

From: [Frank Hill](#)
To: [Melissa Anderson](#); [Connie Eyster](#); [Corina Gerety](#); [Lisa Hardin](#); [Richard Hess](#); [Stan Kent](#); [Alison Leary](#); [Marianne Luu-Chen](#); [Melissa Anderson](#); [Julie McVey](#); [Kevin Millard](#); [Carl Stevens](#); [Tony Vaida](#); [Kirsten Waldrip](#); [Sonny Wiegand](#); [Carolyn Wiley](#); [Gene Zuspahn](#)
Cc: [Hayley Lambourn](#); [Rikke Liska](#); [Dave Kirch](#)
Subject: Chair's 11/28/21 Status Report: OBFC CUTC Revisions Subcommittee
Date: Sunday, November 28, 2021 7:21:00 PM
Attachments: [\[Extract\] Appx A_Gen and Adm Prov_Notes on Use \(2021-10-29\).pdf](#)
[Desig of Additional Trustee_JGM \(2021-11-01\).pdf](#)
[\[Edited\] Desig of Additional Trustee_JGM \(2021-11-01\).pdf](#)
[Deadlock provision.pdf](#)
[\[Extract\] 0350-Rev Mar Ded Tst \(2021-10-29\).pdf](#)
[\[Extract\] 0361-Mar Ded Will \(2021-10-29\).pdf](#)
[1. Notice \[Rev Tst 15.12\] NoU_CCW \(2021-11-26\).pdf](#)
[2. Notice \[Will 9.14\] NoU_CCW \(2021-11-26\).pdf](#)
[3. Reports \[Rev Tst 15.13\] NoU_CCW \(2021-11-26\).pdf](#)
[4. Reports \[Will 9.15\] NoU_CCW \(2021-11-26\).pdf](#)
[Exoneration \[Rev Tst 14.4\]-CGS \(2021-08-29\).pdf](#)
[Form 350 Rev trust section 14.4.msg](#)
[Exoneration \[Rev Tst 14.4\]-EPZ \(2021-09-10\).pdf](#)
[Selecting a Trust Situs.pdf](#)

Dear Colleagues,

Our next meeting will be held (virtually) on **Wednesday, December 1st, 2021, 10:00-11:30 AM**. This report covers actions of our subcommittee during our last meeting on 11/3/21 as well as in preparation for this meeting. Here's our virtual meeting access info provided by the CBA:

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

Meeting ID: 895 0080 5835

Passcode: 090355

Call-in: 1 253 215 8782

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

Attached please find [\[Extract\] Appx A_Gen and Adm Prov_Notes on Use \(2021-10-29\).pdf](#), [Desig of Additional Trustee_JGM \(2021-11-01\).pdf](#), [\[Edited\] Desig of Additional Trustee_JGM \(2021-11-10\).pdf](#), [Deadlock provision.pdf](#), [\[Extract\] 0350-Rev Mar Ded Tst \(2021-10-29\).pdf](#), [\[Extract\] 0361-Mar Ded Will \(2021-10-29\).pdf](#), [1. Notice \[Rev Tst 15.12\] NoU_CCW \(2021-11-26\).pdf](#), [2. Notice \[Will 9.14\] NoU_CCW \(2021-11-26\).pdf](#), [3. Reports \[Rev Tst 15.13\] NoU_CCW \(2021-11-26\).pdf](#), [4. Reports \[Will 9.15\] NoU_CCW \(2021-11-26\).pdf](#), [Exoneration \[Rev Tst 14.4\]-CGS \(2021-08-29\).pdf](#), [Form 350 Rev trust, section 14.4.msg](#), [Exoneration \[Rev Tst 14.4\]-EPZ \(2021-09-10\).pdf](#), and [Selecting a Trust Situs.pdf](#) on which I comment briefly below. You should use a color printer to print them out.

