

SLICING AND DICING OF TRUSTEES' DUTIES

WHEN AND HOW TO USE DIRECTED TRUSTS

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SLICING AND DICING OF TRUSTEES' DUTIES

WHEN AND HOW TO USE DIRECTED TRUSTS*

I. Introduction

Directed trusts are not new. Delaware (for example) has statutorily recognized the power of the trustor of a trust to restrict a trustee's authority to dispose of or otherwise deal with specified trust assets for more than twenty years. 12 Del. C. § 3313 (65 Laws 1986, ch. 422, § 5). Prior to the statute, going back to the early 1900s, Delaware adopted the practice of allowing directed trusts to accommodate its wealthiest families.

In its earliest form, directed trusts tended toward the limitation of a trustee's power to sell specific trust assets without the consent or written direction of a person not serving as trustee. Today the limitations on a trustee's authority to deal with certain trust assets often affect all of the trustee's discretionary powers over the assets including voting decisions, management decisions, distribution decisions and other decisions previously solely within the realm of the trustee's discretion.

The desire of wealthy families to preserve their control over the stock of the corporation founded by their ancestors and the recognition that today's trusts often hold new kinds of unique trust investments have driven the issue of directed trusts. In fact, trustees faced with the fiduciary duty to diversify trust assets and deal impartially with income beneficiaries and remainder beneficiaries have welcomed the ability to limit their liability through the use of directed trusts.

The result has been the creation of a statutory framework authorizing a trustor (or the trustee and the trust beneficiaries through appropriate trust modification proceedings) to include in trust instruments a new regime for the administration of specific trust assets. In addition to the traditional trustee, the new regime often includes trust advisers. See, Rachel Emma Silverman, *How Many Trustees Do You Need?* Wall St. J., July 12, 2007, at B5.

This paper will focus on the new regime of modern trust administration that includes the use of trust advisers and protectors. It will illustrate how trustees are attempting to limit (or perhaps shift) their fiduciary liability for the administration of specific trust assets by

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relinquishing traditional fiduciary powers over such assets and by delivering control of those assets to others better able to deal with them who serve as advisers and protectors to the trust. Finally, this paper will illustrate how the allocation of various trustee duties and responsibilities may lead to the more efficient and economical administration of a trust and more effectively accomplish the goals of the trustor.

II. What is a Directed Trust

- A. Definition. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distribution decisions and any other decision affecting the administration of the trust. The starting point for the creation of directed trusts is the statutory framework that permits them coupled with the carefully worded language of the trust instrument.
- B. Statutory Recognition of “Advisers”. A trustor’s statutory power to dictate the rights and obligations of the beneficiaries and trustee through the express terms of a trust instrument and the trustee’s statutory right to rely in good faith on the terms of the trust instrument for protection from liability are essential to the effective use of directed trusts. Three different approaches are illustrated below.
1. UTC. Section 808(b) of the Uniform Trust Code states:

If the terms of a trust confer upon a person other than the trustee of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power **unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty** that the person holding the power owes to the beneficiaries of the trust.
[emphasis added]
 2. Third Restatement. Section 75 of the Third Restatement of Trusts states:

...[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power,

unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries. [emphasis added]

3. Delaware Provisions. The foregoing provisions for directed trusts should be compared with the more protective provisions adopted by Delaware and a few other states.
 - a. Delaware law recognizes a broad class of advisers including direction advisers, consent advisers and trust protectors. Where one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decisions of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides. 12 Del. C. § 3313(a).
 - b. When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its "willful misconduct".

Direction Provision

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). [emphasis added]

- c. The statutory standard of care required of a fiduciary acting on the consent of a Consent Adviser is only somewhat broader. When a trustee acts with the consent of a Consent Adviser, the trustee will only be liable for its "willful misconduct" or "gross negligence".

Consent Provision

If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then **except in cases of willful misconduct or gross negligence on the part of the**

fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the fiduciary. 12 Del. C. § 3313(c).
[emphasis added]

- d. In all cases, there may be an adviser who is a trust "protector".

Trust Protector

... the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

1. The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
2. The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
3. The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument. 12 Del. C. § 3313(f).

- e. The statutory protection afforded trustees of directed trusts would be diminished if advisers or beneficiaries could sue the trustee on the theory that the trustee had a duty to keep them informed and to impart to them knowledge affecting their interests in the trust so they could perform their duties as advisers or otherwise protect their beneficial interests in the trust.

Duty to Monitor, Communicate and Inform

Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, **the fiduciary shall have no duty to:**

- (1) monitor the conduct of the adviser;**
- (2) provide advice to the adviser or consult with the adviser; or**

(3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser. 12 Del. C. § 3313(e).
[emphasis added]

* * *

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority. Id.

III. **The Most Common Directed Trusts**

- A. Directed Trusts - The Language of the Trust Instrument. Once the statutory framework is in place, the focus shifts to the specific language of the trust instrument.
1. Trust Adviser Language. The particular adviser language included in the trust instrument depends upon the purpose for which the trust is created and the reason why the adviser is appointed. There are innumerable reasons why trustors create directed trusts and it would be impossible to include in this outline all of the language used over the years creating trusts with trust advisers. Most directed trusts do, however, fall into certain categories and the most common are illustrated below by examples with sample language in the appendix.
 - a. Special Holdings Direction Adviser. Mr. and Mrs. Ipo started two software companies which have gone public, created three more which may or may not go public and invested in certain speculative land development companies building hotels and casinos in Las Vegas and elsewhere. They have four children. From the inception of their enterprises, they created one trust for each of their four children funded with investment assets that, at that time,

had very little value. Each trust is presently worth \$30,000,000 and consists of ownership interest in each of the separate entities. Although there has been some diversification in each trust, it is minimal. Each trust now holds approximately \$10,000,000 of marketable assets, interests in the various real estate investment companies and interests in newly formed software companies that may or may not go public.

Mr. and Mrs. Ipo recognize that their talents are more technical and scientific and not at all financial. Throughout the development of the various businesses, they relied heavily on Ms. Business-Manager who presently serves as trustee of the four trusts. Ms. Business-Manager has no problem dealing with the privately held investments. However, she feels totally incapable of managing the \$40,000,000 of marketable investments - \$10,000,000 in each trust. No bank or trust company is willing to accept the trusts because of the high concentration of privately held investments. Mr. and Mrs. Ipo wish to keep Ms. Business-Manager handling the private investments and seek professional money management for the cash and marketable securities.

Answer. Mr. and Mrs. Ipo may designate a trustee in a jurisdiction that allows directed trusts. A routine court proceeding in the new situs will permit the court to confirm the appointment of the new trustee, accept jurisdiction over the trust, confirm that the law of administration in the new situs will thereafter govern the administration of the trust and reform the trust to include a Special Holding Direction Adviser. Alternatively, it may be possible to utilize a decanting statute to “pour over” trust assets to a new trust with the appropriate directed trustee language. Thereafter, the trustee in the new situs will administer the trust and be responsible for investment of the marketable securities in each of the trusts. The old trustee will become a Special Holding Direction Adviser and will direct the new trustee with respect to all decisions affecting the special holdings: the land development companies and the new start up businesses. The new trustee will have no liability for the special holdings. The Special Holding Direction Adviser will have no liability for the investment of publicly traded assets. A sample Special Holding Direction Adviser form is included in the appendix.

- b. Investment Direction Adviser. Mr. I. M. Rich formerly resided in New York and now resides in Florida. He has three children. He

has a variety of different trusts he created for each of these children. He is also in the process of creating additional trusts for his children. He is concerned about the New York state income tax the trusts are being required to pay because the trustees reside in New York. He has been advised by his attorney to relocate the trusts to a jurisdiction that does not tax trust income or capital gain accumulated for future distribution to beneficiaries who do not reside in the new situs. He is willing to accept the advice of his counsel. However, he has developed a skilled network of financial managers who reside outside of New York and does not want to turn over the investment of all of the trust wealth to a new trustee simply to avail the trust of the income tax savings. Moreover, Mr. Rich is cheap. He does not want to pay the new trustee significant fees for holding trust assets that are being invested by others.

