

From: [Frank Hill](#)
To: [Melissa Anderson](#); [Connie Eyster](#); [John Ferguson](#); [Corina Gerety](#); [Lisa Hardin](#); [Richard Hess](#); [Stan Kent](#); [Alison Leary](#); [Marianne Luu-Chen](#); [Julie McVey](#); [Kevin Millard](#); [Carl Stevens](#); [Jacob Tonda](#); [Tony Vaida](#); [Kirsten Waldrip](#); [Sonny Wiegand](#); [Carolyn Wiley](#); [Gene Zuspenn](#)
Cc: [Hayley Lambourn](#); [Dave Kirch](#)
Subject: OBF CUTC Revisions Subcomm Mtg (Virtual) Wed 5/5/21 10:00-11:30am
Date: Friday, April 30, 2021 3:51:00 PM
Attachments: [\[Extract\] 0350-Rev Mar Ded Tst \(2021-04-27\).pdf](#)
[\[Extract\] 0361-Mar Ded Will \(2021-04-27\).pdf](#)
[Darla's 14.3 and 8.2 Note on Use \(2021-01-05\).docx](#)
[Addendum to Chair's 4-5-2021 Status Report.pdf](#)
[Pg 69, Appx A - Gen & Adm Prov \(2021-04-27\).pdf](#)
[Page 79, Appx A - Gen & Adm Prov.pdf](#)
[CUTC Sections 1008, 1009, & 1010.pdf](#)

Dear Colleagues:

This is the Chair's **4/30/21 Status Report** regarding the actions of the subcommittee through our last meeting on 4/7/21 and our preparation for our next virtual meeting on Zoom next Wednesday morning, 5/5/21, supported by the CBA:

Online: <https://cba-cle.zoom.us/j/92173214603>
Meeting ID: 921 7321 4603
Passcode: 731923

Call-in: 1 (301) 715 8592
Meeting ID: 921 7321 4603
Find your local number: <https://cba-cle.zoom.us/u/abYHgMJhf>

Attached please find [\[Extract\] 0350-Rev Mar Ded Tst \(2021-04-27\).pdf](#), [\[Extract\] 0361-Mar Ded Will \(2021-04-27\).pdf](#), [Darla's 14.4 and 8.2 Note on Use \(2021-01-05\).docx](#), [Pg 69, Appx A – Gen & Adm Prov \(2021-04-27\).pdf](#), [Page 79, Appx A – Gen & Adm Prov.pdf](#), and [CUTC Sections 1008, 1009, & 1010.pdf](#) on which I comment briefly below. You should use a color printer to print them out.

Most of our work was (and still is) in the two 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 the two extracts,

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

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

Old Stuff ...

Designation of Additional Trustee 14.3 & 8.2 [& Darla's Note on Use]: After raising the issue of “indefinite” vs. “definite” term of appointment for an additional trustee during our 1/6/21 mtg, Darla offered to revise the last sentence of the paragraph to perhaps include some comment about

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

But now Darla has had to bow out of further participation in our subcommittee before she had a chance to finish this item. If there is someone who is a "fellow traveler" with Darla on this point regarding "indefinite" vs. "definite" term of appointment for an additional trustee, perhaps you might wish to proffer the revision Darla was contemplating? As you can see in the attached extracts, the last sentence of ¶¶ 14.3 & 8.2 is still 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), this Note on Use will have to be incorporated into the existing Note on Use, perhaps as a separate paragraph or subparagraph.

Designation of Additional Trustee 14.3 & 8.2 [Kevin's Note on Use]: Approved during our 12/2/20 mtg, during our 1/6/21 mtg, we had initially decided to relocate this 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, appearing at the beginning of the article and referencing 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 specific "boilerplate" paragraphs and appearing in Appx A, General and Administrative Provisions at the rear of the book. I have included the text of his Note on Use (as tweaked slightly by Kevin, Darla, and yours truly) in the Notes on Use section of the forms at the rear of the extracts of both documents. See the gist of Kevin's 4/5/21 transmittal email (highlighted) in the attached [Addendum to Chair's 4-5-2021 Status Report.pdf](#).

While I agree that the *topic* of the Note on Use applies generally to the "Trusteeship" article, it seems to me that the *specific text* of the Note on Use appears to apply primarily to the two provisions that mention multiple trustees, namely, *Designation of Additional Trustee* and *Majority Control*. (For the time being, I have positioned the references to the Note on Use in front of each of those two provisions.) We'll need to decide where to most appropriately reference this Note on Use, and that will determine for us whether it will appear in the rear of each form containing a trust, or be added to Appx A, Notes on Use 2 and 6 on Pages 69 and 79, respectively (attached).

