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| **From:** | Frank Hill |
| **Sent:** | Monday, October 4, 2021 11:04 AM |
| **To:** | Melissa Anderson; Connie Eyster; Corina Gerety; Lisa Hardin; Richard Hess; Stan Kent; Alison Leary; Marianne Luu-Chen; Melissa Anderson; Julie McVey; Kevin Millard; Carl Stevens; Tony Vaida; Kirsten Waldrip; Sonny Wiegand; Carolyn Wiley; Gene Zuspann |
| **Cc:** | Hayley Lambourn; Rikke Liska; Dave Kirch |
| **Subject:** | Chair's 10/4/21 Status Report: OBFC CUTC Revisions Subcommittee |
| **Attachments:** | [Extract] 0350-Rev Mar Ded Tst (2021-10-04).pdf; [Extract] 0361-Mar Ded Will (2021-10-04).pdf; Darla's 14.3 and 8.2 Note on Use (2021-01-05).docx; Page 69, Appx A - Gen & Adm Prov.pdf; Page 79, Appx A - Gen & Adm Prov.pdf; RE: Unfinished Business; P 69 App A w Millard edits.pdf; Deadlock provision.pdf; Exoneration [Rev Tst 14.4]-CGS (2021-08-29).pdf; Form 350 Rev trust, section 14.4; Exoneration [Rev Tst 14.4]-EPZ (2021-09-10).pdf; Selecting a Trust Situs.pdf; [Extract] Appx A_Gen and Adm Prov_Notes on Use (2021-04-27).pdf |

Dear Colleagues,

Our next meeting will be held (virtually) on **Wednesday, October 6th, 2021, 10:00-11:30 AM**. This report covers actions of our subcommittee during our last meeting on 9/1/21 as well as in preparation for this meeting. Virtual meeting access info:

https://cba-cle.zoom.us/j/89048167273?pwd=ZE11TXdZQkZOR1Ivb3VmeWJQMmRudz09

Meeting ID: 890 4816 7273
Passcode: 882872

Call-in: 1 312 626 6799
Meeting ID: 890 4816 7273
Find your local number: https://cba-cle.zoom.us/u/kgro8OlZk

Attached please find [Extract] 0350-Rev Mar Ded Tst (2021-10-04).pdf, [Extract] 0361-Mar Ded Will (2021-10-04).pdf, Darla's 14.4 and 8.2 Note on Use (2021-01-05).docx, Pg 69, Appx A – Gen & Adm Prov (2021-04-27).pdf, Page 79, Appx A – Gen & Adm Prov.pdf, RE: Unfinished Business.msg, P 69 App A w Millard edits.pdf, Deadlock provision.pdf, Exoneration [Rev Tst 14.4]-CGS (2021-08-29).pdf, Form 350 Rev trust, section 14.4.msg, Exoneration [Rev Tst 14.4]-EPZ (2021-09-10).pdf, and Selecting a Trust Situs.pdf on which I comment briefly below. You should use a color printer to print them out.

Note: New Appx A Extract is also included, [Extract] Appx A_Gen and Adm Prov_ Notes on Use (2021-04-27).pdf. Because Appx A, a monstrous 85-page document, is so difficult to work with, I created this extract containing only the provisions of Appx A on which we are working.

Most of our work was (and still is) in the rev tst [Form 350] and will [Form 361] extracts. 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 boilerplate*** as it currently exists in the Orange Book Forms,
> **RED** typeface = ***approved changes*** to that existing boilerplate made by this subcommittee, and
> **GREEN** typeface = ***proposed changes*** suggested to be made to these documents.

## Old Stuff …

***Designation of Additional Trustee* 14.3 & 8.2 [& Darla's Note on Use]**:

> Most of you are aware that Darla Daniel had to leave our team back in March. Julie McVey has graciously volunteered to pick up on this project right where Darla left off. She was going to try to touch base with Darla and submit something following that conversation. This is what Julie is dealing with (where Darla left off):

After raising the issue of "indefinite" vs. "definite" term of appointment for an additional trustee during our 1/6/21 mtg, Darla had offered to revise the last sentence of the paragraph to perhaps include some comment about that issue. She also offered to revise her proffered Note on Use to include some discussion of this issue as well as restructure the existing material to focus on its salient point, *i.e.*, allocation of the duty to inform and report between the trustee and the additional trustee. For the reasons explained in the next item regarding Kevin's Note on Use, Darla was going to hold off on revising her previously offered Note on Use until after we had finalized our discussion of how we want to treat relationships among cofiduciaries generally, which we finally concluded during our 4/7/21 meeting.

As you can see in the attached extracts, the last sentence of ¶¶ 14.3 & 8.2 is an "open matter" until we resolve this issue. Although Darla's originally proposed Note on Use (attached) was proffered as a stand-alone item, please remember that now that we've discovered an existing one for that provision, Note on Use 2 on Page 69 of Appendix A, General & Administrative Provisions (attached), Darla's {& Julie's] Note on Use will have to be incorporated into the existing Note on Use, perhaps as a separate paragraph or subparagraph.

***Designation of Additional Trustee* 14.3 & 8.2 [Kevin's Note on Use]**:

> Most of you are aware that Kevin has not been able to participate in our deliberations since our meeting last April. He, too, like Darla, seems to have been slammed by work, severely limiting his availability to participate in our meetings for the next few months. However, he was able to submit one final response to try to address the "loose ends" on his Note on Use project. See his new material, RE: Unfinished Business.msg and P 69 App A w Millard edits.pdf attached. This is what he was responding to (where Kevin had left off back in April):

Approved during our 12/2/20 mtg, during our 1/6/21 mtg, we had initially decided to relocate this Note on Use to be attached to the *Cotrustees* paragraphs in our documents. But Kevin thought, on reconsideration, since an additional trustee is in the nature of a cotrustee, we should also link his Note on Use to ¶¶ 14.3 & 8.2 as well, and we concurred.

However, after we preliminarily approved the relocation and retitling of ¶¶ 15.8 & 9.10 *Majority Control* during our 3/3/21 mtg, Kevin reassessed the issue of an appropriate location for his previously proffered Note on Use. After he tweaked it slightly, he resubmitted it for our 4/7/21 mtg, but this time *not* to be linked to any specific paragraph (like ¶¶ 14.3 & 8.2 *Designation of Additional Trustee*, or ¶¶ 15.8 & 9.10 *Majority Control*), but rather to apply to the "Trusteeship" article as a whole. He would have the Note on Use reference appear at the beginning of the article, with the text of his Note on Use to appear in the Notes on Use *at rear of the form* (and each OB form containing a "Trusteeship" article) *instead of* being linked to the specific "boilerplate" paragraphs and appearing in Appx A, General and Administrative Provisions at the rear of the book. I have included the text of his Note on Use (as tweaked slightly by Kevin, Darla, and yours truly) in the Notes on Use section of the forms at the rear of the extracts of both the rev tst and will documents.

While I agree that the *topic* of the Note on Use applies generally to the "Trusteeship" article, it seems clear that the *specific text* of the Note on Use appears to apply primarily to the two provisions that mention multiple trustees, namely, *Designation of Additional Trustee* and *Majority Control*. (For the time being, I have positioned the references to the

Note on Use in front of each of those two provisions.) We'll need to decide where to most appropriately reference this Note on Use, and that will determine for us whether it will appear in the rear of each form containing a trust, or be added to Appx A, Notes on Use 2 and 6 on Pages 69 and 79, respectively (attached).

