Deconstructing the Special Needs Trust

Presented on
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by
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Boilerplate Provisions in Special Needs Trusts

The following article originated as a presentation at the 2009 Special Needs Trusts Annual Conference organized by Professor Rebecca Morgan at Stetson University College of Law. Offered as part of the “basics” curriculum of that program, the focus is on drafting the boilerplate — “fine print” trust administration provisions — in a third party special needs trust. The original concept was for a trust professor to bring a traditional trust law perspective to the endeavor, to help conjoin Elderlaw, Medicaid, and trust law knowledge that informs the creation and management of a special needs trust.

Various members of the faculty and organizers at that program were kind enough to provide samples from which the form itself was cobbled together. In some cases it was clear that the samples were not meant to illustrate the “best” or “preferred” approaches but, rather, those that may be all-to-common or that illustrate issues of a particular or recurring concern. The point is that some provisions are included here purely for illustration purposes, and not because they are model or advisable language (as the annotations reveal). Annotations appear as if they were footnotes but, unlike a traditional article, these are not meant to extract the distractions and bury them in the margin — they are the “meat” of the discussion and warrant your full attention.

Note that the annotated sample is designed to ground a discussion about trust administration, not about dispositive provisions — the substantive provisions that are the bread-and-butter of special needs trust drafters. Nevertheless, there are some annotations to some dispositive provisions, simply because there are elements in them that also speak to trust administration.

The contributors who provided examples are not identified — solely to avoid casting aspersions as a result of any of the annotations to the form. Furthermore, this form is produced solely for educational purposes, and as such it may not be appropriate for any particular use. Added caution is necessary because the annotations were created by a trust lawyer, not by a specialist Elderlaw counselor. They have been reviewed by specialists in the Elderlaw arena but they may ignore or overlook aspects of the endeavor that are informed by the substantive rules governing special needs trusts. And these rules are such a constantly moving target that, even if correct upon publication, they easily could become less so with the passage of time. Thus, users are cautioned to exercise restraint and discretion in considering these comments, so as not to defeat the original and overriding purposes of the trust.

1/ Note that many of the trust forms from the special needs trust specialists refer to “general administrative provisions” and trust lawyers refer to “trust administration provisions” — a difference that is more than just linguistic. The “administrative” provisions often deal with things like defining “survivorship” or “descendants,” specifying whether captions are part of the substance of a provision, selecting those who may act on behalf of an incapacitated beneficiary, stating the settlor’s primary intent, and other clauses that seem to have no logical “home” in the document. See Article 3 of this sample form. Trust lawyers regard trust “administration” provisions as those that deal with the core operation of the trust, ranging from facility-of-payment to trust investment to principal-and-income allocation rules. See the provisions that begin with Article 5 of this sample.
THIRD PARTY SPECIAL NEEDS TRUST

This trust is established effective [Month] [date], [year], by [ ] (Grantor) for the benefit of [ ] (Beneficiary), on the following terms and conditions:

RECEITALS²/

A. Beneficiary is a resident of [city], [state], who was born on [ ]. Beneficiary is a disabled person, as defined in the Social Security Act §1614(a)(3) (42 U.S.C. 1382c(a)(3)).

B. Grantor intends by this instrument to create a trust in accordance with the laws of the State of [state], by which the trust property shall be managed for the benefit of Beneficiary during Beneficiary’s life and distributed upon Beneficiary’s death.

ARTICLE 1. GENERAL PROVISIONS

A. Name.

This Trust shall be known as THE [ ] THIRD PARTY SPECIAL NEEDS TRUST for all purposes. This trust agreement is referred to herein as “the Trust” or “Agreement”.

B. Irrevocable Trust.

This trust is and shall remain irrevocable,³/ except that the Trust may be amended or revoked, in whole or in part, by order of any Court of competent jurisdiction over the Trust, or by the [Trustee / Trust Advisor / Trust Protector] as set forth in Article 6 below, for the purposes

²/ From a trust administration perspective neither recital is necessary — either to designate the beneficiary’s domicile or to state the settlor’s intent. It is not uncommon to state the settlor’s domicile (not that of the beneficiary, which may change during administration of the trust). Doing so may be helpful to establish which state’s law governs questions of interpretation or trust administration. Note that Article 7, Paragraph A contains a governing law provision, which makes a designation here less important. Occasionally a designation of the beneficiary’s domicile is harmful because it empowers more than one state to claim jurisdiction for state income tax purposes.

³/ No good drafter leaves the question to state law whether a trust is revocable or irrevocable, regardless of the state law rule at the time the trust is created. Uniform Trust Code §602(a) changes the common law rule (which was that the trust is irrevocable if the document is silent) and its adoption may alter state law in a manner that is unanticipated and undesirable. Moreover, with “decanting” of trusts to make them subject to the law of another jurisdiction, it is conceivable that this aspect could be altered by a change of situs or by pouring an old trust into a new one. It is better to nail this down at the inception of the trust.
of maintaining an effective trustee and allowing the Trust to continue to accomplish its stated purpose in the event that a change in the law, policy, interpretation of the law, or other circumstance will frustrate the Trust purpose.\textsuperscript{4/}

\textbf{OR}

\section*{B. Revocability}

During the lifetime of the Grantor, or the survivor of the Grantors,\textsuperscript{5/} the Grantor(s) shall have the right to alter, amend, revoke, or terminate this Trust at any time, and to designate the person(s) who shall possess or enjoy the trust property and the income therefrom, and to exercise any of the incidents of ownership in any property transferred to the Trust.

This trust shall become irrevocable upon the death of the Grantor, or the survivor of them[, or upon initial trust funding by a third party\textsuperscript{6/} ], and thereafter no person shall have the right (1) to alter, revoke, or terminate this Trust or any of the terms of this Agreement in whole or in part; (2) to designate the person who will possess or enjoy the Trust property, and the income therefrom; or (3) to exercise any of the incidents of ownership in any property transferred to the Trust. The Trust may be amended, in whole or in part, by further order of any Court of competent jurisdiction over the Trust, or by the [Trustee / Trust Advisor / Trust Protector] as set forth in Article 6 below, for the purposes of maintaining an effective trustee and allowing the Trust to continue to accomplish its stated purpose in the event that a change in

\textsuperscript{4/} It is not common to give a trustee the power to amend a trust. Better that a trust advisor, trust protector, or other third party exercise this authority — either directly or through a power of appointment — to maintain checks and balances over the trustee.

A special provision is not needed to empower the trustee (or any other interested party) to petition a state court to reform a trust, as for example to adapt to changed circumstances. See note 31 and Uniform Trust Code §§411 through 416 (which are more robust than the law of many jurisdictions and likely provide all the authority needed to adapt to changed circumstances).

An important caveat to any grant of authority is that the trustee not be permitted to alter the fundamental fiduciary duties owed by the trustee that make this a trust. See text accompanying note 86.

\textsuperscript{5/} Presumably this is a joint power, requiring the settlors to act unanimously while both are alive and competent, but it would be good to clarify that. Requiring both to act could prove problematic if (for example) one is incompetent, or following the divorce of married settlers. Note that even a joint power to alter, amend, or revoke the trust will cause its corpus to be includible in the settlor’s gross estate at death, under Internal Revenue Code §2038.

\textsuperscript{6/} From a trust law perspective it is not clear why this provision is included, nor why the drafter would permit a third party to make a contribution to the trust that would cause it to become irrevocable in its entirety (and not just to the extent of the third party’s funding).
the law, policy, interpretation of the law, or other circumstance will frustrate the Trust purpose.7/

C. Purpose of Trust.

The purpose of this Trust is to provide the greatest degree of security for Beneficiary and to preserve the assets of this Trust to provide for Beneficiary’s lifelong care. The term “security” includes consideration of Beneficiary’s overall circumstances and needs, including Beneficiary’s personal, emotional, spiritual, social, and financial well-being. The greatest degree of security can be provided for Beneficiary if this Trust is administered and managed to maximize and protect any insurance, public benefits for the disabled, or other assistance that Beneficiary is or may become eligible to receive. A number of needs other than support and maintenance are basic to a dignified life but may not be available to Beneficiary except through this Trust. This Trust is created expressly to benefit Beneficiary by providing for the special needs and supplemental care, maintenance, support, and education in addition to, and over and above, benefits that Beneficiary otherwise may be entitled to receive from any local, state, or federal government, or from any private or non-profit agencies that provide services or benefits to persons with disabilities similar to those of Beneficiary. It is the express purpose of this Trust that it be used to supplement any other benefits received by or on behalf of Beneficiary, and not to supplant any such benefits.

D. Intent of Trust.

Beneficiary will benefit from the protection and financial management provided by this Trust. It is the primary intent of this Trust to provide a system for handling funds, fiscal management, administration and disbursement, respite care, personal attendant services, advocacy, social development services, rehabilitation, care, education, training, and guidance for the sole benefit of Beneficiary to supplement all other financial and service benefits for which Beneficiary may be eligible from any local, state, or federal agency, or through any private or public profit or non-profit source. It is only an ancillary intent of this Trust to provide for the continued conservation and enhancement of the funds constituting the Trust Estate, or for the ultimate benefit of the remainder beneficiaries.

All actions of the Trustee shall be directed toward carrying out this intention. Beneficiary shall not be considered to have access to trust income or principal and may not, directly or through any legal representative of the Beneficiary, compel the Trustee to pay funds

7/ See note 4.
8/ See note 12.
from the Trust for any particular purposes.\(^9\) This Trust shall not be construed as a support trust and is established as a pure discretionary trust.

E. Trust Funding.

Grantor and others may convey money or property to the Trustee on the same terms set forth herein, with the initial conveyance of trust principal to be known as the initial trust estate. The Trustee hereby agrees to hold that property and any other trust property on the terms set forth in this instrument. All property held by the Trustee, and all investments and reinvestments thereof, shall constitute the “Trust Estate.” No public assistance benefits received by or for Beneficiary shall be commingled with or become part of the Trust Estate.

F. Consideration.

In consideration of the mutual covenants contained herein, the Trustee hereby agrees to hold in trust those assets described as the Trust Estate for the uses and purposes and subject to the terms and conditions hereafter set forth.

**ARTICLE 2. DISTRIBUTION AND ADMINISTRATION DURING BENEFICIARY’S LIFETIME**

A. Distribution

1. In the Trustee’s sole and absolute discretion\(^10\) the Trustee shall distribute so much income and principal to or for the benefit of Beneficiary as the Trustee shall determine to provide special needs and supplemental benefits to Beneficiary that are not provided by or through private or governmental assistance programs. Any and all discretionary distributions shall be based primarily upon Beneficiary’s best interest. No Trust income or principal shall be paid or expended for Beneficiary so long as the Trustee determines that there are sufficient resources available for Beneficiary’s care, support, comfort, and welfare from any governmental

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\(^9\) The intent of this provision is to preclude state Medicaid authorities from asserting that the beneficiary has greater rights than those meant to be granted by this supplemental needs trust. Nevertheless, the trust must be enforceable by someone. The fiduciary’s duty must be enforceable if the proper distribution standard is met — however that provision is drafted — because, lacking enforceability, there is no fiduciary duty and, without that, there is no trust. See note 28.

