with a general definition and then supplement it with either examples in either a list or a broadened scope article.

Education includes all expenses of public and private education at any level, such as tuition, room and board, books, fees, study materials, dues, reasonable allowance to travel to and from home, [as well as graduate and professional education, and specialized or vocational training]. Further, Education is not to be limited to a traditional education, but rather should include other methods of education that the Trustee determines is more appropriate for the particular beneficiary. In making distributions for such an education, the expenses itemized above are appropriate for a beneficiary that the Trustee determines needs a different education.

[The Trustee may pay expenses for a particular beneficiary until, but not after, the beneficiary reaches age 30.]

[The Trustee may only pay a cumulative total of \$100,000.00 for education expenses for any one beneficiary.]

The Trustee shall have the absolute discretion to determine the reasonableness and the scope of all educational costs.

[If desired explain or give examples of the Settlor's desires as to what is to be considered or included.]

I have been involved in several cases wherein the grantor of a revocable living trust has given trust property to someone (typically a child of the grantor who is providing care and comfort), which has been met with dismay by others after grantor's demise. In the typical case this amounts to transfers of significant sums of cash which upsets the original estate plan of the grantor. Recently, I have become involved in a case where a prior to his death, grantor granted to one of his children a quitclaim deed, in his individual capacity and not as trustee, to real property titled in the name of the trust. The question, particularly in the most recent example, is whether such a transfer evidences by clear and convincing evidence an intention to engage in a revocation of the trust, in whole or in part.

CRS 15-5-602(3) provides:

The settlor may revoke or amend a revocable trust:

- (a) By substantial compliance with a method provided in the terms of the trust; or
- (b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by any other method manifesting clear and convincing evidence of the settlor's intent, which may include a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust. A provision in a trust specifying a method to revoke or amend the trust does not make the specified method exclusive unless the specified method is referred to as the "sole", "exclusive", or "only" method of revoking or amending the trust or the provision includes similar language manifesting the settlor's intent that the trust may not be revoked or amended by any other method.

A bit of discussion, if I may. Exchange National Bank v. Sparkman, 554 P.2d 1090 (Colo. 1976), held that a revocable trust not illusory and has a separate existence, granting vested interests. More recent authors, most notably Cliff Kruse, have argued that a revocable living trust is nothing more than a "will substitute," and that a beneficiary's interest in the remainder is a "mere expectation," rather than a vested interest. Appreciating the nature of the argument, I am not satisfied that it reflects the state of the law in Colorado, as stated in the Exchange case and others (e.g. Gorman and Balanson).

Nonetheless, if we are to help folks establish a living trust to see that their estate planning goals are met, grantors should have the option of bolstering the decisions they have reduced to writing. Thus, I would like to see a provision in Orange Book trust documents providing for "sole," "exclusive," or "only" techniques whereby the terms of a trust might be modified. There are reasons other than tax savings or avoidance of probate for establishing living trusts, which include the preservation of our estate plans when we get old and "hard in the cranial arteries." I ask that your sub-committee consider this option for its own merits and perhaps as a means to reduce post mortem litigation between siblings (and others).

(See over ►)

**Proposal**

**Orange Book Form**

**EXISTING LANGUAGE**

2.5 TRUST ADDITIONS AND REMOVALS: Settlor reserves the power to add to the trust estate at any time by delivering to the trust additional property which is acceptable to trustee. Settlor reserves the power to remove all or any part of the property from the trust at any time by notifying trustee of such removal in writing.

2.6 AMENDMENT AND REVOCATION: Settlor reserves for settlor's lifetime the following powers which settlor may exercise at any time or times:

- a) To revoke the trust by a writing;
  - b) Upon trustee's consent, to amend the trust, in whole or in part, by a writing; and
  - c) To direct, by a memorandum which settlor may leave at settlor's death, distribution by trustee on settlor's death of any of settlor's tangible personal property, together with any insurance policies covering such property and claims under such policies.
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**PROPOSED LANGUAGE**

2.5 TRUST ADDITIONS AND REMOVALS: Settlor reserves the power to add to the trust estate at any time by delivering to the trust additional property which is acceptable to trustee. Settlor reserves the power to remove all or any part of the property from the trust at any time by notifying trustee of such removal ~~in~~ ONLY BY A SEPARATE SIGNED writing OTHER THAN A DEED OR OTHER DOCUMENT OF CONVEYANCE, AND REFERRING TO THE TRUST.

2.6 AMENDMENT AND REVOCATION: Settlor reserves for settlor's lifetime the following powers which settlor may exercise at any time or times:

- a) To revoke the trust ONLY by a SEPARATE SIGNED writing REFERRING TO THE TRUST;
- b) Upon trustee's consent, to amend the trust, in whole or in part, ONLY by a SEPARATE SIGNED writing REFERRING TO THE TRUST; and
- c) To direct, by a memorandum which settlor may leave at settlor's death, distribution by trustee on settlor's death of any of settlor's tangible personal property, together with any insurance policies covering such property and claims under such policies.

**ARTICLE 6 – DESIGNATION AND SUCCESSION OF FIDUCIARIES**

- 6.1 PERSONAL REPRESENTATIVE: I nominate my spouse as my personal \*\*\*
- 6.2 GUARDIAN: If appointment of a guardian of a minor child of mine becomes \*\*\*
- 6.3 CONSERVATOR: I nominate the guardian of any minor child of mine as \*\*\*
- 6.4 TRUSTEE: I appoint \_\_\_\_\_ of \_\_\_\_\_ as trustee of any trusts under my will. If \_\_\_\_\_ fails or ceases to act as trustee, I appoint \_\_\_\_\_ of \_\_\_\_\_ as trustee.

**ARTICLE 7 – POWERS OF FIDUCIARIES**

- 7.1 GRANT: My fiduciaries may perform every act reasonably necessary to administer \*\*\*
- 7.2 FIDUCIARIES' POWERS ACT: In addition to all of the above powers, my \*\*\*
- 7.3 DISTRIBUTION ALTERNATIVES: My fiduciaries may make any payments under \*\*\*

**ARTICLE 8 – TRUSTEESHIP**

*See Appx A Note on Use A*

- 8.1 ACCEPTING OR DECLINING TRUSTEESHIP:
- a) Except as otherwise provided in **paragraph 8.1(c)** of this article, a person designated as trustee accepts the trusteeship by:
    - i) Delivering written consent as follows:
      - ~~A) To my personal representative, if acting,~~
      - ~~B) To the qualified beneficiaries, if my personal representative is no longer acting, and~~
      - A) To my personal representative; but if my personal representative is not acting, then to the distributees and permissible distributees of trust income or principal, ~~and to other qualified beneficiaries who request it, and~~

- B) To all other acting trustees; or
- ii) Accepting delivery of trust property, exercising powers or performing duties as a trustee, or otherwise indicating acceptance of the trusteeship.
- b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A person designated as trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.
- c) A person designated as trustee, without accepting the trusteeship, may:
  - i) Act to preserve trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship as follows:
    - A) ~~To my personal representative, if acting~~
    - B) ~~To a qualified beneficiary, if my personal representative is no longer acting, and~~
    - A) To my personal representative; but if my personal representative is not acting, then to a qualified beneficiary, and
    - B) To any acting trustee; and
  - ii) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

***See Appx A Note on Use 2***

8.2 DESIGNATION OF ADDITIONAL TRUSTEE: If for any reason my trustee is unwilling or unable to act as to any property of any trust hereunder, or with respect to any provision of my will, my trustee may ~~designate~~ **appoint** in writing an ~~individual or bank or trust company to serve as~~ **additional** trustee as to such property or with respect to such provision, and may revoke any such designation at will. Each **additional** trustee so serving shall exercise all fiduciary powers granted by my will unless expressly limited by my trustee in the instrument designating such **additional** trustee.

~~8.3 EXONERATION OF TRUSTEE: No trustee shall be obligated to examine the accounts, records, or acts, or in any way or manner be responsible for any act or omission to act on the part of any previous trustee or of the personal representative of my estate. No trustee shall be liable to~~

~~my personal representative or to any beneficiary for the consequences of any action taken by such trustee which would, but for the prior removal of such trustee, have been a proper exercise by such trustee of the authority granted to trustee under my will, until actual receipt by such trustee of notice of such removal. Any trustee may acquire from the beneficiaries, or from their guardians or conservators, instruments in writing releasing such trustee from liability which may have arisen from the acts or omissions to act of such trustee, and indemnifying such trustee from liability therefor. Such instruments, if acquired from all then living beneficiaries, or from their guardians or conservators, shall be conclusive and binding upon all parties, born or unborn, who may have, or may in the future acquire, an interest in the trust.~~

*See Appx A Note on Use ????*

8.3 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

- a) Exoneration of Trustee; Duties Regarding Previous Fiduciaries: My trustee is not liable for an act or omission of a former trustee or of the personal representative of my estate. Also, my trustee has no duty to examine the accounts, records, or acts of any former trustee or of the personal representative of my estate. But my trustee shall take reasonable steps to redress a breach of trust known to my trustee to have been committed by a former trustee.
- b) Exoneration of Trustee Actions: My trustee is not liable to any beneficiary for the consequences of any action taken by that trustee which would, but for the prior removal of that trustee, have been a proper exercise by that trustee of the authority granted to my trustee under my will, until actual receipt by that trustee of notice of the removal.
- c) Beneficiary's Consent, Release, or Ratification: My trustee may acquire from the beneficiaries instruments in writing releasing that trustee from liability which may have arisen from the acts or omissions of that trustee and indemnifying that trustee against liability. The instruments are conclusive and binding upon all parties who execute them or who may have or acquire an interest in the trust.

