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To: [Melissa Anderson](#); [Darla Daniel](#); [Connie Eyster](#); [Corina Gerety](#); [Lisa Hardin](#); [Richard Hess](#); [Stan Kent](#); [Alison Leary](#); [Marianne Luu-Chen](#); [Julie McVey](#); [Kevin Millard](#); [Lauren.Morris@wellsfargo.com](#); [Matthew Skotak](#); [Carl Stevens](#); [Tony Vaida](#); [Kirsten Waldrip](#); [Sonny Wiegand](#); [Carolyn Wiley](#); [Gene Zuspahn](#)
Cc: [Hayley Lambourn](#); [Rikke Liska](#); [Dave Kirch](#)
Subject: Chair's 5/10/2022 Status Report: OBF CUTC Revisions Subcommittee
Date: Tuesday, May 10, 2022 12:19:00 PM
Attachments: [\[Extract\] 0350-Rev Mar Ded Tst \(2022-05-09\).pdf](#)
[\[Extract\] 0361-Mar Ded Will \(2021-05-09\).pdf](#)
[\[Extract\] Appx A Gen and Adm Prov Notes on Use \(2022-05-10\).pdf](#)

Dear Colleagues,

Our next meeting will be held (virtually) **TOMORROW AFTERNOON, Wednesday, May 11th, 2022, @ 1:00-2:30 PM** (MDT). This report covers actions of our subcommittee during our last meeting on 4/13/22 as well as in preparation for this meeting. Here's our virtual meeting access info provided by the CBA:

<https://cba-cle.zoom.us/j/89500805835?pwd=K1VybnNENXQwUnpoTlBnRzI3UExzZz09>

Meeting ID: 895 0080 5835

Passcode: 090355

Call-in: 1 253 215 8782

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

Attached please find [\[Extract\] 0350-Rev Mar Ded Tst \(2022-05-09\).pdf](#), [\[Extract\] Mar Ded Will \(2022-05-09\).pdf](#), and [\[Extract\] Appx A_Gen and Adm Prov_Notes on Use \(2022-05-10\).pdf](#) on which I comment below. **THESE ARE ALL NEW AND UPDATED; PLEASE USE A COLOR PRINTER TO PRINT THEM OUT.**

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

BLACK typeface: **Original text** as it currently exists in the Orange Book Forms (or in a contributor's proposal);
GREEN typeface: **Approved changes** made to that original text by the subcommittee; and
RED Typeface: **Proposed changes** suggested to be made to original text or our prior work.

Last Month's Priority Issue

"Qualified beneficiaries," or

"The distributees or permissible distributees of trust income or principal"

After this issue arose during the full Orange Book Forms Committee meeting this past April while reviewing a draft of the revised Form 1520, the Drop-in Directed Trustee article, It suggested that we

should re-visit what we had decided to do about this issue nearly two years ago (It was one of the earliest issues we grappled with).

Background: The concept of Qualified Beneficiaries is a “big tent” (my term) embracing “three tiers” of beneficiaries, all of whom fit under the “qualified” tent:

[First Tier] Beneficiaries who **are** the distributees or permissible distributees of trust income or principal.

[Second Tier] Beneficiaries who **would be** the distributees or permissible distributees of trust income or principal if the interests of the (first tier) distributees and permissible distributees ended (without the trust terminating).

[Third Tier] Beneficiaries who **would be** the distributees or permissible distributees of trust income or principal if the trust terminated.

And remember, early on we voted to **NOT exclude qualified beneficiaries under 21** from our notice provisions, choosing to use the most inclusive option, while in our Notes on Use reminding practitioners that they could draft to restrict that to beneficiaries over 21 if they or their client so chose.

So, during our April meeting a week later, we took the uncomfortable step of re-visiting our prior decisions in general, and in each one of the locations where the issue is presented in the Rev Tst form (0350). During the intervening weeks, I then took the new choices we had just made for the Rev Tst form and cloned them into the Will form (0361), tweaking them as I felt appropriate for inclusion in a testamentary instrument.

Please check the following provisions in BOTH the Rev Tst extract and in the Will extract to ensure that they say what we decided they should say and that I have accurately cloned the choices you made for the Rev Tst form appropriately into the Will form:

14.2	8.1	Accepting/Declining Trusteeship
14.6	8.5	Resignation
14.7	8.6	Removal
14.8	8.7	Replacement
15.13	9.15	Duties/ Inform and Notify
15.14	9.16	Duties/ Report and Respond
16.3	11.3	Trust Situs
16.13	11.11	Qualified Beneficiary

Related Stuff ...

