

MEMORANDUM

From: Frank Hill
To: OBF CUTC Revisions Subcommittee
Subject: Chair's 11-7-2023 Status Report

This report covers actions of our subcommittee taken during our last (virtual) meeting on 10/11/2023, as well as revisions made and contributions received in preparation for our next (virtual) meeting on 11/8/2023.

Trust Amendments

We previously agreed during our September mtg that:

**Settlor may amend this agreement at any time, in whole or in part, by a signed writing.
Trustee is not bound by an amendment until the amendment is delivered to trustee.**

Now we had to put that concept into practice by amending/revising the existing ¶¶ 2.5 & 2.6. So we looked at 2.5-2.6 Remove-Amend-Revoke_WIP (2023-10-08).docx which had been distributed with the Chair's 10-9-2023 Status Report.

Discussion focused on two items:

1. In ¶ 2.5, *Trust Additions and Removals*, in the second sentence regarding removal, Michelle thought that the requirement that the writing be "signed" should be dropped. She felt that settlors should be able to direct trustees to distribute funds or remove something from the trust *informally* by phone call, text, or email, and that requiring a *signed* writing giving that direction was cumbersome and unnecessary. (Much discussion ensued on this point including whether we might run afoul of the Statute of Frauds.) [Other than this issue, the proposed revision to 2.5 seemed to be OK with everyone.]

As this seemingly endless discussion wore on without reaching a resolution, Mike reminded us that OBFs always take the conservative (safe) approach [advocating "best practices"], and that we probably should stick with the conservative approach and leave it to individual practitioners (perhaps in consultation with the trust officer) to elect to include the "informal" approach in their document for a particular client.

2. In 2.6, *Amendment and Revocation*, everyone seemed to like the revised (a) and (b). Big discussion then ensued on (c), focusing on whether it was needed at all. Marianne pointed out that in the rev tst's Art 5, *Specific Distributions on Settlor's Death*, the first provision is a specific direction to the trustee to distribute "settlor's" TPP in accordance with settlor's memorandum (after spouse). So why would we also need that direction again in 2.6(c)?

Carl pointed out that the purpose of 2.6(c) is to ensure that settlor's memorandum is regarded as a valid "amendment" of the trust agreement, and that this provision could be important to include `cause in other jurisdictions strict interpretation of the Doctrine of Independent Significance [Incorporation by Reference?] may cause a problem for the memorandum without it.

Someone else reminded us that the TPP we're talking about isn't the "settlor's" TPP but is rather "trust TPP" because it had been conveyed to the trust by Bill of Sale.

We decided to keep 2.6(c) primarily to protect the memorandum as a valid amendment of the trust agreement and avoid the Incorporation by Reference issue in other jurisdictions. We also felt it prudent to reference the writing as complying with the TPP memo statute. Marianne volunteered to take a crack at it.

Our latest iteration of our revised ¶¶ 2.5 and 2.6 is attached, including Marianne's new 2.6(c): see, [2.5-2.6 Remove-Amend-Revoke_WIP \(2023-11-06\).docx](#), and [CRS 15-11-513 \(2023\).pdf](#).

Remove, Amend, Revoke: “Sole” or “Exclusive” Method

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

During our 3/8/23 meeting, we revisited this issue and we decided to include a Note on Use discussing the issue and perhaps suggesting some language previously proffered by Mike, who graciously agreed to convert his 9-22-2022 submissions into a new Note on Use for these provisions which could be inserted into Appx A, Gen & Adm Prov. Bette graciously offered to collaborate with Mike on this project.

So we reviewed Mike and Bette’s Draft 3 (2023-09-15) which had been distributed as Sole-Exclusive NoU Draft 3_MDH BH (2023-09-15).docx, with the Chair’s 10-9-2023 Status Report.

General comments seemed to be that (i) it was unnecessary to reproduce sections of the statute in the NoU; summary and citations should probably suffice, (ii) it would probably be useful to include a citation to Turney Berry’s Heckerling article [if accessible (Michelle to check that out)]; and (iii) “Removal” should probably still be included as it was an appropriate part of Mike’s original proposal when first submitted back on 9-22-2022.

Mike said he would touch base with Bette on fine-tuning their submission.

SNT Conforming Amendments

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

Apparently, the offending boilerplate provisions are:

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

So for our June mtg, our SNT colleagues submitted a proposed draft aimed at the boilerplate provision *Distribution to Incapacitated Persons or Persons Under 21*, Draft Distrib To Incap Pers or Pers Under 21 NNS_05.09.2023.docx, which had been attached to my Chair’s 6/13/23 Status Report.

