MEMORANDUM

From: Frank Hill

To: OBF CUTC Revisions Subcommittee

Subject: **Chair's 2-12-2024 Status Report**

This report covers actions of our subcommittee taken during our last (virtual) meeting on 1/10/2024, as well as revisions made and contributions received in preparation for our next (virtual) meeting on **2/14/2024**.

Trustee Resignation, Revisited

The boilerplate *Trustee Resignation* provision currently in use in all OBF will and trust forms allows a trustee's resignation to be effective "only upon acceptance of appointment by the successor trustee."

If that is consistent with Colorado law, isn't it inconceivable then that a court would allow a trustee who has given notice of resignation to become effective at the end of a certain period of time to "walk away" from that responsibility (abandoning the office) at the mere expiration of that period of time before a successor has accepted the trusteeship?

But some of our members feel that our current Subcommittee revision gives that impression by saying,

> A trustee may resign by giving at least 30 days' written notice effective upon acceptance of appointment by a successor trustee *if this instrument requires a successor trustee*, …

Are we saying that, if the instrument *does not* require a successor trustee, then after giving a 30-day notice, a trustee can "walk" at the expiration of that period of time, *without* the acceptance of appointment by a successor trustee, whether required by the instrument or not? Is that an accurate reflection of Colorado law? A friendly fix to address our giving the wrong impression is attached. See, 14.6-8.5 Trustee Resignation-Reconsideration (2024-02-12).docx, attached.

Trust Consolidation; Additions to Separate Trusts

Close examination of current OBF provisions regarding *Trust Consolidation* and *Additions to Separate Trusts* and this Subcommittee's minor tweakings of those two related provisions reveals that substantively they both seem to address the same topic, consolidation of trusts, with only a minor shade of difference, if any at all.

Are they different enough to justify their continued independent existence? Or should one just be deleted because the other says it all well enough by itself. Or should their substances just be combined, yielding one concise provision adequately addressing both concepts? See, Trust Consolidation – Additions to Separate Trusts (2024-02-06).docx, attached.

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 *almost all of our OBF wills and trusts* 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
> Distribution Alternatives
> Protection Against Perpetuities Rule

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 no*t candidates for public assistance (non-public assistance beneficiaries).

During our 1/10/24 meeting, happily with more participation from our SNT Subcommittee colleagues, we reviewed that subcommittee's latest work on the *Distribution Alternatives* and the *Protection Against Perpetuities Rule* provisions and approved their submissions. Then when Carolyn suggested that, as drafted, a beneficiary of a SNT under ¶ 8.8 (public assistance beneficiary) could also be their own trustee! We all scrambled and tweaked it to address the disqualifying circumstance which Carolyn detected. THANKS Carolyn! Now see the results of our two subcommittees' collaborative effort. See Dft Dist to Incap Pers or Pers Under 21_01.10.24.docx and Fm 531 NoU 01.10.24_CUTC review.docx, attached

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 citations in his original submission 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. A copy of Carl's *original submission* is attached for your reference. See, Exoneration NoU [Rev Tst 14.4]_CGS (2022-02-07).docx.

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, (copy attached). 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.

A few years ago, noting that the current version of this Note on Use merited significant trimming and editing, Jim Ingraham and Dan Rich prepared a revised version 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) [clean].docx (copy attached).

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***.
- [Chair's Note: The Colorado Principal and Income Act cited in the proposed revision has since been repealed and replaced.]

Michelle and Carl agreed to collaborate on fine tuning Jim and Dan's clean version 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

Why does it have to be so difficult for a practitioner to compare the postmortem administrative provisions of an OBF will form against those of an OBF revocable trust form suitable for the same client situation?

Many of the postmortem administrative provisions in the two types of OBF forms are nearly identical or at least very similar, but they are found in very different locations in the two types of documents.

Attached is a proposal simply to restructure and reorganize the postmortem administrative provisions appearing generally at the rear of most our OBF will and revocable trust forms so that they would generally appear in the same order in the two types of forms. The two attached charts illustrate the proposed "migration" of various administrative provisions in the Form 361 • Marital Deduction Will and the Form 350 • Revocable Marital Deduction Trust as examples, and as starting places for this suggested reform. See, Form 361 Will Admin Articles Reorg (2023-02-09).pdf, and Form 350 Rev Tst Admin Articles Reorg (2023-02-09).pdf, attached.