***<u>Majority Control</u>*** **<u>15.8 & 9.10</u>**:

**The "One Signature" Issue**

During our 4/7/21 mtg, we approved the "final" versions of these paragraphs. However, yours truly had forgotten to add a provision suggested during our 3/3/21 mtg to provide that in a multiple trustee setting, the signature of only one trustee be required to bind the trust. Both Sonny and Gene graciously provided me with examples of some language to accomplish that. I submitted suggested language which the subcommittee approved during our last mtg on 9/1/21.

While I appreciated the subcommittee's swift approval of my succinct offerings, after re-reading my own work, I began having second thoughts about the precision of the words I had chosen. Is it the "trust" or my "estate" that is bound (as though they were legal entities) or is it actually the *cofiduciaries, collectively*, that are bound by the signature of one of the cofiduciaries? I have suggested revised language for your consideration (or am I needlessly being too fastidious?). See, ¶ 15.8 (b) on Pg. 24 of the rev tst extract, and ¶ 9.10 (b) on Pg. 14 of the will form extract.

**The "Two-Trustee Impasse" Issue**

During our last meeting on 9/1/21, Tony reminded us that he had raised the issue of It's all well and good for our form to say, "*... if only two cotrustees [cofiduciaries] are acting, the joinder of both is required,*" but what if they can't agree? He suggested that we consider adding a "Deadlock Provision," or, if not, at least a Note on Use alerting practitioners to the issue and possibly including an example of a simple deadlock provision.

In working on this during this past month, I polled a few members of this subcommittee on this issue. Kevin doesn't have such a standard provision, rarely drafts them and doesn't think it belongs as a standard provision in an OB form. Sonny uses a Trust Protector with authority to appoint a temporary cotrustee to break the deadlock. While Gene said he, too, doesn't have or use a specific provision, he has seen documents giving a specific person or class deadlock-breaking powers. See Tony's proffered Note on Use in Deadlock provision.pdf attached.

***<u>Trustee's Duties to Inform and to Notify</u>*** **<u>15.12 & 9.14</u>** *and* ***<u>Trustee's Duties to Report and to Respond</u>*** **<u>15.13 & 9.15</u>**:

During our 4/7/21 mtg, we approved the "final" versions of all four of these paragraphs as presented in the extracts attached to my 4/5/21 Status Report [without the CUTC source references in brackets]. The final versions, as approved [without the CUTC source references in brackets], appear in the extracts attached to this status report.

However, Carolyn opined that she thought practitioners would probably benefit knowing the CUTC source references of all the provisions contained in ¶¶ 15.12 & 9.14 as well as in ¶¶ 15.13 & 9.15. and proposed that Note(s) on Use be created (back in Appx A) replicating these paragraphs ***with the CUTC source references in brackets*** so that practitioners would be aware of which provisions were mandatory in CUTC and which were optional (default) when they were considering whether to modify these provisions in their own documents. For last month's meeting, Carolyn graciously proffered preliminary Notes on use for Rev Tst ¶ 15.12 and Will ¶ 9.14, which, upon review we seemed to think might be bolstered a bit to explain why the information being provided might be useful to practitioners.

***<u>Exoneration of Trustee</u>*** **<u>14.4 & 8.3</u>**: Early on, Darla advised us strongly to address the impact of CUTC §§ 1008, 1009 and 1010 on our will and trust provisions addressing trustee exoneration, beneficiary releases, and trustee liability. Last month, Carl provided his suggestions for some revisions to the existing language of Rev Tst ¶ 14.4 *Exoneration of Trustee*. As we began to discuss it, Gene said he might propose a slightly different approach. So, we decided to hold off in depth discussion until we could see what Gene also had to offer. See these three attached documents (previously distributed to you under my 9/15/21 email):

Exoneration [Rev Tst 14.4]-CGS (2021-08-29).pdf: You've seen this before. **This is Carl's 8/29/21 offering** that was sent out attached to my 8/30/21 email to the subcommittee. I have just re-worked it a little to put it into the standard font and green typeface we are used to seeing in this subcommittee for *proposed* changes to existing OBF text. I admit that I have also made a couple of very minor corrections which I believe are consistent with Carl's intent.

Form 350 Rev Tst, section 14.4.msg: **This is Gene's 9/10/21 transmittal email.** In it, *he suggests that there may be nothing in CUTC §§ 1008 or1010 that we should include, and, perhaps, that to do so may be inappropriate.*

Exoneration [Rev Tst 14.4]-EPZ (2021-09-10).pdf: **This is Gene's version of Carl's 8/29/21 offering.** He mentions in his 9/10/21 transmittal email that he made no substantive changes to Carl's suggested revisions to the existing OBF text; he just gave the provision a new (CUTC inspired) title and broke it up into three titled subparagraphs to improve readability. (Again, I have re-worked it a little to put their proposed revisions into our standard font and green typeface and have made a couple of very minor corrections which I believe are consistent with Gene's intent.)

New Stuff ...

**SELECTING A TRUST SITUS**: Is this a subject that this subcommittee should address. A quick scan of the new *Colorado Lawyer* article, "Selecting a Trust Situs." (attached) has CUTC implications. I have highlighted CUTC references in the copy of the article for your consideration. Should we be considering recommending inclusion of a situs selection provision (or notice of such) in our rev tsts and wills? See, Selecting a Trust Situs.pdf, attached.

Other Stuff ...

**FOLLOWING CUTC'S LEAD: MODERN DRAFTING STYLE; RETIRING SUPERFLUOUS ADJECTIVES**: During our 12/2/20 mtg, I suggested that OBF having been conceived decades before CUTC, the OBFC had to decide on generally using the term "serving" or "acting" when referring to the status of a fiduciary. I reported that I had made a quick review of CUTC and found that there is a consistent preference for "act" over "serve" (which only occurs once referring to a conservator). So, I suggested that we change "serve" and "serving" to "act" and "acting" in OBF to bring us consistent with Uniform Acts drafting style.

But more importantly, I discovered that CUTC does not use "current", "then-acting," "so serving," "acting as" and other such references when talking about those who are **IN OFFICE** as trustee. As you read through CUTC, you clearly see that giving notice to "**the trustee**" or to "**any cotrustee**" IS giving notice to the "then-acting," "current," trustee and/or cotrustee. In other words, the CUTC approach is that **if they are *in office*, they *are* the trustee and/or a cotrustee** and adding archaic adjectives emphasizing that status is simply unnecessary.

The only exception I can think that might still justify retaining a status adjective might be the personal representative, so that a provision directing notice be given to "my personal representative" not be interpreted to require re-opening an estate to secure the appointment of a PR just for the purpose of complying with a notice provision in a document.

While the foregoing suggestion appeared to be favorably received by the few of our number present during our 2/3/21 mtg, I have included it here again to see if our consensus changes with more members participating, before I go to the effort of actually making those changes in these two documents wherever they might occur.

Respectfully submitted,

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settle, or contest claims. They may employ attorneys, accountants, investment advisors, custodians of trust property, and other agents or assistants as deemed advisable to act with or without discretionary powers and compensate them and pay their expenses from income or principal or both.