14.2 Accepting or Declining Trusteeship & 14.6 Resignation: Having nothing directly to do with the

prior issue, Matt suggested that maybe we needed some clarification regarding notice to the settlor under these two provisions. Corina reorganized her prior work, and we now have the fruit of her labor in the red typeface revisions appearing in those two provisions as they now appear in the attached Rev Tst extract. But be sure to check the slightly different treatment in ¶¶ 8.1 Accepting and 8.2 Resignation in the attached Will extract.

15.9 & 9.11 Single Signature Facility: During our March meeting, we reviewed Corina’s recasting of Connie’s original offering on this subject, and **we approved** the edited version with a new second sentence in Single Sig [15.8 9.10]_CDG (2022-02-10).docx which was attached to my 3/8/2022 Status Report. However, when Carolyn suggested a less-wordy version of the last sentence, **we approved** her rendition of that sentence instead. In her new third sentence, Carolyn introduces a new term “professional fiduciary” which has interesting implications discussed below. The final version of this new provision now appears in both the attached Rev Tst and Will extracts.

14.4 & 8.3 Liability of Trustee; Beneficiary Rights: Back during our February meeting, Carl proffered a slightly revised version of his and Gene’s combined offering to replace the old ¶ 14.4 & 8.3 Exoneration of *Trustee*. Carl’s latest revision consisted primarily in deleting the statutory references, which he had removed to a Note on Use which he is working up for us.

But while discussing of his Note on Use, it became apparent that the new duty of a trustee with knowledge of a former trustee’s breach of trust probably required some modification to subparagraph (a) of our new provision. A suggested new rendition of subparagraph (a) appeared in Exoneration [Rev Tst 14.4]-WIP (as of 2022-0307).docx which was attached to 3/8/2022 Status Report, which **we approved** (in Rev Tst terminology) during our March meeting. But now **Please Check Out the Will form version, ¶ 8.3** in the attached Will form extract.

16.12 Personal Representative: This very old (’89-’93) definition *only exists in our trust forms*. It is different than the statutory definition of the term in the CPC, because, as used in the two places it exists in our trust documents (e.g., ¶16.9 *Incapacity*), you’ll see that it really means the broader term intended to be a person’s “legal representative,” which could conceivably include a court appointed P.R. I suggested that to avoid any confusion or potential conflict between this old generic all-inclusive definition and the statutory definition of Personal Representative we consider changing it to (Corina’s) “Legal representative” which although used in our documents is not otherwise defined. So, we considered Pers Rep-Legal Rep [16.11]_WIP (2022-03-08).pdf which was attached to my 3/8/2022 Status Report.

Since we were nearing the end of our March meeting, we took no action on this proposal and so it appears as an open matter at ¶¶ 16.9 and 16.12 in the attached Rev Tst extract.

[Extract] Appx A – Gen and Admin Prov – Notes on Use

Please check through the New and Updated attached extract of our Appx A Notes on Use. It now includes Julie’s (and Darla’s & Kevin’s) new Note on Use 2, the new “Deadlock” Note on Use 6, Other Definitions 18, and Carolyn’s Trustee’s Duties at Notes on Use 25A and 25B.

More importantly, Please check your Note on Use to see if it should be modified in view of our new decision to limit notice to “First Tier Plus” QBs and action to “First Tier” QBs.

Professional Fiduciary? Corporate Fiduciary? Others?

Different references to those other-than-an-individual serving as a fiduciary appear scattered throughout our will and trust forms: “bank or trust company,” “corporate trustee” “corporate fiduciary, “ and now “professional fiduciary.” Perhaps, we should consider simply adopting the Colorado Legislature’s definition of “Professional fiduciary” as it appears in **C.R.S. § 15-23-103(14)** of the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, and use that one term consistently in lieu of all the other variations:

“Professional fiduciary” means an individual or entity that is in the business of acting as a fiduciary.

Whatever we choose to do about this, we’ll need to apply it consistently across all relevant provisions of all will and trust forms.

Next Month (June 8th)...

The discussion of Form 1520 (Directed Trustees) at the full OBFC meeting last week resurrected the issue of whether and where it is appropriate to use “designate” or “appoint” when referring to a trustee. Our forms use these terms inconsistently. I believe there is an appropriate and consistent place for each which we can address next month (*i.e.*, that settlors, testators, and courts “appoint,” while others only “designate.”).

And if we have time after attending to the foregoing, we can turn to the project of modernizing some of our terminology which I have been alluding to under the topic of “Other Stuff ...” at the end of most of my previous status reports but which we have, of necessity, been deferring for the past year and a half. I hope we will finally be able to turn our attention to putting the finishing touches on our work as we gradually begin to bring this project to a conclusion.