The attached article, "For Further Reading: How We Got There" just explains all the above in more detail. See, For Further Reading-How We Got There.pdf, attached.

"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.

14.6-8.5 Trustee Resignation-Reconsideration (2024-02-12)

Trustee Resignation

CUTC 5-704(2) "If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee."

CUTC 5-705(1) "A trustee may resign: (a) Upon at least thirty days' notice …"

Current OBF Form 350 • Revocable Marital Deduction Trust:

14.5 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.

Our current revision: [Extract] 0350 Rev Mar Ded Tst (2023-12-12).doc:

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 distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, and

iii) To all cotrustees; or

b) With the approval of the court.

Our current revision: [Extract] 0361 Mar Ded Will (2023-12-12).doc:

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 distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, and

iii) To all cotrustees; or

b) With the approval of the court.

Proposed Fixes

14.6 RESIGNATION: ~~A trustee may resign:~~

a) A trustee may resign:

i) 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:

A) To settlor; but if settlor is incapacitated or deceased, then to any acting legal representative of settlor, and

B) To the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, and

C) To all cotrustees; or

ii) With the approval of the court.

b) If one or more cotrustees remain in office, then a resignation becomes effective in accordance with its terms. If the trust has no remaining trustee, then the resignation becomes effective only upon acceptance of appointment by a successor trustee.

8.5 RESIGNATION: ~~A trustee may resign~~:

a) A trustee may resign:

i) 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:

A) To my personal representative, if acting,

B) To the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who have sent the trustee a request for notice, and

C) To all cotrustees; or

ii) With the approval of the court.

b) If one or more cotrustees remain in office, then a resignation becomes effective in accordance with its terms. If the trust has no remaining trustee, then the resignation becomes effective only upon acceptance of appointment by a successor trustee.

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

Leimberg Information Services, Inc. (LISI). Much of the text of subparagraph (b) of the form is taken from the Morrow article and used with the permission of the copyright owner.

We already have the publisher's written permission to use what in subparagraph (b) of the form is essentially a direct quote from the article.

Article 8 – Paragraphs 8.8 and 8.9 Form 531

8.8 DISTRIBUTION TO DISABLED PERSONS. If my fiduciary is directed to distribute any share of my probate or trust estate to a beneficiary who is either "disabled" as defined under the Social Security Act, 42 U.S.C. § 1382c(a)(3), or is receiving or eligible for a means-tested government benefit program, such as Supplemental Security Income, Medicaid, or other state medical assistance program authorized under the federal Medicaid program, federal Social Security Disability Insurance, then my fiduciary shall set aside the beneficiary's share in a supplemental needs trust under the provisions of this paragraph.

[NOTE TO COMMITTEE: For a trust, delete the words "probate or" on the second line. Also consider replacing "fiduciary" with "trustee" in trusts.]

(a) While any trust is being held under this paragraph, the disabled beneficiary shall not act as trustee.

(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, 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.

(c) 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.

(d) 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).

(e) 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 fiduciary is directed to distribute any share of my probate estate does not qualify for the trust in paragraph 8.8 (Distributions to Disabled Persons), and is under the age of twenty-one (21) years or is, in the opinion of my fiduciary, unable to administer distributions properly when the distribution is to be made, my fiduciary, in its sole and absolute discretion, 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.

14.4 a) – C.R.S. § 15-5-812 requires that a successor trustee should redress a breach of trust known to the trustee to have been committed by a former trustee.

14.4 c) - C.R.S. §§ 15-5-1008 and 15-5-1009 are the provisions of CUTC that set forth exculpation of trustees and allow a beneficiary's consent, release or ratification of a breach of trust. CUTC Part 3 C.R.S. §§ 15-5-301, et seq. sets forth requirements for representation of persons who may be bound by another.