Answer: Mr. Rich can transfer the existing trusts and establish the new trusts in a jurisdiction that does not tax trust income or capital gains accumulated for nonresidents. The corporate trustee in the new situs will serve as an administrative trustee. All of the investment decisions will be made by Investment Direction Advisers in accordance with the terms of the new trust agreements or in accordance with judicial modification of the existing trust agreements when they are moved to the new situs. Once again, the judicial modification will confirm the appointment of the new trustee, accept jurisdiction over the trust, confirm that the law of administration in the new situs will thereafter govern the administration of the trust and reform the trust. As noted, it may also be possible to use a state decanting statute to pour over the trust assets to a new trust with the appropriate directed trustee language. The new situs trustee will charge a flat annual fee of anywhere from \$3,500 on the low end to \$10,000 on the high end for serving as “purely administrative trustee”. The trusts will avoid state income tax on income and capital gain accumulated in the trust. A sample Investment Direction Adviser form is included in the appendix.

- c. Consent Adviser. Mr. Johnson is the founder of a famous pharmaceutical company. He began his business in the basement of his home when his children were young and has watched the business grow to a publicly traded company. Along the way, he created many trusts for his family and has admonished all of his descendants never to sell any of the company stock. In the course of establishing trusts, Mr. Johnson had great difficulty locating a

trustee who would accept trusts 90% of the corpus of which consisted of one company's stock. The trustees pointed out cases where changes in technology and lawsuits for products liability substantially reduced the value of a company's stock. They warned that, even though the company is doing well now, no one knows what the future will hold. They informed Mr. Johnson they have a duty to diversify trust investments. Mr. Johnson values the advice of the trustees, but wants to hold the trustees in check and prevent a "precipitous sell off" of the stock. He has close business associates and he wants them to have the final say on a recommendation to sell the stock.

Answer: Mr. Johnson can include language in his trust appointing a "Consent Adviser". If the trustee determines that there is a "material change in the business prospects of the company" the trustee can make a recommendation to sell some or all of the company stock. However, the stock may not be sold by the trustee without the "written consent of the Consent Adviser". The trustee will have no liability for its good faith reliance on the terms of the trust instrument and will only be liable for its willful misconduct or gross negligence. A sample Consent Adviser form is included in the appendix.

- d. Distribution Adviser. Mr. and Mrs. Dysfunctional have been phenomenally successful and have built huge family wealth. Unfortunately, they have four children, all of whom have drug and alcohol problems. They want to create a separate trust for each child and prohibit income and principal distributions whenever "the trustee reasonably believes the beneficiary routinely or frequently uses or consumes any illegal drugs or other illegal chemical substances and is physically or psychologically dependent upon that drug or substance". They want testing provisions and treatment provisions included in the trust document. They insist that, at any sign of dependency, the trustees "completely cut off" any distributions to or for the benefit of a child "no matter what". Mr. and Mrs. Dysfunctional value the trustee's investment expertise and trust management skills. However, the trustee is concerned that the Dysfunctional children will initiate litigation as soon as their parents are dead. Mr. and Mrs. Dysfunctional have brothers and sisters who are also wealthy and very sympathetic to the plight of the Dysfunctional children. The trustee wants to manage the trust fund but does not want liability for enforcing

subjective, discretionary distribution provisions included in the trust instrument.

Answer: The trust instrument may include language appointing a “Distribution Adviser”. The Distribution Adviser can be given the power to direct, consent to, or disapprove any discretionary distributions of income or principal to or for the benefit of the Dysfunctional children. The trustee will have no liability to the trust beneficiaries for the trustee’s good faith reliance on the trust instrument and the decisions made by the Distribution Adviser. The children will be required to sue their uncles and aunts (the Distribution Advisers) if they disagree with the distribution decisions. A sample Distribution Adviser form is included in the appendix.

- B. Regime Change Provision. Trust language appointing a trustee and establishing the roles of the Special Holding Direction Adviser, the Investment Direction Adviser, the Consent Adviser and the Distribution Adviser is only part of the picture. Circumstances change. Trust departments lose key personnel, advisers grow tired and old, the law of trust administration in the host jurisdiction may be modified and new tax laws may be passed. The appointment of a Trust Protector may be appropriate.

IV. **Trust Protectors**

- A. Statutory Framework. Some states treat Trust Protectors as just another kind of trust adviser. Others have statutorily recognized Trust Protectors and clearly define the additional powers Trust Protectors may have.
1. Trust Protectors as Advisors. Alabama, Maine, North Carolina, South Carolina and Tennessee have statutes recognizing trust advisers with the “power to direct” trustees by comment to the statute that ratifies the use of Trust Protectors as advisers. Ala. Code 1975 § 19-3B-808; 18-B M.R.S.A. § 808; N.C.G.S.A. § 36 C-8-808; SCC § 62-7-808; T.C.A. § 35-15-808.
 2. Statutory Recognition - Trust Protector. Alaska, Delaware, Idaho, South Dakota, Utah and Wyoming have statutes that specifically recognize the role of Trust Protector. AS 13.36.370; 12 Del. C. § 3313(f); I.C. § 15-7-501; SDCL § 55-1B-1; U.C.A. 1953 § 25-6-14; W.S. 1977 § 4-10-103. Most of the cited statutes define the Trust Protector as a “disinterested third party” who has the powers and discretions provided in the trust instrument which may include, but are not limited to, the following powers:

- a. The power to remove and appoint a trustee, trust adviser, investment committee member or distribution committee member. Example: SDCL § 55-1B-6(4); 12 Del. C. § 3313(f)(1).
- b. The power to modify or amend the trust instrument to achieve favorable tax status or to facilitate the efficient administration of the trust. Example: AS 13.36.370(b)(2); 12 Del. C. § 3313(f)(2); W.S. 1977 § 4-10-710(a)(i).
- c. The power to increase or decrease the interest of trust beneficiaries. Example: I.C. § 15-7-501(6)(b).
- d. The power to modify the terms of a power of appointment created under the trust instrument. Example: 12 Del. C. § 3313(f)(3); I.C. § 15-7-501(6)(c).

The Wyoming statute is the most comprehensive and, in addition to the foregoing powers, allows the Trust Protector to exercise the following additional powers pursuant to W.S. 1977 § 4-10-710(a).

- The power to appoint successor Trust Protectors.
- The power to review and approve accountings.
- The power to change the governing law or principal place of administration of the trust.
- The power to interpret the terms of the trust instrument at the request of the trustee.
- The power to advise the trustee on matters concerning any beneficiary.
- The power to direct, consent or disapprove a trustee's action or inaction in making distributions to beneficiaries.

3. Trustee Liability. A trustee is not liable for any loss resulting from any action or inaction upon the direction of the Trust Protector. Examples: I.C. § 15-7-501(5); SDCL § 55-1B-5; W.S. 1977 § 4-10-717.

- B. Trust Protector - The Language of the Trust. Whether the Trust Protector is merely a different kind of trust adviser with broader powers over the trust or a statutorily recognized person with statutory powers, the scope of the Trust

Protector's authority over the trustee, the trust advisers, the trust beneficiaries, the trust investments and indeed the very terms of the trust instrument will itself turn on the language of the trust. A sample Trust Protector form is included in the appendix.

V. **The Purely Administrative Trustee**

- A. Definition. Purely administrative trustees provide very limited trust services. Their sole purpose is to allow the trust over which they serve to utilize the favorable trust laws of their jurisdiction. Example: A wealthy New York resident wishes to create a perpetual trust in Delaware with marketable securities for tax purposes. The trustor already has a sophisticated team of financial planners and investment advisers. The trustor creates a Delaware limited liability company ("LLC") to which he transfers marketable securities. The trustor then creates a Delaware dynasty trust naming a Delaware trustee as a Purely Administrative Trustee. The only asset held by the Delaware trustee is the LLC units. The language of the trust instrument includes a Special Holding Direction Adviser to direct the trustee with respect to all matters concerning the LLC units held in trust. Because the trust may one day hold investment assets, the trust is a directed trust with an Investment Direction Adviser named to direct the trustee with respect to all matters concerning trust investments. There is a Distribution Adviser to direct the trustee with regard to trust distributions. A Trust Protector provision is included allowing the Trust Protector to remove and replace the trustee, the Special Holding Direction Adviser, the Investment Direction Adviser and the Distribution Adviser. The Trust Protector may also change the situs of the trust and modify the language of the trust instrument to obtain favorable tax treatment or facilitate the administration of the trust.
1. Administrative Trustee Duties. The only duties performed by the Administrative Trustee are to hold the LLC units, maintain trust records, prepare or otherwise arrange for the preparation of fiduciary income tax returns and maintain an office for its business in the state. The trustee has no liability for actions taken or not taken by the Special Holding Direction Adviser, the Investment Direction Adviser, the Distribution Adviser and the Trust Protector absent the trustee's willful misconduct.
- B. Trustee Fees. Administrative trustees, recognizing the limited role they play, offer low fees for trust services and look for a volume business to produce revenues for the trust company. Typically, administrative trustees will serve for annual fees of anywhere from \$3,500 to \$10,000 per trust. To illustrate the fee structure, below are actual fee quotes from two Delaware trust companies for providing trust services in different capacities for a trust with assets valued at \$7.5 million.

