

**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:** OBF CUTC Revisions UPDATE - Julie's (and Kevin's) Latest  
**Date:** Monday, November 1, 2021 4:45:00 PM  
**Attachments:** [Desig of Additional Trustee\\_JGM \(2021-11-01\).pdf](#)  
[\[Edited\] Desig of Additional Trustee\\_JGM \(2021-11-01\).pdf](#)

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Dear Colleagues,

Attached please find [Desig of Additional Trustee\\_JGM \(2021-11-01\).pdf](#) and [\[Edited\] Desig of Additional Trustee\\_JGM \(2021-11-01\).pdf](#) on which I comment briefly below. The first document could be printed on a monochrome printer, while the second should be printed on a color printer.

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 [attached to my 10-30-21 Status Report]). If I understand correctly, the first 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.

Thank you, Julie and Kevin, for this effort. You have brought us closer to eventually being able to wrap up our consideration of this issue.

Respectfully submitted.

Frank Hill

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**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 10/30/21 Status Report: OBFC CUTC Revisions Subcommittee  
**Date:** Saturday, October 30, 2021 1:18:00 PM  
**Attachments:** [\[Extract\] Appx A Gen and Adm Prov Notes on Use \(2021-10-29\).pdf](#)  
[Desig of Additional Trustee JGM \(2021-10-24\).pdf](#)  
[Deadlock provision.pdf](#)  
[WealthCounsel Special Trustee CGS \(2021-10-28\).pdf](#)  
[WealthCounsel Trustee Mediation CGS \(2021-10-28\).pdf](#)  
[\[Extract\] 0350-Rev Mar Ded Tst \(2021-10-29\).pdf](#)  
[\[Extract\] 0361-Mar Ded Will \(2021-10-29\).pdf](#)  
[Language Re Single Signature RWII \(2021-03-03\).msg](#)  
[Single Signatory Language EPZ \(2021-04-07\).msg](#)  
[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](#)

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Dear Colleagues,

Our next meeting will be held (virtually) on **Wednesday, November 3<sup>rd</sup>, 2021, 10:00-11:30 AM**. This report covers actions of our subcommittee during our last meeting on 10/6/21 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

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

Attached please find [\[Extract\] Appx A\\_Gen and Adm Prov\\_Notes on Use \(2021-10-29\).pdf](#), [Desig of Additional Trustee\\_JGM \(2021-10-24\).pdf](#), [Deadlock provision.pdf](#), [WealthCounsel Special Trustee\\_CGS \(2021-10-28\).pdf](#), [WealthCounsel Trustee Mediation\\_CGS \(2021-10-28\).pdf](#), [\[Extract\] 0350-Rev Mar Ded Tst \(2021-10-29\).pdf](#), [\[Extract\] 0361-Mar Ded Will \(2021-10-29\).pdf](#), [Language Re Single Signature\\_RWII \(2021-30-03\).msg](#), [Single Signatory Language\\_EPZ \(2021-04-07\).msg](#), [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.

**Old Stuff ...**

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

Before I knew that Julie (see next topic, below) was working on *combining* Darla's and Kevin's contributions into an updated Appx A Note on Use 2, I took Kevin's 10-1-21 email and mark-up of P 69 App A w Millard edits (both of which were attached to last month's status report) and produced a new (Kevin only) updated Appx A Note on Use 2.

- See Note on Use 2 in [Extract] Appx A\_Gen and Adm Prov\_Notes on Use (2021-10-29).pdf, attached.

I think you will find it consistent with the comments contained in his email. However, I also included the text of his earlier Note on Use on this topic, written (and approved by us) before he was aware there was an old Appx A Note on Use 2 on the subject that would have to be taken into consideration. I moved his prior Note on Use from the Notes on Use at the back of both the rev tst and the will forms (where I had temporarily parked them back in the 4/27/21 Extracts) and have now included it in Note on Use 2 because, since 14.3 and 8.2 are "boilerplate" administrative provisions, CLE will move them to Appx A anyway.) This is what he was responding to (where Kevin had left off back in April):

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

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

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

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

Julie has valiantly grappled with trying to divine where Darla was headed when some months ago, before she had to leave us, she suggested that her draft Note on Use (and perhaps these two paragraphs of the rev tst and will forms) needed a little

more. Also, recognizing that Darla and Kevin were jointly trying to eventually produce a combined and updated Appx A Note on Use 2, Julie took a stab at coming up with an updated Appx A Note on Use 2 combining her thoughts of where Darla may have been headed together with Kevin's latest update thereof, discussed above.

- See Julie's first attempt, [Desig of Additional Trustee\\_JGM \(2021-10-24\).pdf](#), attached.

As I was finishing up this Status Report, Julie was still trying to fine tune her offering, so regard the attached as a work-in-progress. If she is able to get a newer version to me before our meeting, I will make a special distribution of that later version. This is what Julie is dealing with (where Darla left off):

After raising the issue of "indefinite" vs. "definite" term of appointment for an additional trustee during our 1/6/21 mtg, Darla had offered to revise the last sentence of the paragraph to perhaps include some comment about that issue. She also offered to revise her proffered Note on Use (Darla's 14.4 & 8.2 Note on Use (2021-01-05).docx, attached to last month's status report) to include some discussion of this issue as well as restructure the existing material to focus on its salient point, *i.e.*, allocation of the duty to inform and report between the trustee and the additional trustee. For the reasons explained in the next item regarding Kevin's Note on Use, Darla was going to hold off on revising her previously offered Note on Use until after we had finalized our discussion of how we want to treat relationships among cofiduciaries generally, which we finally concluded during our 4/7/21 meeting.

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

### **Majority Control 15.8 & 9.10:**

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

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.
- 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

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.

- 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 last month's meeting, Carolyn graciously proffered preliminary Notes on use for Rev Tst ¶ 15.12 and Will ¶ 9.14, which, upon review we seemed to think might be bolstered a bit to explain why the information being provided might be useful to practitioners.

**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.)

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 this point in our discussion, however, our virtual meeting time expired.)

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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