

## MEMORANDUM

**From:** Frank Hill  
**To:** OBF CUTC Revisions Subcommittee  
**Subject:** **Chair's 9-12-2023 Status Report**

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This report covers actions of our subcommittee taken during our last (virtual) meeting on 8/9/2023, as well as revisions made and contributions received in preparation for our next (virtual) meeting on **9/13/2023**.

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

For an exhaustive treatment of this subcommittee's previous spirited discussions of this issue, please see the Chair's 6-13-2023 Status Report. We will pick up here only where we left off during our last meeting on 8/9/23.

**2.6 Amendment and Revocation:** Currently, Form 350 says, at ¶ 2.6 *Amendment and Revocation*: Settlor reserves for settlor's lifetime the following powers which settlor may exercise at any time or times:

- a) ...
- b) **Upon trustee's consent**, to amend the trust, in whole or in part, by a writing; and ...

Trying to reach the "right" position on this issue, our discussions over the months ebbed and flowed from the extremes of the current position of *trustee consent being required for all amendments* to be effective which nobody seems to like, to the other extreme of effective immediately upon execution by settlor in all cases which most of us are worried could be very inappropriate in some cases where the amendment expands trustee duties, liability, or affects their compensation.

*N.B.:* For purposes of simplicity and clarity, so as to isolate the issue of trustee consent, the Chair suggests that we omit from this discussion language regarding "sole," or "exclusive" method as that is a separate issue discussed below and that that requirement could be included later.

We all seemed to want something simple and straightforward, like a rev tst amendment would be effective *when communicated to the trustee*, but, the trustee would not be bound by any part of the amendment which affected the trustee's duties, liability, or compensation without their consent, perhaps under a provision something like:

Settlor may amend this agreement, in whole or in part, by a writing delivered to trustee. Trustee is not bound by an amendment which affects trustee's duties, liability, or compensation without trustee's consent.

However, as our discussion ensued during our 8/9/23 mtg, we seemed to be swinging back to favoring the requirement of trustee consent *provided* there could be a "carve-out" for settlor's amendment of "dispositive provisions." That seemed to be our big hangup. The consensus was that the settlor should be able to amend the "distribution provisions" of the agreement without trustee's consent.

Perhaps that could be "...the provisions of Articles 5, 6, 7, 8 & 9 of this agreement..." (Distributions on Settlor's Death, Marital and Family Trusts Created, Marital Trust Provisions, Family Trust Provisions, Contingent Distributions). Or, if still too broad, we could add the line about trustee not being bound without their consent if the amendment affected their liability?

Or we could limit the provision further to only *the identity of beneficiaries, and the amount, share, commencement, frequency, or term of their entitlement to distributions of income or principal?*

But what about **CUTC § 5-603** (attached) that was pointed out to us that clearly gives the settlor *significant clout*, saying, in part that, **while a trust is revocable, the duties of the trustee are owed exclusively to the settlor.**

So, Michelle graciously volunteered to try and bail us out of our quandary by taking a crack at coming up with a new suggested provision that would at least allow amendment of the agreement's "distribution provisions" without trustee consent (or would have that effect).

### **Rev Tsts: Remove, Amend, Revoke "Sole" or "Exclusive" Method**

We were not able to get to this discussion during our 8/9/23 mtg as Mike (together with the latest version of his Note on Use) was unable to be with us. So, the comments which appear below are from the Chair's 8-8-2023 Status Report.

**2.5 & 2.6 Removal/Amendment/Revocation:** After considering, deliberating, and debating Mike's scholarly proposal on this issue over the course of several months, during our 12/14/22 meeting, as a matter of policy, **we decided not** to adopt a "sole" or "exclusive" method which the settlor would be required to employ to remove property from the trust or to revoke the trust.

However, Marianne reported that at the Heckerling conference in early January, Turney Berry made a presentation supporting the "sole" or "exclusive" revocation and removal requirement. In view of that, during our 3/8/23 meeting, we revisited this issue and **we reaffirmed our prior position not to adopt** a "sole" or "exclusive" method which the settlor would be required to employ to remove property from the trust or to amend or revoke the trust. But, **we also decided to include a Note on Use** discussing the issue and perhaps suggesting some language previously proffered by Mike, who graciously agreed to convert his prior submissions into a new Note on Use for these provisions which could be inserted into Appx A, Gen & Adm Prov. Bette graciously offered to collaborate with Mike on this project.

Then during our May mtg, we reviewed Mike's 5/7/23 submission, and with Bette's help tweaked it a bit. You can see that tweaked version, [2.5-2.6 Amend Revoke \[Remove\] NoU\\_MDH\\_BH \(2023-05-10\).docx](#), attached. (Mike is working on a slightly more comprehensive offering, since this version does not address ¶ 2.5 "Removal" of an asset from the trust which was included in his prior submissions.)

### **SNT Conforming Amendments**

The Chair hopelessly dropped the ball on this last month. During our 8/9/23 mtg, I inadvertently skipped this agenda item entirely. I will strive to not be remiss again this month. So, the comments which appear below are from the Chair's 8-8-2023 Status Report.

Our colleagues over in the Supplemental Needs Trust (SNT) Subcommittee has been laboring for many months creating an example Drop-in SNT for Form 531 • Will with Contingent Trust (Couple) that will allow the beneficiary to qualify for public assistance. In that process, they have determined that, regardless of how carefully crafted the example Drop-in SNT may be, certain old boilerplate provisions contained in Form 351 may operate to disqualify the beneficiary from qualifying for public assistance.

