SELECTION OF A TRUSTEE;
TAX AND OTHER CONSIDERATIONS†

by

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†This is a chapter from the forthcoming Manual, Trusts and Trust Administration in
Texas to be published by the State Bar of Texas under the editorship of Whitfield J. Collins,
Paul C. Cook and Joseph P. Driscoll. The Manual will be a comprehensive treatment of
trust law and related tax and other problems.
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Bromberg gratefully acknowledges the careful review and valuable comments of Joseph M.
Stuhl and Marvin J. Wise of the Dallas Bar, and Dean Charles O. Galvin of the Southern
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1. BACKGROUND

It is hornbook law that a trust will not be permitted to fail for want of a trustee; the courts will supply one if the grantor does not. This may suggest to some that the trustee is a relatively insignificant figure in the trust. Realistically, though, the selection of the trustee is one of the most important decisions of the grantor, for the trustee must fill the grantor's shoes and carry out his intentions. In states like Texas, where the trustee typically has broad powers and no judicial supervision, it is even more vital that the right kind of person be chosen. Yet the choice is often routinely handled by grantors and their attorneys. This article is designed as a guide to intelligent selection of a trustee.

The trustee may be an individual, a corporation, or a combination of these serving as co-trustees. A corporate trustee is usually a bank
having trust powers, and the individual is normally a friend, relative, attorney or business associate. The individual professional trustee is often found in larger Eastern cities but seldom elsewhere. Nonetheless, some Texas lawyers, accountants and others serve as trustees frequently enough to be at least semi-professional.

So far we have assumed that the selection of the trustee is the settlor’s decision. Frankness dictates recognition that this is not always true. The idea of the trust may have been sold to the settlor by a bank, accountant, lawyer or insurance agent in a package which already included a trustee. For purposes of further discussion we assume that this has not happened, and that the choice of the trustee is a matter for deliberation. The lawyer has an important function in advising the settlor in this respect, as in others relating to the trust.

The intelligent selection of a trustee involves careful consideration of the entire nature of the trust. While it is easy to draw up a list of qualities for a good trustee (it sounds like a Boy Scout oath), generalities will not do the job. There is no universal formula for a trustee any more than there is a universal form for a trust instrument. We turn then to some of the useful criteria for selecting a trustee, starting with the more general and moving on to those related to particular types of trusts. Later we consider tax factors.

The next section of this discussion proceeds on the assumption that there will be only one trustee. This makes it easier to isolate the relevant qualities. Often, however, the argument becomes unnecessarily polarized. As we conclude in sections III and IV below, it is

1 See note 6 infra. From 1919 to 1961, Texas corporations with trust powers but without banking privileges could be formed under the general corporate laws, i.e., without the capital requirements and state supervision of regular bank and trust companies. Tex. Rev. Civ. Stat. Ann. arts. 1302(49), 1303b (1945); Gordon v. Lake, 316 S.W.2d 138 (Tex. 1962). This was no longer true after 1961 when the general corporate laws superseded by the Texas Business Corp. Act were repealed; see Tex. Bus. Corp. Act Ann. art. 2.01(B) (4)(b) (1916). However, previously formed "1302(49) and 1303b" trust companies did not lose their existence and could continue to exercise their powers. Op. Att’Y Gen. (Tex.) WW-897 (Aug. 2, 1960). The repealer stated that it did not "impair or otherwise affect . . . the organization or the continued existence of a domestic corporation existing at the time of such repeal . . . provided that any corporation heretofore operating by virtue of ["1302(49) and 1303b"] must meet the qualifications of the Texas Business Corporation Act." Texas Acts 1961, ch. 229, § 2. The meaning of the proviso is far from clear. It may require that trust powers be given up by such corporations. Or it may merely mean that they must bring their internal corporate procedures into line with the Tex. Bus. Corp. Act. The latter view is more consonant with the cited Op. Att’y Gen., and has been adopted by Op. Att’y Gen. (Tex.) WW-1508 (Dec. 20, 1962). Assuming this is the correct view, old "1302(49) and 1303b" corporations may be acquired to serve as trustees where a controlled, low-capital corporate fiduciary is desired. They remain subject to the normally mild supervision of Tex. Rev. Civ. Stat. Ann. art. 1524a (1962).

2 An attorney who agrees to serve as trustee should be aware of possible conflicts of interest. For example, in an inter vivos arrangement, his professional duty to his client (the grantor) may clash with his fiduciary duty to the trust and its beneficiaries.
frequently desirable to have two or more trustees combining the characteristics desired. The reader should keep this in mind as he moves through the next section.

2. CRITERIA FOR SELECTING A TRUSTEE

2.1 General Criteria

(A) Legal There are surprisingly few legal restrictions on the choice of a trustee. It may even be that he need not have capacity to contract, and thus might be an incompetent or minor. Obviously, an incompetent is ruled out on practical grounds, and a minor usually will be. More importantly, a wife can be a trustee despite coverture. Non-resident citizens can be used, although their remoteness may present physical complications, and perhaps double state taxation.

Domestic corporations can serve if they have trust powers or purposes. In addition to the usual banks and trust companies, non-profit corporations often act as trustees of trusts within their charitable, educational or similar provinces. Foreign corporations may have to qualify locally before they can act and are usually reluctant to do so.

—See Greenought v. Tax Assessors, 331 U.S. 486 (1947) (because one trustee lived in Rhode Island, its intangibles tax applied to stock owned by the trust, although the other trustee, the stock certificate and the trust administration were all in New York).
—Bell County v. Alexander, 22 Tex. 351 (1858). Except as indicated in note 1 supra, the only corporations now expressly permitted to have trust powers or purposes in Texas are national banks, and state banks and trust companies all organized with substantial capital and subject to considerable supervision and regulation. 12 U.S.C. § 248(k) (1964) (national banks); Tex. Rev. Civ. Stat. Ann. arts. 342-301(c), (d) (1959) (state banks), 1513a, § 2 (1962) (state trust companies).
—See note 6 supra.
—Tex. Rev. Civ. Stat. Ann. art. 1396-2.01.A (1962) lists a non-exclusive variety of purposes for which non-profit corporations may be organized. Coupled with general powers to hold property, invest and contract, and incidental powers to carry out their purposes, art. 1396-2.02.A, these should amply support their capacity to be trustees for their purposes. A specific but narrow power to hold property in trust for certain affiliated organizations, art. 1396-2.02.A(16), may create some negative implication. On the other hand, the authorization to call the governing body either a board of directors or a board of trustees, art. 1396-2.14, adds some indirect support to the trust concept. Non-profit corporations have been recognized as trustees in other states; see 1 Scott, Trusts 717 n.2 (2d ed. 1956); Jones v. Habersham, 107 U.S. 174 (1883). An agreement with a nonprofit corporation is illustrated by Form H in the Appendix.

We understand that at least one probate court declines to appoint nonprofit corporations as guardians within the general scope of their corporate purposes. The premise is that art. 1513a, note 6 supra, must be complied with. The same article covers trustees as well as guardians, although the largely nonjudicial operation of trusts in Texas makes it unlikely that the question will come up in the same way.

—See Tex. Bus. Corp. Act Ann. art. 8.01B(11) for certain local activities of a foreign trustee which do not require local qualification; Michigan Trust Co. v. Turney, 36 S.W.2d 787 (Tex. Civ. App. 1931) error ref. (allowing attorney's fees for services to local ancillary
so because of the consequent susceptibility to local taxation and service of process. Alien individuals or corporations meet legal barriers to property ownership, which normally make them ineligible.

Apart from tax problems there is nothing to keep the grantor from being the trustee, and he is often the logical choice. The Texas Trust Act specifically provides that a beneficiary may be the trustee of a testamentary trust and a co-trustee of any trust. The negative implication is strong that a beneficiary cannot be the sole trustee of an inter vivos trust. There are tax problems here too.

(B) Practical and Personal  Administering a trust is a complicated operation and requires many talents. Foremost among these is probably sound judgment. This includes getting relevant information and advice and acting wisely and firmly on it. An indecisive person may be paralyzed by a trustee’s heavy responsibilities. Others, ordinarily prudent, may become reckless in handling someone else’s property.

Usually, though not always, a grantor will want a trustee who is impartial and not swayed by favoritism or the personal persuasions of a beneficiary. A fortiori, it is questionable to make a beneficiary a trustee with power to prefer himself over other beneficiaries. Financial responsibility is desirable in a trustee, since there is reason to believe that more skillful and careful administration will be given administrator of local assets where foreign corporate trustee failed to qualify). In general, see Administration of Out-of-State Assets by Corporate Trustees, 103 Trusts & Estates 997 (1964); Annots., Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary Trustee, 65 A.L.R. 1237 (1930); Eligibility of Foreign Corporation to Appointment as Trustee of Inter Vivos Trust, 82 A.L.R. 2d 946 (1962).

A fairly common and generally acceptable alternative is to name as trustee for local assets an individual who is an officer of the foreign corporation. See Casner, Estate Planning 1160-61, 1654 (3d ed. 1961 & Supp. 1964).

11 See Tex. Rev. Civ. Stat. Ann. arts. 166-67 (with some exceptions, aliens cannot acquire legal or equitable interest in Texas land), 177 (an alien has in Texas only such rights to personal property as his country gives to United States citizens). These were repealed in 1965 with a statement that aliens shall enjoy the same property rights as citizens. Tex. Laws 1965, ch. 61, 2 Vernon’s Tex. Sess. L. Serv. 146 (1965).

12 Section 2.3 infra.


14 Id. at 7425b-7.C. By saying that he may be a beneficiary,” the act suggests that he may not be the sole beneficiary.

15 Id. at 7425b-7.F.

16 Without benefit of statutes like those cited in the two previous notes, the case law doctrine of merger would probably operate to the extent that legal and equitable interests were in the same person; the doctrine is apparently preserved where a beneficiary is the only trustee of an inter vivos trust. If one of several beneficiaries were sole trustee of an inter vivos trust, there would probably be only a partial merger (i.e., of his interests), and the trust would remain valid for the other beneficiaries.

17 Section 2.3 infra.

18 For example, see the elaborate procedure in Texas Bankers Ass’n Trust Section, Texas Trust Operations Manual (1960 with Supp. 1964). Many trusts can be handled more simply.

19 A corporate trustee does not automatically qualify. For some of the conflicts of interest to which corporate trust personnel are exposed, see Harris, Code of Ethics for Trustees, 103 Trusts & Estates 1186 (1964).
by a trustee who has accumulated assets of his own and knows they are at some risk of liability for his misconduct. A bond offers some protection, but the attendant costs and restrictions usually make it undesirable. A bond is certainly no substitute for integrity and honesty in the trustee. If the grantor is not willing to have a particular trustee without bond, he probably does not have enough confidence to name him trustee at all. Nevertheless, the possibility of future disloyalty should be weighed against the trouble and expense of a bond.

Experience is a valuable attribute of a trustee, although it need not be experience in trust administration if it is experience relevant to the particular trust. For farm assets and operations, a farmer may be a better trustee than a city bank. However, trust experience is extremely valuable because of the skill and insight developed. Closely related is knowledge of what to do and how to do it. Business, investment, tax, legal, accounting and other aspects are involved here. However, the trustee need not have it all himself if he knows what he needs and how to get it from those who have it. An intelligent individual, adequately advised, can serve quite as well as an experienced institution, and perhaps more economically and flexibly.

Facilities are necessary for bookkeeping, safe handling of securities and other trust matters. As with knowledge, it is not essential that the trustee have the facilities himself, so long as he can command them when needed. Thus a part-time accountant and a safe deposit box will suffice in some situations.