Eureka!!! I am beginning to see light at the end of the tunnel...

Respectfully submitted,

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ARTICLE 14 - TRUSTEESHIP

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

See Appx A Note on Use A

14.2 ACCEPTING OR DECLINING TRUSTEESHIP:

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

See Appx A Note on Use 2

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

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

See Appx A Note on Use ????

14.4 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

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

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

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

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

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

See Appx A Note on Use 22A

14.6 RESIGNATION: A trustee may resign:

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

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

See Appx A Note on Use.22

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

14.8 REPLACEMENT OF TRUSTEE: If any trustee fails or ceases to **serve act** and no designated successor trustee serves, settlor, or if settlor is deceased or incapacitated, settlor's spouse, or if settlor and settlor's spouse are both deceased or incapacitated, a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ **qualified beneficiaries distributees and permissible distributees of trust income or principal** may designate 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 every ***

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

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

~~15.8 MAJORITY CONTROL: Except where otherwise expressly provided, in all matters pertaining to the administration of any trust under this agreement, when more than two trustees are serving, the concurrence and joinder of a majority of such trustees shall be required; but if only two trustees are serving, the joinder of both of them shall be required. If a trustee has released or is prohibited from exercising any power under any other provision of this agreement with respect to any action or property, then with respect to such action or property such trustee shall not be counted~~

~~in the application of the preceding sentence and the other trustee or trustees then serving may exercise such power. Any trustee, however, may dissent or abstain from a decision of the majority and be absolved from personal liability by registering such dissent or abstention in the records of such trust, but such trustee shall thereafter act with the other trustees in any way necessary or appropriate to effectuate the decision of the majority.~~

See Appx A Note on Use 2

15.8 MAJORITY CONTROL:

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

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

15.10 DELEGATION: Any trustee may delegate to any other trustee the exercise of any powers, discretionary or otherwise, **unless it is a function settlor reasonably expected to be performed jointly. Unless a delegation is irrevocable, the delegating trustee may also revoke it. The** delegation and revocation **must** be in writing executed by the delegating trustee and delivered to **the** other trustee. While **the** delegation is in effect, any of the delegated powers may be exercised or action may be taken by the trustee receiving the delegation with the same force and effect as if the delegating trustee had personally ~~joined in the exercise of such power or the taking of such action~~ **exercised the power or taken the action.** Anyone dealing with trustee may rely upon the written statement of the delegating trustee relative to the fact and extent of **the** delegation.

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

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

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

15.13 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

- a) After trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall keep the ~~qualified beneficiaries of the trust~~

distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who request it, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [§ 813(1)].

- 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 [§ 813(2)(c)];
 - ii) The existence of the trust [§ 813(2)(c)], [§ 105(h)];
 - iii) Trustee's acceptance of the trust [§ 813(2)(b)];
 - iv) Trustee's name, address, and telephone number [§ 813(2)(b)], [§ 105(h)];
 - v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest [§ 813(2)(c)]; and
 - vi) Their right to request reports as provided in **paragraph 15.14 (Trustee's Duties to Report and to Respond)** of this article [§ 813(2)(c)], [§ 105(h)].
- c) Trustee shall notify the ~~qualified beneficiaries~~ distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who request it, in advance of any change in the method or rate of trustee's compensation [§ 813(2)(d)].

15.14 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

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

the former trustee shall send a report as described in **paragraph 15.14(a)** of this article to the ~~qualified beneficiaries distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it.~~ Should the former trustee be deceased or incapacitated, the former trustee's legal representative may send the report [§ 813(3)(b)].

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

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

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

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

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

ARTICLE 16 - GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See Appx A Note on Use 20A

16.13 QUALIFIED BENEFICIARY: As used in this agreement, "qualified beneficiary" means a person who:

- a) has a present or future beneficial interest in the trust, vested or contingent, or holds a

power of appointment over property of the trust in a capacity other than that of trustee, and who;

- b) on the date the beneficiary's qualification is determined:
 - i) is a distributee or permissible distributee of trust income or principal;
 - ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees or permissible distributees of trust income or principal terminated on that date without causing the trust to terminate; or
 - iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

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

16.14 SURVIVORSHIP: If settlor's spouse in fact survives settlor by any period of time or if the order of deaths of settlor and settlor's spouse is not known, settlor's spouse shall be deemed to have survived settlor. Any other beneficiary shall be deemed to have predeceased settlor if such beneficiary dies within 30 days after the date of settlor's death.