Apparently, the offending boilerplate provisions are:

- Distribution to Incapacitated Persons or Persons Under 21
- Consolidation of Trusts
- Early Termination

So for our June mtg, our SNT colleagues submitted a proposed draft aimed at the boilerplate provision *Distribution to Incapacitated Persons or Persons Under 21*, Draft Distrib To Incap Pers or Pers Under 21 NNS\_05.09.2023.docx, which had been attached to my Chair's 6/13/23 Status Report.

Their offering divides our existing provision into two separate but related provisions, (i) one provision ¶ 8.8 for targeted beneficiaries who *are* candidates for public assistance (public assistance beneficiaries), and (ii) a parallel provision ¶ 8.9 for targeted beneficiaries who *are not* candidates for public assistance (non-public assistance beneficiaries).

Their ¶ 8.8 provision for public assistance beneficiaries contains SNT provisions within it (including trustee's absolute discretion power). With minor tweaking, we **approved** this provision (reserving the right to tweak its non-substantive language in the future).

Their other ¶ 8.9 provision for non-public assistance beneficiaries (including trustee's HEMS discretion power), we also **approved** (reserving the right to tweak its non-substantive language in the future). However, after the meeting, several of us quickly reconsidered that HEMS power being in there and felt that it should be returned to the absolute discretion power that applied to all targeted beneficiaries in the existing boilerplate provision.

As this Chair's Status Report goes to press, I can report that I have been told that the SNT Subcommittee will be reconsidering the trustee discretionary standard of their ¶ 8.9 non-public assistance beneficiary provision with an eye toward returning it to an absolute discretion power, together with inclusion of a Note on Use offering a HEMS standard alternative.

### Single Signature Problem

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

In addition, during our 9/14/22 mtg, we **decided** to use that new term in the first sentence, which is the only sentence actually addressing "custody." See, [15.11 Custody\\_\[Extract\] \(2022-10-11\).docx](#), attached

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

After Carolyn brought this issue to the attention of Lauren Da Cunha and Margot Edwards of J. P. Morgan Trust, they were good enough to share their thoughts with us.

So, during our December meeting, we considered Lauren's and Margot's suggestion that the conflict existing between our new *Single Signature Facility* provision (Form 350 Rev Tst ¶ 15.9) and the old existing *Custody* provision (Form 350 Rev Tst ¶ 15.11) could be resolved simply by expanding the scope of the type of "accounts" professional fiduciaries would automatically be given single signature authority over (under ¶ 15.9) upon taking office as cofiduciary. Instead of receiving automatic authority over *only* the trust's depository account, under a revised ¶ 15.9, the professional fiduciary's automatic single signature authority would instead graduate to *all the trust's accounts at banks and other financial institutions*.

Despite a certain reticence among some of our members to expand this authority in the absence of a delegation agreement, most of our members seemed to recognize both the practicality and the historical custom of this slightly expanded facility being granted to professional fiduciaries.

During our December meeting, we **decided** that *substantively*, ¶ 15.9 would be revised to expand the automatic single signature authority of professional fiduciaries to include all the trust's accounts at banks and other financial institutions.

**However**, during our 5/10/23 mtg the discussion turned instead to whether a single signature provision was needed or appropriate at all. Points raised: (i) The document *already* contains a boilerplate *Delegation* provision allowing cotrustees to enter into a written agreement allocating functions and ministerial actions among themselves. And (ii) when professional fiduciaries are acting as cotrustees, they *always* have a written delegation agreement with their individual cotrustees giving the professional fiduciary exclusive access to and signature authority over the trust's accounts, anyway.

So, if that's the case, why would we need inclusion of a *boilerplate* single signature provision if a single signature arrangement can already be specifically discussed, agreed to, and arranged among the cotrustees under the existing *Delegation* provision?

Then, during our 8/9/23 meeting, once again we reviewed 15.9-9.11 Single Signature Facility\_WIP (2022-12-22).docx which had been attached to my 8/8/2023 Status Report. Now, instead of striking it as unnecessary, members seemed to favor its inclusion (perhaps as a proper balance to the removal of the second sentence from the 15.11 *Custody* provision), but with the second sentence of subparagraph (a) about the depository institution deleted. See, [15.9-9.11 Single Signature Facility\\_WIP \(2023-08-09\).docx](#), attached.

### Exoneration Loose End

**14.4 & 8.3 Liability of Trustee; Beneficiary Rights:** During our 2/9/22 meeting, Carl had submitted a suggested Note on Use to be a repository for the statutory citations which had previously been in the text of these paragraphs. Upon the subcommittee's review, Carl said he would try to "flesh out" the naked citations in the Note on Use with some brief explanatory text, and perhaps add a comment on the last sentence of subparagraph (a) which is a change to the common law on the issue. (The draft Note on Use we considered during that meeting is attached to and discussed in the Chair's 2/8/22 Status Report [an email].)

### Relocate Trustee's Duty to Inquire Boilerplate Provision

This provision is administrative boilerplate:

The trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee, and (b) the failure by a beneficiary to provide requested information.

But instead of appearing once as a titled provision under the *Administrative Provisions* articles of our will and trust forms, instead this boilerplate provision appears redundantly *at least five times* in the dispositive provisions of our rev tsts, and *at least three times* in the dispositive provisions of our will forms. See, [\[Extract\] Fm 350 - TEE's Duty to Inquire.pdf](#), and [\[Extract\] Fm 361 - TEE's Duty to Inquire.pdf](#), attached.