7.2 FIDUCIARIES' POWERS ACT: In addition to all of the above powers, my * * *

7.3 DISTRIBUTION ALTERNATIVES: My fiduciaries may make any payments * * *

**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 to (A) my personal representative, if acting, (B) the qualified beneficiaries, if my personal representative is no longer acting, and (C) 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 to (A) my personal representative, if acting, (B) a qualified beneficiary, if my personal representative is no longer acting, and (C) 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 Note on Use 11A and 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 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. Unless otherwise provided in the designating instrument, any additional trustee so designated may resign at any time~~ by giving written notice to my trustee in accordance with the provisions of **paragraph 8.6 (Resignation)** of this article~~.

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.

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 shall become my successor trustee under my will with like powers, duties, and obligations.

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

8.5 RESIGNATION: Any trustee may resign:

a) By giving at least thirty days' written notice to (i) my personal representative, if acting, (ii) the qualified beneficiaries, and (iii) all other acting trustees, effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee; 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 qualified beneficiaries 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 qualified beneficiaries may designate 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 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 be administered in a timely and efficient manner consistent with its terms, free of active judicial intervention and without order, approval, or other action by any court. It shall be subject only to the jurisdiction of a court being invoked by the trustees or other interested parties or as otherwise provided by law.

***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, assign, * * *

9.5 UNDISTRIBUTED INCOME AT DEATH OF BENEFICIARY: Except as * * *

* * *

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,

~~9.10 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 Note on Use 11A and 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) When acting upon decisions made by cofiduciaries, [the signature of any one cofiduciary is sufficient to bind my estate or any trust under this instrument] [the signature of any one personal corepresentative is sufficient to bind all personal corepresentatives, and the signature of any one trustee is sufficient to bind all trustees].

c) If a vacancy occurs, the remaining cofiduciaries may act for my estate or for any trust under this instrument.

d) 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.

e) 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.

f) 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 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. Such delegation and revocation shall be in writing executed by the delegating fiduciary and delivered to such other cofiduciary. While such 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. Anyone dealing with my fiduciaries may rely upon the written statement of the delegating fiduciary relative to the fact and extent of such delegation.

9.12 CUSTODY: Whenever a corporate fiduciary is serving, such corporate fiduciary * * *

9.13 RELEASE OF POWERS: Any fiduciary may release in whole or in part, * * *

~~9.14 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.~~

9.14 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

a) My trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

b) Within sixty days after accepting the trusteeship, my trustee shall notify the qualified beneficiaries of:

  i) My identity as settlor of the trust;

  ii) The existence of the trust;

  iii) My trustee's acceptance of the trust;

  iv) My trustee's name, address, and telephone number;

  v) Their right to request portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest; and

  vi) Their right to request reports as provided in **paragraph 9.15 (Trustee's Duties to Report and to Respond)** of this article.

c) My trustee shall notify the qualified beneficiaries in advance of any change in the method or rate of my trustee's compensation.

9.15 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 permissive distributees of the trust's income or principal, and to other qualified beneficiaries who request it, a report containing:

i) A list of the assets comprising the property of the trust, and if feasible, their respective market values;

ii) The liabilities of the trust, if any;

iii) The trust's receipts and disbursements during the period covered by the report; and

iv) The amount and source of my trustee's compensation.

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 9.15(a)** of this article to the qualified beneficiaries. Should my former trustee be deceased or incapacitated, my former trustee's legal representative may send the report.

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; 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.

9.16 ANCILLARY FIDUCIARY: In the event ancillary administration shall be * * *

* * *

**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 * * *

*[Extract] 0361-Mar Ded Will (2021-10-04).doc*

**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.

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

11.4 CONSTRUCTION: Unless the context requires otherwise, words denoting the singular may be construed as denoting the plural. Words of the plural may be construed as denoting the singular. Words of one gender may be construed as denoting another gender, if appropriate.

11.5 EDUCATION: Under this instrument, distributions for education may, in the * * *

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

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

11.8 I.R.C.: I.R.C. shall refer to the Internal Revenue Code of the United States. Any reference to specific sections of the I.R.C. shall include sections of like or similar import which replace the specific sections as a result of changes to the I.R.C. made after the date of this instrument.

11.9 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.

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

11.10 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 the trust's income or principal;

   ii) would be a distributee or permissible distributee of the trust's income or principal if the interests of the distributees and permissible distributes of the trust's income or principal terminated on that date without causing the trust to terminate; or

   iii) would be a distributee or permissible distributee of the trust's 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.

11.11 SURVIVORSHIP: For purposes of this will, if my spouse in fact survives me by any period of time or if the order of our deaths is not known, then my spouse shall be deemed to have survived me. Any other beneficiary shall be deemed to have predeceased me if such beneficiary dies within 30 days after the date of my death.

11.12 TRUSTEE: As used in this instrument, "trustee" includes an original, additional, and successor trustee, and a cotrustee.

11.13 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.

**NOTES ON USE**

1) The marital deduction formula in paragraph 3.2(b) provides for the minimum marital deduction, fully utilizing the applicable exclusion amount under I.R.C. § 2010 before creating the marital share. It is a pecuniary formula (not a fractional share formula) and has the effect of fixing the value of the marital share at date of death values and allowing post death fluctuation of values to increase or decrease the residuary credit shelter share. Since the Marital Trust is established only if there is value in excess of the applicable exclusion amount under I.R.C. § 2010(c), use of this formula in relatively small estates could result in all or a significant portion of the trust estate being transferred to the Family Trust. In relatively small estates, therefore, the drafter might wish to consider using the Disclaimer Will (Form 461).

* * *

10) Treas. Reg. § 25.2518-2(e)(2) provides that a disclaimer by a surviving spouse with respect to property in which he/she retains the right to direct beneficial enjoyment (*i.e.*, by exercise of a nongeneral power of appointment) will not qualify as a qualified disclaimer unless the power is limited by an ascertainable standard. Since the nongeneral power of appointment provisions in paragraph 5.2 are not limited by ascertainable standards, paragraph 5.3 creates a subaccount to receive property disclaimed from the Marital Trust to which the power of appointment provisions of paragraph 5.2 do not apply.

11) The client's preference regarding contingent beneficiaries should be determined. You may wish to encourage clients to consider gifts to charity. *See* Note on Use 21, General and Administrative Provisions (Appendix A).

11A) Generally, any time there is more than one trustee, each trustee has fiduciary duties to use reasonable care to prevent a another cotrustee from committing a breach of trust and to seek redress if a cotrustee 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 cotrustee 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 a cotrustee or additional trustee is relieved from these duties only as provided by the terms of the will or of the delegating instrument, the drafter should consider whether to include express language to that effect in the will or in the delegating instrument.

12) The trust provided for under this paragraph is a pure discretionary trust. The trustee's discretion to make distributions is complete and absolute, and not limited by the ascertainable standards of health, education, support, or maintenance. Requiring the trustee to fulfill the beneficiary's health and support needs would jeopardize the beneficiary's qualification for public assistance. *See* Note on Use 8.