Bank I

1. Where we hold only an LLC interest, our fee is \$5,000 per year.
2. Where we hold liquid assets, subject to direction on investments, our fee is \$24,000 per year.
3. Where we hold liquid assets, but have full discretion as to investments, our fee is \$77,000 per year.

Bank II

1. Bank II is hired as trustee. Under this scenario, there is no direction adviser. Bank II is trustee and manages the investment portfolio at its discretion, subject to the terms of the trust document. The fee schedule is as follows:

<u>Fee Schedule</u>	<u>Rate</u>	<u>Balance</u>	<u>Fee</u>
First \$2,000,000 of principal value	0.500%	\$2,000,000	\$10,000
Next \$3,000,000 of principal value	0.375%	3,000,000	11,250
Next \$5,000,000 of principal value	0.350%	<u>2,500,000</u>	<u>6,250</u>
<u>Total</u>		<u>\$7,500,000</u>	<u>\$27,500</u>

2. Bank II is hired as trustee. The trust holds LLC units only and Bank II, the administrative trustee, is directed to hold the LLC units in the trust.

\$6,000 for the first \$10 MM of assets held in the LLC

\$10,000 for assets valued between \$10 MM and \$20 MM in the LLC.

- C. Fully Directed Trusts. Purely administrative trustees evolved from the carefully crafted language of trust instruments that define the duties and responsibilities of various advisers to the trust. The combination of Direction Advisers and Distributions Advisers coupled with the power of the Trust Protector resulted in the development of a trust concept where the formerly fully responsible corporate trustee now serves only in an administrative capacity while all of the duties and responsibilities traditionally vested in the corporate trustee rest now in the hands

of advisers and protectors to the trust. A sample Administrative Trustee form is included in the appendix.

VI. Liability Issues

A. Case Law. Can directed trusts protect fiduciaries from liability? Will the statutory framework previously discussed and the language of the trust instrument really work? This author is aware of only two state court decisions on the matter to date: One is a Delaware decision and the other is a Virginia decision. Both involve Investment Direction Advisers.

1. The Delaware Decision. In *Duemler v Wilmington Trust Co.*, C.A. No. 20033 N.C. (Del. Ch. 2004), the corporate trustee was sued by an individual co-trustee who was the sole Investment Direction Adviser of a trust established by his family. The Investment Direction Adviser chose not to tender a bond owned by the trust when he had the option to do so. The issuer of the bond defaulted and the Investment Direction Adviser sued the corporate trustee alleging the corporate trustee breached its fiduciary duty to the trust by, among other things, failing to provide the Investment Direction Adviser with appropriate financial information to allow the Investment Direction Adviser to make an informed decision. The case was litigated in the Delaware Court of Chancery.

a. The Ruling. The Court decision is not reported. The Court was so certain of the proper outcome of the case that it ruled from the bench. A copy of the transcript of the decision may be obtained by email request to pgordon@gfmlaw.com. Relevant quotes are set forth below.

THE COURT: I'm in a position to rule. I'm not going to require that the parties expend additional resources on this. The matter is abundantly clear to me. (Tr. P. 3, L. 2-5).

* * *

...Mr. Duemler was the investment adviser for a high-risk approach to investing of particular - of assets under a particular trust. Had he wished for Wilmington Trust to be investment advisor to run a high-risk portfolio - I'm sure Wilmington Trust likes to make money. It would be willing to do it. It costs a lot more. (Tr. P. 3, L. 10-16).

Finding that the trust held “a nondiversified portfolio with extremely risky assets” (Tr. P. 11, L. 22-23), the court stated:

I think in terms of the division of trust responsibilities, it was absolutely clear that this was on Mr. Duemler’s side of the ledger. (Tr. P. 12, 9-11).

The Court held that the proximate cause of the loss was “the breach of fiduciary duty by Mr. Duemler” who had the primary responsibility for being the investment adviser. (Tr. P. 13, L. 4-13).

- b. Significance of the Decision. The Court upheld the statutory defense under 12 Del. C. § 3313(b) (Delaware’s directed trust statute) and noted that the case was “an apt instance for its application” because there was “absolutely no evidence of willful misconduct” on the part of Wilmington Trust Company. (Tr. P. 15, L. 12-16). Moreover, the court admonished the investment direction adviser for arguing that the trustee was responsible for failure to provide relevant information. The court stated:

And you don’t get to come in and hang your fellow fiduciary on that unless they engaged in willful misconduct. There is none there. And if I were to rule that, ‘oh, no. What the problem is here is the failure to provide information or to make sure that the fiduciary making the decision knew what they were doing,’ I think that would gut the statute. (Tr. P. 16, L. 5-12).

The court’s clear recognition of the intent and purpose of the directed trust statute and its firm ruling upholding the statute is a clear indication that Delaware courts will enforce directed adviser provisions in a trust instrument based on the statutory framework that permits them.

2. The Virginia Decision. In *Rollins v Branch Banking and Trust Company of Virginia*, 2001 W.L. 34037931 (Va. Cir. Ct.), the plaintiffs were children and grandchildren of the grantors of two trusts created in 1977 for their benefit. The plaintiffs were suing the corporate trustee for breach of fiduciary duty, in particular, the trustee’s failure to diversify trust investments. The trusts were funded primarily with shares of stock in two

textile corporations. At the inception of the trusts, the trustee “obtained the written authority of the beneficiaries to over-concentrate the trust” with textile stocks. *Rollins*, at *1. The trust remained over concentrated in the textile stock until 1997 (20 years later) when the stock was sold. The beneficiaries sued the trustee for \$25 million, the amount they claim they lost due to the trustee’s failure to diversify the trust investments. The trustee, citing the Virginia directed trust statute, filed the equivalent of a motion for summary judgment contending that:

when, as here, the trust vests the power to make investment decision exclusively in persons other than the trustee, the trustee cannot be liable for the loss resulting from the retention of the investment.
Rollins, at *2.

- a. The Ruling. The court ruled in favor of the corporate trustee citing the Virginia directed trust statute and quoting the specific language of the trust instrument. The Virginia trust statute (which has since been changed to a version closer to the UTC provision) then provided:

§ 26-5.2. Liability of a fiduciary for actions of cofiduciary

C. Whenever the instrument under which a fiduciary or fiduciaries are acting reserves unto the trustor, testator, or creator or vests in an advisory or investment committee or any other person or persons, including a cofiduciary, to the exclusion of one or more of the fiduciaries, authority to direct the making or retention of investments, or any investment, the excluded fiduciary or cofiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or cofiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction. Va. Code § 26-5.2.

The court found that: “The trustee’s power to diversify, however, was limited by the express language of Article X of the trust instruments” which stated “investment decisions as to the retention, sale, or purchase of any asset of the Trust Fund shall

likewise be decided by such living children or beneficiaries, as the case may be”. *Rollins*, *2.

- b. Significance of the Decision. Like *Duemler*, the plaintiffs in *Rollins* argued that the trustee had a duty to keep them informed and to impart to them any knowledge affecting their interest in the trust. *Rollins* at *4. However, the court was not persuaded:

The plain language of the instrument, however, clearly contradicts the beneficiaries’ argument. The beneficiaries, alone, had the power to make investment decisions. **The statute enacted by the General Assembly recognizes the basic principal (sic) that the court cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made.** The statute clearly applies in this instance and the beneficiaries have not stated a cause of action against the trustee for failing to diversify the trust assets. The demurrer is granted as it relates to all claims for failure to diversify. *Rollins*, at *2. [emphasis added]

The court’s clear recognition of the intent and purpose of the directed trust statute and its firm ruling upholding the statute is a clear indication that Virginia courts will enforce directed adviser provisions in a trust instrument based on the statutory framework that permits them.