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

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

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

Nadia reported that in a recent mtg, the SNT Subcommittee had revised the distribution standard of ¶ 8.9 (Non-Public Assistance Beneficiary) from a HEMS standard, as originally submitted, back to the pure discretionary standard of the old original boilerplate (current OBF version). They also opted to

discuss the possible appropriateness of substituting a HEMS standard in an accompanying Note on Use. See their most recent version, [FINALDft Dist to Incap Pers or Pers Under 21 NNS_07.14.2023.docx](#), attached.

The Chair asked Nadia to remind the SNT Subcommittee that if they are revising Notes on Use as a result of their substantive work, they should not only be revising Note on Use 9 in Form 531, *but also*, the related Note on Use 8 in Appx A – General and Administrative Provisions.

Exoneration Loose End

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

Trustee’s Duty to Inquire: When Trustee Has NO Duty to Inquire

Like the provisions setting out the trustee’s duty to notify and the trustee’s duty to report, It had been suggested that the proper place for the provision setting out the trustee’s duty to inquire is in the *Administrative Provisions* articles of our will and trust forms rather than within a trust’s dispositive provisions.

However, despite the obvious practicality of relocating that provision, during our 9/13/23 mtg, some of our members pointed out the benefit to a trustee of leaving that requirement in the text of the dispositive provisions, because it makes it easier for a trustee to explain to a protesting beneficiary that the very terms of the provision describing their benefit requires the trustee to obtain their compliance. So, **we decided** to leave them where they are in the text of the dispositive provisions.

But **we** also **decided** to modernize the language of the provision (proffered by Marianne) to now read (in its numerous iterations):

Trustee must consider all circumstances relevant to the trust administration, such as (a) a beneficiary’s resources that are outside of the trust and are known to or readily ascertainable by the trustee and (b) a beneficiary’s failure to provide requested information.

But Michelle pointed out that there should be a new corresponding provision in the *Administrative Provisions* articles of our will and trust forms which would clearly relieve trustees of a duty to inquire where it is not specifically required. We concurred with the practicality of this idea. Michelle offered to put together a suggested provision for our consideration.

Trustee’s Duty to Inquire (Edit Note on Use)

We then reviewed the existing Note on Use accompanying the foregoing boilerplate provision, TEE’s Duty to Inquire NoU (2019-09-27) [Current].docx, which had been attached to the Chair’s 10-9-2023 Status Report. OBF Notes on Use are only supposed to be concise and succinct explanations of a provision, briefly helping practitioners understand the provision’s use, and perhaps provide a suggestion as to where they might turn for additional information.

Noting that the current version of this Note on Use merited significant trimming and editing, we looked at a revised version prepared by Jim Ingraham and Dan Rich a few years ago, in which they pared down the bloat, and bolstered the Colorado Uniform Prudent Investor Act and Colorado Principal and Income Act references, getting to the heart of the matter quickly. We reviewed the fruit of their collaboration, TEE’s

Duty to Inquire NoU (2018-06-19) [redline].docx, and TEE's Duty to Inquire NoU (2018-06-19) [clean].docx, which had been attached to the Chair's 10-9-2023 Status Report.

While we seemed to receive the clean version of their revision favorably, several comments indicated that we believed that it merited a little more fine-tuning:

- In the first paragraph, Michelle had some issues with the focus of the items gleaned from the statute. She said she would check it out and make a recommendation for possible "tweaking."
- In the second paragraph, we felt that the old opening phrase, "The committee believes that" should be deleted as superfluous. Also, in the last line, "definitely" should be stricken and "should" merited our reconsideration.
- Lastly, in the third paragraph, while acknowledging that this Note on Use was composed before the advent of CUTC, Carl pointed out that it said that the duty to inquire " ... only requires that the trustee act **reasonably**, while CUTC now requires that a trustee act in **good faith**."

Michelle and Carl agreed to collaborate on fine tuning Jim and Dan's clean version, [TEE's Duty to Inquire NoU \(2018-06-19\) \[clean\].docx](#) (again attached to this report) to address the issues we raised in our discussion.

