Understanding Trusts and the Trust Documents

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Introduction

As the Baby Boom generation matures and prepares for what may be the greatest transfer of wealth in history, trusts are becoming more commonplace in estate and legacy planning. This session will be an introduction to trusts. We'll discuss the purpose of a trust and keywords used in trust documents, then summarize the common types of trusts tax professionals may see in practice. We'll conclude the session by providing a trust document, which we will interpret. We'll also examine the tax implications of a trust while discussing the trust document.

A trust is not a substitute for a will; rather, it complements the will and helps to carry out the transfer of wealth in an orderly, preplanned manner while minimizing probate and other costs. Our primary focus as tax professionals is usually the tax issues of a given trust and the proper completion of Form 1041, *U.S. Income Tax Return for Trusts and Estates*. However, to fully understand the taxation of a trust, we must also understand the entity itself — how, when and why it was formed, what assets it contains, how those assets are to be managed, who are the key players and what has occurred in that entity for the tax year.

What is a Trust?

A trust is a legal contract establishing an entity in accordance with prevailing state statutes for the purpose of the separation of the legal ownership of an asset from the benefits of that asset. Let's break that down for further understanding.

Legal contract. Much like a corporation, LLC or partnership, the trust is a creature of state law and is generally governed by those statutes. A trust is established by way of execution of a legal document that serves as a binding contract for the parties involved.

Prevailing state statutes. A trust should be drawn up by an attorney, taking into account not only the goals and intentions of the client, but also the complex and bewildering state and federal trust and estate tax laws. Noncompliance with those standards may result in the entity not being able to withstand legal challenges from creditors, heirs and others. In addition, the trust and estate tax laws are in a virtually constant state of flux. All trusts, especially those designed to become effective at a future date, should be frequently reviewed and updated in light of changes in family dynamics, state statutes, federal statutes, and the goals and intent of the trust grantor.

Separation of legal ownership of an asset from the benefit of that asset. This is the basic underlying principle for which a trust is established. The person or institution holding legal title to the assets, known as the **trustee**, has a fiduciary duty to the persons entitled to the benefits of that property, the **beneficiaries**. The trustee is charged with exercising a certain level of care in managing the assets according to the requirements and intent of the trust. In addition, state courts and statutes may impose certain other obligations and duties upon the trustee.

Example

Joe has a brokerage account and would like to provide funds for his niece's college education beginning in about three years. Joe could simply gift the proceeds to his niece with instructions to use it for college expenses. However, Joe would have no control over the money if his niece decides to buy a fancy sports car instead.

If Joe forms an irrevocable trust at BigBank, appointing their trust department as trustee and placing the brokerage account into that trust, there would be several differences. First, the value of the brokerage account would not be included in Joe's estate for tax purposes and could not be attached by Joe's creditors. Second, Joe would not have control over the account. BigBank would administer the account and place trades and make investments according to the guidelines provided in the trust document. Finally, Joe's niece would not have free access to the money. The trustee would control distributions and verify their use for the intended purpose.

Many times, the persons entitled to the benefits of a trust are ones who cannot or should not be in control of those assets. Here, a trust provides an ideal vehicle for the management of those funds. Trusts can permit a bank or financially astute family member to manage the money for the benefit of a minor child, a special needs individual, those lacking in maturity in handling large or complicated assets, or an incapacitated family member who cannot manage the funds for their own benefit. Again, the benefits of the trust arrangement are derived from this separation of ownership and benefit of the assets. In general, where this separation of the ownership and benefit is recognized by the courts, assets can be used for the benefit of the beneficiaries and may escape the grasp of creditors of those beneficiaries (asset protection trusts).

Five Key Elements of a Trust

No matter what the structure, intent or location of a trust, there are five key elements present in all. Let's examine those five elements and discuss the basics of trust formation. All trusts must have:

- A grantor
- Trust property or assets
- A trustee
- Beneficiary (there may be more than one)
- Purpose or intent of the trust

Grantor

This is the person who forms and transfers property to the trust. Other terminology used for this role are "trustor," "settlor" or "donor." In general, the grantor is the owner of the property that is placed into the trust. The grantor must also have proper legal capacity (i.e., be of sound mind), and have an intent to form a trust. Some courts have held that the level of competence required for a grantor exceeds the level of competence for a person to sign a will. This technical legal decision should be left to an attorney, perhaps in consultation with an attending physician.

