

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 1/4/22 Status Report: OBFC CUTC Revisions Subcommittee
Date: Tuesday, January 4, 2022 11:03:00 AM
Attachments: [\[Edited Final\] Desig of Additional Trustee_JGM \(2021-11-01\).pdf](#)
[\[Extract\] Desig of Additional Trustee \[14.3 8.2\]_Com \(2021-12-01\).pdf](#)
[Deadlock NoU \[15.8 9.10\]_CTE \(2021-12-01\).docx](#)
[\[Extract\] Majority Control \[15.8 9.10\] \(as of 2021-10-29\).pdf](#)
[Single Sig \[15.8 9.10\]_RWII \(2021-03-03\).docx](#)
[Single Sig \[15.8 9.10\]_EPZ \(2021-04-07\).docx](#)
[Single Sig \[15.8 9.10\]_CTE \(2021-12-01\).docx](#)
[Single Sig \[15.8 9.10\]_JGM \(2021-12-27\).docx](#)
[Exoneration \[Rev Tst 14.4\]-WIP \(as of 2021-12-01\).pdf](#)
[Rep of Beneficiary \[15.7 9.9\]_MLC \(2021-12-01\).docx](#)
[Trust Situs \[none yet\]_CTE \(2021-12-01\).docx](#)
[Trust Situs \[none yet\]_JGM \(2021-12-02\).docx](#)

Dear Colleagues,

Our next meeting will be held (virtually) on **Wednesday, January 5th, 2022, 10:00-11:30 AM**. This report covers actions of our subcommittee during our last meeting on 12/1/21 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 [\[Edited Final\] Desig of Additional Trustee_JGM \(2021-11-10\).pdf](#), [\[Extract\] Desig of Additional Trustee \[14.3 8.2\]_Com \(2021-12-01\).pdf](#), [Deadlock NoU \[15.8 9.10\]_CTE \(2021-12-01\).docx](#), [\[Extract\] Majority Control \[15.8 9.10\] \(as of 2021-10-29\).pdf](#), [Single Sig \[15.8 9.10\]_RWII \(2021-03-03\).docx](#), [Single Sig \[15.8 9.10\]_EPZ \(2021-04-07\).docx](#), [Single Sig \[15.8 9.10\]_CTE \(2021-12-01\).docx](#), [Single Sig \[15.8 9.10\]_JGM \(2021-12-27\).docx](#), [Exoneration \[Rev Tst 14.4\]-WIP \(as of 2021-12-01\).pdf](#), [Rep of Beneficiary \[15.7 9.9\]_MLC \(2021-12-01\).docx](#), [Trust Situs \[none yet\]_CTE \(2021-12-01\).docx](#), and [Trust Situs \[none yet\]_JGM \(2021-12-02\).docx](#) on which I comment below. You should consider using a color printer to print some of them out.

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

BLACK typeface = **original 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.

First of all, I hope that none of you, nor any of your loved ones were touched by the wildfire tragedy

that befell many of the residents of Superior and Louisville at the end of last week. If you were, my heart sincerely goes out to you. The pictures which I saw of the fire and its aftermath look devastating beyond belief. I just cannot fathom the magnitude of the loss.

Also, I apologize for the tardiness of this Status Report. Perhaps like many of you, yours truly, too, got sucked into the vortex of holiday chaos. As a result, my good intentions to get this all done before that set in didn't pan out. So, unfortunately, I am writing this only a few hours before you see it, and most of what I say in it is based upon my faulty memory and sketchy notes of our last meeting held *more than a month ago*. Please bear with me and don't hold back if you wish to point out any misstatements of fact that may follow.

If you will recall, we didn't have sufficient participation of our subcommittee members during our November (11/3//21) meeting to enable us to make any decisions, though the discussion among those of us in attendance was stimulating. As a result, we were able, however, to lay the groundwork for some relatively expeditious action on some of our open issues during our December (12/1/21) meeting.

Old Stuff ...

Designation of Additional Trustee 14.3 & 8.2 [Form Text and Julie's (Kevin's & Darla's) Note on Use]:

By way of background, Julie had been working for several months to combine and finalize two separate Notes on Use for this provision which had originally been offered by Kevin and Darla. During our 12/1/21 meeting, after discussion, **we approved** her final draft, *Desig of Additional Trustee_JGM (2021-11-01).pdf*, which had been attached to my 11/28/21 Status Report.

In addition, yours truly had prepared an Editor's Version of Julie's final draft which made no substantive changes to Julie's final draft. So, again, during our 12/1/21 meeting, **we approved** that Editor's Version, *[Edited] Desig of Additional Trustee_JGM (2021-11-10).pdf*, which also had been attached to my 11/28/21 Status Report. So, our final approved version of this Note on Use now appears as Note on Use 2) in, *[Edited Final] Desig of Additional Trustee_JGM (2021-11-10).pdf*, attached.

Finally, even though we had hashed out the text of ¶¶ 14.3 & 8.2 many months ago, Julie's work and submissions got some of us to thinking that, now that a really thorough explanatory Note on Use is in place, perhaps a little surgery on our previously approved text was merited. So, at Gene's suggestion, and after discussion, **we decided** to delete the last sentence of the text of the paragraphs. See, *[Extract] Desig of Additional Trustee [14.3 8.2]_Com (2021-12-01).pdf*, attached.