\(^10\) See note 28. In one form or another this “sole discretion” statement is used in numerous circumstances throughout this trust, which informs inclusion of the overriding statement of intent regarding discretion in text accompanying note 28. But given its existence, quaer why the drafter does not delete the repetitive references such as this.
or private programs. Although the intent of this trust is to preserve Beneficiary’s eligibility for public benefits, the overriding goal\(^\text{11}\) of the trust is to ensure Beneficiary’s \textbf{good health, safety, and welfare}.\(^\text{12}\)

In the Trustee’s discretion the Trustee may make distributions of trust assets to or for the benefit of Beneficiary to meet any need not fully met by public or private benefit programs. In its sole discretion the Trustee may pay to or for Beneficiary’s benefit any amount that does not exceed the state or federal regulations for maximum supplemental income. In the Trustee’s sole discretion the Trustee also may repay any part or all of any amounts owed to the Social Security Administration if an overpayment of benefits to Beneficiary has been made, either prior to or subsequent to establishment of this Trust, to prevent a loss of SSI or other related government assistance by Beneficiary.

2. The Trustee shall not be required to see to the application of any funds applied or paid, and the receipt of the payee shall be a full acquittal of the Trustee.\(^\text{13}\) The decision of the Trustee as to direct payments or application of funds as above prescribed shall be conclusive and binding upon all parties in interest if made in good faith.\(^\text{14}\)

\(^\text{11}\) Note that this document already has referred to trust purposes, trust intent, and now goals, yet it is not clear how these terms are meant to differ. Trust drafting is not the place to use a thesaurus, if the meaning of the drafter is the same in each case. If the meaning is \textit{not} meant to be the same, then the varying uses should be clarified.

\(^\text{12}\) The highlighted terms — the distribution “standards” that guide or govern the fiduciary — are not consistent and could prove problematic to the fiduciary, as might the lack of an “ascertainable” standard as that term is known for tax or state law purposes. See also text accompanying notes 8, 18, 48, and 99. As suggested in note 36 it is probable that the trustee will be an individual who, if care is not taken, could be deemed to possess a taxable inter vivos power of appointment. An easy way to preclude that exposure would be to insert an “Upjohn” clause that precludes the distribution of trust income or principal to the extent doing so would discharge any person’s legal obligation to support the beneficiary or might jeopardize the beneficiary’s qualification for public benefits. Such a provision might read “the trustee shall make no distribution that would have the effect of discharging any person’s legal obligation to support a beneficiary or cause any reduction in any beneficiary’s entitlement to public benefits.” See Casner & Pennell, \textit{ESTATE PLANNING} §7.1.10.1 (6th ed.).

\(^\text{13}\) In the same way that an insurance trust will relieve the insurance company from any obligation to see to the application of insurance proceeds paid to a trust (see text accompanying note 77), this document properly relieves the payor of any obligation to verify how distributed funds are used.

\(^\text{14}\) A common administration power is a “facility of payment” provision. The one in this trust (see text accompanying note 46) is inadequate because it applies only with respect to a remainder beneficiary. A more inclusive provision might specify:

If income or discretionary amounts of principal become payable to a minor or to a person under legal disability or to a person not adjudicated disabled but who, by reason of illness or mental or physical disability, is in the opinion of the trustee unable properly to manage
B. Additions To Trust Estate; Environmental Compliance.

1. With the Trustee’s consent, any person may at any time or from time to time, whether by Court order, assignment, gift, transfer, beneficiary designation, deed, will, or otherwise, provide income or add to the principal of the Trust Estate, and any property so added shall be held, administered, and distributed under the terms of this Trust. The Trustee shall execute documents the Trustee may deem necessary to accept additional contributions to the Trust Estate and shall designate the additions on the business and accounting records of the Trust. At the end of a calendar year, the Trustee shall designate any accumulated and undistributed income as principal,\textsuperscript{15} and may so designate such additions on amended schedules to this Trust.

2. Regardless of any provision to the contrary, as a prerequisite to accepting property the Trustee may require that the transferor provide evidence satisfactory to the Trustee that (i) the property is not contaminated by any hazardous or toxic materials or substances; and (ii) the property is not being used and never has been used for any activities directly or indirectly involving the generation, use, treatment, storage, disposal, release, or discharge of any hazardous or toxic materials or substances.\textsuperscript{16}

his or her affairs, then that income or principal shall be paid or expended only in such of the following ways as the trustee deems best: (a) directly to the beneficiary or his or her attorney in fact; (b) to the legally appointed guardian of the beneficiary; (c) to a custodian for the beneficiary under a Uniform Transfers or Gifts to Minors Act; (d) by the trustee directly for the benefit of the beneficiary; (e) to an adult relative or friend in reimbursement for amounts properly advanced for the benefit of the beneficiary. The “reimbursement” provision is particularly useful because it precludes any suggestion that funds are being diverted to a third party, this clause instead making it clear that the third party advanced funds to the beneficiary and is only being compensated for those expenditures.

\textsuperscript{15} This “add to principal” provision should not apply only to amounts added to the trust, and therefore might better be a separate, free standing provision. The rationale for it is to avoid the need to maintain a separate income accumulation fund that would require separate investment and accounting, generating its own separate fiduciary fee. This administration also need not be done “at year end;” it appropriately may be left to the trustee’s discretion. Compare text accompanying note \textsuperscript{30}, which refers to an annual (but not a calendar year) addition to principal.

\textsuperscript{16} Under City of Phoenix v. Garbage Services Co., 827 F. Supp. 600 (D. Ariz. 1993), a trustee that did not participate in an environmental tort is not \textit{personally} liable for superfund cleanup costs, but the addition of contaminated property to a trust could generate trust liability that could exhaust the full corpus of a trust. Although the intent here is that the transferor incur the cost to verify that property is not tainted, this provision might authorize the use of trust funds to perform an independent environmental audit, incur legal or other fees (including to pay for a trustee’s extraordinary services), or to perform other appropriate due diligence before accepting potentially contaminated property.
C. Distribution Guidelines.

In making any distribution the Trustee shall:

1. Consider any other income or resources of Beneficiary known to the Trustee to be reasonably available;\footnote{17}

2. Consider Beneficiary’s entitlement to benefits from any government agency, such as federal SSDI, SSI, food stamps, Medicare, Medicaid, welfare, and any other special purpose benefits for which Beneficiary is or may be or become eligible;

3. Consider resource and income limitations of any such assistance program;

4. Consider making expenditures so that the standard of living of Beneficiary will be \textit{comfortable and enjoyable};\footnote{18}

5. Not be obligated or compelled to make such payments;\footnote{19}

\footnote{17} Lacking this provision trust law may require the trustee to ignore the beneficiary’s other resources. See Restatement (Third) of Trusts §50, comment e: “to the extent . . . the [beneficiary’s] discretionary interest is intended to provide for the support, education, or health care of a beneficiary . . . for periods during which a beneficiary probably was not expected to be self-supporting, the usual inference is that the trustee is \textit{not} to deny or reduce payments for these purposes because of a beneficiary’s personal resources.” A special needs trust is meant to supplement rather than provide for basic support, as appropriate to qualify for Medicaid, which might suggest that the trust is not for “support” (because the public entitlement instead provides for that care), but that refinement is intended only to preclude the trust from being a countable resource that would disqualify the beneficiary for the public benefit and does not alter the fundamental notion that this trust is a safety net that provides for the beneficiary’s needs (at least to the extent they exceed those provided for by the entitlement). As such, it is likely that the general principle noted is applicable. Austin W. Scott, William F. Fratcher, & Mark L. Ascher, \textsc{Scott and Ascher on Trusts} §13.2.4 (5th ed. 2007), is more pragmatic, stating: “When the terms of the trust require the trustee to pay or apply for the beneficiary so much as is necessary for maintenance or support, but fail to provide whether the trustee is to take into account the beneficiary’s other resources, it is unclear what the usual inference ought to be.” As a general matter and here in particular that uncertainty is undesirable, which makes it essential to clarify the settlor’s intent. And it likely will not hurt to clarify the settlor’s intent, which absolutely is to consider the Medicaid resource before invading the trust.

\footnote{18} See note 12.

\footnote{19} See note 9.
6. Not be liable for any loss of benefits that may occur as a result of Trustee’s good faith actions in the administration of this trust;

7. Be entitled to rely on the representation of a trust advisor who is a competent professional that all other sources of income and benefits have been taken into consideration and the effect of trust disbursements on such benefits.\footnote{20/}

D. Right of Trustee to Contest Demands Upon the Trust.

If the Trustee is requested by any department or agency to release trust income or principal to or on behalf of Beneficiary to pay for equipment, medical expenses, or other services that any governmental or private organizations or agencies are authorized to provide were it not for the existence of this Trust, or if the Trustee is requested by any department or agency administering such benefits to petition a court or administrative agency for the release of trust income or principal for this purpose, or if any department or agency terminates payment or eligibility for any benefits to Beneficiary based upon the existence of or payments from this Trust, the Trustee is authorized to deny and contest such request or termination through administrative or judicial action and to defend any contest or other attack of any nature on this Trust and the public assistance program eligibility of Beneficiary. Trustee also is authorized to settle or otherwise compromise any such claim or litigation in whole or in part. Any expenses of the Trustee in this regard, including reasonable attorney’s fees, shall be a proper charge to the Trust.\footnote{21/}

E. Trust Estate Unavailable to Beneficiary.

Under no circumstances shall Beneficiary have the right to demand any distribution from the Trustee, who is under no obligation, implied or otherwise, to make any distributions to Beneficiary.\footnote{22/} Further, the Trustee may withhold distributions to Beneficiary if, in the Trustee’s sole discretion, such amounts would not be consistent with the intentions expressed in this Agreement. The Trustee shall use its best efforts to avoid distributions that may cause termination of public or private benefits that Beneficiary is or may be eligible to receive during the term of this Trust.

\footnote{20/} Article 6 does not dovetail with this provision — no authority (or responsibility) is imposed on the Trust Advisor to advise the trustee, nor is any exculpation provided to an Advisor who provides advice. See text accompanying note \footnote{91}, which would be the appropriate provision to expand for such purpose.

\footnote{21/} Particularly because the trust corpus may be consumed if a challenge is not successful, this compensation for any extraordinary administration or legal and accounting fees incurred is essential to ensure that the trustee will mount an appropriate challenge.

\footnote{22/} See note \footnote{9}, and see Article 7, Paragraph B (a standard spendthrift provision).
F. Administration Expenses.

The Trustee is authorized to pay or pre-pay out of trust income or principal\(^{23/}\) any expenses of administration related to the Trust, including reasonable attorney’s fees, fees and expenses related to the administration or termination of a guardianship or any legal action commenced by or on behalf of Beneficiary prior to Beneficiary’s death, and the Trustee should further consider purchasing a reasonable burial plan and paying the expenses relating to Beneficiary’s funeral and burial.

G. Acquisition and Maintenance of Residential Real Estate.

1. To the extent permitted by the laws, regulations, or policy provisions pertaining to any state or federal public benefit program for which Beneficiary may be eligible, the Trustee is authorized to purchase, maintain, improve, or replace a residence or any interest in a residence in which the Beneficiary may reside, whether by purchase, lease, or purchase of an interest in any such residence, including any portion of a residence that may be owned by a family member. If the Trust shall at any time own such realty, the Trustee may permit Beneficiary’s occupancy or use without charge in such manner as, in the opinion of the Trustee, best serves Beneficiary’s needs, without the necessity of turning such property into cash or generating an income therefrom.

