My Trustee Manual

Checklists and Guidelines for the
Successor Trustee of My Living Trust

Prepared by

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PLEASE NOTE: This Manual was published in August 2017. Prior to utilizing this Manual, you may wish to contact our office at (720) 528-4227 to find out if it has been more recently updated and to obtain the most recent version.

DISCLAIMER

This Manual is intended to provide general guidelines only, to assist you when acting as successor Trustee upon the incapacity or death of the Trust maker (also known as the "Grantor") or upon the incapacity or death of a previously acting Trustee. It is not intended to, nor does it address every single thing you may need to know for every single situation that could arise. Hopefully, it can give you a significant head start in taking appropriate actions and place you in a position to reduce attorney involvement to a minimum. **However, it is not a substitute for proper legal advice and assistance, and you should consult with competent legal counsel regarding the specific details of your individual situation and any questions you may have that may not be fully answered in this Manual.**

This Manual does not constitute legal advice and the fact that THE RAINS LAW FIRM, LLC has written and provided this Manual does not in and of itself constitute your engagement of THE RAINS LAW FIRM, LLC for legal representation; that must be done by a separate engagement letter. THE RAINS LAW FIRM, LLC does provide a *free initial consultation* (if you qualify), and you may wish to take advantage of this (if you have not already done so) by contacting us and setting up an appointment.

This Manual is based on Colorado Law and, where applicable, Federal Law existing as of the date of publication appearing on the title page. The laws that apply to the administration of a Trust may differ from state to state. In particular, Colorado is what is known as a "separate property" state whose laws for married couples may differ greatly from "community law" states. If the Grantor lives in a state other than Colorado, or had real estate in another state, or you, the Trustee, live in another state, it is possible that you will, at some point, need to consult the laws of these particular states. If other state laws may need to be considered, it is advisable to seek legal counsel licensed in those particular states.

Finally, keep in mind that the laws and their interpretation continue to change and evolve over time. Before proceeding to use this Manual, you should consult the date of publication on the title page and find out if you require any updates to this Manual. By providing this Manual, THE RAINS LAW FIRM, LLC assumes no responsibility or obligation to periodically update it. If THE RAINS LAW FIRM, LLC does have more recent updates, there may be an additional charge for you to obtain them.

Again, this Manual is intended to only provide a general overview, but hopefully, a very useful and practical one that will save you a lot of time, expense, aggravation, and anxiety!

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INTRODUCTION

When a Living Trust is established, the person setting up the Trust as part of his or her estate plan (the "Grantor") usually serves as initial "Trustee" in charge of the administration of the Trust and the handling of the Trust assets. For that initial Trustee, handling the Trust is pretty much "business as usual", with the exception that title to assets (and, in some cases, beneficiary to assets) is placed into the name of the Trust.

However, when the Grantor can no longer act as Trustee for himself or herself because of disability, incapacity, or death, then the Successor Trustee (or more than one "Co-Trustees") named in the Trust document is called upon to take over. Unfortunately, even though the Successor Trustee may be an individual in whom the Grantor had great trust and faith in being able to handle the affairs of the Trust, most Trustees have never done this before and really have no idea what to do or how to do it. Many Grantors, as well as Trustees, may even think that the Living Trust will automatically take care of everything, without any work involved by anyone!

The purpose of this Manual is to give you, the Successor Trustee, a general understanding of what to expect and what needs to be done, along with some simple checklists and guidelines to assist you. As already stated in the "Disclaimer", this Manual is not a substitute for proper legal advice and assistance, but it *can* give you a great deal of help and peace of mind, whether you choose to handle the position of Trustee on your own, or with the assistance of an attorney.

This Manual has been laid out in the order that you should read it. It does not necessarily reflect the chronological order of the various actions that must take place. The first chapter gives you a quick overview of how a Living Trust works and the second chapter acquaints you with certain "Do's" and "Don'ts" before you get started. Chapters 3, 4 and 5 provide specific checklists of actions that should be taken upon the disability or death of the Grantor. We have placed these chapters in the front in order to give you immediate assistance in tackling the important tasks ahead. The remaining chapters then go into further detail and explanation of the various aspects of administering the Trust, as well as provide additional helpful checklists and guidelines. You may want to refer back to this Manual as a useful tool throughout the Trust administration process, particularly as you complete each step and approach the next one.

ABOUT THE AUTHOR

As a father of three and a business owner, Brandon Rains understands the worries, concerns, and hopes of parents and business owners. So often, we are filled with hope and worry for the future. Parents and business owners want to hope for the best, but we feel the need to prepare for the worst. We also want to do the most and best we can to try to guarantee that everything will turn out how we hope.

Both estate planning and business planning are about those we love. While parents and business owners understand that while love is at the center of it all, money helps. We also understand that not everything lasts forever. While estate planning and business planning does not change this, Brandon can still help the inevitable parts of life hurt less.

Brandon is an experienced estate planning and business planning attorney practicing in the Denver Metro and Fort Collins areas of Colorado. His practice is both client-focused and relationship-based. What does that mean? Brandon firmly believes in his role as "counselor" to his clients, and so he works with his clients to develop the planning that they want and what fits their needs.

Brandon believes that education and knowledge is power, and so he spends large portions of time educating clients and helping them narrow their options down to their preferred method to continue to take care of their loved ones. A plan that does not do what the client wants is not a success. Brandon takes pride in taking care of his clients through clear communication, prompt responses to questions, and prioritizing his clients to help them realize their business and familial goals.

Brandon's fundamental belief is that clients are not one-time transactions. Rather, estate and business planning are investments that clients make to protect their financial future and that of their loves ones. Time and legal changes can very quickly render even the best estate plans obsolete. Without a strong attorney-client relationship, those changes are never addressed and clients' plans no longer work as they intended.

Brandon seeks to develop deep and long-lasting relationships with his clients through frequent contact and an optional Continual Update and Education Program so that he can do all he can to help his clients take care of their loved ones. Brandon understands that estate planning and business planning is an investment on the part of his clients in the future of their loved ones. Brandon wants to give his clients a voice, so they can be successful in expressing their love and desires to their loved ones after they can no longer do so for themselves.

ABOUT THE RAINS LAW FIRM, LLC

Mission Statement

The Rains Law Firm's mission is to provide comprehensive, client-focused, and relationship-based estate planning and business planning services to individuals, families, and business owners in Colorado. The Rains Law Firm's ultimate purpose is to provide individuals, families, and business owners with peace of mind and promote harmony within their families as they invest in their family's future.

Guiding Principles

The Rains Law Firm has three core principles that guide everything that we do. Clients are not one-time transactions, but are individuals who want to take care of their loved ones after they are no longer there for their families. Our clients are investing in their families, and so my purpose is to invest in my clients and their families just as much as our clients are invested in their families. The way that we do this is through consistent and practical application of our Guiding Principles, which are Comprehensiveness, Client-focused, and Relationship-based.

- **Comprehensiveness**

People's lives are complicated, and they have many different concerns, goals, and influences. I aim to address all of these different dynamics that are going on in my clients' lives. I recognize that only by addressing as much of a person's life that I can, can I truly develop an estate plan that accomplishes everything that a person needs. Estate Planning touches on all those parts in a person's life that is most important, and so I address a person's life with sensitivity and comprehensiveness to give my clients the best possible experience.

- **Client-focused**

One of the titles for attorney is "counselor." To me, that is the most powerful word that describes my purpose. I am not an attorney who condescendingly tells my client what they are going to do. Rather, my process is to first listen, educate, and then counsel with my clients to help them identify the legal solution that best meets their needs, and to fulfill those needs efficiently and effectively. I understand that I am here to serve my clients, and I can only do that by always focusing on my client and their desires.

- **Relationship-based**

I am committed to develop long-term relationships with my client and their team of financial professionals in order to provide continual, long-term legal solutions. Again, my clients are not one-time transactions. People's lives change and develop, and so should their estate plans. My practice is structured, through the Continual Update and Education Program, to make it easy and affordable for clients to consistently edit their estate plans so that they always reflect their wishes. This optional Program allows me to become a part of my client's lives and be available whenever I am needed. If you desire more information about the Continual Update and Education Program, please ask me during our complimentary initial meeting.

CHAPTER 1
BRIEF OVERVIEW OF HOW A LIVING TRUST WORKS

First, you should become familiar with certain Trust terminology. There are basically three parties, or groups of individuals, that are involved with the administration of a Trust.

First, there is the person who originally set up the Trust to handle his or her affairs. This person is referred to as the "Trust Maker," "Trustor," "Settlor," or **"Grantor."** Throughout this Manual, we will use the term "Grantor". Many times, a joint Trust will be set up for both husband and wife, with both being Grantors. The role of you, as Successor Trustee, is to follow the wishes and intentions of the Grantor(s) as expressed in the Trust document.

Second, there is the manager of the Trust referred to as the **"Trustee"**. When the Trust is set up, usually the Grantor(s) act as initial Trustee(s). Once the initial Trustee becomes too ill, disabled, incapacitated, dies, or for any other reason is unable or unwilling to act, then the "Successor Trustee" named in the Trust document is to take over. Sometimes, there may be "Co-Trustees" named; in other words, more than one individual may be specified to act together. Trustees may be either individuals or professional organizations such as banks and trust companies.