Like the provisions setting out the trustee's duty to notify and the trustee's duty to report, It has been suggested that the proper place for the provision setting out the trustee's duty to inquire is in the *Administrative Provisions* articles of our will and trust forms *where it logically belongs*, and that it should simply be relocated there from the multitude of locations in the dispositive provisions where it where it has been inserted repetitively. See, instead, [Trustee's Duty to Inquire\\_WIP \(2023-03-03\).docx](#), attached.

The existing Note on Use accompanying this boilerplate provision is another "law review article" note on use that merits significant trimming and editing. But we'll look at that next time.

### Older, Unfinished Business

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

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

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

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

## **“First Tier” QBs and “First Tier *Plus*” QBs Loose Ends**

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

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

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

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

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

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

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

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

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

### **Important Clean Up Needed for Consistency**

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

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

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

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

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

### **In Future Months**

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

**Clean-Up #2: "Act" vs. "Serve":**

**Clean-Up #3: "Record" vs. "Writing":**

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

**Clean-Up #5: Restructure & Reorganize Administrative Articles:**

**Clean-Up #6: Plain English vs. Legalese:**

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

(4) UPON REVOCATION OF A REVOCABLE TRUST, THE TRUSTEE SHALL DELIVER THE TRUST PROPERTY AS THE SETTLOR DIRECTS.

(5) A SETTLOR'S POWERS WITH RESPECT TO REVOCATION, AMENDMENT, OR DISTRIBUTION OF TRUST PROPERTY MAY BE EXERCISED BY AN AGENT UNDER A POWER OF ATTORNEY ONLY TO THE EXTENT EXPRESSLY AUTHORIZED BY THE TERMS OF THE TRUST OR THE POWER.

(6) UNLESS THE TERMS OF A TRUST EXPRESSLY PROVIDE OTHERWISE, OR THE POWER TO DO SO HAS BEEN EXPRESSLY GRANTED TO ANOTHER PERSON, A CONSERVATOR OF THE SETTLOR OR, IF NO CONSERVATOR HAS BEEN APPOINTED, A GUARDIAN OF THE SETTLOR, MAY EXERCISE THE SETTLOR'S POWERS WITH RESPECT TO REVOCATION, AMENDMENT, OR DISTRIBUTION OF TRUST PROPERTY, BUT ONLY WITH THE APPROVAL OF THE COURT SUPERVISING THE CONSERVATORSHIP OR GUARDIANSHIP.

(7) A TRUSTEE WHO DOES NOT KNOW THAT A TRUST HAS BEEN REVOKED OR AMENDED IS NOT LIABLE TO THE SETTLOR OR THE SETTLOR'S SUCCESSORS IN INTEREST FOR DISTRIBUTIONS MADE AND OTHER ACTIONS TAKEN ON THE ASSUMPTION THAT THE TRUST HAS NOT BEEN AMENDED OR REVOKED.

**15-5-603. Settlor's powers.** UNLESS THE TERMS OF THE TRUST EXPRESSLY PROVIDE OTHERWISE, WHILE A TRUST IS REVOCABLE, THE RIGHTS OF THE BENEFICIARIES ARE SUBJECT TO THE CONTROL OF, AND THE DUTIES OF THE TRUSTEE ARE OWED EXCLUSIVELY TO, THE SETTLOR.

**15-5-604. Limitation on action contesting validity of revocable trust.** (1) (a) A PERSON MUST COMMENCE A JUDICIAL PROCEEDING TO CONTEST THE VALIDITY OF A TRUST THAT WAS REVOCABLE AT THE SETTLOR'S DEATH WITHIN THE EARLIER OF:

(I) THREE YEARS AFTER THE SETTLOR'S DEATH; OR

(II) ONE HUNDRED TWENTY DAYS AFTER THE TRUSTEE SENT THE PERSON A COPY OF THE TRUST INSTRUMENT AND A NOTICE INFORMING THE PERSON OF THE TRUST'S EXISTENCE, OF THE TRUSTEE'S NAME AND ADDRESS, AND OF THE TIME ALLOWED FOR COMMENCING A PROCEEDING. A TRUSTEE IS NOT LIABLE TO ANY PERSON FOR GIVING OR FAILING TO GIVE NOTICE UNDER THIS SECTION.

*Trustee's Duty to Inquire\_WIP (2023-03-03)*

Form 350 Rev Tst:

**ARTICLE 15 – ADMINISTRATIVE PROVISIONS**

\* \* \*

15.13 TRUSTEE’S DUTY TO INQUIRE: Except when exercising absolute discretion or making distributions to or for the benefit of settlor, trustee shall consider all circumstances relevant to the administration of the trust, including: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by trustee; and (b) the failure by a beneficiary to provide requested information.

Form 361 Mar Ded Will:

**ARTICLE 9 – ADMINISTRATIVE PROVISIONS**

\* \* \*

9.15 TRUSTEE’S DUTY TO INQUIRE: Except when exercising absolute discretion, my trustee shall consider all circumstances relevant to the administration of the trust, including: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by my trustee; and (b) the failure by a beneficiary to provide requested information.