FORM 531
NOTES ON USE

9) ~~The trust provided for under this paragraph is a pure discretionary trust. The trustee's discretion to make distributions is complete and absolute, and not limited by the ascertainable standards of health, education, support, or maintenance. Requiring the trustee to fulfill the beneficiary's health and support needs would jeopardize the beneficiary's qualification for public assistance.~~

[Suggestion: SNT subcommittee recommends we not use the above language, but instead use the language below for the form so that the form and the Appendix A say the same thing]

APPENDIX A
GENERAL AND ADMINISTRATIVE PROVISIONS
NOTES ON USE

8) DISTRIBUTION TO ~~INCAPACITATED~~ DISABLED PERSONS ~~OR PERSONS UNDER TWENTY-ONE~~: This provision ~~permits~~ REQUIRES a fiduciary to retain in trust the share of a beneficiary which would otherwise be distributable to the beneficiary ~~but for the beneficiary's perceived inability to manage such distribution effectively due to lack of capacity brought about by the beneficiary's incapacity or minority~~ IF THE BENEFICIARY 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 PROGRAMS. ~~While such a trust is in effect, [~~Once established,~~]~~ this trust is a pure discretionary trust, which means ~~[~~distributions are in~~]~~ the trustee's discretion ~~[~~and are ~~*notis*~~ not governed by the ascertainable standards of health, education, support, or maintenance, but rather all such distributions, if any, are within the trustee's sole and absolute discretion. This absence of ascertainable standards was chosen so as not to jeopardize a beneficiary's ability to qualify for public assistance and other benefits. In any event, even the presence of ascertainable standards specifying and limiting the purposes of distributions to the beneficiary would not shield a trustee who owed the beneficiary a legal obligation of support from exposure to the possible adverse tax consequences of being an interested trustee. *See* Note on Use 17 (Limitation on Power of Interested Trustee). IF A BENEFICIARY IS known to be disabled at the time of drafting and is either ~~KNOWN TO BE~~ RECEIVING PUBLIC ASSISTANCE ~~AT THE TIME OF DRAFTING THE DOCUMENT,~~ OR IS ANTICIPATED TO NEED PUBLIC ASSISTANCE IN THE FUTURE, CONSIDER ADDING A SUPPLEMENTAL NEEDS TRUST (SNT) FOR THE BENEFICIARY (SEE FORM ___ DROP-IN SUPPLEMENTAL NEEDS TRUST).

8a) DISTRIBUTION TO PERSONS UNDER TWENTY-ONE (21) OR PERSONS UNABLE TO ADMINISTER DISTRIBUTIONS PROPERLY: If a beneficiary does not qualify for the trust in paragraph 8.8 (Distribution to Disabled Persons), this provision permits but does not require a fiduciary to retain in trust the share of a beneficiary which would otherwise be distributable to the beneficiary if the beneficiary is under age ~~twenty-one~~21 or, in the

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fiduciary's opinion, is unable to administer such distribution properly. ~~While such a trust is in effect~~Once established, the trustee's discretion is not governed by the ascertainable standards of health, education, support, or maintenance, but rather any distributions are within the trustee's sole and absolute discretion. This is because distribution under an ascertainable standard can be enforced against a trustee for allegedly failing to meet the needs of the beneficiary. In other words, under an ascertainable standard, a beneficiary can force the trustee to make distributions to pay for the beneficiary's support.

However, if the client prefers to use an ascertainable standard, the language can be adjusted accordingly. In addition, the practitioner might consider discussing with the client any specific issues that the client may wish to include in the list of examples in this paragraph. This paragraph is designed to allow a trustee to determine in the future whether the beneficiary has an issue that warrants keeping their funds in trust. If the client knows that a particular beneficiary already has such an issue, practitioner might suggest that the client create a separate trust under this will to protect that beneficiary.