3. Trust Protector - Case Law. Perhaps because the concept of trust protector is so new in the United States or because cases are settled or are otherwise disposed of, there appear to be no reported decisions dealing with the subject of fiduciary liability for an administrative trustee following the direction of a Trust Protector. There have been at least two Trust Protector cases in Delaware in which the author’s law firm was involved. One case is a matter of public record. The other was sealed by the court during the proceedings to protect the privacy of the parties.*2.
- a. The Friedman Case. In *Friedman v. U.S. Trust Company of Delaware*, C.A. No. 20205 NC (2003 Del. Ch.), an elderly California resident was the beneficiary of a credit shelter trust established in 1970 by his late wife. He was about to marry for the fifth time. All of the residuary trust assets were held in more than 25 limited liability companies. The resident’s son persuaded his

father to move the residuary trust to Delaware “for asset protection purposes” prior to the marriage. U.S. Trust Company of Delaware agreed to serve as administrative trustee. A routine proceeding was conducted in the Court of Chancery to have Delaware accept jurisdiction over the trust, recognize U.S. Trust Company of Delaware as the trustee, declare that Delaware would thereafter govern the administration of the trust and modify the trust to include direction adviser provisions including the appointment of the son as a Trust Protector. The father resigned as trustee of the residuary trust. The father and son had a falling out. The son informed the father that the son, as Trust Protector, was now in charge of all of the business assets held in the 25 limited liability companies. When the father realized he had lost control of the residuary trust assets, he filed suit in Delaware seeking to open the judgment transferring the trust situs and appointing the son as Trust Protector. The reformed trust document defined the role of the Trust Protector as follows:

The Trustee shall not exercise any of its rights, powers or privileges under the Trust, or take any action under the Trust ...except upon written direction of the Trust Protector.

- b. The Ruling. The court was deeply concerned with certain procedural matters. In particular, no notice of the change of situs of the trust had been given to the father’s other three children who were remainder beneficiaries of the trust. The court also struggled with the concept of a purely administrative trustee and the role of the Trust Protector as evidenced by the following excerpt from the transcript of a hearing before the court.

The Court: Trust Protector... sounds like a super hero, or something like that. Is that something under California law that’s developed as a concept? ...Why do we need a trustee when you have the omnipotent-

Attorney: In this case, that’s a good question. Virtually all of the powers are vested in [the son], as Trust Protector.

* * *

The Court then questioned the attorney for the Trust Company to determine how the father lost control of the trust assets in the process.

Trust Co.: We simply did not have any knowledge of those facts that created this. My client was a facilitator. And under these instruments, if they are to govern, we are Administrative Trustee... that's our limited role. We are at the direction of the Trust Protector.

The Court: You are not really - - you are almost a pure Administrative Trustee. Right?

Trust Co.: I would say we are a pure Administrative Trustee.

The Court: Not even a money managing trustee, or anything like that.

Trust Co.: That's correct.

Immediately following the hearing, the court opened and vacated the order appointing the son as Trust Protector and the trust company as Administrative Trustee. The action was stayed pending further proceedings. In the interim, the parties agreed to litigate their dispute in California where the trust had been administered for more than thirty years.

c. Significance of the Outcome. The court did not assess any liability against the corporate fiduciary and all of the corporate fiduciary's legal fees were paid by the trust.

4. Sealed Case. Little can be said about the second Delaware case involving a Trust Protector. The case is under seal. However, it involved an offshore asset protection trust moved to Delaware pursuant to the Delaware Qualified Dispositions in Trust Act by a Trust Protector. It was alleged that the beneficiary of the trust suffered from mental illness and the Trust Protector essentially directed the Delaware Administrative Trustee not to make any distribution to or for the benefit of the beneficiary

who the Trust Protector viewed as uncooperative. The beneficiary petitioned the Delaware court, which had jurisdiction over the Delaware Administrative Trustee, for the payment of approximately \$7,000 in certain past due bills and a stipend of only \$4,000 per month from a trust with a corpus that exceeded \$1 million.

- a. The Ruling. The corporate fiduciary took the position that it could not make any distributions from the trust except upon direction of the Trust Protector. There was hostility between the Trust Protector and the trust beneficiary. The court urged the parties to resolve their differences by stipulation. At one point the court wrote:

Dear counsel:

My in-box gives me an inclination that rationality might not be prevailing in this matter.

At the urging of the court, the parties entered into a stipulated settlement paying the beneficiary's delinquent bills and establishing a \$4,000 monthly living allowance. It was stipulated that the Trust Protector would resign (as would the Delaware corporate fiduciary) and the trust would be transferred back to the offshore jurisdiction from which it came.

- b. Significance of the Outcome. No liability was assessed against the corporate fiduciary who served as a purely administrative trustee. All of the corporate fiduciary's legal fees were paid by the trust.

VII. **Creating a Directed Trust**

- A. New Trusts. It is self evident that a person who resides in a jurisdiction that does not recognize directed trusts may take advantage of directed trust law by establishing a new trust with a trustee in a directed trust jurisdiction. Typically, local counsel will not work directly with individual non-residents for this purpose and will instead insist on coordinating with the non-resident's local counsel so the new trust will be part of the overall non-resident's estate plan.
- B. Existing Irrevocable Trusts. The more intriguing question is whether existing irrevocable trusts can be converted to directed trusts.
 1. In cases where the existing trust is drafted with flexible provisions that allow a change of situs, the removal of one trustee and the appointment of

a successor trustee and include a Trust Protector or other provision that allows a person, not related or subordinate to the trustor under Internal Revenue Code § 672(c), to modify or amend the trust instrument to facilitate the efficient administration of the trust, the existing trust situs may be changed to a directed trust situs and the trust may be reformed to add direction provisions without court intervention.

2. When the trust language is not flexible, it is still possible to change the situs of an existing trust to a directed trust jurisdiction and modify the trust language to create a directed trust using one of two techniques.

a. First, the trust may be reformed through court proceedings. These proceedings sometimes require a petition in the jurisdiction where the trust is then being administered. However, in most cases, the situs of the trust can be changed through a petition filed in the host jurisdiction that (i) confirms the appointment of the local trustee (often an affiliate of the existing corporate fiduciary that now has established offices there), (ii) accepts jurisdiction over the trust, (iii) confirms that the law of administration in the new situs will thereafter be the trust administration laws of the state of the new situs, and (iv) reforms the trust to avail it of the various favorable administrative laws of the new jurisdiction including the adviser provisions that allow directed trusts.

b. A second technique that has recently become more popular involves decanting. When a directed trust jurisdiction also has a decanting statute and it is possible to appoint a trustee in the directed trust jurisdiction, the trustee, without court proceedings, may decant the trust assets into a new trust that contains the appropriated directed trustee language.

C. Result. The result is that a new trust with a particular reason to be a directed trust may be established, in the first instance, in a jurisdiction that permits directed trusts, and an existing irrevocable trust may be easily moved, in most cases, to the directed trust jurisdiction and reformed. Out of state trustors can retain their network of investment advisers and professionals and continue their relationship with their local trust attorney while availing themselves of favorable provisions of directed trust law and, in the process, negotiate a fee with the directed trustee that is appropriate given the services to be performed by the directed trustee.

VIII. Conclusion

Directed trusts are now more common than ever. States have recognized the different duties and responsibilities of trust administration and statutorily recognized advisers and protectors to the trust.

Like trustees, advisers and protectors are given sole responsibility for the various duties and responsibilities assigned to them by the language of the trust instrument. More modern trust instruments are now governed by a regime that includes a trustee, a trust protector and one or more trust advisers.

While there is little case law to date on the issue of trustee liability for the actions or omissions of advisers and protectors to the trust, two courts have ruled on the issue of investment directed trusts. Both courts echoed the common principle that a court cannot hold a trustee “liable for decisions that it did not and could not have made” and the Delaware court refused to impart blame to the trustee for its alleged failure to inform the adviser, for to do so “would gut” the very statute recognizing advisers and directed trusts.