2. To the extent permitted by the laws, regulations, or policy provisions pertaining to any state or federal public benefit program for which Beneficiary may be eligible, the Trustee is authorized to pay out of trust income or principal\(^{24/}\) any taxes, insurance, and maintenance

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\(^{23/}\) The critical element here is the authority to use income \textit{or} principal. Lacking this the trustee might become embroiled in questions under the Principal and Income Act, particularly relating to the prepayment of expenses. This provision might be more helpful to the trustee if it also relieved the need to make any adjustments in income or principal to account for such use to make the initial payment — that is, adjustments to repay one set of beneficiaries for what otherwise could be regarded as only an advancement of the funds used to make payment.

\(^{24/}\) Here again the critical element is the authority to use income \textit{or} principal. Lacking this the trustee could become embroiled in questions under the Principal and Income Act, particularly relating to the payment of maintenance expenses (which some might regard as improvements, which could alter their character). This provision also would be more helpful if it addressed the need to adjust. By way of example, if the trustee paid from principal to provide a new furnace or air conditioning system in the beneficiary’s dwelling, and paid extra for an extended warranty or maintenance agreement, the issue might be whether that added expense, also paid from principal, should be charged back against income during the years covered by the agreement. The effect of a prepayment and chargeback might be a wash, because payment from corpus would reduce the available investment fund, which might reduce the income subsequently...
expenses needed to keep the residential or replacement property in suitable repair, or any portion thereof and to collect rent from other occupants of the property, as the Trustee deems proper. These powers may be exercised for the benefit of Beneficiary, even if Beneficiary is residing with any family member who also may be serving as a Trustee.\footnote{25}

3. To the extent permitted by the laws, regulations, or policy provisions pertaining to any state or federal public benefit program for which Beneficiary may be eligible, the Trustee may acquire furnishings, make home improvements, and provide for regular household assistance to Beneficiary.

4. The Trustee is expressly authorized, in its absolute discretion, to permit any family member of Beneficiary, who is residing now or at any time in the future upon any real property forming a part of the Trust Estate to continue residing there on such terms as the Trustee shall deem proper, whether rent free or in consideration of payment of taxes, insurance, maintenance, and ordinary repairs, or otherwise, even if Beneficiary is residing with any family member who also may be serving as a Trustee.\footnote{26}

H. Emergency or Material Change of Circumstances.

In the event of an emergency or any other condition that the Trustee reasonably believes threatens the life, safety, or security of Beneficiary, or any material change of circumstances, the Trustee has full and unrestricted\footnote{27} discretion to administer this Trust so as to alleviate the condition and address the change of circumstances in keeping with Beneficiary’s best interest, which is of primary importance in the administration of this Trust.

\textbf{ARTICLE 3. ADMINISTRATIVE GUIDANCE TO THE TRUSTEE}

A. Discretion of Trustee.

As used herein, “discretion” shall mean sole, exclusive, unrestricted and absolute discretion. Discretionary powers are exercisable in the sole and absolute discretion of the

\footnote{25}{This provision permits a form of self-dealing by an individual trustee that likely would not be challenged, but there is no need to run the risk.}
\footnote{26}{See note 25.}
\footnote{27}{See note 28, and quaere whether “unrestricted” discretion is meant to differ from “absolute” discretion as used in the text accompanying that note. Then see note 11 regarding trust drafting in general.}
Trustee, and Beneficiary shall have no right or power to enforce or object to the lawful exercise of such powers.\textsuperscript{28/}

B. Maintain Eligibility for Public Benefits.

If Beneficiary is unable to do so independently, the Trustee shall exercise its best judgment and fiduciary duty to seek support and maintenance for Beneficiary from all available public and private resources, including but not limited to the Supplemental Security Income Program (“SSI”); Supplemental Income Program (“SIP”) of [state] or any other state; the Old Age Survivor and Disability Insurance Program (“OASDI”); the Medicaid Program, and any additional, similar, or successor program; and from any private support sources. The Trustee also shall request that any appointed guardian or conservator seek such support or maintenance. The Trustee shall take into consideration the applicable resources and income limitations of any public assistance program for which Beneficiary is eligible when determining whether to make any discretionary disbursements.\textsuperscript{29/} In carrying out the provisions of this Trust, the Trustee shall be mindful of the present and probable future special needs of Beneficiary. With reasonable frequency the trustee shall reevaluate Beneficiary’s living conditions, treatment, and morale.

\textsuperscript{28/} No grant of sole, exclusive, absolute, unrestricted, unfettered, non-reviewable, or any other similar grant of authority is valid. Drafters regularly say this but presumably know that a fiduciary’s exercise of discretion must be subject to review. If it were otherwise there would be no enforceability, and that would mean that there would be no trust. See Restatement (Third) of Trusts §50, comment c: “It is . . . a contradiction in terms, to permit the settlor to relieve a ‘trustee’ of all accountability. . . . Once it is determined that the authority over trust distributions is held in the role of trustee . . . , words such as ‘absolute’ or ‘unlimited’ or ‘sole and uncontrolled’ are not interpreted literally.” Austin W. Scott, William F. Fratcher, & Mark L. Ascher, \textit{SCOTT AND ASCHER ON TRUSTS} §§13.2.3, 18.2 (5th ed. 2007): “The terms of the trust may enlarge the trustee’s discretion by use of qualifying adjectives or phrases such as ‘absolute,’ ‘sole,’ ‘uncontrolled,’ or ‘unlimited.’ Such terms are not, however, interpreted literally; they do not confer on the trustee unlimited discretion,” citing Uniform Trust Code §814(a): “Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as ‘absolute’, ‘sole’, or ‘uncontrolled’, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” In this regard see also notes 9 and 85. Also note that “lawful exercise” in the last clause adds nothing because it begs the essential question.

\textsuperscript{29/} See note 17. A similar provision would permit a trustee to consider a beneficiary’s tax liability in making or withholding distributions — which is a factor that likely is not important in this context but otherwise would require the grant of specific authority to resolve what likely is an absence of authority under state law.
C. Restrictions on Trustee’s Discretion.

1. This provision is applicable only if any need of Beneficiary is not otherwise adequately provided for by private or governmental financial assistance and benefits or by the providers of services. Subject to this condition the Trustee may pay or apply for the benefit of Beneficiary any part or all of the trust income or principal as the Trustee in its sole discretion may from time to time deem necessary or advisable for any of Beneficiary’s special needs. Any income not distributed shall be added annually to principal.\(^{30/}\)

2. In determining whether the existence of the Trust has the effect of rendering Beneficiary ineligible for any program of public benefit, the Trustee is hereby granted full discretion to initiate steps rendering Beneficiary eligible for any such program of public benefit and to initiate administrative or judicial proceedings to determine eligibility. All costs relating thereto, including but not limited to reasonable attorney’s fees, shall be a proper charge to the Trust.\(^{31/}\)

3. If Beneficiary becomes ineligible for any program of public benefit the Trustee may obtain the authority of a court of competent jurisdiction to terminate this Trust, and distribute outright the balance of the Trust Estate in accordance with the ruling of such court.\(^{31/}\)

D. Consultation with Advisors.

1. The Trustee shall, at least annually, and may at other times chosen by the Trustee, consult with an attorney or other consultant with appropriate knowledge and expertise

\(^{30/}\) See note 15.

\(^{31/}\) See the second paragraph of note 4, here in regard to not needing authority to seek approval to terminate a trust. Administratively it also might be appropriate to include a “small trust termination” provision, such as the following, and to incorporate added triggers relating to termination of any program of public benefits that made the trust appropriate in the first instance:

The trustee in its discretion may terminate and distribute any trust hereunder if the trustee determines that the costs of continuance thereof will substantially impair accomplishment of the purposes of the trust. Distribution under this provision shall be made to the persons then entitled to receive or have the benefit of the income from the trust in the proportions in which they are entitled thereto or, if their interests are indefinite, then in equal shares. In no event shall the trustee exercise this authority if doing so would cause termination of a beneficiary’s entitlement to public benefits, nor may the trustee be compelled to exercise this authority.

Some trust documents combine this provision with the Perpetuities Saving Clause because the distribution is the same. See, e.g., Article 7, Paragraph C.
in the area of public benefits and trust law to review applicable state and federal laws, regulations, and other requirements of the public benefit programs and to review the appropriateness of Trust distributions and expenditures so that the public benefits eligibility of Beneficiary is not jeopardized by inappropriate actions or distributions by the Trustee. The cost of such professional consultations may be paid by the Trustee from Trust assets.  

2. The Trustee may seek the counsel and assistance of Beneficiary’s advocate, guardian, or conservator, if any, and any state and local agencies that have been established to assist persons with similar disabilities and limitations. The Trustee may use the resources of the Trust Estate to aid Beneficiary’s advocate, guardian, or conservator as appropriate, in identifying programs that may be of social, financial, developmental, or other assistance to Beneficiary. However, the Trustee shall not in any event be liable to Beneficiary, the remainder beneficiaries of this Trust, or any other party for any acts as Trustee hereunder so long as the Trustee acts reasonably and in good faith. For example, the Trustee, as well as Beneficiary’s advocate, guardian, or conservator shall not be liable for the failure to identify each and every program or resource that might be available to Beneficiary on account of Beneficiary’s disabilities and limitations.

3. The Trustee is authorized to employ investment counsel, financial advisors, corporate cotrustees, custodians of trust property, brokers, accountants, lawyers, realtors, rental agents, and other agents in those instances in which the Trustee, in the exercise of discretion, deems it necessary or advisable, and to pay reasonable fees in connection therewith from income or principal. The Trustee shall be free from liability for neglect or misconduct of any agent selected and retained with reasonable care. Trustee may, at its discretion, obtain and compensate a correspondent trust fiduciary or other agent to hold, manage, or otherwise dispose of real property located in another jurisdiction.

32/ This provision would be more helpful if it was crafted in the same manner and provided the same authority as the text accompanying notes 23 and 24.

33/ Quaere whether the intent here is to exculpate these other advisors or fiduciaries. If not, this dependent clause may be inappropriate. If it is, quaere why this is an appropriate provision without more to guide a court regarding that intent.

34/ Delegation is a critical function about which state law may be unclear, absent authority as found in this entire paragraph or specific state law. See Uniform Trust Act §807; Restatement (Third) of Trusts §80; Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.3 (5th ed. 2007). In addition to the authority to allocate fees to income or principal, the trustee should be relieved of any responsibility to adjust accounts, it should be made clear that the trustee’s fee will not be reduced by the delegation of trustee functions to outsiders. The same delegation factors and relief of liability should apply to the out-of-state trustee provision in the last sentence (that is, if the selection and retention is prudent) — but notice that the order of these sentences suggests that it is not.
4. It is a purpose of this Trust, which is precatory and not mandatory, that disbursements may be made from the Trust Estate for such advocates, both legal and non-legal, as may be necessary to protect any and all rights of Beneficiary, as well as to protect the integrity of this Trust. The Trustee is authorized, in its discretion, to take whatever administrative or judicial steps may be necessary to continue Beneficiary’s eligibility for benefits, including obtaining instructions from a court of competent jurisdiction ruling that the Trust corpus is not available to Beneficiary for eligibility purposes. Any expenses of the Trustee in this regard, including reasonable attorney’s fees, shall be a proper charge to the Trust estate.\footnote{35/}

E. Annual Evaluation of Beneficiary.

The Trustee is requested (but not required) to conduct or arrange for an annual evaluation of Beneficiary, addressing Beneficiary’s needs and circumstances such as: physical condition; educational, residential, vocational, and training opportunities; recreational, leisure, and social needs; appropriateness of existing program services; and the availability of governmental financial assistance and private contractual benefit programs. The Trustee or its agent(s) are requested to personally visit Beneficiary at Beneficiary’s residence at periodic intervals determined appropriate by the Trustee, to assess Beneficiary’s living conditions, to assess the treatment given Beneficiary by caregivers, and to let Beneficiary know that Trustee is Beneficiary’s friend and advocate.\footnote{36/}

F. Trustee Environmental Exculpation.

No Trustee shall be liable for any loss or depreciation in value sustained by the Trust as a result of the Trustee retaining any property upon which there is later discovered to be hazardous materials or substances requiring remedial action pursuant to any federal, state, or local environmental law, unless the Trustee contributed to the loss or depreciation in value through willful default, willful misconduct, or gross negligence.\footnote{37/}

\footnote{35/} Given a fiduciary’s normal duty of loyalty, this authority — essentially to advocate against the beneficiary’s best interests under the trust — might appropriately grant exculpation to the fiduciary from any liabilities that may exist. Also quaere why the expense provision here does not authorize payment from income or principal, and whether it should be crafted in the same manner and provide the same authority as the text accompanying notes \textsuperscript{23} and \textsuperscript{24}.