13.2 FIDUCIARIES' POWERS ACT: In addition to all of the above powers, trustee may exercise those powers set forth in the Colorado Fiduciaries' Powers Act, as amended after the date of this agreement. Settlor incorporates such Act as it exists today by reference and makes it a part of this agreement.

**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 by:

i) Delivering written consent to (A) settlor, if living, (B) settlor's legal representative and the qualified beneficiaries, if settlor is deceased or incapacitated, and (C) 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 to (A) settlor, if living, (B) settlor's legal representative and a qualified beneficiary, if settlor is deceased or incapacitated, and (C) any acting trustee; and

ii) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

*[Extract] 0350-Rev Mar Ded Tst (2021-10-04).doc*

***See Note on Use 14A and 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 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. Unless otherwise provided in the designating instrument, any additional trustee so designated may resign at any time ~~by giving written notice to trustee in accordance with the provisions of **paragraph 14.7 (Resignation)** of this article~~.

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.

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 shall become the successor trustee under this agreement with like powers, duties, and obligations.

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

14.6 RESIGNATION: Any trustee may resign:

a) By giving at least thirty days' written notice to (i) settlor, if living, or settlor's legal representative (if any) if settlor is deceased or incapacitated, (ii) the qualified beneficiaries, and (iii) all other acting trustees, effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee; 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 qualified beneficiaries 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 qualified beneficiaries may designate 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 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 consistent with its provisions, free of judicial intervention, and without order, approval, or action of any court. It shall be subject only to the jurisdiction of a court being invoked by trustee or by other interested parties or as otherwise provided by law.

***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 * * *

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.

~~15.8 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 Note on Use 14A and 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) When acting upon decisions made by trustees, the signature of any one trustee is sufficient to bind [the trust] [all trustees].

c) If a vacancy occurs, the remaining cotrustees may act for the trust.

d) 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.

e) 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.

f) 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 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. Such delegation and revocation shall be in writing executed by the delegating trustee and delivered to such other trustee. While such 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. Anyone dealing with trustee may rely upon the written statement of the delegating trustee relative to the fact and extent of such delegation.

15.10 CUSTODY: Whenever a corporate trustee is serving, such corporate trustee shall * * *

15.11 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 * * *

~~15.12 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.~~

15.12 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 reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

b) Within sixty 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;

  ii) The existence of the trust;

  iii) Trustee's acceptance of the trust;

  iv) Trustee's name, address, and telephone number;

  v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest; and

  vi) Their right to request reports as provided in **paragraph 15.13 (Trustee's Duties to Report and to Respond)** of this article.

c) Trustee shall notify the qualified beneficiaries in advance of any change in the method or rate of trustee's compensation

15.13 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 or permissive distributees of the trust's income or principal, and to other qualified beneficiaries who request it, a report containing:

   i) A list of the assets comprising the property of the trust, and if feasible, their respective market values;

   ii) The liabilities of the trust, if any;

   iii) The trust's receipts and disbursements during the period covered by the report; and

   iv) The amount and source of trustee's compensation.

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 15.13(a)** of this article to the qualified beneficiaries. Should the former trustee be deceased or incapacitated, the former trustee's legal representative may send the report.

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; and

   ii) Furnish promptly a copy of the portions of the trust instrument that describe or affect the requesting beneficiary's interest.

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

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

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

15.17 DIGITAL ASSETS: To the extent permitted by applicable law, trustee may (i) access, use, and control digital devices, including desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or * * *

**ARTICLE 16 - GENERAL PROVISIONS**

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

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.

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

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

16.5 EDUCATION: Under this agreement, distributions for education may, in trustee's * * *

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

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

16.8 INCAPACITY: For the purposes of this agreement, an individual may be treated as * * *

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

16.10 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.

16.11 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.

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

16.12 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 the trust’s income or principal;

  ii) would be a distributee or permissible distributee of the trust’s income or principal if the interests of the distributees and permissible distributes of the trust’s income or principal terminated on that date without causing the trust to terminate; or

  iii) would be a distributee or permissible distributee of the trust’s 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.

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

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

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

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

**NOTES ON USE**

1) Generally, throughout this form the trustee's discretion to make distributions is limited by the ascertainable standards of health, education, support, or maintenance. *See* I.R.C. § 2041 and Treas. Reg. § 20.2041-1(c)(2). These standards should not be changed without a thorough understanding of the resulting tax consequences. *See* Notes on Use 17 and 22 of General and Administrative Provisions (Appendix A), and Chapter 18, "Powers of Appointment," in *Orange Book Handbook: Colorado Estate Planning Handbook*, Seventh Ed. (David K. Johns et al. eds., CLE in Colo., Inc. 2017).

2) There is some debate among practitioners as to whether there is a duty for a trustee to inquire into the financial circumstances of a beneficiary before making a distribution * * *

13) This provision gives the trust beneficiary a nongeneral testamentary power of appointment which can be exercised in favor of any individual or entity *other than* the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate. "Nongeneral power of appointment" is defined in the Colorado Uniform Powers of Appointment Act as any power of appointment that is not a general power of appointment. C.R.S. § 15-2.5-102(10). "General power of appointment" is defined as "a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate." C.R.S. § 15-2.5-102(6). "Person" is defined in the Colorado Probate Code as "an individual or an organization." C.R.S. § 15-10-201(38). An example of a more restrictive nongeneral power of appointment is found in Form 350, paragraph 10.1(d) where the class of eligible beneficiaries is limited to settlor's descendants. See also Form 1560 regarding the generation-skipping transfer tax consequences of distributions to persons one or more generations younger than the settlor or testator. The language regarding default beneficiaries is intended to provide for distribution to the family line most closely related to the deceased beneficiary. Other specific default beneficiaries could be named instead, or reference could be made to Article 12 of this form, titled "Remote Contingent Disposition."

14) The client's preference regarding contingent beneficiaries should be determined. You may wish to encourage clients to consider gifts to charity. *See* Note on Use 21, General and Administrative Provisions (Appendix A).

14A) Generally, any time there is more than one trustee, each trustee has fiduciary duties to use reasonable care to prevent a another cotrustee from committing a breach of trust and to seek redress if a cotrustee 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 cotrustee 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 a cotrustee or 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 trust agreement or in the delegating instrument.

# Darla's 14.3 and 8.2 Note on Use (2021-01-05)

Darla Daniel:

**DESIGNATION OF ADDITIONAL TRUSTEE 14.3 & 8.2** ***NOTE ON USE***

To be introduced on 1/6/2021.

This paragraph authorizes the trustee to designate an additional trustee to act with respect to :

a). Any property of the trust over which the trustee is unable or unwilling to act (such as real property located in another state or jurisdiction), or

b) Any provision of the will or trust which the trustee is unable or unwilling to carry out (such as a trustee who is concerned about a possible conflict of interest between the trustee's fiduciary and personal interests).

The drafter should consider clearly specifying the additional trustee's duties and powers in the designating instrument. The designating instrument could specify a method for the additional trustee to accept or resign as additional trustee. If the designating instrument specifies that the additional trustee's duties to inform and report are only to the designating trustee, then the instrument should also specify that the designating trustee remains responsible for all the trustee's regular duties of informing and reporting to the beneficiaries, including as to the activities of the additional trustee.