Trust property

This is the principal or **corpus** of the trust. Property is usually transferred to the trust by the grantor, but there is a wide variation as to the timing of the funding of the trust.

- A **funded trust**, also termed **inter vivos trust**, is one which is formed during the life of the grantor and to which property is transferred immediately after formation of the trust. The property could be in almost any form, such as cash or securities, personal property, real estate, insurance policies or business interests.
    - The **revocable**, or living trust, is a sub-type of the funded trust. This will be discussed in further detail below.
    - The **irrevocable** trust is the other sub-type of funded trust, also detailed below.
- An **unfunded trust**, also called a **standby trust**, is one that is established currently, but into which the intended assets are to be transferred sometime in the future, perhaps upon a triggering event such as the death of the grantor.
- A **testamentary trust** is one which is formed under a will or final testament. It does not exist during the grantor's lifetime but is created upon the grantor's death. The term "springing trust" is also used to describe this type of trust as it "springs" into being upon the death of the grantor. It's funded by the estate executor, who is instructed by the will to transfer designated assets into the trust. It can also be funded through beneficiary designation, where the named beneficiary of the life insurance or pension plan is the testamentary trust. Note that assets of a testamentary trust are generally included in the gross estate of the decedent, and some tax benefits may be lost by naming a trust as a beneficiary rather than an individual.

Trustee

The trustee is the person responsible for managing and administering the trust. Trustees are often required to make a declaration (often by signing the trust agreement or contract) that they accept the trust property as a trustee or guardian of the property. A trustee may be the grantor, a friend or family member, an investment professional, an attorney or a bank trust department. An important legal requirement to serve as a trustee is that the individual have the legal capacity to accept ownership of trust property. Thus, a minor or incompetent person should not be chosen as trustee. It's often a good idea for the grantor to designate successor trustees in the event the first named trustee becomes unwilling or unable to fulfill their duties as trustee. This is of particular importance if the trust is expected to exist for several years or even multiple generations. In this situation, it may be preferable to appoint an institution as trustee, despite the additional cost.

The trustee will generally hold **legal title** to the assets in the trust but is not granted **beneficial title**. Such beneficial title to the trust property is held by the beneficiaries of the trust. The trustee is obligated with specific duties associated with the management of that property and may hold certain powers concerning the disposition of that property. But that property is held in trust for the named beneficiaries of the trust. They alone hold the right to benefit from the income or principal value of those assets. The trustee owes the beneficiaries a **fiduciary duty** to manage the assets in a way to maximize those benefits.

The grantor should carefully consider the selection of the trustee. The trustee must maintain and invest the property, must keep accounts, and must manage and distribute the trust assets in the best interests of the beneficiaries. If the trustee is also one of the beneficiaries, as we frequently see with family trusts and testamentary trusts, the potential for conflict of interest is obvious. A better solution may be to name co-trustees, having both a professional trustee, such as a bank, and a nonprofessional, such as a family member, working together to manage the assets.

Beneficiary

The beneficiary of a trust is the person or persons who are designated in the trust document to receive the benefits and advantages of the property that has been transferred to the trust by the grantor. It's important that the persons who are beneficiaries can be determined. The description should be clear and certain, and it may need to be updated frequently as family or other circumstances change. Use of vague terms such as "my descendants" or "my nieces and nephews" may be too broad or generalized to prevent challenges to the distribution of trust assets. In addition, it's usually advisable to name contingent or alternate beneficiaries to provide for any primary beneficiaries who may have predeceased the grantor.

Frequently, beneficiary interests are split up over time. There may be **income beneficiaries**, who have the right to receive income, profits and other distributions from the trust for the duration of their lives. At the expiration of the life interests, the trust document directs the trustee to then distribute the trust assets to the **remainder beneficiaries**. Upon completion of this final distribution, the trust terminates.

Beneficiaries can be charities as well. Again, the designation of the charitable beneficiary must be clear and precise. In addition, it's essential that the qualification of the organization as an eligible charity be confirmed beyond the shadow of a doubt. It's advisable to contact the charity, confirm the name and principal business address and request a copy of the IRS letter the charity received in approving its tax-exempt status. This document should become part of the permanent trust papers. It may also be advisable to designate successor charities.