Limitations on Interested Trustee • Provision & Note on Use

The Problem: In recent years there has been an alarming increase in creditors of individual trustees who are also a trust beneficiary successfully attaching trust assets. Solution: Trust asset protection requires tighter restrictions on the unfettered discretion of individual trustees who are also a trust beneficiary.

In 2017 a major article was published which drew attention to the rising frequency with which creditors of individual trustee/beneficiaries were able to successfully attach trust assets due to the lax restrictions over the exercise of the individual trustee's powers. See, Edwin P. Morrow III, "Ed Morrow: Asset Protection Dangers When a Beneficiary is Sole Trustee and Piercing the Third-Party, Beneficiary-Controlled, Irrevocable Trust," *LISI Asset Protection Planning Newsletter #339* (March 9, 2017), at <http://leimbergservices.com>. Copyright 2017 Leimberg Information Services, Inc. (LISI).

The Morrow article reviewed cases, analyzed usefulness of frequently included restrictions and recommended inclusion of *additional* frequently overlooked restrictions which recent cases indicated were lacking leading to unanticipated TRUST vulnerability to individual trustee/beneficiary creditor claims.

Much of the text of new subparagraph (b) is taken verbatim from the recommended additional provision in the Morrow article referred to above. *Jim Ingraham and Dan Rich have already obtained written permission from the publisher for CLE to include Leimberg's copyrighted text in the OBFs.*

See, [15.15-9.21 Limitations on Interested Trustee_WIP \(2018-06-19\).docx](#), attached.

Before considering the revision of the text proposed above, it would probably be best to read the explanation of the additional provision in the proposed revision to Appx A Note on Use 17. See, [Appx A NoU 17 Interested Trustee_WIP \(2018-06-19\).docx](#), attached.

Reorganize Administrative Articles

Between this week's meeting and that of next month, the Chair hopes to be able to distribute a proposal with charts suggesting that the administrative articles of our complex will and trust forms that have been cobbled together over many years now be rearranged in a more orderly fashion and organized in a more "parallel" structure, making comparison of administrative provisions between will and trust forms easier.

Older, Unfinished Business

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

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

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

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

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

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

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

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

“Professional Fiduciary” definition, and its Ramifications

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

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

Important Clean Up Needed for Consistency

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

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

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

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

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

In Future Months

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

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

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

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

Clean-Up #5: Plain English vs. Legalese:

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

Colo. Rev. Stat. § 15-11-513 Separate writing or memorandum identifying devise of certain types of tangible personal property (Colorado Revised Statutes (2023 Edition))

§ 15-11-513. Separate writing or memorandum identifying devise of certain types of tangible personal property

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing shall be either in the handwriting of the testator or be signed by the testator and shall describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

History:

L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995. L. 95: Entire section amended, p. 355, § 5, effective July 1.

Editor's Note:

This section is similar to former § 15-11-513 as it existed prior to 1995.

Case Note:

ANNOTATION

Law reviews. For article, "Estate Planning for Young Lawyers", see 14 Colo. Law. 53 (1985).

Handwritten list found in safe deposit box of deceased may be found to be a valid holographic codicil to will if signature and material provisions are in handwriting of deceased, but evidence must show the writing was executed with testamentary intent and evidence failed to make such showing since the list was undated and had no language indicating it was to operate as codicil. In the Estate of Harrington, 850 P.2d 158 (Colo. App. 1993).

If a contemplated post-will memorandum disposing of certain items of personal property is not in existence at the time of the decedent's death, the items of personal property sought to be transferred are limited to items of "tangible personal property", which could be disposed of by such memorandum. In the Estate of Sandstead, 897 P.2d 883 (Colo. App. 1995).

Colo. Rev. Stat. § 15-11-513 Separate writing or memorandum identifying devise of certain types of tangible personal property (Colorado Revised Statutes (2023 Edition))

Applied in Robinson v. Blake, 638 P.2d 809 (Colo. App. 1981).

Final - Article 8 – Paragraphs 8.8 and 8.9 Form 531 – July 2023

8.8 DISTRIBUTION TO DISABLED PERSONS. If any beneficiary to whom my personal representative is directed to distribute any share of my probate estate is either “disabled” as defined under the Social Security Act, 42 U.S.C. § 1382c(a)(3), or is receiving or eligible for means-tested government benefit program(s), including but not limited to Supplemental Security Income, Medicaid, or other state medical assistance program authorized under the federal Medicaid program, federal Social Security Disability Insurance, and any other similar program, my personal representative, acting as trustee, shall hold the beneficiary’s share in a supplemental needs trust under the provisions of this paragraph.