**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").

1) ADOPTED CHILDREN: Consider appropriateness of this provision concerning children adopted by descendants, or consider appropriateness of a substitute provision concerning children relinquished by a family member for adoption by strangers. The client's intent should be ascertained in those areas because of the legal and social changes in adoption procedures. *See* C.R.S. § 15-11-114(2).

2) ~~APPOINTMENT~~ DESIGNATION OF ~~COTRUSTEE OR SUBSTITUTE~~ ADDITIONAL 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.

Generally, each trustee has fiduciary duties to use reasonable care to prevent a another cotrustee from committing a breach of trust and to seek redress if a cotrustee 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 cotrustee 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 a cotrustee is relieved from these duties only as provided by the terms of the trust, the drafter should consider whether to include express language to that effect in this paragraph.

> DEFINITION OF RESIDUARY ESTATE: All the remainder of my estate, including property referred to above that is not effectively disposed of, and any lapsed gifts or devises, shall be referred to in this will as my "residuary estate." I do not exercise any power of appointment under the provisions of this article.

The phrase "and any lapsed gifts or devises" is suggested in the official comments to UPC II as one method of ensuring that lapsed gifts will fall into the residue.

6) DELEGATION and MAJORITY CONTROL: The practitioner should note that common law requires a unanimous vote of cotrustees. 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.

7) DISTRIBUTION ALTERNATIVES and REPRESENTATIVE OF BENEFICIARY. In cases of dissolution of marriage, your client may wish to have "Distribution Alternatives" and "Representative of Beneficiary" modified to specifically exclude a former spouse.

8) DISTRIBUTION TO INCAPACITATED PERSONS OR PERSONS UNDER TWENTY-ONE: This provision permits a fiduciary to retain in trust the share of a beneficiary which would otherwise be distributable to the beneficiary but for the beneficiary's perceived inability to manage such distribution effectively due to lack of capacity brought about by the beneficiary's incapacity or minority. While such a trust is in effect, the trustee's discretion is <u>not</u> governed by the ascertainable standards of health, education, support, or maintenance, but rather all such distributions, if any, are within the trustee's absolute discretion. This absence of ascertainable standards was chosen so as not to jeopardize a beneficiary's ability to qualify for public assistance and other benefits. In any event, even the presence of ascertainable standards specifying and limiting the purposes of distributions to the beneficiary would not shield a trustee who owed the beneficiary a legal obligation of support from exposure to the possible adverse tax consequences of being an interested trustee. *See* Note on Use 17.

9) DISTRIBUTIONS FREE FROM TRUST: This paragraph eliminates the perceived necessity of funding a trust just to distribute it when the event triggering such distribution (for example, the beneficiary reaching an attained age) may have already occurred.

10) EDUCATION: This paragraph defines the term "education." The committee considers inclusion of a provision defining education to be optional with the drafter, while generally desirable. At least one professional fiduciary has commented favorably on the additional clarity such a definition brings to administration of trusts. The focus of the form is a settlor who might prefer more latitude in the exercise of discretion by the trustee — a settlor who would expect the trustee to look favorably upon requests by beneficiaries for reimbursement

**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").

1) ADOPTED CHILDREN: Consider appropriateness of this provision concerning children adopted by descendants, or consider appropriateness of a substitute provision concerning children relinquished by a family member for adoption by strangers. The client's intent should be ascertained in those areas because of the legal and social changes in adoption procedures. *See* C.R.S. § 15-11-114(2).

2) ~~APPOINTMENT~~ DESIGNATION OF ~~COTRUSTEE OR SUBSTITUTE~~ ADDITIONAL TRUSTEE: The practitioner should consider ~~the inclusion of~~ the ~~substitute~~ additional 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~~ an additional 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~~ an additional trustee to hold the tainted assets or the appointment of ~~a substitute~~ an additional 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~~ an additional trustee would allow the utilization of corporate trustee pooled funds without the necessity of a court appointment as cotrustee.

*Majority Control [Rev Tst 15.8] NoU_MAV (2021-09-30)*

An Attorney often finds that a Grantor wishes to name two persons to assume that role of Co-Trustee. In those circumstances the drafter may wish to consider including the following, in order to avoid an impasse.

“Except where otherwise expressly provided, in all matters pertaining to the administration under this instrument by a fiduciary, when two persons are serving, as Co-Trustees the concurrence and joinder of both Trustees shall be required. If the two Trustees are unable to agree or make a decision on any matter pertaining to the administration of Trust, the matter shall be referred to binding arbitration under the rules and regulations of the American Arbitration Association.

14.1 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~~ former trustee or of the personal representative of settlor's probate estate unless a breach of trust is known to have been committed by a former trustee as provided by C.R.S.§ 15-5-812. No trustee shall be liable to settlor or to any beneficiary for the consequences of any action taken by ~~such~~ a former trustee which would, but for the prior removal of ~~such~~ the former trustee or revocation of the trust ~~created hereunder~~, have been a proper exercise by ~~such~~ the trustee of the authority granted to trustee under this agreement, until actual receipt by ~~such~~ the 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~~ the current trustee from liability which may have arisen from the acts or omissions ~~to act~~ of ~~such~~ the former trustee, and indemnifying ~~such~~ the current trustee from liability, pursuant to C.R.S. §§ 15-5-1008 and 15-5-1009 ~~therefor~~. ~~Such~~ The instruments~~, if acquired from all then-living beneficiaries, or from their guardians or conservators~~[1]~~,~~ shall be conclusive and binding upon all parties who execute the instrument~~, born or unborn~~, or who may have~~,~~ or ~~may in the future~~ acquire~~,~~ an interest in the trust and are bound pursuant to C.R.S. §§ 15-5-301, et seq.

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[1] According to the official comments to Section 1009 of the UTC, a consent is binding on a consenting beneficiary although other beneficiaries have not consented. See Restatement. (Second) of Trusts § 216 cmt. g (1959).

14.4 LIABILITY OF TRUSTEES; BENEFICIARY RIGHTS

a) Exoneration of Trustee; Duty to Examine Records of a Former 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~~ former trustee or of the personal representative of settlor's probate estate unless a breach of trust is known to have been committed by a former trustee as provided by C.R.S.§ 15-5-812.

b) Exoneration of Trustee for Actions by a Former Trustee: No trustee shall be liable to settlor or to any beneficiary for the consequences of any action taken by ~~such~~ a former trustee which would, but for the prior removal of ~~such~~ the former trustee or revocation of the trust ~~created hereunder~~, have been a proper exercise by ~~such~~ the trustee of the authority granted to trustee under this agreement, until actual receipt by ~~such~~ the trustee of notice of such removal or revocation.

c) Beneficiary's Consent, Release, or Ratification: Any trustee may acquire from the beneficiaries, or from their guardians or conservators, instruments in writing releasing ~~such~~ the current trustee from liability which may have arisen from the acts or omissions ~~to act~~ of ~~such~~ the former trustee, and indemnifying ~~such~~ the current trustee from liability, pursuant to C.R.S. §§ 15-5-1008 and 15-5-1009 ~~therefor~~. ~~Such~~ The instruments~~, if acquired from all then-living beneficiaries, or from their guardians or conservators~~[1]~~,~~ shall be conclusive and binding upon all parties who execute the instrument~~, born or unborn~~, or who may have~~,~~ or ~~may in the future~~ acquire~~,~~ an interest in the trust and are bound pursuant to C.R.S. §§ 15-5-301, et seq.