Purpose or intent of the trust

Every trust has a purpose or intent that motivates the grantor to set up the trust in the first place. There are few restrictions (other than legality) on the grantor's intent. The purpose of the trust can relate to benefiting an individual or group of individuals (including the grantor themselves, a spouse or other family members), providing for the professional management of assets, such as real estate, a business or investments, or to achieving certain tax benefits, such as making a charitable deduction, loweing tax liability or minimizing capital gains.

The **trust agreement**, also termed the trust document, trust deed or trust instrument, is the single most important document in the administration of all trusts. It's the legal contract through which the grantor vests the ownership rights of the assets to the trust, and it names the beneficiaries of the trust. It also states the purpose for which the trust is established and delineates the powers and limitations of the grantor, the trustee and the beneficiaries. The provisions listed in this document are also essential for the correct classification of the type of trust and the ultimate tax treatment of the trust. The tax professional should always request a copy of the trust agreement before preparing the trust return.

Types of Trusts

Trusts can be as varied as the people who set them up. Many estate planners, insurance company agents and financial planners create their own names for trusts in order to appear to have some unique or proprietary type of offering that others do not. Unfortunately, that simply serves to make the job of analyzing the type and purpose of the trust more difficult. It's important to read past the hype and ask questions about the basic structure and purpose of the trust. We'll present a listing of the most common types of trusts using a few different classification criteria including time of formation, beneficiaries, powers of trustees or beneficiaries, tax features, type of assets held and purpose of the trust.

Inter vivos trust

Inter vivos (Latin, between the living) is any trust set up during the grantor's lifetime, also often called a **living trust**. The underlying intent of the grantor may be to avoid probate, since assets transferred into the trust during the grantor's lifetime are excluded from probate. The desired outcome may be to avoid the extra cost or potential for public scrutiny of that court action. If all significant assets are transferred to the trust prior to death, the function of the will is simply to provide a safety net for any overlooked items.

- As we will see, inter vivos trusts may be revocable or irrevocable.
- Common types of inter vivos trusts are the living trust, family trust, funded trust, charitable remainder trust, children's' trust and insurance trust.

Testamentary trust

Any trust which arises upon the death of the grantor, created through explicit instructions in their last will and testament, is a testamentary trust. Generally, the assets of the trust must pass through probate and are usually included in the taxable estate of the descendant. The intent of a testamentary trust is often to provide for young children (and irresponsible adults) or special needs individuals, or as a legacy for future generations. They are also frequently used in so-called blended families to ensure that stepchildren or other acquired relatives do not receive benefits ultimately desired to be provided to blood relatives.

- ◦ All testamentary trusts are irrevocable.
- ◦ Common types of testamentary trusts are a spousal trust, bypass trust, charitable lead trust, special needs trust and spendthrift trust.

Note: Many trusts have been designed with an intent to keep the assets of the decedent from being included in their taxable estate. Over the past two decades, the estate tax exemption has ranged from $600,000 (with a top tax rate of 55%) to the current exemption amount of $12.06 million for estates created in 2022 (with a top tax rate of 37%). While it may seem pointless for most individuals to be concerned with estate taxation, the Tax Cuts and Jobs Act is not forever. It's slated to expire after 2025, and it is entirely possible that the exemption amount will plummet to its old levels at that time. Additionally,15 states and the District of Columbia have an estate tax, and another six have an inheritance tax. Thus, trusts will continue to play an important role in estate and legacy planning for years to come.

Revocable trust

Any inter vivos trust in which the grantor retains the right to modify, change or revoke any provision of the trust agreement is a revocable trust. Often the grantor is also the first trustee and may even be the sole beneficiary, at least until their death. In general, since the grantor has free rights to move assets in and out of the trust, it's considered a disregarded entity for tax purposes. The income from the trust must be included on the grantor's individual income tax return, and the value of those assets will be included in the grantor's taxable estate. However, the assets do avoid probate.

A key concept to keep in mind is that a revocable trust becomes an irrevocable trust upon the death of the grantor. In fact, a new federal tax ID number should be obtained upon the death of the grantor. Also, assets transferred to a revocable trust are generally considered an incomplete gift for basis purposes and will usually receive a step up in basis upon the grantor's death.

- Common types of revocable trusts are a living trust, loving trust, family trust, grantor trust, and shared or joint living trust.