\footnote{36/} Notwithstanding the reference to the trustee’s agent(s), this paragraph appears to suggest that a corporate fiduciary is less likely to serve than an individual, as to whom various protections, delegation authorities, and succession provisions will be appropriate, that otherwise would not be needed with respect to a corporate fiduciary. See, e.g., note \textsuperscript{12} and accompanying text.

\footnote{37/} See note \textsuperscript{16}. This document seems obsessed with the environmental tort topic. Experience suggests that typical trusts are not so comprehensive about the issue. Quaere why this one is. In
G. Trustees’ Exemptions Regarding Bond, Inventorying, and Reporting.

No trustee shall be required to give bond or other security, or file any formal inventory, accounting, or appraisal with any court regarding the performance of Trustee’s duties hereunder, unless required to do so by a duly entered order of a court of competent jurisdiction over this Trust.\footnote{38/}

H. Annual Accounts.

The Trustee shall render and maintain an annual account of the administration of the Trust to Beneficiary or to the legal representative of Beneficiary. Such accounting shall include a schedule of receipts and disbursements of the Trust and a copy of any Federal fiduciary income tax return filed by the Trust. In addition, the Trustee shall furnish to Beneficiary at least annually documentation of the investment status of the Trust Estate.\footnote{39/}

I. Notices to Beneficiary.

Any time when Beneficiary is entitled to receive a notice, the Trustee may give such notice in writing by fax, regular mail, overnight courier, or hand delivery,\footnote{40/} in the Trustee’s discretion, to Beneficiary at Beneficiary’s last known address if Beneficiary is competent to receive such notice or, if not, to Beneficiary’s legally appointed guardian or conservator of the person or estate of Beneficiary or to any suitable person with whom Beneficiary resides or who regularly provides care for Beneficiary.

\footnote{38/} This does not exempt the trustee from making accountings to beneficiaries, which is an essential function to permit enforcement of the trust. See Uniform Trust Code §813(c); Restatement (Third) of Trusts §83; Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.4 (5th ed. 2007). The more significant accounting function is addressed in note 61.

\footnote{39/} This provision is harmless but not common — because state law will determine what form of accountings are appropriate or required. And notice — why does the first sentence of this paragraph allow delivery to a beneficiary’s legal representative, but not the last? For that matter, why does the next paragraph not refer to the beneficiary’s “legal representative” simpliciter, instead of naming all of the various flavors thereof?

\footnote{40/} But not by email attachment? Experience suggests that this provision also is not common. And quaeer whether (or why) delivery to a caregiver — which might include an extended care facility — is adequate or appropriate.
ARTICLE 4. TERMINATION OF TRUST

A. Termination Upon Death of Beneficiary.

This Trust shall terminate upon the death of Beneficiary, except that the title, powers, duties, immunities, and discretion herein conferred upon the Trustee shall continue after termination of the Trust and until final distribution. Upon Beneficiary’s death, or as soon as practical thereafter, the Trustee shall distribute the remaining trust principal and any accumulated income in accordance with the provisions for distribution set forth hereinbelow.

B. Payment of Final Expenses and Taxes.

The Trustee may pay or hold in reserve for payment an amount of money, which in Trustee’s opinion will be necessary, to pay the funeral and burial expenses of Beneficiary to the extent not covered by life insurance on Beneficiary’s life or any other funds set aside for such funeral or burial expenses. The Trustee also may withhold an amount in reserve to cover any estate, gift, generation-skipping transfer, or income taxes or final trust administration expenses that are or may be due upon or by reason of the death of Beneficiary. The decision as to the amount held in reserve shall be binding upon the remainder beneficiaries.

C. Remainder Beneficiaries.

After making or providing for the payments authorized in the prior paragraph the Trustee shall distribute the remaining trust principal and income to or for the benefit of one or

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41/ Trust law permits a trustee to continue a trust for a reasonable period needed to wind up its affairs and make any required distributions. See Uniform Trust Code §817(b); Restatement (Third) of Trusts §89; Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §36.1 (5th ed. 2008).

42/ First, why not just direct payment of these items and then termination of the trust, rather than the contorted provisions here and in paragraph A – is this a function of the requirements of a special needs trust, that it must terminate at Beneficiary’s death and the drafter does not want to raise any concerns about what that means as a practical matter?

This paragraph does not direct payment of any of these items, nor does it indicate how the trustee should exercise the discretion to pay (“may pay”) those items noted in the first sentence. Also quare why the second sentence only authorizes withholding and does not authorize payment. And notice that the next provision is consistent in indicating that the trustee is not authorized to pay either taxes or final administration expenses. Debts, expenses, and taxes provisions are the most common source of malpractice liability in drafting trusts, exacerbated in many cases by failure to coordinate with any will or other documents of transfer that also may address these items. See Pennell, TRANSFER TAX PAYMENT AND APPORTIONMENT, 834-2 Estates, Gifts, and Trusts Portfolio (Tax Mgmt. 2010).
more persons or organizations as Beneficiary may appoint by specific reference thereto in the
last will and testament of Beneficiary, admitted to probate. Such appointment may be outright
or in trust. 43/

To the extent Beneficiary fails to effectively exercise the power of appointment, 44/ then
upon the death of Beneficiary the Trustee shall distribute any remaining principal and
accumulated income to [Beneficiary’s spouse and children in equal shares per stirpes] 45/
[Beneficiary’s heirs at law].

During the minority or legal incapacity of any remainder 46/ beneficiary to or for whom
income or principal is authorized or directed to be paid, the Trustee, in its sole discretion, may
pay, transfer, or assign the income or principal in any one or more of the following ways: (a)
directly to such beneficiary such amount as it may deem advisable; (b) to the guardian or
custodian 47/ of the person or of the property of such beneficiary; (c) to a relative of such

43/ This is a general (taxable) power to appoint. Quaere why it is appropriate to thereby make
this trust taxable in the estate of the beneficiary for federal estate tax purposes.

See Casner & Pennell, ESTATE PLANNING §12.4.4 (6th ed. 2001), regarding the importance
of the specific reference requirement and the power to appoint in further trust, which establish
the beneficiary’s authority to continue the trust or create a new trust, and preclude unwitting
exercise of a power by either a “blanket” or a “silent” residuary provision, each of which can
cause tax and fiduciary liability issues that are best avoided.

44/ The following provision may be useful in determining whether Beneficiary effectively
exercised the power:

In disposing of any trust property subject to a power to appoint by will, the trustee may
rely upon an instrument admitted to probate in any jurisdiction as the will of Beneficiary
or may assume that the power was not exercised if Trustee has no actual notice within
three months of Beneficiary’s death of a will that exercises the power. The Trustee may
rely on any document or other evidence in making payment under this will and shall not
be liable for any payment made in good faith before the Trustee receives actual notice of a
changed situation.

45/ Numerous decisions indicate that “in equal shares per stirpes” doesn’t mean anything
(because a per stirpal distribution does not necessarily produce equal shares) and thus invites a
construction suit. See, e.g., Restatement (Second) of Property, Donative Transfers §28.2
Reporter’s Note 5.d. (1988). The likely intent of a drafter who uses this language is “in equal
shares with the right of representation,” both components of which form the definition of a per
stirpes distribution.

46/ See note 14. Quaere why it is appropriate that this provision only applies to a remainder
beneficiary, particularly because distribution to them is outright at Beneficiary’s death and this
facility of payment provision is intended to deal with periodic or interim distributions.

47/ See the last sentence of note 39. Lack of consistency in a document such as this increases
the potential for a construction controversy.
beneficiary upon the agreement of such relative to expend such income or principal solely for the benefit of the beneficiary; (d) to any person or financial institution, including the Trustee, as custodian under the Uniform Transfers to Minors Act of any state, and in all other ways provided by any statute dealing with gifts or distributions to or for minors or persons under disability, or to any trust then in existence of which such minor or person is a beneficiary; or (e) by expending such income or principal directly for the education, support, and maintenance of such beneficiary. The Trustee shall have the power in its uncontrolled discretion to determine whether a beneficiary is incapacitated, and its determination shall be conclusive. Any such distribution by the Trustee shall be without continuing court supervision or the intervention of a guardian or other personal representative and without giving or requiring any bond, and any distribution so made shall be without obligation on the part of the Trustee to see to the further application thereof. A receipt for any such distribution by the recipient thereof shall fully discharge the Trustee.

Further, if any remainder beneficiary shall be a minor or be under any legal disability, his or her share shall be vested in him or her, but the Trustee, in its sole discretion, may hold such share in trust and distributions shall be postponed until the beneficiary attains such age or until such disability has been removed. The Trustee is authorized to pay to or for the benefit of such beneficiary such part of the income or principal of the retained share as the Trustee considers advisable for the beneficiary’s education and maintenance and may add to the principal any income not so expended, and shall, subject to the following paragraph of this Article, distribute to the beneficiary all remaining principal and income at the termination of the Beneficiary’s minority or legal disability.

If the Trustee determines that a remainder beneficiary (at any time such beneficiary otherwise would be entitled to receive a distribution of trust income or principal) does not have the ability to prudently use and conserve the trust income or principal, then the Trustee is authorized to withhold any part or all of such income or principal distribution until the Trustee shall deem such beneficiary to be qualified to prudently use and conserve the same; provided, however, such income or principal so retained shall continue to be administered as an integral part of such beneficiary’s trust estate and may thereafter, as the Trustee deems wise, be paid over and delivered to such beneficiary in whole or in part and from time to time as and when the

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48/ See note 12.
49/ See note 28.
50/ See note 13.
51/ Why is this paragraph needed, given the existence of the prior paragraph? If it is needed, also quaere why it differs from the prior paragraph.
ARTICLE 5. TRUSTEE(S)

A. Identity.

The initial Trustee of this Trust is [trustee]. If [trustee] fails to become or ceases to act as Trustee, then [trustee 2] shall be Trustee, and if [trustee 2] fails to become or ceases to act, then [trustee 3] shall be Trustee.

OR

The initial Trustee of this Trust shall be [cotrustees]. If either cotrustee fails to become or ceases to act, then the other cotrustee may continue to serve as sole trustee. If neither cotrustee is willing or able to act, then [trustee 2] shall be successor Trustee, and if [trustee 2] fails to become or ceases to act, then [trustee 3] shall be Trustee, in either case to serve alone.

