

**DRAFTING FIDUCIARY POWERS FOR TRUST
PROTECTORS AND INDEPENDENT TRUSTEES**

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EDUCATION & PROFESSIONAL

B.S., Accounting – Southern Nazarene University (summa cum laude 1980)
J.D. – University of Texas (with honors 1983) (The Order of the Coif)
Board Certified in Estate Planning & Probate Law (December 1995)
Fellow – The American College of Trust and Estate Counsel (April 1997; Estate & Gift Tax Committee 2005 – ‘11, 2014 – ; Tax Policy Study Committee 2014 –)
The Best Lawyers in America – (a) Trusts & Estates and (b) Trusts & Estates and Litigation
Estate Planning Council of North Texas Board of Governors (2005 – 2007)
Dallas Estate Planning Council Board of Governors (1999 – 2001; 2003 – 2005)
Dallas Bar Probate Trust & Estates Section Council (2022 –)

RECENT LAW RELATED PUBLICATIONS AND SPEECHES

Co-Author/Speaker – A Discussion of Intentionally Defective Grantor Trusts (formerly Drafting Defective Grantor Trusts)
Estate Planning Council of North Texas (September 2021)
American Bar Association Skills Training for Estate Planners (July 2008 – 2013, 2015 – 2019)
Panelist – “All’s Well That Ends Well” – Designing a Plan That Performs “As You Like It”
State Bar of Texas 25th Advanced Estate Planning Strategies (April 2019)
Author/Speaker – Making Charitable Gifts of Non-Marketable Assets a Success
East Texas Estate Planning Council (November 2017)
Communities Foundation of Texas – Professional Advisors Series (January 2015)
Author/Speaker – Gift and Estate Tax Developments over the Last Year, Decade, and 40 Years, and Maybe Coming Soon
Dallas CPA Society’s Convergence 2017 (May 2017)
Author/Speaker – Defenses to a Will Contest
Collin County Bar Association Estate Planning/Probate Section (September 2016)
State Bar of Texas 40th Annual Advanced Estate Planning and Probate Course (June 2016)
Author/Speaker – Basic Trust & Estate Income Tax Planning
American Bar Association Skills Training for Estate Planners (July 2014)
Author/Speaker – Drafting Fiduciary Powers for Trust Protectors and Independent Trustees
State Bar of Texas 24th Annual Estate Planning & Probate Drafting Course (October 2013)
Author/Speaker – New Law Income Tax Issues
Estate Planning Council of North Texas (October 2013)
Author/Speaker – Where Do We Go From Here? - A Tax Law Update
Dallas Bar Association Probate Trusts & Estates Section (March 2013)
Collin County Bar Estate Planning and Probate Section (June 2014)
Author/Speaker – Estate Planning in 2012, 2013 and the Foreseeable Future
Tax and Estate Planning Council, Shreveport, Louisiana (December 2011)
Collin County Bar Estate Planning and Probate Section (August 2012)
Speaker – Estate Planning Effects and Strategies under the “Tax Relief . . . Act of 2010”
Dallas Bar Association Tax Section (January 2011)
Co-Author/Speaker – Judicial and Non-Judicial Trust Modifications and Terminations
Dallas Bar Association Probate Trusts & Estates Section (January 2010)

RECENT COMMUNITY ACTIVITIES

Southern Nazarene University (Bethany, Oklahoma) – Trustee (2007 – 2013) and Foundation Board Member (1993 –)
North/East Texas District Advisory Board – Church of the Nazarene (2019 –)
Nexus Community, A Church of the Nazarene (Dallas, TX) – Church Board Member (2010 –) (church meets and ministers in a low-income neighborhood)
Nexus Neighborhood Outreach (Dallas, TX) – Board Member and Secretary (2019 –) (a public charity improving the wellbeing of people living at the margins, primarily in northeast Dallas)

PERSONAL

Married to Debbie (1980), children are Daniel (PhD in Philosophy from Indiana Univ.) and Laura (NICU RN in Plano)
Raised in Far North Dallas (Renner) and attended Plano Independent School District, Grades 1 to 12
Hobbies are travel (been to forty-nine states at least three times, all fifty state capitols and twenty-eight foreign countries), cars, politics, economics, current events, theology, and being a fan of auto racing

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Drafting Fiduciary Powers for Trust Protectors and Independent Trustees

I. INTRODUCTION

Whenever you introduce a second fiduciary into a trust agreement or declaration, you need to draft carefully to be clear as to the division of authority and of responsibility between the fiduciaries. The reasons for introducing this complexity into the document will vary with the situation. In some situations, it may be to separate the investment role and the distribution role. In others, it may be that a related trustee cannot hold certain powers without creating adverse tax and other consequences. *See Bisignano, WHEN THE ONLY ONE YOU TRUST IS YOURSELF - DRAFTING AND PLANNING WITH SELF TRUSTEED IRREVOCABLE NONGRANTOR TRUSTS, Advanced Estate Planning Strategies 2003, State Bar of Texas.* Yet another reason may be to retain certain controls, such as the ability to remove and replace a corporate trustee.

II. MINIMAL POWERS

A. Remove and Replace Trustee

1. Why the Need Has Arisen

In days long gone, a client could choose a corporate trustee to provide professional management based on a long-standing reputation in the local community and a long history of business continuity. Change down at the bank was measured and reasonably predictable.

Over the last few decades, Texas has allowed bank holding companies, which gave way to branch banking. This was followed by interstate banking and a massive interstate consolidation in the banking industry. The days of choosing as trustee the local First National Bank and Trust, with its local ownership and management and an expectation that the corporate trustee would continue to be locally owned and managed over the life of the trust, are long gone.

At its extreme, that local bank has come, after a series of transactions, to be owned by an out-of-state banking giant and many of the significant trust relationships of the old local bank are now managed at a centralized, out-of-state office where trust officers and their assistants rely primarily on technology to

deliver trust services as efficiently as possible with a minimum of physical presence.

The bottom-line is that for more than thirty years a settlor of a new trust has not had any certainty that any corporate trustee that he or she might choose would be an organization that he or she (or his or her descendants) would recognize by the time the trust terminates.

2. Power to Remove and Replace

The widely adopted response to the reality that the corporate trustee you choose today might undergo material change over the life of the trust is to give someone the power to remove and replace the corporate trustee.

It might be possible to limit the application of such a power so that only a corporate trustee that has undergone some specified amount of change, be that in ownership, management, etc., can be removed or replaced. But that creates a level of complexity and a potential source of future controversy as to whether the specified amount of change has in fact occurred. As a result, it is common for the power to remove and replace a corporate trustee to be kept simple and unqualified.

While it is possible to replace a corporate trustee with an individual trustee, typically the considerations that lead to the selection of a corporate trustee in the first place will lead to a requirement that the replacement trustee also be a corporate trustee. If such a limitation is not imposed, care needs to be taken by the drafter to either require that an individual successor trustee be independent in all of the necessary ways or that the necessary limitations be included in the trust agreement to limit the powers of a non-independent trustee.

3. Who Should Hold the Power?

Deciding who should hold the power to remove and replace a corporate trustee depends upon a number of considerations. Why did the settlor name a corporate trustee in the first place? Was it simply to gain professional management? If so, perhaps the beneficiaries currently entitled to distributions should be given the power. Was it because of potential conflict among family members whose relationship is described with the word "step"? Perhaps the power

should be shared by the beneficiary currently entitled to receive current distributions and the beneficiaries who would receive the remainder interest in the trust if the trust were to then terminate. Was it because the beneficiary should be kept as far away from the management of the trust assets as is possible? Perhaps the power should be given to another family member or a trusted friend instead of the beneficiary. Is there another fiduciary who could be given this power as well as his or her other powers and responsibilities? Or, as discussed below, could the settlor be given this power without adverse consequences?