Irrevocable trust

Any type of trust in which the grantor generally relinquishes the right to change or terminate the trust is an irrevocable trust. In most instances, assets placed into the trust are considered a completed gift, and those assets are excluded from probate as well as from inclusion in the grantor's estate. When tax considerations are important, the trust is likely to be irrevocable. The grantor may be permitted extremely limited rights under an irrevocable trust. They may be permitted to replace an institutional trustee with another institution. Some powers can be given to others, such as powers of appointment or discretionary distribution powers (sprinkle trust). It may be possible to change the trust if every person with any interest in the trust (grantor, trustees and current beneficiaries) agree to the change. Note, however, these features do not come easily and frequently require court action. Careful consideration should be given to the permanence of an irrevocable trust before entering into such arrangement.

- Another feature of the irrevocable trust that should be considered is the taxation of trust income. If the trust arrangement requires that all items of assets and income be held in the trust until a future date, that income will be taxable to the trust. Unfortunately, the income tax rate schedule for trusts is quite compressed in comparison to the individual income tax rate, with the trust being subject to the 37% tax rate for taxable income above just $13,450 in 2022. Trusts are also subject to the net investment income tax (NIIT) as well as alternative minimum tax (AMT).

Grantor-benefit trust

Any trust that is designed primarily for the benefit of the grantor is a grantor-benefit trust. These can include both revocable and irrevocable trusts, although the revocable trust is the most common type of grantor-benefit trust. Such trusts are set to provide benefits in case of disability, to provide a modicum of protection from creditors and to manage one's assets. In addition, the grantor benefit trust may contain provisions for the distribution of assets to other trusts, such as an education trust or a bypass trust.

- Common types of grantor-benefit trusts are a qualified personal residence trust (QPRT), a grantor-retained annuity trust (GRAT), a charitable lead trust (CLT), a charitable remainder trust (CRT) and an asset protection trust (APT).

Spouse and/or children-benefit trust

Any trust designed primarily to benefit the grantor's spouse or children is a spouse and/or children-benefit trust. The primary function of these trusts is to provide maximum estate tax savings. As a result of the increases in the estate exemption and the permanence of the portability of deceased spouse unused exemption (DSUE), there has been a dramatic reduction of the need for these types of trusts. In the past, the unlimited marital deduction was a cornerstone of estate planning for married couples. Intricate trusts were often constructed, (A/B trusts, marital trusts, bypass trusts, etc.), to take advantage of the unlimited marital deduction for the first to die, without placing an undue tax burden on the surviving spouse or ultimately on their estate.

One type of spouse benefit trust, the qualified domestic trust (**QDOT**), is of particular benefit for those instances where one spouse is a non-U.S. citizen. In general, the unlimited marital deduction does not apply when one spouse is a non- citizen. The QDOT provides for all assets of the first-to-die spouse to be placed into the trust, and the surviving spouse is eligible to receive all income produced by those assets annually. The assets then go to the children upon the occurrence of the second spouse's death, but they are not included in that spouse's estate. While highly complex and subject to detailed IRS rules, a QDOT may be useful for estate planning in these circumstances.

Special needs trust

An irrevocable trust established to benefit a disabled or chronically ill individual is a special needs trust. The trust must be carefully designed and administered to allow the beneficiary to receive income without reducing their eligibility for the public assistance disability benefits provided by Social Security, Supplemental Security Income, Medicare or Medicaid. A special needs trust, also called a supplemental needs trust, is a popular strategy for those who want to help someone in need without taking the risk that the person will lose their eligibility for programs that require their income or assets to remain below a certain limit. Generally, an individual can be a beneficiary of only one special needs trust.

Charitable trusts

Irrevocable trusts designed for individuals making large donations to qualified charities but not willing to part entirely with the benefits of that property are called charitable trusts. The grantor donates property (real estate, stock, business interests and so forth) to a charity and receives a charitable contribution tax deduction in the year of the donation.

- In a **charitable remainder trust (CRT)**, the income generated from the donated property may be paid to the grantor for life, thereafter to their spouse or other designated income beneficiary for their life. After the death of the final income beneficiary, the charity will obtain full use and benefit of the donated property.

- Essentially the mirror image of the CRT, a **charitable lead trust (CLT)** provides a stream of income to the charity. The remainder interest is distributed to the designated beneficiaries at some future date, termed the "expiration date" of the charitable beneficiaries' interest. A CLT may be established inter vivos or may be a testamentary trust. Design of a CLT is burdensome, costly and difficult. The current IRS scrutiny upon donor advised funds held by tax-exempt organizations may ultimately spell their demise, but a carefully designed and administered CLT can have long-term benefits.