8.4 RIGHTS OF SUCCESSOR TRUSTEE: Any successor trustee at any time serving hereunder, ~~whether corporate or individual~~, shall have all the title, rights, powers and privileges,

and be subject to all of the obligations and duties, both discretionary and ministerial, as herein and hereby given and granted to the original trustee hereunder, and shall be subject to any restrictions herein imposed upon the original trustee. Any fiduciary succeeding to the trust business of any ~~corporate trustee~~ professional fiduciary acting as trustee shall become my successor trustee under my will with like powers, duties, and obligations.

~~8.4 RESIGNATION: Any trustee may resign by giving written notice to my personal representative, if serving, to any adult beneficiary and to the parents of any minor beneficiary then eligible to receive current income, and to any other trustee then serving. The resignation shall become effective only upon acceptance of appointment by the successor trustee.~~

*See Appx A Note on Use 22A*

8.5 RESIGNATION: A trustee may resign:

- a) By giving at least 30 days' written notice effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee, as follows:
  - i) To my personal representative, if acting,
  - ii) To the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who ~~request~~ ~~if~~ have sent the trustee a request for notice, and
  - iii) To all other acting trustees; or
- b) With the approval of the court.

*See Appx A Note on Use.22*

8.6 REMOVAL OF TRUSTEE: Any trustee may be removed, without cause, by my spouse, or if my spouse is deceased or incapacitated, by a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ qualified ~~beneficiaries~~ distributees and permissible distributees of trust income or principal, by giving written notice to such trustee and to any other trustee then serving, effective in accordance with the provisions of the notice.

8.7 REPLACEMENT OF TRUSTEE: If any trustee fails or ceases to ~~serve~~ act and no designated successor trustee ~~s~~ serves, my spouse, or if my spouse is deceased or incapacitated, a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ qualified beneficiaries distributees and permissible distributees of trust income or principal may ~~designate~~ appoint a successor trustee. If any vacancy is not filled within thirty days after the vacancy arises, then any qualified beneficiary or the resigning trustee may petition a court of competent jurisdiction to ~~designate~~ appoint a successor trustee to fill such vacancy. By making such designation, such court shall not thereby acquire any jurisdiction over the trust, except to the extent necessary for making such designation. ~~Any successor trustee designated hereunder may be an individual or may be a bank or trust company authorized to serve in such capacity under applicable federal or state law.~~

## **ARTICLE 9 – ADMINISTRATIVE PROVISIONS**

9.1 COURT PROCEEDINGS: Any trust established under this instrument shall \*\*\*

### *See Appx A Note on Use 17A*

9.2 NO BOND: I direct that no fiduciary shall be required to give any bond in any jurisdiction, and if, notwithstanding this direction, any bond is required by any law, statute, or rule of court, no sureties be required.

### *See Appx A Note on Use 3A*

9.3 COMPENSATION: Any fiduciary under this instrument shall be entitled to reasonable compensation commensurate with services actually performed and to be reimbursed for expenses properly incurred.

9.4 INALIENABILITY: No beneficiary shall have any right to anticipate, sell, \*\*\*

9.5 UNDISTRIBUTED INCOME AT DEATH OF BENEFICIARY: Except as

9.6 BENEFITS PAYABLE TO TRUSTEE: The trustee of any trust established under \*\*\*

9.7 PROTECTION AGAINST PERPETUITIES RULE: Every trust hereunder, and \*\*\*

9.8 DISTRIBUTION TO INCAPACITATED PERSONS OR PERSONS UNDER 21: \*\*\*

~~9.9 REPRESENTATIVE OF BENEFICIARY: The conservator of the estate or, if none, the guardian of the person of a beneficiary may act for such beneficiary for all purposes under my will or may receive information on behalf of such beneficiary.~~

9.9 REPRESENTATIVE OF BENEFICIARY: The following persons, in order of priority, may act for a beneficiary for all purposes under my will and may receive information on behalf of the beneficiary: (a) the conservator of the beneficiary's estate; (b) the beneficiary's guardian; (c) the beneficiary's attorney-in-fact acting under a durable power of attorney; or (d) the person who has custody of the beneficiary.

~~9.10 MAJORITY CONTROL: Except where otherwise expressly provided, in all matters pertaining to the administration of any trust under this instrument, when more than two trustees are serving, the concurrence and joinder of a majority of such trustees shall be required; but if only two trustees are serving, the joinder of both of them shall be required. If a trustee has released or is prohibited from exercising any power under any other provision of this instrument with respect to any action or property, then with respect to such action or property such trustee shall not be counted in the application of the preceding sentence and the other trustee or trustees then serving may exercise such power. Any trustee, however, may dissent or abstain from a decision of the majority and be absolved from personal liability by registering such dissent or abstention in the records of such trust, but such trustee shall thereafter act with the other trustees in any way necessary or appropriate to effectuate the decision of the majority.~~

*See Appx A Note on Use 2*

9.10 MAJORITY CONTROL:

- a) Cofiduciaries who are unable to reach a unanimous decision may act by majority decision; if only two cofiduciaries are acting, the joinder of both is required.
- b) If a vacancy occurs, the remaining cofiduciaries may act for my estate or for any

trust under this instrument.

- c) If a cofiduciary is unavailable to perform duties because of absence, illness, disqualification, or other temporary incapacity, and prompt action is necessary to avoid injury to property of my estate, achieve the purposes of a trust or avoid injury to trust property, the remaining cofiduciaries or a majority of the remaining cofiduciaries may act for my estate or for any trust under this instrument.
- d) A trustee who does not join in an action of another trustee is not liable for the action, except that each trustee must exercise reasonable care:
  - i) To prevent a cotrustee from committing a serious breach of trust, and
  - ii) To pursue a remedy, at trust expense, for a cotrustee's serious breach of trust.
- e) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

9.11 SINGLE SIGNATURE FACILITY: When two or more individuals are serving in a fiduciary capacity, an individual fiduciary may act alone on any deposit account maintained by the fiduciaries at a bank or other financial institution if authorized to do so under a written delegation agreement. The bank or other financial institution may act on the signature or instruction of any individual named as fiduciary on the account without regard to the terms of any document governing the fiduciary's actions. But when a professional fiduciary is serving, the professional fiduciary is the only fiduciary authorized to act alone on any deposit account maintained by the fiduciaries.

9.12 DELEGATION: Any fiduciary may delegate to its cofiduciary the exercise of any powers, discretionary or otherwise, unless it is a function I reasonably expect to be performed jointly. Unless a delegation is irrevocable, the delegating fiduciary may also revoke it. The delegation and revocation must be in writing executed by the delegating fiduciary and delivered to the other cofiduciary. While the delegation is in effect, any of the delegated powers may be exercised or action may be taken by the cofiduciary receiving the delegation with the same force and effect as if the delegating fiduciary had personally joined in the exercise of such power or

~~the taking of such action~~ exercised the power or taken the action. Anyone dealing with my fiduciaries may rely upon the written statement of the delegating fiduciary relative to the fact and extent of ~~the~~ delegation.

9.13 CUSTODY: Whenever a ~~corporate fiduciary is serving, such corporate fiduciary~~ professional fiduciary is acting as personal representative or trustee, the professional fiduciary shall be the custodian of my estate and trust property and of the books and records of my estate or trust. ~~It may perform all ministerial acts necessary for the acquisition and transfer of personal property and money, including the signing and endorsement of checks, receipts, stock certificates, and other instruments. No person need inquire into the propriety of any such act.~~

9.14 RELEASE OF POWERS: Any fiduciary may release in whole or in part, temporarily or permanently, any power, authority, or discretion conferred by my will or trust by a writing delivered to any cofiduciary and to ~~each beneficiary then eligible to receive income distributions from any trust~~ the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, ~~or, if none, to all ascertainable beneficiaries. Such renunciation or release shall not affect the grant of power, authority, or discretion renounced or released.~~

9.15 ~~REPORTS: My trustee shall report no less frequently than annually to all adult beneficiaries and to the parents of any minor beneficiaries then eligible to receive current income, all the receipts, disbursements, and distributions during the reporting period, and property then held as the principal of the trust. The records of the trust shall be open at all reasonable times to the inspection of the beneficiaries of the trust and their representatives.~~

*See Appx A Note on Use 25A*

9.15 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

- a) My trustee shall keep the ~~qualified beneficiaries of the trust~~ distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, reasonably informed about the administration of the trust and of the material facts necessary

- for them to protect their interests [§ 813(1)].
- b) Within 60 days after accepting the trusteeship, my trustee shall notify the qualified beneficiaries of:
- i) My identity as settlor of the trust [§ 813(2)(c)];
  - ii) The existence of the trust [§ 813(2)(c)], [§ 105(2)(h)];
  - iii) My trustee's acceptance of the trust [§ 813(2)(b)];
  - iv) My trustee's name, address, and telephone number [§ 813(2)(b)], [§ 105(2)(h)];
  - v) Their right to request portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [§ 813(2)(c)]; and
  - vi) Their right to request reports as provided in **paragraph 9.16 (Trustee's Duties to Report and to Respond)** of this article [§ 813(2)(c)], [§ 105(2)(h)].
- c) My trustee shall notify the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, in advance of any change in the method or rate of my trustee's compensation [§ 813(2)(d)].