[1] According to the official comments to Section 1009 of the UTC, a consent is binding on a consenting beneficiary although other beneficiaries have not consented. See Restatement. (Second) of Trusts § 216 cmt. g (1959).

# Selecting a Trust Situs

## What Should a Trustee Consider?

BY REBECCA KLOCK SCHROER AND MARGOT EDWARDS

*Choosing a trust situs involves several considerations, both at the inception of a trust and during its ongoing administration. This article reviews situs considerations, including a trustee's duty to consider a transfer of situs and options for completing a transfer.*

With Nevada and Wyoming in close proximity to Colorado, the question often arises whether trustees should move a trust's principal place of administration (or situs) to one of these states for more favorable asset protection or income tax treatment. In recent years, Colorado has provided clarity and flexibility in trust administration through various legislation, including the Colorado Uniform Directed Trust Act (2014), the Colorado Uniform Trust Decanting Act (2016), and most recently the Colorado Uniform Trust Code (CUTC) (2019 and 2021).[1] These laws provide statutory guidance for trustees and facilitate trust administration, making Colorado a more attractive trust situs than many other states.

A number of factors should be considered when choosing a trust situs, both when forming a trust and during its ongoing administration. This article discusses relevant considerations when evaluating trust situs, including circumstances in which trustees may have a duty to maintain a situs in a certain state or transfer situs to another state.

### Initial Situs Selection

The settlor's location is often chosen as the initial situs, especially for testamentary trusts created in wills and revocable trusts that become irrevocable upon the settlor's death. But other relevant factors may include preferential state law; state income tax; and locations of the trustee, trust assets, and beneficiaries.[2]

A settlor's existing relationship with a trustee may significantly impact the settlor's situs choice. In addition, the settlor and/or the trustee may have professional advisors, including attorneys and accountants, who will serve in connection with the trust administration. Having a trusted advisory team in place can greatly increase the settlor's comfort with implementing the trust plan and promote efficiency in the trust administration. Trusted advisors should ensure that the settlor considers all relevant situs options and makes a decision based on the key factors that the settlor considers important.

### Trustee's Ongoing Duty to Consider Situs

Under the CUTC, "[a] trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."[3] Trustees should take the following steps to meet this mandate.

First, a trustee must consider the trust's purposes, which requires analyzing the settlor's intent.[4] For example, the settlor may have created a special needs trust to provide assistance to a beneficiary without affecting the beneficiary's eligibility for government benefits. In this circumstance, it may be best to have the trust administered in the same state where the beneficiary resides with a trustee who understands that state's government assistance programs. Or the settlor may have created a directed trustee arrangement to separate the trustee's investment and administrative functions.[5] In this case, the trustee would need to consider whether this arrangement could be maintained if the trust's situs were transferred to a new state. In addition, a trust may have been created under a specific state's statutory scheme, such as one allowing a domestic asset protection trust (DAPT), which requires the trust to remain in that jurisdiction.[6]

Second, the trustee should consider whether the situs is appropriate for the trust's administration.[7] This inquiry may involve practical and logistical issues. For example, if the sole beneficiary of the trust lives in Colorado, it might not make sense to administer the trust in California. Likewise, if the trust's sole asset is a ranch in Colorado, it might not be efficient to administer the trust in Delaware. While it is possible to administer a trust under such circumstances, the efficiency of administration may suffer.

Third, the trustee should consider the beneficiaries' interests.[8] This refers to the beneficial interests provided in the trust's terms.[9] For example, a trustee might consider moving the trust to a state that does not impose an income tax to save that expense, as discussed below. In addition, it could be beneficial to move the trust to a state with strong asset protection laws to protect beneficiaries from divorce and creditors.

Unless substantial changes occur after the trust's creation, the trustee likely has no affirmative duty to transfer the trust situs to a different state. "Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration."[10] However, as discussed above, if circumstances have changed or there is a compelling reason to transfer situs, the trustee should likely consider a transfer. "A trustee may have a duty to move the situs of the trust if to do so would substantially further the interest of the beneficiaries, would not be in contravention of the terms of the trust, and would be both possible and practical."[11]

> "When considering a situs transfer, one issue that varies by state is the trustee's duty to provide information to the beneficiaries. In Colorado, this duty is codified in the CUTC and only certain portions of the duty can be changed by the trust's terms."

When evaluating whether a trust situs should be transferred to another state, it is important to understand the laws of both states.[12] For example, if "[t]he state in which the trust was established . . . might attempt to continue to tax the income of the trust even after all the trustees and all the beneficiaries had moved elsewhere,"[13] there is no point in moving the trust for state income tax purposes.

After a trust is formed, situs is typically where the trustee is located.[14] Accordingly, a situs transfer may require the trustee's resignation. If the trust beneficiaries wish to change the situs and there is a compelling reason to do so, they may be able to remove the trustee if the trustee refuses to resign. A trustee's change to the place of administration or the relocation of beneficiaries or other developments "may result in costs or geographic inconvenience serious enough to justify removal of a trustee."[15] Similarly, if a trustee relocates and situs should stay in the original state, that trustee may have a duty to resign to allow a new trustee to continue to administer the trust.

### Duty to Inform and Report

When considering a situs transfer, one issue that varies by state is the trustee's duty to provide information to the beneficiaries. In Colorado, this duty is codified in the CUTC, and only certain portions of the duty can be changed by the trust's terms.[16] The mandatory duties in Colorado include the duty to provide notice of the existence of an irrevocable trust, the trustee's identity, and the right to request trustee's reports to current or permissible distributees of such trust at any age, or to other qualified beneficiaries of such trust who have attained age 25.[17] In addition, the trustee must respond to a qualified beneficiary's request for reports and other information reasonably related to the trust.[18] A trustee's report includes a list of the trust's assets, liabilities, receipts, and disbursements; trustee compensation; and a list of market values, if feasible.[19]

Other states may require more or less disclosure and may have a different definition of the type of beneficiary that is entitled to such information. Accordingly, a trustee should consider whether transfer to a new situs that requires additional disclosure may be contrary to the settlor's intent.

### State Income Tax

Trustees should consider state income tax and related factors when analyzing trust situs. It may be possible to create substantial tax savings by modifying the location where the trustee administers the trust.

Grantor trusts are taxed in the state where the grantor resides, so the situs of administration is not an income tax factor for such trusts. But

state income tax can be a significant factor when evaluating the trust situs of a non-grantor trust. States differ in their approaches to determining whether a particular trust is subject to tax and in their tax rates. Some states tax trusts based on a broad swath of connections to the state, including, among other factors, the situs of administration, the residences of beneficiaries and trustees, the location of trust assets, and the settlor's domicile.[20] Other states, such as Wyoming and Nevada, do not impose any state income tax on trust income and are therefore appealing locations for administering trusts.