(a) While any trust is being held under this paragraph, my trustee may distribute to, or apply for the benefit of, the beneficiary for whom the trust is held such amounts of the net income or principal, or both, as my trustee, in my trustee’s sole and absolute discretion, determines advisable for the beneficiary’s benefit. Any undistributed net income may be added to principal from time to time in the discretion of my trustee. The beneficiary shall have no right to direct or compel any distribution from the trust. My trustee shall exercise its discretion in such a manner as to maximize medical or public assistance benefits, and shall not enter into any agreement with any representative of a medical or public assistance program or governmental entity which compromises such beneficiary’s continued care or eligibility for services in or from any public or private institution or facility. For purposes of determining the beneficiary’s eligibility for public benefits, no part of the principal or income of the trust shall be considered “available” to the beneficiary. My trustee’s discretion shall be binding on all persons, including any organization providing benefits to the beneficiary.

(b) If the beneficiary dies during the administration of this trust, my trustee shall distribute the remaining trust property to the beneficiary’s then-living descendants by representation, if any, or if none, to the then-living descendants by representation of that parent of the beneficiary who was a child of mine, or if none, to my then-living descendants by representation.

(c) If the supplemental needs trust as provided for in this paragraph would disqualify the beneficiary for public benefits, but a first-party supplemental needs trust would qualify the beneficiary for public benefits, then my trustee shall create a first-party supplemental needs trust for the beneficiary pursuant to 42 U.S.C. § 1396p(d)(4).

(d) Without limiting my trustee’s discretion, my trustee is authorized to distribute funds to a qualified account under the Achieving a Better Life Experience (ABLE) Act on behalf of the beneficiary, provided the beneficiary is an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions to the ABLE account shall be made in cash. Any

distribution to the ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by Section 529A(b)(6).

8.9 DISTRIBUTION TO PERSONS UNDER TWENTY-ONE (21) OR PERSONS UNABLE TO ADMINISTER DISTRIBUTIONS PROPERLY. If any beneficiary to whom my personal representative is directed to distribute any share of my probate estate does not qualify for the trust in paragraph 8.8 (Distribution to Disabled Persons), and is under the age of twenty-one (21) years or is, in the opinion of my personal representative, unable to administer distributions properly when the distribution is to be made, my personal representative, in its sole and absolute discretion, acting as trustee, may hold such beneficiary's share as a separate trust.

a) A beneficiary who is "unable to administer distributions properly" includes, but is not limited to, a beneficiary experiencing addiction, dependency, substance abuse, a pending divorce, a potential financial difficulty, pending or threatened litigation, a serious tax disadvantage, or similar substantial issue affecting the beneficiary who otherwise would be entitled to the distribution.

b) While any trust is being held under this paragraph, my trustee may distribute to, or apply for the benefit of, the beneficiary for whom the trust is held such amounts of the net income or principal, or both, as my trustee may determine in its sole and absolute discretion. Any undistributed net income may be added to principal from time to time in the discretion of my trustee.

c) When the beneficiary reaches the age of twenty-one (21) or in the sole and absolute discretion of the trustee becomes able to administer distributions properly, my trustee shall distribute the trust assets to the beneficiary.

d) If the beneficiary dies during the administration of this trust, my trustee shall distribute the trust, including any accrued and undistributed net income, to the persons the beneficiary may appoint by their will. The will may be made either before or after my death, making specific reference to this power, and shall be admitted to probate in a formal or informal proceeding. This power may not be exercised in favor of the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate. To the extent this nongeneral power of appointment is not exercised, on the death of the beneficiary, the trust property shall be distributed to the beneficiary's then-living descendants by representation, or, if none, to the then-living descendants by representation of that parent of the beneficiary who was a child of mine, or, if none, to my then-living descendants by representation.

NOTE ON USE

Age of 21 – The Orange Book uses the age of twenty-one (21) in this paragraph because that is the age that the following protections for minors terminate: conservatorship under C.R.S. § 15-14-431(1), guardianship under C.R.S. § 15-14-210(1), and Colorado Uniform Transfers to Minors Act under C.R.S. § 11-50-121(1)(a). If the client would prefer the age of eighteen (18), which is the age of majority in Colorado, practitioner can substitute that in all places where it appears in this paragraph.