Age of 21 – In general, ~~The Orange Book uses the age of twenty-one (21) in this paragraph because a~~in Colorado, a personal representative or trustee cannot distribute directly to a person who is under the age of ~~eighteen (18)~~18, which is the age of majority in Colorado. ~~In such case,~~The Orange book form uses the age of 21 in this provision because the majority of statutes providing for the protection of minors do not allow distribution until age 21. *See* ~~the funds must be distributed under one of the following protections for minors, all of which terminate at age twenty-one (21): conservatorship under~~ C.R.S. § 15-14-401 *et. seq.* (conservatorship), ~~guardianship under~~ C.R.S. § 15-14-301 *et. seq.* (guardianship), and ~~Colorado Uniform Transfers to Minors Act under~~ C.R.S. § 11-50-101 *et. seq.* (Uniform Transfers to Minors Act); ~~*One exception is if the funds are under a certain specified amount pursuant to*~~ *but see* C.R.S. § 11-50-107(c) (threshold amount for outright distributions), ~~,~~ C.R.S. § 15-1.5-101 *et seq.* (Uniform Custodial Trust Act). If the client would prefer the age of 1~~eighteen (18),~~ or any other age over ~~eighteen (~~18~~),~~ a practitioner can substitute that age in all places where it appears in this paragraph.

~~Should we cite this article in the above paragraph?~~
~~13 Colo.Law. 2223~~
~~Colorado Lawyer~~
~~1984.~~
~~1984, December, Pg. 2223. Colorado Uniform Transfers to Minors Act..." 1984, December, Pg. 2223 (December, 1984), Colorado Uniform Transfers to Minors Act Colorado Uniform Transfers to Minors Act (Colorado Lawyer)~~

6.3 DISTRIBUTION ALTERNATIVES: Except for a trust established under paragraph 8.8 (Distributions to Disabled Persons) or a supplemental needs trust for a specific beneficiary under this will, IF ~~UNDER MY WILL OR ANY~~ other ~~TRUST HEREUNDER~~ A PAYMENT OR DISTRIBUTION IS AUTHORIZED OR REQUIRED TO BE MADE ~~TO OR FOR THE BENEFIT OF A BENEFICIARY OTHER THAN A BENEFICIARY OF A TRUST ESTABLISHED UNDER PARAGRAPH 8.8~~

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~~(DISTRIBUTION TO DISABLED PERSONS) OF ARTICLE 8,~~ my fiduciaries may make ~~any~~ the ~~SUCH~~ payments ~~OR DISTRIBUTIONS~~ ~~under my will or any trust under my will~~:

a) Directly to the beneficiary;

b) In any form allowed by applicable state law for gifts or transfers to minors or persons under incapacity;

c) To the beneficiary's guardian, conservator, or caregiver for the benefit of the beneficiary; and

d) By direct payment of the beneficiary's expenses. A receipt by the recipient for any such distribution, if such distribution is made in a manner consistent with the proper exercise of my fiduciaries' duties hereunder, shall fully discharge my fiduciaries.

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8.7 PROTECTION AGAINST PERPETUITIES RULE:

Every trust hereunder, and every trust created by the exercise of a power of appointment hereunder, shall terminate no later than the end of the period allowed by the applicable Rule Against Perpetuities.

a) Except as provided in subparagraph b, the trust property shall be distributed to the persons then entitled to the income from the trust in the proportions in which they are entitled to such income. For this purpose only, any person eligible to receive discretionary distributions of income from a particular trust shall be treated as being entitled to receive the income. If two or more persons are so treated, they shall be treated as being entitled to receive the income by representation if they have a common ancestor, or in equal shares if they do not.

b) If a trust established under paragraph 8.8 (distribution to disabled persons) terminates under this paragraph, then the trustee shall distribute the trust property pursuant to the terms of the trust as if the disabled beneficiary is deceased.

[NOTE ON USE] Paragraph 8.8 specifies that a fiduciary must create a supplemental needs trust for a disabled beneficiary at the time of distribution, which may be a generation or two following the settlor's or testator's death. Colorado's Rule Against Perpetuities (C.R.S. § 15-11-1102.5) runs for 1,000 years. However, if the situs of the trust is in a state that still adheres to the original Rule Against Perpetuities (lives in being plus 21 years), the trust may need to terminate before anticipated, and distributing to the disabled beneficiary would jeopardize their public benefits. Therefore, subparagraph b treats the disabled beneficiary as deceased so that the disabled beneficiary will not share in the distribution on termination.