Finally, the third party (or parties) to a Trust are the people who will benefit from Trust income and/or principal distributions, commonly referred to as the "inheritors", but known in legal terminology as **"beneficiaries"**. Beneficiaries can fall into several categories: "primary" (or "current") beneficiaries, presently entitled to distributions or to whom distributions may be made in the discretion of the Trustee (including the Grantor while he or she is alive); "secondary" (or "contingent") beneficiaries, who replace the primary beneficiaries should they pass away (such as a grandchild succeeding to a child's share); and "remainder" beneficiaries, who inherit only when all of the above beneficiaries are deceased (sometimes these may be distant relatives known as "heirs at law" or may be charitable organizations).

A Living Trust-centered estate plan (which may include such other legal documents as a Pour-Over Will, General Durable Power of Attorney, Medical Power of Attorney, Living Will, and HIPAA Authorization) is generally intended to:

- Distribute the Grantor's assets to the right people, in the right amounts, at the right times and in the right manner appropriate for each of them, without the delays and expenses of Probate Court involvement.
- Manage the Grantor's assets for him or her in the event of his or her disability or incapacity, and to manage those assets for the people who will later inherit them (until they are distributed after the Grantor's death), again, without the need for court involvement.
- Maintain the privacy of the Grantor's assets and business, as well as his or her last wishes.
- Possibly reduce estate taxes for a married couple.

- If so designed, protect beneficiaries' inheritance from the claims of spouses, creditors, and lawsuits, from the loss of needs-based government benefits, and from potential estate taxes when the original inheritor dies and passes the assets down to the next generation.

Both individually and together, these benefits that may be derived from a properly drafted and administered Living Trust-centered estate plan are substantial. *It is very important that you remember these benefits when you, as Successor Trustee, are dealing with the work and paying the expenses, fees and costs that may be involved in the Trust administration process.* The work, expenses, fees and costs will almost always be far less than they would have been if you had to undertake the administration without a Trust and were forced to go to Probate Court! *Also, keep in mind that a properly qualified attorney can help take the burden of much of the work off you and assist you with your key decisions.* Just because you have this Manual does not mean that you are expected to do it all alone! In fact, the Trust enables you to employ and pay from Trust assets the reasonable fees of professional advisors, including not only the attorney, but an accountant, investment advisor, financial planner, real estate manager, appraiser, and so on.

You, as Successor Trustee, have certain legal obligations to carry out and administer the Trust properly on behalf of the Grantor and the beneficiaries. **Your basic duties or actions will fall into three major categories:**

1) Collection, management and investment of assets;
2) Payment of debts, expenses and taxes;
3) Distributions to the beneficiaries.

This Manual is intended to assist you in carrying out these duties and actions.

Before we go further, please note that the Grantor(s) may have established other trusts, besides the Living Trust, during his or her lifetime (or even in his or her Will). These other trusts fall within many different types, including (but not limited to) an Irrevocable Life Insurance Trust, an Standalone Retirement Trust, a Gifting Trust, a Personal Residence Trust, a Charitable Trust, etc. As you will see in the checklists contained in Chapters 3, 4 and 5 of this Manual, one of the very first tasks you will need to undertake is locating all trusts or other pertinent legal documents that may exist other than just the Living Trust. You may need to coordinate your actions, as Successor Trustee of the Living Trust, with the provisions of these other documents. There may even be different people serving as Trustees of these other trusts with whom you will need to coordinate. One way to check on whether there are other pertinent legal documents involved is to contact the estate planning attorney who created the Living Trust. This may be a good reason, as well as many others, to arrange a consultation with the estate planning attorney before even proceeding with any actions laid out in this Manual.

Whether the Living Trust or other Trusts were prepared by THE RAINS LAW FIRM, LLC, you may obtain a *free initial consultation* (if you qualify) with an attorney of THE RAINS LAW FIRM, LLC by calling us at (720) 528-4227 and setting up an appointment.

CHAPTER 2
BEFORE GETTING STARTED:
A FEW IMPORTANT "DO'S" AND "DON'TS"

In getting you started, here are a few key things to keep in mind (you may want to refer to this Chapter from time to time!).

DO'S:

- *Do* take your role and responsibility as Trustee seriously. You are not required, or morally or legally obligated, to take on the position of Trustee even though you may have been named to do so. If for any reason you do not wish to act, you should decline or resign as soon as possible, because once you take on the position of Trustee, you must do it right and not take your duties, powers and liabilities lightly.
- *Do* seek the guidance and advice, as needed, of a qualified attorney, accountant, financial advisor, real estate manager, and other professionals. You have the power to hire these professionals and to pay for the reasonable cost of their services from the Trust.
- *Do* get organized from the start and stay organized. Keep a calendar of due dates and make sure to act promptly when required to do so.
- *Do* run all cash transactions through a bank or brokerage account in the name of the Trust. Be sure to keep records of what income item(s) each deposit represents and what expense each withdrawal or payment represents.
- *Do* make decisions prudently and reasonably. It is extremely important to act responsibly, maintain records of major decisions made, and document why you made them, should your actions ever be questioned.
- *Do* document all meetings and phone calls with Trust advisors (attorney, CPA, financial advisor, etc.) and with the beneficiaries. Again, this may prove useful later if any of your decisions or actions are ever questioned.
- *Do* maintain the confidentiality of Trust matters. You should do whatever reasonably possible to protect the privacy of the Grantor's affairs, but also remember to periodically inform the primary beneficiaries of what is going on and be appropriately responsive to their questions and requests.
- *Do* be civil and courteous. As a Trustee, it is imperative that you do remain civil and courteous at all times with the beneficiaries and professionals you may work with (even when you may be emotional or under stress).
- *Do* keep in mind that it is always better to act slowly and conservatively, rather than quickly and perhaps too aggressively. Be sure not to make any quick or impulsive decisions without fully considering the pros and cons of your actions. Again, seek professional advice, if necessary for your peace of mind.

DON'TS:

- *Don't* immediately start cashing out assets, selling properties or reinvesting assets. As Trustee, do not immediately cash out assets (particularly retirement plans, IRAs and annuities), selling properties (particularly a business or real estate), or reinvesting assets (such as cash or stocks, bonds, and mutual funds). The only possible exception to this would be if it is absolutely necessary to raise immediate cash for expenses or taxes, and even in the event you are required to do this, you should consult with appropriate professional advisors before doing so.
- *Don't* let anyone pressure you to do something "now". You should not let anyone (other than your attorney, of course!) pressure you into acting immediately following the Grantor's disability or death. The first "hard" deadline when a Grantor dies usually isn't until *nine months after the date of death*, and even then, you should take the time to properly consider actions before implementing them.
- *Don't* commingle Trust funds with your own or use Trust funds for your own personal purposes or expenses. In addition, *don't* advance monies from your own personal accounts to pay Trust expenses; the only exception to this might be for a brief period, following the decedent's disability or death, if there are immediate expenses to be paid, but bank accounts for the Trust have not yet been set up and you cannot access existing ones.
- *Don't* make loans to anyone, particularly yourself, from Trust funds, without first consulting with an attorney, considering the future need for liquid funds, and then properly documenting these loans.
- *Don't* deal directly with the IRS (or any other tax authority) or with an attorney representing someone else. Have a qualified professional do it for you.
- *Don't* procrastinate. Do not wait until the last minute to do things, especially when you may be required to gather information for your attorney or CPA; do it well in advance of important deadlines.
- *Don't* ignore phone calls, faxes, e-mails and other forms of correspondence from beneficiaries or their legal counsel. Don't avoid them just because you don't like dealing with them or may think that you are in trouble or some conflict may arise. Responding promptly, fully and truthfully to questions and requests will often result in resolving potential trouble or conflict *before* it arises.
- *Don't* act alone, if there are other Co-Trustees, unless you have their proper written agreement to do so.
- *Don't* just throw up your hands and give up when it appears that your Trustee duties may be too overwhelming or too difficult. Remember, you can seek the assistance of qualified professionals. Also keep this in mind - - many hundreds of thousands of other Trustees have worked their way through the Trust administration process...and survived!

CHAPTER 3
CHECKLIST OF IMMEDIATE ACTIONS UPON DISABILITY OR INCAPACITY

This chapter is designed to enable you, the person named as the "Successor Trustee" in someone's Living Trust, to handle the affairs of the person who set up the Trust (the "Grantor"), when that person becomes disabled, incapacitated or otherwise is unable or just unwilling to act as his or her own Trustee. You may be married to the Grantor and have been serving as Co-Trustee along with him or her. Or, you may be a child of the Grantor, or a distant relative, friend, or independent third party stepping in. This is not intended as an exhaustive or detailed list of all the actions which should be taken by you as Trustee. Rather, it is intended to give you a brief, general checklist which will help you immediately step in and handle those items that demand your attention first. After reviewing this checklist, it is recommended that you then read through the rest of this Manual (beginning at the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)"). These other portions of the Manual will provide you with significantly more detail and explanation of the actions on this checklist, as well as further actions you may need to take as Trustee.