Resignation 14.6 & 8.5: During our 4/7/21 mtg, we approved the "final" version these provisions as

presented in the extracts attached to my 4/5/21 Status Report. ***The final versions, as approved, now appear in the extracts attached to this status report.***

Majority Control 15.8 & 9.10: During our 4/7/21 mtg, we approved the relatively minor revisions made to these paragraphs during our 3/3/21 mtg, as well as the balance of these paragraphs reflected in the extracts attached to my 4/5/21 Status Report. But for my oversight, discussed below, the “final” versions, as approved, now appear in the extracts attached to this status report.

However, yours truly forgot 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, which yours truly has now tried to include. The proffered provision is succinct and to the point; your review and critique would be appreciated. See, ¶ 15.8 (b) on Pg. 24 of the rev tst extract, and ¶ 9.10 (b) on Pg. 14 of the will form extract.

Delegation 15.9 & 9.11: During our 4/7/21 mtg, we approved Corina’s revisions made to these paragraphs as presented in the extracts attached to my 4/5/21 Status Report. ***The final versions, as approved, now appear in the extracts attached to this status report.***

Trustee’s Duties to Inform and to Notify 15.12 & 9.14: During our 4/7/21 mtg, we approved the “final” version these ¶¶ 15.12 & 9.14 as presented in the extracts attached to my 4/5/21 Status Report [without the CUTC source references in brackets] including retaining the reference to the testator as “settlor” of the testamentary trust within the will based upon CUTC § 15-5-103 (18). ***The final versions, as approved [without the CUTC source references in brackets], now appear in the extracts attached to this status report.***

As to the comment that temporarily leaving in the CUTC source references in brackets might be helpful to the full OBFC when considering the appropriateness of our submission, see two paragraphs below in this report regarding including new Notes on Use to accompany these provisions which would contain replications of these paragraphs *with the CUTC source references in brackets* differentiating between mandatory requirements and optional (default) provisions.

Trustee’s Duties to Report and to Respond 15.13 & 9.15: During our 4/7/21 mtg, we approved the “final” version these ¶¶ 15.13 & 9.15 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], now appear in the extracts attached to this status report.***

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. Carolyn graciously volunteered to try to craft such Note(s) on Use and John volunteered to give her a hand with the project.

Other Definitions 16.10 & 11.9 (Carl): During our 4/7/21 mtg, after some discussion, we approved my suggested revisions (of Carl’s original offering) made to these paragraphs as presented in the extracts attached to my 4/5/21 Status Report. In that process, we determined that the last phrase “... and after settlor’s [my] death.” should be deleted as needless surplusage. ***The final versions, as approved, now appear in the extracts attached to this status report.***

Fiduciary 16.6 & 11.6: During our 4/7/21 mtg, we determined the appropriateness of including the definition of the term “fiduciary,” and approved the one proffered in RUFADAA at C.R.S. § 15-1-1501 (14), employed pretty consistently (with only minor variations) by NCCUSL in most of its recent suggested uniform acts in the trust and estate field. ***The final versions, as approved*** [without the RUFADAA source reference in brackets], ***now appear in the extracts attached to this status report.***

Trustee 16.14 & 11.12: During our 4/7/21 mtg, we determined the appropriateness of reforming the definition of “trustee” brought into OBF more than thirty-five years ago in favor of replacing it with that proffered in CUDTA at C.R.S. § 15-16-802 (10), employed pretty consistently (with only minor variations) by NCCUSL in most of its recent suggested uniform acts in the trust and estate field. ***The final versions, as approved*** [without the CUDTA source reference in brackets], ***now appear in the extracts attached to this status report.***

New Stuff ...

Exoneration of Trustee 14.4 & 8.3: Way back during our October 2019 meeting, we had concurred with Darla’s caveat that while it was appropriate to focus our attention on addressing the notice and reporting issues discussed in CUTC §§ 105 and 813, we also really needed to address **the impact of CUTC §§ 1008, 1009 and 1010** on our will and trust provisions addressing **trustee exoneration, beneficiary releases, and trustee liability**. She was pretty adamant that these three items were a big concern that demanded our attention. Now that our decks have been pretty much cleared of most other CUTC-related issues, we should now be able to turn our attention to these weighty areas of concern, perhaps beginning by focusing on ¶¶ 14.4 & 8.3 *Exoneration of Trustee* and its related CUTC provisions.

Even though Darla can’t be with us, I do remember Darla being singularly unimpressed with the ¶¶ 14.4 & 8.3. I think she felt that it was sort of a hodge-podge of CUTC concepts, and that it would probably be simpler to draft from scratch and track CUTC rather than trying to salvage much of the existing provision (which was a “pre-CUTC” attempt at “best practices” more than thirty-five years ago). To aid in this effort, I have attached copies of CUTC §§ 1008, 1009 and 1010 for your reference.

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 OBF 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,

Frank Hill

Frank T. Hill

Attorney at Law (Ret.)