7.5 REMOVAL OF TRUSTEE:

7.6 REPLACEMENT OF TRUSTEE:

8.16 CONSOLIDATION OF TRUSTS:

8.17 EARLY TERMINATION:

8.18 DISTRIBUTIONS FREE FROM TRUST:

For Further Reading: How We Got There

Proposal to Restructure and Reorganize OBF Will and Trust Administrative Articles

It had come to our attention that over the years, practitioners using the Orange Book Forms various will and trust forms had opined that the current divergent structure of the postmortem administrative articles of the rev tst and will forms (Forms 350, 361, and their progeny) was an unnecessary distraction to the drafting attorney who might wonder if there was a substantive reason as to why they were different.

There is no substantive reason why they are structured differently. (They just had their origins in different law firms back in the 1970s and 1980s.) They basically address the same issues and try to do it in the same or a similar way, just organized/arranged differently and using slightly different language to say it.

We believed that while the rev tst and the will forms admittedly have different drafting styles, to the extent possible, at least *their generic postmortem administrative provisions should be structured similarly*, and written either nearly identically (if possible), or at least *in a similar manner*, substantively saying the same thing in slightly different language, as context may require.

It was hoped that such an approach would lessen the anxiety of a drafting attorney. While he/she might notice that the language of the postmortem administrative articles of the rev tsts was a little different than the language of the administrative articles of the will forms, they would see that at least their structure would be nearly identical, and both types of forms would be trying to address the same issues using very similar language.

In proposing the following administrative article reorganization changes, we had these objectives in mind:

- (Overall Objective): Have the postmortem administrative articles of the will and the rev tst end up somewhat "parallel," i.e., be structured similarly, and written either nearly identically (if possible), or at least in a similar manner, substantively saying the nearly same thing in slightly different language, as context required.
- Since the OBFs are "teaching tools" we wanted to enable the drafting attorney to place the rev tst form and the will form side by side and see the parallelism between the postmortem administrative articles of the two forms *so that both the similarities and the differences between them would be clearly evident*.
- Close examination of the two forms reveals that their current dissimilarity in postmortem administrative article structure is not substantive, but rather solely due to "in-house" form structuring standards in the law firms from which the forms originated years ago. So, if we desired to make them more "parallel" no harm should come of it.
- We felt that "Powers" provisions should be collected together in the *Powers* article and not spread out over both the *Powers* and the *Administrative Provisions* articles.
- We felt that the appointment of successor fiduciaries provisions were important enough to be set off in their own article as is done in the will form.
- We felt positioning the Remote Contingent Disposition provision as the last paragraph of the *Family Trust* in the will but as a separate article in the rev tst were *both* not quite right; that moving it into a new separate article collecting select *Contingent Distributions* provisions together would be a far more appropriate location for it.
- We knew that for substantive reasons certain provisions would be in some versions of a rev tst or will form but not in others. So to keep the integrity of each of the postmortem administrative articles together, we felt that the "optional" provisions *should be placed as the last paragraphs of their articles*, so that when they didn't appear in a different form the rest of that article would still be nearly all intact in the exact same order.

  For example, *Ancillary Fiduciary* could appear as the last provision in the *Administrative Provisions* article of the will since that provision does not appear in the rev tst form.

Likewise, *Benefits Payable to Trustee*, since in the rev tst form that subject is addressed in detail in Article 3.

And *Consolidation of Trusts* could be listed as the last of the *Powers* provisions because it is dropped from this article in the four generation skipping forms (two wills and two rev tsts) since it will be covered in detail in the new GS forms in a separate provision about the trustee's powers regarding generation skipping transfers.

Highlights: We felt that the admin articles of the will form were ***structurally*** the better of the two types of forms to use as our "base." That's not to say that the admin articles will form were not in need of any rearrangement and tweaking. But we felt it was slightly better organized than the admin articles of the rev tst form.

The best example of that is the inclusion of that odd article, *Facility of Distribution and Management* in the rev tst right after the conclusion of the *Family Trust* article. It's a somewhat odd combination of distribution provisions, trustee powers, and administrative provisions. This *Facility* article does not appear in the will form as such, but all of its provisions do appear in other articles.