The following actions are recommended upon the disability, incapacity, inability or unwillingness of the Grantor to act as Trustee (some of these may also apply if the Grantor voluntarily resigns as Trustee; see the Chapter, "Transition to Another Trustee"):

- ❑ If you are the Grantor's spouse, or another close family member, and the Grantor's incapacity has come suddenly, the most important thing is to **take care of yourself first**. Shock and trauma can take unexpected forms. Most actions that will need to be taken do *not* have to be done immediately and, if you act too quickly out of worry or anxiety, you may do the *wrong* things and make *bad* decisions. You should contact a family member or friend who can spend time with you, either by phone or in person, during the next few hours or days, until such time as you are emotionally stable and can pursue the other items on this checklist. Avoid entering contracts for anything while you are still in a highly emotional state, and avoid spending or lending large sums of money.
- ❑ **Contact by telephone or otherwise notify the immediately family, close friends, business colleagues and the Grantor's employer** (even if the Grantor has retired, as there may be some company benefits still available). If the Grantor was a client of THE RAINS LAW FIRM, LLC, see his or her "Estate Planning Portfolio" three-ring binder and then turn to the tab entitled "Location List" for the persons to contact and how to reach them.
- ❑ **Arrange for the care of members of the immediate family** who may need continuing personal attention, including appropriate in-home living assistance or childcare.

- **Locate the Grantor's important papers**, including the Living Trust and other estate planning documents (copies of which should be found in his or her THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder). See the Chapter, "Reviewing the Trust (and Other Estate Plan Documents"). Also, inventory the safe deposit box, if any. Gather as many of the Grantor's papers as possible, which could include statements of various accounts and assets, tax returns, deeds, insurance and annuity policies, etc. Realize that this information gathering process may not be completed all at once and may take several weeks.

- **If you have good reason to believe the Grantor is subject to Elder Abuse - - either financial, physical or emotional - -** you should immediately check the phone book yellow pages and contact the appropriate government agency or contact an "Elder Law" Attorney.

- **Make healthcare and treatment decisions** on behalf of the Grantor, as appropriate and necessary. The Grantor should have a separate document known as an "Advance Healthcare Directive" (or two documents called a "Durable Power of Attorney for Healthcare" and "Living Will"). The Grantor may have also executed a "HIPAA Authorization". You will need to check these documents to be sure you are the person appointed to make these healthcare and treatment decisions; someone else, other than you as Trustee of the Living Trust, may be named instead, in which case you should contact that person immediately. If the Grantor has been rushed to a hospital and emergency decisions must be immediately made, check his or her wallet for a "Health Document Emergency Card" (or "Emergency Access to Healthcare Directives" card); some attorneys (including THE RAINS LAW FIRM, LLC) offer this service, which can immediately fax to the hospital the healthcare documents. Assuming you are the first "agent" named to make medical decisions for the Grantor, you will utilize the pertinent document to do so. Depending on the document, you may make decisions immediately or be required to get two doctor letters (as discussed below) before acting. A copy of these healthcare documents should be delivered to the Grantor's physicians as soon as possible. The scope of decisions that you can make will vary according to the terms of the Grantor's documents, but will generally include everything from operations, transfusions, various medical care and treatments, nursing care, and artificial life support. (Note: Termination of artificial life support can also generally be made under an Advance Healthcare Directive, but if the Grantor instead has a Durable Power of Attorney for Healthcare, the separate document known as a "Living Will" will probably be necessary to make this decision). You may need to use the "HIPAA Authorization" in order to obtain the Grantor's medical information, get any doctor letters, and make medical-related decisions; if the Grantor did not sign such a document, you may be empowered to do so on his or her behalf either under the Healthcare Document or a separate document executed by the Grantor known as a "Durable Power of Attorney for Property" (also known as a "Durable Power of Attorney for Estate and Personal Planning Uses").

- ❑ If you do not reside with the Grantor, **change the Grantor's mailing address** so that you can receive his or her mail. You will need to complete a Change of Address Form and submit it to the U.S. Postal Service. It may be done online through www.usps.com. Proof of your authority to change the mailing address is typically not required. This address change will be valid for only a limited number of months, so as mail comes in, you should notify any senders that future correspondence should be mailed directly to your address.

- ❑ As soon as you *begin* to locate the Grantor's important papers (as set forth above), **notify THE RAINS LAW FIRM, LLC (or another qualified estate planning and trust administration law firm) and make an appointment** to review the Grantor's estate planning documents and assist you with some of the remaining items on this checklist. (THE RAINS LAW FIRM, LLC offers a *free* initial consultation, if you qualify, even if the estate plan was not prepared by them.)

- ❑ In the event that the Grantor's condition is terminal, or the doctors do not believe the Grantor will live beyond one year, you should **consult with an attorney regarding the advisability of pursuing last minute estate planning,** such as gifting, paying certain deductible taxes, withdrawing certain taxable accounts, converting to a Roth IRA, other planning to reduce potential income and estate taxes or revising the estate plan to be current with recent laws. Generally, these actions may be taken by you under the Grantor's Durable Power of Attorney for Property, but the attorney will need to confirm this by consulting the exact terms of that document. These last-minute actions may wind up saving significant sums of money for the Grantor's loved ones and beneficiaries.

- ❑ **Take the legal steps necessary for you to assume the position of Trustee.** If you are the spouse of the Grantor and have already been serving as a Co-Trustee, you may be able to act as sole Trustee on certain accounts without requiring further legal documents. However, it is still advisable that you pursue the following steps in order to take over other matters as sole Trustee. Whether you are the spouse or not, the process of installing you as acting Trustee may occur in one of four ways.

  If the Grantor is legally competent, that is, capable of making and agreeing to a *voluntary resignation,* you may proceed to act as Trustee once the Grantor signs an appropriate Trustee resignation document, which should be notarized. You may need an attorney's assistance when determining the capacity of the Grantor and formalizing the resignation document. The original Trustee resignation should be placed with the original Living Trust document and a copy placed with the other document copies (that may already be in THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder).

The second way that you may take over as Trustee is for the Grantor to sign a *Living Trust Amendment,* which states that you are now appointed to serve as immediate sole Trustee (or as Co-Trustee with the Grantor, if he or she wishes). An amendment has certain advantages over a resignation, in that the Grantor is affirmatively stating his or her wishes to have you act immediately so there is less likelihood of other persons questioning your authority. In

addition, the Grantor is spared the emotional disappointment of acknowledging his or her inability or unwillingness to act, and the Grantor may choose to continue to act as a Co-Trustee with you until he or she feels comfortable enough to resign and let you solely handle his or her affairs. However, whether the Grantor voluntarily resigns or amends the Trust, there is still a possibility that his or her actions can be questioned on the basis of whether he or she had the legal capacity to do so.

Therefore, the third (and usually most preferable) way for you to take over as Trustee, is through obtaining *attending doctor letters* stating that the Grantor, in the opinion of each of the doctors, is no longer able to handle his or her own affairs (whether one letter will be sufficient and the exact wording of the doctor letters will be dictated by the language contained in the Living Trust document). Sometimes, the Trust document may provide for a "panel" of people to determine that the Grantor is incapacitated, without the need or requirement of doctor letters. Note: If you instead obtain two attending doctor letters stating that the Grantor *is* capable of handling his or her own affairs, these can be used as support for having the Grantor either resign or amend the Trust; but if the Grantor does not wish to do so and you believe that he or she lacks the ability to continue to handle his or her own affairs despite the positive doctor letters, it may be necessary for you to file a petition in Probate Court to have a judge determine the Grantor's capacity.

The final way you may take over as Trustee can be dictated in the Living Trust document itself. Sometimes, *the beneficiaries or a special party to the Trust (such as a "Special Co-Trustee" or "Trust Protector") may have the authority to appoint and install you as the acting Trustee.* If the Trust does not provide for this and all of the other options fail, you may need to file a petition with the Probate Court to install you as the new Trustee (or to act as the Grantor's "guardian" or "conservator").

Regardless of the procedure used, you will likely need a *"Trust Certification"* document prepared by an attorney that verifies your authority to act as Trustee; that way, you will be able to transact business more quickly and smoothly with third parties, such as banks, mutual fund companies, real estate escrows, etc. (For more details, see the Chapter, "Transition to Another Trustee"). (Also note: you may be named as "agent" under the Grantor's Durable Power of Attorney and may have to utilize that document to take certain urgent, immediate actions that may be necessary before you are formally installed as Trustee.)

- ❑ Once you have been installed as Trustee, you should **notify the next Successor Trustee as well as the beneficiaries of the Trust**. The people you will be required by law to notify and how you must notify them will be determined both by the Living Trust document and state law, so you may want to consult an attorney. (See the Chapter, "Transition to Another Trustee").
- ❑ **Establish immediate control over the assets in the Grantor's home.** You may need to place valuables in safe, locked places and may even need to change the door locks in order to prevent "beneficiary raids". You may also want to write down a simple inventory of personal items (not necessarily every little item in complete detail), just in case beneficiaries start to "borrow" items.