***See Appx A Note on Use 25B***

**9.16 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:**

- a) At least annually and at the termination of the trust, my trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], [§ 105(2)(i)], a report containing:
- i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];
  - ii) The liabilities of the trust, if any [§ 813(3)(a)(I)];
  - iii) The trust's receipts and disbursements during the period covered by the report [§ 813(3)(a)(I)]; and
  - iv) The amount and source of my trustee's compensation [§ 813(3)(a)(I)].
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the

trusteeship, my former trustee shall send a report as described in **paragraph 9.16(a)** of this article to the ~~qualified-beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it. Should my former trustee be deceased or incapacitated, my former trustee's legal representative may send the report [§ 813(3)(b)].

- c) Upon request of a qualified beneficiary, my trustee shall:
  - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances [§ 813(1)], **[§ 105(2)(i)]**; and
  - ii) Furnish promptly a copy of the portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [§ 813(2)(a)].

9.17 ANCILLARY FIDUCIARY: In the event ancillary administration shall be required or desired and my domiciliary personal representative is unable or unwilling to act as an ancillary fiduciary, my domiciliary personal representative shall have the power to designate, compensate, and remove the ancillary fiduciary. The ancillary fiduciary may ~~either be a natural person or a corporation~~ **be an individual or a professional fiduciary**. My domiciliary personal representative may delegate to such ancillary fiduciary such powers granted to my original personal representative as my personal representative may deem proper, including the right to serve without bond or surety on bond. The net proceeds of the ancillary estate shall be paid over to the domiciliary personal representative.

9.18 CONSOLIDATION OF TRUSTS: My trustee may consolidate and merge for all \*\*\*

9.19 EARLY TERMINATION: If my trustee shall determine, in its discretion, that a \*\*\*

9.20 DISTRIBUTIONS FREE FROM TRUST: Any property of my estate or of any \*\*\*

9.21 LITIGATION POWERS: My fiduciaries, in their discretion and at the expense of \*\*\*

9.22 POWERS OF INSURED TRUSTEE: Any individual trustee hereunder is prohibited \*\*\*

9.23 LIMITATIONS ON POWER OF INTERESTED TRUSTEE: Notwithstanding \*\*\*

9.24 ADDITIONS TO SEPARATE TRUSTS: If on the termination of any separate trust \*\*\*

9.25 DIGITAL ASSETS: To the extent permitted by applicable law, my fiduciary may \*\*\*

#### **ARTICLE 10 – TAX PROVISIONS**

10.1 TAX APPORTIONMENT: I direct that all estate, inheritance, and succession \*\*\*

10.2 TAX ELECTIONS: In exercising any permitted elections regarding taxes, my \*\*\*

#### **ARTICLE 11 – GENERAL PROVISIONS**

11.1 ADOPTED CHILDREN: A child adopted by any person and the descendants by \*\*\*

11.2 APPLICABLE LAW: The validity and construction of my will shall be determined by the laws of Colorado. Questions of administration of any trust established under my will shall be determined by the laws of the situs of administration of such trust. The laws of Colorado shall govern the creation, revocation, or amendment of a power of appointment created by this trust and the exercise, release, disclaimer, or other refusal of such a power of appointment.

#### ***See Appx A Note on Use 25C***

11.3 TRUST SITUS: The State of Colorado is the original situs of any trust created under my will. However, the domiciles of the beneficiaries, the location of trustees, changes in the laws relating to trusts and taxation, or other circumstances relevant to the purposes of the trust, the administration of the trust, or the interests of the beneficiaries may make it desirable at some time in the future to transfer the situs of a trust created under my will. Accordingly, following notice as containing the information required by law to the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who ~~request~~ it have sent the trustee a request for notice, my trustee may transfer the situs of a trust at

any time and to any place in the discretion of my trustee.

11.4 BY REPRESENTATION: Whenever property is to be distributed or divided \*\*\*

11.5 CONSTRUCTION: Unless the context requires otherwise, words denoting the \*\*\*

11.6 EDUCATION: Under this instrument, distributions for education may, in the trustee's discretion, include the cost of tuition, fees, books, supplies, living expenses, and travel, to the extent they are reasonable. The term "education" means:

- a) Study or instruction at, or under the auspices of, an accredited educational institution (the term "accredited educational institution" means a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; if such school, college, university, trade school, or other institution provides an academic curriculum, employs a full-time faculty, offers classes **electronically or** on a campus, and enjoys a currently effective accreditation from a generally recognized accreditation board); and
- b) Study or instruction which the trustee, in its discretion, considers appropriate for a beneficiary who has special needs or abilities which are not likely to be served by an accredited educational institution.

11.7 FIDUCIARY: As used in this instrument, "fiduciary" means an original, additional, or successor personal representative, conservator, agent, or trustee.

11.8 HEADINGS AND TITLES: The headings and paragraph titles are for reference only.

11.9 I.R.C.: I.R.C. shall refer to the Internal Revenue Code of the United States. Any \*\*\*

11.10 OTHER DEFINITIONS: Except as otherwise provided in this instrument, terms **are** as defined in the Colorado Probate Code, **or, with regard to trust provisions, in the Colorado Uniform Trust Code**, or, with regard to powers of appointment, in the Colorado Uniform Powers of Appointment Act, as **any are** amended after the date of this instrument.

11.11 LEGAL REPRESENTATIVE: As used in this instrument, “legal representative” includes an individual’s attorney-in-fact acting under a durable power of attorney, a conservator of the individual’s estate, an individual’s guardian, a personal representative, executor, or administrator of the individual’s decedent’s estate, or any other form of legal representative, depending upon the context in which the term occurs.

11.12 PROFESSIONAL FIDUCIARY: As used in this instrument, “professional fiduciary” means an individual or entity that is in the business of acting as a fiduciary.

***See Appx A Note on Use 20A***

11.13 QUALIFIED BENEFICIARY: As used in any trust under this instrument, “qualified beneficiary” means a person who:

- a) has a present or future beneficial interest in the trust, vested or contingent, or, holds a power of appointment over property of the trust in a capacity other than that of trustee, and who;
- b) on the date the beneficiary’s qualification is determined:
  - i) is a distributee or permissible distributee of trust income or principal;
  - ii) would be a distributee or permissible distributee of trust income or principal if the interests of other distributees or permissible distributees then receiving or eligible to receive distributions of trust income or principal terminated on that date without causing the trust to terminate; or
  - iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

As used in this paragraph, “person” does not include an appointee under a power of appointment unless and until the power is exercised and my trustee has knowledge of the exercise and the identity of the appointee.

11.14 SURVIVORSHIP: For purposes of this will, if my spouse in fact survives me by \*\*\*

11.15 TRUSTEE: As used in this instrument, “trustee” includes an original, additional, and

successor trustee, and a cotrustee.

11.16 SEVERABILITY: If any part of this instrument shall be adjudicated to be void or invalid, the remaining provisions not specifically so adjudicated shall remain in full force and effect.

I, **[testator's name]**, sign my name to this instrument on \_\_\_\_\_, 20\_\_\_\_, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Testator

We, \_\_\_\_\_ and \_\_\_\_\_, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that **[testator's name]** signs and executes this instrument as **[his][her]** will and that **[he][she]** signs it willingly (or willingly directs another to sign for **[him][her]**) and that **[he][she]** executes it as **[his][her]** free and voluntary act for the purposes therein expressed, and that each of us, in the conscious presence of **[testator's name]**, hereby sign this will as witness to **[his][her]** signing, and that to the best of our knowledge **[testator's name]** is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

### **Note on Use for HEMS standards**

In a Columbia Law Review article titled “Problems of Discretion in Discretionary Trusts,” Professor Edward Halbach, Jr. noted:

"Too frequently trust instruments provide no guidance as to the purpose and scope of the power. Although determining and assisting in the formulation of the donor's intentions is a primary counseling function, it is apparently one of the most neglected aspects of estate planning. A poorly defined discretionary power often results."

Often, the discretionary beneficiary and the remaindermen will disagree as to the settlor's intent. Absent some direction in the governing instrument, the trustee is often forced to rely on conflicting memories from the beneficiaries or, in many cases, forced to make a decision without any guidance at all."

Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1424, 1434 (1961), hereinafter “Halbach, *Discretion*.” This is also discussed in the RESTATEMENT (Third) OF TRUSTS, §50 ENFORCEMENT AND CONSTRUCTION OF DISCRETIONARY INTERESTS.