So, we decided that this should work well:

1. In the rev tst form, the title of the existing article *Facility of Distribution and Management* is replaced with the new title, *Contingent Distributions*, and its two existing distribution provisions are retained (joined by the rev tst's old one-paragraph article *Remote Contingent Disposition*, now deleted as an article but restructured to become the third paragraph of the prior article on contingent distributions).
2. In the will form, a new article is inserted right after the end of the *Family Trust*, entitled, *Contingent Distributions*. To parallel the same article of the rev tst, it will contain (a) the Remote Contingent Disposition paragraph [moved from being the last paragraph of the *Family Trust*], (b) the former "Distributions to Incapacitated Persons and Persons Under 21," now retitled as "Protective Distributions in Trust," and (c) the "Distribution Alternatives" provision moved from the will form's *Powers of Fiduciaries* article.
3. Now, you can see by comparing the two charts, both forms now have *substantively* the same new first administrative article, gathering together each form's three contingent distribution provisions in one place, as sort of a transition article from dispositive provisions to pure administrative provisions. And we've cleaned up the old "weirdness" of both forms in the process.

Also, we liked the will form's separate article approach to *Designation and Succession of Fiduciaries*. We felt that the same separate article approach was appropriate in the rev tst form for naming successor trustees, so folks wouldn't have to hunt all over to locate that provision. Hence, a new article in the rev tst (to replace the rev tst's old *Remote Contingent Distributions* article) a one-paragraph *Designation of Successor Trustee* article simply containing the old paragraph of the same name relocated from the rev tst's *Trusteeship* article.

Lastly, we also felt that there were simply too many provisions in the *Administrative Provisions* article and that if the *Powers*-related provisions were relocated to the Powers article it would be both more appropriate and bring better balance to the forms. This move would also provide more space in the *Administrative Provisions* article to accommodate many of the new CUTC provisions we will be adding.

Proposed Form 350 Rev Tst Administrative Articles Reorganization
(Pre-CUTC Revisions)

Current Form 350 Admin Article Organization	Proposed Fm 350 Adm Article Reorganization
Art 11 – Facility of Distribution & Management 11.1 Continued Retention in Trust 11.2 Distribution Alternatives 11.3 Additions to Separate Trusts 11.4 Consolidation of Trusts 11.5 Early Termination 11.6 Distributions Free from Trust	**Art 11 – Contingent Distributions** 11.1 Continued Retention in Trust 11.2 Distribution Alternatives ^^ ^ ~~Additions to Separate Trusts~~ ↓ (15.14) ^^ ^ ~~Consolidation of Trusts~~ ↓ (13.7) ^^ ^ ~~Early Termination~~ ↓ (15.12) ^^ ^ ~~Distributions Free from Trust~~ ↓ (15.13) 11.3 Remote Contingent Disposition
Art 12 – Remote Contingent Disposition	~~Art 12 – Remote Contingent Disposition~~ ↑ (11.3)
	Art 12 – Designation of Successor Trustee (No substantive changes proposed)
Art 13 – Powers of Trustee 13.1 Grant 13.2 Fiduciaries Powers Act	**Art 13 – Powers of Trustee** 13.1 Grant 13.2 Fiduciaries Powers Act 13.3 Litigation Powers 13.4 Powers of Insured Trustee 13.5 Limitations on Powers of Interested Trustee 13.6 Release of Powers 13.7 Consolidation of Trusts
Art 14 – Trusteeship 14.1 Designation of Successor Trustee 14.2 Appt of Cotrustee or Successor Trustee 14.3 Exoneration of Trustee 14.4 Rights of Successor Trustee 14.5 Resignation 14.6 Removal of Trustee 14.7 Replacement of Trustee	**Art 14 – Trusteeship** ^^ ^ ~~Designation of Successor Trustee~~ ↑ (Art 12) 14.1 Appt of Cotrustee or Successor Trustee 14.2 Exoneration of Trustee 14.3 Rights of Successor Trustee 14.4 Resignation 14.5 Removal of Trustee 14.6 Replacement of Trustee
Art 15 – Administrative Provisions 15.1 Court Proceedings 15.2 No Bond 15.3 Compensation 15.4 Inalienability 15.5 Undistributed Income at Death of Beneficiary 15.6 Protection Against Perpetuities Rule 15.7 Representative of Beneficiary 15 8 Majority Control 15.9 Delegation 15.10 Custody 15.11 Release of Powers 15.12 Reports 15.13 Litigation Powers 15.14 Powers of Insured Trustee 15.15 Limitations on Power of Interested Trustee 15.16 Digital Assets	**Art 15 – Administrative Provisions** 15.1 Court Proceedings 15.2 No Bond 15.3 Compensation 15.4 Inalienability 15.5 Undistributed Income at Death of Beneficiary 15.6 Protection Against Perpetuities Rule 15.7 Representative of Beneficiary 15.8 Majority Control 15.9 Delegation 15.10 Custody ^^ ^^ ~~Release of Powers~~ ↑ (13.6) 15.11 Reports 15.12 Early Termination 15.13 Distributions Free from Trust 15.14 Additions to Separate Trusts ^^ ^^ ~~Litigation Powers~~ (13.3)↑ ^^ ^^ ~~Powers of Insured Trustee~~ ↑ (13.4) ^^ ^^ ~~Limit on Power / Interested Trustee~~↑ (13.5) 15.15 Digital Assets