## ARTICLE 14 - TRUSTEESHIP

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

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

#### 14.2 ACCEPTING OR DECLINING TRUSTEESHIP:

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

*See Appx A Note on Use 2*

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

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

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

14.4 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

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

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

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

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

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

See Appx A Note on Use 22A

14.6 RESIGNATION: A trustee may resign:

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

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

*See Appx A Note on Use.22*

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

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

**ARTICLE 15 - ADMINISTRATIVE PROVISIONS**

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

*See Appx A Note on Use 17A*

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

*See Appx A Note on Use 3A*

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

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

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

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

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

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

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

**See Appx A Note on Use 2**

**15.8 MAJORITY CONTROL:**

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

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

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

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

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

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

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

*See Appx A Note on Use 25A*

15.13 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

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

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

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

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

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

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



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

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

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

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

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

## **ARTICLE 16 - GENERAL PROVISIONS**

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

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

*See Appx A Note on Use 25C*

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

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

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

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

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

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

successor personal representative, conservator, agent, or trustee.

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

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

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

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

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

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

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

*See Appx A Note on Use 20A*

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

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

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

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

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

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

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

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

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

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

**ARTICLE 7 – POWERS OF FIDUCIARIES**

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

**ARTICLE 8 – TRUSTEESHIP**

*See Appx A Note on Use A*

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

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

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

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

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

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~~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,

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

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

*See Appx A Note on Use 22A*

8.5 RESIGNATION: A trustee may resign:

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

*See Appx A Note on Use.22*

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



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

#### **ARTICLE 9 – ADMINISTRATIVE PROVISIONS**

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

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

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

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

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

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

9.5 UNDISTRIBUTED INCOME AT DEATH OF BENEFICIARY: Except as

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

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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~~

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

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

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

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

*See Appx A Note on Use 25A*

9.15 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

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

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

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

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

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

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

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

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

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

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

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

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

*[Extract] 0361-Mar Ded Will (2022-10-11).doc*

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

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

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

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

**ARTICLE 10 – TAX PROVISIONS**

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

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

**ARTICLE 11 – GENERAL PROVISIONS**

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

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

*See Appx A Note on Use 25C*

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

successor trustee, and a cotrustee.

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

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

\_\_\_\_\_  
Testator

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

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

## Notes on Use

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

\* \* \*

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

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

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

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

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

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

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

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

\* \* \*

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

\* \* \*

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

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

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

\* \* \*

- 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 of expenses associated with nontraditional forms of education if the trustee believed them to be in the beneficiaries’ best interests. Alternatively, for more conservative settlors whose preferences might lean toward limiting educational assistance to expenses derived from course work under the auspices of “accredited educational institutions,” the drafter might consider substituting the following language:~~

~~EDUCATION: Under this [instrument] [agreement], 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 study or instruction at, or under the auspices of, an accredited educational institution. The term “accredited educational institution” means a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; if such school, college, university, trade school, or other institution provides an academic curriculum, employs a full time faculty, offers classes on a campus, and enjoys a currently effective accreditation from a generally recognized accreditation board.~~

- 10) EDUCATION: The purpose of this note on use is to examine possible definitions of “education” as pertains to the “ascertainable standards” of health, education, maintenance, and support (HEMS). The Orange Book Forms themselves do not currently include specific definitions of these standards because guidance to the trustee in exercising discretion around distributions heavily depends on client intent. Although “an express standard is not required to enable a court to impose a general standard of reasonableness,” including guidance in the trust instrument can be of great assistance to the trustee and reduce the potential for conflict. *See* Edward C. Halbach, Jr., “Problems of Discretion in Discretionary Trusts,” 61 *Colum. L. Rev.* 1424, 1434 (1961). Such guidance may take the form of a statement of client intent, definitions, or illustrations/examples. Practitioners may also want to be mindful of preserving sufficient flexibility for the trustee to respond to unanticipated changes in circumstances, while maintaining consistency with client preferences.

A number of articles have been published explaining the use of the HEMS standards, and many of them provide sample language. A good example is Christian S. Kelso's "Get HEMS Straight: Tailor the Right Distribution Standard," 42 *Est. Plan.* 3 (2015).

With respect to the definition of education, the following examples represent a range of possible approaches.

Example 1: This definition takes a traditional approach to education (i.e., through an accredited educational institution) but with an out for beneficiaries for whom that would not be appropriate. Note that (a) and (b) are mutually exclusive by their terms, allowing access to a non-traditional education only upon determination that a traditional education would not serve the particular beneficiary.

EDUCATION: Distributions for education may, in trustee's discretion, include the cost of tuition, fees, books, supplies, computers and other equipment, 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 institution that enjoys a currently effective accreditation from a generally recognized accreditation board, such as: 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; and
- b) Study or instruction that trustee, in its discretion, determines to be appropriate for a beneficiary who has needs or abilities which are not likely to be served by an accredited educational institution.

Example 2: This definition provides more flexibility than Example 1, as it does not make traditional and non-traditional education an "either/or" proposition. It also provides a broad set of options without being too specific.

EDUCATION: "Education" includes all expenses of public and private education at any level, including graduate or professional education and specialized or vocational training, such as tuition, room and board, books, fees, materials, computers and other equipment, dues, and a reasonable travel allowance. Further, education is not to be limited to traditional learning environments but may include other forms of learning that the trustee determines is more appropriate for the particular beneficiary and can include the expenses itemized above. The trustee shall have the discretion to determine the reasonableness and the scope of all educational costs.

Example 3: This definition is the most specific, while preserving a wide range of options.

EDUCATION: Education is intended to be an ascertainable standard under I.R.C. §§ 2041 and 2514 and includes: (a) elementary, junior, and senior high school programs, including enrollment in public or private school,

boarding school, homeschool, and online or virtual school; (b) undergraduate and graduate study in any field at a college or university; (c) specialized, vocational, or professional training or instruction at any institution, as well as private instruction, internship, or apprenticeship; (d) any other program that trustee, in its discretion, considers useful for developing a beneficiary's abilities and interests including athletic training and instruction in the arts; (e) study or instruction that trustee, in its discretion, considers appropriate for a beneficiary who has needs or abilities that are best supported outside of traditional programs. The term education also includes expenses such as tuition, room and board, fees, books, supplies, computers and other equipment, tutoring, transportation and travel, and a reasonable allowance for living expenses.