Permanence and continuity are important to any trust, and moreso to the longer ones. These factors appear to weigh heavily in favor of the corporate trustee. Yet, closer examination reveals that, while the corporation has legal continuity in theory, its operational continuity in fact depends on succession of individual officers and employees. Personnel turnover can be disruptive in a corporate trustee just as with individual trustees. The problem is likely to be more acute in a small trust department than in a larger one. In most cases the corporate trustee compensates for turnover by having several persons familiar with each account, and by collective experience, precedents and information. Individuals are seldom able to match this. But it should be realized that succession is always a need. In one sense, the question is whether the succession is to be provided by the grantor

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(through names and procedures) or by the management of the corporate fiduciary.

Along with permanence, the trustee should have *adaptability*. Needs, circumstances and techniques change with time, often radically. The trustee must know when and how to change with them.

The trustee must be *conscientious* and *loyal* in the highest degree. His position is full of responsibility. Unless he can and will carry it out devotedly, he is not the man for the job. To sum up in a sort of tautology, the trustee must be *trustworthy*; the grantor must trust him as well as entrust property to him.

(C) **Cost**

Texas is one of the relatively few states without statutory patterns of compensation for trustees. Consequently, different trustees may make different charges, and it behooves the trustor to compare and consider them. Other things being equal, he will want the lowest possible costs in this respect.

Corporate trustees used to have fairly uniform charges, often published. They were probably not as uniform in fact as in appearance because of concessions through bargaining. As a result of an anti-trust scare, less information is published, and fee formulas are more varied. However, the actual charge is likely to be about the same at most institutions in a given locale. In our experience, the common figure is around one-half per cent of assets per annum, a little higher on the first $25,000 to $50,000, and rather lower on assets over $500,000 or $1,000,000. However, in some localities, the fee may be a percentage of income without regard to asset value. To some extent,

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21 Considerations of this sort are occasionally used to disparage corporate fiduciaries; their pressures to operate profitably may result in efficient but rule-of-thumb procedures. See, e.g., Shattuck & Farr, An Estate Planner's Handbook 147 (2d ed. 1953). For an example of the pressure, see Ferguson, Trust Department Profits—At What Expense?, 102 Trusts & Estates 1173 (1963); Ferguson, Trust Profits—Agony and Ecstasy, 104 Trusts & Estates 905 (1967).

22 See Bogert, Trusts and Trustees § 973 (2d ed. 1962) for a review of the statutes in other states. See Bogert, supra at pp. 352-58 for prevailing charges of trust companies in various cities.

23 Reasonable fees are deductible in computing the trust's income tax. Tress. Reg. § 1.212-1(i) (1961). Until 1961, trustees' commissions for distributions of corpus were chargeable against corpus in trust accounting; all other trustees' compensation was chargeable against income. Tex. Rev. Civ. Stat. Ann. art. 7425b-36A, B (1960). By virtue of a 1963 amendment, all trustee's compensation is chargeable against income, principal or partially against each, as the trustee shall in its discretion determine to be "just and equitable." Ibid. (Supp. 1965).

24 United States v. Northwestern Nat'l Bank, Trade Cas. ¶ 71,020 (D. Minn. 1964); United States v. First Nat'l Bank, Trade Cas. ¶ 71,021 (D. Minn. 1964); United States v. Duluth Clearing House, Trade Cas. ¶ 71,022 (D. Minn. 1964). See United States v. Hunterdon County Trust Co., Trade Cas. ¶ 70,263 (N.D. N.J. 1962) (consent injunction against fixing uniform service charges; first anti-trust case on bank charges). None of these cases involved trust fees, but banks naturally became skittish about all their charges. The situation was brought home to Texas by a grand jury investigation of Dallas banks; see N.Y. Times, Jan. 3, 1962, p. 39, col. 1; Jan. 5, 1962, p. 39, col. 1. No indictment resulted.
fees are negotiable, particularly for good customers of a bank. In addition, it is sometimes possible to obtain a commitment as to future fees, e.g., for a testamentary trust at the time the will is drawn.

Attorneys, accountants and other individuals may serve for the same sort of fee, or for an hourly charge (usually comparable to their professional rates), which makes the total cost much less predictable. In all instances it is important to find what services are covered by the designated charge and what will be extra, e.g., initiation and termination, legal services, tax services, accounting services, real estate or oil property management, etc.

Relatives, beneficiaries, business associates, or close friends will often serve without compensation. Such an arrangement should be weighed carefully to see if the trustee will give the trust the paramount attention it will need, or will follow the natural tendency to slight it for more remunerative matters. Free services, many lawyers would admit, are worth just about what is paid for them. Moreover, expenses may be incurred by individual trustees for accounting or other services which would be covered by an institution's fee. While there is no necessary correlation between a trustee's charges and his abilities, the settlor should keep in mind that the usual corporate fees are small relative to the losses that might result from inept administration.

2.2 Criteria Related To The Particular Trust

There are many more variations in trusts than we can list here; we attempt to treat only the more prominent differences and the effect they may have on the selection of the trustee.

(A) *Inter Vivos v. Testamentary* Because an inter vivos trust typically comes into effect at once, the grantor is in a better position to choose individual trustees and (to some extent) supervise their conduct. However, tax limitations operate rather severely. Many of these tax limitations do not operate in the selection of testamentary trustees, although a few of them do. The grantor, by hypothesis, is no longer on the scene when the testamentary trust begins to function, so he must have even greater faith in the trustee. Moreover, it may be many years between the drafting of the will and the commencement of the trust, so that named individuals may no longer be available or suitable. In a testamentary trust there is an obvious advantage in having the same person as trustee and as executor;

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25 Section 2.3 (B) *infra.*
26 Section 2.3 (A) *infra.*
coordination is simplified and continuity is maximized. Similarly, with pour-over trusts a common fiduciary is desirable.

(B) Term of the Trust In general the shorter the term of the trust, the broader the possible choice of trustees. Less administration is required, and fewer changes are likely to occur in the trust or the trustees. Thus, a two-year inter vivos charitable trust under section 673(b) of the Internal Revenue Code makes far fewer demands on a trustee than a three-generation testamentary trust. The need for continuity and investment skill is much less. In appraising the term of a trust one must realize the risk of speculating on life expectancies. While statistically accurate, they can be individually misleading. The ailing octogenarian whose life measures the trust may live to be 110.

(C) Discretion Given the Trustee At one extreme, the trustee may be directed to distribute all income to a single beneficiary and have virtually no discretion. At the other, he may have wide discretion to accumulate income or to distribute it (or corpus) in unequal portions among several beneficiaries. Contrary arguments can be made in these situations. Some would urge that the corporate trustee is better suited for the former and the relative or close associate for the latter because of his acquaintance with and understanding of the individual beneficiaries and their problems and needs. Others would insist that the corporate trustee, because of its impartiality, is better suited to deal with the complex situation. The special problems of giving a beneficiary discretion over distributions have already been mentioned.2

(D) Purpose of the Trust A charitable trust may find its most suitable trustee in someone actively associated with the particular charity.2a Similarly, the logic of a voting trust designed to consolidate control of a group of shareholders will usually compel that the trustees be principal shareholders. On the other hand, a voting trust designed to relieve someone from a legally-prohibited control will call for a highly independent trustee.2b An alimony or child support trust would be nonsense if the grantor were the trustee.

(E) Assets of the Trust Institutional trustees are reluctant to hold unincorporated business interests (proprietorships or partnerships)

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2 Section 2.1(B) supra. See also 2.2(H) infra.
2a A conventional trust may be less efficient than a gift to an existing charitable organization with instruction to retain corpus as an endowment and spend only income. If no suitable charitable institution exists, one may be created for the purpose, usually more simply as a corporation than as a trust. Thus trust results can be achieved without the formality of a separate trust. See also note 8 supra, on nonprofit corporations as trustees, and Form H in Appendix.
because of possible liabilities. If the trust is to include such an interest, and the grantor wants it held for an extended period, the use of an individual trustee may be dictated.\textsuperscript{30} He will usually be a business associate or partner, to take advantage of special familiarity with and involvement in the business. Real estate typically requires expert management. However, there will be cases where this is not true, say a property under net lease to a highly rated tenant for a term extending beyond the life of the trust. Stocks and bonds call for considerable supervision, although this can be had through investment advisers or mutual funds (quite economically for those which charge no sales load).

The size of the trust corpus and its yield are plainly relevant. For a very small trust the minimum fees of corporate fiduciaries may be prohibitive; the same may be true of a trust with low income production if fees are based on assets. At the other end of the scale, a very large trust may be able to operate more economically with its own staff and an individual trustee than with a corporate trustee.

In this connection it is important to keep in mind that the longer the trust lasts, the more changes there are likely to be in assets, size and yield. Planning on the basis of the immediate situation may be very poor for the long run.

(F) Desired Investment Policy Closely related is the matter of investment policy. Corporate trustees have a reputation for conservatism in this respect. Often this will be just what the grantor wants. If it is not, he should seriously consider another kind of trustee who, short of recklessness, will follow a more adventurous investment course.\textsuperscript{31}

Common trust funds of corporate fiduciaries are an efficient way of obtaining diversification and intensive supervision of investments. Indeed, except for fairly large trusts, few other methods of diversified investment are likely to be economical. While such collective administration is attractive, the grantor should realize that there may be an extra cost, since withdrawals on termination or other distribu-

\textsuperscript{30} One alternative is to convert the interest into a limited partnership interest for holding by the trust. Another is to incorporate, although this may have drawbacks. These are far more acceptable to the typical corporate fiduciary.

\textsuperscript{31} Corporations creating profit-sharing and pension plans for their employees must establish trusts for the plans to obtain maximum tax benefits of qualified deferred compensation arrangements. See Int. Rev. Code of 1954, § 401(a); Rev. Rul. 61-157, Part 2(b), 1961-2 Cum. Bull. 67, 70. But corporate management typically wants to maintain control over investments of the trust. This is commonly done by providing for a committee whose investment decisions are binding on the trustee. See Note, Trust Advisers, 78 Harv. L. Rev. 1230, 1239 (1965), commenting also on the fiduciary status of such advisers, and the various forms their powers may take. Such committees are often given discretion over other aspects of the trust, e.g., the method of distribution to beneficiaries.
tions of corpus are taxable transactions. Moreover, most of the advantages of common trust funds can be had from mutual funds (particularly those few which have no sales load), with the added attraction that the shares (like any other shares held directly by the trust) can be distributed to beneficiaries without precipitating a tax. The compulsory recognition of gain on withdrawals from common trust funds puts them at a disadvantage relative to other trusts, and the more successful the investment experience is, the greater the disadvantage.

(G) **Geography** Location is a factor in designating the trustee. Despite rapid communications it will rarely be desirable to have a trustee distant from the principal trust properties or from the principal beneficiaries. How much distance is tolerable is another of those value judgments that must be made in view of all the circumstances. Geographical considerations may lead also to a provision in the trust instrument for change of trustee when a principal beneficiary moves permanently to a new location, although this is likely not to be worth the added expense and complication.

(H) **Psychology** Closely related to the practical and personal qualities discussed in 2.1(B) above are the psychological dimensions of the choice of a trustee. Obviously, a grantor is asking for trouble if he names a trustee toward whom beneficiaries are already hostile. Even without prior hostility, beneficiaries sometimes become resentful of a trustee. This may be because they were not chosen for the position—it does signify special confidence, and perhaps love, by the grantor—or because they dislike the power (real or imaginary) that the trustee has over them. And it is easily intensified where the trustee symbolizes the "dead hand," as in a tight testamentary trust.