NOTES ON USE

- 2) Both the Colorado Uniform Prudent Investor Act, C.R.S. § 15-1.1-102(c), and the Colorado Principal and Income Act, C.R.S. § 15-1-404(2), impose a duty on the trustee to consider (i) other resources of the beneficiaries, (ii) the purposes of the trust regarding one or more of the beneficiaries, (iii) beneficiaries' income, (iv) tax consequences, and (v) any other issue that is reasonably suited to carry out the purposes of the trust. This supports the conclusion that there is a duty imposed on the trustee to “know your beneficiary.”

The committee believes that it is appropriate for documents to require the trustee to inquire into the circumstances of the beneficiaries. Waiving the duty should be done only after considerable thought and a discussion with the client, on a case by case basis, if at all, and definitely should not be adopted as a wholesale, standard practice.

The trustee's duty to consider outside circumstances and resources does not deprive the trustee of discretion as to the appropriate weight (including none) that the trustee may choose to assign to a particular beneficiary's circumstances. The duty to inquire into and consider circumstances does not set a specific standard of conduct for trustees as to the extent of inquiry, but instead only requires that the trustee act reasonably.

ARTICLE 14 - TRUSTEESHIP

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

See Appx A Note on Use A

14.2 ACCEPTING OR DECLINING TRUSTEESHIP:

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

See Appx A Note on Use 2

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

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

See Appx A Note on Use ????

14.4 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

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

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

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

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

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

See Appx A Note on Use 22A

14.6 RESIGNATION: A trustee may resign:

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

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

See Appx A Note on Use.22

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

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

ARTICLE 15 - ADMINISTRATIVE PROVISIONS

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

See Appx A Note on Use 17A

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

See Appx A Note on Use 3A

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

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

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

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

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

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

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

See Appx A Note on Use 2

15.8 MAJORITY CONTROL:

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

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

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

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

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

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

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

See Appx A Note on Use 25A

15.13 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

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

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

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

See Appx A Note on Use 25B

15.14 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

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

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

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

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

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

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

ARTICLE 16 - GENERAL PROVISIONS

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

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

See Appx A Note on Use 25C

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

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

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

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

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

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

successor personal representative, conservator, agent, or trustee.

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

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

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

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

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

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

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

See Appx A Note on Use 20A

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

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

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

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

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

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

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

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

ARTICLE 6 – DESIGNATION AND SUCCESSION OF FIDUCIARIES

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

ARTICLE 7 – POWERS OF FIDUCIARIES

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

ARTICLE 8 – TRUSTEESHIP

See Appx A Note on Use A

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

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

See Appx A Note on Use 2

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

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

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~~my personal representative or to any beneficiary for the consequences of any action taken by such trustee which would, but for the prior removal of such trustee, have been a proper exercise by such trustee of the authority granted to trustee under my will, until actual receipt by such trustee of notice of such removal. Any trustee may acquire from the beneficiaries, or from their guardians or conservators, instruments in writing releasing such trustee from liability which may have arisen from the acts or omissions to act of such trustee, and indemnifying such trustee from liability therefor. Such instruments, if acquired from all then living beneficiaries, or from their guardians or conservators, shall be conclusive and binding upon all parties, born or unborn, who may have, or may in the future acquire, an interest in the trust.~~

See Appx A Note on Use ????

8.3 LIABILITY OF TRUSTEE; BENEFICIARY RIGHTS:

- a) Exoneration of Trustee; Duties Regarding Previous Fiduciaries: My trustee is not liable for an act or omission of a former trustee or of the personal representative of my estate. Also, my trustee has no duty to examine the accounts, records, or acts of any former trustee or of the personal representative of my estate. But my trustee shall take reasonable steps to redress a breach of trust known to my trustee to have been committed by a former trustee.
- b) Exoneration of Trustee Actions: My trustee is not liable to any beneficiary for the consequences of any action taken by that trustee which would, but for the prior removal of that trustee, have been a proper exercise by that trustee of the authority granted to my trustee under my will, until actual receipt by that trustee of notice of the removal.
- c) Beneficiary's Consent, Release, or Ratification: My trustee may acquire from the beneficiaries instruments in writing releasing that trustee from liability which may have arisen from the acts or omissions of that trustee and indemnifying that trustee against liability. The instruments are conclusive and binding upon all parties who execute them or who may have or acquire an interest in the trust.