Colorado's state income tax is a relatively moderate 4.55% as of January 1, 2021.[21] Colorado imposes state income tax on trusts based on whether a trust is a "resident trust," which is a trust that is administered in Colorado.[22] Even a nonresident trust (one that is not administered in Colorado) may be subject to Colorado state income tax on Colorado source income, which includes income derived from a business conducted in Colorado, income from property ownership in Colorado, and other similar categories of income.[23] Thus, when evaluating the impacts of state income tax on a trust, it is important to consider source income as part of the analysis. If a trust has substantial Colorado source income, administering that trust outside of Colorado may not create significant tax savings, but other factors impacting the trustee's decision regarding where to administer the trust may significantly outweigh the impact of state income tax.

Determining whether a trust is administered in Colorado and therefore subject to Colorado state income tax is not as simple as it may initially sound. To determine jurisdiction over a trust, the trust terms designating the trust's principal place of administration may be valid and controlling if (1) the trustee's usual place of business or residence is within that jurisdiction, or (2) all or part of the administration takes place within the jurisdiction.[24] Further, the trustee of a trust with its principal place of administration in Colorado may register the trust with the appropriate court in Colorado.[25] While these factors are relevant to determining jurisdiction, none will likely be dispositive with respect to whether a trust is a resident trust. Whether Colorado state income tax applies is based on the facts and circumstances surrounding the particular trust's administration, and there is a lack of clear guidance on this issue; no published regulations, rulings, or court cases outline how to make this determination. But in analyzing whether Colorado state income tax applies, it is reasonable to focus on where the actual trust administration takes place, including the amount and significance of the administrative activities occurring both inside and outside of Colorado.[26]

A key factor in this regard is where the trustee makes its most important decisions regarding the trust,[27] because a trustee may have multiple places of business inside and outside Colorado. In particular, where the trustee makes significant investment decisions such as developing its overall investment strategy for the trust; deciding to buy, sell, or exchange assets; and hiring investment managers makes a difference in determining whether the trust is administered in Colorado. Another substantial factor in this analysis is where the trustee makes decisions regarding distributions to the trust beneficiaries. Other important factors include where the trustee maintains the trust records and executes important documents related to the trust and the location of regular meetings of the trustee or trustees. Finally, it is important to consider where the trustee can be reached and where its communications with beneficiaries originate.

State income tax has become an even more significant factor in selecting trust situs since the passage of the 2017 Tax Cuts and Jobs Act (2017 Tax Act). Specifically, the 2017 Tax Act limited the deduction previously available under Internal Revenue Code § 164 for state income tax to $10,000 per year for taxpayers, including non-grantor trusts, through 2025. The Biden administration has indicated that it will seek to reverse some of the changes that were included

in the 2017 Tax Act. The limit on the deduction for state income taxes has not been popular, but a complete restoration of this deduction may not be a priority for lawmakers. As a result, at least for wealthier taxpayers, state income tax will likely continue to be an area of concern.

### Asset Protection

Another factor when considering trust situs is a state's asset protection laws. Colorado recently enacted Part 5 of the Uniform Trust Code,[28] which addresses the validity of spendthrift clauses and a creditor's ability to reach a trust to collect against a beneficiary and a settlor.[29]

There are two main types of irrevocable trusts to consider when thinking about asset protection, self-settled DAPTs and irrevocable trusts created by a third party. There are currently 19 states that allow some form of DAPT.[30] In Colorado, CRS § 38-10-111 was previously interpreted to support the formation of DAPTs, but the Colorado Supreme Court confirmed that was not the case in 1999.[31] Colorado's enactment of Part 5 of the Uniform Trust Code further confirms that Colorado does not support the formation of a self-settled DAPT.[32]

Regarding irrevocable trusts created by a third party, Colorado case law provides some creditor protection to a beneficiary of a purely discretionary trust.[33] The new CUTC provides clearer direction on this issue. Subject to narrow exceptions, including for child support, a beneficiary's interest in a third-party irrevocable trust is well protected if distributions are subject to the trustee's discretion.[34] This protection exists even if the trust includes a standard of distribution (e.g., health, education, maintenance and support) and the beneficiary is his or her own trustee.[35] However, if a beneficiary is entitled to a mandatory distribution under the trust, the trustee cannot simply choose to withhold it to try to avoid the beneficiary's creditors.[36]

The CUTC thus strengthens and clarifies Colorado's asset protection laws and makes Colorado a more attractive trust situs.

### The Drafter's Role in Determining Situs

The trust drafter has a significant impact on initial situs and decisions related to the trust's future situs. The settlor and his or her advisors should discuss the pros and cons of various options related to a trust's situs and the settlor's views on changing situs in the future. For trusts that will last for generations after the settlor has passed away, flexibility to move a trust to a new jurisdiction may be a key goal. Changes in the law, the trust assets, or the beneficiaries' locations are factors that might precipitate a move.

Settlors who are considering establishing a trust should outline their goals with respect to the trust. Is it important for the trustee to have a significant ongoing relationship with the beneficiaries? If so, selecting a trust jurisdiction where the beneficiaries are located may be important. Is there a particular asset that the settlor would like to see preserved? In this case, the opportunity for a directed trustee relationship, or at least the ability to limit the trustee's obligation to diversify the trust assets, may be paramount. Are there certain features that appeal to the settlor, such as protecting the trust assets from potential future divorces? Jurisdictions vary with respect to the enforceability of these protections. Some settlors wish to keep their trust as private as possible, and the applicable law would have a substantial impact on the amount of information to which the beneficiaries are entitled. Other settlors favor significant transparency with respect to the trust beneficiaries.

These are just some examples of practical concerns and priorities that can impact the selection of a trust's situs. A trust agreement may specify the settlor's goals and outline the settlor's perspective on whether the trustee should consider a change in situs in the future to further the stated goals.

### How to Change Situs

There are several ways to transfer situs. First, the trust document itself may provide a mechanism for changing situs. Second, the CUTC provides a procedure for changing situs under which the trustee must give notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer.[37] If a qualified beneficiary objects, the trustee loses authority to transfer situs until that objection is resolved.[38] The trustee could ask the court to approve a situs transfer over a beneficiary's objection if the court concludes the transfer is in the best interests of all trust beneficiaries.[39] Third, if the trust directs that it be administered in a certain state but the trustee determines that a transfer would be in the best interests of the beneficiaries, the trustee could decant the trust or modify it to remove the restriction.[40] Decanting or modifying a trust may be beneficial even if not strictly necessary to transfer situs. For example, a Colorado trust could be decanted under Colorado law into a Wyoming trust with appropriate state law provisions.

To transfer situs, often the trustee needs to resign and allow a new trustee to be appointed to administer the trust in the new situs. This is not always best for the beneficiaries, particularly if the settlor wanted a specific trustee to administer the trust. The trustee may have a history with the family or certain expertise desired by the settlor.

There are options to allow the trustee to transfer situs yet continue to be involved in the trust administration. For example, a trustee in the new state could be appointed as either a co-trustee or an administrative trustee in a directed trustee arrangement. This may complicate the situs issue because Colorado law provides that, unless the trust states otherwise, if one co-trustee is a corporate trustee, the situs is the corporate co-trustee's usual place of business.[41] Similarly, if one co-trustee is a professional and there is no corporate co-trustee, the situs is the professional's place of business. Finally, if there are two individual trustees, the situs is as agreed upon by them.[42] A careful analysis of both states' laws would be necessary to ensure either a co-trustee or directed trustee arrangement would be adequate to transfer situs.