4. Should There be a Committee?

Should the power be given to only one person, or should it be given to a committee of two or more? And if so, how much structure should the trust agreement provide for the committee? Will a member who fails or ceases to serve be replaced, and by whom? Who gets to call the meetings of the committee? Does the committee act unanimously or by majority vote? Should some people be barred from serving on the committee?

Typically, if a committee is composed of more than two persons, the trust agreement will provide more structure than if the power is given to only two people. But the answers to all of these questions are more a matter of judgment than of objective correctness.

5. Tax Considerations as to Settlor

Care must be exercised in creating a power to remove and replace a trustee to not create an adverse tax result. When a trust is drafted in the expectation that the trustee will be a corporate trustee (and assuming for purposes of this paper that all corporate trustees are independent of the settlor and all of the beneficiaries), the agreement may not have any of the provisions that would be necessary if the trustee was not independent.

The Treasury Regulations have long been clear that a settlor is generally deemed to hold all of the powers of the trustee if the settlor retains the power to remove the trustee and appoint himself trustee. *See, e.g.,* Treas. Reg. § 20.2036-1(b)(3); Treas. Reg. § 20.2038-1(a)(3). On the other hand, even though there is not a statutory exception for powers limited by an ascertainable standard, such an exception is well-

settled in the case law. *See, e.g., Estate of Budd*, 49 TC 468 (1968), acq., 1973-2 C.B. 1 (in acquiescing, the Internal Revenue Service (“IRS”) conceded that “a power of invasion will not cause a trust’s corpus to be includible in the grantor-trustee’s gross estate under Int. Rev. Code of 1954 § 2036 or § 2038 in similar cases if under all the circumstances and reading the trust instrument as a whole, a fiduciary would be prevented under State law from substantially shifting beneficial interests solely at his discretion”).

What if the settlor only retains the power to remove and appoint another person as trustee? The bottom-line answer is that it is okay, but the IRS has said you must draft an exception to the power to avoid a tax disaster. We got to this place because the IRS overreached and refused to fully back down, insisting that, to avoid estate tax inclusion, the removal and replacement power had to be limited by an income tax standard.

The sixteen-year story began when the IRS summarized its Revenue Ruling 79-353 as follows. “A decedent created an irrevocable inter vivos trust. The trust instrument provided that the decedent must not appoint himself trustee, that the corporate trustee might distribute trust income and principal to decedent’s adult children without limitation, that after the children died the remaining trust principal and undistributed income would be distributed to decedent’s grandchildren, and that decedent would retain a life power to replace the corporate trustee without cause. The value of the undistributed trust principal and accumulated income are includible in the decedent’s gross estate under sections 2036 and 2038 of the Code.”

Practitioners generally doubted the correctness of the IRS’s position in Revenue Ruling 79-353, and, in any event, had not drafted irrevocable trust agreements with such a position in mind. The IRS conceded in Revenue Ruling 81-51 that it would only apply Revenue Ruling 79-353 prospectively.

The IRS already had conceded in Revenue Ruling 77-182 that a decedent’s power to appoint a successor corporate trustee only in the event of the resignation or removal by judicial process of the original trustee did not amount to a power to remove the original trustee that would have endowed the decedent with the trustee’s discretionary control over trust income. As to the balance of the issue, the IRS failed to sustain its position in the courts. *See, e.g., Estate of Vak v. Commissioner*, 973 F.

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2d 1409 (8th Cir. 1992); *Estate of Wall*, 101 T.C. 300 (1993).

In Revenue Ruling 95-58, the IRS revoked Revenue Ruling 79-353 and Revenue Ruling 81-51, modified Revenue Ruling 77-182, and largely conceded the issue in ruling that even if the decedent had possessed the power to remove the trustee and appoint an individual or corporate successor trustee *that was not related or subordinate to the decedent (within the meaning of section 672(c))*, the decedent would not have retained a trustee's discretionary control over trust income. Note that in not fully backing down the IRS imported a concept into the estate tax law from the grantor trust income tax rules, requiring that the appointed successor trustee not be related or subordinate to the decedent, as those terms are used in Section 672(c) of the Internal Revenue Code. The IRS's exception would seem to be of limited practical impact, except for the need to include the limitation in a power to remove and replace that is retained by the settlor if you do not want to risk having the IRS assert full estate tax inclusion.

6. Tax Considerations as to Beneficiary

The logic of Revenue Ruling 95-58 would seem to be readily extended to a power to remove and replace a trustee that is held by a beneficiary where the trustee holds powers that the beneficiary could not hold without creating tax problems. Accordingly, a beneficiary's power to remove and replace a trustee should also be limited so that the beneficiary cannot appoint a related or subordinate successor trustee if the trustee will have powers that would be a problem if the beneficiary had those powers.

7. Sample Removal and Replacement Language

If, at any time, a corporate trustee is serving as trustee or co-trustee of any trust created hereunder, the adult primary beneficiary of such trust shall have the right, by written instrument signed by the adult primary beneficiary and delivered to said corporate trustee or co-trustee, to remove said corporate trustee or co-trustee and appoint a successor corporate trustee or co-trustee that is a corporation, state or national bank or trust company located in Texas or qualified to serve in Texas as provided in subchapter A of Chapter 505 of the Texas Estates Code; provided, however, that in the case of a trust other than [identify any revocable trusts

held under the agreement], the corporate trustee or co-trustee so appointed by the adult primary beneficiary of such trust may not be a related or subordinate party to any beneficiary of or contributor to such trust within the meaning of section 672(c) of the Internal Revenue Code.

Note that "adult primary beneficiary" is our defined term to reference the typically most senior current beneficiary of the trust.

III. INDEPENDENT TRUSTEES, TRUST PROTECTORS, TRUST CONSULTANTS, ETC.

While drafting for an independent trustee is relatively straightforward, the settlor may wish, for any number of reasons, to appoint a trustee that is not independent. Such can certainly be done, but the need will remain to grant the powers and responsibilities that cannot be held by the non-independent trustee to someone who can hold them.

One way to do this is to appoint an independent co-trustee to serve with the non-independent trustee.

Another way is to appoint a "trust protector" or a "trust consultant" or some other entitled person (who this article will call a "trust consultant") who is given only those powers that cannot be held by the non-independent trustee in the expectation that the trust consultant will be involved with the trust only when needed to exercise such powers.

We typically draft to provide provisions for an independent trustee, or, if there is not one then serving, for a trust consultant.

For an example of language for a trust consultant, see Appendix A.

A. Definition of an Independent Trustee

The logical place to begin thinking about an independent trustee is to define the term. For example:

(1) "Trustee" shall mean the trustee or trustees or successor trustee or trustees of the trust acting at the time in question.

(2) An "independent trustee" of a trust created hereunder shall mean a trustee who is not a prohibited person with respect to such trust.

(3) A "related trustee" of a trust hereunder shall mean a trustee who is a prohibited person with respect to such trust.