Note, if the client desires, practitioners may also include limits on the beneficiary's age (e.g., educational expenses up to age 30) or dollar amounts (e.g., educational expenses up to a cumulative total of \$100,000 for any one beneficiary).

\* \* \*

- 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).

As mandated by CUTC § 5-105(2)(h), a trustee must notify, under CUTC § 5-813(2)(b) and (2)(c), *all qualified beneficiaries* of the existence of the trust, the identity of the trustee, and of their right to request a copy of the trustee's annual report. Also, as mandated under



CUTC § 5-105(2)(i), a trustee must respond, under CUTC § 5-813(1), to a *qualified beneficiary's* request for trustee's reports and other information reasonably related to the administration of the trust.

Recognizing that the pool of "qualified beneficiaries" could be impractically large, practitioners need to be aware then that, other than the statutorily-mandated notices cited above, Orange Book Forms try to moderate the burden on trustees by providing that (i) notice to beneficiaries who have the right to notice *and* to take action is strictly limited to "the distributees and permissible distributees of trust income and principal," while (ii) notice to beneficiaries who only have the right to notice (incl. to be "notified," for "information," and to be "kept informed") is limited to "the distributees and permissible distributees of trust income and principal, and other qualified beneficiaries *who have sent the trustee a request for notice.*"

\* \* \*

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

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

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

~~In Rev. Rul. 79-353, 1979-2 C.B. 325, the settlor of a funded irrevocable trust retained the power to remove the corporate trustee and to substitute another corporate trustee. The settlor could not appoint himself as trustee. The trustee had broad discretion to distribute trust income and principal among the settlor's children. The IRS ruled that the settlor's power to remove and replace the corporate trustee was tantamount to the settlor's directly retaining all of the~~



trustee's powers. Under the facts of the ruling, those powers were broad, the trust was therefore includible in the settlor's gross estate under I.R.C. §§ 2036 and 2038. Rev. Rul. 79-353 does not apply, however, to a transfer or addition to a trust made before October 29, 1979 (the publication date of Rev. Rul. 79-353), if the trust was irrevocable on October 28, 1979. Rev. Rul. 81-51, 1981-1 C.B. 458.

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

The IRS's position in Rev. Rul. 79-353 was addressed by the tax court in *Estate of Wall v. Commissioner*, 101 T.C. 300 (1993). See also *Estate of Vak v. Commissioner*, 973 F.2d 1409 (8th Cir. 1992). In *Wall*, as in Rev. Rul. 79-353, the taxpayer created an irrevocable trust and retained the right to remove the trustee and appoint a successor, but the successor had to be a corporate trustee. The court found the IRS's position in Rev. Rul. 79-353 to be "supported neither by cogent argument nor by cited cases supporting the conclusion reached," refused to follow the Revenue Ruling, and held that the trust was not includible in the decedent's gross estate because of her retained power to change trustees. In response to *Wall*, the IRS finally reversed its position, and issued Rev. Rul. 95-58, 1995-2 C.B. 191. That ruling revoked Revenue Rulings 79-353 and 81-51, and adopted the position that a settlor who possesses the power to remove the trustee and appoint a successor trustee who is not a related or subordinate party, as defined in I.R.C. § 672(e), 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(e), which defines this term, is an income tax section, not an estate tax section, and the IRS does not explain why that standard of independence should be used in this context. The IRS will apparently continue to take the position that the settlor should be treated as having the discretionary powers of the trustee if the settlor can remove the trustee and appoint a trustee other than the settlor, if the replacement trustee could be a related or subordinate party.

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

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

~~In view of the foregoing analysis of relevant authorities, it appears that generally in an irrevocable trust setting, the settlor's retention of power to remove a trustee should not run the risk of having the trust's assets be deemed to be included in the settlor's estate, while the settlor's retention of a power to replace a trustee would be fraught with much greater uncertainty and attendant risk. Accordingly, in the forms the process of changing trustees has been bifurcated through the use of separate "Removal of Trustee" and "Replacement of Trustee" provisions. In the case of the irrevocable life insurance trusts, on the basis of trying to maintain some flexibility for the settlor within the latitude apparently permitted by the foregoing authorities, the "Removal of Trustee" provisions provide that the settlor retains the right to remove a trustee. However, in the "Replacement of Trustee" paragraphs, the language of those provisions only gives the power to replace a trustee to the beneficiaries. And, in the case of the Section 2503(c) Trust (Form 1610), neither the power to remove nor the power to replace a trustee has been included due at least in part to the additional uncertainty and perceived risk of the beneficiary being regarded as a settlor, should the trust be drafted to permit continuation after the beneficiary attains the age of 21 and elects not to terminate the trust. See Notes on Use 4 and 5 of Section 2503(c) Trust (Form 1610).~~

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

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

\* \* \*

- 22A) RESIGNATION: The 30-day notice is the default provision in the Colorado Uniform Trust Code. See C.R.S. § 15-5-705. The previous version of this provision provided that a

resignation would be effective only upon the acceptance of appointment by a successor trustee. However, in most cases the occasion of a temporary vacancy would not be considered sufficient cause to require a trustee who wishes to resign to remain in office, especially since there are other events that may cause a temporary vacancy (e.g., death or incapacity of the trustee).

\* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

## **ARTICLE 2 - SETTLOR'S RIGHTS IN THE TRUST**

2.1 **DISTRIBUTIONS AS SETTLOR DIRECTS:** During settlor's lifetime, trustee shall dispose of the net income and principal of the trust in such manner as settlor may direct from time to time. Unless otherwise directed by settlor, the net income shall be paid to settlor no less frequently than quarter-annually.

2.2 **DISTRIBUTIONS TO SETTLOR DURING INCAPACITY:** During any period when settlor is incapacitated with resulting inability to manage property and financial affairs effectively, trustee shall apply for the benefit of settlor so much of the net income and principal of the trust as trustee shall determine in its discretion.

2.3 **PAYMENTS FOR SETTLOR'S FAMILY:** During any period when settlor is so incapacitated, trustee shall also distribute such amounts of net income and principal as in its discretion shall be necessary or advisable (a) for the health, support, or maintenance of settlor's spouse, and (b) for the health, education, support, or maintenance of those persons deemed by trustee to be dependent on settlor.

2.4 **ADMINISTRATIVE GUIDELINES:** Primary consideration should be given to the needs of settlor, and thereafter to the needs of settlor's immediate family. Any such distributions may be made to one or more of such beneficiaries to the complete exclusion of the others, in equal or unequal shares, as their respective needs require. Trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiaries which are outside the trust and are known to or are readily ascertainable by trustee; and (b) the failure by a beneficiary to provide requested information. Any net income not so distributed to settlor, to settlor's spouse, or to those persons dependent upon settlor shall be accumulated and added to principal. No distribution authorized by this article and made during settlor's lifetime to a person other than settlor shall be charged against the share of such person ultimately distributable under any other provision of this trust.

- a) If settlor's spouse disclaims any portion of the property which would otherwise be allocated to the Marital Trust, the disclaimed interest shall be added to the property of the Family Trust and shall be administered pursuant to the provisions of **Article 8 (Disposition of the Family Trust)** of this agreement.
- b) If settlor's spouse also disclaims the interest of settlor's spouse in any portion of the Family Trust, the disclaimed interest shall be disposed of under the provisions of this agreement as though settlor's spouse had predeceased settlor.

## **ARTICLE 7 - DISPOSITION OF THE MARITAL TRUST**

7.1 INCOME: From the date of settlor's death, trustee shall distribute to or apply for the sole benefit of settlor's spouse, during the lifetime of settlor's spouse, all the net income from the Marital Trust, in convenient, regular installments, no less frequently than quarter-annually.

7.2 PRINCIPAL: Trustee may also distribute to or for the benefit of settlor's spouse, from time to time, so much of the principal of the Marital Trust as trustee, in its discretion, shall consider necessary or advisable for the health, education, support, or maintenance of settlor's spouse. **The trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide requested information.**

7.3 UNDISTRIBUTED INCOME AT DEATH OF SPOUSE: Upon the death of settlor's spouse, all income of the Marital Trust then accrued but undistributed shall be distributed to the personal representative of settlor's spouse's estate.

7.4 TAX REIMBURSEMENTS: In the event federal estate taxes are incurred by settlor's spouse's estate as a result of inclusion of any part or all of the principal of this Marital Trust in the gross estate of settlor's spouse as determined for federal estate tax purposes, trustee shall distribute to the personal representative of settlor's spouse's estate that amount of principal necessary to reimburse settlor's spouse's estate for the tax so incurred, including interest and penalties thereon, computed in accordance with the provisions of I.R.C. § 2207A(a). In addition, trustee shall distribute



## **ARTICLE 8 - DISPOSITION OF THE FAMILY TRUST**

8.1 **PROPERTY SUBJECT TO THIS ARTICLE:** All trust property not disposed of \*\*\*

8.2 **DISTRIBUTION OF INCOME AND PRINCIPAL:** Trustee shall distribute to or apply for the benefit of settlor's spouse and settlor's descendants as much of the net income and principal of the Family Trust as trustee deems necessary or advisable for their health, education, support, or maintenance; provided, however, that no distribution of income or principal shall be made to settlor's children which would operate to discharge or relieve settlor's spouse of any legal obligation the spouse may have to support settlor's children. Any net income of the Family Trust not so distributed shall be accumulated and added to principal.

8.3 **DISCRETIONARY GUIDELINES:** In making discretionary distributions hereunder, trustee should bear in mind that settlor's primary concern and objective is to provide for the well-being of settlor's spouse and settlor's descendants, and the preservation of principal is not as important as the accomplishment of this objective. Trustee shall, at all times, give primary consideration to the needs of settlor's spouse, and secondary consideration to those of settlor's descendants, when exercising its discretion with respect to distributions of principal and income under this article. Trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide requested information. Trustee may make distributions to or for the benefit of one or more of the beneficiaries of the Family Trust to the complete exclusion of the others, and in equal or unequal proportions, according to their respective needs as those needs arise. Any distribution to or for a beneficiary shall be charged to the Family Trust as a whole rather than against the share ultimately distributable to such beneficiary or those taking through such beneficiary upon termination of the Family Trust. In making distributions of principal to settlor's spouse, consideration should be given to making all such distributions of principal from the Marital Trust, until it is exhausted, and preferably thereafter from the Family Trust.