From another angle, making an individual (beneficiary or not) a trustee can be constructive for him, fulfilling a natural desire for stature and control. (If the desire exceeds natural bounds, the warn-

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33 The general rule is that a distribution of trust corpus is a gift or bequest from the grantor, and thus nontaxable. However, the distribution becomes taxable as a sale or exchange if it is in satisfaction of a pecuniary obligation or bequest. Treas. Reg. § 1.1014-4(a)(2) and (3) (1957).
34 It is beyond the scope of this paper to consider whether a trust should be formed in a particular case. However, the factors just discussed in the text prompt one observation along this line. If the grantor's plans call for limited discretion, intangible assets and routine investments, he should examine non-trust devices which produce somewhat similar results, e.g., (a) life insurance with settlement options including annuities or installment payments; (b) similar arrangements often available under employee pension and profit-sharing plans; (c) conventional or variable annuities, perhaps with joint-and-survivor features; (d) mutual funds with systematic accumulation and withdrawal plans.
34 See, e.g., In Re Mathues Estate, 185 Atl. 768, 322 Pa. 358 (1936).
A trusteeship can provide a sense of purpose, especially in cases of great wealth, where a beneficiary might otherwise become a parasite. But the trustee is a sort of father figure and often a family counselor. If he is psychologically ill-equipped for these roles, the trust, as well as the trustee, may suffer. The same will be true if he is also a beneficiary and unable to perceive and fairly resolve the resulting conflict of interest. Conflict with the grantor can also result, particularly if the trustee-beneficiary is (for tax purposes) given powers to benefit the grantor which are "adverse" to the beneficiary's own interest.

Corporate trust personnel are typically too detached from the beneficiaries to generate problems of the kind just mentioned. But they are also too detached for the formation of any very positive relationship, although they are professionally sympathetic.

We are not urging grantors and lawyers to become amateur psychiatrists; this is much too risky. But the considerations suggested here are within the grasp of intelligent, observant men accustomed to dealing with others. They may help prevent serious personal suffering.

### 2.3 Tax Criteria

More often than not, a trust has important tax objectives. These include minimization of income and estate levies on the grantor and on the various beneficiaries. These objectives operate through certain familiar tax principles. For example, the income of a trust is generally taxed to the beneficiaries so far as it is distributed (or required to be distributed) to them, and taxed to the trustee (as a separate taxpayer) so far as it is not. Taxes can be saved by diverting income from the grantor, who is typically in a high tax bracket, to beneficiaries or trustees who are in lower brackets. Savings increase if the income can be discretionally channeled to the particular beneficiaries or trustee in the lowest brackets. (It is always open to question whether such maneuvering is sound family planning, as opposed to tax planning, but that is another matter.) Similarly, in general, one is estate-taxed only on property he owns at death. Therefore, a person with substantial property can avoid estate tax by giving it away before he dies, and, if it continues to be held in trust, no tax is due on the death of a beneficiary or trustee.

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35 See § 2.3 (B) (1) infra.

36 For problems seen by the industry in attitudes toward corporate trustees, see Staver, Public Image of a Corporate Trustee, 102 Trusts & Estates 552 (1963).
Tax minimization objectives can be achieved only by careful compliance with intricate rules designed to tax the real owner, identified by the enjoyment and control of the property rather than by legal title. Thus it is widely understood that the objectives can be destroyed by faulty dispositive provisions, like the grantor's retention of a reversionary interest. It is not so widely understood that they can be equally destroyed by other powers or interests in grantors, beneficiaries or third persons. Such powers and their allocation can materially influence the choice of a trustee. In general, the more remote the trustee is from grantor and beneficiary, the more power he can hold without adverse tax consequences, but this is not always true. Moreover, the rules are not the same for income and estate taxes, and different considerations apply to inter vivos and testamentary trusts. The results are confusing, to say the least. In most instances the alternatives are: (a) a closer trustee, broader powers and higher taxes, (b) a closer trustee, narrower powers and lower taxes, and (c) a more remote trustee, broader powers and lower taxes. There is no uniformly easy solution to this three-way conflict among trustee choice, trust flexibility and taxation level. We turn now to the details of the problem, looking first at testamentary and then at inter vivos trusts. Under each, we consider both income and estate tax consequences. We make no attempt to cover the whole field of trust taxation but only those parts affecting the trustee's selection. The results are summarized in (A) (4) and (B) (3) below.

(A) Testamentary Trusts

By hypothesis the grantor (testator) is not around to be a trustee, beneficiary or power-holder. Hence the special problems of grantor trusts (discussed below under inter vivos trusts) are inapplicable. In this connection it should be noted that a widow electing to accept her husband's will which disposes of her community property is a grantor to the extent of her interest, and is proportionately subject to the same limitations as any grantor of an inter vivos trust.

A beneficiary or fiduciary of a testamentary trust, depending upon his powers, may be individually subjected to unnecessary taxation. By this is meant personal tax on income not distributed (or required to be distributed) to him personally, or on corpus not owned by him personally.

38 See Vardell's Estate, 307 F.2d 688 (5th Cir. 1962) (widow's gross estate included elective property as transfer with retained life estate, Int. Rev. Code of 1954, § 2036; dictum that same result would be reached under § 2038 (transfer with power to alter, amend, revoke or terminate)).
(1) Income Tax.—A trustee-beneficiary is personally taxable on the income of any portion of a trust over which he has power exer-
cisable solely by himself to vest the corpus or income in himself,\(^3\) whether or not he exercises the power. The same would be true of a
beneficiary who had such a power without being trustee. Thus it is
the power rather than the position which generates the tax. On the
other hand, a trustee who is not the beneficiary can be given the
power to vest corpus or income in the beneficiary without imposing
any tax on the beneficiary—except so far as the power is exercised.
Similarly, under a literal reading of the Code a beneficiary may,
without tax, have the power jointly with anyone else (including
another beneficiary).\(^4\) Thus it is entirely feasible to use a beneficiary
as trustee without unnecessary tax, either by denying him discretion
to distribute to himself, or by giving such discretion to him and
someone else jointly.

A trustee is not personally taxable merely because he has power
to direct income to someone else. This is so even if the someone is
his dependent, for whose support he is individually obligated. The
typical example is a father who is trustee for his son under a trust
established by the grandfather. However, he is taxable to the extent
that the power is exercised in favor of the dependent.\(^5\) A non-
trustee with such a power would be worse off: taxed whether or not
it is exercised.\(^6\) This is an unusual situation in which the trusteeship
renders non-taxable a power which would otherwise be taxable, and
thus encourages naming as a trustee the holder of such a power. A
power of this sort held by a third person would precipitate no tax
as long as it went unexercised; but an exercise could constitute a
discharge of the supporter’s (e.g., the father’s) legal obligation and
thus be taxable to him.\(^7\) There are troublesome questions in deter-
mining the extent of the legal obligation to support,\(^8\) which often
make support trusts rather unattractive from the tax viewpoint,
regardless of the identity of the trustee and regardless of their de-
sirability as a family matter.

No tax results from powers other than those covered by the dis-
cussion above. Thus a power to accumulate income is not taxable.

\(^3\) Int. Rev. Code of 1954, § 678(a) (1). Vesting includes any method by which the
beneficiary can personally enjoy the property, e.g., discretion to distribute income or corpus
to himself, a power of appointment exercisable in his own favor, and a right to terminate
the trust if he is the remainderman.

\(^4\) Treas. Reg. § 1.678(a)-1 (1956).

\(^5\) Int. Rev. Code of 1954, § 678(c).

\(^6\) Treas. Reg. § 1.678(c)-1(b) (1956).

\(^7\) Id. at § 1.662(a)-4.

\(^8\) Ibid.
But powers must be regarded in terms of their substance, not their labels.\footnote{\textsuperscript{45}}

(2) 

\textit{Estate Tax.}—As we have just seen, a power to vest trust income or corpus in himself will subject the holder to income tax. The same power will subject him to estate tax, but so will the power to vest in his estate, or in the creditors of himself or of his estate.\footnote{\textsuperscript{46}}

The statutory language here shifts to "power of appointment," and the taxable ones are classed as "general."\footnote{\textsuperscript{47}} Here too, it is immaterial whether the holder of the power is a trustee, so nothing is lost by naming him one. For example, a marital deduction trust calls for such a power in the surviving spouse;\footnote{\textsuperscript{49}} the spouse may as well be a trustee.

The broadest power can be used without estate tax consequences if it is given to someone who cannot exercise it in favor of himself, etc. Such a power is not taxable to him or to the beneficiary in whose favor it can be exercised. So far as the tax law is concerned, it does not matter whether the holder is a trustee. From a trust viewpoint, it is obviously desirable to call him a trustee, in order to underline his fiduciary obligation with respect to the power.

By special statutory provisions, more limited powers of appointment can be given a beneficiary (whether or not he is a trustee) without imposing any estate tax on him, except, of course, to the extent the powers are exercised and vest him with individual ownership (and except as noted in (d) below). These include:

(a) A power exercisable only in favor of someone besides the power-holder, his estate, and the creditors of either.\footnote{\textsuperscript{50}} This kind of power can extend to the holder's children and other relatives and is a valuable element of flexibility in transmitting wealth through several generations.

(b) A power, even though exercisable in favor of the holder, which is limited by an ascertainable standard relating to his health, education, support or maintenance.\footnote{\textsuperscript{51}}

(c) A power, even though exercisable in favor of the holder (or

\footnote{\textsuperscript{45}} See note 39 supra.
\footnote{\textsuperscript{46}} Int. Rev. Code of 1954, § 2041(a) (2), (b) (1).
\footnote{\textsuperscript{47}} Ibid. This concept is as broad as in note 39 supra; see Treas. Reg. § 20.2041-1(b) (1961).
\footnote{\textsuperscript{48}} Int. Rev. Code of 1954, § 2056(b) (1). See also note 14 in Appendix.
\footnote{\textsuperscript{49}} In this case, it is important to draft the power so that it is in the spouse individually and not as trustee. If the latter, the possible resignation or removal of the trustee might defeat the marital deduction.
\footnote{\textsuperscript{50}} Int. Rev. Code of 1954, § 2041(a) (2), by negative implication. See Form A, § 5.03 in Appendix.
\footnote{\textsuperscript{51}} Int. Rev. Code of 1954, § 2041(b) (1) (A). For examples of such powers, see Treas. Reg. § 20.2041-1(c) (2) (1961).}
his estate, or the creditors of either), which is exercisable only in
conjunction with another person having a substantial adverse interest
in the property, e.g., some other beneficiary.\(^\text{32}\)

(d) A power, even though exercisable in favor of the holder,
which is limited in any one year (non-cumulatively) to $5,000 or
five per cent of the value of the property subject to appointment,
whichever is greater.\(^\text{33}\) This power does carry an estate tax burden for
the holder, but it is relatively small: his estate includes the value of
the unexercised power for the current year (i.e., the larger of $5,000
or five per cent).

(3) Combined Effect.—Except to the extent exercised, Powers
(a) and (c) are estate-tax-exempt and should not subject the holder
to income tax, since they do not constitute power (exercisable alone)
to vest in himself.

Power (b) is free from estate tax and should be free from income
tax because of the restrictions on exercise.\(^\text{34}\) The power-holder is
safer from income tax if he holds the power as trustee, because of the
fiduciary reinforcement of the restrictions on exercise.

