

# Important Issues in Modern Trust Design

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## Sample Trust Provisions<sup>1</sup>

### Beneficiary as a Co-Trustee

During any time that the primary beneficiary is serving as a trustee after attaining age \_\_\_\_\_, the primary beneficiary (as trustee) may decide whether to pay trust property to the primary beneficiary or his/her descendants for health, maintenance, support and/or education within the meaning of Sections 2041 and 2514 of the IRC without the consent or participation of any co-trustee, provided the payment will not discharge or satisfy the primary beneficiary's legal obligations.

### Administrative Only Trustee

If at any time there is more than one Trustee serving and one of those Trustees is [Name of designated administrative trustee], then the following powers, authorities and discretions (hereinafter referred to as the "Administrative Powers") shall be carried out in

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<sup>1</sup> The sample trust provisions have been gathered from various non-copyright sources and are subject to applicable state law; therefore, you may wish to modify the language accordingly.

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the State of \_\_\_\_\_ solely by [Name of designated administrative trustee], as trustee, so long as the situs of this trust is in, and this trust is governed by the laws of, the State of \_\_\_\_\_:

- (1) To maintain bank accounts, brokerage accounts, and other custody accounts for (i) the custody and safekeeping of the trust estate; (ii) receiving trust income; (iii) making disbursements for trust expenses; and (iv) making distributions to or for the benefit of Beneficiaries;
- (2) To maintain storage of stock certificates, tangible personal property or other evidence of ownership of assets held as part of the trust estate;
- (3) To maintain trust records;
- (4) To maintain an office for the transaction of trust business;
- (5) To originate, facilitate and review trust accountings, reports and other communications pertaining to the trust with the Grantor, any co-Trustees, Beneficiaries, (Protectors) and unrelated third parties;
- (6) To execute instruments, agreements, contracts and any other documents with respect to trust account transactions; and
- (7) To retain, at the expense of the trust, accountants, attorneys, agents and other advisors in connection with the performance of the Trustee's duties.

#### Trust Protectors – Administrative Provisions

The Trust Protector may amend the terms of the trust as the Trust Protector deems necessary or desirable to:

- (1) Achieve the intended tax consequences of any provision hereunder, to realize tax advantages or to respond to changes in the IRC or applicable state law and the rules and regulations thereunder that otherwise may result in addition tax to the trust and/or its beneficiaries; or
- (2) Expand, limit, restrict, revoke, or otherwise modify the powers of a fiduciary hereunder other than powers to make payments of trust property to beneficiaries hereunder, except that the Trust Protector may not expand his or her own powers in a manner that would cause the trust property to be included in his, her, or the Grantor's estate.

### Contingent General Power of Appointment.

For any portion of the trust property that is not then GST Exempt, the trustee may at any time prior to the death of the beneficiary, by an instrument in writing, (1) convert the beneficiary's limited power of appointment over such property into a general power of appointment by adding to the beneficiary's power of appointment the power to appoint all or part of the trust to the creditors of the beneficiary's estate, and the instrument conferring such power upon the beneficiary may require the written consent of the trustee (other than any interested trustee) to exercise that power, (2) revoke any such instrument previously executed, with or without executing a replacement instrument; and/or (3) irrevocably relinquish the powers conferred upon clause (1) and/or (2). Without limiting the trustee's discretion, the trustees may use the authority conferred by this section to subject some or all of the property of the trust to inclusion in the beneficiary's gross estate when it appears that it may reduce overall taxes, such as to use the beneficiary's estate tax exemption rather than having the generation-skipping transfer tax imposed at the beneficiary's death, to achieve a step-up or increase in income tax basis for the trust assets upon the death of the beneficiary, or to permit a greater use of the generation-skipping transfer tax exemption of the beneficiary or the beneficiary's spouse. If the value of any property of a beneficiary's trust is included in the gross estate of the beneficiary as a result of the grant of a general power of appointment pursuant to this section, the trustees may, in the sole discretion of the independent trustee(s), pay over to the beneficiary's estate, or pay directly from trust property, an amount equal to that increment of such tax liability attributable to the inclusion of the value of such property in the beneficiary's gross estate.