Medicaid qualifying trust

An irrevocable trust, similar to an asset protection trust, designed to shield assets from claims related to medical care and health care facilities is called a Medicaid qualifying trust. To qualify for Medicaid as it relates to long-term care, the individual is permitted to retain an extremely limited amount of assets. The rules concerning what assets may be excluded, the value permitted for retained assets and the lookback concerning transfer of those assets varies from state to state. The Medicaid qualifying trust should be designed in consultation with an elder-care specialist in the state in which the trust will operate.

Trust Taxation

The threshold issue in determining how a trust will be taxed is to determine if the trust income is to be reported on the individual income tax return of the grantor or beneficiary, or if it is to appear on its own trust tax return, Form 1041, U.S. Income Tax Return for Estates and Trusts. If the trust is characterized as a grantor trust, the income tax consequences are generally the same as any other income of an individual. If the trust is to be taxed as a separate entity, it (generally the trustee) will file its own income tax return, make its own elections, pay its own tax, etc.

In general, a **grantor trust** is disregarded as a taxable entity. All items of income, expense, gain or loss are reported on the individual income tax return of the grantor. Although the IRS generally does not require a tax ID number for revocable living trusts, some grantor trusts may obtain a federal tax identification number to satisfy banking and other regulations. Most grantor trusts do not file an actual income tax return at the federal level, but state tax laws should be consulted as well.

Note: Recall that the grantor or revocable living trust becomes irrevocable upon the death of the grantor. This event also requires the (former) living trust to obtain a new federal tax identification number. The name of the trust remains unchanged, however. Thus, the "John Doe Living Trust" may indeed be an irrevocable trust if John Doe, the grantor, is deceased. Do not judge a trust by its title!

Before diving deeper into the concept of trust taxation, let's deal with some confusing terminology:

- **Simple trust** – a trust that is required to distribute all its income annually (regardless of whether the trustee actually does so), does not distribute principal and has no provisions in the trust instrument for charitable contributions.

- **Complex trust** – defined as any trust that is not a simple trust. If a trust's income is required or permitted to be accumulated, it's generally considered a complex trust. A trust may be classified as a simple trust one year and as a complex trust in another year. All trusts are considered complex trusts in the final year, because distribution of corpus to the remainder beneficiaries is generally the final act of the trust document.
- **Corpus** – literally the body of the trust. It's also termed "trust principal" or "trust assets." Corpus is the total value of the property conveyed into the trust for management and administration by the trustee.
- **Income** – the profits or earnings made or produced by property after it is conveyed into the trust. If income is accumulated by the trust, and the trust recognizes the income, that amount is then considered part of the corpus of the trust in future years.

Note: Do not confuse income with gain! **Income** is profit or earnings, whereas **gain** is an increase in worth or size. The dividends paid by stocks held in a trust would be considered income. The sale of stock at more than its cost basis would be a capital gain. The act of selling the stock is treated as a mere "rearrangement" of the corpus of that trust and would not be included in the current income of the trust.

The Trust Agreement

The trust agreement, which establishes the trust in the first place, is an agreement between the grantor and a trustee. It is a contractual arrangement whereby the grantor gives the trustee legal title to the trust assets and, in exchange, the trustee agrees to hold those assets for the benefit of the beneficiary. The beneficiary need not be, and usually is not, a party to the trust agreement.

While there is a wide variation in trust language and provisions, all trusts are required to contain at least the following elements:

- Trusts must identify the grantor, trustee and beneficiary. The grantor and trustee must be identified because they are parties to the contract. The beneficiaries can be named individually, or they can be named as a class, for example "the children and grandchildren of the grantor."
- The trust "res" must be identified. "Res" is a Latin word for "thing." That is, to be valid, a trust must have something in it! It doesn't have to be much, and more can be added later, but at the outset of the trust agreement, something must be transferred to the trust.
- The trust agreement must contain the signature of both the grantor and the trustee. Many states require the signature to be notarized or witnessed by two individuals who would then also sign the document as witnesses. Backup trustees, beneficiaries and other parties potentially involved in trust operations need not sign the trust document. In fact, they need not know of its existence.

To further our understanding of trust agreements, following is an edited version of a typical revocable trust. While there is no such thing as a standard trust form, this sample trust agreement contains the elements common to most trust documents. Note that, of course, this is a fictitious document, and none of the names or provisions mentioned are to be construed as real or enforceable.