~~16.15 TRUSTEE DEFINITION: As used throughout this agreement, the word "trustee" shall always refer to the original trustee as well as to any successor, replacement or additional person, corporation or other entity from time to time serving, whether in fact there shall be one or more trustees serving from time to time.~~

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

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

16.17 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.

ARTICLE 8 – TRUSTEESHIP

See Appx A Note on Use A

8.1 ACCEPTING OR DECLINING TRUSTEESHIP:

- a) Except as otherwise provided in **paragraph 8.1(c)** of this article, a person designated as trustee accepts the trusteeship by:
 - i) Delivering written consent as follows:
 - ~~A) To my personal representative, if acting,~~
 - ~~B) To the qualified beneficiaries, if my personal representative is no longer acting, and~~
 - A) To my personal representative, but if my personal representative is not acting, to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, and
 - B) To all other acting trustees; or
 - ii) Accepting delivery of trust property, exercising powers or performing duties as a trustee, or otherwise indicating acceptance of the trusteeship.
- b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A person designated as trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.
- c) A person designated as trustee, without accepting the trusteeship, may:
 - i) Act to preserve trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship as follows:
 - ~~A) To my personal representative, if acting~~
 - ~~B) To a qualified beneficiary, if my personal representative is no longer acting, and~~
 - A) To my personal representative, but if my personal representative is not acting, to a qualified beneficiary, and
 - B) To any acting trustee; and
 - ii) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

See Appx A Note on Use 2

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

~~8.3 EXONERATION OF TRUSTEE: No trustee shall be obligated to examine the accounts, records, or acts, or in any way or manner be responsible for any act or omission to act on the part of any previous trustee or of the personal representative of my estate. No trustee shall be liable to my personal representative or to any beneficiary for the consequences of any action taken by such trustee which would, but for the prior removal of such trustee, have been a proper exercise by such trustee of the authority granted to trustee under my will, until actual receipt by such trustee of notice of such removal. Any trustee may acquire from the beneficiaries, or from their guardians or conservators, instruments in writing releasing such trustee from liability which may have arisen from the acts or omissions to act of such trustee, and indemnifying such trustee from liability therefor. Such instruments, if acquired from all then living beneficiaries, or from their guardians or conservators, shall be conclusive and binding upon all parties, born or unborn, who may have, or may in the future acquire, an interest in the trust.~~

See Appx A Note on Use ????

8.3 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

- a) Exoneration of Trustee; Duties Regarding Previous Fiduciaries: My trustee is not liable for an act or omission of a former trustee or of the personal representative of my estate. Also, my trustee has no duty to examine the accounts, records, or acts of any former trustee or of the personal representative of my estate. But my trustee shall take reasonable steps to redress a breach of trust known to my trustee to have been committed by a former trustee.

- b) Exoneration of Trustee Actions: My trustee is not liable to any beneficiary for the consequences of any action taken by that trustee which would, but for the prior removal of that trustee, have been a proper exercise by that trustee of the authority granted to my trustee under my will, until actual receipt by that trustee of notice of the removal.
- c) Beneficiary's Consent, Release, or Ratification: My trustee may acquire from the beneficiaries instruments in writing releasing that trustee from liability which may have arisen from the acts or omissions of that trustee and indemnifying that trustee against liability. The instruments are conclusive and binding upon all parties who execute them, or who may have or acquire an interest in the trust.

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

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

See Appx A Note on Use 22A

8.5 RESIGNATION: A trustee may resign:

- a) By giving at least thirty days' written notice effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee, as follows:
 - i) To my personal representative, if acting,
 - ii) To the ~~qualified beneficiaries~~ distributees and permissible distributees of

trust income or principal, and to other qualified beneficiaries who request it,, and

iii) To all other acting trustees,; or

b) With the approval of the court.

See Appx A Note on Use.22

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

8.7 REPLACEMENT OF TRUSTEE: If any trustee fails or ceases to ~~serve~~ **act** and no designated successor trustee ~~serves~~, my spouse, or if my spouse is deceased or incapacitated, a majority of the ~~beneficiaries then eligible to receive income who have attained the age of 21 years and are not incapacitated~~ **qualified beneficiaries distributees and permissible distributees of trust income or principal** may designate 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 ***

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

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

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

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

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

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

See Appx A Note on Use 2

9.10 MAJORITY CONTROL:

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

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

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

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

9.14 RELEASE OF POWERS: Any fiduciary may release in whole or in part, temporarily or permanently, any power, authority, or discretion conferred by my will or trust by a writing delivered to any cofiduciary and to each beneficiary then eligible to receive income distributions from any trust or, if none, to all ascertainable beneficiaries. Such renunciation or release shall not

affect the grant of power, authority, or discretion renounced or released.