Power (d) will subject the holder to income tax each year only
to the extent of the trust's income included in the $5,000 or five
per cent, and to the extent of any additional income produced by
the corpus to which his power applies.\(^\text{35}\) He will be subject to estate
tax only on the final year's $5,000 or five per cent.

Where a dependent of the holder is a potential beneficiary of any
of the four limited powers, the holder must be a trustee to escape
both taxes.\(^\text{36}\)

(4) Summary.—Tax factors do not seriously limit the choice of
a testamentary trustee. With careful planning, a beneficiary-trustee
can be given, through powers exempt from both income and estate
taxes, a great deal of discretion—enough to provide the desired

\(^{32}\) Int. Rev. Code of 1954, § 2041 (b) (1) (C) (ii).

\(^{33}\) Id. at § 2041 (b) (2).

\(^{34}\) Cf. United States v. DeBonchamps, 278 F.2d 127 (9th Cir. 1960). By analogy to Int.
Rev. Code of 1954, § 678 (a), life tenants with power to consume corpus for their "needs,
maintenance and comfort" were not taxable on corpus capital gains. (They were already
taxable on ordinary income because of their right to it.) The standard was a sufficient re-
straint on the exercise of the power.


\(^{36}\) See notes 41-3 supra and accompanying text.

Of like importance are the gift tax consequences of powers of appointment. Generally
speaking, the gift tax follows the estate tax, so that the exercise by the power holder in favor
of a third person is a taxable gift if the power is a general one, and is not if the power is
a limited one of any of the kinds described in (a) - (d). See Int. Rev. Code of 1954, §
2514 (b). Since only gifts by individuals are subject to a gift tax, supra, § 2501 (a), the use
of a corporate trustee affords an extra (but usually superfluous) degree of protection in this
area.
flexibility in most instances. An independent trustee can be given still more power.

(B) *Inter Vivos Trusts* The presence of a living grantor complicates the tax considerations here. He typically wants a major part in the administration of the trust. How big a part he can have, and how it affects other parties, we now consider.

(1) Income Tax.—To avoid a lengthy narrative analysis, we tabulate below the main trust powers and interests which make a grantor taxable or non-taxable on trust income. This condensation necessarily omits some details and should be used with that in mind. The powers are arranged in roughly descending order of magnitude. Correspondingly, the class of persons who may hold them (right-hand column) generally expands as we go down the list.

However intricate this pattern appears, close inspection reveals that it has relatively little direct impact on the choice of a trustee. The reason is that once again the restrictions are upon powers, not positions. However, there is an important indirect effect: if it is necessary or desirable that the trustee have a particular power, selection of the wrong trustee may make the grantor taxable on the trust income.
### Table 1

Powers Taxable and Non-Taxable with Reference to
Grantor’s Income Tax ("Clifford Rules")

<table>
<thead>
<tr>
<th>Type of Power or Interest</th>
<th>Income Taxable to Grantor if Held by—</th>
<th>Income Not Taxable to Grantor if Held by—</th>
</tr>
</thead>
</table>
| 1) Reversion
c 2) Revoke and revest in grantor
| Grantor                   | Grantor and/or non-adverse party [without consent of adverse party] |
|                           | [Adverse party, or grantor and/or non-adverse party with consent of adverse party] |
| 3) (a) Deal with corpus or income for inadequate consideration or (b) borrow it without adequate security or interest
| Anyone in nonfiduciary capacity without consent of one in a fiduciary capacity |
|                           | [Anyone except those shown on right] |
| 4) Apply income for grantor's benefit (including payment of insurance premiums on his life)
| Grantor and/or non-adverse party without consent of adverse party |
|                           | [Adverse party, or grantor and/or non-adverse party with consent of adverse party] |
| 5) Power to control beneficial enjoyment (subject to exceptions in 7-9 below)
| Anyone but grantor or spouse living with grantor |
|                           | Anyone but grantor or spouse living with grantor [or either of them with consent of adverse party] |
| 6) Vote closely held stock or control investment of trust with closely held stock
| [Anyone except those shown on right] |
|                           | Independent trustee(s) [also adverse party; grantor and/or non-adverse party with consent of adverse party] |
| 7) Broad power to control beneficial enjoyment, *i.e.*:
(a) To distribute income among beneficiaries or accumulate it
(b) To distribute corpus among beneficiaries
(c) To lend income or corpus to grantor for adequate interest and security
| Grantor and/or spouse living with grantor |
|                           | Anyone |
| 8) Moderate power to control beneficial enjoyment, *i.e.*:
(a) To distribute income among beneficiaries
(b) To accumulate it according to a reasonably definite external standard
| Grantor and/or spouse living with grantor |
| 9) Narrow power to control beneficial enjoyment, including, *e.g.*:
(a) To distribute corpus among beneficiaries according to a reasonably definite standard or (if to a current income bene- | Anyone |
TABLE 1 (continued)

- To distribute income to a current income beneficiary or accumulate it temporarily for him.
- To distribute income to a beneficiary or accumulate it during his disability or minority.
- To allocate receipts and disbursements between corpus and income, even though expressed in broad language.

57 Int. Rev. Code of 1954, § 673. There are certain exceptions for reversions after ten years or after death of a beneficiary.
58 Id. at § 676. It bears emphasizing that in Texas, contrary to the usual rule, a trust is revocable by the grantor unless the instrument provides otherwise. Tex. Rev. Civ. Stat. Ann. art. 742b-41 (1960). To avoid income tax to the grantor, a Texas trust should specify irrevocability.
59 Treas. Reg. § 1.676(a)(1) (1956). All statements in brackets are implications from express statutory provisions. A beneficiary’s interest is generally adverse, but the interest (and its adverseness) may extend only to a fraction of the trust, or to corpus but not income, or vice versa. For examples, see Treas. Reg. § 1.672(a)-1 (1956), especially (b)-(d).
60 Int. Rev. Code of 1954, § 673(1), (2). Borrowing from the trust by the grantor without adequate interest or security does not make him taxable on the trust income where a trustee (other than the grantor) has general power to lend to any person without regard to interest or security. A related provision, included in the table as Power 7(c), permits loans to a grantor with adequate interest and security, if made by an independent trustee (defined in note 68, infra.). Id. § 675(3).
61 Id. at § 677.
62 Id. at § 674(a).
63 Id. at § 675(4).
64 A trustee is presumed to be acting in a fiduciary capacity. Treas. Reg. 675-1(b) (4) (ii) (1956). The presumption is rebuttable only by clear and convincing proof that the power is not exercisable primarily in the interests of the beneficiaries. A non-trustee may be shown to be acting in a fiduciary capacity, but the presumption seems to be that he is not. Supra.
65 Int. Rev. Code of 1954, § 674(c) (1).
66 Id. at § 674(c) (2).
67 Id. at § 675(3); see note 60 supra.
68 This means one or more trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the grantor. Ibid. Related or subordinate parties include the grantor’s wife (unless living apart), parents, issue, siblings, employees, closely held corporations and the employees of such corporations or any other corporation in which the grantor is an executive. Int. Rev. Code of 1954, § 672(c). Related or subordinate parties are presumed subservient unless the contrary is shown by a preponderance of the evidence. Ibid. The practical possibility of so showing is much too slight to rely on in planning.
69 Since Power 7 is embraced within Power 5, anyone permitted to hold the latter can hold the former.
71 Id. at § 674(b) (1)-(4). The table shows only four of the eight powers permitted by this section; for the others, see § 674(b) (1)-(4).
Powers 1-4 in Table 1 are basically unaffected by the identity of the trustee. The exception is that Powers 2-4, while they cannot generally be given to an independent trustee (unless he happens to be adverse), can be given to a beneficiary (who may, but need not, also be trustee) if his interest is sufficiently adverse. All this is true of Power 5, too, except that it is riddled with exceptions (Powers 7-9) considered below.

Power 6 can be safely given only to one in a fiduciary capacity. For all practical purposes this requires that the holder of the power (who may be the grantor, a beneficiary or anyone else) be a trustee. Powers 7(a) and (b), which are highly prized for the flexibility they afford in long-term multi-beneficiary trusts, demand an independent trustee. This is usually a corporate trustee but may be a business associate or professional adviser. An independent trustee is virtually essential, also, if the grantor hopes to borrow from the trust (Power 7(c)).

Powers 8 and 9 have no influence on the selection of the trustee.

Restating these rules by reference to parties, we see: the grantor can have Powers 2-5 and probably 7-8 (with consent of an adverse party), 6 (if he is trustee) and 9. A beneficiary can have Powers 2-5 and probably 7 (if he is adverse, or with consent of an adverse party), 6 (if he is trustee), 8 (if he is not a spouse living with the grantor) and 9. A related or subordinate party (other than a beneficiary) can have Powers 2-5 (with the consent of an adverse party), 6 (if he is trustee), 8 (if he is not a spouse living with the grantor), and 9. An independent trustee can have Powers 2-5 (if he is adverse, or with consent of an adverse party) and 6-9.

In applying these concepts, bear in mind the community property aspect. Although a husband may create the trust under his managerial powers, his wife is a grantor, too.

The preceding discussion concerns only the taxability of the grantor. The beneficiary may be taxed for unexercised powers he holds to favor himself. The rules are the same as for a testamentary trust, except that the beneficiary is not taxed if the grantor is.

(2) Estate Tax and Combined Effect.—There is no exact corre-
tion between the estate tax and the income tax. Of the Powers listed in the previous section, most will precipitate estate tax for the grantor if held by him at his death. However, in some cases, the estate tax is less restrictive; in others it is more. Again skipping many refinements:

Power 1 subjects the grantor to estate tax.  

Power 2 is estate-taxable if held by the grantor alone or with anyone else. The income tax exception for consent of an adverse party is unavailable for estate tax. However, such a power in a non-adverse party alone would be income-taxable but probably not estate-taxable. Any power (by the grantor alone or with anyone else) to alter or amend the trust is estate-taxable, although it might be too slight to be income-taxable.

Power 3 is not explicitly dealt with in the estate tax provisions but would quite possibly be taxable under one or more of the general ones.

Power 4 is estate-taxable if held by the grantor.

Power 5: same as Power 2.

Looking only at the estate tax, Powers 2-5 appear non-taxable if held by anyone beside the grantor. But, recalling that they are income-taxable when held by any non-adverse party, we must recognize a remote possibility that the income taxable to the grantor will be treated as retained income subjecting him to estate tax if the power is held by a non-adverse party.

Power 6 is not explicitly dealt with in the estate tax provisions and is probably not taxable. However, it carries some risk of uncertainty and should be approached with caution.

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79 Int. Rev. Code of 1954, § 2037(a)(2). There is an exception if its actuarial value is no more than 5% of the value of the property at death.
80 Id. at § 2038(a)(1).
83 Id. at §§ 2016-2018.
84 Id. at § 2036(a)(1).
86 See Lowndes & Kramer, Federal Estate and Gift Taxes 148 (1962) arguing against this result in the case of an insurance trust. Life insurance is not taxable if the insured divests himself of all incidents of ownership, even though he continues to pay premiums. Int. Rev. Code of 1954, § 2042. Transferring the insurance to an inter vivos trust will accomplish the divestiture if the grantor (insured) has no incidents of ownership; this bars him from being trustee, Treas. Reg. § 20.2042-1(c)(4) (1961). However, if premiums are paid from the income of the trust, without the consent of an adverse party, the income is taxable to the grantor and raises the spectre that the corpus of the trust (i.e., the pre-death cash value of the insurance and possibly even the proceeds at death) will be estate taxable.
87 See Lowndes and Kramer, Federal Estate and Gift Taxes 149-51 (2d ed. 1962) for discussion of the uncertain state of the law as to transfers of closely held stock.
88 If nothing else, the instrument should specify that the power is to be exercised only in a fiduciary capacity. See Form E and note 32 in Appendix.
Powers 7-9 are generally estate-taxable if held by the grantor alone or with anyone else. The income tax exception covering all of Power 9 (when held by the grantor) is unavailable for estate tax. The estate tax, unlike the income tax, makes no express exception for powers limited by definite external standards. However, case law has recognized an equivalent, applicable, e.g., to Powers 8(b) or 9(a).