52/ As a matter of fiduciary administration this paragraph raises the same questions as the prior two paragraphs. As a matter of fiduciary liability it is more troublesome than the prior two paragraphs because of the standard applied. If the standard for its application is thought to be needed, why not just meld the “ inability to use and conserve” into the third paragraph of this Paragraph C and allow the single facility of payment provision to apply?

53/ Absent this provision the trust would require that a vacancy always be filled so as to always maintain two fiduciaries at all times. A careful reading of Restatement (Third) of Trusts §§34, comment d and §39, comment a, along with the authorities cited therein (including Uniform Trust Code §§703 and 704(b)) reveals that they are a break from the traditional common law, requiring that cotrustee must be unanimous and that a vacant cotrustee position must be filled. It is critical that the trust document address each question because the drafters of the Uniform Act and the Restatement (Third) are seeking to influence the law rather than reflect a development that already has occurred. As such, their position reveals that the law in this context is going to reflect turmoil.

Like these modern authorities, the provision in this document alters the traditional result, which raises the question why cotrustees were needed or appropriate in the first instance. In that regard see note 54, addressing the desirability of cotrustees.

54/ Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.16 (5th ed. 2007), reveals that Uniform Trust Code §703(f) and (g) modified the historic general rule (that still is the law in most jurisdictions) that cotrustees are jointly and severally liable for all mistakes that occur in the administration of a trust. The revised rule manifests cotrustee liability in a duty to “(1) prevent a cotrustee from committing a serious breach of trust; and (2) compel a cotrustee to redress a serious breach of trust.” Notwithstanding modification, this cofiduciary liability makes the use of multiple trustees disadvantageous. It is preferable for liability purposes to designate agents to perform special functions and name a single trustee to exercise overall responsibility for the trust, with authority to designate others to serve as advisors to the trustee or as agents — if, for example, the designated trustee is not the appropriate actor to exercise distribution discretion, or perform investments, or whatever other function a cotrustee otherwise would perform.
B. Successor or Substitute Trustees.

1. Any trustee may resign without court approval regardless of whether a successor trustee has been appointed or is willing and able to serve.\textsuperscript{55/}

Any Trustee hereof is authorized, while serving as trustee, to appoint any person (excluding Beneficiary and Beneficiary’s spouse or child), financial institution, or trust company, as a successor Trustee to serve in such capacity if the Trustee becomes unable or unwilling to continue to serve; provided, however, that any successor Trustee named herein may be replaced by the initial Trustee only in the event the initial Trustee determines such replacement to be in the best interest of Beneficiary and the Trust Estate.\textsuperscript{56/} Any Trustee hereof is authorized, while serving as sole trustee, to appoint any person (excluding Beneficiary and Beneficiary’s spouse or child), financial institution, or trust company as a cotrustee; provided, however, that any such cotrustee shall be an “independent trustee” as defined in the Internal Revenue Code.\textsuperscript{57/} If such a cotrustee shall be serving, Trustee shall have the authority to

As drafted herein, these cofiduciaries essentially are exposed to the foibles of each other and their collective liability is measured by the lowest common denominator as between them. Because of this exposure a knowledgeable cofiduciary will charge a higher fee to compensate for shared liability than it will charge to act alone.

In addition, this provision should specify whether the cofiduciaries must act by unanimous vote or whether one will trump the other in the event of a disagreement. Lacking express language to the contrary, the traditional rule reflected in note \textsuperscript{53} is that unanimity is required, which gives either cofiduciary a veto power that can stymie any action. An express consent or veto provision is a preferable approach, combined with exoneration of the trustee whose actions are pre-empted.

\textsuperscript{55/} Absent this provision the trustee would not be permitted to resign without prior approval of the court or the consent of all the beneficiaries. See Restatement (Third) of Trusts §36. It is conceivable that the drafter of a trust would not grant this authority, as a means of locking a trustee into the function, but a knowledgeable trustee would more seriously consider whether to decline to serve in the first instance if the trustee could not resign after beginning to act.

\textsuperscript{56/} Quaere the value (and thus the meaning) of this “best interest” requirement, given that a trustee always must act in the best interest of the trust and its beneficiaries.

\textsuperscript{57/} An “independent trustee” is defined in Internal Revenue Code §674(c) as not the grantor and “no more than half of whom are related or subordinate parties who are subservient to the grantor.” As such, no one person would ever be “independent” – this definition turns on the identity of several trustees. The apparent rationale here may be to prevent the trust from becoming a “defective grantor trust” for fiduciary income tax purposes, notwithstanding that grantor trust treatment during the settlor’s life likely would be a good thing (because it would allow the settlor to pay income tax on trust income that otherwise is available to the beneficiary, which increases the after-tax benefit to the beneficiary without incurring added gift tax). See note \textsuperscript{79}. None of that explains why the beneficiary or a spouse or child of the beneficiary must be excluded from serving and, for both income and wealth transfer tax purposes, it is possible for any of them to serve as the trustee or as a cotrustee if the appropriate language is employed.
petition a court of competent jurisdiction over this trust for the removal or replacement of such cotrustee.\footnote{58} Any corporate cotrustee must be a bank or trust company or financial institution then qualified and licensed to do business in \[state\].\footnote{59}

2. If neither Trustee nor any successor trustee is currently willing and able to act as Trustee, then a successor Trustee shall be designated by Beneficiary’s guardian or appointed by a court of competent jurisdiction in keeping with the provisions of \[state\] Code (as amended).\footnote{60}

3. Any Trustee, upon ceasing to serve, shall pay over, deliver, assign, transfer, and convey to the successor Trustee (and to a successor cotrustee who qualifies and accepts in establishing the standards for distribution. See note 12. From a trust administration perspective the primary point here is to consider the income and wealth transfer tax implications of any fiduciary designation.

Note that a \textit{self-settled} special needs trust would have grantor trust status under Internal Revenue Code §677(a) by virtue of the settlor being the beneficiary. Subject to the “portion” rules in Treas. Reg. §1.671-3, trust income, deductions, credits, and losses would pass through to the settlor’s income tax return, regardless of whether the trustee accumulated or distributed trust income. In this \textit{third party trust} the income tax status is as a “complex” trust, meaning that income not distributed currently is taxed to the trust at what amounts to the highest income tax rates under the Internal Revenue Code. See §1(e). The third form of trust is a “simple” trust and it could be created in this context but the income tax consequences vary only because simple trusts must distribute all income annually (and the trust cannot make any corpus distributions during the year), which likely makes simple trusts not practical or appropriate for special needs purposes.

\footnote{58} Removal of a cotrustee also may be designed to engineer what is known as “toggle switch” defective grantor trust planning, allowing the trustee to turn on or off grantor trust status for federal income tax purposes.

\footnote{59} The in-state requirement is not necessary in jurisdictions that do not prohibit nonresident (foreign) corporations from service as trustee. The need (or even the desirability) for local actors is greatly reduced in this age of easy communication, and given the authority to employ agents.

\footnote{60} One of the most difficult aspects of trust design and administration is providing for trustee succession (and, under alternatives to Article 6 below, providing for succession of trust advisors or trust protectors). At some point the list of designated fiduciaries may be exhausted, but black letter law specifies that the trust will not fail for the lack of a trustee unless only particular trustees are allowable. See Restatement (Third) of Trusts §31. If not, the key to effective administration is to provide a viable means for selection of successors that will stand the test of time. This trust will not exist for multiple generations, making the challenge less difficult than in a perpetual dynasty trust. Common options for the selection include delegation to the local court with jurisdiction over the trust administration, or reliance on some other body or person (such as the trust advisor or protector, which just pushes the issue to selection of their successors), or the presiding judge of a local court or perhaps the lead lawyer in whatever amounts to the successor of the drafter’s law firm.
appointment to serve in that role, if any) the trust estate as it shall then be constituted and that is under its control, and it shall make a full and proper accounting to the successor Trustee, whereupon the replaced Trustee, after such accounting is accepted and approved and the trust estate is fully received, shall be discharged and have no further responsibility. Upon the failure of a replaced Trustee to make such conveyance and accounting, the successor Trustee or Beneficiary may apply to any court having jurisdiction of this trust and such court may compel the conveyance and accounting by the replaced Trustee. The successor Trustee upon acceptance of this trust and the trust estate shall succeed to and possess all the rights, powers, duties, authority, and responsibility conferred upon the replaced Trustee.

C. Compensation of Trustees.

A Trustee other than a parent, spouse, or child of Beneficiary shall be entitled to such reasonable compensation as may be allowable under the laws of [state]. Any Trustee shall be entitled to be reimbursed for the reasonable expenses incurred in the administration of this Trust. Any corporate or independent Trustee or cotrustee hereof shall be entitled to compensation in accordance with the reasonable schedule of fees as from time to time maintained by trust institutions in the state for such trusts.

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61/ Most trusts exempt a successor trustee from the obligation to audit the accounts of a predecessor, and provide that a successor has no liability for failing to sue to recover for any losses attributable to a predecessor’s breach. That is not what this document provides, and it can cause a knowledgeable trustee to refuse to act as a successor. Or it can cause a successor to generate a significant fee to compensate the successor for engaging in that review. It would be wise to add such exculpation of the successor trustee from this liability unless there is a special reason to suspect that such a review is necessary (because, for example, accounts rendered to the beneficiary will not be studied carefully, or because it is expected that a trustee that is being replaced is likely to have breached the trust).

62/ Portions of this document suggest that no spouse or child could serve as trustee. See, e.g., note 57 and accompanying text.

Trust administration is not a casual undertaking, and it exposes the trustee to liability for mistakes. Quaere the wisdom, then, of asking any trustee to serve without making a serious commitment to the role, and whether a serious commitment is realistic without compensation.

63/ Quaere whether it is possible to determine the “average” compensation of trustees serving in a particular state, for trusts in general or for trusts of this variety in particular. In addition, why would a first-rate trustee be willing to serve for a jurisdictional-average compensation? It may be wrong-minded to include such a provision as this unless the notion is that good trustees will willingly reduce their fees, or that average trustees are “good enough.” It probably is preferable to shop fees before selecting a fiduciary, and to negotiate a proper fee as part of the selection process. Unbeknownst to many consumers, corporate fiduciaries will discount their fees in the “right” circumstances (which includes a case in which there is family wealth in addition to the special needs trust).
D. Powers of Trustees.

The Trustee shall have those powers, duties, and discretions listed in the following sections, in addition to those otherwise granted herein, and by the [state trustee powers provision] as amended, except as elsewhere herein specifically restricted. 64/

1. Exercise of Power.

Provided that the Trustee shall exercise such powers at all times in a fiduciary capacity in the best interest of Beneficiary, the Trustee may freely act under all or any of the powers given the Trustee by this Trust Agreement in all matters concerning the trust after exercising the Trustee’s best judgment in a good faith manner based upon all the circumstances of any particular situation known to the Trustee as to the best course to follow in the interest of this Trust and of Beneficiary, without the necessity of obtaining the consent or approval of any court and notwithstanding that the Trustee may also be acting individually or as trustee of other trusts. 65/

2. Trust Property.

To manage, control, operate, invest, reinvest, sell, exchange, lease, mortgage, encumber, or deal with the property of this Trust for and on behalf of the trust and Beneficiary to the same extent and with the same powers that any individual would have in respect to his or her own property and funds. 66/

64/ A pervasive issue is whether to grant long form trustee powers (on the theory that no one knows what the state legislature might add or alter in the state law trust provisions) or to rely on state law trustee powers as sufficiently robust and generic. Professional trustees typically want their own form power provisions but will accept other trusts if the engagement is attractive and the powers provision is reasonably comprehensive. Lacking appropriate powers, however, good trustees may decline to act, which hardly serves the settlor’s purpose. At a minimum the drafter should consider asking designated trustees to review the document in advance of its execution, to determine whether changes or additions are needed to improve the chances that the trustee will accept that appointment.