- ❑ **Notify the Grantor's financial counselor and accountant or tax preparer,** or use your own or obtain a new one to assist you as Trustee. Decisions may need to be made soon regarding sales and/or repositioning of financial assets and income tax planning, and estimated income tax payments and tax returns may become due. A new taxpayer identification number may need to be obtained for the Trust, unless you are the Grantor's spouse and you were already acting as a Co-Trustee. (See the Chapter, "Income Taxes").

- ❑ **Telephone the Grantor's employee benefits office** (whether or not he or she is yet retired) with the following information: name, Social Security number, whether the incapacity was due to accident or illness, and your name and address. The company can then begin to immediately process any benefits to which the Grantor may be entitled.

- ❑ **Look into any available federal or state benefits,** such as Supplemental Security Income ("SSI"), state disability income ("SDI"), Medicare and Medicaid. Notify the local program office and provide the same information as in the preceding item. You may need the assistance of an attorney who is an "Elder Law" Specialist to assist you in obtaining government benefits; do not just assume that no benefits are available or simply give up if the program office rejects your benefits request. (THE RAINS LAW FIRM, LLC can refer you to such a Specialist). If the Grantor was ever in the service, he or she may also have available certain benefits through the Veteran's Administration which you should check into.

- ❑ **Notify appropriate accident or disability insurers.** Give the same information as with the Grantor's employee benefits office above and ask what further information is needed to process your claim. If the Grantor's inability to act is a result of an accident where a third-party was involved, such as an auto accident, you may wish to consult with an attorney about possibly pursuing a legal claim on the Grantor's behalf.

- ❑ **Be sure the assets already in the name of the Living Trust are re-titled to show you as the Trustee of the Trust.** How this is done may differ depending on the type of asset. (See the Chapter, "Maintaining Title to Assets, Transacting Business and Paying Expenses"). <u>If you find assets that, for any reason, are *not* already in the name of the Living Trust,</u> you may need to use the Grantor's Durable Power of Attorney for Property to re-title such assets into the Trust name, with you as Trustee; however, many third-parties do not like to rely on Powers of Attorney for such title transfers, and you may further require the assistance of an attorney. If you are the Grantor's spouse and have already been acting as sole Trustee or Co-Trustee, you may not need to immediately do any significant paperwork; this is often true on certain banking and financial institution accounts, but you will likely need to go through the above procedures with respect to any real estate, as well as certain other assets. *It may be critically important to get the Grantor's name off title to accounts and assets as quickly as possible, in order to prevent "looting" by unscrupulous parties who may influence or coerce the*

Grantor into signing away assets. (Note: For the same reason, you may want to contact credit card companies and immediately close the accounts).

- ❑ **Actively take over management of Trust property.** As Trustee, it is your duty to manage the affairs of the Grantor to the same degree as would a reasonable, prudent person. This duty includes placing cash assets in interest-bearing accounts, refraining from speculative investments, paying bills in a timely fashion and maintaining proper records. You are permitted to delegate some of these duties to responsible professionals and pay their reasonable fees from the Trust. (For more details, see the Chapters, "Your Trustee Duties", "Your Liability as a Trustee", "Maintaining Title to Assets, Transacting Business and Paying Expenses", "Investing Trust Assets", and "Recordkeeping").

- ❑ **You should be sure that all liability, fire, homeowner's and personal property insurance policies are (and continue to be) in force and effect and have been "endorsed" to the Trust, naming you as Successor Trustee.** Should there be no such insurance coverage on real and personal property, you should consult with an appropriate insurance agent to review your needs and obtain adequate coverage. (It's probably a good idea to have an insurance agent review all the ones already in place too, to be sure they are adequate based on the current market values of assets.)

- ❑ **Consult with an accountant, at the earliest possible time, to help you establish a recordkeeping system,** as the accountant will not only need organized information for tax purposes, but you may in the future be required to provide an accurate accounting to the beneficiaries. (See the Chapter, "Accounting to the Beneficiaries"). Usually, if you are the spouse of the Grantor, you will not be required to provide an accounting to other family members/beneficiaries of your income, expenses and transactions; the terms of the Trust will need to be reviewed.

- ❑ **Refrain from making loans, gifts or distributions to or for the benefit of anyone other than the Grantor** (and the Grantor's spouse), without first going over the Living Trust document with an attorney and determining the extent to which such loans, gifts or distributions are permitted and are advisable. (See the Chapter, "Making Distributions to the Beneficiaries").

- ❑ **Check with the attorney as to the advisability of your executing a "HIPAA Authorization"** and providing it to the next Successor Trustee, in the event you are unable to act at some time in the future. (See the Chapter, "Transition to Another Trustee").

- ❑ *If the Grantor should recover,* and become capable of acting then as his or her own Trustee, and he or she wishes to do so, he or she should **see an attorney about executing an amendment to the Living Trust to place himself or herself back as Trustee (or Co-Trustee).** Alternatively (and preferably, in order to avoid issues with third-parties), the Grantor should **obtain doctor letters** now stating that the Grantor *is* fully capable of handling his or her own affairs. Unless the Trust requires, they don't have to be the same doctors who may have earlier

declared the Grantor incapacitated. Thereafter, the title to assets will need to be changed back to the name of the Grantor as Trustee (or Co-Trustee) and some of the other steps above will also need to be taken. (See the Chapter, "Transition to Another Trustee"). If the Grantor claims that he or she is capable of once again serving as Trustee, but you do not feel that is the case, it may become necessary for you or the Grantor to file a petition in the Probate Court to determine the Grantor's legal capacity.

- ❑ Now, go ahead and read the rest of this Manual beginning with the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)". Before you proceed, it's a good idea to see if you qualify for a *free* initial consultation with THE RAINS LAW FIRM, LLC, unless you have already done so!

CHAPTER 4
CHECKLIST OF IMMEDIATE ACTIONS UPON THE DEATH OF THE FIRST SPOUSE

This chapter is designed to enable you, the person named as the "Successor Trustee" in someone's Living Trust, to handle the affairs of the Trust when the Grantor is married and is the first spouse to die (even if the Grantor has his or her own separate Living Trust). You may be the surviving spouse, or you may be a child of the deceased Grantor, or a distant relative, friend, or independent third-party stepping in. This is not intended as an exhaustive or detailed list of all the actions which should be taken by you as Trustee. Rather, it is intended to give you a brief, general checklist which will help you immediately step in and handle those items that demand your attention first. After reviewing this checklist, it is recommended that you then read through the rest of this Manual (beginning at the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)"). These other portions of the Manual will provide you with significantly more detail and explanation of the actions on this checklist, as well as the further actions you may need to take as Trustee.

The following actions are recommended upon the death of the Grantor, when he or she is the first of a married couple to die:

- ❑ If you are the Grantor's spouse, or another close family member, and the Grantor's death has come suddenly, the most important thing is to **take care of yourself first**. Shock and trauma can take unexpected forms. Most actions that will need to be taken do *not* have to be done immediately and, if you act too quickly out of worry or anxiety, you may do the *wrong* things and make *bad* decisions. The first important deadline generally does not occur until nine (9) months after the date of death. You should contact a family member or friend who can spend time with you, either by phone or in person, during the next few hours or days, until such time as you are emotionally stable and can pursue the other items on this checklist. Avoid entering contracts for anything while you are still in a highly emotional state, and avoid spending or lending large sums of money. Do NOT make any financial decisions that involve moving title to assets, selling or reinvesting accounts until you consult with an attorney and/or CPA, as such actions may have adverse tax consequences and violate the terms of the Trust.
- ❑ **Contact by telephone or otherwise notify the immediately family, close friends, business colleagues and the Grantor's employer** (even if the Grantor has retired, as there may be some benefits to which the surviving spouse is entitled). If the Grantor was a client of THE RAINS LAW FIRM, LLC, see his or her "Estate Planning Portfolio" three-ring binder and then turn to the tab entitled "Location List" for the persons to contact and how to reach them.