APPENDIX

1. Special Holdings Direction Adviser
2. Investment Direction Adviser
3. Consent Adviser
4. Distribution Adviser
5. Trust Protector
6. Administrative Trustee

SPECIAL HOLDING DIRECTION ADVISER LANGUAGE

EIGHTH: Special Holding Direction Adviser. At any given time, the assets of the Trust estate may consist of an interest in [Insert Name of Entity] or one or more closely held business entities including, but not limited to, partnerships, limited liability companies, corporations and business trusts that are not publicly traded or such other assets identified as Special Holdings by the Special Holding Direction Adviser in a writing delivered to the Trustee (collectively the “Special Holdings”). Notwithstanding any other provision of this Agreement, at any time that the Trust estate includes any Special Holdings, there shall at all times be one or more Special Holding Direction Advisers (the “Special Holding Direction Adviser” or “Special Holding Direction Advisers”) to serve in accordance with the provisions of this Article EIGHTH. The role and function of the Special Holding Direction Adviser is set forth in this Article EIGHTH. The Special Holding Direction Adviser shall serve in a fiduciary capacity and conform to the purposes of this Agreement.

(a) Initial Appointment of Special Holding Direction Adviser. The initial Special Holding Direction Adviser shall be the [Name of SHDA] of [City], [State]. To the extent that more than two persons are serving as Special Holding Direction Adviser at any time, an affirmative vote of a majority of such Special Holding Direction Advisers must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Special Holding Direction Advisers must act unanimously. Notwithstanding the foregoing, to the extent that more than one Special Holding Direction Adviser is serving, the Special Holding Direction

Advisers may designate one such Special Holding Direction Adviser to communicate all directions to the Trustee.

(b) Role and Function. The Special Holding Direction Adviser shall hold and exercise the full power to manage the Special Holdings, including, but not limited to, the power to purchase, sell and retain all of the Special Holdings, and the power to exercise voting, subscription, conversion, option and similar rights with respect to Special Holdings and to participate in and consent to any voting trust, reorganization, merger, dissolution or other action affecting any Special Holdings. The Trustee shall follow the direction of the Special Holding Direction Adviser with respect to all matters relating to the management and investment of the Special Holdings.

(c) Liability of Trustee. The Special Holding Direction Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for the investment, voting and management of the Special Holdings. The Trustee shall make only such sales and investments with respect to the Special Holdings as the Special Holding Direction Adviser directs. The Trustee shall be under no obligation to review the Special Holdings, make any investment recommendations with respect to them, solicit any direction from the Special Holding Direction Adviser, value the Special Holdings if they are non-marketable, or insure the Special Holdings. The Trustee need not review whether the Special Holding Direction Adviser is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Special Holding Direction Adviser, or for acting on a direction of the Special Holding Direction Adviser or with respect to its implementation of any such direction of the Special Holding Direction Adviser and the Trustee shall not be liable for

any loss resulting from action taken by the Special Holding Direction Adviser, or taken by the Trustee in accordance with the Special Holding Direction Adviser's direction. As provided in 12 Del. C. § 3313(e), the Trustee shall have no duty to monitor the conduct of the Special Holding Direction Adviser, provide advice to the Special Holding Direction Adviser or consult with the Special Holding Direction Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Special Holding Direction Adviser. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article EIGHTH or any other provisions of this Agreement concerning the management of the Special Holdings (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Special Holding Direction Adviser shall not be liable for the acts or defaults of each other or any other trust adviser.

(d) Liability of Special Holding Direction Adviser. Unless otherwise provided in the instrument of appointment appointing any subsequent Special Holding Direction Adviser, the initial Special Holding Direction Adviser and any subsequent Special Holding Direction Adviser shall be protected to the fullest extent permitted by law, and specifically permitted by 12 Del. C. § 3303. The Special Holding Direction Adviser need not inquire into the Trustee's performance of its duties, and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. Notwithstanding the foregoing, the instrument of appointment appointing any subsequent Special Holding Direction Adviser may provide that such subsequent Special Holding Direction Adviser shall be required to abide by the prudent person standard imposed by 12 Del. C. § 3302(a), or in any corresponding provision of law which may be later enacted.

(e) Indemnification. Unless otherwise provided in the instrument of appointment appointing any subsequent Special Holding Direction Adviser, the Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the initial Special Holding Direction Adviser and any subsequent Special Holding Direction Adviser for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Special Holding Direction Adviser under this Agreement (unless the Special Holding Direction Adviser has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary

jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust).

(f) Resignation of Special Holding Direction Adviser. Any Special Holding Direction Adviser serving hereunder may resign at any time by providing written notice to the Trustee, the Trust Protector and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. Such resignation shall become effective at such time as the resigning Special Holding Direction Adviser shall provide in the notice of resignation.

(g) Removal of Special Holding Direction Adviser. The Trust Protector shall have the power to remove any Special Holding Direction Adviser by providing written notice to such Special Holding Direction Adviser, the Trustee and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal.

(h) Appointment of Additional or Successor Special Holding Direction Advisers. The Trust Protector shall have the power to appoint additional Special Holding Direction Advisers if at such time there are fewer than three Special Holding Direction Advisers serving and shall have the power to designate a successor Special Holding Direction Adviser upon the death, resignation, removal or incapacity of the last serving Special Holding Direction Adviser by providing written notice to such additional or successor Special Holding Direction Adviser, the Trustee and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income.

The appointment of additional or successor Special Holding Direction Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance of the designee.

(i) Power to Hire Agents. The Special Holding Direction Adviser shall have the power to employ agents and pay such agents reasonable compensation.

(j) Compensation. The Special Holding Direction Adviser may be entitled to compensation for its services as agreed upon by the Special Holding Direction Adviser and Trust Protector.

INVESTMENT DIRECTION ADVISER LANGUAGE

EIGHTH: Investment Direction Adviser. Notwithstanding any other provision of this Agreement, there shall at all times be one or more Investment Direction Advisers (the “Investment Direction Adviser” or “Investment Direction Advisers”) to serve in accordance with the provisions of this Article EIGHTH. The role and function of the Investment Direction Adviser is set forth in this Article EIGHTH. The Investment Direction Adviser shall serve in a fiduciary capacity and conform to the purposes of this Agreement.

(a) Initial Appointment of Investment Direction Adviser. The initial Investment Direction Adviser shall be (Name of IDA) of (City), (State). To the extent that more than two persons are serving as Investment Direction Adviser at any time, an affirmative vote of a majority of such Investment Direction Advisers must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Investment Direction Advisers must act unanimously. Notwithstanding the foregoing, to the extent that more than one Investment Direction Adviser is serving, the Investment Direction Advisers may designate one such Investment Direction Adviser to communicate all directions to the Trustee.

(b) Role and Function. The Investment Direction Adviser shall hold and exercise the full power to manage the investments of the Trust, including, but not limited to, the power to purchase, sell and retain all of the Trust assets, and the power to exercise voting, subscription, conversion, option and similar rights with respect to such property and to participate in and consent to any voting trust, reorganization, merger, dissolution or other action affecting any such

property. The Trustee shall follow the direction of the Investment Direction Adviser with respect to all matters relating to the management and investment of Trust assets.

(c) Liability of Trustee. The Investment Direction Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for the investment, voting and management of the assets of the Trust. The Trustee shall make only such sales and investments as the Investment Direction Adviser directs. The Trustee shall be under no obligation to review the Trust assets, make any investment recommendations with respect to them, solicit any direction from the Investment Direction Adviser, value the assets if they are non-marketable, or insure the assets. The Trustee need not review whether the Investment Direction Adviser is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Investment Direction Adviser, or for acting on a direction of the Investment Direction Adviser or with respect to its implementation of any such direction of the Investment Direction Adviser and the Trustee shall not be liable for any loss resulting from action taken by the Investment Direction Adviser, or taken by the Trustee in accordance with the Investment Direction Adviser's direction. As provided in 12 Del. C. § 3313(e), the Trustee shall have no duty to monitor the conduct of the Investment Direction Adviser, provide advice to the Investment Direction Adviser or consult with the Investment Direction Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Investment Direction Adviser. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under

this Trust for the Trustee's good faith reliance on the provisions of this Article EIGHTH or any other provisions of this Agreement concerning investment decisions (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Investment Direction Adviser shall not be liable for the acts or defaults of each other or any other Trust Adviser.