65/ This authority permits the trustee to engage in self-dealing or a conflict of interest, if the trustee is acting with respect to multiple trusts. For example, the trustee may be authorized to purchase shares in its own common trust funds, which provides better investment diversification at a lower cost than individually investing all assets of the trust, or the trustee may choose to purchase an asset from one trust or sell it to another, each under its administration.

66/ This authority likely does not permit the trustee to make gratuitous transfers of trust funds to individuals not specifically named as beneficiaries, although an individual could make gifts with personal funds. See Casner & Pennell, ESTATE PLANNING §3.10.4.3 (6th ed. 1999), regarding the need in a durable power of attorney to specifically authorize such transfers. In a similar vein, the trust document should be more specific if it is desirable for the trustee to
3. Maintenance of Investments.

To hold any or all of the trust estate in the form of investment in which it is received.\(^{67/}\)

4. Title of Investments.

To hold investments or any part of the trust estate in common or undivided interest with other persons.\(^{68/}\)

5. Investments.

To invest and reinvest the trust estate without limitation in investments of any kind, real or personal, including without limitation stocks, bonds, notes, mortgages, real estate, mineral interests, royalties, leaseholds, and to participate in partnerships, joint ventures, and other business enterprises.\(^{69/}\)

engage in estate planning or other spend down transfers. Alternatively the settlor could grant a power of appointment to a powerholder that would permit transfers among a specified class of permissible appointees.

\(^{67/}\) Normally a trustee must diversify trust assets. See Restatement (Third) of Trusts §90(b) and comment g. Diversification may be undesirable if it requires sale of legacy assets, such as a family business or a farm/ranch that the family wishes to maintain. This provision is not an absolute grant of authority to hold assets that are in steady decline — without more specificity the trustee likely would not be regarded as exempt from the duty to review investments and act prudently in light of all the facts and circumstances. See \textit{id.} §91(b).

\(^{68/}\) A corporate trustee also may want the authority to hold investments in nominee form as a means of insulating the trustee’s identity from public scrutiny. As written this provision only permits a trustee to continue to hold property as a tenant in common (which may be desirable because of valuation adjustments for fractional or minority interests) or as a joint tenant with the right of survivorship (for which no such adjustment is available). On the valuation differences compare Bogdanski, \textit{Federal Tax Valuation} ¶¶5.01 (coterminous interests) and 5.02 (survivorship interests) (2006).

\(^{69/}\) This grant of broad discretion may permit the trustee to consider a wider range of investment assets but it does not relieve the trustee of the overarching fiduciary duty to invest as would a reasonably prudent person, either in the investment of individual wealth or the wealth of others, depending on the state law prudent person/investor standard.
6. Participation In Corporate Activities.

To participate in any reorganization, consolidation, merger, or dissolution of any corporation, the stocks, bonds, or securities of which may be held at any time as part of the trust estate. 70/

7. Voting on Trust Investments.

To vote in person or by proxy on shares of stock or other investments that may at any time be a part of the trust estate. 71/

8. Disposal of Trust Property.

To sell at public or private sale, to mortgage, pledge, or hypothecate, or to exchange or lease any stocks, notes, securities, real estate, minerals, or any other trust property upon such terms, cash or credit or both, as the Trustee may deem advisable. 72/


To borrow funds for this Trust in such amounts and for such purposes as the Trustee may deem proper and to purchase property on the credit of this Trust and, in connection therewith, or in connection with such borrowing, to execute and deliver promissory notes or

70/ Particularly if the trustee is an individual who is employed in or as a director of a family business, this provision allows the trustee to engage in what otherwise might be regarded as self-dealing or conflict of interest activities vis-à-vis that investment. See Restatement (Third) of Trusts §78(2) and comment e, and Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.2.8 (5th ed. 2007).

71/ Proxy voting arguably violates the anti-delegation responsibility of a trustee, although Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §18.1.8.3 (5th ed. 2007), makes the practical case that it should not be deemed improper in circumstances in which an investment is not substantial. More useful here would be the authority to vote stock in a business in which the trustee is involved.

72/ Particularly a private sale might generate criticism, even if it is clearly at arms’ length, because it entails self dealing and a conflict of interest. See Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.2.1 (5th ed. 2007). The power to borrow and pledge trust assets as security, or to enter into a lease or other transaction involving temporal interests, is more useful if the document specifies that the term of the loan or lease may exceed the expected duration of the trust, and that the lease may begin in the future. For example, the trustee may be called upon to grant a mineral interest or ground lease with respect to realty held in the trust, which grant may run for several decades or may not begin until an existing lease terminates several years in the future, although the trust itself is expected to terminate in a few years.
other evidence of indebtedness of this Trust, and to mortgage or pledge all or any part of the Trust to secure payment of such indebtedness and to repay such indebtedness out of the trust estate.

10. Settlement of Claims.

To demand, receive, provide receipt for, and collect any and all rights, money, properties, or claims to which this Trust may be entitled, and to compromise, settle, or abandon any claim in favor of or against this Trust.73/

11. Litigation.

To prosecute, defend, contest, or otherwise litigate legal actions or other proceedings for the protection or benefit of a trust or the Trustee; to pay, compromise, release, adjust, or submit to arbitration any debt, claim, or controversy; and to insure the trust against any risk, and the Trustee against liability, with respect to third persons.

12. Real Property; Investigation and Handling of Environmental Issues.74/

To construct, repair, improve, or demolish any improvements upon any real property held by the Trust; and to (i) conduct environmental assessments, audits, and site monitoring to determine compliance with any environmental law or regulation thereunder; (ii) take all appropriate remedial action to contain, clean up, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation thereunder; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards; and (v) employ agents, consultants, and legal counsel to assist or perform the above undertakings or actions. Any expenses incurred by the trustee under this subparagraph may be charged against income or principal as the Trustee shall determine.75/

73/ As articulated in Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §18.1.6 (5th ed. 2007), the pursuit of claims rather than the prudent settlement of them might be regarded as imprudent, and a trustee should consider the likely costs and possibility of success of litigation to collect. See the next power.

74/ Again the environmental issues! See notes 16 and 37.

75/ This provision would be more helpful if it was crafted in the same manner and provided the same authority as the text accompanying notes 23 and 24.
13. Insurance.

The Trustee has discretion to purchase whatever casualty insurance is deemed by the Trustee useful or advisable to protect the trust estate against any damage or loss and to protect the Trustee against liability with respect to third parties.\(^{76/}\)

14. Life Insurance.

To purchase, pay premiums, assessments, or other charges with respect to, cancel, convert, or modify, policies of life insurance on the life of Beneficiary and for the benefit of Beneficiary or the trust and to hold and to pay for the same as an investment and an asset of the estate, any time and upon successive occasions, the premiums to be charged against income or principal, as the Trustee shall determine, so long as the face amount of the life insurance policy does not exceed the maximum amount allowed by SSI or other applicable benefit programs. The Trustee may compromise, arbitrate, or otherwise adjust claims upon any policies and may, but shall not be required to, exercise any settlement options available under such policies. The receipt of the Trustee to the insurer shall be a full discharge, and the insurer is not required to see to the application of the proceeds.\(^{77/}\)

15. Preparation of Tax Returns and Elections.

(a) To prepare and file all types of tax returns, forms, and schedules and to arrange for payment with respect to all local, state, federal, and foreign taxes incident or applicable to this Agreement; to prepare all necessary fiduciary income tax returns; and to make all necessary and appropriate elections in connection therewith in its discretion.\(^{78/}\)

\(^{76/}\) Failure to insure likely would be regarded as a breach of fiduciary duty if a reasonably prudent individual would insure the subject property from the subject risk. See Restatement (Third) of Trusts §76(2)(b) and comment d; Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §17.8 (5th ed. 2007). As such, authority to insure is likely less important than would be a provision allowing the trustee not to insure.

\(^{77/}\) See note 13 regarding the insurer’s duty to see to the application of insurance proceeds. The right to take and hold cash value life insurance is not fundamentally different than any other investment, which this provision recognizes.

\(^{78/}\) A critical, missing authority is to make tax elections without regard to the impact they may have on the relative interests of the beneficiaries and a direction not to make equitable or “compensating” adjustments to account for or ameliorate the inequities of those consequences. This is a very detailed and intricate concept that largely is lost on casual observers and inexperienced trustees. Such a provision might read:

The Trustee shall make such elections and allocations under the tax laws as the Trustee deems advisable, without regard to the relative interests of the beneficiaries and without
(b) To pay any of Beneficiary’s income tax liability that results from income received by the Trust but properly reported on Beneficiary’s income tax return. The funds used to pay any such income tax liability shall be paid directly to the appropriate tax authority and shall not be available to Beneficiary. Beneficiary shall not have any right to or interest in any such funds paid by the Trustee.\textsuperscript{79}/

(c) In the event of a tax refund, any amount refunded shall be paid directly to the Trustee to the extent such refund is attributable to amounts previously paid by the Trustee. Beneficiary or Beneficiary’s guardian or conservator shall execute any letters, powers of attorney, or other documents required or requested by the taxing authority in order to allow payment of any refund to the Trustee.\textsuperscript{80}/

16. Avoidance of Tax Liability.

To enter into agreements with any taxing agency, including but not limited to the Internal Revenue Service and any state taxing agency, to circumscribe the implementation of trust administration provisions to ensure that the Trust will not cause any unanticipated tax liability of any kind and to provide such taxing agency with any necessary disclaimer or

\textsuperscript{79}/ Apropos the discussion in note 57, one reason for making the trust a defective grantor trust is to avoid the need recognized in this provision to pay income tax on trust income that is deemed taxable to the beneficiary, and thus the need to wrestle with whether an added distribution to pay that income tax is likely to cause disqualification consequences for benefit calculation purposes. Also note that distributions of trust funds to provide the beneficiary with funds to pay income tax will themselves carry out income of the trust to the beneficiary to the extent the distributable net income of the trust has not previously been exhausted, thus requiring a “gross up” distribution of the original amounts needed by the beneficiary, followed by enough added funds to cover the tax on those distributions and then the tax on the added funds. See Internal Revenue Code §662(a)(2). An algebraic calculation can be done to make the determination of the proper amount of tax, and then tax on the tax, ad nauseum, but it may be worth asking whether the benefit sought is worth all of this complexity.

\textsuperscript{80}/ Quaere whether (or how) this document may direct a beneficiary’s personal representative to do anything. The last sentence of this provision likely is unenforceable.
agreements restricting the discretion of the Trustee in further transactions or any other matter that may be in the best interest of the Trust estate and the Beneficiary of the Trust.  

17. Division of Trust Estate for Distribution.

When the Trustee must divide any of the trust estate into parts or shares for the purpose of distribution, or otherwise, the Trustee may, in its discretion, make the division and distribution in identical interest, in kind, or partly in kind and partly in money, pro rata or non-pro rata, and no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for federal income tax purposes. Also, the Trustee may make such sales of the property of the trust estate as the Trustee deems necessary to accommodate such distributions. No action taken by the trustee pursuant to this paragraph shall be subject to question by any beneficiary.

