

Office of Trustee

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I. Identification of the Trustee

A. Initial Trustee

§16.1 The settlor of a revocable grantor trust ordinarily acts as the trust's initial trustee. However, if the settlor expects his or her own death or incapacity in the near future, he or she may choose to name another person as the initial cotrustee or even as the sole initial trustee, thus avoiding any complications associated with the transfer of trusteeship on the settlor's death or incapacity. In addition, the settlor may choose to name another initial cotrustee, often a bank, if he or she would like assistance in managing the trust assets. See §§15.2–15.4 for sample clauses naming the initial trustee.

B. Trustee Defined to Include One or More Trustees

1. In General

§16.2 It is important for the identification of the trustee throughout the document to be clear and consistent. Because at different times there may be multiple trustees of a trust, as a matter of convenience it is helpful to define the word *trustee* to refer to the one or more persons acting as trustee, regardless of number. This makes the trust instrument much easier to read than if a phrase such as “trustee or trustees, as the case may be” must be used throughout.

2. Sample Clause: *Trustee Defined to Include One or More Trustees* §16.3

Definition. The term “Trustee” refers to the one or to those acting as Trustee or Trustees, regardless of number. Individual trusts under this Agreement need not have the same Trustee.

C. Successor Trustees

1. In General

§16.4 The trust instrument should clearly identify the successor trustees and the order in which they are to take office. If individuals are named as successor trustees, a sufficient number should be named to ensure that one of them is able to act as successor trustee when necessary. The trust should also indicate whether they are to serve one at a time or together. If the trust has or may have multiple trustees, the trust should indicate whether a successor is to take office when any of the trustees cease to serve or only if all of the original trustees cease to serve.

2. Sample Clause: *One Original Trustee; Multiple Successors Serve Together* §16.5

Named successor. If the original trustee becomes unable or unwilling to serve, *[name]* and *[name]* shall succeed as cotrustees.

3. Sample Clause: *One Trustee; Multiple Successors Serve One at a Time* §16.6

Named successor. If the original trustee becomes unable or unwilling to serve, the first person named below and the others as alternates or successors, in the order of preference listed, shall succeed the original trustee and any successor trustee:

[name]

[name]

[name]

4. Sample Clause: *Multiple Trustees; Successor If None Acting* §16.7

Named successor. If an original trustee becomes unable or unwilling to serve, the remaining trustees shall continue to serve. When all original trustees become unable or unwilling to serve, *[name]* shall succeed as Trustee.

5. Sample Clause: *Multiple Trustees; Successor If Any Cease to Serve* §16.8

Named successor. If an original trustee becomes unable or unwilling to serve, *[name]* shall succeed that person as a trustee.

D. Bank as Trustee

1. In General

§16.9 If a bank, trust company or other corporate entity that provides trustee services to the general public is named as a trustee, the settlor should consider sending a copy of the trust instrument to this professional trustee following the instrument's execution. This allows the bank or other entity to review the terms of the trust to determine whether the trust's terms will prevent it from acting as a trustee. Even when a bank is named as a successor trustee, it is best to allow the bank to make this determination while the settlor is able to change problematic terms or name a different successor trustee. As a condition of acting as a trustee, some banks require specific language in the trust instrument concerning the trustee's powers and duties. Often the instrument must include the power to invest trust assets through entities affiliated with the bank.

In addition, if the settlor names a bank as a trustee, the trust should anticipate potential future mergers and consolidations. The Michigan Banking Code of 1999 expressly provides that a consolidated bank "holds and enjoys the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as a fiduciary, in the same manner and to the same extent as those rights and interests were held or enjoyed by each consolidating organization at the time of the consolidation." MCL 487.13703(2). Nonetheless, if the client wishes to have the consolidated entity continue to serve as the trustee, it will provide further clarification if the trust instrument expressly indicates this.

2. Sample Clause: Merger or Consolidation of a Corporate Trustee

§16.10

Successor in interest. Any reference to a fiduciary in this agreement or to an entity referenced in the Article shall include any successor in interest to that entity arising by merger, consolidation, reorganization in another form, or name change.

E. Trustee of a Qualified Domestic Trust

§16.11 It is important to identify a trustee who qualifies under the tax regulations if the trust provides for the creation of a qualified domestic trust (QDT). As discussed in chapter 17, when the surviving spouse is not a U.S. citizen, he or she may qualify for a marital deduction for property passing for his or her benefit only if the property is transferred to a QDT. IRC 2056(d)(1). This requirement stems from the concern that a surviving spouse who is not a U.S. citizen could take the property offshore, so that on the death of the surviving spouse, the property would not be available for the collection of tax under the federal estate tax. Placing the property in a QDT ensures that the property will be available to the Internal Revenue Service (IRS) at the death of the surviving spouse. Among other requirements, to qualify as a QDT, the terms of the trust must provide that at least one trustee of the trust be an individual U.S. citizen or a U.S. domestic corporation. IRC 2056A(a)(1)(A).