170 N. Oak Street, Apt 223

Gilbert, AZ 85233-5449

Phone: 303.517.8447

fhill.com@outlook.com

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

ARTICLE 14 - TRUSTEESHIP

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

See Appx A Note on Use A

14.2 ACCEPTING OR DECLINING TRUSTEESHIP:

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

See Note on Use 14A and Appx A Note on Use 2

14.3 DESIGNATION OF ADDITIONAL TRUSTEE: If for any reason trustee is unwilling or unable to act as to any property of the trust, or with respect to any provision of this agreement, trustee may designate in writing an individual or bank or trust company to serve as additional trustee as to such property or with respect to such provision, and may revoke any such designation at will. Each additional trustee so serving shall exercise all fiduciary powers granted by this trust unless expressly limited by trustee in the instrument designating such additional trustee. Unless otherwise provided in the designating instrument, any additional trustee so designated may resign at any time ~~by giving written notice to trustee in accordance with the provisions of paragraph 14.7 (Resignation) of this article.~~

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

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

See Appx A Note on Use 22A

14.6 RESIGNATION: Any trustee may resign:

- a) By giving at least thirty days' written notice to (i) settlor, if living, or settlor's legal representative (if any) if settlor is deceased or incapacitated, (ii) the qualified beneficiaries, and (iii) all other acting trustees, effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee; or
- b) With the approval of the court.

See Appx A Note on Use.22

14.7 REMOVAL OF TRUSTEE: Any trustee may be removed, without cause, by settlor, or if settlor is deceased or incapacitated, by settlor's spouse, or if settlor and settlor's spouse are both deceased or incapacitated, by a majority of the qualified beneficiaries by giving written notice to such trustee and to any other trustee then serving, effective in accordance with the provisions of the notice.

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

ARTICLE 15 - ADMINISTRATIVE PROVISIONS

15.1 COURT PROCEEDINGS: The trust estate shall be administered expeditiously consistent with its provisions, free of judicial intervention, and without order, approval, or action of any court. It shall be subject only to the jurisdiction of a court being invoked by trustee or by other interested parties or as otherwise provided by law.

See Appx A Note on Use 17A

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

See Appx A Note on Use 3A

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

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

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

15.6 PROTECTION AGAINST PERPETUITIES RULE: Every trust hereunder, and every trust created by the exercise of a power of appointment hereunder, shall terminate no later than * * *

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 * * *

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

See Note on Use 14A and Appx A Note on Use 2

15.8 MAJORITY CONTROL:

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

15.9 DELEGATION:

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

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

15.11 RELEASE OF POWERS: Any trustee may release, in whole or in part, temporarily or permanently, any power, authority, or discretion conferred by this agreement by a writing delivered to each cotrustee and to each beneficiary then eligible to receive income distributions from any * * *

~~15.12 REPORTS: Trustee shall report no less frequently than annually to settlor, to all adult beneficiaries and to the parents of any minor beneficiaries then eligible to receive current income, all the receipts, disbursements, and distributions during the reporting period, and property then held as the principal of the trust. The records of the trust shall be open at all reasonable times to inspection by settlor and by the beneficiaries of the trust and their representatives.~~

15.12 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

- a) After trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.
- b) Within sixty days after the date trustee acquires knowledge that the trust created under this instrument has become irrevocable, trustee shall notify the qualified beneficiaries of:
 - i) Settlor's identity;
 - ii) The existence of the trust;
 - iii) Trustee's acceptance of the trust;
 - iv) Trustee's name, address, and telephone number;
 - v) Their right to request portions of the trust instrument that describe or affect the requesting beneficiary's interest; and
 - vi) Their right to request reports as provided in **paragraph 15.13 (Trustee's Duties to Report and to Respond)** of this article.
- c) Trustee shall notify the qualified beneficiaries in advance of any change in the method or rate of trustee's compensation

15.13 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

- a) At least annually and at the termination of the trust, trustee shall send to the distributees or permissive distributees of the trust's income or principal, and to other qualified beneficiaries who request it, a report containing:
 - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values;
 - ii) The liabilities of the trust, if any;
 - iii) The trust's receipts and disbursements during the period covered by the report; and
 - iv) The amount and source of trustee's compensation.
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, the former trustee shall send a report as described in **paragraph 15.13(a)** of this article to the qualified beneficiaries. Should the former trustee be deceased or incapacitated, the former trustee's legal representative may send the report.
- c) Upon request of a qualified beneficiary, trustee shall:
 - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances; and
 - ii) Furnish promptly a copy of the portions of the trust instrument that describe or affect the requesting beneficiary's interest.

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

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

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

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

ARTICLE 16 - GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

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

16.11 PERSONAL REPRESENTATIVE: For the purposes of this agreement, the term "personal representative" shall include an executor, administrator, guardian, conservator, or any other form of

personal representative, depending upon the context in which such term occurs.