Halbach repeatedly stresses in his article,<sup>1</sup> the need for the governing instrument to provide guidance. He states:

To assure appropriate use of a discretionary power to pay over income or principal, it is essential that the power be accompanied by a standard or some other indication of its purpose and nature. The trustee will certainly be aided in exercising his judgment if the terms of the trust offer some guide for his actions, even if only by way of illustration or suggestion. **He [the trustee] should be informed of the purposes of the trust, the factors he is to consider, and something of the general frame of mind in which the settlor wishes him to act.** If a trustee must be reasonable in his decisions, in fairness he is entitled to know on what basis his reasonableness will be judged, although, as already pointed out, an express standard is not required to enable a court to impose a general standard of reasonableness

In a number of articles and comments in the past five years, suggestions have been made. A good example is from an article in the Checkpoint product produced by RIA. This is from an Article by Christian S Kelso, in Nov, 2015,

*Get HEMS Straight: Tailor the Right Distribution Standard. Complying with the commonly used “health, education, maintenance, and support” standard for making trust distributions can present challenges for trustees.*

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<sup>1</sup> Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1424, 1434 (1961), hereinafter “Halbach, *Discretion*.”

This Article contains extensive lists of expenditures that might be properly payables under a HEMS standard.

**The various lists go on for 2 or more pages and I do not think it is appropriate to put them in a Note on Use:**

A lengthy definition that I have used in a trust follows: This is from a presentation by Tami F. Conetta of the Northern Trust Company titled *Decision making for Discretionary Distributions*.

The definition and scope of the term education as outlined in this Article will be used in this Article to determine the education distributions that the Trustees will use. The Settlor intends that the term education is to be defined broadly, but the decision of the Trustees of the Trust as to what comprises “education” will be final.

1. In determining distributions for Education of any person, the Trustees shall take into account the following:
  - (a) All education expenses of such beneficiary from Kindergarten through the 12<sup>th</sup> grade, including, but not limited to, tuition, books, supplies, activity fees, memberships in scholastic societies and clubs. Such expenses shall not include the cost of room and board.
  - (b) All undergraduate education expenses including (i) college or university, (ii) any non-degreed program at an institution that is recognized for training in a particular trade, and (iii) continuing education courses taken at a college or university or at such non-degreed institution. Such expenses shall be paid by the Trustees until graduation or for a period of six (6) years, whichever is the shorter period. These expenses shall include tuition, room and board at the school or schools (or the same amount as board, if the beneficiary elects to live off of the campus), books, supplies and memberships in academic and professional societies and similar expenses. These expenses shall also include any additional living expenses incurred by the beneficiary, including, but not limited to, expenses incurred when traveling to and from school, to the extent that the Trustee determines that, in his sole and absolute discretion, (i) such expenses are appropriate and reasonable; and (ii) it is in the best interest of the beneficiary, the other beneficiaries and the Trust to pay such expenses.
  - (c ) All education expenses at the graduate level until the first to occur of (i) graduation from such graduate program, (ii) the expiration of the customary period for attaining a particular degree, or (iii) the expiration of twice the amount of time of the customary period for attaining a particular degree if the beneficiary is enrolled on a part-time basis. These expenses shall include tuition, room and board at the school or schools (or the same amount as board, if the beneficiary elects to live off of the campus), books, supplies and memberships in academic and professional societies and similar expenses. These expenses shall also include any additional living expenses incurred by the beneficiary, including, but not limited to, expenses incurred when traveling to and from school, to the extent that the Trustee determines that, in his sole and absolute discretion,

(i) such expenses are appropriate and reasonable; and (ii) it is in the best interest of the beneficiary, the other beneficiaries and the Trust to pay such expenses.

Clients often want reassurance that their estate planning documents are unassailable. The inclusion of a provision that a trust may not be accidentally revoked in whole or in part can be of assistance in making a client's plans more secure. When estate planning documents themselves cannot be overcome, resort to claims of revocation of one's estate plan through actions taken has seen some success. It has been argued that a revocable living trust is nothing more than a "will substitute," and that a beneficiary's interest in the remainder is a "mere expectation," rather than a vested interest, and that as a result a settlor may deal with trust property without regard to its place as corpus of a trust. Exchange National Bank v. Sparkman, 554 P.2d 1090 (Colo. 1976), held that a revocable trust not illusory and has a separate existence, granting vested property interests, but that notion has been the subject of some criticism.

The Colorado Uniform Trust Code addresses this issue in CRS 15-5-602(3) by providing that a settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the trust, or by another method manifesting clear and convincing evidence of the settlor's intent to revoke the trust if a method is not provided or is not exclusive. A provision for revocation is not exclusive unless the specified method is referred to as the "sole," "exclusive," or "only" method of revoking or amending the trust or the provision includes similar language manifesting the settlor's intent that the trust may not be revoked or amended by any other method.

## Notes on Use

- A) **ACCEPTING OR DECLINING TRUSTEESHIP:** The Colorado Uniform Trust Code (C.R.S. § 15-5-701) contains the default for acceptance of the trusteeship. The terms of the trust may specify different method(s) to accept or decline. However, if a method to accept or decline is intended to be exclusive, it must be expressed in language manifesting the intent that the acceptance or declination may not be by any other method (e.g., “sole,” “exclusive,” “only”).

\* \* \*

- 2) **APPOINTMENT OF COTRUSTEE OR SUBSTITUTE TRUSTEE:** ~~The practitioner should consider the inclusion of the substitute trustee provision to provide flexibility in handling assets of the trust that require special expertise in handling, such as oil and gas leases or other mineral interests. A clause which allows the appointment of a substitute trustee would also be useful in the case where trust assets include environmentally tainted real property. Many corporate trustees and individual trustees will refuse to accept the appointment as trustee if they must hold real property which may be subject to EPA action. A clause allowing a substitute trustee to hold the tainted assets or the appointment of a substitute trustee to hold the non-tainted assets may be helpful in persuading reluctant trustees.~~

~~In addition, the ability to appoint a substitute trustee or cotrustee is useful in the case where the original trustee may trigger an income or estate taxable event through the exercise of trustee discretion. By the use of a substitute trustee or cotrustee, and a renunciation of the power by the original trustee, the original trustee could be protected from such tax liability.~~

~~Finally, corporate trustees who utilize pooled funds which are regulated by the Comptroller of the Currency Reg. 9 cannot use these pooled funds in customer account unless the corporate trustee is serving in a fiduciary capacity. The ability to appoint a cotrustee would allow the utilization of corporate trustee pooled funds without the necessity of a court appointment as cotrustee.~~

- 2) **DESIGNATION OF ADDITIONAL TRUSTEE:** The practitioner should consider including the additional trustee provision to provide flexibility in handling trust assets which require special expertise, such as oil and gas leases or other mineral interests. Or consider providing for the designation of an additional trustee to handle property over which the trustee is unable or unwilling to act, such as real property located in another state or jurisdiction. A clause that allows the appointment of an additional trustee would also be useful where trust assets include environmentally tainted real property. Many trustees will refuse to accept appointment as trustee if they must hold tainted real property. A clause allowing an additional trustee to hold either the tainted assets or the non-tainted assets may be helpful in persuading reluctant trustees.

The practitioner should consider clearly specifying the additional trustee’s duties and powers in the designating document. Also, the document could specify a method for the acceptance and resignation of the additional trustee.

If the designating document specifies that the additional trustee is only to report to and inform the designating trustee, the document should also specify that the designating trustee remains responsible for all of the trustee's regular duties to report to and inform the beneficiaries, including as to the activities of the additional trustee.

Generally, any time there is more than one trustee, each trustee has fiduciary duties to use reasonable care to prevent another trustee from committing a breach of trust and to seek redress if a trustee commits a breach. C.R.S. § 15-5-703(7). Under the Colorado Uniform Directed Trust Act, the terms of the trust may relieve a trustee from these duties to the same extent that the terms of a directed trust may relieve the directed trustee from liability for acts of a trust director. C.R.S. § 15-16-812. Because an additional trustee is relieved from these duties only as provided by the terms of the trust or of the delegating instrument, the drafter should consider whether to include express language to that effect in the terms of the trust or in the delegating instrument.

C.R.S. § 15-5-802(9) allows a court to appoint a special fiduciary to make a decision about a proposed transaction which might violate the trustee's duty of loyalty. Provision in the will or trust which allows the trustee to designate an additional trustee to handle the transaction may eliminate the need for court involvement under this statute.

\* \* \*

- 3A) **COMPENSATION:** Compensation of personal representatives, guardians, and trustees in Colorado is subject to the Compensation and Cost Recovery Act, C.R.S. § 15-10-601, *et seq.* Under the Colorado Uniform Trust Code, if the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court still retains the power to adjust that compensation if it determines such compensation is unreasonably high or low. *See* C.R.S. §§ 15-5-708(2) and 15-5-105(1)(g).