### Limited Powers of Appointment – Additional Powers and Later Added Property

The exercise of a power of appointment may direct that the property subject to the power be disposed of outright or in trust, may impose limitations or conditions to the exercise of the power, and may grant additional powers of appointment to the recipient of the power which can be exercisable during life and/or at death. Such additional powers of appointment granted to a recipient of the power shall be exercisable only in favor of permissible recipients of the power of appointment held by the holder who granted such powers unless such holder is authorized to appoint outright to the recipient of the power.

If a power of appointment is exercised over all or a portion (and not a specified dollar amount) of trust property, unless otherwise provided in the exercise of such power of appointment, any property added to such trust after the effective date of such exercise shall be disposed of in the same manner as though it had been part of the property of such trust as of the effective date of such exercise (i.e., it shall be disposed of as directed in such exercise).

### Life Insurance and Annual Gifts

The Trustee may purchase life insurance on the life of the Grantor, the Grantor's spouse, or any beneficiary, provided, however, that life insurance may not be purchased on the life of any Co-Trustee. Unless otherwise provided in this trust agreement, the Trustee may pay the premiums and other charges thereon from the trust income or principal. The Trustee may satisfy any withdrawal rights by the distribution of any property held by the trust, including the assignment of a part or all of any insurance policies owned by the trust. The Trustee may exercise all of the rights, options, elections, privileges and other powers exercisable in connection with any such policy and may receive all payments in respect thereof. The Trustee shall not be responsible for the lapse or other failure, in whole or in part, of any such policy due to the insufficiency of the trust property to provide for the payment of premiums or other charges in respect thereof. The Trustee shall have no obligation to bring suit to collect any amounts payable in respect of any such policy unless its expenses in connection therewith shall have been provided for in a manner satisfactory to it.

To the extent that the trust purchases or owns any such life insurance, the Trustee shall have no duty to diversify trust investments and shall have no liability from any such failure to diversify. Notwithstanding any rule concerning the prudent investment of a trust, the Grantor(s) do hereby confirm that life insurance is a prudent investment for this trust.

The Trustee shall not be required to take into account any prior gifts in any calendar year made outside of this trust or any withdrawal rights with respect to gifts made outside of this trust unless the Trustee (1) is advised in writing at the time of any gift to this trust of the amount of such outside prior gifts and any withdrawal rights (including the amount and time of any lapse of withdrawal rights outside of this trust) and (2) is provided in writing with all information necessary to perform the calculations required by this trust agreement with respect to the amount and lapse of withdrawal rights hereunder.

The Trustee shall not be required to send notice of any withdrawal rights with respect to any premium payment made outside of this trust, and the Trustee shall have no liability for failure to send such notice, unless the Trustee is advised in writing at the time such a premium payment is made of the amount and date of such premium payment.

### Trustee Guidance

I request (but do not require) that when determining whether to make a distribution to a beneficiary from any trust hereunder, the trustee do so in a manner that assists, encourages or rewards the beneficiary for exhibiting or accomplishing the following "desired behaviors":

- a. obtain an education at least through college and/or a vocational/technical school;

- b. be gainfully employed with a view toward being financially self-sufficient;
- c. be a productive member of society by making meaningful and positive contributions to family, community and society;
- d. act with kindness and consideration toward others;
- e. make contributions of time, money or both to charity; and
- f. maintain a healthy lifestyle.

The trustee should consider the societal norms in the geographical area in which a beneficiary resides when determining what constitutes “gainful employment,” “healthy lifestyle,” or other subjective notions referred to above, and the trustee’s beliefs are to be a part of such determinations. The trustee should keep in mind that a beneficiary’s age, health, abilities and other circumstances will affect his or her ability to accomplish one or more of the desired behaviors, and these circumstances should be considered in construing and applying the foregoing to any particular beneficiary. I consider fulltime parents to be productive members of society and gainfully employed, and do not intend that a beneficiary be discouraged from choosing to raise a family as his or her sole occupation.