See Appx A Note on Use 20A

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

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

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

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

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

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

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

NOTES ON USE

- 1) Generally, throughout this form the trustee's discretion to make distributions is limited by the ascertainable standards of health, education, support, or maintenance. *See* I.R.C. § 2041 and Treas. Reg. § 20.2041-1(c)(2). These standards should not be changed without a thorough understanding of the resulting tax consequences. *See* Notes on Use 17 and 22 of General and Administrative Provisions (Appendix A), and Chapter 18, "Powers of Appointment," in *Orange Book Handbook: Colorado Estate Planning Handbook*, Seventh Ed. (David K. Johns et al. eds., CLE in Colo., Inc. 2017).
- 2) There is some debate among practitioners as to whether there is a duty for a trustee to inquire into the financial circumstances of a beneficiary before making a distribution * * *
- 13) This provision gives the trust beneficiary a nongeneral testamentary power of appointment which can be exercised in favor of any individual or entity *other than* the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate. "Nongeneral power of appointment" is defined in the Colorado Uniform Powers of Appointment Act as any power of appointment that is not a general power of appointment. C.R.S. § 15-2.5-102(10). "General power of appointment" is defined as "a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate." C.R.S. § 15-2.5-102(6). "Person" is defined in the Colorado Probate Code as "an individual or an organization." C.R.S. § 15-10-201(38). An example of a more restrictive nongeneral power of appointment is found in Form 350, paragraph 10.1(d) where the class of eligible beneficiaries is limited to settlor's descendants. *See* also Form 1560 regarding the generation-skipping transfer tax consequences of distributions to persons one or more generations younger than the settlor or testator. The language regarding default beneficiaries is intended to provide for distribution to the family line most closely related to the deceased beneficiary. Other specific default beneficiaries could be named instead, or reference could be made to Article 12 of this form, titled "Remote Contingent Disposition."
- 14) The client's preference regarding contingent beneficiaries should be determined. You may wish to encourage clients to consider gifts to charity. *See* Note on Use 21, General and Administrative Provisions (Appendix A).
- 14A) Generally, any time there is more than one trustee, each trustee has fiduciary duties to use reasonable care to prevent another cotrustee from committing a breach of trust and to seek redress if a cotrustee commits a breach. C.R.S. § 15-5-703(7). Under the Colorado Uniform Directed Trust Act, the terms of the trust may relieve a cotrustee from these duties to the same extent that the terms of a directed trust may relieve the directed trustee from liability for acts of a trust director. C.R.S. § 15-16-812. Because a cotrustee or additional trustee is relieved from these duties only as provided by the terms of the trust or of the delegating instrument, the drafter should consider whether to include express language to that effect in the trust agreement or in the delegating instrument.

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

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

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

ARTICLE 8 – TRUSTEESHIP

See Appx A Note on Use A

8.1 ACCEPTING OR DECLINING TRUSTEESHIP:

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

See Note on Use 11A and Appx A Note on Use 2

8.2 DESIGNATION OF ADDITIONAL TRUSTEE: If for any reason my trustee is unwilling or unable to act as to any property of any trust hereunder, or with respect to any provision of my will, my trustee may designate in writing an individual or bank or trust company to serve as additional trustee as to such property or with respect to such provision, and may revoke any such designation at will. Each additional trustee so serving shall exercise all fiduciary powers granted by my will unless expressly limited by my trustee in the instrument designating such additional trustee. Unless otherwise provided in the designating instrument, any additional trustee so designated may resign at any time ~~by giving written notice to my trustee in accordance with the provisions of paragraph 8.6 (Resignation) of this article.~~

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

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

See Appx A Note on Use 22A

8.5 RESIGNATION: Any trustee may resign:

- a) By giving **at least thirty days'** written notice to (i) my personal representative, if acting, (ii) the **qualified beneficiaries**, and (iii) **all other acting trustees, effective upon acceptance of appointment by a successor trustee if this instrument requires a successor trustee; or**
- b) **With the approval of the court.**

See Appx A Note on Use.22

8.6 REMOVAL OF TRUSTEE: Any trustee may be removed, without cause, by my spouse, or if my spouse is deceased or incapacitated, by a majority of the **qualified** beneficiaries by giving written notice to such trustee and to any other trustee then serving, effective in accordance with the provisions of the notice.

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

ARTICLE 9 – ADMINISTRATIVE PROVISIONS

9.1 COURT PROCEEDINGS: Any trust established under this instrument shall be administered in a timely and efficient manner consistent with its terms, free of active judicial intervention and without order, approval, or other action by any court. It shall be subject only to the jurisdiction of a court being invoked by the trustees or other interested parties or as otherwise provided by law.