\* \* \*

- 6) **DELEGATION and MAJORITY CONTROL:** The practitioner should note that common law requires a unanimous vote of cotrustees while the Colorado Probate Code defaults to the same for personal corepresentatives under C.R.S. § 15-12-717. The Majority Controls and Delegation clauses are offered for the practitioner's consideration to promote efficiency in handling conflicts between fiduciaries. This approach is contrary to common law and the inclusion of these provisions should only be made after due consideration of the overall effect. To develop an understanding of matters of liability of the delegating fiduciary, see C.R.S. § 15-12-717, and *Scott on Trusts*, §§ 171-171.4, 194, and 224.2.

When only two fiduciaries are serving, their joinder is required for them to act. Should they be unable to reach agreement, they may, if appropriate under the circumstances, delegate the decision to an agent. Alternatively, the practitioner may choose to draft a provision in the instrument that addresses a deadlock circumstance. Options may include designating a third party to break the deadlock – such as a trust protector – or by including language either suggesting or requiring the fiduciaries to seek some form of alternative dispute resolution such as mediation or arbitration. *See*, C.R.S. § 15-1-804(2)(x) for personal representatives, and

C.R.S. §§ 15-5-807 and 113 for trustees. See also, the Colorado Dispute Resolution Act, C.R.S. § 13-22-301, et seq.

\* \* \*

- 17A) NO BOND: Under the Colorado Uniform Trust Code the court retains the power to require, dispense with, modify or terminate any bond, notwithstanding the terms of a will or trust directing otherwise. See C.R.S. §§ 15-5-105(1)(f) and 15-5-702.

\* \* \*

- 18) OTHER DEFINITIONS: This provision incorporates definitions in the Colorado Probate Code, the Colorado Uniform Trust Code regarding trust provisions of the instrument, and the Colorado Uniform Powers of Appointment Act with regard to powers of appointment “*as any are amended after the date of this instrument and after my death.*” ~~The practitioner should be aware that UPC II changed certain definitions. See C.R.S. § 15-10-201.~~

\* \* \*

- 20A) QUALIFIED BENEFICIARY: The term “qualified beneficiary” appears throughout the Colorado Uniform Trust Code (CUTC) and was adopted directly from the Uniform Trust Code (UTC). The purpose of establishing the category is to distinguish between beneficiaries to whom the trustee has a duty to report and those beneficiaries who are remote and contingent, and whom the trustee, even with reasonable efforts, may have difficulty identifying. Generally, those remote and contingent beneficiaries have been categorized as “nonqualified beneficiaries.” Though the UTC does not define a nonqualified beneficiary, the term is occasionally used in the text of some UTC provisions. This provision was crafted by combining the substance of CUTC § 103(4) with that of CUTC § 103(16).

By adopting the term “qualified beneficiary”, the CUTC has defined those beneficiaries to whom the trustee has a clear duty to report and keep informed, to notify them of material facts necessary for them to protect their interests, to promptly respond promptly to qualified beneficiary’s requests for information related to the trust, and to notify qualified beneficiaries ~~over the age of 25~~ within 60 days of accepting the trusteeship and include in the notice the trustee’s name, address, and telephone number. C.R.S. §§ 15-5-813(1), 15-5-102(i), 15-5-813(2)(b), and 15-5-105(2)(h).

\* \* \*

- 22) REMOVAL OF TRUSTEE and REPLACEMENT OF TRUSTEE: The power to remove a trustee, for whatever reason, can be an important way to provide flexibility, but may have tax implications. The regulations under I.R.C. §§ 2036 and 2038 provide that, if the decedent has the unrestricted right to remove a trustee and appoint himself or herself as successor trustee, the decedent is considered to have the powers of the trustee. Treas. Reg. §§ 20.2036-1(b)(3) and 20.2038-1(a)(3). The regulations do not specifically address the result if the decedent ~~can~~

has the power to remove and replace the trustee, ~~but may not appoint himself or herself as the successor trustee.~~

Following the tax court's decisions in *Estate of Wall v. Commissioner*, 101 T.C. 300 (1993) and also *Estate of Vak v. Commissioner*, 973 F.2d 1409 (8th Cir. 1992) it has been settled that the settlor can retain the power to remove and replace the trustee. However if the settlor appoints himself as the successor trustee the trust will likely be included in the settlor's estate. Also see Rev. Rul. 95-58, 1995-2 C.B. 191 which provides that a settlor who possesses the power to remove the trustee can also have the power to appoint a successor trustee, who is not a related or subordinate party, as defined in I.R.C. § 672(c).

If the trust document provides that the beneficiary may remove and replace the trustee, the IRS has indicated in Ltr. Rul. 9607008 that it will apply the same standard to beneficiary powers as those applied to trustees. That is, if the beneficiary may only appoint a trustee who is not a related or subordinate party, then the beneficiary will not be treated as having the powers of the trustee for purposes of applying I.R.C. § 2041.

~~In Rev. Rul. 79-353, 1979-2 C.B. 325, the settlor of a funded irrevocable trust retained the power to remove the corporate trustee and to substitute another corporate trustee. The settlor could not appoint himself as trustee. The trustee had broad discretion to distribute trust income and principal among the settlor's children. The IRS ruled that the settlor's power to remove and replace the corporate trustee was tantamount to the settlor's directly retaining all of the trustee's powers. Under the facts of the ruling, those powers were broad, the trust was therefore includible in the settlor's gross estate under I.R.C. §§ 2036 and 2038. Rev. Rul. 79-353 does not apply, however, to a transfer or addition to a trust made before October 29, 1979 (the publication date of Rev. Rul. 79-353), if the trust was irrevocable on October 28, 1979. Rev. Rul. 81-51, 1981-1 C.B. 458.~~

~~In the opinion of most estate planners, Rev. Rul. 79-353 was wrong. Nevertheless, the ruling raised serious questions about whether a settlor should retain the right to remove and replace a trustee. In addition, the IRS took the position in letter rulings that the theory of Rev. Rul. 79-353 also applied in the context of I.R.C. §§ 2041 and 2042. That is, if a beneficiary had the right to remove and replace a trustee, the beneficiary would be deemed to have the powers of the trustee. Therefore, the beneficiary would have a general power of appointment over the trust unless the trustee's discretion to distribute to the beneficiary was limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance. See Note on Use 17 and Ltr. Ruls. 8916032 and 8926066. Similarly, if the insured settlor of an irrevocable life insurance trust retained both the right to remove and to replace trustees, the insured settlor would be deemed to have the powers of the trustee, and therefore to have incidents of ownership in the life insurance policies held in the trust, causing estate taxation under I.R.C. § 2042(2). TAM 8922003.~~

~~The IRS's position in Rev. Rul. 79-353 was addressed by the tax court in *Estate of Wall v. Commissioner*, 101 T.C. 300 (1993). See also *Estate of Vak v. Commissioner*, 973 F.2d 1409 (8th Cir. 1992). In *Wall*, as in Rev. Rul. 79-353, the taxpayer created an irrevocable trust and retained the right to remove the trustee and appoint a successor, but the successor had to be a~~

corporate trustee. The court found the IRS's position in Rev. Rul. 79-353 to be "supported neither by cogent argument nor by cited cases supporting the conclusion reached," refused to follow the Revenue Ruling, and held that the trust was not includible in the decedent's gross estate because of her retained power to change trustees. In response to *Wall*, the IRS finally reversed its position, and issued Rev. Rul. 95-58, 1995-2 C.B. 191. That ruling revoked Revenue Rulings 79-353 and 81-51, and adopted the position that a settlor who possesses the power to remove the trustee and appoint a successor trustee who is not a related or subordinate party, as defined in I.R.C. § 672(c), will not be treated as possessing the discretionary powers of the trustee. The use of the "related or subordinate party" standard is curious, in that I.R.C. § 672(c), which defines this term, is an income tax section, not an estate tax section, and the IRS does not explain why that standard of independence should be used in this context. The IRS will apparently continue to take the position that the settlor should be treated as having the discretionary powers of the trustee if the settlor can remove the trustee and appoint a trustee other than the settlor, if the replacement trustee could be a related or subordinate party.

Rev. Rul. 95-58 does not deal with the issue of whether a trust *beneficiary* who has the power to change trustees will be treated as having the powers of the trustee, and therefore possibly having a general power of appointment. However, the logic of *Wall* should apply in that context as well, and the IRS has indicated in Ltr. Rul. 9607008 that it will apply the same standard to beneficiary powers to change trustees. That is, if the beneficiary may only appoint a trustee who is not a related or subordinate party, then the beneficiary will not be treated as having the powers of the trustee for purposes of applying I.R.C. § 2041.

Rev. Rul. 95-58 also does not deal with the issue of whether, if the settlor of an irrevocable life insurance trust retains both the power to remove and to replace the trustee, the settlor will be deemed to have incidents of ownership in the life insurance policies held in the trust under I.R.C. § 2042. Again, the logic of *Wall* would seem to apply in this context, but there is not yet even a letter ruling applying the approach of Rev. Rul. 95-58 in the context of I.R.C. § 2042. Until there is some indication that the IRS will take the same approach for purposes of I.R.C. § 2042 as it does for purposes of I.R.C. §§ 2036 and 2038, it may be prudent not to give the settlor of an irrevocable life insurance trust both the power to remove and to replace trustees.