Much of our work is in the rev tst [Form 350] and will [Form 361] extracts. When parallel paragraph reference numbers are given below, the first one will be to the rev tst [Form 350] extract and the second one will be to the will [Form 361] extract. Within all extracts,

BLACK typeface = **original boilerplate** as it currently exists in the Orange Book Forms,
RED typeface = **approved changes** to that existing boilerplate made by this subcommittee,
and

GREEN typeface = **proposed changes** suggested to be made to these documents.

UNFORTUNATELY, too few of our regularly attending subcommittee members showed up for our November (11/3/21) meeting to allow us to make any decisions. Only Carl, Gene, and Julie had shown up by 10:15. So we had a very enlightening and stimulating discussion of many of the issues listed below, and even exhausted some of the topics, and reached conclusions that could have been dispositive had enough of our members been present to act. Tony eventually joined us to give us his thoughts on Deadlock Provisions. Then Connie eventually joined having misunderstood our start time.

As you read below, our little core group thoroughly hashed out many of the issues listed and, in some instances, came up with a recommendation for action by the full subcommittee. Those recommendations are reflected below, and it is our hope that our deliberation last month might aid in reaching expeditious decisions on those issues this month.

So, since we will be dealing (at least briefly) with almost everything that was attached to last month's 10/30/21 Status Report and 11/1/21 Update, most of attachments are attached again *unchanged* to this 11/28/21 Status Report.

Old Stuff ...

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

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

To read the exhaustive treatment of the background of these two issues, please see the Chair's 10/30/21 Status Report, where what has gone before Julie showed up to save our bacon is set out in detail. Then Julie stepped into the fray, and, as set forth below, worked with both Kevin and Darla to come up with a unified approach to resolving and concluding this long-standing Note on Use project.

As mentioned in the introductory note, the little core group of attendees on 11/3/21 thoroughly hashed this out, and, if I could speak for them, I believe it was their consensus that Julie's 11-1-21 offering should be approved. [In the absence of "a quorum," yours truly didn't think it fruitful to have us look at the "Edited" version of Julie's offering, so that is still on the table for your consideration, too.]

If I understand correctly, Julie "withdrew" her abbreviated renditions of ¶¶ 14.3 and 8.2 appearing at the top of her offering, not realizing that the language of those paragraphs as they appear in the Extracts had already been thoroughly hashed out and approved during the months when she was not able to be with us. However, Gene opined that, since the last sentence, "Unless otherwise provided in the designating instrument, any additional trustee so designated may resign at any time" in both ¶¶ 14.3 and 8.2 as they appear in the Extracts, is covered in Julie's 11-1-21 Note on Use, it should be deleted from the text of the two paragraphs in the forms. I believe we all concurred with his recommendation.

Julie reports that she and Kevin had a chance to confer regarding her earlier 10-24-2021 draft (and Kevin's draft as it now appears as Note on Use 2 in the [Extract] Appx A_Gen and Adm Prov_Notes on Use (2021-10-29).pdf. If I understand correctly, the second attached document, [Desig of Additional Trustee_JGM \(2021-11-01\).pdf](#) represents their joint offering of a **combined** Note on Use 2 for the *Designation of Additional Trustee* and *Majority Control* paragraphs. Kevin has reviewed and considered Julie's offering, and Julie has included Kevin's earlier Note on Use which we approved several months ago; it's the fourth paragraph beginning with, "Generally, ..."

In your review, you should focus on the substance of their joint offering. Assuming that you might approve its substance, yours truly has simply suggested an *Editor's version*, (the second attached document, [\[Edited\] Desig of Additional Trustee_JGM \(2021-11-10\).pdf](#), for your subsequent consideration. THE *EDITOR'S VERSION* CONTAINS NO SUBSTANTIVE CHANGES.