See Appx A Note on Use 17A

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

See Appx A Note on Use 3A

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

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

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

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

* * *

9.9 REPRESENTATIVE OF BENEFICIARY: The conservator of the estate or, if none, * * *

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

See Note on Use 11A and Appx A Note on Use 2

9.10 MAJORITY CONTROL:

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

9.11 DELEGATION:

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

fiduciary relative to the fact and extent of such delegation.

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

9.13 RELEASE OF POWERS: Any fiduciary may release in whole or in part, temporarily or permanently, any power, authority, or discretion conferred by my will or trust by a writing delivered to any cofiduciary and to each beneficiary then eligible to receive income distributions from any trust or, if none, to all ascertainable beneficiaries. Such renunciation or release * * *

~~9.14 REPORTS: My trustee shall report no less frequently than annually to all adult beneficiaries and to the parents of any minor beneficiaries then eligible to receive current income, all the receipts, disbursements, and distributions during the reporting period, and property then held as the principal of the trust. The records of the trust shall be open at all reasonable times to the inspection of the beneficiaries of the trust and their representatives.~~

9.14 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

- a) My trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.
- b) Within sixty days after accepting the trusteeship, my trustee shall notify the qualified beneficiaries of:
 - i) My identity as settlor of the trust;
 - ii) The existence of the trust;
 - iii) My trustee's acceptance of the trust;
 - iv) My trustee's name, address, and telephone number;
 - v) Their right to request portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest; and
 - vi) Their right to request reports as provided in **paragraph 9.15 (Trustee's Duties to Report and to Respond)** of this article.
- c) My trustee shall notify the qualified beneficiaries in advance of any change in the method or rate of my trustee's compensation.

9.15 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

- a) At least annually and at the termination of the trust, my trustee shall send to the distributees or permissive distributees of the trust's income or principal, and to other qualified beneficiaries who request it, a report containing:
 - i) A list of the assets comprising the property of the trust, and if feasible, their respective market values;
 - ii) The liabilities of the trust, if any;
 - iii) The trust's receipts and disbursements during the period covered by the report; and
 - iv) The amount and source of my trustee's compensation.
- b) If no cotrustee remains in office upon the occurrence of a vacancy in the trusteeship, my former trustee shall send a report as described in **paragraph 9.15(a)** of this article to the qualified beneficiaries. Should my former trustee be deceased or incapacitated, my former trustee's legal representative may send the report.
- c) Upon request of a qualified beneficiary, my trustee shall:
 - i) Respond promptly with information related to the administration of the trust, unless unreasonable under the circumstances; and
 - ii) Furnish promptly a copy of the portions of the trust provisions of my will that describe or affect the requesting beneficiary's interest.

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

* * *

ARTICLE 10 – TAX PROVISIONS

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

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

ARTICLE 11 – GENERAL PROVISIONS

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

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

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

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

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

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

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

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

11.9 OTHER DEFINITIONS: Except as otherwise provided in this instrument, terms are 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 ~~and after my death~~.

See Appx A Note on Use 20A

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

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

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

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

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

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

NOTES ON USE

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

* * *

- 10) Treas. Reg. § 25.2518-2(e)(2) provides that a disclaimer by a surviving spouse with respect to property in which he/she retains the right to direct beneficial enjoyment (*i.e.*, by exercise of a nongeneral power of appointment) will not qualify as a qualified disclaimer unless the power is limited by an ascertainable standard. Since the nongeneral power of appointment provisions in paragraph 5.2 are not limited by ascertainable standards, paragraph 5.3 creates a subaccount to receive property disclaimed from the Marital Trust to which the power of appointment provisions of paragraph 5.2 do not apply.
- 11) The client's preference regarding contingent beneficiaries should be determined. You may wish to encourage clients to consider gifts to charity. *See* Note on Use 21, General and Administrative Provisions (Appendix A).
- 11A) Generally, any time there is more than one trustee, each trustee has fiduciary duties to use reasonable care to prevent a another cotrustee from committing a breach of trust and to seek redress if a cotrustee commits a breach. C.R.S. § 15-5-703(7). Under the Colorado Uniform Directed Trust Act, the terms of the trust may relieve a cotrustee from these duties to the same extent that the terms of a directed trust may relieve the directed trustee from liability for acts of a trust director. C.R.S. § 15-16-812. Because a cotrustee or additional trustee is relieved from these duties only as provided by the terms of the will or of the delegating instrument, the drafter should consider whether to include express language to that effect in the will or in the delegating instrument.
- 12) The trust provided for under this paragraph is a pure discretionary trust. The trustee's discretion to make distributions is complete and absolute, and not limited by the ascertainable standards of health, education, support, or maintenance. Requiring the trustee to fulfill the beneficiary's health and support needs would jeopardize the beneficiary's qualification for public assistance. *See* Note on Use 8.

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

Darla Daniel:

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

To be introduced on 1/6/2021.