- ❑ **Arrange for the care of members of the immediate family** who may need continuing personal attention, including appropriate in-home living assistance or childcare.
- ❑ **Notify a funeral director and clergy, and make an appointment to discuss funeral arrangements.** Consult the "Memorial Instructions" sections of the Grantor's THE RAINS LAW FIRM, LLC's "Estate Planning Portfolio" binder for the names and phone numbers of any parties the Grantor may have selected and any special requests.
- ❑ **Complete and send obituary report to newspaper(s).** Consult the "Memorial Instructions" sections of the Grantor's THE RAINS LAW FIRM, LLC's "Estate Planning Portfolio" binder for information and contact for an obituary the Grantor may have recorded and any special requests.
- ❑ **Request several copies of Grantor's death certificate,** which you'll need for his or her employer, life insurance companies and for your attorney for legal procedures. Additionally, you will need one (1) original death certificate for each parcel of real property and Deed of Trust owned by the Grantor. It's easier to have the funeral director or mortuary obtain these for you, than for you to obtain them later on your own, so simply ask the funeral director or mortuary for more than you think you will need. You may desire about 10 – 20 of death certificates.
- ❑ **Locate the Grantor's important papers**, including the Living Trust and other estate planning documents (copies of which should be found in his or her THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder). See the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)". Also, inventory the safe deposit box, if any. Gather as many of the Grantor's papers as possible, which could include statements of various accounts and assets, tax returns, deeds, insurance and annuity policies, etc. Realize that this information gathering process may not be completed all at once and may take several weeks.
- ❑ If you do not reside with the Grantor, **change the Grantor's mailing address** with the local postmaster so that you can receive his or her mail. You will need to complete a Change of Address Form and submit it to the U.S. Postal Service. It may be done online through www.usps.com. Proof of your authority to change the mailing address is typically not required. This address change will be valid for only a limited number of months, so as mail comes in, you should notify any senders that future correspondence should be mailed directly to your address.
- ❑ At the *earlier* of the date you *begin* to locate the Grantor's important papers (as set forth above) and the date *seven (7) months after the date of death,* **notify THE RAINS LAW FIRM, LLC (or another qualified estate planning and administration law firm) and make an appointment** to review the Grantor's estate planning documents, discuss any possible state and federal death taxes due (not usually the case when the first spouse dies), go over any disclaimer or other possible tax planning (which may be required to be completed within 9 months of death), determine if a Court Probate will be required for any assets not in the Trust

name, and assist you with some of the remaining items on this checklist. (THE RAINS LAW FIRM, LLC offers a *free* initial consultation, if you qualify, even if the estate plan was not prepared by them.)

- ❑ **Take the legal steps necessary for you to assume the position of Trustee.** If you are the spouse of the Grantor and have already been serving as a Co-Trustee, you may be able to act as a sole Trustee/owner on certain accounts without requiring further legal documents. However, it is still advisable that you pursue the following steps in order to take over other matters as sole Trustee. Whether you are the spouse or not, if you are the first Successor Trustee named in the Trust, the process of properly installing you as acting Trustee usually simply involves obtaining a *"Trust Certification"*. This is a document prepared by an attorney that verifies your authority to act as Trustee under the terms of the Trust and has attached a copy of the Trust and death certificate; that way, you will be able to transact business more quickly and smoothly with third parties, such as banks, mutual fund companies, real estate escrows, etc. If you are not the first Successor Trustee named in the Trust, the process may be more complicated and involve the resignation or removal of a prior Trustee, or that Trustee's death certificate, before you can obtain the Trust Certification. Sometimes, a prior Trustee, the beneficiaries or a special party to the Trust (such as a "Special Co-Trustee" or "Trust Protector") may have the authority to appoint and install you as Trustee and this may need to be done before you can obtain the Trust Certification. If all of these options fail to install you as the new Trustee, you may need to file a petition with the Probate Court. Regardless of the procedure used, you will likely need a Trust Certification when dealing with third-parties. (For more details, see the Chapter, "Transition to Another Trustee").

- ❑ Once you have been installed as Trustee, you should **notify the next Successor Trustee as well as the beneficiaries of the Trust**. The people you will be required by law to notify and how you must notify them will be determined both by the Living Trust document and state law, so you may want to consult an attorney. (See the Chapter, "Transition to Another Trustee").

- ❑ **Establish immediate control over the assets in the Grantor's home.** You may need to place valuables in safe, locked places and may even need to change the door locks in order to prevent "beneficiary raids". You may also want to write down a simple inventory of personal items (not necessarily every little thing in complete detail), just in case beneficiaries start to "borrow" items.

- ❑ **Terminate any credit cards in the Grantor's name.** Let the credit card companies (as well as mortgage companies, utilities and other known creditors) know about the Grantor's death and when they can expect payment; they usually will give you a "grace period" and agree to waive any late charges. You may also want to ask your attorney whether a formal notice to creditors should be published or mailed.

- ❑ **Notify the Grantor's financial counselor and accountant or tax preparer,** or use your own or obtain a new one to assist you as Trustee. Decisions may need to be made soon regarding sales and/or repositioning of financial assets and tax planning, and estimated tax payments and tax returns may become due. A new taxpayer identification number may need to be obtained, particularly if Exemption ("B") and/or Marital ("C") Trusts will be established under the terms of the Trust (See below, plus the Chapters, "Income Taxes" and "Estate Taxes").
- ❑ **Telephone the Grantor's employee benefits office** (whether or not he or she was retired) with the following information: name, Social Security number, and your name and address. The company will also likely require you to send in a death certificate so it can then begin to immediately research and process any benefits to which the Grantor and his or her surviving spouse may be entitled.
- ❑ **Notify your Social Security office of the death.** You may have a claim for survivor's benefits. Claims may be expedited if you go in person to the nearest office. Look for the address under U.S. Government in the phone book.
- ❑ **Notify the government agencies which provided any federal or state benefits to the Grantor,** such as Supplemental Security Income ("SSI"), state disability income ("SDI"), Medicare and Medicaid, or any other relevant government agency. Contact the local program office and provide the same information as to the Grantor's employee benefits office above. You may be asked to return the last payment and/or to reimburse the benefits previously paid; if so, you should seek the assistance of an attorney who is an "Elder Law" Specialist to assist you. (THE RAINS LAW FIRM, LLC can refer you to such a Specialist). If the Grantor was ever in the service, he or she and the surviving spouse may have available certain benefits through the Veteran's Administration which you should check into.
- ❑ **Notify appropriate accident and/or life insurance companies.** Give the same information as with the Grantor's employee benefits office above and ask what further information is needed to process your claim. It may be important to make insurance claims as soon as possible, so you will then have immediate cash to pay various expenses. If the Grantor's death is a result of an accident where a third-party was involved, such as an auto accident, you may wish to consult with an attorney about possibly pursuing a legal claim on the Grantor's behalf.
- ❑ **Actively take over management of Trust property.** As Trustee, it is your duty to manage the affairs of the Trust to the same degree as would a reasonable, prudent person. This duty includes placing cash assets in interest-bearing accounts, refraining from speculative investments, paying bills in a timely fashion and maintaining proper records. You are permitted to delegate some of these duties to responsible professionals and pay their reasonable fees from the Trust. (For more details, see the Chapters, "Your Trustee Duties", "Your Liability as a Trustee", "Maintaining Title to Assets, Transacting Business and Paying Expenses", "Investing Trust Assets", and "Recordkeeping").

- ❑ **You should be sure that all liability, fire, homeowner's and personal property insurance policies are (and continue to be) in force and effect and have been "endorsed" to the Trust, naming you as Successor Trustee.** Should there be no such insurance coverage on real and personal property, you should consult with an appropriate insurance agent to review your needs and obtain adequate coverage. (It's probably a good idea to have an insurance agent review all the ones already in place too, to be sure they are adequate based on the current market values of assets.)

- ❑ **Do NOT withdraw or rollover any annuities, corporate retirement plan benefits and IRAs without first seeking the advice of your attorney, accountant and/or financial advisor.** Premature withdrawal of these assets, or even just moving them to another place or re-titling them, may cause undue immediate income tax consequences, as well as may eliminate certain estate tax planning alternatives. Note: There may have been a *required* withdrawal of a portion of these in the year of death, so again you should consult with these advisors.

- ❑ **Consult with an accountant, at the earliest possible time, to help you establish a recordkeeping system,** as the accountant will not only need organized information for tax purposes, but you may in the future be required to provide an accurate accounting to the beneficiaries. (See the Chapter, "Accounting to the Beneficiaries"). Usually, if you are the spouse of the Grantor, you will not be required to provide an accounting to other family members/beneficiaries of your income, expenses and transactions; the terms of the Trust will need to be reviewed.

- ❑ **Refrain from making loans, gifts or distributions to or for the benefit of anyone other than the Surviving Spouse,** without first going over the Living Trust document with an attorney and determining the extent to which such loans, gifts or distributions are permitted and are advisable. In some cases, the Trust document may require distributions of income or assets to be made to beneficiaries shortly after the Grantor's death. (See the Chapters, "Reviewing the Trust" and "Making Distributions to the Beneficiaries").

- ❑ **Check with the attorney as to the advisability of your executing a "HIPAA Authorization"** and providing it to the next Successor Trustee, in the event you are unable to act at some time in the future. (See the Chapter, "Transition to Another Trustee").