(d) Liability of Investment Direction Adviser. Unless otherwise provided in the instrument of appointment appointing any subsequent Investment Direction Adviser, the initial Investment Direction Adviser and any subsequent Investment Direction Adviser shall be protected to the fullest extent permitted by law, and specifically permitted by 12 Del. C. § 3303. The Investment Direction Adviser need not inquire into the Trustee's performance of its duties, and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. Notwithstanding the foregoing, the instrument of appointment appointing any subsequent Investment Direction Adviser may provide that such subsequent Investment Direction Adviser

shall be required to abide by the prudent person standard imposed by 12 Del. C. § 3302(a), or in any corresponding provision of law which may be later enacted.

(e) Indemnification. Unless otherwise provided in the instrument of appointment appointing any subsequent Investment Direction Adviser, the Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the initial Investment Direction Adviser and any subsequent Investment Direction Adviser for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Investment Direction Adviser under this Agreement (unless the Investment Direction Adviser has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust).

(f) Resignation of Investment Direction Adviser. Any Investment Direction Adviser serving hereunder may resign at any time by providing written notice to the Trustee, the Trust Protector and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. Such resignation shall become effective at such time as the resigning Investment Direction Adviser shall provide in the notice of resignation.

(g) Removal of Investment Direction Adviser. The Trust Protector shall have the power to remove any Investment Direction Adviser by providing written notice to such Investment Direction Adviser, the Trustee and the Grantor, while **he/she** is living and competent, or after the

Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal.

(h) Appointment of Additional or Successor Investment Direction Advisers. The Trust Protector shall have the power to appoint additional Investment Direction Advisers if at such time there are fewer than three Investment Direction Advisers serving and shall have the power to designate a successor Investment Direction Adviser upon the death, resignation, removal or incapacity of the last serving Investment Direction Adviser by providing written notice to such additional or successor Investment Direction Adviser, the Trustee and the Grantor, while he/she is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The appointment of additional or successor Investment Direction Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee.

(i) Power to Hire Agents. The Investment Direction Adviser shall have the power to employ agents and pay such agents reasonable compensation.

(j) Compensation. The Investment Direction Adviser may be entitled to compensation for its services as agreed upon by the Investment Direction Adviser and Trust Protector.

CONSENT ADVISER LANGUAGE

1. **PRIVATELY HELD BUSINESS INTEREST.**

The Grantor recognizes that a substantial portion of the Trust estate consists of stock in TNT Enterprises, Inc., a Delaware corporation (“TNT Stock”) that is privately held by Grantor [and members of the Grantor’s family]. It is the Grantor’s intention that the TNT Stock will be retained by the Trustee notwithstanding the lack of diversification of Trust investments, changes in general economic conditions, the probable or actual low income yield of the TNT Stock or any fiduciary obligation to dispose of the TNT Stock that would otherwise be imposed upon the Trustee if not for the express terms of this Agreement. The Grantor believes that the retention of the TNT Stock and the preservation of the privately held status of TNT Enterprises, Inc. represents the most productive and ultimately rewarding investment program for the Trust.

2. LIMITATION ON TRUSTEE’S AUTHORITY TO SELL.

Accordingly, the Trustee is directed to retain, and not to sell, the TNT Stock transferred by the Grantor to the Trust during the term of the Trust subject only to the provisions of Section 3 below. Furthermore, the Trustee is directed to exercise all management authority and voting authority with respect to the TNT Stock to prevent the TNT Stock from being publicly traded and to preserve the privately held status of TNT Enterprises, Inc. during the term of the Trust subject only to the provisions of Section 3 below.

3. CONDITIONS PRECEDENT TO DISPOSITION OF STOCK.

If during the term of the Trust both: (i) the Trustee, in its sole and absolute discretion, determines that there has been a substantial and material change in the business or

prospects of TNT Enterprises, Inc. so that it is in the best interest of the Trust and the beneficiaries of the Trust for the TNT Stock to be sold or publicly traded for reasons other than the lack of diversification of Trust investments, changes in general economic conditions, the probable or actual low income yield of the TNT Stock or any fiduciary obligation to dispose of the TNT Stock that would otherwise be imposed upon the Trustee if not for the express terms of this Agreement and (ii) the Trustee obtains the written consent of the Consent Adviser, (as hereinafter defined) appointed in accordance with 12 Del. C. § 3313(c), in the manner set forth in Section 4 below, then the Trustee may exercise the Trustee's rights and powers as owner of the TNT Stock to effect its continued operation, or the sale or disposition of its assets or business, or, to sell, exchange, offer for redemption, or otherwise dispose of the TNT Stock or any interest in TNT Enterprises, Inc. owned by the Trust, or to effect the liquidation or dissolution of TNT Enterprises, Inc., at such time or times and upon such terms and conditions as the Trustee, shall determine, but only with the consent of the Consent Adviser.

4. APPOINTMENT AND APPROVAL OF CONSENT ADVISER.

The Trustee, after making its determination under Paragraph 3(i), shall notify the Consent Adviser in writing of the Trustee's determination to sell or otherwise dispose of the TNT Stock and shall request the approval of the Consent Adviser. The Consent Adviser shall have thirty (30) days from receipt of such written notification to approve or disapprove the Trustee's proposed disposition of the TNT Stock.

If the Consent Adviser approves the Trustee's proposed disposition of the TNT Stock, or if the Consent Adviser fails to respond to the Trustee's request within thirty (30) days following receipt of the Trustee's notification ("Deemed Consent"), the Trustee is authorized to

dispose of the TNT Stock in accordance with the Trustee's written notification to the Consent Adviser. The consent or Deemed Consent of the Consent Adviser shall be a condition precedent to the Trustee's disposition of the TNT Stock.

The initial Consent Adviser for each Trust created under this Agreement shall be (Name of C.A.) of (City), (State). To qualify, any person or entity designated as Consent Adviser shall deliver a written instrument to the Trustee indicating acceptance and agreement that all powers conferred upon such Consent Adviser will be exercised in a fiduciary/nonfiduciary capacity. The Trust Protector shall have the power to appoint additional Consent Advisers if at such time there are fewer than three Consent Advisers serving and shall have the power to designate a successor Consent Adviser upon the death, resignation, removal or incapacity of the last serving Consent Adviser by providing written notice to such additional or successor Consent Adviser, the Trustee and the Grantor, while he/she is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The appointment of additional or successor Consent Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee. To the extent that more than two persons are serving as Consent Adviser at any time, an affirmative vote of the majority of such Consent Advisers must be reached with respect to any decisions, action taken, or direction given. Otherwise, the Consent Adviser must act unanimously. Notwithstanding the foregoing, the Consent Adviser may delegate, by a writing delivered to the Trustee, one or more individuals from whom the Trustee is instructed to accept written direction and such person or persons so appointed may, acting alone, exercise all of the authority of the Consent Adviser.

The Consent Adviser's compensation (if any) may be designated in writing and thereafter changed from time to time with respect to each such Trust by the individual who is then entitled to appoint successor Consent Adviser [, provided, however that the initial Consent Adviser named above shall serve without compensation]. In addition, the Consent Adviser shall be reimbursed for out-of-pocket expenses incurred incident to performing services as such.

The Consent Adviser shall have the right to resign at any time upon thirty (30) days written notice to the Trustee and to the beneficiaries then entitled to receive current distributions of income or principal under this Agreement or, in the event that any such beneficiaries are incapacitated or are minors, to such beneficiaries and the respective guardian, personal representative or custodial parent of such Trust beneficiary, as the case may be.

5. MANAGEMENT AUTHORITY.

In addition to any other powers conferred by law, the Trustee is authorized to exercise the rights and powers set forth in this Section with respect to the TNT Stock and TNT Enterprises, Inc.

The Trustee is expressly authorized to select, vote for and remove directors of TNT Enterprises, Inc., to name or change officers, managing personnel and/or operating personnel; to reduce, expand, limit or otherwise change the trade or business of TNT Enterprises, Inc., or any property or investment that it holds; to employ accountants or engineers to appraise or evaluate TNT Enterprises, Inc. or its assets; to employ investment or legal counsel, including any firm with which the Trustee may be affiliated; to charge the cost of such services against the interests of TNT Enterprises, Inc. owned by the Trust, or to require TNT Enterprises, Inc. to pay such costs; to contribute additional working capital or to subscribe to additional stock as the Trustee may see fit;

to take all steps and perform all acts which the Trustee may deem necessary or advisable in connection therewith; to participate in any incorporation, reorganization, merger, consolidation, recapitalization, liquidation or dissolution of TNT Enterprises, Inc.; and to rely upon the reports of certified public accountants or public accountants as to the operations and financial conditions of any business conducted by TNT Enterprises, Inc. without independent investigation.