8.4 **NONGENERAL POWER OF APPOINTMENT:** Settlor's spouse shall have the power to appoint all or any part of the principal and net income of the Family Trust, other than any policy of

## ARTICLE 9 - COMMON TRUST AND DIVISION INTO SEPARATE SHARES

9.1 PROPERTY SUBJECT TO THIS ARTICLE: All trust property which is not disposed of under the foregoing provisions (including but not limited to the entire trust estate or any remainder, unappointed, or disclaimed interest in the trust) shall be administered and apportioned as provided in this article.

9.2 COMMON TRUST FOR DESCENDANTS: If any then-living child of settlor has neither attained the age of 23 years nor received a baccalaureate degree from an accredited college or university, the balance of the trust property shall be retained by trustee upon the following terms:

- a) Income and Principal: Trustee shall distribute to or apply for the benefit of settlor's descendants as much of the net income and principal of the trust as is necessary or advisable for their health, education, support, or maintenance. Trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by trustee; and (b) the failure by a beneficiary to provide requested information. Any net income of the trust not so distributed shall be accumulated and added to principal. Trustee may make distributions to or for the benefit of one or more of the beneficiaries to the complete exclusion of others, and in equal or unequal proportions, according to their respective needs as those needs arise.
- b) Provision for Indirect Child Care: Trustee may also make distributions for the personal use and benefit of any person with whom a child of settlor may be residing in order to ease the financial burden upon such person resulting from the responsibility which they have assumed in caring for such child.
- c) Special Purpose Distributions: Without intending to limit the discretion of trustee in making distributions, settlor suggests that trustee be liberal in exercising such discretion so as to give assistance to settlor's children in purchasing homes, in establishing or purchasing businesses or professional practices, or for any other unusual or emergency expense which trustee deems to be in the best interests of such children. All such discretionary distributions for special purposes should take into consideration the probable future needs of all of the beneficiaries, and all such

## ARTICLE 10 - DISTRIBUTION TO DESCENDANTS

10.1 SHARE FOR LIVING CHILD: From each share set aside for a living child of settlor, one-third thereof shall be distributed to the child outright, and the balance shall be held in a separate trust for the child upon the following terms:

- a) Income and Principal: Trustee, in its discretion, may distribute to or apply for the benefit of the child and the descendants of the child as much of the net income and principal of the child's trust as is necessary or advisable for his or her health, education, support, or maintenance. Trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by trustee; and (b) the failure by a beneficiary to provide requested information. Any net income of the child's trust not so distributed shall be accumulated and added to principal.
- b) Distribution Guidelines: Trustee shall, at all times, give primary consideration to the needs of the child, and secondary consideration to those of the descendants of the child, when exercising its discretion with respect to distributions of principal and income from the child's trust. Without intending to limit the discretion of trustee in making distributions, settlor suggests that trustee be liberal in exercising such discretion so as to give assistance to the child for whom the trust is held in purchasing a home, in purchasing a business or establishing a professional practice, or for any other unusual or emergency expense which trustee deems to be in the best interests of the child. All discretionary distributions by trustee should take into consideration the probable future needs of the child. Trustee shall have no duty to consider the needs of the descendants of the child but may consider the descendants' needs in its sole discretion. Trustee shall have no duty to distribute any income or principal to descendants of the child during the lifetime of the child. The preservation of principal is not as important as the accomplishment of these objectives.
- c) Distributions and Termination: Three years after creation of the trust, trustee shall distribute to the child one-half of the principal of the trust as then constituted. Six years after creation of the trust, trustee shall distribute to the child the balance of the principal and all accrued and undistributed net income of the child's trust.

## **ARTICLE 4 – DISPOSITION OF MARITAL TRUST**

4.1 INCOME: My trustee shall distribute to or apply for the sole benefit of my spouse no less frequently than quarter-annually all of the net income of the Marital Trust from the date of my death.

4.2 PRINCIPAL: My trustee shall distribute to my spouse such amounts or all of the principal of the Marital Trust as my spouse may request from time to time by a writing delivered to my trustee during my spouse's lifetime. My trustee may also distribute to my spouse, or apply for my spouse's benefit, such amounts of principal as it may from time to time in its discretion deem necessary or advisable for my spouse's health, education, support, or maintenance. The trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide requested information.

4.3 TERMINATION AND DISPOSITION: On the death of my spouse, my trustee shall distribute from the Marital Trust the then remaining principal and income for the period between the last income distribution date and my spouse's death to, or hold the same for the benefit of, such persons or corporations, or the estate of my spouse, in such amounts and proportions and for such estates and interests, outright or upon such terms, trusts, conditions, and limitations as my spouse shall appoint by my spouse's last will made either before or after my death making specific reference to this power, and which shall have been admitted to probate in a formal or informal proceeding. To the extent that my spouse does not validly exercise this power to appoint by will, then upon my spouse's death, the then remaining principal and income for the period between the last income distribution date and the death of my spouse (less any estate, inheritance, or other death taxes payable with respect thereto which my trustee, in its discretion, deems necessary or desirable to pay from such remainder) shall be added to or reconstitute the principal of the Family Trust and be held, administered and disposed of under **Article 5 (Disposition of Family Trust)**.

4.4 SPECIAL PROVISIONS: Unproductive assets shall not be held as property of the

Marital Trust for more than a reasonable time without my spouse's written consent. My personal representative and trustee shall not exercise any discretion or power granted by my will or by law in a manner inconsistent with qualification of the Marital Trust for the federal estate tax marital deduction.