Majority Control 15.8 & 9.10:

The "Two-Trustee Impasse" Issue

When Tony was able to join our little group, we thoroughly hashed out the issues presented below. I think it is fair to say that it was our consensus no Deadlock Provision be include in the text of any OBF will or trust form, but that, an appropriately drafted Note on Use raising the issue and perhaps briefly suggesting options of dealing with it would the way to proceed. Tony said he would update his proffered Note on Use to reflect the fruits of our discussion for your consideration.

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

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

- See Tony's proffered Note on Use in [Deadlock provision.pdf](#) attached.

To see the following two attachments, see Chair's 10/30/21 Status Report: OBF CUTC Revisions Subcommittee.

- See also two copyrighted Wealth Counsel provisions offered by Carl for our consideration: [WealthCounsel Special Trustee_CGS \(2021-10-28\).pdf](#) and [WealthCounsel Trustee Mediation_CGS \(2021-10-28\).pdf](#).

The “One Signature” Issue

This issue generated the most intense discussion among the members of our little core group. We really hashed out the “pros” and “cons,” and the administrative difficulties likely to be involved. It was opined that no corporate fiduciary would be likely to be willing to serve under an instrument containing this clause in its boilerplate. In the end it seemed to be our consensus that this was something best left to agreement between the cotrustees (or cofiduciaries) and should not be included in an OBF will or trust form. Therefore, ¶¶ 15.8(b) and 9.10(b) should not be revised, but instead, should be deleted. At most, a Note on Use on the topic might be entertained if someone felt strongly about it and was so inclined to compose and proffer one.

During our 4/7/21 mtg, we approved the “final” versions of these paragraphs. However, yours truly had forgotten to add a provision suggested during our 3/3/21 mtg to provide that in a multiple trustee setting, the signature of only one trustee be required to bind the trust. Both Sonny and Gene graciously provided me with examples of some language to accomplish that. I submitted suggested language (the “4/27/21 Extract”) which the subcommittee approved during our mtg on 9/1/21.

While I appreciated the subcommittee’s swift approval of my succinct offerings, after re-reading my own work, I began having second thoughts about the precision of the words I had chosen. Is it the “trust” or my “estate” that is bound (as though they were legal entities) or is it actually the *cofiduciaries, collectively*, that are bound by the signature of one of the cofiduciaries? Last month, I suggested revised language for your consideration (the “10/4/21 Extract”). See, ¶ 15.8 (b) on Pg. 24 of the rev tst extract, and ¶ 9.10 (b) on Pg. 14 of the will form extract.

- See ¶ 15.8(b) in [\[Extract\] 0350-Rev Mar Ded Tst \(2021-10-29\).pdf](#), attached.
- See also ¶ 9.10(b) in [\[Extract\] 0361-Mar Ded Will \(2021-10-29\).pdf](#), attached.

As we began to discuss my new versions (the “10/4/21 Extract”), Gene and Carl suggested that perhaps we might consider a more thorough approach than the “quick and dirty” approach I had suggested in either of my 4/27/21 or 10/4/21 submissions.

To see the following two attachments, see Chair’s 10/30/21 Status Report: OBF CUTC Revisions Subcommittee.

- See Sonny’s [Language Re Single Signature_RWII \(2021-30-03\).msg](#), attached.
- See also Gene’s [Single Signatory Language_EPZ \(2021-04-07\).msg](#), attached.

Trustee’s Duties to Inform and to Notify 15.12 & 9.14 and Trustee’s Duties to Report and to Respond 15.13 & 9.15:

During our 4/7/21 mtg, we approved the “final” versions of all four of these paragraphs as presented

in the extracts attached to my 4/5/21 Status Report [without the CUTC source references in brackets]. The final versions, as approved [without the CUTC source references in brackets], appear in the extracts attached to this status report.