- ❑ **Depending upon the Trust document and, in some cases, whether the Surviving Spouse exercises a "Disclaimer" election (which must take place <u>within nine months</u> of death), you may need to establish new parts of the Trust (also known as "sub-trusts").** First, the decision must be made as to whether these sub-trusts are required by the document to be established, or the Surviving Spouse may elect to establish them; at least an initial discussion of these choices will likely take place at your first attorney meeting. There are a number of personal, legal and tax (particularly estate tax) objectives that may be fulfilled

by setting up these sub-trusts, commonly known as the "Survivor's Trust" (or "A"), "Exemption Trust" (or "Family Trust" or "B"), and "Marital Trust" (or "C"). The rights of the Surviving Spouse, both as Trustee and as beneficiary, may differ depending upon each sub-trust's terms and this should also be discussed with the attorney before finalizing the decision whether to establish them. If the decision is made to establish these sub-trusts, the attorney and/or CPA will need to assist you in determining the most appropriate allocation of assets (or portions of assets) between these sub-trusts; the allocation should only be done after reviewing the pros and cons of the allocation, including the effect upon the future income and capital gains taxation of the Surviving Spouse and the Surviving Spouse's ability to make future Trust changes or make gifts. Once it is determined which assets or portions of assets are to be allocated to each sub-trust, then asset titles will need to be changed to reflect ownership by the separate sub-trusts. You may or may not be named Trustee of each of the sub-trusts, depending upon the terms of the Trust. If you are Trustee of a sub-trust, the attorney should review with you how that sub-trust will then work. In particular, if you are both the Surviving Spouse and the Trustee of a sub-trust, you must clarify exactly how and when distributions of income and/or principal may be made to yourself or to others (see the Chapter, "Making Distributions to the Beneficiaries").

NOTE: The Tax Act of 2010 introduced a new provision into the estate tax laws, referred to as "portability". This may enable a married couple's estate to take advantage of both spouses' estate tax exemption amounts *without* having to set up A, B or C Trusts at the first spouse's death. However, to take advantage of portability, an Estate Tax Return must be timely filed after the first spouse's death. The Trustee should consult with a qualified attorney or CPA within 8 months of the first spouse's death regarding the pros and cons of electing portability instead of setting up the A, B or C Trusts.

- ❑ **Obtain appraisals of the value of the Trust assets as of the date of death.** (You may also have to value assets outside of the Trust in which the Grantor may have had an interest, such as those held in the Grantor's name alone or jointly with others). These valuations should be done by qualified appraisers wherever possible, particularly with respect to any real estate. The attorney may assist you with choosing appropriate appraisers. A financial advisor may be able to assist you with the valuation of any stocks, bonds, mutual funds, limited partnerships and any other investments traded on markets. You may or may not need an appraisal of the Grantor's personal property around the house, antiques and jewelry (you should make this decision with the assistance of your attorney). All these valuations will determine whether or not an estate tax return is due (which may be the case if the estate exceeds a certain size, even though there may be no federal estate taxes due upon the death of the first spouse). These valuations will also be necessary for purposes of determining whether the establishment and funding of the sub-trusts is warranted and will need to be used during the allocation of assets between those sub-trusts. Finally, even if no estate tax return is due and no sub-trusts are to be established and funded, these valuations will be

important for future capital gains/income taxes of the Surviving Spouse or other beneficiaries. Note: If the Grantor of the Trust owned assets in another state, a *state* inheritance or estate tax return may also be due there and, in rare cases, there may even be some taxes to be paid to that other state.

- ❑ **Notify alumni association, clubs, and associations**. Review "Property Information" document within THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder to identify any of these organizations and their contact information to notify them and cancel any memberships as necessary.
- ❑ Now, go ahead and read the rest of this Manual, beginning with the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)". Before you proceed, it's a good idea to schedule your *free* initial consultation, if you qualify, with THE RAINS LAW FIRM, LLC, unless you have already done so!

CHAPTER 5
CHECKLIST OF IMMEDIATE ACTIONS UPON THE DEATH OF AN INDIVIDUAL (OR THE SURVIVING SPOUSE)

This Chapter is designed to enable you, the person named as the "Successor Trustee" in someone's Living Trust, to handle the affairs of the Trust when the Grantor is an unmarried individual, or a widow or widower (and is now the second spouse to die). You may be the child of the deceased Grantor, or a distant relative, friend or independent third-party stepping in. This is not intended as an exhaustive or detailed list of all the actions which should be taken by you as Trustee. Rather, it is intended to give you a brief, general checklist which will help you immediately step in and handle those items that demand your attention first. After reviewing this checklist, it is recommended that you then read through the rest of this Manual (beginning at the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)"). These other portions of the Manual will provide you with significantly more detail and explanation of the actions on this checklist, as well as the further actions you may need to take as Trustee.

The following actions are recommended upon the death of the Grantor, when he or she is an individual or the second of a married couple to die:

- ❑ If you are a close family member, and the Grantor's death has come suddenly, the most important thing is to **take care of yourself first**. Shock and trauma can take unexpected forms. Most actions that will need to be taken do *not* have to be done immediately and, if you act too quickly out of worry or anxiety, you may do the *wrong* things and make *bad* decisions. The first important deadline generally does not occur until nine (9) months after the date of death. You should contact a family member or friend who can spend time with you, either by phone or in person, during the next few hours or days, until such time as you are emotionally stable and can pursue the other items on this checklist. Avoid entering contracts for anything while you are still in a highly emotional state, and avoid spending or lending large sums of money. Do NOT make any financial decisions that involve moving title to assets, selling or reinvesting accounts until you consult with an attorney and/or CPA, as such actions may have adverse tax consequences and violate the terms of the Trust.
- ❑ **Contact by telephone or otherwise notify the immediately family, close friends, business colleagues and the Grantor's employer** (even if the Grantor had already retired, as there may be some benefits available). If the Grantor was a client of THE RAINS LAW FIRM, LLC, see his or her "Estate Planning Portfolio" three-ring binder and then turn to the tab entitled "Location List" for the persons to contact and how to reach them.

- ❑ **Arrange for the care of members of the immediate family** who may need continuing personal attention, including appropriate in-home living assistance or childcare.
- ❑ **Notify a funeral director and clergy, and make an appointment to discuss funeral arrangements.** Consult the "Location List" and the "Directions to My Representative" sections of the Grantor's THE RAINS LAW FIRM, LLC's "Estate Planning Portfolio" binder for the names and phone numbers of any parties the Grantor may have selected and any special requests.
- ❑ **Request several copies of Grantor's death certificate,** which you'll need for his or her employer, life insurance companies and for your attorney for legal procedures. Additionally, you will need one (1) original death certificate for each parcel of real property and Deed of Trust owned by the Grantor. It's easier to have the funeral director or mortuary obtain these for you, than for you to obtain them later on your own, so simply ask the funeral director or mortuary for more than you think you will need.
- ❑ **Locate the Grantor's important papers**, including the Living Trust and other estate planning documents (copies of which should be found in his or her THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder). See the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)". Also, inventory the safe deposit box, if any. Gather as many of the Grantor's papers as possible, which could include statements of various accounts and assets, tax returns, deeds, insurance and annuity policies, etc. Realize that this information gathering process may not be completed all at once and may take several weeks.
- ❑ If you do not reside with the Grantor, **change the Grantor's mailing address** with the local postmaster so that you can receive his or her mail. You will need to complete a Change of Address Form and submit it to the U.S. Postal Service. It may be done online through www.usps.com. Proof of your authority to change the mailing address is typically not required. This address change will be valid for only a limited number of months, so as mail comes in, you should notify any senders that future correspondence should be mailed directly to your address.
- ❑ At the *earlier* of the date you *begin* to locate the Grantor's important papers (as set forth above) and the date *seven (7) months after the date of death,* **notify THE RAINS LAW FIRM, LLC (or another qualified estate planning and administration law firm) and make an appointment** to review the Grantor's estate planning documents, discuss any possible state and federal death taxes due, go over any disclaimer (which must be made within 9 months of death) or other possible tax planning, determine if a Court Probate will be required for any assets not in the Trust name, and assist you with some of the remaining items on this checklist. (THE RAINS LAW FIRM, LLC offers a *free* initial consultation, if you qualify, even if the estate plan was not prepared by them.)
- ❑ **Take the legal steps necessary for you to assume the position of Trustee.** If you were already serving as a Co-Trustee with the Grantor, you may be able to act

as a sole Trustee/owner on certain accounts without requiring further legal documents. However, it is still advisable that you pursue the following steps in order to take over other matters as sole Trustee. If you are the first Successor Trustee named in the Trust, the process of properly installing you as acting Trustee usually simply involves obtaining a *"Trust Certification"*. This is a document prepared by an attorney that verifies your authority to act as Trustee under the terms of the Trust and has attached a copy of the Trust and death certificate; that way, you will be able to transact business more quickly and smoothly with third parties, such as banks, mutual fund companies, real estate escrows, etc. If you are not the first Successor Trustee named in the Trust, the process may be more complicated and involve the resignation or removal of a prior Trustee, or that Trustee's death certificate, before you can obtain the Trust Certification. Sometimes, a prior Trustee, the beneficiaries or a special party to the Trust (such as a "Special Co-Trustee" or "Trust Protector") may have the authority to appoint and install you as Trustee and this may need to be done before you can obtain the Trust Certification. If all of these options fail to install you as the new Trustee, you may need to file a petition with the Probate Court. Regardless of the procedure used, you will likely need a Trust Certification when dealing with third-parties. (For more details, see the Chapter, "Transition to Another Trustee").

- ❑ Once you have been installed as Trustee, you should **notify the next Successor Trustee as well as the beneficiaries of the Trust**. The people you will be required by law to notify and how you must notify them will be determined both by the Living Trust document and state law, so you may want to consult an attorney. (See the Chapter, "Transition to Another Trustee").