8.4 RIGHTS OF SUCCESSOR TRUSTEE: Any successor trustee at any time serving hereunder, ~~whether corporate or individual~~, shall have all the title, rights, powers and privileges,

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

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

See Appx A Note on Use 22A

8.5 RESIGNATION: A trustee may resign:

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

See Appx A Note on Use.22

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

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

ARTICLE 9 – ADMINISTRATIVE PROVISIONS

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

See Appx A Note on Use 17A

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

See Appx A Note on Use 3A

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

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

9.5 UNDISTRIBUTED INCOME AT DEATH OF BENEFICIARY: Except as

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

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9.7 PROTECTION AGAINST PERPETUITIES RULE: Every trust hereunder, and ***

9.8 DISTRIBUTION TO INCAPACITATED PERSONS OR PERSONS UNDER 21: ***

~~9.9 REPRESENTATIVE OF BENEFICIARY: The conservator of the estate or, if none, the guardian of the person of a beneficiary may act for such beneficiary for all purposes under my will or may receive information on behalf of such beneficiary.~~

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

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

See Appx A Note on Use 2

9.10 MAJORITY CONTROL:

- a) Cofiduciaries who are unable to reach a unanimous decision may act by majority decision; if only two cofiduciaries are acting, the joinder of both is required.
- b) If a vacancy occurs, the remaining cofiduciaries may act for my estate or for any

trust under this instrument.

- c) If a cofiduciary is unavailable to perform duties because of absence, illness, disqualification, or other temporary incapacity, and prompt action is necessary to avoid injury to property of my estate, achieve the purposes of a trust or avoid injury to trust property, the remaining cofiduciaries or a majority of the remaining cofiduciaries may act for my estate or for any trust under this instrument.
- d) A trustee who does not join in an action of another trustee is not liable for the action, except that each trustee must exercise reasonable care:
 - i) To prevent a cotrustee from committing a serious breach of trust, and
 - ii) To pursue a remedy, at trust expense, for a cotrustee's serious breach of trust.
- e) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

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

9.12 DELEGATION: Any fiduciary may delegate to its cofiduciary the exercise of any powers, discretionary or otherwise, unless it is a function I reasonably expect to be performed jointly. Unless a delegation is irrevocable, the delegating fiduciary may also revoke it. The delegation and revocation must be in writing executed by the delegating fiduciary and delivered to the other cofiduciary. While the delegation is in effect, any of the delegated powers may be exercised or action may be taken by the cofiduciary receiving the delegation with the same force and effect as if the delegating fiduciary had personally ~~joined in the exercise of such power or~~

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

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

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

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

See Appx A Note on Use 25A

9.15 TRUSTEE'S DUTIES TO INFORM AND TO NOTIFY:

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

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

See Appx A Note on Use 25B

9.16 TRUSTEE'S DUTIES TO REPORT AND TO RESPOND:

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 10 – TAX PROVISIONS

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

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

ARTICLE 11 – GENERAL PROVISIONS

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

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

See Appx A Note on Use 25C

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

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

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

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

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

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

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

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

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

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

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

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

See Appx A Note on Use 20A

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

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

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

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

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

successor trustee, and a cotrustee.

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

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

Testator

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

Witness

Witness

Address

Address

Notes on Use

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

* * *

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

* * *

- 10) ~~EDUCATION: This paragraph defines the term “education.” The committee considers inclusion of a provision defining education to be optional with the drafter, while generally desirable. At least one professional fiduciary has commented favorably on the additional clarity such a definition brings to administration of trusts. The focus of the form is a settlor who might prefer more latitude in the exercise of discretion by the trustee—a settlor who would expect the trustee to look favorably upon requests by beneficiaries for reimbursement of expenses associated with nontraditional forms of education if the trustee believed them to be in the beneficiaries’ best interests. Alternatively, for more conservative settlors whose preferences might lean toward limiting educational assistance to expenses derived from course work under the auspices of “accredited educational institutions,” the drafter might consider substituting the following language:~~

~~EDUCATION: Under this [instrument] [agreement], distributions for education may, in the trustee’s discretion, include the cost of tuition, fees, books supplies, living expenses and travel to the extent they are reasonable. The term “education” means study or instruction at, or under the auspices of, an accredited educational institution. The term “accredited educational institution” means a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; if such school, college, university, trade school, or other institution provides an academic curriculum, employs a full time faculty, offers classes on a campus, and enjoys a currently effective accreditation from a generally recognized accreditation board.~~

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

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

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

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

EDUCATION: Distributions for education may, in trustee's discretion, include the cost of tuition, fees, books, supplies, computers and other equipment, living expenses, and travel, to the extent they are reasonable. The term "education" means:

- a) Study or instruction at, or under the auspices of, an institution that enjoys a currently effective accreditation from a generally recognized accreditation board, such as: a public or private elementary or secondary school; a college or university granting undergraduate or graduate degrees; or a trade school or other institution for specialized, vocational, or professional training; and
- b) Study or instruction that trustee, in its discretion, determines to be appropriate for a beneficiary who has needs or abilities which are not likely to be served by an accredited educational institution.