(4) A "prohibited person" with respect to a trust administered in accordance with the terms and provisions of this Agreement shall mean:

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- (a) *any contributor to such trust;*
- (b) *any beneficiary of such trust currently eligible to receive distributions; and*
- (c) *at such time as settlor does not possess the [swap] power described in section [#](a) because he has disclaimed such power pursuant to section [#](b), any person whose service as an independent trustee or trust consultant of such trust would cause the income of such trust to be taxable to settlor or settlor's spouse pursuant to sections 671 through 679 of the Internal Revenue Code.*

B. Distribution Powers of Independent Trustee

Authority to make distributions will typically be divided between the non-independent trustee and the independent trustee or trust consultant. For example:

(1) *So long as the primary beneficiary is living, trustee may pay such part or all of the income or corpus, or both, of the trust as trustee deems proper for the support of the primary beneficiary and those of the descendants of the primary beneficiary who are living from time to time. In addition, so long as the primary beneficiary is living, the independent trustee (or a related trustee if directed by the trust consultant as provided in section [#]) may pay such part or all of the income or corpus, or both, of the trust as the independent trustee (or the trust consultant, as the case may be) deems proper for the benefit, comfort and happiness of the primary beneficiary and those of the descendants of the primary beneficiary who are living from time to time. Any income not distributed in accordance with this section shall be accumulated and added to corpus.*

(2) *“Primary beneficiary” shall mean only a beneficiary who is, at the time, specifically designated as primary beneficiary of a trust created hereunder. It shall not include other beneficiaries.*

(3) *“Support” shall mean support, maintenance, health and education. The standard of support, as so defined, shall be limited to support in the beneficiary's accustomed manner of living.*

C. Power to Control Beneficial Enjoyment

Section 674 of the Internal Revenue Code is the grantor trust rule that is most likely to ensnare a settlor in the grantor trust rules. The section begins with a sweeping general rule that would make most trusts

grantor trusts for income tax purposes. However, the rule is subject to many exceptions, which taken together substantially reduce the application of Section 674. Nonetheless, care must be taken in drafting a trust instrument to be sure that one or more of the applicable exceptions will actually apply and supplant Section 674's sweeping general rule (unless the grantor trust is desired, in which case a swap power should be used to ensure grantor trust status).

The exceptions that apply regardless of the identity of the trustee, set forth in Section 674(b) of the Internal Revenue Code, generally do not allow for a “pot” trust and impose requirements that may give the current beneficiaries more ultimate control over the trust income than the settlor desires.

Section 674(d) provides an exception that allows the allocation of income among multiple beneficiaries if (a) the power is limited by a reasonably definite external standard that is set forth in the instrument and (b) none of the trustees allocating the income are the settlor or settlor's spouse living with the settlor. If the settlor (or settlor's spouse living with settlor) is the trustee, the power to distribute on a standard can be given to someone else, including a beneficiary of the trust, who might be a distributions trustee, as discussed below.

Section 674(c) contains an extremely broad exception to Section 674's general rule as long as none of the trustees are the settlor and no more than half of the trustees are related or subordinate parties who are subservient to the wishes of the grantor. This exception is why distribution powers held by independent trustees or trust consultants are not subject to Section 674. Indeed, with care, it is possible to even provide for the distribution power to be as much as “half” shared with others, even if they are related or subordinate to the wishes of the grantor.

D. Power to Convert a Power of Appointment

We have traditionally included a power to convert a special power of appointment into a general power of appointment because of the potential in some situations for significant savings in transfer taxes by having an estate tax (rather than a generation-skipping transfer tax) imposed on property subject to such general power of appointment, or because such a conversion may permit a greater use of the beneficiary's, or his or her spouse's, exemption from generation-skipping transfer tax set forth

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in section 2631 of the Internal Revenue Code. Now, with the increase in the transfer tax exemptions, conversion might also be desirable to get a new income tax basis, even if the trust is not subject to transfer tax. For an example of such language, see Section 1 of Appendix B.

Note that this conversion power must not be held by the beneficiary who is the power holder or it will be a general power of appointment from the beginning. Also be careful that you do not create what the IRS can view as reciprocal powers when drafting parallel trusts for siblings (for example, daughter is trust consultant for son's trust and son is trust consultant for daughter's trust). See PLR 9235025 (or was that the result of the IRS accommodating taxpayers who wanted a general power of appointment to be found for their own reasons?).

E. Modifications for S Corporation Purposes

Only certain trusts will qualify to hold stock in an S Corporation. We typically include language authorizing the trustee to modify a trust held under the agreement to make it qualify as an S Corporation shareholder, but such modification powers are often broad enough that they create other tax concerns if the trustee is not independent. So we include language that limits who can exercise the modification power. For example:

Any decision regarding what modifications to make and the type of qualifying trust to be elected shall be made by the independent trustee (or if no independent trustee is serving, the trust consultant) if a prohibited person is serving as trustee and such decision entails a change in the powers or rights of any beneficiary with respect to such ineligible trust.

F. Controlled Corporation Stock

In 1972, the U.S. Supreme Court rejected the IRS's claim that stock in three unlisted corporations that decedent gave away inter vivos was includible in his taxable estate pursuant to Section 2036 of the Internal Revenue Code because he retained the right to vote the transferred stock, to veto the transfer by the bank trustee of any of the stock, and to remove the trustee and appoint another corporate trustee as successor. *U.S. v. Byrum*, 408 U.S. 125 (1972). The right to vote the transferred stock, together with the

vote of the stock decedent owned at the time of his death, gave decedent a majority vote in each of the corporations. *Id.* Congress responded by legislatively overturning the result and enacting the "anti-Byrum rule."

That rule, Section 2036(b) of the Internal Revenue Code, provides that the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property and includible in the decedent's taxable estate under Section 2036. For this purpose, a corporation shall be treated as a controlled corporation if, at any time after the transfer of the property and during the three year period ending on the date of the decedent's death, the decedent owned (with the application of section 318 of the Internal Revenue Code), or had the right (either alone or in conjunction with any other person) to vote, stock possessing at least twenty percent of the total combined voting power of all classes of stock. Note that the statute only reversed *Byrum* as to corporate ownership, and not with respect to other entities.

Accordingly, consideration should be given to including savings language that will prevent the donor from voting controlled stock. Further, consideration should be given to extending the prohibition to the donor's spouse if there is any possibility that the controlled stock was community property when given. For an example of such language, see Section 2 of Appendix B.

G. Co-Trustee Voting Provisions

When there is more than one trustee serving at a time, there needs to be a rule as to whether they act by majority vote or only by unanimous action. If the trust agreement is silent, the default rule under Texas law is by majority decision. Tex. Tr. Code § 113.085(a). If the structure of the trust relies on there being an independent trustee as to certain matters, it is important to be clear in the trust agreement that the independent trustee has exclusive authority over those matters. For example, at the end of a provision dealing with how co-trustees make decisions, consider adding:

Notwithstanding any provision of this subsection to the contrary, any powers or authority reserved exclusively to the independent trustee of a trust created under this Declaration shall be exercised only by such trustee.

H. Renunciation Power

It is possible that a change in tax or other law could create a problem with a particular individual serving as an independent trustee. Rather than having the individual resign as a trustee altogether, a provision allowing the individual to renounce the “independent” powers would likely solve the problem. For example:

Each individual independent trustee of a trust created hereunder shall have the right to renounce any or all powers granted to the independent trustee hereunder that are not also granted to a related trustee (such as the power to make distributions to a primary beneficiary for reasons other than support and the power to convert a primary beneficiary’s power of appointment as described in sections [#](f) and [#](g)), in which case such trustee shall be considered a prohibited person and related trustee with respect to such trust for all purposes of this Declaration. Such renunciation may be made by such independent trustee at any time prior to or during the time that such trustee is serving as trustee hereunder, by giving thirty (30) days’ written notice (which notice may be waived), signed by such trustee and in recordable form, to the primary beneficiary of such trust, or if no primary beneficiary is available, by filing such written notice in the Deed Records of Dallas County, Texas, at least thirty (30) days prior to the effective date of such renunciation. Any such independent trustee’s renunciation shall be final, binding and conclusive upon all parties ever interested hereunder, but shall have no effect on any other current or future trustee’s powers with respect to such trust.

IV. INVESTMENT TRUSTEE PROVISION

Another division of responsibility that is sometimes used is to appoint co-trustees but to give one of them responsibility over an area like investments, or particular investments, to the exclusion of the other. For an example of such language, see Appendix C.