#### *Private Trust Companies*

Another common technique to transfer situs is the use of a private family trust company (PTC). Several states allow an unregulated PTC; those closest to Colorado are Nevada and Wyoming.[43] A PTC is an entity formed and operated in the state where a family wishes to situs their trusts. There should be at least one officer of the trust company who is a resident of the state where the entity is formed and that officer should maintain a place of business in that state. One

advantage of a PTC is that family members or trusted advisors from other states may serve as committee members and participate in decision making related to the trust. PTCs often have separate committees for making decisions related to investments, specific assets, and distributions to beneficiaries. This structure permits family members or other individuals who reside in other states to participate in key parts of the trust administration while providing an anchor for situs in a state that may be more advantageous.

The PTC also provides continuity and succession planning for the trusteeship of family trusts, allowing a smoother transition between generations.[44] Members of younger generations can serve on committees with older family members and with key professional advisors. This provides an opportunity for younger family members to learn about the trust and its assets while benefiting from the guidance of more seasoned committee members. A PTC can also be a vehicle for educating younger generations regarding the family's philosophy and values and how those values are reflected in the family's management and distribution of assets. A PTC's committees should meet regularly in the state where the trust situs is located. This regular meeting schedule can also provide an opportunity for family members to gather and maintain deep connections with one another.

Families must be careful to ensure that the PTC and its committee members truly administer the trust in the desired state. The family must maintain discipline to make decisions related to the trust during meetings held in the trust situs and ensure that communications, maintenance of trust records, and execution of trust-related documents all occur in that state.

## Conclusion

A trust situs must be chosen with care at the trust's inception. Changing situs requires similar attention to factors affecting the trust's administration. A trustee has a duty to administer a trust in a place that is appropriate to the trust's purposes, its efficient administration, and the best interests of the beneficiaries. Colorado is an attractive situs and may be appropriate, but each trust and family is unique, and no one situs is perfect in every situation. Fiduciaries and advisors should therefore be ever mindful of the requirements for both selecting and transferring situs. CL

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## NOTES

1. CRS §§ 15-16-801 et seq. and -901 et seq.; CRS §§ 15-5-101 et seq.)
2. Unif. Tr. Code § 108, cmt.
3. CRS § 15-5-108(3). While the CUTC was only recently enacted, prior law on this issue was similar. *See* CRS § 15-16-305 (repealed effective Jan. 1, 2019).
4. CRS § 15-5-108(3).
5. CRS §§ 15-16-801 et seq.
6. For example, W.S. §§ 4-10-510 through -523.
7. CRS § 15-5-108(3).
8. *Id.*
9. Unif. Tr. Code § 108, cmt.
10. *Id.*
11. Loring and Rounds, *A Trustee's Handbook* § 6.2.1.3 (Wolters Kluwer 2020 ed.).
12. It is possible for a trust situs to be in one state, the governing law to be another state, and for the trust to be subject to income tax in one or more other states. *See generally* Uniform Trust Code §§ 107 and 108. Typically, the interpretation and construction of a trust is governed by the law that governed its creation. The administration of a trust, however, is usually governed by the law in the place where the trust is administered. An analysis of governing law versus principal place of administration is beyond the scope of this article, but for purposes of this article, it is assumed that a situs transfer would include application of the new state's laws to the trust administration.
13. Loring and Rounds, *supra* note 11 at § 6.2.1.3.
14. CRS § 15-5-108; Unif. Tr. Code § 108, cmt. "A trust's principal place of administration ordinarily will be the place where the trustee is located."
15. *Restatement (Third) of Trusts* § 76, cmt.(b)(2) (Am. Law Inst. 2012).
16. CRS §§ 15-5-813 and -105.
17. CRS § 15-5-105(2)(h).
18. CRS § 15-5-105(2)(i).
19. CRS § 15-5-813(3).
20. Note, however, that the ability of states to tax trusts based solely on the residence of the trust beneficiaries was curtailed by *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr.*, 139 S.Ct. 2213 (2019).
21. Co. Exec. Order No. D 2020 302 (Dec. 31, 2020).
22. CRS § 39-22-103(10).
23. CRS § 39-22-403.
24. CRS § 15-5-108(1).
25. CRS § 15-5-205.
26. This approach is consistent with the approach taken by the Wisconsin Supreme Court in *Wis. Dep't of Taxation v. Pabst*, 112 N.W.2d 161 (1961); and *Pabst v. Wis. Dep't of Taxation*, 120 N.W.2d 77 (1963). Wisconsin's statutory language is similar to Colorado's.
27. As noted above, no published regulations or rulings outline the factors that should be considered in determining whether a trust is administered in Colorado and subject to its state income tax. As a result, the factors outlined here are based on the authors' experience with the Colorado Department of Revenue and *Pabst*, 112 N.W.2d 161, and *Pabst*, 120 N.W.2d 77.
28. CRS §§ 15-5-501 et seq. (effective Sept. 7, 2021); Unif. Tr. Code §§ 501 et seq.
29. Colorado included some Colorado-specific amendments to the uniform act. *See* CRS §§ 15-5-501 et seq. and Unif. Tr. Code §§ 501 et seq.
30. Shaftel, ed., Twelfth ACTEC Comparison of the Domestic Asset Protection Trust Statutes (Aug. 2019), www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf.
31. *In re Cohen*, 8 P.3d 429 (Colo. 1999).
32. CRS § 15-5-505.
33. *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); *In re Marriage of Rosenblum*, 602 P.2d 892 (Colo.App. 1979); *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001); *Univ. Nat'l Bank v. Rhoadarmer*, 827 P.2d 561 (Colo.App. 1991).
34. CRS §§ 15-5-502 through -504. A creditor against whom a spendthrift provision cannot be enforced is limited to the remedy of attaching the beneficiary's present or future distributions.
35. CRS § 15-5-504.
36. CRS § 15-5-506.
37. CRS § 15-5-108(5).
38. CRS § 15-5-108(6).
39. Unif. Tr. Code § 108, cmt; CRS § 15-5-201.
40. CRS § 15-5-411; CRS §§ 15-16-901 et seq.
41. CRS § 15-5-108(2).
42. *Id.* Note that this analysis of situs is for state law purposes; the analysis for income tax is different.
43. W.S. §§ 13-5-701 et seq.; N.R.S. § 669A.100.
44. Weeg, Private Trust Companies: A DIY for the Uber Wealthy, https://actecfoundation.org/wp-content/uploads/THE-PRIVATE-TRUST-COMPANY-A-DIY-FOR-THE-UBER-WEALTHY.pdf.

**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~~ DESIGNATION OF ~~COTRUSTEE OR SUBSTITUTE~~ ADDITIONAL TRUSTEE: The practitioner should consider the inclusion of the ~~substitute~~ additional 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~~ an additional 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~~ an additional trustee to hold the tainted assets or the appointment of ~~a substitute~~ an additional 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~~ an additional trustee would allow the utilization of corporate trustee pooled funds without the necessity of a court appointment as cotrustee.

* * *

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. 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.

* * *

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.

* * *

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), 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 remove and replace the trustee, but may not appoint himself or herself as the successor trustee. 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* Eyster and Stevens, "The Colorado Uniform Trust Code," 48 *Colo. Law.* 36, 41 (March 2019).

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22A) RESIGNATION: The thirty-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).