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

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

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

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

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

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

* * *

- 17A) NO BOND: Under the Colorado Uniform Trust Code the court retains the power to require, dispense with, modify or terminate any bond, notwithstanding the terms of a will or trust directing otherwise. *See* C.R.S. §§ 15-5-105(1)(f) and 15-5-702.

* * *

- 18) OTHER DEFINITIONS: This provision incorporates definitions in the Colorado Probate Code, the Colorado Uniform Trust Code regarding trust provisions of the instrument, and the Colorado Uniform Powers of Appointment Act with regard to powers of appointment "*as any are amended after the date of this instrument and after my death.*" ~~The practitioner should be aware that UPC II changed certain definitions. *See* C.R.S. § 15-10-201.~~

* * *

- 20A) QUALIFIED BENEFICIARY: The term "qualified beneficiary" appears throughout the Colorado Uniform Trust Code (CUTC) and was adopted directly from the Uniform Trust Code (UTC). The purpose of establishing the category is to distinguish between beneficiaries to whom the trustee has a duty to report and those beneficiaries who are remote and contingent, and whom the trustee, even with reasonable efforts, may have difficulty identifying. Generally, those remote and contingent beneficiaries have been categorized as "nonqualified beneficiaries." Though the UTC does not define a nonqualified beneficiary, the term is occasionally used in the text of some UTC provisions. This provision was crafted by combining the substance of CUTC § 103(4) with that of CUTC § 103(16).

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

2.5-2.6 Remove-Amend-Revoke_WIP (2023-11-06)

Trying to revise our existing provisions with this concept:

Settlor may amend this agreement at any time, in whole or in part, by a signed writing. Trustee is not bound by an amendment until the amendment is delivered to trustee.

Existing OBF Rev Tst Provisions

2.5 TRUST ADDITIONS AND REMOVALS: Settlor reserves the power to add to the trust estate at any time by delivering to the trust additional property which is acceptable to trustee. Settlor reserves the power to remove all or any part of the property from the trust at any time by notifying trustee of such removal in writing.

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

- a) To revoke the trust by a writing;
- b) Upon trustee's consent, to amend the trust, in whole or in part, by a writing; and
- c) To direct, by a memorandum which settlor may leave at settlor's death, distribution by trustee on settlor's death of any of settlor's tangible personal property, together with any insurance policies covering such property and claims under such policies.

Proposed Revisions

2.5 TRUST ADDITIONS AND REMOVALS: Upon trustees' consent, settlor may add property to the trust by delivering the additional property to trustee. Settlor may remove property from the trust at any time by a signed(?) writing delivered to trustee.

2.6 AMENDMENT AND REVOCATION:

- a) Settlor may amend this agreement at any time, in whole or in part, by a signed writing. Trustee is not bound by an amendment until the amendment is delivered to trustee.
- b) Settlor may revoke this agreement at any time by a signed writing. Trustee is not bound by a revocation until the revocation is delivered to trustee.
- c) ~~Settlor may direct trustee, by a writing existing at settlor's death, to distribute items of settlor's tangible personal property, together with insurance policies covering the property and claims under such policies.~~

Settlor intends that a separate writing conforming to C.R.S. § 15-11-513 regarding distribution of tangible personal property be deemed an amendment to this agreement.

15.15-9.21 Limitations on Interested Trustee_WIP (2018-06-19)

Existing OBF Form 350 Rev Tst Provision

15.15 LIMITATIONS ON POWER OF INTERESTED TRUSTEE: No individual trustee, other than settlor, shall exercise or participate in the exercise of discretion with respect to the distribution of income or principal, or the termination of any trust administered hereunder:

- a) To or for the benefit of such trustee to the extent that such exercise results in economic benefit in excess of that which is necessary for the health, education, support, or maintenance of such trustee;
- b) To any person such trustee is legally obligated to support, to the extent such distribution is for the purpose of discharging such support obligation; or
- c) Which would cause the disqualification of an otherwise qualified disclaimer.