I do not expect a beneficiary to necessarily accomplish or exhibit all desired behaviors and recognize that some desired behaviors may even conflict with others. It is my hope and intent that the trust property will be used to reward and enhance the quality of life of those beneficiaries that have exhibited, accomplished or are working toward accomplishing one or more of the desired behaviors, and to encourage and assist the beneficiaries to exhibit and achieve the desired behaviors. But, I also hope trust property will not be distributed to a beneficiary who is engaging in self-destructive, abusive or illegal behavior, except specifically for the beneficiary’s health, education and basic support, which may include expenses for rehabilitation and treatment or care. If the trustee, in the trustee’s discretion, determines (1) that a beneficiary is not capable of handling money or financial affairs prudently, or (2) that a beneficiary has financial problems or marital difficulties that could result in the diversion or dissipation of trust property, then I recommend (but do not direct) that the trustee refrain from distributing property to the beneficiary until such problems have been resolved to the trustee’s satisfaction.

#### Conflicts of Interest Waiver

The Trustee is authorized to use any products or services offered by it or its affiliates and may enter into such transactions including, without limitation, purchases, sales and leases of property (including life insurance products), loans, or a private sale of stock. The Trustee, is specifically authorized to compensate itself or its affiliates for any such products or services, notwithstanding any rule of law relating to self-dealing or conflict of interest, provided only that the Trustee and its affiliates act in good faith.

### Compensation of Trustees

The corporate trustee shall be entitled to receive compensation for its services in any fiduciary capacity in accordance with its schedule of rates, published from time to time and in effect at the time the compensation is paid, including minimum fees, and additional compensation for special investments, closely-held business interests and certain other services. The Grantor intends this paragraph to be a provision for specific rates or amounts of commissions within the meaning of any applicable state statute requiring such a provision. Family member trustees (whether by blood or marriage) are not entitled to compensation, but they shall receive reimbursement for reasonable out-of-pocket expenses incurred in the discharge of their duties as trustee. Non-family trustees of any trust hereunder who are attorneys, certified public accountants, or other professionals licensed in the financial services industry shall be entitled to compensation for such services at the standard hourly rates which they charge at that time, based on the actual time spent in serving as trustee hereunder, plus reasonable and customary disbursements for out-of-pocket costs actually incurred in the discharge of their responsibilities hereunder. Non-family trustees who are not licensed professionals as aforesaid shall be compensated based on one-quarter of the then prevailing hourly rate for the lawyer then serving as the primary legal adviser to the trust, plus reimbursement of reasonable expenses as aforesaid.

### Paid Third Party Services (including affiliates)

The trustee may employ such agents, advisors and other counsel, including but not limited to entities affiliated with any trustee, and to pay out of income or principal or both the reasonable charges and fees of such agents, advisors and counsel, as it shall in its sole discretion determine, including the power to select brokers and dealers affiliated with any trustee for the sale or purchase of any securities or other investment property in the trust. This authorization shall include, but shall not be limited to, an affiliated broker acting in a principal or agency capacity for equity and fixed income securities, routing orders for over-the-counter (OTC) stocks to a market maker affiliated with any trustee, routing listed stocks to specialists affiliated with any trustee, routing listed options through a proprietary trading operation affiliated with any trustee, or routing after-hours orders to a proprietary trading operation in which any trustee or an affiliate owns an equity interest. In such case the trustee or an affiliate may receive both monetary and non-monetary "payment for order flow," including, without limitation, an inter-company transfer of funds in connection with orders routed to an affiliated market maker; monetary compensation (including fee sharing) from, and participation in the profits of, certain affiliated and independent exchange specialists who execute orders; other compensation as part of reciprocal order routing arrangements with various exchange specialists and dealer firms; and rebates and credits against fees paid by various exchanges to member firms. To the extent permitted by applicable law, the trustee's compensation shall not be reduced by any additional compensation received by such agents, advisors and other counsel, including but not limited to the trustee, its parent, or any affiliate thereof, or any

agent, principal, advisor, counsel, broker, dealer, market maker or specialist (including exchange specialist) affiliated with the trustee, its parent or any affiliate thereof, for providing any of the services authorized in this paragraph.