F. Additional Trustees

1. In General

§16.12 The terms of the trust may give the trustee the authority to appoint a cotrustee. This may be helpful to a trustee who was named because of his or her knowledge of the family's affairs but needs assistance with managing the trust assets. The trust may limit this power. For example, the trust may limit the appointment to a corporate cotrustee. See the sample clause in §16.13.

The power to appoint a cotrustee also allows the trustee to appoint a successor, or the trust may specifically authorize the trustee to appoint a successor. Allowing an individual trustee to des-

ignate his or her own successor, individual or corporate, is often an appropriate way to add flexibility to the trust instrument.

In addition, when separate trusts are created for the benefit of each child, it may be appropriate to allow the beneficiary to elect to be cotrustee when he or she reaches a designated age. This gives the beneficiary the opportunity to participate in the management of the assets he or she will eventually receive outright, without giving him or her complete control all at once.

2. Sample Clause: The Trustee May Appoint a Corporate Cotrustee **§16.13**

Additional trustee. Trustee may appoint a professional cotrustee to serve under this Agreement.

3. Sample Clause: A Beneficiary May Elect to Serve as Cotrustee **§16.14**

Addition of beneficiary trustee. A beneficiary who has attained age 21 may elect to serve as a cotrustee of any trust established under Article V of this Agreement of which he or she is the sole current trust beneficiary.

II. Administration Provisions Relating to Trustees

A. Acceptance of the Trustee

1. In General

§16.15 The trustee may be required to accept the position of trustee within a specified time period so that, if no acceptance or declination is given, the next-named successor (or the next successor chosen) can qualify to act instead. This is intended to prevent the trust from being without a trustee for a prolonged period of time. If the trust permits the sole beneficiary of a trust (usually the settlor's child) to elect to serve as a cotrustee when the beneficiary reaches a specified age, a time limit for filing an acceptance of trust is not imposed because, in those circumstances, the trust continues to have an acting trustee. See §16.12 for a discussion of a beneficiary's election to serve as a cotrustee and §16.14 for a sample clause authorizing such an election.

2. Sample Clause: Acceptance of the Trustee **§16.16**

Acceptance. An eligible prospective trustee may accept the trusteeship by signing an acceptance of trust or by any other method permitted by law. If a prospective trustee becomes eligible to serve because of a death, resignation, removal, or appointment, the acceptance must occur within a reasonable time or the prospective trustee shall be deemed to have rejected the trusteeship. If eligibility to serve occurs because of the attainment of a specified age, the notice of acceptance may be given at any time.

B. Notice of Transactions

§16.17 The trust should state who must receive notice of transactions before certain transactions become effective. Especially with respect to changes in the office of trustee, notification of transactions is important so that beneficiaries know whom to contact with questions or concerns regarding their distribution rights or other trust rights. In addition, notification of transactions is consistent with the trustee's duty to keep the qualified trust beneficiaries reasonably informed

about the administration of the trust and of the material facts necessary for them to protect their interests. See MCL 700.7814(1). Note that for a trustee who accepts a trusteeship on or after April 1, 2010, within 63 days after accepting trusteeship, the new trustee is required by statute to inform all qualified trust beneficiaries of the trustee's name, address, and telephone number, and the court, if any, in which the trust is registered. MCL 700.7814(2)(b). For a definition of *qualified trust beneficiary*, see MCL 700.7103(g).

It is also important for successor trustees to receive notification of trustee changes so they have a record of when a particular trustee was acting and when their period of eligibility to serve as trustee begins.

C. Compensation of Trustees

1. In General

§16.18 The Michigan Trust Code (MTC) provides that if the terms of the trust do not specify the trustee's compensation, the trustee is entitled to compensation that is reasonable under the circumstances. MCL 700.7708(1). Nonetheless, the trustee's right to compensation and reimbursement for trust expenses should be provided for in the trust instrument. If the terms of the trust specify the trustee's compensation, a court may allow more or less compensation if (1) the duties of the trustee are substantially different from those contemplated when the trust was created, or (2) the compensation specified by the terms of the trust would be unreasonably low or high. MCL 700.7708(2).

Factors that may be considered in determining the reasonableness of a testamentary trustee's fee are enumerated in *Comerica Bank v Adrian*, 179 Mich App 712, 724, 446 NW2d 553 (1989):

- the size of the trust
- the responsibility required
- the character of the work
- the results achieved
- the knowledge, skill, and judgment required and used
- the time and services required
- the manner and promptness of performance
- the trustee's unusual skill or experience
- the trustee's fidelity or disloyalty
- the risk involved
- the custom of the community
- the trustee's estimate of the value of his or her services

2. Sample Clause: Compensation of Trustees

§16.19

Compensation. Each trustee is entitled to reimbursement for reasonable out-of-pocket expenses and may receive reasonable compensation for services performed. A trustee shall have no duty to notify trust beneficiaries in advance of a change in the method or rate of the trustee's compensation.