Declaration of Trust

Part 1. Trust Name

This revocable living trust shall be known as the **Tammy Trustmaker Revocable Living Trust.**

Part 2. Declaration of Trust*

Tammy Trustmaker, called the grantor, declares that she has transferred and delivered to the trustee all her interest in the property described in Schedule A attached to this Declaration of Trust. All that property is called the "trust property." The trustee hereby acknowledges receipt of the trust property and agrees to hold the trust property in trust, according to this Declaration of Trust.

The grantor may add property to the trust.

**This article names the grantor and declares the transfer of specific property into the trust. It also gives the grantor the power to transfer other property into the trust.*

Part 3. Terminology*

The term "this Declaration of Trust" includes any provisions added by valid amendment.

**This allows the grantor, Tammy, to amend the trust, such as to establish sub-trusts for minor children.*

Part 4. Amendment and Revocation*

A. Amendment or Revocation by Grantor

The grantor may amend or revoke this trust at any time, without notifying any beneficiary. An amendment must be made in writing and signed by the grantor. Revocation may be in writing or in any manner allowed by law.

B. Amendment or Revocation by Other Person

The power to revoke or amend this trust is personal to the grantor. A conservator, guardian or other person shall not exercise it on behalf of the grantor, unless the grantor specifically grants a power to revoke or amend this trust in a Durable Power of Attorney.

**This further empowers the grantor with the ability to amend or even revoke this trust at any time and specifies the method to do so. It also vests the grantor solely with the power to revoke or amend unless the grantor provides the power to another via a Durable Power of Attorney.*

Part 5. Payments From Trust During Grantor's Lifetime*

The trustee shall pay to or use for the benefit of the grantor as much of the net income and principal of the trust property as the grantor requests. Income shall be paid to the grantor at least annually. Income accruing in or paid to trust accounts shall be deemed to have been paid to the grantor.

**This article addresses the income produced by the trust during the grantor's lifetime. It has been established that this is a revocable trust, so all income of the trust, whether paid to the grantor or accrued in trust accounts, is deemed to have been paid to the grantor and is taxable on the grantor's individual tax return.*

Part 6. Trustees*

A. Trustee

Tammy Trustmaker shall be the trustee of this trust.

B. Trustee's Responsibilities

The trustee in office shall serve as trustee of all trusts created under this Declaration of Trust, including children's sub-trusts.

C. Terminology

In this Declaration of Trust, the term "trustee" includes successor trustees or alternate successor trustees serving as trustee of this trust. The singular "trustee" also includes the plural.

D. Successor Trustee

Upon the death or incapacity of Tammy Trustmaker, the trustee of this trust and of any children's sub-trusts created by it shall be Tim Trustmaker. If Tim Trustmaker is unable or unwilling to serve as successor trustee, Ann Smith shall serve as trustee.

E. Resignation of Trustee

Any trustee in office may resign at any time by signing a notice of resignation. The resignation shall be delivered to the person or institution who is either named in this Declaration of Trust or appointed by the trustee under Section F of this Part, to next serve as the trustee.

F. Power to Appoint Successor Trustee

If no one named in this Declaration of Trust as a successor trustee or alternate successor trustee is willing or able to serve as trustee, the last acting trustee may appoint a successor trustee and may require the posting of a reasonable bond, to be paid for from the trust property. The appointment must be made in writing, signed by the trustee and notarized.

G. Bond

No bond shall be required for any trustee named in this Declaration of Trust.

H. Compensation

No trustee shall receive any compensation for serving as trustee unless the trustee serves as a trustee of a child's sub-trust created by this Declaration of Trust.

I. Liability of Trustee

With respect to the exercise or non-exercise of discretionary powers granted by this Declaration of Trust, the trustee shall not be liable for actions taken in good faith. Such actions shall be binding on all persons interested in the trust property.

**This lengthy article provides the guidelines for trustees, including the responsibilities they are charged with; who is to serve as successor trustee upon the grantor's death or incapacity; resignation of a successor trustee; appointment of additional successor trustees; and bonding, compensation and liabilities of the trustee.*

Part 7. Trustee's Management Powers and Duties*

A. Powers Under State Law

The trustee shall have all authority and powers allowed or conferred on a trustee under Arizona law, subject to the trustee's fiduciary duty to the grantors and the beneficiaries.