Majority Control 15.8 & 9.10:

The "Two-Trustee Impasse" Issue

After struggling for several months with this issue and considering a couple of Tony's offerings of a

suggested Note on Use to address it, after discussion, **we decided** that we wanted a Note on Use but that we didn't want it to proffer any particular suggested "drop-in" provision – just raise the issue and suggest some possible solutions (most of which would probably require further research, like inserting a Trust Protector). But we generally liked where Tony was headed with the substance of his suggestions, mediation, perhaps followed by arbitration. In Tony's absence, Connie volunteered to pick up where Tony had left off and give it a go at finishing it off. See Connie's offering, [Deadlock NoU \[15.8 9.10\]_CTE \(2021-12-01\).docx](#), attached.

The "One Signature" Issue

During our 11/3/21 meeting, the few of us who were in attendance really hashed out the "pros" and "cons" of including such a provision and the administrative difficulties likely to be involved. See, [\[Extract\] Majority Control \[15.8 9.10\] \(as of 2021-10-29\).pdf](#), attached. 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.

However, **during our 12/1/21 meeting** with more of our number in attendance, the wind on this issue shifted dramatically, and it appeared that most participants felt strongly that this issue *should* be addressed in our OBF forms. So, rather than wanting to see the deletion of ¶¶ 15.8(b) and 9.10(b) of the Extracts, some members have submitted alternatives for our consideration. Hopefully, together we can find middle ground between what sounded like "doomsday envisioned" on 11/3/21 and the ease of administration envisioned on 12/1/21. See offerings from Sonny, Gene, Connie, and Julie, respectively, [Single Sig \[15.8 9.10\]_RWII \(2021-03-03\).docx](#), [Single Sig \[15.8 9.10\]_EPZ \(2021-04-07\).docx](#), [Single Sig \[15.8 9.10\]_CTE \(2021-12-01\).docx](#), and [Single Sig \[15.8 9.10\]_JGM \(2021-12-27\).docx](#), attached.

And please bear in mind, that this is not only an issue for cotrustees under a trust agreement, but also an issue under a will for the personal corepresentatives, and for cotrustees of a trust created under it.

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 April (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]. 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.

During our 12/1/21 meeting, after review and discussion, **we approved** Carolyn's final drafts, 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, all of which had been attached to my 11/28/21 Status Report.

Following our approval, Carolyn asked for a little assistance with some minor editing (not substantive revisions) and I offered to do that as I had done for Julie's Note on Use. However, due to the poor planning on my part alluded to at the beginning of this report, I was unable to get that done in time to have them for this Status Report. I apologize and will have to include them in my *next* Status Report (after first sending them to Carolyn for her approval).

Exoneration of Trustee 14.4 & 8.3:

(The historical background of our consideration and deliberations over this provision is best laid out in my 11/28/21 Status Report. Considerations of space and your patience tell me that I should not repeat all that here. Those interested may refer to that Status Report to see how we got here.

Once again, we discussed Gene's reformatted version, Exoneration [Rev Tst 14.4]-EPZ (2021-09-10).pdf, attached to my 11/28/21 Status Report, of Carl's earlier single-paragraph version. We determined that a close reading subparagraph (b) yielded the conclusion that it was meant to include former trustees *and* current trustees. In view of that determination, the subparagraph title should be revised to remove the limiting phrase, "by a Former Trustee," and references to "such" or "a former trustee" should be removed and replaced with simply "that trustee."

We also determined that the phrase in subparagraph (c), "or from their guardians or conservators," should be deleted as separately addressed in both the rev tst and the will under ¶¶ 15.7 & 9.9, *Representative of Beneficiary*. (But see below for more on those two paragraphs.)

Lastly, during our 11/3/21 meeting, Carl suggested that the offering would be a lot more readable if the statutory references were removed from the text of the form's provision and placed instead into a Note on Use, which he graciously volunteered to draft.

See the current WIP status of this provision in [Exoneration \[Rev Tst 14.4\]-WIP \(as of 2021-12-01\).pdf](#), attached.

New Stuff ...

Representative of Beneficiary 15.7 & 9.9: While it seemed to be our consensus that these two old provisions ¶¶ 15.7 & 9.9, *Representative of Beneficiary* were sufficient to support the deletion of "or from their guardians or conservators" from the *Exoneration* provision (explained above), Marianne Luu-Chen opined that the text of the two provisions should be expanded to include a beneficiary's

agent under a power of attorney, and generally updated in the light of experience, legislative developments, and litigation on the topic over the last thirty-five years or so since the provision was first included in the OBFs. Accordingly, she has provided [Rep of Beneficiary \[15.7 9.9\]_MLC \(2021-12-01\).docx](#), attached, for our consideration.

TRUST SITUS: Brought to our attention by a recent *Colorado Lawyer* article, “Selecting a Trust Situs”.pdf, which had been attached to my 11/28/21 Status Report, CUTC § 5-108(3) places an *ongoing duty* on a trustee to consider appropriateness of trust situs. After discussion and noting that OBFs only give trust situs a cursory glance in the *Applicable Law* provisions, ¶¶ 16.2 & 11.2, we decided to consider placing a new numbered paragraph in the OBFs to address CUTC’s direction to trustees to be mindful of the ongoing importance of considering trust situs. Connie and Julie have provided some language for our consideration. See, [Trust Situs \[none yet\]_CTE \(2021-12-01\).docx](#) and [Trust Situs \[none yet\]_JGM \(2021-12-02\).docx](#), 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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