In view of the foregoing analysis of relevant authorities, it appears that generally in an irrevocable trust setting, the settlor's retention of power to remove a trustee should not run the risk of having the trust's assets be deemed to be included in the settlor's estate, while the settlor's retention of a power to replace a trustee would be fraught with much greater uncertainty and attendant risk. Accordingly, in the forms the process of changing trustees has been bifurcated through the use of separate "Removal of Trustee" and "Replacement of Trustee" provisions. In the case of the irrevocable life insurance trusts, on the basis of trying to maintain some flexibility for the settlor within the latitude apparently permitted by the foregoing authorities, the "Removal of Trustee" provisions provide that the settlor retains the right to remove a trustee. However, in the "Replacement of Trustee" paragraphs, the language of those provisions only gives the power to replace a trustee to the beneficiaries. And, in the case of the Section 2503(c) Trust (Form 1610), neither the power to remove nor the power to replace a trustee has been included due at least in part to the additional uncertainty and

~~perceived risk of the beneficiary being regarded as a settlor, should the trust be drafted to permit continuation after the beneficiary attains the age of 21 and elects not to terminate the trust. See Notes on Use 4 and 5 of Section 2503(c) Trust (Form 1610).~~

Because with few exceptions the trustee's discretion to make distributions is limited by ascertainable standards in these forms, a beneficiary having the powers to remove and to replace trustees should not create a problem. However, if the attorney using these forms changes the distribution provisions so as to eliminate the ascertainable standards, then the beneficiaries' powers to remove and to replace trustees should either be eliminated, or should be modified so as to fall within the safe harbor of Rev. Rul. 95-58, by requiring that the replacement trustee may not be a related or subordinate party. ~~Of course, the client may, in some cases, want to restrict the choice of successor trustees for non-tax reasons as well.~~

If the instrument creating a trust does not contain trustee removal provisions, the Colorado Uniform Trust Code contains a section which provides qualified beneficiaries removal alternatives, all of which involve the court. *See* C.R.S. § 15-5-706. *See also* C. Eyster and C. Stevens, "The Colorado Uniform Trust Code," 48 *Colo. Law.* 36, 41 (March 2019).

\* \* \*

- 22A) RESIGNATION: The 30-day notice is the default provision in the Colorado Uniform Trust Code. *See* C.R.S. § 15-5-705. The previous version of this provision provided that a resignation would be effective only upon the acceptance of appointment by a successor trustee. However, in most cases the occasion of a temporary vacancy would not be considered sufficient cause to require a trustee who wishes to resign to remain in office, especially since there are other events that may cause a temporary vacancy (*e.g.*, death or incapacity of the trustee).

\* \* \*

- 25A) TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY: Some practitioners may prefer to tailor these provisions, for the sake of brevity, or to limit "other qualified beneficiaries" to those who have attained 25 years of age, or for reasons discussed with the client regarding how much information the client wanted shared with qualified beneficiaries. For convenience, both the trust version and the will version of the provision are replicated below with bracketed citations to the Colorado Uniform Trust Code in italics. References to items which the statute requires to be included are indicated in ***bold italics***. *See* K. Millard, "The Trustee's Duty to Inform and Report Under the Uniform Trust Code," 40 *Real Property, Probate and Trust Journal* 373; *see also* C. Eyster and C. Stevens, "The Colorado Uniform Trust Code," 48 *Colo. Law.* 36 (March 2019).

TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY [Trust version]:

- a) After trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall keep the distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request~~ it have sent

- the trustee a request for notice, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [§ 813(1)].
- b) Within 60 days after the date trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall notify the qualified beneficiaries of:
- i) Settlor's identity [§ 813(2)(c)];
  - ii) The existence of the trust [§ 813(2)(c)], [§ 105(2)(h)];
  - iii) Trustee's acceptance of the trust [§ 813(2)(b)];
  - iv) Trustee's name, address, and telephone number [§ 813(2)(b)], [§ 105(2)(h)];
  - v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest [§ 813(2)(c)]; and
  - vi) Their right to request reports as provided in paragraph \_\_. \_\_ (Trustee's Duties to Report and to Respond) of this article [§ 813(2)(c)], [§ 105(2)(h)].
- c) Trustee shall notify the distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, in advance of any change in the method or rate of trustee's compensation [§ 813(2)(d)].

TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY [Will version]:

- a) My trustee shall keep the distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [§ 813(1)].
- b) Within 60 days after accepting the trusteeship, my trustee shall notify the qualified beneficiaries of:
- i) My identity as settlor of the trust [§ 813(2)(c)];
  - ii) The existence of the trust [§ 813(2)(c)], [§ 105(2)(h)];
  - iii) My trustee's acceptance of the trust [§ 813(2)(b)];
  - iv) My trustee's name, address, and telephone number [§ 813(2)(b)], [§ 105(2)(h)];
  - v) Their right to request portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [§ 813(2)(c)]; and
  - vi) Their right to request reports as provided in paragraph \_\_. \_\_ (Trustee's Duties to Report and to Respond) of this article [§ 813(2)(c)], [§ 105(2)(h)].
- c) My trustee shall notify the distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, in advance of any change in the method or rate of my trustee's compensation

[§ 813(2)(d)].

- 25B) TRUSTEE’S DUTIES TO REPORT AND TO RESPOND: Some practitioners may prefer to tailor these provisions, for the sake of brevity, or to limit “other qualified beneficiaries” to those who have attained 25 years of age, or for reasons discussed with the client regarding how much information the client wanted shared with qualified beneficiaries. For convenience, both the trust version and the will version of the provision are replicated below with bracketed citations to the Colorado Uniform Trust Code in italics. References to items which the statute requires to be included are indicated in ***bold italics***. See K. Millard, “The Trustee’s Duty to Inform and Report Under the Uniform Trust Code,” 40 *Real Property, Probate and Trust Journal* 373; see also C. Eyster and C. Stevens, “The Colorado Uniform Trust Code,” 48 *Colo. Law.* 36 (March 2019).

TRUSTEE’S DUTIES TO REPORT AND TO RESPOND [Trust version]:

- a) At least annually and at the termination of the trust, trustee shall send to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], ***§ 105(2)(i)***, a report containing:
  - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];
  - ii) The liabilities of the trust, if any [§ 813(3)(a)(I)];
  - iii) The trust’s receipts and disbursements during the period covered by the report [§ 813(3)(a)(I)]; and
  - iv) The amount and source of trustee’s compensation [§ 813(3)(a)(I)].
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, the former trustee shall send a report as described in paragraph \_\_.\_\_(a) of this article to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it. Should the former trustee be deceased or incapacitated, the former trustee’s legal representative may send the report [§ 813(3)(b)].
- c) Upon request of a qualified beneficiary, trustee shall:
  - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances [§ 813(1)], ***§ 105(2)(i)***; and
  - ii) Furnish promptly a copy of the portions of the trust instrument that describe or affect the requesting beneficiary’s interest [§ 813(2)(a)].

TRUSTEE’S DUTIES TO REPORT AND TO RESPOND [Will version]:

- a) At least annually and at the termination of the trust, my trustee shall send to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], ***§ 105(2)(i)***, a report containing:

- i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];
  - ii) The liabilities of the trust, if any [§ 813(3)(a)(I)];
  - iii) The trust's receipts and disbursements during the period covered by the report [§ 813(3)(a)(I)]; and
  - iv) The amount and source of my trustee's compensation [§ 813(3)(a)(I)].
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, my former trustee shall send a report as described in paragraph \_\_.\_\_(a) of this article to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it. Should my former trustee be deceased or incapacitated, my former trustee's legal representative may send the report [§ 813(3)(b)].
- c) Upon request of a qualified beneficiary, my trustee shall:
  - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances [§ 813(1)], [§ 105(2)(i)]; and
  - ii) Furnish promptly a copy of the portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [§ 813(2)(a)].

25C) TRUST SITUS: The information required in a trustee's notice of transfer of trust situs appears in C.R.S. 15-5-108(5). *See*, R. Schroer and M. Edwards, "Selecting a Trust Situs," 50 *Colo. Law.* 38 (October 2021). *See also*, C. Eyster and C. Stevens, "The Colorado Uniform Trust Code," 48 *Colo. Law.* 36 (March 2019).

## ARTICLE 14 - TRUSTEESHIP

14.1 DESIGNATION OF SUCCESSOR TRUSTEE: If \_\_\_\_\_ ceases to serve as trustee, settlor appoints \_\_\_\_\_ of \_\_\_\_\_ as trustee.