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

- a). Any property of the trust over which the trustee is unable or unwilling to act (such as real property located in another state or jurisdiction), or
- b) Any provision of the will or trust which the trustee is unable or unwilling to carry out (such as a trustee who is concerned about a possible conflict of interest between the trustee's fiduciary and personal interests).

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

From: [Frank Hill](#)
To: [Melissa Anderson](#); [Steve Brainerd](#); [Darla Daniel](#); [Connie Eyster](#); [Corina Gerety](#); [Lisa Hardin](#); [Richard Hess](#); [Stan Kent](#); [Alison Leary](#); [Marianne Luu-Chen](#); [Julie McVey](#); [Kevin Millard](#); [Carl Stevens](#); [Jacob Tonda](#); [Tony Vaida](#); [Kirsten Waldrip](#); [Sonny Wiegand](#); [Carolyn Wiley](#); [Gene Zuspahn](#)
Cc: [Hayley Lambourn](#); [Dave Kirch](#)
Subject: ADDENDUM: OBF CUTC Revisions Subcomm Mtg 4/7/21
Date: Monday, April 5, 2021 10:27:00 AM
Attachments: [2021 04 05 Page 69 Appx A - Gen Adm Prov w kdm change-20210405-.pdf](#)

Folks,

Kevin's email to me and my status report "crossed in the mails." So, attached please find his 4-5-2021 contribution regarding his Note on Use discussed more fully in my 4-5-2021 Status Report.

And by way of explanation, in his transmittal email he makes the following comments:

I have looked back at your prior emails and my draft of the note on use dealing with the duty of trustees to monitor each other and the possibility of modifying that duty. I don't think that my note on use is inconsistent with the other existing notes on use, but **I think it needs to be a general note to the trusteeship article, Rather than a note referring to any specific section of that article, because the note on use is relevant any time there is more than one trustee, no matter how the multiple trustee situation came to be.** I did modify the wording slightly at the end, because it originally referred to "this paragraph" and should I think refer to either the trust agreement or the will. This slightly revised version is attached.

Respectfully submitted,

Frank Hill

Frank T. Hill

170 N. Oak Street, Apt 223

Gilbert, AZ 85233-5449

Phone: 303.517.8447

fhill.com@outlook.com

NOTES ON USE

- A) **ACCEPTING OR DECLINING TRUSTEESHIP:** The Colorado Uniform Trust Code (C.R.S. § 15-5-701) contains the default for acceptance of the trusteeship. The terms of the trust may specify different method(s) to accept or decline. However, if a method to accept or decline is intended to be exclusive, it must be expressed in language manifesting the intent that the acceptance or declination may not be by any other method (e.g., “sole,” “exclusive,” “only”).
- 1) **ADOPTED CHILDREN:** Consider appropriateness of this provision concerning children adopted by descendants, or consider appropriateness of a substitute provision concerning children relinquished by a family member for adoption by strangers. The client’s intent should be ascertained in those areas because of the legal and social changes in adoption procedures. *See* C.R.S. § 15-11-114(2).
- 2) **APPOINTMENT DESIGNATION OF ~~COTRUSTEE OR SUBSTITUTE~~ ADDITIONAL TRUSTEE:** The practitioner should consider the inclusion of the ~~substitute~~ **additional** trustee provision to provide flexibility in handling assets of the trust that require special expertise in handling, such as oil and gas leases or other mineral interests. A clause which allows the appointment of ~~a substitute~~ **an additional** trustee would also be useful in the case where trust assets include environmentally tainted real property. Many corporate trustees and individual trustees will refuse to accept the appointment as trustee if they must hold real property which may be subject to EPA action. A clause allowing ~~a substitute~~ **an additional** trustee to hold the tainted assets or the appointment of ~~a substitute~~ **an additional** trustee to hold the non-tainted assets may be helpful in persuading reluctant trustees.