Proposed Form 361 Will Administrative Articles Reorganization
(Pre-CUTC Revisions)

Current Form 361 Admin Article Organization	Proposed Fm 361 Adm Article Reorganization
Art 5 – Disposition of Family Trust 5.8 Remote Contingent Disposition	**Art 5 – Disposition of Family Trust** ~~5.8 Remote Contingent Disposition~~ ↓ (6.3)
	Art 6 – Contingent Distributions 6.1 Protective Distributions in Trust 6.2 Distribution Alternatives 6.3 Remote Contingent Disposition
Art 6 – Designation / Succession of Fiduciaries (No substantive changes proposed)	**Art 7 – Designation / Succession of Fiduciaries** (No substantive changes proposed)
Art 7 – Powers of Fiduciaries 7.1 Grant 7.2 Fiduciaries Powers Act 7.3 Distribution Alternatives	**Art 8 – Powers of Fiduciaries** 8.1 Grant 8.2 Fiduciaries Powers Act ^ ^ ~~Distribution Alternatives~~ ↑ (6.2) 8.3 Litigation Powers 8.4 Powers of Insured Trustee 8.5 Limitations on Powers of Interested Trustee 8.6 Release of Powers 8.7 Consolidation of Trusts
Art 8 – Trusteeship 8.1 Appt of Cotrustee or Successor Trustee 8.2 Exoneration of Trustee 8.3 Rights of Successor Trustee 8.4 Resignation 8.5 Removal of Trustee 8.6 Replacement of Trustee	**Art 9 – Trusteeship** 9.1 Appt of Cotrustee or Successor Trustee 9.2 Exoneration of Trustee 9.3 Rights of Successor Trustee 9.4 Resignation 9.5 Removal of Trustee 9.6 Replacement of Trustee
Art 9 – Administrative Provisions 9.1 Court Proceedings 9.2 No Bond 9.3 Compensation 9.4 Inalienability 9.5 Undistributed Income at Death of Beneficiary 9.6 Benefits Payable to Trustee 9.7 Protection Against Perpetuities Rule 9.8 Distrib to Incapacitated / Under 21 Persons 9.9 Representative of Beneficiary 9.10 Majority Control 9.11 Delegation 9.12 Custody 9.13 Release of Powers 9.14 Reports 9.15 Ancillary Fiduciary 9.16 Consolidation of Trusts 9.17 Early Termination 9.18 Distributions Free from Trust 9.19 Litigation Powers 9.20 Powers of Insured Trustee 9.21 Limitations on Power of Interested Trustee 9.22 Additions to Separate Trusts 9.23 Digital Assets	**Art 10 – Administrative Provisions** 10.1 Court Proceedings 10.2 No Bond 10.3 Compensation 10.4 Inalienability 10.5 Undistributed Income at Death of Beneficiary ^^ ^ ~~Benefits Payable to Trustee~~ ↓ (10.16) 10.6 Protection Against Perpetuities Rule ^^ ^ ~~Distrib to Incapacit/Under 21 Persons~~ ↑ (6.1) 10.7 Representative of Beneficiary 10.8 Majority Control 10.9 Delegation 10.10 Custody ^^ ^^ ~~Release of Powers~~ ↑ (8.6) 10.11 Reports ^^ ^^ ~~Ancillary Fiduciary~~ ↓ (10.17) ^^ ^^ ~~Consolidation of Trusts~~ ↑ (8.7) 10.12 Early Termination 10.13 Distributions Free from Trust ^^ ^^ ~~Litigation Powers~~ ↑ (8.3) ^^ ^^ ~~Powers of Insured Trustee~~ ↑ (8.4) ^^ ^^ ~~Limit on Power of Interested Trustee~~↑ (8.5) 10.14 Additions to Separate Trusts 10.15 Digital Assets 10.16 Benefits Payable to Trustee 10.17 Ancillary Fiduciary