### *See Appx A Note on Use A*

#### 14.2 ACCEPTING OR DECLINING TRUSTEESHIP:

- a) Except as otherwise provided in **paragraph 14.2(c)** of this article, a person designated as trustee accepts the trusteeship:
  - i) By delivering written consent as follows:
    - A) to settlor; but if settlor is incapacitated or deceased, then to any acting legal representative of settlor, and
    - B) To the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, ~~and to other qualified beneficiaries who request it,~~ and
    - C) To all other acting trustees; or
  - ii) By accepting delivery of trust property, exercising powers or performing duties as a trustee, or otherwise indicating acceptance of the trusteeship.
- b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A person designated as trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.
- c) A person designated as trustee, without accepting the trusteeship, may:
  - i) Act to preserve trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship as follows:
    - A) To settlor; but if settlor is incapacitated or deceased, then to any acting legal representative of settlor, and
    - B) To a qualified beneficiary, and
    - C) To any acting trustee; and
  - ii) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

*See Appx A Note on Use 2*

14.3 DESIGNATION OF ADDITIONAL TRUSTEE: If for any reason trustee is unwilling or unable to act as to any property of the trust, or with respect to any provision of this agreement, trustee may ~~designate~~ appoint in writing an ~~individual or bank or trust company to serve as~~ additional trustee as to such property or with respect to such provision, and may revoke any such designation at will. Each additional trustee so serving shall exercise all fiduciary powers granted by this trust unless expressly limited by trustee in the instrument designating such additional trustee.

~~14.4 EXONERATION OF TRUSTEE: No trustee shall be obligated to examine the accounts, records, or acts, or in any way or manner be responsible for any act or omission to act on the part of any previous trustee or of the personal representative of settlor's probate estate. No trustee shall be liable to settlor or to any beneficiary for the consequences of any action taken by such trustee which would, but for the prior removal of such trustee or revocation of the trust created hereunder, have been a proper exercise by such trustee of the authority granted to trustee under this agreement, until actual receipt by such trustee of notice of such removal or revocation. Any trustee may acquire from the beneficiaries, or from their guardians or conservators, instruments in writing releasing such trustee from liability which may have arisen from the acts or omissions to act of such trustee, and indemnifying such trustee from liability therefor. Such instruments, if acquired from all then living beneficiaries, or from their guardians or conservators, shall be conclusive and binding upon all parties, born or unborn, who may have, or may in the future acquire, an interest in the trust.~~

*See Appx A Note on Use ????*

14.4 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

- a) Exoneration of Trustee; Duties Regarding Previous Fiduciaries: A trustee is not liable for an act or omission of a former trustee or of the personal representative of settlor's estate. Also, trustee has no duty to examine the accounts, records, or acts of any former trustee or of the personal representative of settlor's estate. But trustee shall take reasonable steps to redress a breach of trust known to trustee to have been committed by a former trustee.
- b) Exoneration of Trustee Actions: Trustee is not liable to settlor or to any beneficiary for the consequences of any action taken by that trustee which would, but for the prior

removal of that trustee or revocation of the trust, have been a proper exercise by that trustee of the authority granted to trustee under this agreement, until actual receipt by that trustee of notice of the removal or revocation.

- c) Beneficiary's Consent, Release, or Ratification: A trustee may acquire from the beneficiaries instruments in writing releasing that trustee from liability which may have arisen from the acts or omissions of that trustee and indemnifying that trustee against liability. The instruments are conclusive and binding upon all parties who execute them or who may have or acquire an interest in the trust.

14.5 RIGHTS OF SUCCESSOR TRUSTEE: Any successor trustee at any time serving hereunder, ~~whether corporate or individual~~, shall have all of the title, rights, powers, and privileges, and be subject to all of the obligations and duties, both discretionary and ministerial, as herein and hereby given and granted to the original trustee hereunder, and shall be subject to any restrictions herein imposed upon the original trustee. Any fiduciary succeeding to the trust business of any ~~corporate trustee~~ professional fiduciary acting as trustee shall become the successor trustee under this agreement with like powers, duties, and obligations.

~~14.6 — RESIGNATION: Any trustee may resign by giving written notice to settlor, if living, to any adult beneficiary and to the parents of any minor beneficiary then eligible to receive current income, and to any other trustee then serving. The resignation shall become effective only upon the acceptance of appointment by the successor trustee.~~

See Appx A Note on Use 22A

14.6 RESIGNATION: A trustee may resign:

- a) By giving at least 30 days' written notice effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee, as follows:
- i) To settlor; but if settlor is incapacitated or deceased, then to any acting legal representative of settlor, and
  - ii) To the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, and

- iii) To all other acting trustees; or
- b) With the approval of the court.

***See Appx A Note on Use.22***

14.7 REMOVAL OF TRUSTEE: Any trustee may be removed, without cause, by settlor, or if settlor is deceased or incapacitated, by settlor's spouse, or if settlor and settlor's spouse are both deceased or incapacitated, by a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ **qualified beneficiaries distributees and permissible distributees of trust income or principal**, by giving written notice to such trustee and to any other trustee then serving, effective in accordance with the provisions of the notice.

14.8 REPLACEMENT OF TRUSTEE: If any trustee fails or ceases to **serve act** and no designated successor trustee serves, settlor, or if settlor is deceased or incapacitated, settlor's spouse, or if settlor and settlor's spouse are both deceased or incapacitated, a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ **qualified beneficiaries distributees and permissible distributees of trust income or principal** may ~~designate~~ **appoint** a successor trustee. If any vacancy is not filled within thirty days after the vacancy arises, then any **qualified beneficiary or the resigning trustee** may petition a court of competent jurisdiction to ~~designate~~ **appoint** a successor trustee to fill such vacancy. By making such designation, such court shall not thereby acquire any jurisdiction over the trust, except to the extent necessary for making such designation. ~~Any successor trustee designated hereunder may be an individual or may be a bank or trust company authorized to serve in such capacity under applicable federal or state law.~~

**ARTICLE 15 - ADMINISTRATIVE PROVISIONS**

15.1 COURT PROCEEDINGS: The trust estate shall be administered expeditiously \*\*\*

***See Appx A Note on Use 17A***

15.2 NO BOND: No trustee acting under this trust shall be required to furnish any bond for the faithful performance of such trustee's duties, but if bond is ever required by any law or court rule, no surety shall be required on such bond.

*See Appx A Note on Use 3A*

15.3 COMPENSATION: Trustee shall be entitled to reasonable compensation commensurate with services actually performed and to be reimbursed for expenses properly incurred.

15.4 INALIENABILITY: No beneficiary shall have any right to anticipate, sell, assign, \*\*\*

15.5 UNDISTRIBUTED INCOME AT DEATH OF BENEFICIARY: Except as \*\*\*

15.6 PROTECTION AGAINST PERPETUITIES RULE: Every trust hereunder, and every \*\*\*

~~15.7 REPRESENTATIVE OF BENEFICIARY: The conservator of the estate or, if none, the guardian of the person of a beneficiary may act for such beneficiary for all purposes under this agreement or may receive information on behalf of such beneficiary.~~

15.7 REPRESENTATIVE OF BENEFICIARY: The following persons, in order of priority, may act for a beneficiary for all purposes under this agreement and may receive information on behalf of the beneficiary: (a) the conservator of the beneficiary's estate; (b) the beneficiary's guardian; (c) the beneficiary's attorney-in-fact acting under a durable power of attorney; or (d) the person who has custody of the beneficiary.

~~15.8 MAJORITY CONTROL: Except where otherwise expressly provided, in all matters pertaining to the administration of any trust under this agreement, when more than two trustees are serving, the concurrence and joinder of a majority of such trustees shall be required; but if only two trustees are serving, the joinder of both of them shall be required. If a trustee has released or is prohibited from exercising any power under any other provision of this agreement with respect to any action or property, then with respect to such action or property such trustee shall not be counted in the application of the preceding sentence and the other trustee or trustees then serving may exercise such power. Any trustee, however, may dissent or abstain from a decision of the majority and be absolved from personal liability by registering such dissent or abstention in the records of such trust, but such trustee shall thereafter act with the other trustees in any way necessary or appropriate to effectuate the decision of the majority.~~

*See Appx A Note on Use 2*

15.8 MAJORITY CONTROL:

- a) Cotrustees who are unable to reach a unanimous decision may act by majority decision; if only two cotrustees are acting, the joinder of both is required.
- b) If a vacancy occurs, the remaining cotrustees may act for the trust.
- c) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or avoid injury to trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
- d) A trustee who does not join in an action of another trustee is not liable for the action, except that each trustee must exercise reasonable care:
  - i) To prevent a cotrustee from committing a serious breach of trust, and
  - ii) To pursue a remedy, at trust expense, for a cotrustee's serious breach of trust.
- e) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

15.9 SINGLE SIGNATURE FACILITY: When two or more individuals are serving in a fiduciary capacity, an individual fiduciary may act alone on any deposit account maintained by the fiduciaries at a bank or other financial institution if authorized to do so under a written delegation agreement. The bank or other financial institution may act on the signature or instruction of any individual named as fiduciary on the account without regard to the terms of any document governing the fiduciary's actions. But when a professional fiduciary is serving, the professional fiduciary is the only fiduciary authorized to act alone on any deposit account maintained by the fiduciaries.

15.10 DELEGATION: Any trustee may delegate to any other trustee the exercise of any powers, discretionary or otherwise, unless it is a function settlor reasonably expected to be performed jointly. Unless a delegation is irrevocable, the delegating trustee may also revoke it. The delegation and revocation must be in writing executed by the delegating trustee and delivered to the other trustee. While the delegation is in effect, any of the delegated powers may be exercised or action may be

taken by the trustee receiving the delegation with the same force and effect as if the delegating trustee had personally ~~joined in the exercise of such power or the taking of such action~~ **exercised the power or taken the action**. Anyone dealing with trustee may rely upon the written statement of the delegating trustee relative to the fact and extent of **the** delegation.