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

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

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

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

- 6) DELEGATION and MAJORITY CONTROL: The practitioner should note that common law requires a unanimous vote of cotrustees. The Majority Controls and Delegation clauses are offered for the practitioner’s consideration to promote efficiency in handling conflicts between fiduciaries. This approach is contrary to common law and the inclusion of these provisions should only be made after due consideration of the overall effect. To develop an understanding of matters of liability of the delegating fiduciary, see C.R.S. § 15-12-717, and *Scott on Trusts*, §§ 171-171.4, 194, and 224.2.
- 7) DISTRIBUTION ALTERNATIVES and REPRESENTATIVE OF BENEFICIARY. In cases of dissolution of marriage, your client may wish to have “Distribution Alternatives” and “Representative of Beneficiary” modified to specifically exclude a former spouse.
- 8) DISTRIBUTION TO INCAPACITATED PERSONS OR PERSONS UNDER TWENTY-ONE: This provision permits a fiduciary to retain in trust the share of a beneficiary which would otherwise be distributable to the beneficiary but for the beneficiary’s perceived inability to manage such distribution effectively due to lack of capacity brought about by the beneficiary’s incapacity or minority. While such a trust is in effect, the trustee’s discretion is not governed by the ascertainable standards of health, education, support, or maintenance, but rather all such distributions, if any, are within the trustee’s absolute discretion. This absence of ascertainable standards was chosen so as not to jeopardize a beneficiary’s ability to qualify for public assistance and other benefits. In any event, even the presence of ascertainable standards specifying and limiting the purposes of distributions to the beneficiary would not shield a trustee who owed the beneficiary a legal obligation of support from exposure to the possible adverse tax consequences of being an interested trustee. *See* Note on Use 17.
- 9) DISTRIBUTIONS FREE FROM TRUST: This paragraph eliminates the perceived necessity of funding a trust just to distribute it when the event triggering such distribution (for example, the beneficiary reaching an attained age) may have already occurred.
- 10) EDUCATION: This paragraph defines the term “education.” The committee considers inclusion of a provision defining education to be optional with the drafter, while generally desirable. At least one professional fiduciary has commented favorably on the additional clarity such a definition brings to administration of trusts. The focus of the form is a settlor who might prefer more latitude in the exercise of discretion by the trustee — a settlor who would expect the trustee to look favorably upon requests by beneficiaries for reimbursement

INFORMATION SO THAT THE BENEFICIARY OR REPRESENTATIVE KNOWS OF THE POTENTIAL CLAIM OR SHOULD HAVE INQUIRED INTO ITS EXISTENCE.

(3) IF SUBSECTION (1) OF THIS SECTION DOES NOT APPLY, A JUDICIAL PROCEEDING BY A BENEFICIARY AGAINST A TRUSTEE FOR BREACH OF TRUST MUST BE COMMENCED WITHIN THREE YEARS AFTER THE FIRST TO OCCUR OF:

- (a) THE REMOVAL OR RESIGNATION OF THE TRUSTEE;
- (b) THE TERMINATION OF THE BENEFICIARY'S INTEREST IN THE TRUST; OR
- (c) THE TERMINATION OF THE TRUST.

(4) FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, A BENEFICIARY IS DEEMED TO HAVE BEEN SENT A REPORT IF:

- (a) IN THE CASE OF A BENEFICIARY HAVING CAPACITY, IT IS SENT TO THE BENEFICIARY; OR
- (b) IN THE CASE OF A BENEFICIARY WHO, PURSUANT TO PART 3 OF THIS ARTICLE 5, MAY BE REPRESENTED AND BOUND BY ANOTHER PERSON, IT IS SENT TO THE OTHER PERSON.

(5) THIS SECTION DOES NOT PRECLUDE AN ACTION TO RECOVER FOR FRAUD OR MISREPRESENTATION RELATED TO THE REPORT.

15-5-1006. Reliance on trust instrument. A TRUSTEE WHO ACTS IN REASONABLE RELIANCE ON THE TERMS OF THE TRUST IS NOT LIABLE TO A BENEFICIARY FOR A BREACH OF TRUST TO THE EXTENT THE BREACH RESULTED FROM THE RELIANCE.

15-5-1007. Event affecting administration or distribution. IF THE HAPPENING OF AN EVENT, INCLUDING MARRIAGE, DIVORCE, PERFORMANCE OF EDUCATIONAL REQUIREMENTS, OR DEATH, AFFECTS THE ADMINISTRATION OR DISTRIBUTION OF A TRUST, A TRUSTEE WHO HAS EXERCISED REASONABLE CARE TO ASCERTAIN THE HAPPENING OF THE EVENT IS NOT LIABLE FOR A LOSS RESULTING FROM THE TRUSTEE'S LACK OF KNOWLEDGE.

15-5-1008. Exculpation of trustee. (1) A TERM OF A TRUST

RELIEVING A TRUSTEE OF LIABILITY FOR BREACH OF TRUST IS UNENFORCEABLE TO THE EXTENT THAT IT:

(a) RELIEVES THE TRUSTEE OF LIABILITY FOR BREACH OF TRUST COMMITTED IN BAD FAITH OR WITH RECKLESS INDIFFERENCE TO THE PURPOSES OF THE TRUST OR THE INTERESTS OF THE BENEFICIARIES; OR

(b) WAS INSERTED AS THE RESULT OF AN ABUSE BY THE TRUSTEE OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE SETTLOR.

(2) AN EXCULPATORY TERM DRAFTED OR CAUSED TO BE DRAFTED BY THE TRUSTEE IS INVALID AS AN ABUSE OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP UNLESS THE TRUSTEE PROVES THAT THE EXCULPATORY TERM IS FAIR UNDER THE CIRCUMSTANCES AND THAT ITS EXISTENCE AND CONTENTS WERE ADEQUATELY COMMUNICATED TO THE SETTLOR.