Proposed Revision

15.15 LIMITATIONS ON POWER OF INTERESTED TRUSTEE:

- a) No individual trustee, other than settlor, shall exercise or participate in the exercise of discretion with respect to the distribution of income or principal, or the termination of any trust administered hereunder:
 - i) To or for the benefit of such trustee to the extent that such exercise results in economic benefit in excess of that which is necessary for the health, education, support, or maintenance of such trustee;
 - ii) To any person such trustee is legally obligated to support, to the extent such distribution is for the purpose of discharging such support obligation; or
 - iii) Which would cause the disqualification of an otherwise qualified disclaimer.
- b) No individual trustee, other than settlor, who is a beneficiary of the trust shall unilaterally exercise discretion with respect to removing such trustee's own spendthrift restriction or terminating the trust, directly or indirectly, by means of decanting, non-judicial settlement agreement, consolidation or otherwise, or causing an uneconomical termination, without consent of at least one other beneficiary.

[See the proposed revision to Appx A Note on Use 17 for a complete explanation for the addition of subparagraph (b) above.]

- 17) LIMITATIONS ON POWERS OF INTERESTED TRUSTEE: Subparagraph (a) of this paragraph deals with two potential tax problems. The first problem arises where a trustee is also a beneficiary of the trust. If the trustee may make discretionary distributions to or for the trustee's own benefit, the trustee will have a general power of appointment over the trust, causing inclusion of the trust in the trustee's gross estate for federal estate tax purposes under I.R.C. § 2041(a), unless either (1) the discretion is limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiary-trustee, I.R.C. § 2041(b)(1)(A); or (2) the discretion may be exercised only in conjunction with another person who has a substantial interest in the trust which is adverse to the exercise of the discretion in favor of the beneficiary-trustee, I.R.C. § 2041(b)(1)(C)(ii). The provision included here takes the first approach and limits a beneficiary-trustee's authority to distribute to or for his or her own benefit to the ascertainable standards of health, education, support, or maintenance.

The second tax problem dealt with by subparagraph (a) of this provision arises if the trustee may make distributions that would satisfy a legal obligation of the trustee. For example, if the trustee is a parent of a minor beneficiary of the trust, and may make distributions for the support of the beneficiary, the trustee's ability to make distributions in a way that will satisfy the trustee's legal obligation to support the child will cause the trustee to have a general power of appointment over the trust. Treas. Reg. § 20.2041-1(c)(1). Note that limiting the discretion to an ascertainable standard does *not* eliminate this tax problem. The exception to the definition of general power of appointment for a power limited by an ascertainable standard applies only to a standard relating to the health, education, support or maintenance of the holder of the power. I.R.C. § 2041(b)(1)(A). Therefore, to avoid the second tax problem, the trustee must be prohibited from exercising discretion so as to satisfy the trustee's own obligations.

Colorado has a statute designed to prevent an interested trustee from running afoul of the federal tax problems described above. In the situation where a trustee holds discretionary power to distribute either principal or income of a trust to himself or herself, or to related beneficiaries, C.R.S. § 15-1-1401 limits the discretionary power of such interested trustee to the ascertainable standards of the beneficiary's health, education, maintenance, or support. This statutory limitation applies regardless of the standard for distributions contained in the trust instrument. The statute goes on to prohibit any discretionary distribution which would satisfy any legal obligation of the trustee. Furthermore, the statute limits the power to make discretionary distributions to any person having the power to remove or replace such trustee only in compliance with the ascertainable standards of such person's health, education, maintenance, or support.

The focus of subparagraph (b) of this provision is asset protection. In addition to the tax-avoidance purposes of limiting the discretion of an interested trustee, there are significant creditor protection issues that relate to these limitations. For an in-depth discussion of the threat of potential creditor claim vulnerability of an interested trustee, See, Edwin P. Morrow III, "Ed Morrow: Asset Protection Dangers When a Beneficiary is Sole Trustee and Piercing the Third-Party, Beneficiary-Controlled, Irrevocable Trust," *LISI Asset Protection Planning Newsletter* #339 (March 9, 2017), at <http://leimbergservices.com>. Copyright 2017

Appx A NoU 17 - Interested Trustee_WIP (2018-06-19)

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