### Governing Law

This Trust Agreement shall be construed and administered, and the validity of each trust hereunder shall be determined, in accordance with the laws of the State of \_\_\_\_\_, without giving effect to its conflicts of law principles. The trustee may change the jurisdiction whose law shall govern the construction, administration and validity of any trust hereunder and amend any provision of this Trust Agreement solely for such purposes, but any such change shall not affect the original term of the trust or its "Rule Against Perpetuities" period. The jurisdiction whose law governs the construction, administration and validity of any trust hereunder may, but need not, be the same as the situs of the administration of such trust.

### Portability Election

If my spouse survives me and my "applicable exclusion amount" (as defined in Section 2010(c)(2) of the IRC) is not fully used, I direct the trustee to make an election pursuant to Section 2010(c)(5)(A) of the IRC to allow my spouse to claim my "deceased spousal unused exclusion amount" (as defined in Section 2010(c)(4) of the IRC) in calculating his/her applicable exclusion amount.

### Use of Residence by Beneficiary

The trustee may invest in, purchase, retain, lease (or guaranty payment of a lease for) one or more residences (and its related furniture, furnishings and other articles of household use) and permit any person having any interest in such trust, and the guardian of such beneficiary or any adult designated by such guardian, and the family of such beneficiary, guardian or adult, to use such residences and furnishings forming part of such trust, upon such terms as the trustee may deem advisable, with or without rent and/or with or without the payment of taxes, insurance, maintenance and ordinary repairs, or otherwise; provided, however, that with respect to any trust that qualifies or is elected to qualify for the marital deduction, the trustee may permit only the current beneficiary of such trust to use such residence for less than fair market value.

### Divorce

In the event that any of my lineal descendant beneficiaries or any of their spouse's files a petition for legal separation or dissolution of marriage, such spouse, such spouse's parents, all descendants of such spouse's parents who are not my descendants and all spouses of such persons who are not descendants of my parents shall be deemed to have

died intestate on the date of such filing for all purposes of this trust agreement and any exercises of powers of appointment by such persons that have not become effective prior to the date of such filing shall be null and void; provided, however, that if one or more court orders are issued dismissing all such petitions (whether filed by my lineal descendant beneficiary or their spouse) and my lineal descendant beneficiary accepts the dismissal of such petitions filed by their spouse by a duly acknowledged written instrument, then all such persons shall no longer be deemed to have died intestate for all purposes of this trust agreement.

### Trustee Incapacity

If any person acting in any fiduciary capacity hereunder is or becomes incapacitated, then said person shall be deemed to have resigned in every capacity in which said person is acting as a fiduciary hereunder. For purposes of this Agreement, except as otherwise expressly provided herein, a person shall be considered "incapacitated" if (i) such person is a minor or is under a legal disability (under the laws of such person's domicile); (ii) such person is incarcerated for more than five (5) consecutive days; (iii) a licensed physician, within three (3) months after examining such person, signs a letter stating that such examination has occurred and that such person, due to illness or physical, mental or emotional disability, is not able to manage business affairs in a manner similar to that of persons of prudence, discretion and intelligence; or (iv) within ninety (90) days after a written request is made by a current trust beneficiary (i.e., a person to whom the trustee is directed or authorized to currently distribute net income and/or principal) or co-trustee of the trust, such person fails to produce a letter signed by a licensed physician after an examination of such person, which examination shall have occurred no more than three (3) months prior to the date of the written request, stating that such examination has occurred and that such person is able to manage business affairs in a manner similar to that of persons of prudence, discretion and intelligence (a "Physician Letter"); provided, however, no person shall be required to produce a Physician Letter more than once during any one year period.. If a person has been considered "incapacitated" pursuant to this provision but subsequently provides a Physician Letter to the current trustee, such person shall no longer be considered incapacitated and may be reinstated as a fiduciary hereunder.

### Trustee Voting

A decision made by a majority of the co-fiduciaries who are qualified to vote on such decision shall control, without liability to any co-fiduciary who dissents in writing. For purposes of this paragraph, if only two (2) co-fiduciaries are qualified to vote on a decision, such decision shall control only if both fiduciaries vote in favor of the decision.