6. EXONERATION AND INDEMNIFICATION.

The Grantor recognizes the special risk associated with the ownership and management of the privately held business assets transferred by the Grantor to the Trust under this Agreement and has intentionally modified the Trustee's powers, duties and standard of care with respect to the ownership and management of TNT Stock, in accordance with 12 Del. C. § 3303, to accomplish the Grantor's specifically stated intentions set forth in this Agreement and to eliminate the Trustee's liability for administering the Trust in accordance with the express terms of this Agreement. It is the Grantor's direction that the Trustee shall be protected to the fullest extent permitted by law and shall be liable only for its **willful misconduct /or gross negligence** established by clear and convincing evidence. In accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article or any other provision of this Agreement concerning consent decisions (unless the Trustee has acted with **willful misconduct/or gross negligence** proven by clear and convincing evidence in a Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have

exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Consent Adviser shall not be liable for the acts or defaults of each other or any other Trust Adviser. The Grantor directs that the Trustee shall be indemnified by the Trust for the Trustee's good faith reliance on the provisions of this Agreement.

DISTRIBUTION ADVISER LANGUAGE

Distribution Adviser. Notwithstanding any other provision of this Agreement, there shall at all times be one or more Distribution Advisers (the “Distribution Adviser” or “Distribution Advisers”) to serve in accordance with the provisions of this Article NINTH. The role and function of the Distribution Adviser is set forth in this Article NINTH. The Distribution Adviser shall serve in a fiduciary capacity and conform to the purposes of this Agreement.

(a) Initial Appointment of Distribution Adviser. The initial Distribution Adviser shall be (Name of DA) of (City), (State). To the extent that more than two persons are serving as Distribution Adviser at any time, an affirmative vote of a majority of such Distribution Advisers must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Distribution Advisers must act unanimously. Notwithstanding the foregoing, to the extent that more than one Distribution Adviser is serving, the Distribution Advisers may designate one such Distribution Adviser to communicate all directions to the Trustee.

(b) Role and Function. The Distribution Adviser shall hold and exercise the full power to direct the Trustee to distribute income and principal of the Trust pursuant to the standards established under this Agreement. The Trustee shall follow the direction of the Distribution Adviser with respect to all matters concerning the distribution of income or principal of the Trust. Notwithstanding the foregoing or any other provisions of this Agreement, if at any time a beneficiary of a trust created by or pursuant to this Agreement is serving a Distribution Adviser, such beneficiary may only exercise the authority conferred pursuant to the terms of this Agreement to direct the Trustee to distribute income and/or principal of the Trust to such

beneficiary and his or her descendants for his, her or their health, education, maintenance and support. In addition, such beneficiary may not direct the Trustee to distribute income or principal to his or her descendants if doing so would discharge a legal support obligation of such beneficiary.

(c) Liability of Trustee. The Distribution Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for all discretionary actions involving any distribution of income or principal of the Trust. The Trustee shall make only such distributions of income or principal as the Distribution Adviser directs, or that are non-discretionary and mandated by the terms of the Trust. The Trustee shall be under no obligation to review the beneficiaries' needs or requests for income or principal distributions, make any recommendation with respect to such distributions, solicit any direction from the Distribution Adviser, calculate the impact of any distribution on the likely duration of the Trust, or ensure the equality of distributions among the beneficiaries. The Trustee need not review whether the Distribution Adviser is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Distribution Adviser, or for acting on a direction of the Distribution Adviser and it shall not be liable for any loss to the Trust or any claim of inequality, partiality or unreasonableness resulting from any action taken at the direction of the Distribution Adviser, or taken by the Trustee in accordance with the direction of the Distribution Adviser. As provided in 12 Del. C. § 3313(e), the Trustee shall have no duty to monitor the conduct of the Distribution Adviser, provide advice to the Distribution Adviser or consult with the Distribution Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a

manner different from the manner directed by the Distribution Adviser. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article NINTH or any other provision of this Agreement concerning distribution decisions (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proved by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Distribution Adviser shall not be liable for the acts or defaults of each other or any other Trust Adviser.

(d) Liability of Distribution Adviser. The Distribution Adviser shall be protected to the fullest extent permitted by law, and specifically as permitted by 12 Del. C. § 3303. The Distribution Adviser shall not be held liable to any beneficiary for any distribution decision made hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

(e) Indemnification. Unless otherwise provided in the instrument of appointment appointing any subsequent Distribution Adviser, the Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the initial Distribution Adviser and any subsequent Distribution Adviser for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise that result from the performance or non-performance of the powers given to the Distribution Adviser under this Agreement (unless the Distribution Adviser has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust).

(f) Resignation of Distribution Adviser. Any Distribution Adviser serving hereunder may resign at any time by providing written notice to the Trustee, the Trust Protector and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. Such resignation shall become effective at such time as the resigning Distribution Adviser shall provide in the notice of resignation.

(g) Removal of Distribution Adviser. The Trust Protector shall have the power to remove any Distribution Adviser by providing written notice to such Distribution Adviser, the Trustee and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal.

(h) Appointment of Additional or Successor Distribution Advisers. The Trust Protector shall have the power to appoint additional Distribution Advisers if at such time there are fewer than three Distribution Advisers serving and shall have the power to designate a successor Distribution Adviser upon the death, resignation, removal or incapacity of the last serving Distribution Adviser by providing written notice to such additional or successor Distribution Adviser, the Trustee and the Grantor, while **he/she** is living and competent, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The appointment of additional or successor Distribution Advisers shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee. Notwithstanding the foregoing provisions, at no time may the Grantor serve as Distribution Adviser.

(i) Compensation. The Distribution Adviser may be entitled to compensation for its services as agreed upon by the Distribution Adviser and Trust Protector.

TRUST PROTECTOR LANGUAGE

TENTH: Trust Protector. Notwithstanding any other provision of this Agreement, there shall at all times be one or more Trust Protectors (the “Trust Protector” or “Trust Protectors”) to serve in accordance with the provisions of this ARTICLE TENTH. The role and function of the Trust Protector is set forth in this ARTICLE TENTH. The Trust Protector shall serve in fiduciary capacity and shall conform to the purposes of this Agreement.

(a) Initial Appointment of Trust Protector. The initial Trust Protector shall be (Name of TP) of (City, (State). To the extent that more than two persons are serving as Trust Protector at any time, an affirmative vote of a majority of such Trust Protectors must be reached with respect to any decisions, actions taken or direction given. Otherwise, the Trust Protectors must act unanimously. Notwithstanding the foregoing, to the extent that more than one Trust Protector is serving, the Trust Protectors may designate one such Trust Protector to communicate all directions to the Trustee.

(b) Role and Function. The Trust Protector shall have the following roles, powers and duties:

(1) To amend the administrative and technical provisions with respect to any trust created by or pursuant to this Agreement in accordance with **ARTICLE THIRTEENTH** of this Agreement, at such times as the Trust Protector may deem appropriate for the proper administration of the Trust and for tax purposes. **In particular, the Trust Protector shall have the power to modify or amend the provisions of this Agreement to ensure that this Agreement is a**

qualified disposition under the Delaware Qualified Dispositions In Trust Act, 12 Del. C. § 3570, et. seq. (the “Act”).

(2) To designate the law of any jurisdiction (under which the terms of any trust created by or pursuant to this Agreement shall be capable of taking effect) to be the governing law of any trust created by or pursuant to this Agreement, as provided in **ARTICLE SEVENTEENTH** of this Agreement.

(3) To remove and replace the Trustee as provided in **ARTICLE FOURTEENTH** of this Agreement, provided that at all times the situs any trust created by or pursuant to this Agreement is in the State of Delaware, there shall be a “Qualified Trustee” as defined in the Act.

(4) To remove any Investment Direction Adviser and appoint additional and successor Investment Direction Advisers as provided in **ARTICLE EIGHTH** of this Agreement.

(5) To remove any Distribution Adviser and appoint additional and successor Distribution Advisers as provided in **ARTICLE NINTH** of this Agreement.

(6) To appoint additional and successor Trust Protectors as provided in this **ARTICLE TENTH**.

(7) To enter into fee agreements with the Trustee, the Investment Direction Adviser and the Distribution Adviser.