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

9.15 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

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

9.16 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

- a) At least annually and at the termination of the trust, my trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], [§ 105(i)], a report containing:
 - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];
 - ii) The liabilities of the trust, if any [§ 813(3)(a)(I)];
 - iii) The trust's receipts and disbursements during the period covered by the report [§ 813(3)(a)(I)]; and
 - iv) The amount and source of my trustee's compensation [§ 813(3)(a)(I)].
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, my former trustee shall send a report as described in **paragraph 9.16(a)** of this article to the ~~qualified-beneficiaries distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it.~~ Should my former trustee be deceased or incapacitated, my former trustee's legal representative may send the report [§ 813(3)(b)].
- c) Upon request of a qualified beneficiary, my trustee shall:
 - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances [§ 813(1)], [§ 105(i)]; and
 - ii) Furnish promptly a copy of the portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [§ 813(2)(a)].

9.17 ANCILLARY FIDUCIARY: In the event ancillary administration shall be required ***

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

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

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

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

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

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

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

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

ARTICLE 10 – TAX PROVISIONS

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

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

ARTICLE 11 – GENERAL PROVISIONS

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

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

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

of trust income or principal, and to other qualified beneficiaries who request it, my trustee may transfer the situs of a trust at any time and to any place in the discretion of my trustee.

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

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

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

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

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

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

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

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

See Appx A Note on Use 20A

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

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

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

11.12 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.

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

Notes on Use

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

* * *

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

* * *

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

* * *

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

* * *

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

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

* * *

- 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).

* * *

- 25A) TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY: Some practitioners may prefer to tailor these provisions, either for brevity's sake, or for reasons discussed with the client regarding how much information the client wanted shared with qualified beneficiaries. For convenience, both the trust version and the will version of the provision are replicated below with bracketed citations to the Colorado Uniform Trust Code in italics. Items which the statute requires to be included are indicated in **bold italics**. *See* Millard, Kevin D. "The Trustee's Duty to Inform and Report Under the Uniform Trust Code," 40 *Real Property, Probate and Trust Journal*, 373-401; *see also* Eyster, Constance Tromble and Carl G. Stevens, "The Colorado Uniform Trust Code," 28 *Colo. Law* 3, 36-49 (March 2019).

TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY (Trust version):

- a) After trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall keep the distributees and permissible distributees of trust income or principal, and other qualified beneficiaries who request it, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [*§ 813(1)*].
- 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 [*§ 813(2)(c)*];
 - ii) The existence of the trust [*§ 813(2)(c)*], [**§ 105(h)**];
 - iii) Trustee's acceptance of the trust [*§ 813(2)(b)*];
 - iv) Trustee's name, address, and telephone number [*§ 813(2)(b)*], [**§ 105(h)**];
 - v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest [*§ 813(2)(c)*]; and
 - vi) Their right to request reports as provided in paragraph ___ (Trustee's Duties to Report and to Respond) of this article [*§ 813(2)(c)*], [**§ 105(h)**].
- c) Trustee shall notify the distributees and permissible distributees of

trust income or principal, and other qualified beneficiaries who request it, in advance of any change in the method or rate of trustee's compensation [§ 813(2)(d)].

TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY (Will version):

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

- 25b) TRUSTEE'S DUTIES TO REPORT AND TO RESPOND: Some practitioners may prefer to tailor these provisions, either for brevity's sake, or for reasons discussed with the client regarding how much information the client wanted shared with qualified beneficiaries. For convenience, both the trust version and the will version of the provision are replicated below with bracketed citations to the Colorado Uniform Trust Code in italics. Items which the statute requires to be included are indicated in **bold italics**. See Millard, Kevin D. "The Trustee's Duty to Inform and Report Under the Uniform Trust Code," 40 *Real Property, Probate and Trust Journal*, 373-401; see also Eyster, Constance Tromble and Carl G. Stevens, "The Colorado Uniform Trust Code," 28 *Colo. Law* 3, 36-49 (March 2019).

TRUSTEE'S DUTIES TO REPORT AND TO RESPOND (Trust version):

- a) At least annually and at the termination of the trust, trustee shall send to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it [§ 813(3)(a)], [§ 105(i)], a report containing:
 - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values [§ 813(3)(a)(I)], [§ 813(3)(a)(II)];

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

TRUSTEE'S DUTIES TO REPORT AND TO RESPOND (Will version):

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

- ii) Furnish promptly a copy of the portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest [*§ 813(2)(a)*].