### Single Signatory

Unless a co-fiduciary elects otherwise in writing, any one co-fiduciary has the authority sign any checks, agreements, or other documents on behalf of the trust and such sole signature shall bind the trust in the same manner as though said check, agreement or other document had been signed by all of the co-fiduciaries acting in the same capacity, and no person or entity dealing with the signing fiduciary shall be obliged to inquire as to the other co-fiduciary's acquiescence to such action. Further, if there is more than one trustee hereunder, any instrument to be executed on behalf of the trustees, as the case may be, including any check issued by or to the order of the trustees, may be made, executed, signed, endorsed or delivered by one trustee, and any person, firm or corporation, including any bank, may rely upon and shall be protected in relying upon the signature of any person acting as trustee so signing with the same force and effect as though all trustees had signed.

### Annual Accountings

Unless applicable law requires periodic accounts and prohibits a trust agreement from waiving a trustee's duty to account, the trustee may, but has no duty to, render periodic accounts (whether interim, final or otherwise) to a trust beneficiary or any court except upon the written request of a beneficiary; provided, however, that no beneficiary request can require a trustee to account more often than annually.

### Trustee Liability and Indemnification

To the maximum extent allowed by applicable law, a non-corporate trustee shall not be liable, responsible or accountable and shall be fully exonerated for any loss occasioned by such trustee's own acts and omissions (including acts in reliance upon and opinion of counsel) except for such trustee's willful misconduct or gross negligence. Each non-corporate trustee shall be entitled to indemnification out of the property of the trust of which the trustee is serving as fiduciary for costs and legal fees incurred by the trustee in any action concerning any act or omission of such trustee, unless such trustee's act or omission is determined to be the trustee's own willful misconduct or gross negligence. To the maximum extent allowed by applicable law, no trustee shall be liable or responsible in any way for the acts of any co-trustee, nor for any loss or expense occasioned by any act by or omission of a co-trustee and shall be liable only for his/her own willful misconduct or gross negligence.

### Prudent Person Rule Waiver

The trustee shall have the power to invest in or retain any securities or other property, real or personal (within or without the United States), including by way of illustration, but not limitation: any security as defined by the Securities Act of 1933 or other

applicable law, any contract of sale of a commodity for future delivery within the meaning of the Commodity Exchange Act, shares or interests in any private investment fund, private equity or venture capital fund, hedge fund, common trust fund, joint venture, general or limited partnership, limited liability company, statutory or common law business trust, statutory trust, real estate investment trust or an open-end (including any mutual fund) or closed-end management type investment company or unit investment trust, whether registered under the Investment Company Act of 1940 or unregistered, any money market instrument, bank deposit account (including but not limited to savings, time, certificate of deposit and transaction accounts), precious metal, foreign exchange, structured product, insurance contract, options, options on futures and variable forward contracts, swaps, caps, collars and other derivative instruments of a financial nature, notwithstanding the fact that the trustee, investment manager or custodian, its respective parent or any affiliate, is an issuer of such investment or provides services (whether as manager, underwriter, distributor, custodian, advisor, agent, servicer, trustee or otherwise) with respect to any such investment and further notwithstanding that the trustee, investment manager, custodian or its respective parent or any affiliate may receive compensation with respect to any such investment (in addition to trustee's commissions), so long as the total compensation received is reasonable. To the extent permitted by applicable law, this provision is intended to override any contrary provision of law prohibiting such additional fees or otherwise requiring either a reduction in trustee's commissions or an election between such additional fees and such commissions. Further, the trustee may (but is not directed to) acquire or continue to hold any property received by the trustee, even though not of a kind usually considered suitable for trustees to acquire or hold, or even though an investment may constitute a larger proportion of the trust than, but for this provision, would be appropriate, and irrespective of any risk, non-productiveness, or lack of diversification. I intend to grant the trustee the broadest possible discretion in determining what constitutes an appropriate investment, acceptable level of risk and proper investment strategy, consistent with his fiduciary duties. The trustee's investment decisions respecting individual assets shall be evaluated not in isolation, but in the context of the trust portfolio as a whole and part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that the trustee shall consider in investing and managing trust assets are such of the following as may be relevant to the trust or to the beneficiaries: general economic conditions; the possible effect of inflation or deflation; the expected tax consequences of investment decisions or strategies; needs for liquidity, regularity of income and preservation or appreciation of capital; and an asset's special relationship or special value, if any, to the purposes of the trust or to the beneficiaries. Any diversification requirement that would otherwise apply, including one imposed by a Prudent Investor Act or similar applicable law, is negated.