V. DISTRIBUTION TRUSTEE PROVISIONS

In contrast to dividing responsibility between co-trustees, a similar end result can be achieved with a single trustee and a distributions trustee. This arrangement allows the trustee to handle investments and all other trust matters except for distributions, which might be delegated to a family member or trusted confidant.

These provisions also can be “springing.” For example, assume that settlor is also the trustee and that the trust is structured to avoid adverse transfer tax from settlor serving as trustee, but that the trust is a grantor trust because of settlor serving as trustee. Settlor/trustee can be given the right to renounce his or her distribution powers, triggering provisions that call for a distributions trustee to commence serving, and terminating grantor trust status.

For an example of distribution trustee provisions see Appendix D (the triggering release provision is in Section 5.1(i)).

If the trust is a grantor trust with the settlor as trustee and you do not anticipate the settlor terminating grantor trust status, you do not need the distribution trustee language. If you later find that the settlor wishes to terminate grantor trust status and continue to serve as trustee, the trustee should be able to decant the trust into a trust that provides for a distribution trustee.

APPENDIX A

1. ARTICLE III - TRUST CONSULTANT PROVISIONS

3.1 Trust Consultant Powers.

(a) Any provision of this Declaration to the contrary notwithstanding, the trust consultant of any trust created hereunder shall have the power, at any time and from time to time, to direct the trustee of such trust to distribute income or corpus of such trust, or terminate such trust, in whole or in part (and distribute the property subject to such distribution or termination in accordance with the terms and provisions of section 3.1(b)), in the trust consultant's sole and absolute discretion.

(b) Should the trust consultant of any trust created hereunder direct the trustee of such trust to make a distribution from or terminate such trust as described in section 3.1(a), trustee shall distribute the income or corpus so affected, outright and free of trust (subject to section 3.2(d)), to [any one or more, or all, of the beneficiaries of such trust who are currently eligible to receive distributions, in such proportions as the trust consultant, in the trust consultant's sole and absolute discretion, shall determine] **OR** [the then primary beneficiary of such trust], to the exclusion of any remaindermen or other beneficiaries designated by the provisions of such trust.

(c) Any provision of this Declaration to the contrary notwithstanding, at any time that settlor or settlor's spouse is serving as trustee of a trust created hereunder, the trust consultant of such trust shall have the exclusive power to exercise the voting rights attached to any share of stock of a controlled corporation (as such term is defined in section 2036(b) of the Internal Revenue Code) held by any trust created hereunder provided that: (i) such stock was contributed to such trust by settlor or settlor's spouse; and (ii) the retention of such voting rights in such stock by settlor or settlor's spouse would result in the inclusion of full value or any part thereof of such stock in the estate of settlor or the estate of settlor's spouse.

(d) The trust consultant's judgment shall be final, binding and conclusive upon all parties ever interested hereunder, and distribution of trust property in the manner provided herein shall relieve the trustee and the trust consultant of any further responsibility with respect to such property.

(e) The trust consultant of any trust created hereunder shall have no power or authority other than that given to the trust consultant by the express terms of this Declaration.

(f) With respect to any trust created under this Declaration, at any time an independent trustee is serving, all powers and duties of the trust consultant shall be suspended, and the trust consultant shall not serve, with respect to any such trust during that time. This section 3.1(f) is subject to section 3.1(g).

(g) If, at any time, a corporate trustee is serving as trustee or co-trustee of any trust created hereunder, the trust consultant of such trust (or, in the case of a trust without a trust consultant, the adult primary beneficiary of such trust) shall have the right, by written instrument signed by the trust consultant (or the adult primary beneficiary, as the case may be) and delivered to said corporate trustee or co-trustee, to remove said corporate trustee or co-trustee and appoint a successor corporate trustee or co-trustee that is a corporation, state or national bank or trust company located in Texas or qualified to serve in Texas as provided in subchapter A of Chapter 505 of the Texas Estates Code; provided, however, that in the case of a trust without a trust consultant, the corporate trustee or co-trustee so appointed by the adult primary beneficiary of such trust may not be a related or subordinate party to any beneficiary of or contributor to such trust within the meaning of section 672(c) of the Internal Revenue Code.

3.2 Other Trust Consultant Provisions.

(a) With respect to each trust created hereunder, subject to the limitations set forth in this Declaration, in directing the trustee to make distributions of income or corpus, or terminate such trust, in whole or in part, the trust consultant of such trust is hereby authorized, at any time and from time to time, to direct trustee to make distributions in cash or in kind, or partly in cash and partly in kind, and in the event of a distribution to two (2) or more beneficiaries, to

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partition said corpus between or among them, and to determine what property or items of property shall constitute each share to be distributed, or to direct trustee to distribute to them undivided interests in one or more items of property, or to sell all or part of the corpus subject to distribution and distribute the net proceeds of such sale or sales. Every such partition, determination or distribution shall be final, binding and conclusive upon all parties ever interested hereunder.

(b) Any provision contained in this Declaration to the contrary notwithstanding, any individual acting as trust consultant of a trust created hereunder shall in no event be liable for any mistake or error in judgment, but shall be liable only in the case of bad faith, dishonesty, gross negligence or willful misconduct. In the absence of bad faith, dishonesty, gross negligence or willful misconduct, the trust consultant of any such trust shall in no event be liable for any loss or damage to the trust, to any beneficiary thereof or to any other person resulting from any action, inaction or omission of the trustee or the trust consultant of such trust with regard to the investment, management or administration of the trust or otherwise. The trust consultant shall have no duty to supervise trustee, to be informed of trustee's action or inaction, to take any action or correct any actual or possible breach of trust by trustee, or to remove trustee on any account.

(c) No trust consultant, original or successor, need ever furnish bond.

(d) With respect to any distribution directed by the trust consultant of a trust created hereunder, should the beneficiary to whom such distribution is to be made be less than twenty-one (21) years of age, or should the trust consultant, in the trust consultant's sole and absolute discretion, deem such beneficiary incapable of handling any property otherwise distributable to such beneficiary, the trust consultant may direct trustee to make such distribution to any of the following persons, to be used for the benefit of the beneficiary: the natural, testamentary or appointed guardian of the beneficiary's person; the guardian of the beneficiary's estate; the person with whom the beneficiary then resides; the person or persons furnishing the beneficiary's support, or any part thereof; any adult person named by the trust consultant as custodian for the beneficiary under any applicable Uniform Gifts to Minors Act, Uniform Transfers to Minors Act or similar or successor law; or any friend or relative of the beneficiary deemed appropriate by the trust consultant; provided, however, that no such payment shall be made to any contributor to any trust created under this Declaration. The trust consultant may direct trustee to make distributions to the beneficiary directly, should the trust consultant deem the beneficiary capable of handling the property distributed. Distributions to a guardian specified above may be made even though such guardian is appointed by a court of competent jurisdiction of a state other than Texas. All distributions made pursuant to the terms of this section shall be an acquittance to trustee and the trust consultant to the extent of the amounts so paid.

(e) If and when in good faith in doubt as to the proper construction, interpretation or operation of this Declaration, or as to what property be comprehended within its terms, or as to any question that may arise during the administration of any trust created hereunder, or as to the application, interpretation or construction of the trust laws of the state of Texas, or as to any other matter involving the administration of any trust created under this Declaration or the rights of any beneficiary thereof or any person otherwise interested in or affected by any trust created hereunder, the trust consultant, with respect to matters within the trust consultant's discretion, is authorized to resolve such doubts in such manner as the trust consultant deems equitable and proper. Settlor's intention is to avoid suits for construction or instruction to the fullest extent possible; provided, however, that nothing in this section 3.2(e) shall restrict any ability the trust consultant would otherwise have to present any matter to a court for resolution, including a request for construction or instruction. Subject to the trust consultant's fiduciary obligations, all decisions and actions of the trust consultant in the exercise of the discretion and power vested in the trust consultant by the terms and provisions of this Declaration shall be final, binding and conclusive upon all parties ever interested hereunder.