- ❑ **Establish immediate control over the assets in the Grantor's home.** You may need to place valuables in safe, locked places and may even need to change the door locks in order to prevent "beneficiary raids". You may also want to write down a simple inventory (not necessarily in complete detail), just in case beneficiaries start to "borrow" items.

- ❑ **Terminate any credit cards in the Grantor's name.** Let the credit card companies (as well as mortgage companies, utilities and other known creditors) know about the Grantor's death and when they can expect payment; they usually will give you a "grace period" and agree to waive any late charges. You may also want to ask your attorney whether a formal notice to creditors should be published or mailed.

- ❑ **Notify the Grantor's financial counselor and accountant or tax preparer,** or use your own or obtain a new one to assist you as Trustee. Decisions may need to be made soon regarding sales and/or repositioning of financial assets, and tax planning, and estimated tax payments and tax returns may become due. A new taxpayer identification number may need to be obtained for the Trust (see the Chapter, "Income Taxes").

- ❑ **Telephone the Grantor's employee benefits office** (whether or not he or she was retired) with the following information: name, Social Security number, and your name and address. The company will also likely require you to send in a death certificate so it can then begin to immediately research and process any benefits to which the Grantor and his or her beneficiaries may be entitled.
- ❑ **Notify your Social Security office of the death.** Look for the address under U.S. Government in the phone book.
- ❑ **Notify the government agencies which provided any federal or state benefits to the Grantor,** such as Supplemental Security Income ("SSI"), state disability income ("SDI"), Medicare and Medicaid. Contact the local program office and provide the same information as to the Grantor's employee benefits office above. You may be asked to return the last payment and/or to reimburse the benefits previously paid; if so, you should seek the assistance of an attorney who is an "Elder Law" Specialist to assist you. (THE RAINS LAW FIRM, LLC can refer you to such a Specialist). If the Grantor was ever in the service, he or she may have available certain benefits through the Veteran's Administration which you should check into.
- ❑ **Notify appropriate accident and/or life insurance companies.** Give the same information as with the Grantor's employee benefits office above and ask what further information is needed to process your claim. It may be important to make insurance claims as soon as possible, so you can get immediate cash to pay various expenses. If the Grantor's death is a result of an accident where a third-party was involved, such as an auto accident, you may wish to consult with an attorney about possibly pursuing a legal claim on the Grantor's behalf.
- ❑ **Actively take over management of Trust property.** As Trustee, it is your duty to manage the affairs of the Trust to the same degree as would a reasonable, prudent person. This duty includes placing cash assets in interest-bearing accounts, refraining from speculative investments, paying bills in a timely fashion and maintaining proper records. You are permitted to delegate some of these duties to responsible professionals and pay their reasonable fees from the Trust. (For more details, see the Chapters, "Your Trustee Duties", "Your Liability as a Trustee", "Maintaining Title to Assets, Transacting Business and Paying Expenses", "Investing Trust Assets", and "Recordkeeping").
- ❑ **You should be sure that all liability, fire, homeowner's and personal property insurance policies are (and continue to be) in force and effect and have been "endorsed" to the Trust, naming you as Successor Trustee.** Should there be no such insurance coverage on real and personal property, you should consult with an appropriate insurance agent to review your needs and obtain adequate coverage. (It's probably a good idea to have an insurance agent review all the ones already in place too, to be sure they are adequate based on the current market values of assets.)

- ❑ **Do NOT withdraw or rollover any annuities, corporate retirement plan benefits and IRAs without first seeking the advice of your attorney, accountant and/or financial advisor.** Premature withdrawal of these assets, or even just moving them to another place or re-titling them, may cause undue immediate income tax consequences. Note: there may have been a *required* withdrawal of a portion of these in the year of death, so again you should consult with these advisors.
- ❑ **Consult with an accountant, at the earliest possible time, to help you establish a recordkeeping system,** as the accountant will not only need organized information for tax purposes, but you may in the future be required to provide an accurate accounting to the beneficiaries. (See the Chapter, "Accounting to the Beneficiaries").
- ❑ **Refrain from making loans, gifts or distributions to or for the benefit of anyone,** without first going over the Living Trust document with an attorney and determining the extent to which such loans, gifts or distributions are permitted and are advisable. In some cases, the Trust document may require distributions of income or assets to be made to beneficiaries shortly after the Grantor's death (See the Chapters, "Reviewing the Trust" and "Making Distributions to the Beneficiaries").
- ❑ **Check with the attorney as to the advisability of your executing a "HIPAA Authorization"** and providing it to the next Successor Trustee, in the event you are unable to act at some time in the future. (See the Chapter, "Transition to Another Trustee").
- ❑ **Obtain appraisals of the value of the Trust assets as of the date of death.** (You may also have to value assets outside of the Trust in which the Grantor may have had an interest, such as those held in the Grantor's name alone or jointly with others). These valuations should be done by qualified appraisers wherever possible, particularly with respect to any real estate. The attorney may assist you with choosing appropriate appraisers. A financial advisor may be able to assist you with the valuation of any stocks, bonds, mutual funds, limited partnerships and any other investments traded on markets. You may or may not need an appraisal of the Grantor's personal property around the house, antiques and jewelry (you should make this decision with the assistance of your attorney). All these valuations will determine whether or not an estate tax return is due (which may be the case if the estate exceeds a certain size, even though there may be no federal estate taxes due). These valuations will also be necessary for purposes of making distributions to the beneficiaries (or to new "sub-trusts" for them, which spring out of the Trust, and will hold their inheritance). Finally, even if no estate tax return is due, these valuations will be important for future capital gains/income taxes of the beneficiaries. Note: If the Grantor of the Trust owned assets in another state, a *state* inheritance or estate tax return may also be due there and, in rare cases, there may even be some taxes to be paid to that other state.

- ❑ Now, go ahead and read the rest of this Manual. Before you proceed, it's a good idea to schedule your *free* initial consultation, if you qualify, with THE RAINS LAW FIRM, LLC, unless you have already done so!

CHAPTER 6
REVIEWING THE TRUST
(AND OTHER ESTATE PLAN DOCUMENTS)

It is critical that you review the Living Trust document (as well as certain other estate plan documents) very early in the process of taking over as Trustee. These documents essentially set out "the terms of your employment".

First, you must make sure that you have collected all the *latest* documents. For example, the Trust may have been amended, possibly more than once, and those amendment documents may have made substantial changes to the original Trust. The same may be true of the Will, which may have been changed by a "Codicil". With respect to the health documents (discussed below), it will be important to have the newest ones, since older ones may have expired. If the Grantor is a THE RAINS LAW FIRM, LLC client, he or she will likely have a burgundy and gold or green and gold "Estate Planning Portfolio" three-ring binder, where copies of documents are kept. However, it is possible that newer documents have been executed and copies do not appear in this binder; you should also, therefore, look to find any large size, white THE RAINS LAW FIRM, LLC envelopes that contain original documents. You also need to check the Grantor's "hiding places" in the home (including any safe) and any bank safe deposit box (note: in order to access the safe deposit box, you may need to bring a copy of the Trust document you have already located showing you as next Successor Trustee).

Other documents you should look for include: other trusts (such as an "Standalone Retirement Trust", Irrevocable Life Insurance Trust, Charitable Remainder Trust, etc.); Property Agreement, if the Grantor was married; Durable Power of Attorney for Property (also known as "Durable Power of Attorney for Estate and Personal Planning Uses"); HIPAA Authorization; Advance Healthcare Directive (or the two documents known as "Durable Power of Attorney for Healthcare" and "Living Will"); and any business entity documents (such as corporate minutes and bylaws, family limited partnership agreement, buy-sell agreement, etc.). When you look through THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder, be sure to page through all of it and check the front and back pockets for such things as personal properties lists, special instructions or wishes, legal documents prepared by other attorneys or handwritten Wills.

Once you have made a diligent search for the latest Trust document, you should then **refer to the "Trust Summary"** placed in front in the "Overview" Tab in THE RAINS LAW FIRM, LLC "Estate Planning Portfolio" binder. If the Trust was prepared by someone else, there may be a **summary letter, flow chart, or summary page accompanying the Trust document.** Your review of these will help give you a quick overview of the estate plan and how it works, particularly with respect to the manner in which the Trust will be distributed. Once you have conducted this review, you may then wish to **make an appointment with a qualified estate and trust attorney** to assist you in the more detailed review of the Trust

document. (THE RAINS LAW FIRM, LLC, offers a *free* consultation, if you qualify, even if the Trust was not prepared by them).

If you prefer to do your own detailed review of the Trust prior to meeting with an attorney, here are a few helpful tips. First, realize that the Trust and other documents are written in a specialized language often referred to as "legalese". Although it may appear to be English, and therefore you would think that you should be able to understand it, reading these documents is similar to reading a technical manual for a sophisticated piece of machinery. You may find yourself frustrated because, for a non-attorney, it may be very difficult to read and understand. The key thing is not to allow this difficulty to cause you to procrastinate and not move forward with your obligations as Trustee; if you "hit a wall" in reviewing the document, be sure to see an attorney right away. Second, if you are able to read through the document and understand it somewhat, you may want to put notes in the margin of a *copy* of the document, or use Post-It Notes to help identify key items and indicate items you do not understand. This will greatly assist you when you have the meeting with the attorney.