15.11 CUSTODY: Whenever a ~~corporate trustee is serving, such corporate trustee~~ **professional fiduciary is acting as trustee, the professional fiduciary** shall be the custodian of the trust property and of the books and records of the trust. ~~It may perform all ministerial acts necessary for the acquisition and transfer of personal property and money, including the signing and endorsement of checks, receipts, stock certificates, and other instruments. No person need inquire into the propriety of any such act.~~

15.12 RELEASE OF POWERS: Any trustee may release, in whole or in part, temporarily or permanently, any power, authority, or discretion conferred by this agreement by a writing delivered to each cotrustee and to ~~each beneficiary then eligible to receive income distributions from any trust~~ **the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, or, if none, to all ascertainable beneficiaries.** ~~Such renunciation or release shall not affect the grant of power, authority, or discretion renounced or released.~~

~~15.13 REPORTS: Trustee shall report no less frequently than annually to settlor, to all adult beneficiaries and to the parents of any minor beneficiaries then eligible to receive current income, all the receipts, disbursements, and distributions during the reporting period, and property then held as the principal of the trust. The records of the trust shall be open at all reasonable times to inspection by settlor and by the beneficiaries of the trust and their representatives.~~

***See Appx A Note on Use 25A***

**15.13 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:**

- a) After trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall keep the ~~qualified beneficiaries of the trust~~ **distributees and permissible distributees of trust income or principal, and other**

qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [§ 813(1)].

- b) Within 60 days after the date trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall notify the qualified beneficiaries of:
  - i) Settlor's identity [§ 813(2)(c)];
  - ii) The existence of the trust [§ 813(2)(c)], [§ 105(2)(h)];
  - iii) Trustee's acceptance of the trust [§ 813(2)(b)];
  - iv) Trustee's name, address, and telephone number [§ 813(2)(b)], [§ 105(2)(h)];
  - v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest [§ 813(2)(c)]; and
  - vi) Their right to request reports as provided in **paragraph 15.14 (Trustee's Duties to Report and to Respond)** of this article [§ 813(2)(c)], [§ 105(2)(h)].
- c) Trustee shall notify the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who ~~request it~~ have sent the trustee a request for notice, in advance of any change in the method or rate of trustee's compensation [§ 813(2)(d)].

***See Appx A Note on Use 25B***

**15.14 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:**

- a) At least annually and at the termination of the trust, trustee shall send to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], [§ 105(2)(i)], a report containing:
  - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];
  - ii) The liabilities of the trust, if any [§ 813(3)(a)(I)];
  - iii) The trust's receipts and disbursements during the period covered by the report [§ 813(3)(a)(I)]; and
  - iv) The amount and source of trustee's compensation [§ 813(3)(a)(I)].

- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, the former trustee shall send a report as described in **paragraph 15.14(a)** of this article to the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it. Should the former trustee be deceased or incapacitated, the former trustee's legal representative may send the report [§ 813(3)(b)].
- c) Upon request of a qualified beneficiary, trustee shall:
  - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances [§ 813(1)], [**§ 105(2)(i)**]; and
  - ii) Furnish promptly a copy of the portions of the trust instrument that describe or affect the requesting beneficiary's interest [§ 813(2)(a)].

15.15 LITIGATION POWERS: Trustee, in its discretion and at the expense of the trust estate, \*\*\*

15.16 POWERS OF INSURED TRUSTEE: No trustee, other than settlor, may exercise any \*\*\*

15.17 LIMITATIONS ON POWER OF INTERESTED TRUSTEE: No individual trustee, \*\*\*

15.18 DIGITAL ASSETS: To the extent permitted by applicable law, trustee may (i) access, \*\*\*

## **ARTICLE 16 - GENERAL PROVISIONS**

16.1 ADOPTED CHILDREN: A child adopted by any person and the descendants by blood or adoption of such child shall be considered the descendants of such adopting person and of such person's ancestors if the adoption is by legal proceeding while the child is under the age of 21 years.

16.2 APPLICABLE LAW: The validity and construction of this agreement shall be determined by the laws of Colorado. Questions of administration of any trust established under this agreement shall be determined by the laws of the situs of administration of such trust. The laws of Colorado shall govern the creation, revocation, or amendment of a power of appointment created by this trust and the exercise, release, disclaimer, or other refusal of such a power of appointment.

*See Appx A Note on Use 25C*

16.3 TRUST SITUS: The State of Colorado is the original situs of any trust created under this agreement. However, the domiciles of the beneficiaries, the location of trustees, changes in the laws relating to trusts and taxation, or other circumstances relevant to the purposes of the trust, the administration of the trust, or the interests of the beneficiaries may make it desirable at some time in the future to transfer the situs of a trust created under this agreement. Accordingly, following notice as containing the information required by law to the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who ~~request~~ ~~have sent the trustee a request for notice,~~ trustee may transfer the situs of a trust at any time and to any place in the discretion of the trustee.

16.4 BY REPRESENTATION: Whenever property is to be distributed or divided \*\*\*

16.5 CONSTRUCTION: Unless the context requires otherwise, words denoting the singular \*\*\*

16.6 EDUCATION: Under this agreement, distributions for education may, in trustee's discretion, include the cost of tuition, fees, books, supplies, living expenses, and travel, to the extent they are reasonable. The term "education" means:

- a) Study or instruction at, or under the auspices of, an accredited educational institution (the term "accredited educational institution" means a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; if such school, college, university, trade school, or other institution provides an academic curriculum, employs a full-time faculty, offers classes **electronically or** on a campus, and enjoys a currently effective accreditation from a generally recognized accreditation board); and
- b) Study or instruction which trustee, in its discretion, considers appropriate for a beneficiary who has special needs or abilities which are not likely to be served by an accredited educational institution.

16.7 FIDUCIARY: As used in this agreement, "fiduciary" means an original, additional, or

successor personal representative, conservator, agent, or trustee.

16.8 HEADINGS AND TITLES: The headings and paragraph titles are for reference only.

16.9 INCAPACITY: For the purposes of this agreement, an individual may be treated as being incapacitated if so declared or adjudicated by an appropriate court; or if a ~~guardian, conservator, or other personal representative of such~~ legal representative of the individual's person or estate or both has been appointed by an appropriate court; or if certified in writing by his or her personal physician to be unable to properly manage his or her financial affairs; or if such individual is a minor.

16.10 I.R.C.: I.R.C. shall refer to the Internal Revenue Code of the United States. Any \*\*\*

16.11 OTHER DEFINITIONS: Except as otherwise provided in this agreement, terms are as defined in the Colorado Uniform Trust Code, and if not, then in the Colorado Probate Code, or, with regard to powers of appointment, in the Colorado Uniform Powers of Appointment Act, as any are amended after the date of this agreement.

~~16.12 PERSONAL REPRESENTATIVE: For the purposes of this agreement, the term "personal representative" shall include an executor, administrator, guardian, conservator, or any other form of personal representative, depending upon the context in which such term occurs.~~

16.12 LEGAL REPRESENTATIVE: As used in this agreement, "legal representative" includes an individual's attorney-in-fact acting under a durable power of attorney, a conservator of the individual's estate, an individual's guardian, a personal representative, executor, or administrator of the individual's decedent's estate, or any other form of legal representative, depending upon the context in which the term occurs.

16.13 PROFESSIONAL FIDUCIARY: As used in this agreement, "professional fiduciary" means an individual or entity that is in the business of acting as a fiduciary.

*See Appx A Note on Use 20A*

16.14 QUALIFIED BENEFICIARY: As used in this agreement, “qualified beneficiary” means a person who:

- a) has a present or future beneficial interest in the trust, vested or contingent, or holds a power of appointment over property of the trust in a capacity other than that of trustee, and who;
- b) on the date the beneficiary’s qualification is determined:
  - i) is a distributee or permissible distributee of trust income or principal;
  - ii) would be a distributee or permissible distributee of trust income or principal if the interests of other distributees or permissible distributees then receiving or eligible to receive distributions of trust income or principal terminated on that date without causing the trust to terminate; or
  - iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

As used in this paragraph, “person” does not include an appointee under a power of appointment unless and until the power is exercised and trustee has knowledge of the exercise and the identity of the appointee.

16.15 SURVIVORSHIP: If settlor’s spouse in fact survives settlor by any period of time or \*\*\*

~~16.16 TRUSTEE DEFINITION: As used throughout this agreement, the word “trustee” shall always refer to the original trustee as well as to any successor, replacement or additional person, corporation or other entity from time to time serving, whether in fact there shall be one or more trustees serving from time to time.~~

16.16 TRUSTEE: As used in this agreement, “trustee” includes an original, additional, and successor trustee, and a cotrustee.

16.17 COUNTERPARTS: This agreement may be executed in counterparts and each such counterpart shall constitute one and the same agreement.

16.18 SEVERABILITY: If any part of this agreement shall be adjudicated to be void or invalid, the