4.5 TAX REIMBURSEMENT: Unless directed otherwise in my spouse's Last Will, any estate, inheritance, or other death taxes payable by my spouse's estate to any federal, state or foreign taxing authority, which are attributable to the Marital Trust being included in the taxable estate of my spouse shall promptly be reimbursed from the Marital Trust to my spouse's estate in accordance with the provisions of I.R.C. § 2207A, upon showing by the personal representative of my spouse's estate that such taxes have been incurred.

#### **ARTICLE 5 – DISPOSITION OF FAMILY TRUST**

5.1 INCOME AND PRINCIPAL: During the life of my spouse my trustee may distribute so much of the net income and principal of the Family Trust to or for the benefit of one or more persons within a class consisting of my spouse and my descendants in such proportions and in such amounts as my trustee in its discretion may determine to be necessary or advisable for their health, education, support, or maintenance; provided, however, that in exercising its discretion my trustee shall give primary consideration to the needs and general well being of my spouse and secondary consideration to the needs of my descendants. Trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide requested information. Any income not distributed may be added periodically to principal.

5.2 POWER OF APPOINTMENT: My spouse is granted the power to appoint by a will, \*\*\*

5.3 SUBACCOUNT FOR DISCLAIMED PROPERTY: To the extent that any \*\*\*

5.4 DIVISION INTO SEPARATE TRUSTS: At the death of the survivor of my spouse \*\*\*

5.5 TRUSTS FOR CHILDREN: As to each trust created for a child of mine:

- a) My trustee may distribute to, or apply for the benefit of, any one or more of the living members of the group consisting of that child of mine for whom the trust is established and the descendants of such child, such amounts of the net income or principal, or both, as my trustee may determine to be necessary or advisable to provide for the health, education, support, or maintenance of such beneficiaries, without the necessity of equalization among them at any time. The trustee shall consider all circumstances relevant to the administration of the trust, including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide requested information. Any undistributed income may be added to principal from time to time in the discretion of my trustee.
- b) When such child reaches the age of 25 years, or at the division date if such child shall have reached that age, my trustee shall distribute to such child one-third of the principal as it shall then be constituted. When such child reaches the age of 30 years, my trustee shall distribute to such child one-half, or at the division date two-thirds if such child shall have reached that age, of the principal as it shall then be constituted. When such child reaches the age of 35 years, \*\*\*
- c) If such child shall die before reaching the age of 35 years, all of the property comprising his or her trust shall be distributed to such persons or corporations, and in such amounts and proportions and for such estates and interests and outright or upon such terms, trusts, conditions, and limitations as such child may by his or her will, admitted to probate in a formal or informal proceeding, which makes specific reference to this power, have appointed, except that such child may not appoint to such child's estate, such child's creditors or the creditors of such child's estate. If such power of appointment shall not be validly exercised, in whole or in part, then upon such child's death, my trustee shall distribute such part of the trust as shall not have been validly exercised to such child's then-living descendants by representation or, if none, to my then-living descendants by representation.

## 2.5-2.6 Amend Revoke [Remove] NoU\_MDH\_BH (2023-05-10)

Settlors of revocable living trusts can alter, amend, or revoke the trust in whole or in part. They can also direct the administration of trust funds. Some concern has been expressed that by dealing with trust assets without some degree of formality, an amendment or revocation, in whole or in part, of one's trust may accidentally occur, which could adversely affect a carefully devised estate plan. It has been asserted that a review of recent cases like *In re Omega Trust*, 175 N.H. 179, 281 A.3d 1281 (2022), and *Baker v. Baker*, 646 S.W.3d 397 (Ark. Ct. App. 2022), suggests that courts may be persuaded to hold that a trust has been amended by the actions of the settlor regarding the administration of trust assets, ~~the veracity and posture of the parties involved, and perhaps even the equities of the conflict and entitlements bestowed or removed by the settlor's actions~~. A rational argument might be made that litigation will be fostered rather than resolved or avoided by loose standards establishing methods of revoking, altering, or amending revocable living trusts. [here cite Turney Berry's suggestion for sole and exclusive method?]

There has been suggestion that a revocable "living trust" is nothing more than a "will substitute," rendering a beneficiary's interest a "mere expectation" rather than a vested interest. Colorado case law has not adopted that notion. See e.g. *Exchange National Bank v. Sparkman*, 554 P.2d 1090 (Colo. 1976).

C.R.S. § 15-5-602(3) provides that a settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust, or, ~~if no such method is provided~~, by any other method manifesting by clear and convincing evidence the settlor's intent to constitute such a change. If a specific method of amendment or revocation provided for in a trust document, is referred to as the "sole", "exclusive", or "only" method of revoking or amending the trust or includes similar language manifesting such intent, the trust may not be revoked or amended by any other method.

The following provision is offered as a suggestion to require that alterations, amendments, or revocations occur only in writing:

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

- a) To revoke the trust [**only/solely/exclusively**] by a writing; and
- b) Upon trustee's consent, to amend the trust, in whole or in part, [**only/solely/exclusively**] by a writing.

## 15.9-9.11 Single Signature Facility\_WIP (2023-08-09)

### 15.9 SINGLE SIGNATURE FACILITY:

- a) If two or more individuals are acting as cofiduciaries, then one of them may act alone on accounts maintained by the fiduciaries at banks and other financial institutions 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 instrument governing the fiduciary's actions.~~
- b) However, if a professional fiduciary is acting as a cofiduciary, then the professional fiduciary may act alone on all accounts maintained by the fiduciaries at banks and other financial institutions without the necessity of a written delegation agreement.



### 15.11 Custody\_[Extract] (2022-10-11)

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