None of the foregoing powers directly affect the choice of a trustee, so far as the grantor’s estate tax is concerned, although they may do so indirectly. All of them (except of course 1) could be given to a beneficiary, or to a third party. The holder would not have to be a trustee, although making him one would strengthen the inference that he is not a pawn of the grantor. None of the powers (except possibly 6) can safely be given to the grantor, whether or not as trustee. Thus, the estate tax bars him from holding powers which would be all right under the income tax, e.g., 2-5 (with consent of an adverse party) and 9. Similarly, it bars him from the right to substitute himself for a trustee holding the powers which would be taxable to the grantor if held directly.

It remains to consider the estate tax effects of the various powers on other holders. As seen in the examination of testamentary trusts, other power-holders are not estate-taxable unless the powers amount to general powers of appointment. In general, the latter will include Powers 5, 7-9 (and perhaps 3) if held by the beneficiary and exercisable in favor of himself, his estate, or the creditors of either. Their taxability effectively denies him the use of these powers, with three exceptions: if the standards for their exercise (e.g. powers 8, 9(a)) are related to his health, education, support or maintenance.

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89 Int. Rev. Code of 1954, §§ 2036(a)(2), 2038(a)(1), and perhaps even § 2037.
90 See, e.g., State Street Trust Co. v. United States, 263 F.2d 615 (1st Cir. 1959), estate-taxing the grantor for a combination of powers held by him as co-trustee with a corporate fiduciary. Included were a broad power to allocate between corpus and income (Power 9(d)), unusually broad investment powers, and broad powers to make deductions for depreciation, waste, etc. In addition, there was a generous exculpatory clause. No one alone would have precipitated the tax, but the aggregate did.
92 There is an indirect impact to the extent that the powers go with the trusteeship and thus limit the choice of the trustee. For example, a minor’s trust designed to be eligible for the annual gift tax exclusion, Int. Rev. Code of 1954, § 2103(c), virtually that the trustee have powers of distribution which would render the grantor estate-taxable if he were trustee.
94 Section 2.3(A)(2) supra.
95 Such standards keep them from being estate-taxable, see § 2.32(A)(2)(b) supra, but are unnecessary to keep them from being income-taxable.
if they are exercisable only with the joinder of an adverse party,
96 or if they meet the five per cent-$5,000 limits.97 From his own estate
tax viewpoint, he can have Powers 1, 2, 4 and 6 and (if within any of
the three exceptions just mentioned) 3, 5, 7-9. However, the
grantor’s income tax considerations effectively require the bene-
\[574px\]ficiary to be a trustee for 6, and require him to be adverse for 2-5
and 7. The grantor’s estate tax considerations do not further re-
strict the list. But the beneficiary’s own income and estate tax pic-
ture is affected: he is taxable if he can vest income or corpus in
himself.98 Even if his rights are confined so that he lacks a general
power of appointment, he is partially taxable to the extent he is
relying on the five per cent-$5,000 exception.99 And his own income
tax situation dictates that he hold as trustee any of the powers that
can operate in favor of his own dependents.100 Otherwise, the selection
of the trustee is unaffected, except, as always, that he may not safely
be trustee if that position carries powers which would precipitate
unnecessary tax with him as trustee.

A related or subordinate party (other than a beneficiary) can
effectively have Powers 8 and 9. He should be a trustee if the powers
can operate in favor of his own dependents.

A fully independent party as trustee can have any of the Powers
(except of course 1) without causing estate tax to the grantor.
However, to avoid income tax on the grantor, he must be adverse,
or have the consent of an adverse party, to wield Powers 2-5. He
may possess numbers 6-9 freely.

These results are summarized in Table 2.

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96 See § 2.3 (A) (2) (c) supra. Note that the adverse interest must be “substantial.” It
must also be adverse to the power holder, even though the latter is adverse to the grantor.
97 See § 2.3 (A) (2) (d) supra.
98 See note 39 supra and accompanying text.
99 See note 55 supra and accompanying text.
100 See notes 41-3 supra and accompanying text.
| Table 2. Approximate Permitted Distribution of Non-Transferable Powers When Held Along (Except as Otherwise Indicated) |

<table>
<thead>
<tr>
<th>Holder's Estate</th>
<th>Non-Transferable Power</th>
<th>Transferable Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Transferable</td>
<td>Non-Transferable Power</td>
<td>Transferable Power</td>
</tr>
</tbody>
</table>

- Column 1: Holder's Estate
- Column 2: Non-Transferable Power
- Column 3: Transferable Power

Note: In order to fit within two dimensions, this table does not consider contingent or conditional powers or (except as stated) powers held jointly.

Supervisory Power

Table: Approximate Permitted Distribution of Non-Transferable Powers When Held Along (Except as Otherwise Indicated)
SELECTION OF A TRUSTEE

(3) Summary.—Any reader who has followed this far, whether or not he concurs in our analysis, should be aghast at the permutations and overlaps, at the inconsistent terminology and results. The area cries out for clarification and simplification; there is no policy justification for its present bewildering patchwork.

Tax factors more seriously limit the selection of a trustee for an inter vivos trust than for a testamentary one. The grantor must be ruled out. With careful planning a beneficiary-trustee can be given, through powers exempt from both income and estate taxes, a fair amount of discretion, though less than in a testamentary trust. It may still be enough to provide desired flexibility. If more is needed, the choice falls on an independent trustee.102

3. COMBINATIONS AND ALTERNATIVES

Many of the shortcomings of a single trustee can be overcome by combining two or more persons in various ways. This is particularly true where each can make a specific contribution through knowledge, experience or viewpoint. An institution is well-suited to receive, hold and disburse assets, to handle records, and to perform routine administration. A trusted business associate may have investment skills and patterns that are preferred by the grantor. A wise relative or family friend may be the best man to exercise discretion over distributions to beneficiaries. They can be combined in a variety of ways, including (a) co-trustees with divided powers,103 (b) one trustee subject to veto or consent powers in non-trustee advisers,104 (c) one trustee subject to directory or initiatory powers in non-trustee advisers,105 (d) one trustee with precatory, non-binding consultation of advisers, and (e) an individual trustee with a bank as agent or custodian for routine matters, such as holding securities and collecting dividends.

For example, a close friend or relative, as adviser, can be given discretion over distributions, while administration and management are left to a corporate trustee.106 Or, if a trust is to have an interest in a closely held business, a co-owner of the business can provide

102 The critical difference is that a beneficiary can safely have the equivalent of Power 7 in a testamentary trust so long as he is not an eligible beneficiary. In an inter vivos trust, such a power in a beneficiary makes the grantor taxable on the income, unless the beneficiary’s interest is so adverse that it can qualify as Power 5, in which case the beneficiary probably has an estate-taxable general power of appointment.

103 See Form A, §§ 3.01-3.03 and Form E in Appendix. See also, in general, Spindle, The Wife as Co-Fiduciary, 104 Trusts and Estates 633 (1965).

104 See Form F in Appendix.

105 See Form G in Appendix.

106 See Form A, §§ 3.01, 3.03 in Appendix.
valuable insights but may not want to be bothered with other details. Giving him control of the business as co-trustee and another trustee control of the other property might be an ideal combination. Separate trusts, one for the business interest and another for the remaining assets, are another possibility and might save income tax.

Varying the example a little, consider the father who owns a profitable corporation and has two sons who have "grown up" in the business and are fully capable of running it after his death. For tax planning perhaps, the father wishes to keep his stock interest intact for the sons' lives but let them have full power to manage and control the business. This might logically be accomplished by giving a corporate trustee administrative control over the trust, but giving the sons the right to vote the stock, as co-trustees or otherwise. Or, to avoid the tax disadvantages of a beneficiary's having power to distribute income to himself, several beneficiaries can be made co-trustees, with each denied power over distributions to himself, but permitted to participate in the decisions as to the others.

Trust properties in several states might require a lone corporate trustee to qualify as a foreign corporation. However, this difficulty can be avoided by employing ancillary corporate trustees in the foreign states, or by using individual trustees not subject to corporate qualification procedures.

Multiple trustees and advisers also give the benefit of more viewpoints and, presumably, more deliberation. However, appointing too many is likely to invoke the old saw that everybody's business is nobody's business, and valuable time can be lost if too many persons must confer. Multiple trustees may mean additional fees and expenses; a corporate trustee is unlikely to cut its fees merely because someone else also is serving. It will be a rare case where more than three trustees or advisers are justified.

When co-trustees are appointed, they serve collectively as "the

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107 To minimize conflict of interest, the Texas Trust Act provides that while a non-corporate trustee may retain securities of a corporation of which he is a director, owner, manager or executive, he may not acquire additional securities; Tex. Rev. Civ. Stat. Ann. arts. 7425b-14, -12 (1960). This restriction can be waived in the trust instrument, art. 7425b-22, and usually should be. See Form A, § 3.01 (14) in Appendix.

108 See Note, Trust Advisers, 78 Harv. L. Rev. 1230, 1238 (1965), suggesting that available income from the first trust be distributed to the second.

109 See Form B, § 2.10 in Appendix. Care should be taken to see that the beneficiary really does not participate in decisions about his own distributions, for the substance, rather than the formality, is likely to govern if the IRS raises a question.

trustee." Unless the instrument or statute provides otherwise, there must be unanimity of opinion before any action is taken. Costly delays and paralysis may result. Therefore, it is usually better to provide for majority rule (as the Texas act does) or for designated trustees to have authority to act alone in specified areas, or in the event of dispute. The trust may also provide that any trustee has authority to act in any matter, like a partner or co-independent executor. However, this produces a risk of inconsistency and is normally undesirable.

If powers are split or trustees are bound by advisers, it is important to delineate responsibility clearly and provide proper exculpatory clauses to relieve one person of responsibility for acts determined solely by another.  

4. The Final Choice

Most lawyers regard a corporate trustee as the best choice. This is natural, since they are conditioned by advertising and expectant of reciprocal business. But the lawyer needs better reasons than these if he is to fulfill his duty of advising the client. The decision should not be automatic but should be made only after careful review of the alternatives.

If there is to be only one trustee, the preferred choice, after proper deliberation, will usually be the corporation because of its experience, skill and permanence. In this case it is often a useful safety valve to provide that the beneficiaries can substitute another corporation in case they become dissatisfied. It will be a rare individual who can run a sole trusteeship as well as a corporation can, although he is worth searching for, as he may provide extra privacy and personal attention.

Differences exist among corporations and these should be studied. A large trust department probably has more collective wisdom and experience but may suffer from over-departmentalization. One institution may have more expertise than another in the field where the particular trust is to be active.

It should be clear by now that we believe non-corporate parties have an important contribution to make to many, if not most, trusts.