B. Specified Powers

The trustee's powers include, but are not limited to:

1. The power to sell trust property, and to borrow money and to encumber trust property, including trust real estate, by mortgage, deed of trust or other method.
2. The power to manage trust real estate as if the trustee were the absolute owner of it, including the power to lease (even if the lease term may extend beyond the period of any trust) or grant options to lease the property, to make repairs or alterations and to insure against loss.
3. The power to sell or grant options for the sale or exchange of any trust property, including stocks, bonds, debentures and any other form of security or security account, at public or private sale for cash or on credit.
4. The power to invest trust property in every kind of property and every kind of investment, including but not limited to bonds, debentures, notes, mortgages, stock options, futures and stocks, and including buying on margin.
5. The power to receive additional property from any source and add it to any trust created by this Declaration of Trust.
6. The power to employ and pay reasonable fees to accountants, lawyers or investment experts for information or advice relating to the trust.
7. The power to deposit and hold trust funds in both interest-bearing and non-interest-bearing accounts.
8. The power to deposit funds in bank or other accounts uninsured by FDIC coverage.

9. The power to enter into electronic fund transfer or safe deposit arrangements with financial institutions.
10. The power to continue any business of the grantor.
11. The power to institute or defend legal actions concerning this trust or the grantor's affairs.
12. The power to execute any documents necessary to administer any trust created by this Declaration of Trust.
13. The power to diversify investments, including authority to decide that some or all the trust property need not produce income.

**Another lengthy article, this one clearly delineates the powers vested in the trustee. Many trust documents are not this specific, citing simply "fiduciary powers," or the "Prudent Man Rule." It's interesting to note that in specific power #4, the trustee is permitted to invest in "every type of investment, including but not limited to bonds, debentures, notes, mortgages, stock options, futures and stocks, and including buying on margin." Generally, some of these types of investments would be considered too risky to be acceptable under fiduciary guidelines. Note that the trustee is also empowered to "continue any business of the grantor." This is a common reason that a trust may be established in the first place — to ensure business continuity after the death of the grantor.*

Part 8. Incapacity of Grantor*

If the grantor becomes physically or mentally incapacitated, regardless of whether a court has declared the grantor incompetent or in need of a conservator or guardian, the successor trustee named in Part 6 shall be trustee.

The determination of the grantor's capacity to manage this trust shall be made by Celia Gutierrez. The successor trustee shall, if necessary, ask Celia Gutierrez to state, in writing, an opinion as to whether the grantor is able to continue serving as trustee. The successor trustee may rely on that written opinion when determining whether to begin serving as trustee.

If the successor trustee is unable, after making reasonable efforts, to obtain a written opinion from Celia Gutierrez, the successor trustee may request an opinion from Danny Wolfson and may rely on that opinion.

If the successor trustee is also unable, after making reasonable efforts, to obtain a written opinion from Danny Wolfson, the successor trustee may request an opinion from Cyndi Steinberg and may rely on that opinion.

If the successor trustee is unable, after making reasonable efforts, to obtain a written opinion from Celia Gutierrez, Danny Wolfson or Cyndi Steinberg, the successor trustee may request an opinion from a physician who examines the grantor and may rely on that opinion.

The trustee shall use any amount of trust income or trust property necessary for the grantor's proper healthcare, support, maintenance, comfort and welfare, in accordance with the grantor's accustomed manner of living. Any income not spent for the benefit of the grantor shall be accumulated and added to the trust property. Income shall be paid to the grantor at least annually. Income accruing in or paid to trust accounts shall be deemed to have been paid to the grantor.

The successor trustee shall manage the trust until the grantor is again able to manage her affairs. The determination of the grantor's capacity to again manage this trust shall be made in the manner specified just above.

**This rather convoluted article deals with the incapacity of the grantor and the provision for a successor trustee to assume the role while the grantor is living. It goes on to give a lengthy process by which the grantor can be declared incapable of trust management, naming three specific individuals who may establish the grantor's incapacity in writing. Only if all three individuals are unable to give such written opinion is the matter referred to a physician. You'll also note that there is a potential conflict of interest, as Celia Gutierrez is also a contingent beneficiary of the trust (Part 10). You'll also note that, since the grantor is still living, all income produced by trust assets are considered paid to the grantor and must be reported on the individual income tax return, even if they are no longer serving as trustee.*

*Part 9. Death of a Grantor**

When the grantor dies, this trust shall become irrevocable. It may not be amended or altered except as provided for by this Declaration of Trust. It may be terminated only by the distributions authorized by this Declaration of Trust.