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.

NOTES ON USE

2) There is some debate among practitioners as to whether there is a duty for a trustee to inquire into the financial circumstances of a beneficiary before making a distribution from a discretionary trust. In addition there is also debate if the duty to inquire can be eliminated through drafting. Previous editions of this form book contained the following language:

Trustee may take into consideration, to the extent trustee deems advisable, income and other resources of the beneficiaries outside the trust. Trustee shall have no duty to make inquiry into income and resources of the beneficiaries.

Without limiting the absolute discretion of my trustee, I suggest that my trustee should consider all funds or other resources available to a beneficiary, including income or principal of other trust funds, or a support duty owed to a beneficiary by another, before making a distribution to a beneficiary.

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), state that while performing duties under the respective acts the trustee shall consider "other resources" and "circumstances" of the beneficiaries. This supports the argument that there is a duty imposed on the trustee to "know your beneficiary."

When discretionary distributions are to be based on the needs of the beneficiary it is intellectually inconsistent to state in the document that the trustee has no duty to inquire into the financial circumstances of the beneficiary. Language waiving the duty to inquire could mislead the trustee into acting arbitrarily and open the trustee to a complaint of abuse of discretion. Even if discretionary distributions are not to be based on needs, a trustee who has several competing beneficiaries could be open to a complaint of abuse of discretion when making a distribution favoring one beneficiary over the others, if no information on the circumstances of the beneficiaries is obtained. Finally, even when there is only one beneficiary a document that permits the trustee to completely disregard the circumstances of the beneficiary may lead to a complaint of abuse of discretion if the beneficiary's future needs outlive the resources of the trust.

When considering the above issues 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.

Please note that a 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.

Trust Consolidation; Addition to Separate Trusts:

Fm 350 Rev Tst Versions

13.5 TRUST CONSOLIDATION: If there is a trust which contains substantially the same terms for the same beneficiaries and is administered by the same trustee as a trust arising from this agreement, then trustee may consolidate, merge, and administer the consolidated trusts as one unit. If trustee determines that consolidation is not desirable or feasible, then trustee may consolidate the property of the trusts for administrative and investment purposes while maintaining separate records and accounts for each trust.

15.15 ADDITIONS TO SEPARATE TRUSTS. If, on the termination of a separate trust arising from this agreement, trustee will make a distribution to a person for whom trustee is administering another separate trust under this agreement, then trustee shall add the distribution to the other separate trust instead of making an outright distribution. For purposes of administration, the distribution will be deemed an original part of the other trust.

Fm 361 Will Versions

8.5 TRUST CONSOLIDATION: If there is a trust which contains substantially the same terms for the same beneficiaries and is administered by the same trustee as a trust arising from my will, then my trustee may consolidate, merge, and administer the consolidated trusts as one unit. If my trustee determines that consolidation is not desirable or feasible, then my trustee may consolidate the property of the trusts for administrative and investment purposes while maintaining separate records and accounts for each trust.

10.15 ADDITIONS TO SEPARATE TRUSTS: If, on the termination of a separate trust arising from my will, my trustee will make a distribution to a person for whom the trustee is administering another separate trust arising from my will, then my trustee shall add the distribution to the other separate trust instead of making an outright distribution. For purposes of administration, the distribution will be deemed an original part of the other trust.