(f) No trust consultant shall be entitled to receive compensation for serving in such capacity hereunder, but all trust consultants shall be entitled to receive reimbursement for any and all out-of-pocket expenses incurred in connection with the discharge of the duties of said office.

Alternative Compensation Provisions for Trust Consultant (in place of 3.2(f) above)

3.3 Compensation of Trust Consultant.

(a) Any trust consultant hereunder shall be entitled to receive compensation that is fair, reasonable and customary for serving hereunder. Should the same person be acting and entitled to compensation in more than one capacity (for example, as the trust consultant hereunder and as executor of settlor's estate), such person shall be entitled to reasonable compensation in all capacities in which such person is then acting and entitled to compensation, but in no event shall any such person be entitled to compensation for the same service in more than one capacity. Any trust consultant hereunder shall be entitled to receive reimbursement for any and all out-of-pocket expenses incurred in connection with the discharge of the duties of said office.

(b) Any trust consultant of a trust created hereunder may waive his or her right to receive compensation for serving in such capacity by giving thirty (30) days' written notice (which notice may be waived), in recordable form, to the primary beneficiary of such trust, or if no primary beneficiary is available, by filing a written waiver of compensation in the Deed Records of Dallas County, Texas at least thirty (30) days prior to the effective date of such waiver of compensation.

(c) Any person who is serving as the trust consultant hereunder is specifically authorized to employ, retain or engage any person, firm or organization to render services to any trust created hereunder without incurring any liability for self-dealing by reason of such employment, retention or engagement, and both the trust consultant and such person, firm or organization shall be entitled to compensation in all capacities in which they are acting and otherwise entitled to compensation.

Various Additional Trust Consultant Provisions That Go Various Places

Except as otherwise provided regarding the trust consultant's authority to direct trustee to make distributions from any trust created hereunder, and subject to the powers of appointment granted hereunder, in any year trustee shall have the sole and absolute discretion and authority, as trustee deems proper, to: (i) determine whether to make any distributions, or no distributions, from any trust created hereunder; (ii) make distributions to any beneficiary of a trust created hereunder, and make no distributions to any beneficiary of another trust created hereunder; and (iii) make distributions to any one or more beneficiaries of a trust created hereunder, and make no distributions to any other beneficiaries of such trust.

Notwithstanding any provision of this Declaration to the contrary, trustee shall make no distribution from any trust created hereunder, including any distribution made in accordance with section [trustee provision parallel to section 3.2(d)], and the trust consultant shall not direct trustee to make any such distribution, including any distribution made in accordance with section 3.2(d), that satisfies the individual legal obligation of trustee, the trust consultant or any contributor to such trust to support any person.

Notwithstanding any provision of this Agreement to the contrary, no prohibited person shall ever serve as trust consultant of any trust created hereunder. Accordingly, in the event a trust consultant becomes a prohibited person (e.g., because settlor disclaims the [swap] power provided in section [?](a)), such trust consultant shall be deemed to have resigned immediately prior to the event that caused the trust consultant to become a prohibited person.

APPENDIX B

1. Power to Convert a Power of Appointment

(b) The objects of the power granted in section [#], after conversion pursuant to subsections (f) and (g) (but only while such conversion is effective), shall be any permissible object of the power of appointment described in subsection (a) as well as the primary beneficiary's creditors and the creditors of the primary beneficiary's estate. Each such converted power of appointment shall be a general power to appoint the property subject thereto in such amounts and proportions, either outright to any one or more of the objects of the power or in trust to any trustee or trustees (even though such a trustee shall not previously have been trustee hereunder) for the benefit of any one or more of such objects, with such special and general powers of appointment and such administrative, spendthrift and other lawful provisions as the primary beneficiary shall desire; provided always that no one not an object of the power shall benefit thereby.

(f) With respect to any DESCENDANT'S TRUST that is not wholly exempt from generation-skipping transfer tax, the independent trustee of such trust shall have the authority, in such trustee's sole and absolute discretion, with respect to all or any portion of the corpus of such trust (including a pecuniary amount), to do any of the following in accordance with the terms and provisions of subsection (g):

(i) To convert the power of appointment granted to the primary beneficiary of such trust in section [#] to be a general testamentary power of appointment, the objects of which are described in subsection (b);

(ii) To revoke the conversion of a power of appointment that has been converted as provided in subsection (f)(i) with respect to all or any part of the property of the trust to which such conversion had previously applied;

(iii) To convert a power of appointment as provided in subsection (f)(i), and irrevocably to release the right to revoke such conversion; and

(iv) After conversion of a power of appointment as provided in subsection (f)(i) with respect to a part but not all of the trust property, to divide the trust property into two fractional shares based upon the portion of the trust as constituted prior to such division that would be includable in the gross estate of the primary beneficiary if he or she died immediately before such division (in which case the power of appointment that has been converted as provided in subsection (f)(i) shall be exercisable over the entire share that holds the portion of the trust that would be includable in the primary beneficiary's estate, and over no part of the other share), and to hold, administer and dispose of each such share in a separate trust; provided, however, that the independent trustee of such trusts shall have the right to recombine the two trusts so created, in such trustee's sole and absolute discretion.

In authorizing such conversion, it is settlors' request, but not direction, that the independent trustee convert a power of appointment into a general power of appointment when such trustee believes that inclusion of the property affected thereby in the gross estate of the primary beneficiary may achieve a significant savings in taxes with respect to property subject to such general power of appointment, or that such conversion may permit a greater use of the primary beneficiary's, or his or her spouse's, exemption from generation-skipping transfer tax set forth in section 2631 of the Internal Revenue Code. Any purported exercise of a converted power of appointment shall not be valid unless the independent trustee has converted such power prior to its exercise as described in this subsection (f) in accordance with the terms and provisions of subsection (g).

(g) The independent trustee of any trust described in subsection (f) shall exercise his or her power to (i) convert, (ii) revoke the conversion of or (iii) release the right to revoke the conversion of the power of appointment granted in section [#] as described in subsection (f) only by written instrument, signed and acknowledged by the independent trustee, delivered to the primary beneficiary during the primary beneficiary's lifetime, and clearly expressing the independent trustee's conversion, revocation of conversion or release of the right to revoke the conversion of such power by referring explicitly to this subsection (g). A copy of each such instrument of conversion, revocation or release shall be kept with the trust records.

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(h) Should there be no independent trustee of a trust described in subsection (f), the trust consultant of such trust shall, in the trust consultant's sole and absolute discretion, exercise the powers granted to the independent trustee in subsections (f) and (g).

2. Voting Controlled Corporation Stock

(c) Any provision of this Declaration to the contrary notwithstanding, at any time that settlor or settlor's spouse is serving as trustee of a trust created hereunder, the trust consultant of such trust shall have the exclusive power to exercise the voting rights attached to any share of stock of a controlled corporation (as such term is defined in section 2036(b) of the Internal Revenue Code) held by any trust created hereunder provided that: (i) such stock was contributed to such trust by settlor or settlor's spouse; and (ii) the retention of such voting rights in such stock by settlor or settlor's spouse would result in the inclusion of full value or any part thereof of such stock in the estate of settlor or the estate of settlor's spouse.

APPENDIX C

Bifurcation of Trustee Powers.