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112 See Form A, §§ 3.01-3.03 in Appendix.
114 See § 5.2 infra and Form C in Appendix.
Sometimes several of them may provide the optimum combination for the trusteeship. Probably more often, one or more of them should serve with an appropriate institution, either as co-trustees or as advisers.\(^\text{115}\)

If an individual is selected, he should usually be given the power to appoint a co-trustee to relieve him of routine administration,\(^\text{116}\) and he should be authorized to surrender powers.\(^\text{117}\) This is advisable because of the possibility that powers thought not to be taxable to him turn out to be, either through original error or subsequent development.

In summary, our recommendations would be as follows, in descending order—assuming high qualifications and no tax drawbacks in each case:

1. Several individuals
2. A corporation and one or more individuals
3. A corporation
4. An individual

On the whole, we think it sounder to make second and third parties co-trustees (with appropriate division of power) rather than advisers. The legal role of the adviser has not yet been fully developed in the courts,\(^\text{118}\) and this alone is a reason for reticence. More importantly, (a) if the adviser can make binding determinations, he is probably a trustee, and failing so to designate him may be misleading to him and the beneficiaries, and (b) if the adviser is not acting in some sort of fiduciary capacity, his role is incompatible with the fiduciary nature of the trust. If he is not named as co-trustee, the instrument should certainly recite that his powers are to be exercised in a fiduciary capacity.\(^\text{119}\)

5. The Aftermath

The problems of the trustee’s identity do not end with his initial selection. Possible changes in trustees must be considered. We do this under the headings of resignation, removal and succession.

5.1 Resignation

Statutory provision is made for resignation of trustees in Texas in the following language: “Upon petition of any trustee of an express trust, a court having jurisdiction may accept his resignation, and

\(^{\text{115}}\) See Forms A, E-G in Appendix.

\(^{\text{116}}\) See Form D in Appendix.

\(^{\text{117}}\) See Form A, § 3.06 in Appendix.


\(^{\text{119}}\) See Form E in Appendix. This is a good tax precaution, too; see notes 63-64, 88 supra.
discharge him from the trust upon such terms and conditions as the
rights of the person interested in the trust may require. Thus
This procedure can involve a judicial accounting, which is both slow and
expensive. If more summary, non-judicial provisions for resignation
are desired (and most trustees will want them), they should be in-
cluded in the trust instrument.

5.2 Removal

A settlor who chooses his trustee carefully may be shocked at the
thought of a removal provision. But individuals do sometimes fail
to live up to expectations, become incompetent through age or disease,
or turn dishonest. Even a corporate trustee may antagonize bene-
ficiaries or deteriorate as an organization. Statutory provision is
made for removal of a trustee for material violation of (or attempt
to violate) the trust, for becoming incompetent or insolvent, and
for other causes in the court's discretion. It is preferable to furnish
a non-judicial means of removal, although there is always the risk
that a suit will be necessary if there is real antagonism between the
trustee and the beneficiaries. Power of removal will normally be
given to the beneficiaries (subject to the precautions noted in 5.3
below), but may be lodged in others, as with appointment of a
successor.

5.3 Succession

The Texas Trust Act provides for appointment of a successor
trustee by the court having jurisdiction, on the death of a sole or
surviving trustee. This codifies the case law practice that a trust
will not be allowed to fail for want of a trustee. Court-appointed
successor trustees have the same powers, duties and responsibilities as
the original trustee unless the court directs otherwise. If the grantor
wishes to avoid the publicity and expense of judicial appointment
of a successor, or wants a successor to each of several trustees, he
should provide in the trust instrument for succession. This can be
done in various ways: (a) by naming individuals or organizations in
order of preference, (b) by giving specified persons (identified by

\[140\] The grantor's power to do so is given by art. 7421b-22. See Form A, § 2.02 in Ap-

\[139\] Id. at art. 7421b-39.
\[141\] See Form C in Appendix and text accompanying note 114 supra. Bear in mind that,
for tax purposes, a person who can remove a trustee and substitute himself, is regarded as
having the powers of the trustee; note 93 supra and accompanying text.
\[143\] Id. art. 7421b-40.
name or by position) the power to designate the successor, perhaps according to prescribed qualifications. The former is more likely to carry out the trustor’s wishes and is attractive insofar as the wishes have not become obsolete or irrelevant with the passage of the long periods that may be involved in a trust. The latter device may be used to give beneficiaries the power to fill a vacancy, although precautions must be observed to keep this from causing trouble: (1) the power should be limited to adult and competent beneficiaries, to avoid inability to act; (2) a simple majority should be specified, in order to minimize the chance of deadlock; and (3) the persons eligible to be chosen under the power should be defined with the same care as the original trustees, since they have all the same responsibility and importance for the carrying out of the plan. Accordingly, it is often desirable to limit this succession power to corporate trustees of specified size and character. If it comes to this, the grantor would probably do better to name the corporate trustee himself. A commonly used alternative is to authorize the senior judge of the local federal or state court to appoint the successor. This is usually specified to be in his individual and not his judicial capacity, to avoid the need for filing petitions, giving notices, and subjecting the trust to judicial process. It is wise to limit his choice to corporate trustees of designated size and character.

5.4 The Need For A Record

If resignation, removal and succession are to be non-judicial, some definitive public record should be made. It can inform and protect persons dealing with the trust and provide documentation which the remaining or new trustee can furnish. One simple solution is a provision in the trust for conclusiveness of filings of such information in the deed records of a designated county.

106 See Form A, § 2.03 in Appendix.
107 See Form A, §§ 2.02-2.03; Forms C and D in Appendix.
APPENDIX

Form A—Long-Term Trust; Corporate and Individual Trustees with Broad, Divided Powers; Discretion to Spray Income and Principal; Limited Power of Appointment on Termination

[Reference: text at notes 103, 106, 115; 65, 50 to the Article]
[Note: this Form is suitable for a testamentary trust and (with changes indicated in the footnotes) for an inter vivos trust.]

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ITEM TWO: Trustees

2.01 Designation of Trustees I designate as my Trustees:
(A) [name and address of bank or trust company] ("my Corporate Trustee")
(B) My trusted business associate, [name and address] ("my Investment Trustee")

1 It is assumed that he is not a beneficiary.
(C) Our valued family friend, [name and address] ("my Distribution Trustee").

2.02 Resignation of Trustees Any Trustee is authorized to resign by filing a written instrument duly acknowledged in the Deed Records of County, Texas; this filing shall immediately deprive the resigning Trustee of all powers as Trustee hereunder. At least thirty days prior to such filing, the resigning Trustee shall give written notice thereof of those persons who could then with or without the exercise of discretion receive any distribution of income from the trust estate and are then sui juris. No purchaser from or other person dealing with any Trustee is obligated to examine such Deed Records, and any such person shall be protected in all transactions with any Trustee whether or not any such resignation has taken place.

2.03 Successor Trustees

(A) If my Corporate Trustee fails or ceases to serve for any reason, the remaining Trustees may designate as successor Corporate Trustee any national bank in the United States or any state bank or trust company in County, Texas, having trust powers and a capital and surplus of $5,000,000 (five million dollars) or more. The designation shall be by written instrument duly acknowledged and filed in the Deed Records of such county. Any designation shall be revocable until the successor has accepted appointment and entered upon its duties as Trustee; such revocation shall be in the same form as the original designation.

(B) If my Investment Trustee fails or ceases to serve for any reason, he may (before or within 30 days after he so fails or ceases) designate as successor Investment Trustee any individual he thinks suitable for the position. The designation, and its revocation, shall be as provided in 2.03 (A) above. If he fails so to designate, the then Corporate Trustee shall be the successor Investment Trustee.

(C) If my Distribution Trustee fails or ceases to serve for any reason, a majority of those persons who could then with or without the exercise of discretion receive any distribution of income or corpus from the trust estate and are then sui juris, may designate as successor Distribution

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*C It is assumed that he is not a beneficiary. In an inter vivos trust, it is important that he be independent; see note 68 to the Article.

* See note 121 to the Article and accompanying text.

* See text accompanying note 127 to the Article.

* Or (if in a will) the county in which I reside at my death.

* Alternatives:
  (a) a majority by number of those persons who could then with or without the exercise of discretion receive any distribution of income or corpus from the trust estate and are then sui juris, or (b) the Judge of the Court in which this Will is probated (acting in his individual and not his judicial capacity), or (c) the senior Federal District Judge sitting in or for the county where I reside at my death (acting in his individual and not his judicial capacity).

By specifying the county, all these Alternatives can be used inter vivos. See text accompanying note 126 to the Article. Alternative (a) can be further modified by providing that the beneficiaries shall vote in proportion to their financial interests in the trusts, although this is practical only if their interests are readily ascertainable. Still another approach is to give designated beneficiaries (such as a widow) a larger voice in the selection.

* For alternatives, see § 2.03 (A) supra at note 6.

* Where possible, the character requirements of the successor should be spelled out, e.g., in terms of profession or age. See § 5.3 of the text.

* For alternatives, see § 2.03 (A) supra note 6.
Trustee any individual they think suitable for the position. The designation, and its revocation, shall be as provided in 2.03(A) above. If they fail so to designate, the then Corporate Trustee shall be the successor Distribution Trustee.

2.04 Reorganization of Trustee If a Corporate Trustee should, before or after qualification, change its name, be reorganized, merged, or consolidated with, or acquired by, any other bank or trust company, or be converted into a different type of bank or trust company, it shall be deemed a continuing entity and shall continue to act as Trustee or be eligible to become a Trustee, as the case may be.

2.05 Definition of Trustee; Distribution of Powers My Trustee, whether one or more, whether male or female, whether individual or corporate, whether original, successor or substitute, is herein called Trustee. Except as expressly provided otherwise, each Trustee shall have the same duties, powers and discretions.

2.06 Freedom from Court Supervision It is my intention that so far as can be legally provided the Trustee shall be completely free of all court supervision of any kind, including the requirement of any judicial accounting.

2.07 Compensation and Bond Any Corporate Trustee shall receive reasonable compensation for services as Trustee but not more than is then currently being charged for like services by national banks in the vicinity of its principal office. No individual Trustee shall receive compensation for service as such. No Trustee shall be required to furnish bond or other security.

ITEM THREE: POWERS OF TRUSTEES

3.01 General Powers of Corporate Trustee Except as provided in 3.02 and 3.03 below, the Corporate Trustee shall have the following powers alone and without the joinder of any other Trustee.

(1) Usual Trust Powers To exercise all powers granted to a Trustee by the common law or any statute, including every power granted to a Trustee by the “Texas Trust Act,” art. 7425b, Tex. Rev. Civ. Stat. Ann., or any future amendment thereof which serves to increase the extent of the powers granted to a Trustee.

See note § supra. Consideration should be given to the possibility that a beneficiary may be chosen; his powers might subject him personally to income or estate tax; see § 2.3(A)(1) and (2) of the text. Even in this event, § 3.06 infra may provide an escape hatch if it is timely used. In an inter vivos trust, tax considerations require that the grantor be made expressly ineligible to succeed to the investment trustee position, for it gives him the equivalent of Powers 7(a) and 5(b), note 65 to the Article.

Serious consideration should be given to proper compensation for individual trustees, particularly if they are not also beneficiaries. See § 2.1(C) of the text.

A number of the corporate trustee’s powers overlap those of the investment and (to a lesser extent) the distribution trustees. For example, Powers (2)-(8) and (11)-(17) grant authority both to make decisions (the investment trustee’s bailiwick) and to carry them out (the corporate trustee’s duty). These powers all have been given to the corporate trustee to avoid the necessity of splitting each into its decision-making and implementing components. As a result each form may be used where both components are to be held by a single trustee.