ARTICLE 6. TRUSTEE – RIGHT TO AMEND TRUST

In furtherance of this trust, the Trustee shall have the power, which is hereby specifically given, to amend the terms of this Trust for the purpose of maintaining an effective trust and to comply with the requirements for Medicaid assistance under Title XIX of the Social Security Act and under the Medicaid laws of [state], and rules and regulations thereunder, and any other federal or state law that may impact this Trust or the payment of benefits to or on behalf of Beneficiary.

A. The Trustee may modify or amend the following:

1. The trust administration provisions relating to the identity, qualifications, succession, removal, and appointment of the Trustee; provided, however, that no such

81/ Critical here is the authority to disclaim or renounce trustee powers if appropriate to limit or avoid future tax consequences. Lacking the authority in this provision it would be impossible under state law for one fiduciary to relinquish trustee powers in a manner that would bind the trust or future trustees. Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §18.1.7 (5th ed. 2007). See also the power accompanying note 84.

82/ Lacking this authority the trustee might be required to distribute cash in satisfaction of pecuniary entitlements, or proportionate shares of assets distributed in kind, for example in a distribution to a group of individuals (such as “in equal shares to my children”). See Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §36.4 (5th ed. 2008). Note, however, that non pro rata division may be regarded by the government as an income tax sale or exchange event, notwithstanding this grant of authority to do so. See, e.g., Rev. Rul. 2008-41.
amendment may provide that Beneficiary or Beneficiary’s spouse or child\textsuperscript{83} may be a Trustee hereof;

2. The financial powers enumerated in this instrument;

3. The terms of the Trust created in this instrument with respect to the purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors that Trustee may take into account in making such distributions;

B. The Trustee acting from time to time, on his or her own behalf, or on behalf of any or all successor Trustee(s), may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this instrument by a written instrument delivered to the Trustee.\textsuperscript{84}

C. The Trustee shall exercise its powers under this provision as Trustee alone shall determine, and Trustee shall not be liable to Beneficiary or in any way for the exercise or non-exercise of these powers, or for the manner in which Trustee may exercise such powers, except for willful or deliberate malfeasance,\textsuperscript{85} and Trustee may, in addition and if Trustee chooses, rely absolutely on the opinion of counsel competent in the area of trust administration in Trustee’s exercise of the power to amend this instrument under this provision.\textsuperscript{86}

\textsuperscript{83} Notice that in the trust advisor counterpart to this provision no descendant of the beneficiary could be appointed either. See note 87 and accompanying text. Quaere what that inconsistency is about.

\textsuperscript{84} See note 81.

\textsuperscript{85} As discussed in note 28, trust law requires more from a trustee than that it not be willful or deliberate in any malfeasance. At a minimum a court likely would require good faith action, and perhaps more. See Restatement (Third) of Trusts §63, comment j (the default standard regarding modification “against which the reasonableness of the trustee’s judgment can be measured . . . is whether the trustee has acted in bad faith or from an improper motive.” Regarding consent to a termination of a trust, Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §35.1.4 (5th ed. 2007), says “if the terms of the trust neither expressly nor by implication limit the power of the trustee to consent to revocation, it would seem that the giving or withholding of consent ordinarily should be effective, as long as the trustee does not act dishonestly or from an improper motive.”

This provision seeks to be as effective as possible in empowering a trustee by exonerating the trustee from any liability for actions that might be found to be excessive, with the net result that a court might find the trustee to be in breach, and its actions (here, any amendment) invalid, but not impose personal liability on the trustee.

\textsuperscript{86} The document should preclude any changes that diminish the trustee’s fiduciary duties to the trust. See note 4.
ARTICLE 6. TRUST ADVISOR – RIGHT TO AMEND TRUST

In furtherance of this trust, the “Trust Advisor” shall have the power, which is hereby specifically given, to amend the terms of this Trust for the purpose of complying with the requirements for Medicaid assistance under Title XIX of the Social Security Act and under the Medicaid laws of [state], and rules and regulations thereunder, and any other federal or state law that may impact this Trust or the payment of benefits to or on behalf of Beneficiary.

A. Grantor hereby appoints [ ] as the Trust Advisor hereunder. If [ ] fails to become or ceases to act in such capacity, then [ ] may, but is not required to, appoint any one or more successor Trust Advisors as provided in the following subsection. No Trust created under this instrument is required to have a Trust Advisor acting with respect to such Trust.

B. Any Trust Advisor acting from time to time may appoint one or more individuals (other than Beneficiary or a descendant of Beneficiary) as successor Trust Advisor. Any appointment hereunder shall be in writing, may be made effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Advisor may revoke any such appointment before it is accepted by the appointee, and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust Advisor.

C. Any Trust Advisor may resign by giving prior written notice to the Trustee.

D. The Trust Advisor may, with respect to any Trust as to which the Trust Advisor is acting, modify or amend the following:

1. The trust administration provisions relating to the identity, qualifications, succession, removal, and appointment of the Trustee; provided, however, that no such amendment may provide that Beneficiary or Beneficiary’s spouse or child may be a Trustee hereof;

87/ Quaere the intent of this exclusion of any lineal descendant of Beneficiary. It is not a function of any federal tax law. Also, why is Beneficiary’s spouse a permissible appointee here but not in the alternative provisions, and why does this provision make reference to “descendants” whereas the other alternatives only reference a “child”? See notes 83, 88, and 94 and accompanying text.

88/ Notice that in paragraph B of this trust advisor counterpart no descendant of the beneficiary could be appointed either. See note 87 and accompanying text. Quaere what that inconsistency is about.
2. The financial powers enumerated in this instrument;

3. The terms of the Trust created in this instrument with respect to the purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors that Trustee may take into account in making such distributions; or

4. The situs of the trust or the laws applicable to the trust.

E. The Trust Advisor may remove and replace any Trustee (other than any initial Trustee designated herein) if the Trust Advisor determines that the Trustee is not sufficiently responsive to the needs of the Beneficiary or that the Trustee’s actions in the administration of the Trust endanger Beneficiary’s eligibility for public benefits or otherwise are detrimental to the purposes of the Trust.

F. The rights and powers conferred on the Trust Advisor under this instrument, including without limitation the power to remove the Trustee, and all rights and powers granted to the Trust Advisor under Paragraphs D and E of this section shall be exercisable only in a fiduciary capacity.

89/ Several aspects of this statement are notable. First, McLean Revocable Trust v. Patrick Davis, P.C., 283 S.W.3d 786 (Mo. Ct. App. 2009), wrestled with the question whether a Trust Protector is a fiduciary and must act in a fiduciary capacity. Notwithstanding the difference in “label” here, the trust advisor likely would be in the same situation. McLean did not decide the question but it reversed a grant of summary judgment in favor of the trust protector and remanded for a determination. In the course of the opinion the court noted that neither the document nor state law established the capacity in which a trust protector acts, nor the duties and liabilities involved. Further, it opined that minimum duties of good faith, undivided loyalty, confidentiality, and “some duty of care” were applicable.

Notable about the powers granted here is that they essentially amount to a power of appointment – allowing the trust advisor to make certain amendments to either administration or dispositive provisions. In that regard the requirement to act in a fiduciary capacity is more restrictive than a typical power to appoint, which might influence a court’s determination of the responsibility and liability that flows to the trust advisor in this capacity.

Also note that no well drafted trust lacks a trustee removal and replacement (a “revolving door”) provision, which allows the powerholder to exert some check-and-balance control over a fiduciary. This document reveals a clear bias in favor of individual fiduciaries, which is the trend over the past several decades, but the economic meltdown in 2008 revealed that corporate fiduciaries tend to be more defensive in their investment philosophy and many individual fiduciaries lost a larger percentage of trust net worth than did their corporate counterparts, which is just one of many reasons to reconsider the favor for individual fiduciaries. In addition, defalcation (theft) by individuals is a much bigger problem than it is for corporate fiduciaries. On the other hand, settlors routinely worry that a corporate fiduciary will not be as sensitive or as well informed about the personality and needs of the beneficiary, particularly if the corporate
G. Notwithstanding any other provision of this instrument, the Trust Advisor shall not participate in the exercise of a power or discretion conferred under this instrument that would cause the Trust Advisor to possess a general power of appointment within the meaning of Internal Revenue Code §§2041 or 2514.

H. The Trust Advisor acting from time to time, on his or her own behalf, or on behalf of any or all successor Trust Advisors, may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this instrument by a written instrument delivered to the Trustee.  

I. The Trust Advisor shall exercise the powers under this provision as he or she alone shall determine, and shall not be liable to Beneficiary or in any way for the exercise or non-exercise of these powers, or for the manner in which he or she may exercise such powers, except for willful or deliberate malfeasance, and he or she may, in addition and if he or she chooses, rely absolutely on the opinion of counsel competent in the area of trust administration in his or her exercise of the power to amend this instrument under this provision.  

**ALTERNATIVE -- ARTICLE 6. TRUST PROTECTOR**

This Trust shall have a Trust Protector. The purpose of the Trust Protector is to protect, modify, or otherwise exercise powers over the Trust as it currently exists or exists through amendment to carry out the intent of this Trust.

The Trust Protector is to provide the ability to efficiently and more flexibly adjust the Trust to meet existing or changing statutory law or other rule of law that affects the Trust.

fiduciary is the subject of a merger or takeover and its operations are moved to a jurisdiction other than that of the trust’s original administration. All of these possibilities (and so many more considerations) inform the need to exert control over the fiduciary, whether that power is given to a beneficiary or to a third party, such as the trust advisor here or a trust protector, next below.

90/ See note 81.

91/ See note 85. If in fact these powers are exercisable in a fiduciary capacity (as stated in Paragraph F), then this Paragraph I almost certainly is no different.

92/ A trust protector is likely no different than a trust advisor, in terms of the issues that arise with regard to the liability and duties imposed by trust law or the document itself. The term itself has a certain “aroma” from its original use in offshore asset protection trusts, and for that reason some drafters prefer to use a different term. The authorities granted in this provision are different from those in the trust advisor alternative, but there is nothing special about the label used and the same authorities could be granted and the same duties and liabilities created, regardless of the name used. Notice how the trust protector alternative is more robust, however; that is not a function of the office or title used.
administration or the ability to carry out the intent of the Trust. Additionally, the Trust Protector is empowered to amend the Trust or act as otherwise authorized in this Article to ensure proper management of the Trust by the Trustee. The Trust Protector does not have a duty to act until such time as the matter or issue has been brought to the Trust Protector’s attention by written notice, following which the Trust Protector has the duty to either affirmatively act or to decline to serve as Trust Protector. In the event the Trust Protector declines to serve, the Trust Protector must notify the successor Trust Protector or otherwise establish his or her successor. The Trust Protector shall not in any event be liable to the Beneficiary, the remainder beneficiaries of the Trust, or any other party for its acts as Trust Protector hereunder so long as the Trust Protector acts reasonably and in good faith.

The Trust Protector is specifically relieved of any ongoing or continuous duties of supervision of the Trustee.

1. In its discretion the Trust Protector has the authority to remove any Trustee with or without cause.

2. The Trust Protector has the authority to appoint the Trustee (whether a listed successor Trustee or otherwise) if the position is vacant and must do so within 15 days of learning of the vacancy in the position of Trustee. The Trust Protector has the authority to name any qualified corporate or individual Trustee, but in no event can the lifetime Trust Beneficiary be named as Trustee.