(a) Notwithstanding any provision of this Declaration relating to the powers and duties of trustee to the contrary, at any time SON is serving as co-trustee of a trust hereunder, all powers relating to the investment of trust assets shall be held solely by SON and all decisions relating to such investments shall be made by him in his sole and absolute discretion. All other powers and duties of trustee of any trust hereunder shall be performed by the corporate co-trustee. The corporate co-trustee shall have no duties, responsibilities or powers with respect to the investment of the assets held by such trust and SON shall have no duties, responsibilities or powers with respect to such matters other than trust investments. The corporate co-trustee shall have no responsibility to monitor the performance of SON or the performance of the trust's investments, or to consider the advisability of purchasing, retaining or disposing of any investment held by the trust or to replace SON. In addition, the corporate co-trustee shall have no duty to communicate with, warn or apprise any beneficiary or third-party concerning instances in which the corporate co-trustee would or might have exercised the corporate trustee's own discretion in a manner different from the manner directed by SON.

(b) Notwithstanding the foregoing, SON, in his capacity as co-trustee, may at any time by written instrument delivered to the corporate co-trustee delegate his rights and duties with respect to any part or all of a trust's investments to the corporate co-trustee (subject to any conditions or limitations established by SON). At any time or times when the corporate co-trustee is exercising the powers theretofore exercised upon the direction of SON, the corporate co-trustee shall be under no duty to examine the prior actions of SON or to inquire into the acts or omissions of SON and shall not be liable for any act or omission of SON and shall not be liable for any failure to seek redress for any act or omission of SON. At any time or times when the corporate co-trustee is exercising the powers theretofore exercised upon the direction of SON, the corporate co-trustee shall have the same rights, duties, powers and discretions as SON in his capacity as co-trustee.

APPENDIX D

Provisions that are changed with the addition of distributions trustee provisions are italicized

2.1 Trustee Powers. With respect to each trust created under this Declaration, subject to the limitations set forth in this Declaration, the trustee (*and the distributions trustee, with respect to matters within the distributions trustee's discretion, at any time and from time to time as the distributions trustee is serving*) of such trust shall have all of the powers by law granted to a trustee under the Texas Trust Code, and in addition is authorized, at any time and from time to time, as follows:

(l) In making distributions of trust property, to make the same in cash or in kind, or partly in cash and partly in kind, and in the event of a distribution to two or more beneficiaries: to partition property between or among them; to determine what property or items of property shall constitute each share to be distributed; to distribute to them undivided interests in one or more items of property; or to sell all or part of the property subject to distribution and distribute the net proceeds of such sale or sales. Every such partition, determination or distribution shall be final, binding, and conclusive upon all parties ever interested hereunder. Distributions of corpus or income need not be made pro rata or simultaneously to beneficiaries currently eligible to receive distributions. *This paragraph shall apply only to the distributions trustee (and not to any other trustee) when a distributions trustee is serving.*

(p) To deal with any person, including trustee, *the distributions trustee* or the trust consultant, in such person's individual capacity or as trustee of another trust, provided that such dealings shall be for fair and adequate consideration. Such dealings may include the lending of trust funds to any person. Trustee shall be entitled to retain any profit or other reasonable compensation realized by trustee as a result of any such dealings that are entered into in good faith and for fair and adequate consideration notwithstanding the terms and provisions of section 114.001(a) of the Texas Trust Code.

2.2 Exercise of Discretionary Powers by Trustee. This section shall apply only to any discretionary power granted to trustee in Article I of this Declaration. *References to trustee in this section 2.2 shall be deemed to refer to the distributions trustee at any time a distributions trustee is serving.*

(a) In determining whether funds should be disbursed for the support of a beneficiary of a trust, or the amount to be so disbursed, trustee shall consider other sources of support reasonably available to such beneficiary, but trustee need not require such other sources of support to be used before making any such distribution.

(b) Except as otherwise provided regarding the trust consultant's authority to direct trustee to make distributions from any trust created hereunder, and subject to the rights of withdrawal and the powers of appointment granted hereunder, in any year trustee shall have the sole and absolute discretion and authority, as trustee deems proper, to: (i) determine whether to make any distributions, or no distributions, from any trust created hereunder; and (ii) make distributions to any beneficiary of a trust created hereunder, and make no distributions to any beneficiary of another trust created hereunder.

(c) Notwithstanding any provision of this Declaration to the contrary, trustee shall make no distribution from any trust created hereunder, including any distribution made in accordance with section 2.11, and the trust consultant shall not direct trustee to make any such distribution, including any distribution made in accordance with section 3.2(d), that satisfies the individual legal obligation of trustee, the trust consultant or any contributor to such trust to support any person.

2.3 Exculpation. Any individual acting as trustee *or distributions trustee* of a trust created hereunder who is not entitled to compensation for serving as such, or who has waived his or her right to compensation for so serving in accordance with the terms and provisions hereof, shall in no event be liable for any mistake or error in judgment, but shall be liable only in the case of bad faith, dishonesty, gross negligence or willful misconduct. In the absence of bad faith, dishonesty, gross negligence or willful misconduct, such an individual trustee *or distributions trustee* shall in

no event be liable for any loss that may occur by reason of an operating loss, or by reason of the depreciation or decline in value of properties at any time belonging to such trust.

2.5 Spendthrift Provisions. The interests of all beneficiaries of each trust created hereunder shall be held subject to a “spendthrift trust.” No assignment, encumbrance or order by any beneficiary of income or corpus shall, by way of anticipation or otherwise, be valid, but all such income or corpus ever payable or distributable to such beneficiary shall be paid or distributed by trustee *or the distributions trustee* directly to such beneficiary, and no interest of any beneficiary in the income or corpus of the trust shall ever be subject to attachment, garnishment, execution or other legal or equitable process or writ brought by or in favor of any creditor of such beneficiary, and no beneficiary’s interest in the income or corpus of the trust shall ever be an asset of such beneficiary in bankruptcy. Nothing herein shall, however, prevent the making of payments to another for the use of a beneficiary, if and as elsewhere herein permitted. This section 2.5 shall not be construed or interpreted to limit or restrict (a) any beneficiary’s power to disclaim an interest at any time in any trust created by or pursuant to this Declaration or (b) the right of a beneficiary to exercise any power of appointment created by or pursuant to this Declaration.

2.10 Applicable Law. To the extent not in conflict with the terms and provisions of this Declaration, the Texas Trust Code shall apply to each trust created hereunder, except that:

- (a) no trustee *or distributions trustee*, original or successor, need ever furnish bond; and
- (b) notwithstanding section 117.005 of the Texas Trust Code, no trustee shall have any duty to diversify the investments of any trust created hereunder, as settlor believes that the purposes of each such trust will likely be better served without diversification.

2.11 Distribution to Certain Beneficiaries. Should a beneficiary be less than twenty-one (21) years of age, or should trustee *or the distributions trustee*, in trustee’s sole and absolute discretion, deem a beneficiary incapable of handling any property otherwise distributable to such beneficiary, trustee (*or the distributions trustee, as the case may be*) may make such distribution to any one or more of the following persons, to be used for the benefit of the beneficiary: the natural, testamentary or appointed guardian of the beneficiary’s person; the guardian of the beneficiary’s estate; the person with whom the beneficiary then resides; the person or persons furnishing the beneficiary’s support, or any part thereof; any adult person named by trustee *or the distributions trustee* as custodian for the beneficiary under any applicable Uniform Gifts to Minors Act, Uniform Transfers to Minors Act or any similar or successor law; or any friend or relative of the beneficiary deemed appropriate by trustee *or the distributions trustee*; provided, however, that no payment shall be made to any contributor to any trust created under this Declaration; and provided, further, that any distribution pursuant to this section of any amount that is subject to a right of withdrawal shall be made in accordance with section 1.5(c). Subject to section 1.5(c), trustee *or the distributions trustee* may make distributions to the beneficiary directly, should trustee *or the distributions trustee* deem the beneficiary capable of handling the property distributed. Distributions to a guardian specified above may be made even though such guardian is appointed by a court of competent jurisdiction of a state other than Texas. All distributions made pursuant to the terms of this section shall be an acquittance to trustee *and the distributions trustee* to the extent of the amounts so paid.