(c) Liability of Trustee. The Trustee need not review whether the Trust Protector is satisfying its responsibilities hereunder. As provided in 12 Del. C. § 3313(b), the Trustee shall incur no liability for any act or failure to act by the Trust Protector, or for acting on a direction of the Trust Protector and it shall not be liable for any loss to the Trust resulting from any action taken at the direction of the Trust Protector. As provided in 12 Del. C. § 3313(e), the Trustee

shall have no duty to monitor the conduct of the Trust Protector, provide advice to the Trust Protector or consult with the Trust Protector or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Trust Protector. Furthermore, in accordance with 12 Del. C. § 3302(e) and § 3586, the Trustee shall have no liability under this Trust to any Trust beneficiary or any other person whose interest arises under this Trust for the Trustee's good faith reliance on the provisions of this Article TENTH or any other provision of this Agreement concerning actions of the Trust Protector (unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust). The Trustee shall be deemed to have acted within the scope of its respective authority, to have exercised reasonable care, diligence and prudence, and to have acted impartially as to all interested persons unless the contrary may be proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust. The Trustee and the Trust Protector shall not be liable for the acts or defaults of each other or any other Trust Adviser.

(d) Limitation of Responsibilities. The Trust Protector shall have no duty to monitor the conduct of the Trustee, the Investment Direction Adviser and the **Distribution Adviser**, and shall not be liable for any exercise or failure to exercise the powers granted herein, provided that the Trust Protector shall consider in good faith the advisability of their exercise if and when requested to do so by a beneficiary, his or her guardian or a member of his or her family.

(e) Indemnification. The Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the Trust Protector for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Trust Protector under this Agreement (unless the Trust Protector has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust).

(f) Resignation of Trust Protector. Any Trust Protector serving hereunder may resign at any time by providing written notice to the Trustee and to the Grantor, if **he/she** is then living, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. Such resignation shall become effective at such time as the resigning Trust Protector shall provide.

(g) Appointment of Additional or Successor Trust Protectors. The Trust Protector shall have the power to appoint additional Trust Protectors if at such time there are fewer than three Trust Protectors serving and shall have the power to designate a successor Trust Protector to serve upon the death, resignation or incapacity of the last serving Trust Protector by providing written notice to such additional or successor Trust Protector, the Trustee and the Grantor, if **he/she** is then living, or after the Grantor's death or incapacity, to each adult beneficiary to whom the Trustee is then authorized to distribute income. The appointment of additional or successor Trust Protectors shall become effective at such time as the Trust Protector provides in the instrument of appointment. Upon the resignation, death or incapacity of the last serving Trust

Protector, and provided a successor Trust Protector has not been designated in accordance with the provisions of this ARTICLE TENTH, then the Trust Protector of each trust created by or pursuant to this Agreement shall be the person or entity chosen by such one of the following persons, in the order named, including such person if such person appoints himself or herself:

- (1) ;
- (2) ; and
- (3) .

Notwithstanding the designation of Trust Protectors set forth above, the Grantor shall have the power to remove any Trust Protector by providing written notice to such Trust Protector and the Trustee. The removal shall become effective at such time as the Grantor indicates in the notice of removal. In the event the Grantor exercises the authority conferred upon him/her pursuant to this section to remove any Trust Protector, and provided no additional Trust Protector is serving, the Grantor shall appoint a successor Trust Protector by providing written notice to such successor Trust Protector and the Trustee. The appointment of a successor Trust Protector shall become effective at such time as the Grantor provides in the instrument of appointment. At no time may the Grantor or any party related or subordinate to the Grantor within the meaning of Section 672(c) of the Internal Revenue Code be eligible to serve as Trust Protector.

ADMINISTRATIVE TRUSTEE LANGUAGE

There shall at all times be a trustee of this Trust, to be known as the “Administrative Trustee.” The Administrative Trustee shall be a bank or trust company authorized to conduct business in Delaware unless the situs of the Trust has been changed to a State other than Delaware in accordance with ARTICLE _____. The Administrative Trustee shall have the powers and authorities as set forth herein as well as any additional powers now or later conferred by law.

A. Initial Administrative Trustee. The initial Administrative Trustee for this Trust shall be _____. The Administrative Trustee shall be designated, appointed, removed and replaced, from time to time, in accordance with the terms of this ARTICLE _____.

B. Exclusive Duties of Administrative Trustee. The Administrative Trustee shall have the following exclusive duties which shall be performed in the Administrative Trustee’s discretion and not at direction:

1. To maintain bank accounts, brokerage accounts and other custody accounts which receive Trust income and contributions and from which Trust expenditures and distributions are disbursed.
2. To maintain storage of tangible personalty and evidence of intangible Trust property.
3. To maintain Trust records.
4. To maintain an office for trustee meetings and other Trust business.

5. To originate, facilitate and review Trust accountings, reports and other communications with the Trust beneficiaries, advisers and unrelated third parties.

6. To respond to inquiries concerning any trust created hereunder from advisers.

7. To execute documents with respect to Trust account transactions.

8. To retain accountants, attorneys, investment counsel, agents and other advisers in connection with the performance of the Administrative Trustee's duties.

9. To prepare and file federal income tax returns.

C. Limitation on Administrative Trustee's Duties. The Administrative Trustee shall have no other duties, obligations, or authority except to take actions at direction to the extent expressly provided herein.

D. Powers of the Administrative Trustee. Subject to the provisions of ARTICLES _____ of this Agreement relating to the Investment Direction Adviser, Distribution Adviser and Trust Protector, the Administrative Trustee shall have the following powers:

[INSERT CURRENT TRUSTEE POWERS]

E. Resignation of Administrative Trustee. The Administrative Trustee may resign at any time by providing written notice to the Trust Protector and the Settlor, if he is then living, or after the Settlor's death or incapacity, to each adult beneficiary to whom the Administrative Trustee is then authorized to distribute income. Such resignation shall become effective at such time as the resigning Administrative Trustee shall provide.

F. Removal and Replacement of Administrative Trustee. The Trust Protector may remove the Administrative Trustee by providing written notice to the Administrative Trustee and

the Settlor, if he is then living, or after the Settlor's death or incapacity, to each adult beneficiary to whom the Administrative Trustee is then authorized to distribute income. Upon the resignation or removal of the Administrative Trustee, the Trust Protector shall appoint a successor Administrative Trustee by providing written notice to such successor Administrative Trustee and the Settlor if he is then living, or after the Settlor's death or incapacity, to each adult beneficiary to whom the Administrative Trustee is then authorized to distribute income.

G. Compensation of Administrative Trustee. The Administrative Trustee shall be entitled to such compensation for its services as agreed upon by the Administrative Trustee and the Trust Protector. In the absence of any agreement between the Administrative Trustee and the Trust Protector determining the Administrative Trustee's compensation, the Administrative Trustee shall be compensated at its standard schedule of fees in effect from time to time.

H. Duty to Notify Beneficiaries. Notwithstanding any other provisions of this Agreement, pursuant to 12 Del. C. § 3303(a), the Administrative Trustee shall have no obligation to notify or inform any current or future beneficiary of the Trust of the existence of the Trust or of such beneficiary's interest in the Trust unless specifically directed to do so by the Trust Protector.

I. Liability of Predecessor Trustee. Any successor Administrative Trustee shall not be liable for actions of the predecessor Administrative Trustee. The successor Administrative Trustee shall specifically be relieved of the duty to examine the accounts of the predecessor Administrative Trustee.

J. Affiliates. The Administrative Trustee, at the direction of the Investment Direction Adviser, is authorized to invest in and retain any securities managed, issued,

underwritten or distributed by the Administrative Trustee or by any of its affiliates, any participation in any investment company registered under the Investment Company Act of 1940, or any investment fund exempt from registration under the Investment Company Act of 1940, for which the Administrative Trustee or its affiliates is an adviser or agent, and any “affiliated investment” within the meaning of 12 Del. C. § 3312, notwithstanding the fact that such trustee or affiliate may receive separate fees, commissions or other costs directly from such security, fund or “affiliate investment.” The Administrative Trustee is authorized to employ such agents, advisers and other counsel, including but not limited to entities affiliated with the Administrative Trustee, and to pay out of income or principal or both the reasonable charges and fees of such agents, advisers and counsel, as it shall in its sole discretion determine; provide, however, that the Investment Direction Adviser shall have the sole power to select brokers and dealers for the sale or purchase of any securities or other investment property in the Trust.