Unless the noncorporate trustees are to be extremely active in administering the trust, it may be better to leave the powers with the corporate trustee. On the other hand, if it is planned that the noncorporate trustees will be quite active participants, their respective powers might better be removed from the list of the corporate trustee’s powers, leaving in their place a general power to carry out the decisions made by the others.
(2) Retention of Trust Estate To retain any property, real, personal, or mixed, which may from time to time be or become a part of the trust estate, even though such property (by reason of its character, amount, proportion to the total trust estate, or otherwise) would not be considered appropriate for a fiduciary apart from this provision.

(3) Sales or Disposition of Trust Property To sell, exchange, give options upon, partition, convey, or otherwise dispose of, with or without covenants (including covenants of warranty of title) any property, which may from time to time be or become a part of the trust estate, at public or private sale or otherwise, for cash or other consideration or on credit, and upon such terms and conditions as the Trustee shall think advisable, and to transfer and convey the same free of all trusts.

(4) Investment of Trust Property To invest and reinvest the trust estate from time to time in any property, real, personal, or mixed, including (without limiting the generality of the foregoing language) securities of domestic and foreign corporations and investment trusts or companies, bonds, debentures, preferred stocks, common stocks, mortgages, mortgage participations, and interests in common trust funds, all with complete discretion to convert realty into personalty or personalty into realty or otherwise change the character of the trust estate, even though such investment (by reason of its character, amount, proportion to the total trust estate, or otherwise) would not be considered appropriate for a fiduciary apart from this provision, and even though such investment causes a greater proportion of the total trust estate to be invested in investments of one type or of one business or company than would be considered appropriate for a fiduciary apart from this provision.

(5) Loans of Trust Property To make loans, secured or unsecured, in such amounts, upon such terms, at such rates of interest, and to such persons, firms, or corporations as the Trustee shall think advisable.

(6) Acquisition of Non-productive Property To acquire property returning no income or slight income or to retain any such property so long as the Trustee shall think fit without the same being in any way chargeable with income or the proceeds thereof in case of sale being in any part deemed income.

(7) Improving and Leasing Trust Property To improve any real estate comprising a part of the trust estate; to demolish any buildings in whole or in part, and to erect buildings; to lease real estate or personal property on such terms and conditions and for such length of time (including ninety-nine years or more) as the Trustee shall think fit, even though such lease may extend beyond the term of the trusts; to foreclose, extend, renew, assign, release or partially release, and discharge mortgages or other liens and to accumulate income for the purpose of doing so.

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13 See notes 60 and 67 to the Article and accompanying text; § 3.03(A) infra.

14 In a marital deduction trust add: "However, such property shall not be retained for an unreasonable period of time without the written consent of my spouse." Alternatively, in a marital deduction trust, the following may be added, perhaps in part five: "Notwithstanding any other provision, my spouse shall have such rights over the Trustee as are necessary to assure that my spouse is entitled for life to all the income from the [Marital Deduction] trust." Both provisions are intended to implement the requirements of Int. Rev. Code of 1954 § 2016(b)(3) and Treas. Reg. § 202056(b)-5(f)(4) (1961) that the surviving spouse be entitled to all the income for life. The second alternative is the broader of the two.
(8) **Borrowing Money** To borrow money and to execute promissory notes therefor, and to secure such obligations by mortgages or other liens or pledges of any property of the trust estate; to make any type of purchase or contract, including installment contracts or credit arrangements, the effect of which is to borrow money; to accumulate income for the purpose of repaying any indebtedness owed by the Trustee.

(9) **Adjustment of Claims and Suits; Prepayment of Existing Mortgage** To prosecute or defend any suit; to compromise or arbitrate any claim (including a claim for taxes) and any litigation, either in favor of or against the trust estate or the Trustee; to pay claims upon such evidence as the Trustee shall think sufficient; to prepay all or part of any mortgage on my home existing at my death.

(10) **Employment of Agents** To employ such brokers, banks, custodians, investment counsel, attorneys, and other agents or servants, and to delegate to them such duties, rights, and powers of the Trustee for such period as the Trustee shall think fit; to pay such persons reasonable compensation out of the trust estate; all regardless of whether any such person is (or is a partner or employee of, or is owned by) a beneficiary or trustee.

(11) **Nominees** To hold any securities or other property of the trust estate for any length of time in the name of a nominee or nominees without mention of any trust or fiduciary capacity in any instrument of ownership.

(12) **Insurance** To insure any part of the trust estate against such risks as the Trustee shall think fit, such insurance to be based on market value or cost and the coverage to be full or partial as the Trustee shall think fit; to pay the premiums and to collect or adjust the losses. To acquire, hold, and pay premiums upon insurance upon the life of any person or persons, and to exercise any and all rights of ownership thereof. To purchase other types of insurance or annuities for any beneficiary.

(13) **Mineral Contracts and Sales** To execute and deliver oil, gas, and other mineral leases containing such unitization or pooling agreements and other provisions as the Trustee shall think fit; to execute mineral and royalty conveyances; to purchase leases, royalties and any type of mineral interest; to execute and deliver drilling contracts and other contracts, options, and other instruments necessary or desirable to participate actively in the oil, gas, or mining business; all of the foregoing may include such terms, conditions, agreements, covenants, provisions, or undertakings as the Trustee shall think fit.

(14) **Corporations** To incorporate any property in the trust estate; to transfer any such property to one or more corporations for all or part of their capital stock or other securities (whether or not any Trustee is also a securityholder, officer, director or manager of such corporation in an individual, fiduciary or other capacity); to participate in the management of such corporation or any other corporation whose securities are a part of the trust estate; to dissolve any such corporations or any other corporation whose securities are a part of the trust estate; to hold or dispose as part of the trust estate any property received upon such a dissolution; all in such manner, at or for such times, and on such terms as my Trustee shall think fit.

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9 If an inter vivos trust, add "other than the grantor." See note 61 to the Article.

10 See note 107 to the Article.
(15) **Partnerships** To enter into partnerships; to transfer any property in the trust estate to one or more partnerships for interests in such partnerships; to act as a partner in any partnership or with respect to any property, any part of which may be or become part of the trust estate originally or later; so to act as a partner with himself (or herself or itself) acting in an individual, fiduciary or other capacity; to participate in the management of such partnerships; to dissolve any partnership in which the Trustee acts as a partner; and to hold or dispose as part of the trust estate any property received upon such a dissolution; all in such manner, at or for such times, and on such terms as my Trustee shall think fit.

(16) **Businesses** To continue to operate any business interest which becomes part of the trust estate; to delegate all or part of the management thereof; to invest other funds of the trust estate therein; to convert such business from one form (e.g., proprietorship, partnership, corporation) to another; all in such manner, at or for such times, and on such terms as my Trustee shall think fit.

(17) **Voting Securities; Reorganizations** To vote, in person or by proxy, any stocks or other properties having voting rights; to enter voting trusts and voting agreements; to exercise any options, rights, or privileges pertaining to any property in the trust estate; to participate in any merger, reorganization, or consolidation affecting the trust estate, and in connection therewith to take any action which an individual could take with respect to property owned outright by such individual, including the payment of expenses or assessments, the deposit of stock or property with a protective committee, the acceptance or retention of new securities or property, and the payment of such amounts of money as may seem advisable in connection therewith.

(18) **Payment of Expenses and Taxes** To incur such expenses or charges in the management of the trust estate as the Trustee shall think fit; to render the trust estate for taxes if the Trustee shall think it desirable or to refuse to do so if the Trustee shall think it undesirable, and to pay taxes, charges, and governmental assessments against the trust estate; in anticipation of such expenses, charges, taxes and assessments to set up such reserves as the Trustee shall think fit.

(19) **Reliance on Business Documents** To rely upon the authenticity of affidavits, certificates, opinions of counsel, letters, notices, telegrams, cablegrams, and other methods of communication in general use and usually accepted by business men as genuine and what they purport to be.

(20) **Acceptance of Additional Property** To accept from any source any property to be held as part of any trust hereunder.

(21) **Charitable Contributions** To make contributions to educational, charitable, religious, scientific or literary organizations.

(22) **Custody of Trust Estate; Disbursement of Funds** To retain sole custody of the trust estate; to keep any of the property of the trust estate at any place or places in Texas or elsewhere in the United States or abroad, or with a depository or custodian at such place or places; to make all disbursements of the trust funds without any counter-signature; to make

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37 See note 30 to the Article and accompanying text. It may be desirable to transfer this power to the investment trustee as described in § 3.02 infra.

18 See note 14 supra.
all reports, including tax returns, to any agency of the government, local, state or federal.

(23) **Execution of Documents** To execute and deliver agreements, assignments, bills of sale, deeds, leases, notes, powers of attorney, warranties, covenants, guaranties, receipts, releases, and other papers or documents reasonably necessary or desirable to carry out the powers granted to the Trustee or to any one of the Trustees.

(24) **Division into Shares or Separate Trusts** To hold, manage, invest, and account for the several shares or separate trusts which may be held in trust, either as separate funds or as a single fund, as the Trustee shall think fit; if as a single fund, making division thereof only upon the books of account and allocating to each share or trust its proportionate part of the principal and income of the single fund and charging against each share or trust its proportionate part of the common expenses.

(25) **Method of Distribution or Division** In dividing the trust estate into separate shares or trusts or in distributing the same, to divide or distribute in cash, in kind, or partly in cash and partly in kind, using different properties according to their value and/or undivided interests in the same properties, as the Trustee shall think fit. For any purpose, including division or distribution, to value the trust estate or any part thereof reasonably and in good faith, and such valuation shall be conclusive upon all parties.

(26) **Powers Under Changed Conditions** To exercise such other powers as may be necessary or desirable in the management and control of the trust estate (whether or not similar to those here enumerated) to enable the Trustee to act under changed conditions, the exact nature of which cannot now be foreseen.

3.02 **Special Powers of Investment Trustee** Notwithstanding any other provision, my Investment Trustee, alone and without the joinder of any other Trustee, shall have such power and discretion over the method of investment of the trust estate, from time to time. His decisions and directions in this respect shall be promptly transmitted by him to my Corporate Trustee, and shall be promptly carried out by my Corporate Trustee.

3.03 **Special Powers of Distribution Trustee** My Distribution Trustee shall have the following powers alone and without the joinder of any other Trustee. His decisions and directions in these respects shall be promptly transmitted by him in writing to my Corporate Trustee, and shall be promptly carried out by my Corporate Trustee.

(A) **Certain Transactions with Beneficiaries** To make loans (secured or unsecured) to, to buy property from, and to sell property to:

1. Any Trust beneficiary,
2. The estate of any beneficiary (whether living or dead),
3. A trust created by or for the benefit of any beneficiary (whether living or dead).

(B) **Apportionment of Income and Expense** To determine with finality, as to each sum of money or other thing of value held or received by any Trustee, whether and to what extent the same shall be deemed to be
principal or to be income, and as to each charge or expense paid or loss incurred by the Trustee, whether and to what extent the same shall be charged against principal or against income, including (without hereby limiting the generality of the foregoing language) power to apportion any receipt or disbursement between principal and income and to determine what part, if any, of income is available for distribution according to the terms hereof and what part, if any, of the actual income received upon a wasting investment or upon any security purchased or acquired at a premium shall be returned and added to principal to prevent a diminution of principal upon exhaustion or maturity thereof; and to set up such reserves out of principal or income as the Trustee shall think fit.

(C) Allocation of Deductions

To allocate between any trust and any one or more income beneficiaries, as my Trustee shall think fit, any depletion, depreciation or other apportionable deduction under the federal income tax. In allocating such deductions, or in designating the source of any income distributed or accumulated, the Trustee may take into consideration the respective income tax benefits available therefrom to the various beneficiaries and to the Trustee from information known or furnished to the Trustee.