2.12 Construction. If and when in good faith in doubt as to the proper construction, interpretation or operation of this Declaration, or as to any question that may arise during the administration of any trust created hereunder, or as to the application, interpretation or construction of the Texas Trust Code, or as to any other matter involving the administration of any trust created hereunder or the rights of any beneficiary thereof or any person otherwise interested in or affected by any trust created hereunder, trustee (*or the distributions trustee, with respect to matters within the discretion of the distributions trustee*) is authorized to resolve such doubts in such manner as trustee deems equitable and proper. Settlor’s intention is to avoid suits for construction or instruction to the fullest extent possible; provided, however, that nothing in this section 2.12 shall restrict any ability trustee would otherwise have to present any matter

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to a court for resolution, including a request for construction or instruction. Subject to trustee's *and the distributions trustee's* fiduciary obligations, all decisions and actions of trustee *or the distributions trustee* in the exercise of the discretion and power vested in such trustee by the terms and provisions of this Declaration shall be final, binding and conclusive upon all parties ever interested hereunder.

2.14 Compensation of Fiduciaries.

(a) Any trustee *or distributions trustee* hereunder (other than settlor) shall be entitled to receive compensation that is fair, reasonable and customary for serving hereunder, and shall also be entitled to receive reimbursement for any and all out-of-pocket expenses incurred in connection with the discharge of the duties of said office. Should the same person be acting and entitled to compensation in more than one capacity (for example, as trustee hereunder and as executor of settlor's estate), such person shall be entitled to reasonable compensation in all capacities in which such person is then acting and entitled to compensation, but in no event shall any such person be entitled to compensation for the same service in more than one capacity. Any trustee *or distributions trustee* hereunder (including settlor) shall be entitled to receive reimbursement for any and all out-of-pocket expenses incurred in connection with the discharge of the duties of said office.

(b) Any individual trustee *or distributions trustee* of a trust created hereunder may waive his or her right to receive compensation for serving in such capacity by giving thirty (30) days' written notice (which notice may be waived), in recordable form, to the primary beneficiary of such trust, or if the primary beneficiary is not available, by filing a written waiver of compensation in the Deed Records of Dallas County, Texas at least thirty (30) days prior to the effective date of such waiver of compensation.

3.2 Trust Consultant Provisions.

(a) With respect to each trust created hereunder, subject to the limitations set forth in this Declaration, in directing the trustee *or the distributions trustee* to make distributions of income or corpus, or terminate such trust, in whole or in part, the trust consultant of such trust is hereby authorized, at any time and from time to time, to direct trustee *or the distributions trustee* to make distributions in cash or in kind, or partly in cash and partly in kind, or to sell all or part of the corpus subject to distribution and distribute the net proceeds of such sale or sales. Every such direction or distribution shall be final, binding and conclusive upon all parties ever interested hereunder.

(b) Any provision contained in this Declaration to the contrary notwithstanding, any individual acting as trust consultant of a trust created hereunder shall in no event be liable for any mistake or error in judgment, but shall be liable only in the case of bad faith, dishonesty, gross negligence or willful misconduct. In the absence of bad faith, dishonesty, gross negligence or willful misconduct, the trust consultant of any such trust shall in no event be liable for any loss or damage to the trust, to any beneficiary thereof, or to any other person resulting from any action, inaction or omission of the trustee, *distributions trustee* or trust consultant of such trust with regard to the investment, management or administration of the trust or otherwise. The trust consultant shall have no duty to supervise the trustee *or distributions trustee*, to be informed of the trustee's *or distributions trustee's* action or inaction, to take any action or correct any actual or possible breach of trust by the trustee *or distributions trustee*, or to remove the trustee *or distributions trustee* on any account.

4.3 Trustee and Trust Consultant.

(e) "*Distributions trustee*" shall mean the *distributions trustee* or *successor distributions trustee* of the trust acting at the time in question.

5.1 Successor Trustees.

(g) If at any time two (2) or more persons are serving as trustee of any trust created hereunder, the concurrence of a majority of all trustees then serving and of that status (*e.g.*, independent or distribution) shall be required for all acts connected with the administration or distributions of such trust; provided, however, that fewer than a majority of all co-trustees may act in the following situations: (i) any co-trustee may receive and receipt for property

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due to such trust; (ii) any co-trustee may act to preserve any property of such trust if the concurrence of a majority of co-trustees cannot readily be obtained in the time available for action necessary to preserve any property of such trust; and (iii) any co-trustee may perform ministerial acts related to such trust if a co-trustee or the co-trustees have delegated such co-trustee to act for all co-trustees with regard to such ministerial acts. Any third person who in good faith deals with a co-trustee and is unaware that the joinder of any other co-trustee is required under this Declaration shall in no event be liable for the failure to secure the joinder of such other co-trustees. Notwithstanding any provision of this section 5.1(g) to the contrary, (A) any powers or authority reserved exclusively to the independent trustee of a trust created under this Declaration shall be exercised only by such independent trustee and (B) at such time as settlor, settlor's spouse or any other contributor to the trust is serving as trustee and has pursuant to section 5.1(i) renounced his or her discretion to make or participate in the making of any decision with regard to payments or distributions to a beneficiary currently eligible to receive distributions, such discretion shall be solely exercisable by the distributions trustee then serving.

(i) At any time settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse is serving as trustee of a trust created under this Declaration, he or she shall have the right to renounce his or her power to make or participate in the making of any decision with regard to payments or distributions to or for the benefit of a beneficiary currently eligible to receive distributions from income or corpus, in which case the distributions trustee appointed pursuant to section 7.3, 5.3(a) or 5.3(b), as the case may be, shall have the sole and absolute discretion with regard to such matters and any reference to trustee in any provision relating to the exercise of such discretion shall be deemed to refer to the distributions trustee; provided, however, that settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse, as the case may be and in his or her capacity as trustee, shall retain all other rights, duties, powers, discretions and immunities otherwise provided to trustee under this Declaration. Such renunciation may be made by settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse at any time prior to or during the time that any such person is serving as trustee, by giving thirty (30) days' written notice (which notice may be waived), signed by such person and in recordable form, to the primary beneficiary of such trust, or if the primary beneficiary is not available, by filing such written notice in the Deed Records of Dallas County, Texas, at least thirty (30) days prior to the effective date of such renunciation. Any renunciation by settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse shall be final, binding and conclusive on all parties interested hereunder, but shall have no effect on any other current or future trustee's powers with respect to such trust.

5.3 Successor Distributions Trustees.

(a) If, at any time, the distributions trustee of any trust created hereunder should fail or cease to act as distributions trustee of such trust, and, at the time, should no successor distributions trustee be otherwise appointed in a manner provided by this Declaration, then settlor shall have the right, by instrument in writing specifically referring to the right conferred in this Declaration, to appoint a successor individual distributions trustee or successor individual distributions trustees, in such number as settlor may determine. Any appointment of a successor distributions trustee or distributions trustees pursuant to this section 5.3(a) may specifically designate whether such successor distributions trustee or distributions trustees shall or shall not have the right to appoint a successor to serve hereunder.

(b) If, at any time, an appointed distributions trustee of any trust created hereunder should fail or cease to act as distributions trustee of such trust, and at the time, should no successor distributions trustee be otherwise appointed in a manner provided by this Declaration, then, within a reasonable time, a successor individual distributions trustee of such trust may be appointed (i) by the adult primary beneficiary of such trust, or (ii) if there is no adult primary beneficiary, or if the adult primary beneficiary fails to act within a reasonable time, by a court of competent jurisdiction. Any appointment of a successor distributions trustee pursuant to this section 5.3(b) by the adult primary

beneficiary of such trust may specifically designate therein whether such successor distributions trustee shall or shall not have the right to appoint a successor to serve hereunder.