15-5-1009. Beneficiary's consent, release, or ratification. (1) A TRUSTEE IS NOT LIABLE TO A BENEFICIARY FOR BREACH OF TRUST IF THE BENEFICIARY CONSENTED TO THE CONDUCT CONSTITUTING THE BREACH, RELEASED THE TRUSTEE FROM LIABILITY FOR THE BREACH, OR RATIFIED THE TRANSACTION CONSTITUTING THE BREACH, UNLESS:

(a) THE CONSENT, RELEASE, OR RATIFICATION OF THE BENEFICIARY WAS INDUCED BY IMPROPER CONDUCT OF THE TRUSTEE; OR

(b) AT THE TIME OF THE CONSENT, RELEASE, OR RATIFICATION, THE BENEFICIARY DID NOT KNOW OF THE BENEFICIARY'S RIGHTS OR OF THE MATERIAL FACTS RELATING TO THE BREACH.

15-5-1010. Limitation on personal liability of trustee. (1) EXCEPT AS OTHERWISE PROVIDED IN THE CONTRACT, A TRUSTEE IS NOT PERSONALLY LIABLE ON A CONTRACT PROPERLY ENTERED INTO IN THE TRUSTEE'S FIDUCIARY CAPACITY IN THE COURSE OF ADMINISTERING THE TRUST IF THE TRUSTEE IN THE CONTRACT DISCLOSED THE FIDUCIARY CAPACITY.

(2) A TRUSTEE IS PERSONALLY LIABLE FOR TORTS COMMITTED IN THE COURSE OF ADMINISTERING A TRUST, OR FOR OBLIGATIONS ARISING FROM OWNERSHIP OR CONTROL OF TRUST PROPERTY, INCLUDING LIABILITY FOR VIOLATION OF ENVIRONMENTAL LAW, ONLY IF THE TRUSTEE IS PERSONALLY AT FAULT.

(3) A CLAIM BASED ON A CONTRACT ENTERED INTO BY A TRUSTEE IN THE TRUSTEE'S FIDUCIARY CAPACITY, ON AN OBLIGATION ARISING FROM OWNERSHIP OR CONTROL OF TRUST PROPERTY, OR ON A TORT COMMITTED IN THE COURSE OF ADMINISTERING A TRUST, MAY BE ASSERTED IN A JUDICIAL PROCEEDING AGAINST THE TRUSTEE IN THE TRUSTEE'S FIDUCIARY CAPACITY, WHETHER OR NOT THE TRUSTEE IS PERSONALLY LIABLE FOR THE CLAIM.

(4) THE QUESTION OF LIABILITY AS BETWEEN THE TRUST ESTATE AND THE TRUSTEE INDIVIDUALLY MAY BE DETERMINED:

(a) IN A PROCEEDING PURSUANT TO SECTION 15-10-504;

(b) IN A PROCEEDING FOR ACCOUNTING, SURCHARGE, INDEMNIFICATION, SANCTIONS, OR REMOVAL; OR

(c) IN OTHER APPROPRIATE PROCEEDINGS.

(5) A TRUSTEE IS NOT PERSONALLY LIABLE FOR MAKING A DISTRIBUTION OF PROPERTY THAT DOES NOT TAKE INTO CONSIDERATION THE POSSIBLE BIRTH OF A POSTHUMOUSLY CONCEIVED CHILD UNLESS, PRIOR TO THE DISTRIBUTION, THE TRUSTEE RECEIVED NOTICE OR ACQUIRED ACTUAL KNOWLEDGE THAT:

(a) THERE IS OR MAY BE AN INTENTION TO USE AN INDIVIDUAL'S GENETIC MATERIAL TO CREATE A CHILD; AND

(b) THE BIRTH OF THE CHILD COULD AFFECT THE DISTRIBUTION OF THE TRUST ASSETS.

(6) IF A TRUSTEE HAS REVIEWED THE RECORDS OF THE COUNTY CLERK AND RECORDER IN EVERY COUNTY IN COLORADO IN WHICH THE TRUSTEE HAS ACTUAL KNOWLEDGE THAT THE DECEDENT WAS DOMICILED AT ANY TIME DURING THE THREE YEARS PRIOR TO THE DECEDENT'S DEATH AND THE TRUSTEE DOES NOT HAVE ACTUAL NOTICE OR ACTUAL KNOWLEDGE OF THE EXISTENCE OF A VALID, UNREVOKED DESIGNATED BENEFICIARY AGREEMENT IN WHICH THE DECEDENT GRANTED THE RIGHT OF INTESTATE SUCCESSION, THE TRUSTEE IS NOT INDIVIDUALLY LIABLE FOR DISTRIBUTIONS MADE TO DEVISEES OR HEIRS AT LAW THAT DO NOT TAKE INTO CONSIDERATION THE DESIGNATED BENEFICIARY AGREEMENT.