However, Carolyn opined that she thought practitioners would probably benefit knowing the CUTC source references of all the provisions contained in ¶¶ 15.12 & 9.14 as well as in ¶¶ 15.13 & 9.15. and proposed that Note(s) on Use be created (back in Appx A) replicating these paragraphs **with the CUTC source references in brackets** so that practitioners would be aware of which provisions were mandatory in CUTC and which were optional (default) when they were considering whether to modify these provisions in their own documents. For our September (9/1/21) meeting, Carolyn graciously proffered preliminary Notes on use for Rev Tst ¶ 15.12 and Will ¶ 9.14, which, upon review we seemed to think might be bolstered a bit to explain why the information being provided might be useful to practitioners.

Now she has graciously submitted the attached [1. Notice \[Rev Tst 15.12\] NoU_CCW \(2021-11-26\).pdf](#), [2. Notice \[Will 9.14\] NoU_CCW \(2021-11-26\).pdf](#), [3. Reports \[Rev Tst 15.13\] NoU_CCW \(2021-11-26\).pdf](#), [4. Reports \[Will 9.15\] NoU_CCW \(2021-11-26\).pdf](#) for our review and consideration, transmitted along with the following commentary:

I have revised notes on use for both the Trust and the Will version of the Notice provisions using red.

I have created notes on use for both the Trust and the Will version of the Reports provisions--keeping the red so that in case we change it in one place we can change it everywhere more easily.

When the project started, I was only interested in this being a quick reference of the suggested and mandatory provisions from CUTC for ease of reference for the practitioner. When I presented the Notice provisions, there was some discussion of telling the practitioner that they could easily shorten the language. And then, after re-reading the Millard article in particular, he pointed out that these were pretty much the most controversial provisions when the commissioners were drafting them because of the tension between those who want secret trusts and those who feel the beneficiaries have needs to preserve their rights. So, I added a little more and referenced the Millard and Eyster & Stevens articles.

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

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

very minor corrections which I believe are consistent with Carl's intent.

See [Form 350 Rev Tst, section 14.4.msg](#): **This is Gene's 9/10/21 transmittal email**. In it, *he suggests that there may be nothing in CUTC §§ 1008 or 1010 that we should include, and, perhaps, that to do so may be inappropriate.*

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

During our truncated October (10/6/21) meeting, our discussion focused on the second sentence, "No trustee shall be liable ... for the consequences of any action taken by *such* trustee which would..." I opined that when you look at the existing OBF *Exoneration of Trustee* paragraph, *such* refers to the trustee currently serving, while Carl's and Gene's proffered revisions indicate that *such* refers to a former trustee. Julie suggested that it might properly refer to any trustee and that maybe the simplest way out was to change it to "a trustee" so that it would be all-inclusive. (At that point in our discussion, however, our virtual meeting time expired.)

So, we were pleased that Connie was finally able to join our meeting by the time we were able to get to discussing this issue. There evolved a general consensus that Gene's formatting into subparagraphs was a definite improvement, and that conduct by a "previous" or "former" trustee is indeed the focus of the second sentence [subparagraph (b)]. I opined that the phrase in the third subparagraph, "... or from their guardians or conservators," should be deleted as already adequately covered under ¶¶ 15.7 and 9.9 *Representative of Beneficiary*. Carl said he would create a brief Note on Use discussing the CUTC references which would be deleted from the text of the paragraphs and transferred to Carl's Note on Use.

New Stuff ...

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

Other Stuff ...

FOLLOWING CUTC'S LEAD: MODERN DRAFTING STYLE; RETIRING SUPERFLUOUS ADJECTIVES:

During our 12/2/20 mtg, I suggested that OBF having been conceived decades before CUTC, the

OBFC had to decide on generally using the term “serving” or “acting” when referring to the status of a fiduciary. I reported that I had made a quick review of CUTC and found that there is a consistent preference for “act” over “serve” (which only occurs once referring to a conservator). So, I suggested that we change “serve” and “serving” to “act” and “acting” in OBF to bring us consistent with Uniform Acts drafting style.

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

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

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

Respectfully submitted,

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