(c) Upon the appointment of a successor distributions trustee and the written acceptance of such appointment by such successor distributions trustee, the prior distributions trustee shall be released and discharged from any and all claims, demands, duties and obligations arising hereunder and from the prior distributions trustee's duties hereunder, excepting only claims based upon the prior distributions trustee's dereliction of duty.

(d) A successor distributions trustee shall have all the rights, duties, powers, discretions and immunities of the original distributions trustee, except (in the absence of specific authorization) the right to designate a successor; if a successor distributions trustee has the right to designate a successor, he or she shall also have the right to grant his or her designated successor the right to appoint a successor distributions trustee.

(e) No successor distributions trustee shall be obligated to investigate the acts of any prior distributions trustee, except upon written request of any beneficiary who shall pay the costs thereof.

(f) If at any time more than one (1) person is serving as distributions trustee of any trust created under this Declaration, the concurrence of all distributions trustees then serving shall be required for all acts connected with the distribution of such trust; provided, however, that fewer than all distributions trustees may act if a distributions trustee or the distributions trustees have delegated a distributions trustee or distributions trustees to act for all distributions trustees with regard to the distributions of such trust.

5.4 Resignation and Removal.

(a) The trustee, *distributions trustee* and trust consultant of any trust created hereunder shall have the right to resign at any time by giving thirty (30) days' written notice (which notice may be waived), in recordable form, to all of the following:

- (i) the trustee and any co-trustee or co-trustees;
- (ii) the trust consultant; and
- (iii) *the distributions trustee; and*
- (iv) the primary beneficiary of such trust,

or if fewer than all of them are available, by giving notice to those who are available and filing a written resignation in the Deed Records of Dallas County, Texas, at least thirty (30) days prior to the effective date of such resignation.

(b) With regard to any trustee, *distributions trustee* or trust consultant serving hereunder, upon the occurrence of any of the following:

(i) the certification from two (2) licensed doctors of medicine, each doctor affirming in a written instrument signed by such doctor that he or she has examined such trustee, *distributions trustee* or trust consultant, and has concluded, based upon such examination, that such trustee, *distributions trustee* or trust consultant is unable to discharge his or her duties as trustee, *distributions trustee* or trust consultant; or

(ii) the appointment of a guardian or other judicially appointed personal representative of such trustee, *distributions trustee* or trust consultant; or

(iii) the failure of such trustee, *distributions trustee* or trust consultant, on or before the sixtieth (60th) day after receiving a notice initiating the procedure set forth in section 5.5, to deliver to the Health Committee (as established in section 5.5) a certification from a licensed doctor of medicine affirming in a written instrument signed by such doctor that such doctor has examined such trustee, *distributions trustee* or trust consultant at least ten (10) days after the Health Committee was notified that the doctor had been chosen and that such doctor has concluded, based upon such examination and any information provided to him or her by the Health Committee, that such trustee, *distributions trustee* or trust consultant is able to discharge his or her duties as such; or

(iv) the filing of a petition in bankruptcy by such trustee, *distributions trustee* or trust consultant, or the adjudication of such trustee, *distributions trustee* or trust consultant as a bankrupt; such trustee, *distributions trustee* or

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trust consultant shall be deemed to have resigned as trustee, *distributions trustee* or trust consultant, as the case may be, and the successor trustee, *distributions trustee* or trust consultant appointed pursuant to section 5.1, 5.2, 7.1, or 7.2, as the case may be, shall automatically be appointed trustee, *distributions trustee* or trust consultant, as the case may be, of such trust.

5.5 Health Committee. If a good faith concern arises regarding the ability of a trustee, *distributions trustee* or trust consultant to discharge his or her duties as trustee, *distributions trustee* or trust consultant of any trust created hereunder, the following procedure may be invoked by a majority in number of the Health Committee. The Health Committee shall be comprised of (a) the then serving trustee or co-trustees of such trust, (b) *the then serving distributions trustee of such trust*, (c) the then serving trust consultant of such trust and (d) the primary beneficiary of such trust (or if the primary beneficiary lacks legal capacity, the personal representative of the primary beneficiary); provided, however, that the trustee, *distributions trustee* or trust consultant about whom the concern has arisen shall not be a member of the Health Committee. The procedure shall be invoked by written notice signed by each of the members of such majority of the Health Committee and delivered to the trustee, *distributions trustee* or trust consultant about whom the concern has arisen (x) setting forth the facts that make the signers a majority of the Health Committee, (y) stating that each of the signers has a good faith concern regarding the ability of such trustee, *distributions trustee* or trust consultant to discharge his or her duties as trustee, *distributions trustee* or trust consultant and (z) stating that such trustee, *distributions trustee* or trust consultant has sixty (60) days from the date on which the notice is delivered to him or her, to deliver to the Health Committee a certification from a licensed doctor of medicine affirming in a written instrument signed by such doctor that such doctor has examined such trustee, *distributions trustee* or trust consultant at least ten (10) days after the Health Committee was notified that the doctor had been chosen and that such doctor has concluded, based upon such examination and any information provided to him or her by the Health Committee, that such trustee, *distributions trustee* or trust consultant is able to discharge his or her duties as such, and that if such trustee, *distributions trustee* or trust consultant fails to so deliver such written certification to the Health Committee, such trustee, *distributions trustee* or trust consultant shall be deemed to have resigned and will be succeeded by another in such position. The doctor shall be selected at the discretion of the trustee, *distributions trustee* or trust consultant about whom the concern has arisen; provided, however, that such trustee, *distributions trustee* or trust consultant shall notify the Health Committee, and provide a copy of such notice to the doctor, as to the doctor he or she has selected at least ten (10) days before any examination so that the Health Committee shall have the opportunity to provide information regarding such trustee, *distributions trustee* or trust consultant to the selected doctor prior to such doctor's examination of such trustee, *distributions trustee* or trust consultant. All expenses incurred by the trustee, *distributions trustee* or trust consultant so challenged shall be reimbursed by the trust as an expense of administration. The procedure set forth in this section 5.5 shall not be in lieu of, or a limitation of, any available legal remedy to determine a trustee's, *distributions trustee's* or trust consultant's ability to discharge his or her duties.

7.3 Appointment of Distributions Trustee.

(a) *At any time settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse is serving as trustee of a trust created under this Declaration and such person has renounced his or her power to make or participate in the making of any decision with regard to payments or distributions to be made from such trust pursuant to section 1.2(a) settlor hereby appoints [SISTER] as distributions trustee of such trust. Should [SISTER] fail or cease to act as distributions trustee of such trust, and should such trust be without a successor distributions trustee appointed pursuant to the terms and provisions of section 5.3(a), then settlor hereby appoints [BROTHER] as successor distributions trustee of such trust. Should [BROTHER] fail or cease to act as distributions trustee of such trust, and should such trust be without a successor distributions trustee appointed pursuant to the terms and provisions of section 5.3(a), then a successor distributions trustee shall be appointed pursuant to the terms and provisions of section 5.3(b).*

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(b) Should settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse be serving as trustee of a trust created under this Declaration while a distributions trustee is appointed to serve with respect to such trust, and should settlor, settlor's spouse, any other contributor to the trust, or any other contributor's spouse fail or cease to act as trustee of such trust, and should the person taking office as successor trustee not be a contributor to the trust, the office of distributions trustee shall terminate, and all powers exercisable by the distributions trustee shall be exercisable by the trustee of such trust until the circumstances described in section 7.3(a) arise again.