(D) Discretion to Accumulate Income or Corpus or Distribute Corpus

To exercise the discretion given by paragraphs 5.01 and 5.02 to accumulate or distribute income and to distribute principal of the Trust.

(E) Occupancy of Trust Property

To allow any beneficiary to use or occupy trust property without payment of rent.

3.04 Records; Inspection

The Corporate Trustee shall keep accurate and complete records of Trust transactions. Any beneficiary (or his representative authorized in writing) may inspect the records at any reasonable time.

3.05 Annual Report

The Corporate Trustee shall make an annual report in writing to each living beneficiary who could in the discretion of the Trustee receive any income or distribution from the trust estate during that year.

3.06 Release of Powers by Amendment of Trusts

Any Trustee shall have power and authority to amend the provisions of the trust in order to surrender, release, renounce or disclaim (either absolutely or in favor of the Corporate Trustee) any one or more of the discretionary powers given to that Trustee. Any such amendment shall be made by written instrument acknowledged and filed in the Deed Records of the County where I reside at my death. After any power has been so surrendered, released, renounced or disclaimed, it shall never again be exercised by that Trustee.

ITEM FOUR: LIABILITY OF TRUSTEE AND PERSONS DEALING WITH IT

4.01 Persons Dealing with Trustee

No purchaser from or other person dealing with the Trustee shall be responsible for the application of any purchase money or other thing of value paid or delivered to any Trustee, but the receipt of any Trustee shall be a full discharge. No purchaser from or other person dealing with any Trustee and no issuer, transfer agent or other agent of any issuer, of any securities to which any transaction with any Trustee

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This paragraph of powers is often better left to the corporate trustee because of the bookkeeping details. See also note 90 to the Article and note 12 supra.

—23—

For inter vivos trust, specify the county.
SELECTION OF A TRUSTEE

shall relate, shall be under any obligation to ascertain or inquire into the power of the Trustee to transfer, pledge, or otherwise in any manner dispose of or deal with any securities or other property comprising part of the trust estate.

4.02 Liability of Trustee No Trustee shall be responsible or liable for any loss which may occur by reason of depreciation in value of the properties at any time belonging to the trust estate, nor for any other loss which may occur, except that each Trustee shall be liable for his own negligence, neglect, default or willful wrong.

4.03 Liability of Trustee for Acts of Others No Trustee shall be liable or responsible for the acts, omissions or defaults of any agent or other person to whom duties may be properly delegated hereunder (except officers or regular employees of any Trustee) if such agent or person was appointed with due care. No Trustee shall be liable or responsible for failure to contest the accounts of any other Trustee, or otherwise to compel any other Trustee to redress any breach of trust, unless in writing requested to do so by a beneficiary or a guardian or guardian ad litem thereof. No Trustee shall be liable or responsible for any act within the sole power and discretion of any other Trustee. 4

4.04 Limitation of Personal Liability of Trustee No Trustee shall incur any personal liability to any person or corporation dealing with any Trustee in the administration of the trust estate, and each Trustee shall be entitled to reimbursement from the trust estate for any liability, whether in contract or in tort, incurred in the administration of the trust estate in accordance with the provisions hereof, and each Trustee may contract in such form that he shall be exempt from such personal liability and that such liability shall be limited to the trust estate.

4.05 Corporate Trustee The powers and authorities granted to the Trustee shall not be limited by the fact that a Trustee is a bank or financial institution, and no trustee shall be subject to limitations or restrictions imposed upon a bank or financial institution or upon fiduciaries generally with respect to the type of investment any such Trustee may make of its own funds or of the funds of others. Specifically, the Trustee may (A) retain, acquire, or otherwise deal in the capital stock or other securities of a Trustee or of a corporation for which a Trustee is registrar, transfer agent, or the like; (B) deposit trust funds with a Trustee as a bank, and (C) contract or otherwise enter into transactions with a Trustee as a bank or any of its affiliates or any other trust for which it is acting as Trustee.

4.06 Judgment and Discretion of Trustees Final Wherever the judgment or discretion of any Trustee may be exercised, it shall be final and binding upon every person interested in the trust estate. Any Trustee exercising any discretionary power relating to the distribution or accumulation of principal or income or to the termination of any trust shall be responsible only for lack of good faith in the exercise of such power.

ITEM FIVE: DISTRIBUTIONS; TERMINATION

5.01 Income Prior to Termination My Trustee may, from time to time, distribute the income of the trust estate (or may accumulate any or

4 See text accompanying note 113 to the Article.
all of it, and may later distribute any or all accumulated income) in such
amounts as my Trustee in his discretion thinks appropriate, to any one or
more of the following persons [beneficiaries designated by name or class].

5.02 Principal Prior to Termination My Trustee may, from time to
time, distribute any or all the principal of the trust estate in such amounts
as my Trustee in his discretion thinks appropriate, to any one or more of
the following persons [beneficiaries designated by name or class; need not be
same as in 5.01].

5.03 Termination and Distribution My Trust shall terminate on the
death of the last to die of the persons named or described in 5.01 above.
Thereupon the principal and undistributed income of the trust estate shall
be distributed in such amounts to such persons as such last to die shall ap-
point by a will which specifically refers to this power of appointment. This
power shall never be exercisable in favor of the estate, the creditors, or the
creditors of the estate of myself or of such last to die. If such last to die
fails so to appoint, the principal and undistributed income shall be distributed
to my heirs at law and next of kin (as if I had died at the time of such
termination) according to the laws of descent and distribution then in force
in Texas.

FORM B—PROVISIONS FOR INDIVIDUAL CO-TRUSTEES; MAJORITY RULE

[Reference: text section 4 and notes 109, 111; 39, 46 to the Article]

ITEM ONE: DISPOSITIVE PROVISIONS [omitted]

ITEM TWO: TRUSTEES

2.01 Designation of Trustees I designate as my Trustees ________
____________________________________, and __________.

2.02 [Same as in Form A]

2.03 Successor Trustees If all my Trustees fail or cease to serve for
any reason, I" designate as my Trustee [name and address of individuals or
bank or trust company].

2.04 - 2.07 [Same as in Form A]

2.08 Majority Rule When three or more Trustees are qualified and
acting, all powers and discretions granted to the Trustees shall be exercised
by a majority. When fewer than three are acting, all powers and discretions
shall be exercised only by unanimous action.

2.09 Absence; Incapacity; Delegation If an individual Trustee (A)
is at any time absent from the State of Texas, or (B) is mentally or physically incapacitated to perform his duties or (C) by an instrument in writing, delegates his powers and duties to one or more other Trustees, such individual need not resign or be removed. In any such event, the other Trustees shall exercise all the powers and discretions and perform all the duties of such Trustee as if he had died and had no successor. Such individual shall not be liable for any actions taken during such period. Any person dealing with the other Trustees shall be protected in all respects upon receiving a written statement from the other trustees of such absence, incapacity or delegation. On the termination of such absence, incapacity or delegation, such individual shall resume his position as Trustee.\(^{21}\)

2.10 Limitation on Power in Respect of Self Notwithstanding any other provision, no Trustee shall determine (or participate in the determination) (A) whether income to which he may be entitled as a beneficiary shall be accumulated or distributed, or (B) whether principal or accumulated income shall be distributed to him as a beneficiary.\(^ {22}\)

ITEM THREE: POWERS OF TRUSTEES

3.01 Powers [Combining 3.01 - 3.03 of Form A] 3.02 - 3.03 [Based on 3.04 and 3.05 of Form A, with appropriate modifications] 3.04 [Same as 3.06 of Form A] 3.05 [Same as 3.07 of Form A]

FORM C—POWER IN BENEFICIARIES TO REMOVE ONE CORPORATE TRUSTEE AND SUBSTITUTE ANOTHER

[Reference: text at notes 114, 123 to the Article]

At any time or times, a majority of those persons who could then with or without the exercise of discretion receive any distribution of income or corpus from the trust estate, may remove (with or without cause) any Corporate Trustee and substitute therefor any national bank in the United States or any bank or trust company in County, Texas, having trust powers and a capital or surplus of $ or more. The removal and substitution shall be by written instrument, duly acknowledged and filed in the Deed Records of County, Texas. The substitution shall be revocable until the successor has accepted appointment and entered upon its duties as Trustee; such revocation shall be in the same form as the substitution. At least thirty days prior to any effective date specified in the removal and substitution, written notice shall be given to the Trustee being removed and the Trustee being substituted.

FORM D—POWER OF INDIVIDUAL TRUSTEE(S) TO DESIGNATE A CORPORATE CO-TRUSTEE

[Reference: text at note 116 to the Article]

My individual Trustee(s) may at any time designate as co-trustee any national bank in the United States or any state bank or trust company in County, Texas, having trust powers and a capital and sur-

\(^{21}\) More detailed provisions on recovery of capacity may be desired.  
\(^{22}\) See notes 39, 46 and 109 to the Article.
plus of $____________________ or more. Such designation shall be by written
instrument, duly acknowledged, and filed in the Deed Records of such Coun-
ty, and promptly delivered to the designated co-trustee. Any designation
shall be revocable until the Corporate Trustee has accepted appointment and
entered upon its duties as Trustee; such revocation shall be in the same form
as the original designation. Such designation may delegate, in whole or in
part, any or all of the powers and discretions given to my Trustee(s). 23

FORM E—VOTING RIGHTS IN CO-TRUSTEE OR ADVISER

[Reference: text at notes 63, 64, 88, 113, 115, 119 to the Article]

All voting or other rights relating to securities which are at any time part
of the trust estate shall be exercised solely by ________________
as co-trustee. 24 My Corporate Trustee shall be free from all liability and re-
sponsibility with regard to such exercise.

FORM F—TRUSTEE TO CHANGE INVESTMENTS ONLY ON CONSENT
OF ADVISER

[Reference: text at notes 104, 113, 115 to the Article]

My Trustee shall not make any change in the investments of the trust
estate 25 without the written consent of my trusted adviser, [name]. My
Trustee shall promptly notify my adviser in writing of any proposed change,
and my adviser shall promptly reply in writing whether or not he consents
to such proposed change. My Trustee shall have no responsibility or liability
for investments changed pursuant to such consent, or not changed pursuant
to a denial of such consent. This provision shall be of no effect on the death
or incapacity of my adviser. 26

FORM G—TRUSTEE TO INVEST ACCORDING TO ADVISER’S DIRECTION

[Reference: text at notes 105, 113, 115 to the Article]

My Trustee shall invest the trust estate in such securities as my trusted
adviser [name] shall from time to time direct. No investment or purchase
shall be made without the written directions of my adviser. Nothing herein
shall prevent my Trustee from applying to my adviser for directions, nor
require my Trustee to do so. The Trustee shall have no responsibility or li-
ability for investments other than to carry out such written directions. This
provision shall be of no effect on the death or incapacity of my adviser. 27

23 Useful additions: power of removal (see Form C) and protection of third persons (see
Form A, § 2.02, last sentence).

24 Alternative: acting in a fiduciary capacity.

25 Alternative: limit to designated investments, such as closely held stock.

26 Alternative: provision for successor adviser; cf., Form A at notes 6-7 supra. Consider
adding language like Form A, § 3.01(14) at note 16 supra.

27 Alternative: provision for successor adviser; see Form A at notes 6-7 supra. Consider
adding language like Form A, § 3.01(14) at note 16 supra.