The trustee may pay out of trust property such amounts as necessary for payment of the grantor's debts, estate taxes and expenses of the grantor's last illness and funeral.

* *This article specifies what we already know — that the trust becomes irrevocable upon Tammy Trustmaker's death. The trust may then be terminated only upon the distribution of assets as specified in the trust document. The trustee is also authorized to pay the grantor's debts and final expenses out of trust property. A quick glance at Schedule A shows that there is very little liquidity in the trust assets. The trustee may not be able to carry out this provision.*

*Part 10. Beneficiaries**

At the death of the grantor, the trustee shall distribute the trust property as follows:

Tim Trustmaker shall be given Tammy Trustmaker's interest in 100 shares of XYZ Inc. stock. If Tim Trustmaker does not survive Tammy Trustmaker, that property shall be given to Celia Gutierrez.

Bobby Bluestone shall be given Tammy Trustmaker's interest in the trust property not otherwise specifically and validly disposed of by this Part. If Bobby Bluestone does not survive Tammy Trustmaker, that property shall be given to Tim Trustmaker.

******This article clearly spells out who is to receive the assets of the trust upon the death of Tammy Trustmaker. It also names contingent beneficiaries if a beneficiary should predecease Tammy.*

Part 11. Terms of Property Distribution*

All distributions are subject to any provision in this Declaration of Trust that creates a child's sub-trust or a custodianship under the Uniform Transfers to Minors Act.

A beneficiary must survive the grantor for 120 hours to receive property under this Declaration of Trust. As used in this Declaration of Trust, to survive means to be alive or in existence as an organization.

All personal and real property left through this trust shall pass subject to any encumbrances or liens placed on the property as security for the repayment of a loan or debt.

If property is left to two or more beneficiaries to share, they shall share it equally unless this Declaration of Trust provides otherwise. If any of them does not survive the grantor, the others shall take that beneficiary's share, to share equally, unless this Declaration of Trust provides otherwise.

**This article clarifies some of the legal parameters of the distribution of the assets of the trust. Note that some of this is "boilerplate" language and may not be applicable to this specific trust.*

Part 12. Custodianships Under the Uniform Transfers to Minors Act*

Any property to which Bobby Bluestone becomes entitled under Part 10 of this Declaration of Trust shall be given to Tim Trustmaker, as custodian for Bobby Bluestone under the Arizona Uniform Transfers to Minors Act, until Bobby Bluestone reaches the age of 21. If Tim Torres is unable or ceases to serve as custodian, Ann Smith shall serve as custodian.

** It appears that Bobby Bluestone is a minor as of the formation of this trust. This article provides for the establishment of a sub-trust in which Tim Torres is to act as custodian under the Arizona UTMA laws until Bobby turns 21. (It appears that Tammy was a resident of Arizona when this trust was written.) You may note that, again, there is no liquidity in these assets to pay for property taxes, maintenance and upkeep of the properties.*

Part 13. Grantor's Right to Homestead Tax Exemption*

If the grantor's principal residence is held in trust, the grantor has the right to possess and occupy it for life, rent free and without charge except for taxes, insurance, maintenance and related costs and expenses. This right is intended to give the grantor a beneficial interest in the property and to ensure that the grantor does not lose eligibility for a state homestead tax exemption for which she otherwise qualifies.

**Since this is a revocable grantor trust, this provision seems superfluous — Tammy retains full control over the property until her death. The preservation of the state homestead tax exemption is the main focus here.*

Part 14. Severability of Clauses*

If any provision of this Declaration of Trust is ruled unenforceable, the remaining provisions shall stay in effect.

**This is a legal provision only.*

Certification of Grantor

I certify that I have read this Declaration of Trust and that it correctly states the terms and conditions under which the trust property is to be held, managed and disposed of by the trustee, and I approve the Declaration of Trust.

____________________________________ Dated: ______________

Tammy Trustmaker, Grantor and Trustee

Schedule A

Property Placed in Trust

1. 100 shares of XYZ Inc. stock.
2. House at 2100 Fortuna Street, Phoenix, Arizona.
3. Condominium at 57-A Alpine Way, Tahoe City, California.