3. The Trust Protector has the authority to amend the Trust under his or her own signature in compliance with statutory law on Trust amendments for purposes of validity. The amendments can be for the purpose of bringing the Trust in compliance with existing or changing laws governing government benefits that are received or potentially available to Beneficiary. The amendments can be made to bring the Trust in compliance or otherwise comply with any tax code provisions. The Trust Protector has the authority to amend the Trust to otherwise effectuate the intent of this Article and the Trust purposes as a whole.

93/ This was the fundamental issue in McLean, 283 S.W.3d 786 (Mo. Ct. App. 2009), whether the trust protector had merely the authority or more affirmatively a duty to exercise the authority in that case to remove a trustee that was misbehaving. Notice here that there is a duty, yet the exculpation in the last sentence of this paragraph is the same as in McLean, and as in that case likely is not as effective as the drafter (who was the trust protector in McLean, which raises several interesting ethical questions in its own right) or perhaps the settler intended.

94/ Notice that in the trust advisor counterpart to this provision no spouse or descendant of the beneficiary could be appointed either. See note 87 and accompanying text. Quaere what that inconsistency is about.

95/ Also quaere why this provision is worded differently than its counterpart in the alternative Article 6 for trust advisors. For example, what does “under his or her own signature in
4. The Trust Protector has the authority to appoint a Designated Representative to represent and bind a beneficiary and to receive notice, information, accountings, or reports in accordance with state law.

5. The Trust Protector may resign at any time by delivering written notice to the currently serving Trustee and, if no Trustee is serving, to the Beneficiary and any remainder beneficiaries as provided under this Trust.  

6. The initial Trust Protector is [         ]. If [         ] fails to become or ceases to serve, then [         ] shall serve as Trust Protector, and if [         ] fails to become or ceases to serve, then [         ] may, by written instrument executed by two witnesses and notarized, name the successor to this position. If a successor Trust Protector has not been named as provided herein, then a court of competent jurisdiction can appoint the successor Trust Protector. The alternate Trust Protectors shall serve in the original Trust Protector’s position with the same powers and authorities as provided under this Article.

7. The Trust Protector can be paid a reasonable fee for services rendered to the Trust or any beneficiary.

ARTICLE 7. GENERAL PROVISIONS

A. Governing Law; Severability.

All questions relating to the validity and construction of this Trust, the determination of the share of the Beneficiary, the dates, powers, authority, and discretion of the Trustee, and all other matters in connection therewith, shall be governed by, and the Trust shall be administered

compliance with statutory law on Trust amendments for purposes of validity” add or alter? As a general tenet of document construction the notion is that if a drafter says something differently then the intent must be different as well, but here it is not apparent why this lingo should differ, or the significance thereof.

96/ The remainder beneficiaries may not be determinable, or even yet in existence. Moreover, many settlors would prefer that the future interest beneficiaries not know about the existence of their potential inheritance – something that would be disclosed in some measure by this notice.

97/ Notice that designating successor fiduciaries – here the trust protector – often constitutes the hardest element of trust drafting, particularly if a trust is expected to last for an extended duration. See the trustee succession provision discussed in note 60.
in accordance with, the laws of [state]. If any provisions of this Trust shall be invalid or unenforceable, the remaining provisions hereof shall subsist and be carried into effect.

B. Spendthrift Clause.

No interest in the trust income or principal, or of any trust established for any remainder Beneficiary under the term hereof, shall be anticipated, assigned, or encumbered, or shall be subject to any creditor’s claim or legal process, prior to its actual receipt by or for the Beneficiary thereof. Furthermore, because the Trust Estate is to be conserved and maintained for Beneficiary’s special needs throughout Beneficiary’s life, no part of the corpus thereof, neither principal nor undistributed income, shall, during Beneficiary’s lifetime, be construed as part of Beneficiary’s estate or be subject to the claims of voluntary or involuntary creditors.

C. Perpetuities.

If not sooner terminated pursuant to the terms of this Trust, any trust created hereunder shall terminate on the last date that would be in compliance with the Rule Against Perpetuities as the same may be in effect from time to time and, if a trust terminates pursuant to the terms of this paragraph, the principal thereof shall be paid over to the then current income Beneficiary thereof.

D. Interpretation; Headings.

Whenever used herein, and to the extent appropriate, the masculine, feminine, or neuter gender shall include the other two genders, the singular shall include the plural, and the plural shall include the singular. The headings and paragraph captions contained in this trust agreement are not a part of this trust agreement. They are only for the convenience of the parties and do not in any way modify or amplify this trust agreement. They do not give full notice of any of the terms, covenants, or conditions of any portion of this trust agreement and are not relevant to the interpretation of any provision of this trust agreement.

Trust law would recognize the selection of the law of any state with respect to which the trust has any reasonable connection. See Austin W. Scott, William F. Fratcher, & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS §45.1 (5th ed. 2010). This need not be the state of trust administration or creation, although usually it is (so that the trustee is not obliged to learn or apply the law of another jurisdiction). Note, however, that the designation here could be the law of the state in which the trust currently is being administered, such that “decanting” the trust or moving the situs (a power that appears to be lacking) can alter the governing law (to acquire benefits or dodge detriments of a particular jurisdiction’s law).
ARTICLE 8. DEFINITIONS

A. Trustee. "Trustee" shall include the initial Trustee hereof and any successor Trustee or cotrustee.

B. Death. The death of Beneficiary or of a Trustee shall be evidenced by presentation of a certified copy of such person’s death certificate to the Trustee or successor Trustee or cotrustee as the case may be.

C. Incapacity. “Physical or mental incapacity,” as applied to disqualify a Trustee, shall include any physical or mental condition of such person that renders the trustee unable to conduct financial affairs and which condition is likely to extend for a period of greater than 60 days. A condition of incapacity as so defined shall be conclusively established by the written certificate or statement of the incapacitated Trustee’s regularly attending physician, or two doctors authorized to practice medicine in the Trustee’s state of residence, filed with and accepted by the successor Trustee or, in the case of an incapacitated cotrustee, filed with and accepted by the other cotrustee. Each individual Trustee, by accepting such role, for the sole purpose of determining his or her incapacity, (i) hereby authorizes any “covered entity” under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) to disclose protected health information about such individual Trustee and further (ii) hereby voluntarily waives any physician-patient privilege or psychiatrist-patient privilege that may exist in such Trustee’s favor and hereby authorizes physicians to examine such Trustee and disclose the physical or mental condition of such Trustee to determine the incapacity or capacity of such person for purposes of acting in the role of Trustee according to the terms of this document. Refusal to permit such examination or disclosure shall be grounds for removal of such individual Trustee.

D. Special needs. As used in this trust, the term “special needs”:

1. Refers to the requisites for maintaining Beneficiary’s good health, safety, comfort, and happiness when, in the absolute discretion of the Trustee, and only when such requisites are not being provided by any public agency, office, or department of any state in which the Beneficiary may reside, or of the United States or by any private agency, or are not otherwise being provided by another source of income available to Beneficiary.

2. Shall include, but not be limited to, supplemental medical care and dental expenses, annual independent check-ups, assistive technology, programs of training, education, treatment, and rehabilitation, eye glasses, hearing aids, cosmetic surgery or other non-essential

See note 12. Lack of consistent terms may pose a significant issue in trust administration.
medical procedures, transportation (including vehicle purchase), maintenance, insurance, purchase or modification of housing, psychological support services, recreation, entertainment, payment of Beneficiary’s legal obligations, supplemental attendant and custodial care, and similar care or services that would enhance the quality of life of Beneficiary and that would not be paid for by private insurance or government entitlements.

3. Shall include, but not be limited to, the hiring of professionals to assist the Beneficiary. It is contemplated that the types of professionals who may be needed to assist Beneficiary will be social workers, caretakers, medical professionals who would not otherwise accept government entitlements, legal counsel, accounting professionals, vocational counselors, educational counselors, tutors, feeders, therapists, any medical professionals or personnel, investment counsel, architects to advise on accessibility matters, rehabilitation technical engineers and technicians, and computer or augmentative communication technicians who would not otherwise accept or be paid for fully by government entitlements.

4. May include, by way of illustration and not by way of exclusion, money for discretionary spending (subject to the income limitations of any public benefit program); telephone, television, and telecommunications services; electronic equipment such as radios, televisions, audio and video recording and playback devices, and computer equipment; vacations, movies, trips, and recreational outings; payments for attendants to assist Beneficiary for travel, reading, driving, and cultural experiences, periodic outings, and vacations; and other items to enhance Beneficiary’s self-esteem or situation.

IN WITNESS WHEREOF, each Grantor and Trustee named below certifies that he or she has read the foregoing trust agreement and acknowledges that it correctly states the terms and conditions under which the trust estate is to be held, managed, and disposed of by the Trustee, and has executed this agreement, a true and correct photocopy of which may be used as effectively as the original, the day and year first above written, and each Trustee by his or her signature hereby accepts the appointment as Trustee and agrees to execute same in accordance with the terms and conditions thereof as such Trustee.

Executed and accepted this ___________ day of ______________________, 2010.

_________________________________________
[                      ], Grantor

_________________________________________
[                      ], Trustee
ACKNOWLEDGEMENTS

STATE OF [ ]
COUNTY OF [ ]

Personally appeared this _____ day of ____________, 2010 before me, the undersigned Notary Public, the within named [ ], who acknowledged that the foregoing instrument of writing was executed by [ ] on the day and year therein mentioned.

_________________________________________
NOTARY PUBLIC

My Commission Expires:

__________________________

STATE OF [ ]
COUNTY OF [ ]

Personally appeared this _____ day of ____________, 2010 before me, the undersigned Notary Public, the within named [ ], who acknowledged to me that the foregoing instrument was executed by [ ] on the day and year therein mentioned as [ ] voluntary act and deed.

_________________________________________
NOTARY PUBLIC

My Commission Expires:

__________________________

STATE OF [ ]
COUNTY OF [ ]

Personally appeared before me, the undersigned Notary Public, the within named [ ] who acknowledged to me that he/she is the [ ] of [ ], and who further acknowledged to me that [ ] executed the foregoing instrument for and on behalf of said corporation on the day and year therein mentioned, having been first duly authorized so to do.

WITNESS my hand and official seal this _____ day of ____________________, 2010.

_________________________________________
NOTARY PUBLIC

My Commission Expires:

__________________________
(a) To collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(b) To receive additions to the assets of the trust;

(c) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;

(d) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(e) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(f) To deposit trust funds in a bank, including a bank operated by the trustee;

(g) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(h) To make ordinary or extraordinary repairs or alterations in buildings, improvements or other structures; to demolish any improvements; to raze existing or erect new party walls, buildings or improvements;

(i) To subdivide, develop or dedicate land to public use; or to make or obtain the vacation or plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(j) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(k) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources, or enter into a pooling or unitization agreement;

(l) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(m) To vote a security, in person or by general or limited proxy;

(n) To pay calls, assessments and any other sums chargeable or accruing against or on account of securities;

(o) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;
To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, buy the trustee is liable for any act of the nominee in connection with the stock so held;

To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust and for all expenses, losses and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration and protection of the trust;

To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties;

To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by using same for his benefit or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative or to an adult person with whom beneficiary is residing, who is believed to be reliable by trustee;

To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

To employ persons, including attorneys, auditors, investment advisors or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.