### Transfers, Decanting, Merger

The trustee of a trust (other than a trustee who is also a beneficiary hereunder and other than the trustee of a qualified marital trust or a qualified subchapter S trust (as defined in Section 1361(d)(3) of the IRC)) may distribute all or any part of the trust property as the

trustee, in the trustee's discretion, deems advisable to the trustee of one or more other trusts created or to be created by such trustee hereunder (and the trustee is hereby authorized to create a trust for such purpose) or by any person, for the benefit of all of the beneficiaries of such trust hereunder; provided, however, such other trust or trusts are held upon substantially the same terms and conditions as the trust hereunder; provided further, however, that no such distribution shall be made to any trust that may have a duration exceeding the period after which such trust hereunder is to terminate pursuant to the applicable rule against perpetuities. A distribution may be made to a trust for the benefit of less than all of the beneficiaries of the trust hereunder pursuant to the foregoing provisions if the trustee of the trust hereunder is authorized to pay income and principal to the beneficiaries of the existing trust as the trustee determines in his discretion (even if the trustee may also make distributions pursuant to an ascertainable standard within the meaning of Sections 2041 and 2514 of the IRC). Notwithstanding anything in this trust agreement to the contrary, to protect against inadvertent loss of exempt status of a GST exempt trust, the trustees may not exercise their distribution powers in such manner as to shift a beneficial interest in the property held in the existing trust from the beneficiaries who held such interests under the existing trust to a beneficiary who occupies a lower generation than such beneficiaries within the meaning of Treasury Regulation Sec. 26.2601-1(b)(4)(i)(D).

### S Corporations

If a trust owns or will acquire S Corporation Stock or stock in a corporation that is intended to become an S Corporation, the trustee (other than a beneficiary-trustee and other than the trustee of a qualified marital trust) may amend the provisions of such trust and/or the provisions of any trust that may be created from such trust in order to permit such trust to hold stock in an S Corporation or in order to permit such trust to convert from a "qualified subchapter S trust" (as defined in Section 1361(d)(3) of the IRC) to an "electing small business trust" (as defined in Section 1361(e) of the IRC) or vice versa.

### Virtual Representation

Except as otherwise provided in this trust agreement, the guardian, conservator or other representative of an estate of any incapacitated person, if any, otherwise the guardian or conservator of such person, or if no such guardian or conservator has been appointed, his parent, spouse or a relative with whom he resides (other than the trustee), may act for the person to receive and approve any account of the trustee, execute any receipt and receive any notice, waive the right to receive any notice or otherwise act on behalf of such person, where receipt by, notice to or other action by the person is required or permitted hereunder or under any statute or other rule of law, and such actions shall be binding upon such person, his estate, heirs, successors and assigns, and shall be of the same force and effect as if delivered to or executed by a person who is not incapacitated.

### Generation Skipping Transfer Tax Provisions

If a trust hereunder has an inclusion ratio greater than zero and less than one, the trustee may make a qualified severance of such trust in accordance with Section 2642(a)(3) of the IRC dividing the trust into two trusts, so that one of such trusts shall have an inclusion ratio of zero and the other such trust shall have an inclusion ratio of one. It is my intention that the trustee shall not be required to create or administer a trust hereunder that is only partially exempt from federal generation-skipping tax, or to commingle property subject to different treatment for federal generation-skipping tax purposes because the transferors of the property are assigned to different generations or for any other reason. This provision is intended to enable the trustee to avoid such consequences by permitting the trustee to segregate trust property that is GST Exempt from trust property that is not GST Exempt, and this provision should be construed in a manner consistent with this intention.

### Right To Information

Upon request, the trustees of a trust hereunder shall provide the following to me or my spouse, or, if neither of us is living or if we are both incapacitated, to the person(s) empowered to establish a plan or succession of trustees of the trust who are then living and not incapacitated: (1) any information concerning actions that have been taken by such trustees, and (2) a list of the assets of the trust along with the values of such assets.