The major portions of the Living Trust which you should read first are: the "Successor Trustee" provisions; the "Trustee Powers"; and, the "Distribution" provisions. When reviewing these sections of the Trust, you will want to pay special attention to the following types of items. With respect to the Successor Trustee provisions, you will want to check whether there is to be a "Co-Trustee" acting with you and you should note who the next Successor Trustee (after you) is, so that at some point you may contact him or her to "place him or her on deck" if they are needed in the future. With respect to the "Trustee Powers" section, you will want to note whether there are any special provisions such as with respect to restrictions on investing and selling Trust assets and the right to permit beneficiaries to live on Trust property. You should also note whether there are any "Special Co-Trustee", "Administrative Trustee" or "Trust Protector" provisions, as these may impact you while serving as Trustee. With respect to the "Distribution" provisions, you will want to note the following: whether there are any specific bequests of particular assets to particular people (or to their shares of the Trust); any restrictions on the use and/or sale of assets (such as a beneficiary's right to reside on a particular property or right of first refusal to purchase a particular property); and most importantly, to whom, when and how distributions are to be made from the Trust (including any powers of appointment given to beneficiaries, which may allow them to change the original terms). Sometimes the Will may have provisions that add to or supersede those of the Trust. Obviously, there is much more detail to be reviewed in the Trust and Will and you should do so with the assistance of an attorney.

When you have your initial meeting with the attorney, be sure to bring all of the legal documents we instructed you to find. While the Living Trust may represent the "engine" of the estate plan "vehicle", the other documents may represent the "transmission", "wheels", "brakes", etc. that support and to an extent interrelate and interact with the Living Trust. By bringing as many of these documents as you can find to the initial attorney meeting, he or she will be able to give you a more accurate overview of how the estate plan will work. Prior to seeing the attorney, it's a good idea to review the Chapter, "Tips on Working Successfully Working with an Attorney".

After the attorney reviews the various estate plan documents, he or she may note issues that may exist because of particular unclear or wrong drafting language, changes in the law and/or changes in the circumstances of the beneficiaries. If the Trust or other documents require further clarification, reformation or modification, this may be accomplished through a Family Agreement between the Trustee and the beneficiaries, or through an order of the Probate Court judge (See Chapter, "Tips on Working Successfully Working with the Beneficiaries"). Note: In certain Trust documents, there may also appear the option of having the "Trust Protector" (or some other independent party specified) make reformations or modifications to the Trust without the need for a Family Agreement or Probate Court order.

CHAPTER 7
TIPS ON WORKING SUCCESSFULLY WITH AN ATTORNEY (AND OTHER PROFESSIONAL ADVISORS)

Very often, we find that Trustees have never worked closely with an attorney or other professional advisors (such as a CPA, or financial advisor) on important legal matters. Worse yet, Trustees may have certain prejudices or misconceptions about attorneys and other professional advisors which can create obstacles in working closely and successfully with them. The following are a few quick tips on how you can best work, efficiently and amicably, with the attorney and other professionals you may need from time to time.

- **Use a Specialist.** Try to use a "specialist" when engaging the assistance of any attorney, CPA, and other professionals. By this, we mean a specialist in handling estate and Trust matters. You are not required to work with the attorney who drafted the estate plan. Some attorneys may have drafted numerous Living Trusts and estate plans, but have only administered a few. Some attorneys are knowledgeable and experienced in certain aspects of Trust administration, such as inventorying, accounting and distribution of assets, but not in other areas such as the "ABC allocation" on the death of the first spouse of a married couple, or preparing the estate tax return (Form 706). Similarly, some CPAs are excellent at preparing income tax returns for the Trust but haven't done many estate tax returns. You may need more than one specialist to act together as a team in assisting you. If you need help in searching for an attorney, you might look for a local member of certain professional organizations, such as WealthCounsel (www.wealthcounsel.com), the National Network of Estate Planning Attorneys (www.nnepa.com) and the American Academy of Estate Planning Attorneys (www.aaepa.com). You may also contact the State Bar for "Certified Specialists" in estate planning, probate and trust law that may be in your area. The attorney you select may then help you find an appropriate CPA, financial advisor, appraiser, etc. We recommend that you see the attorney first, since he or she is usually in the best position to "quarterback" the team of professionals when it comes to estate and trust administration.
- **Be clear on what are your responsibilities and what are the attorney's or other advisors' responsibilities.** For example, you may be responsible for collecting all required asset information and valuations. The attorney may be responsible for preparing all necessary legal documents, including re-titling of assets and even certain tax returns. Normally, the attorney will outline in his or her engagement letter and initial correspondence to you, in detail, your respective responsibilities. Keep in mind that the attorney has no responsibility or duty to advise the beneficiaries, as he or she only represents you as the Trustee.
- **Clearly understand how fees will be charged by the attorney or other advisors.** Will you be charged based on an hourly rate as work is done, on a

fixed or flat fee basis, or on some percentage of estate value or assets under management, and will your payment be partly due up front and partly when the work is completed? What services will be included and what ones will not? Will you be billed extra for phone calls, meetings, copying costs, court costs, messenger costs, etc.? These should all be answered clearly in the advisor's engagement letter, which should be read by you and signed in advance of the advisor commencing work.

- **Immediately establish with your attorney and other advisors the most efficient manner of communication.** Typically, the attorney or other advisors will have their own "protocol" of how they will handle your phone calls, e-mail, and other correspondence. Usually, it is best for you and the advisor to designate a paralegal or staff person as the one you turn to first for assistance and, when necessary, you can use this person as an intermediary to get questions answered and things done more quickly (realize that the professional may often be tied up during the day in meetings or on other phone calls).

- **Manage *your* expectations by having a clear understanding with your attorney or other advisor, up front, as to *when* your phone calls will be returned and tasks will be completed.** Repeatedly contacting your advisor, and becoming increasingly anxious or upset when each phone call is not immediately returned, does not help get matters handled in the most calm and efficient matter. As stated above, the attorney may designate a contact person for you to call. Alternatively, you may want to schedule periodic meetings with the attorney or other advisor and save your non-urgent matters to be dealt with at those meetings.

- **Respond promptly and as completely as possible to requests made by your attorneys and other advisors.** When they receive late or incomplete information from you, this may make it difficult and even impossible for them to complete their tasks in a timely and accurate manner. By providing important information at the last minute, you can also place undue pressure on these professionals and cause mistakes that might not ordinarily happen. Since you, the Trustee, are primarily responsible and potentially personally liable for not only your own actions, but the actions of other professionals whom you hire, it is important that you give them the appropriate opportunity to do their jobs calmly, completely and accurately.

- **Always be civil and courteous with the professional and all members of his or her staff.** Handling the administration of a Trust can, at times, become aggravating and emotional, particularly because you are not only dealing with the disability or death of someone who may have been close to you, but you may also have to deal with friends or relatives who are the beneficiaries and they may, from time to time, not be very civil and courteous to you. It is important that you not transfer your or the beneficiaries' anxiety, upset or anger onto the professional and his or her staff, as this most always will be counter-productive

and may even result in the attorney or other professionals terminating their relationship with you.

- If you are unhappy with your relationship with the attorney or other professional advisor, first let him or her know and give him or her a reasonable opportunity to "correct" any issues that have arisen, and if then you don't get results you should not delay in terminating the relationship and transferring the matter to another qualified professional. You do not want to wait until the last minute to do this, otherwise, as Trustee, you may be held liable if important matters are not attended to properly and timely.

CHAPTER 8
TIPS ON WORKING SUCCESSFULLY WITH THE BENEFICIARIES

It is important to, as much as possible, keep your Trustee relationship with the beneficiaries on a "strictly business" level. Since the beneficiaries may be friends or relatives of yours, inter-personal histories and previous emotional issues can often surface and may make it difficult for you to carry out your duties. You can keep these issues from flaring up and making the Trust administration more difficult, if you follow these few, important tips below.

- **Be clear with the beneficiaries, from the very start, as to what will be your responsibilities and what will be theirs.** In particular, it's important to explain to them when and how you will be keeping them apprised of Trust matters and, when appropriate and necessary, providing them with financial accountings. Explain that they will be responsible, when necessary, to assist you with collecting assets and information and they must not interfere with your actions or take it upon themselves to gather or sell Trust assets. You may wish to establish these respective responsibilities by having one or more of the beneficiaries attend your initial conference with the Grantor's estate planning attorney (or other attorney of your choosing). That way, the beneficiaries will be immediately brought into the process, have it explained to them, and questions and issues can be resolved up front before they become major problems and conflicts. At this meeting, the attorney can also explain to the beneficiaries that he does not represent them individually, only you as the Trustee, and properly advise them of the need for them to obtain separate legal counsel, if they so wish; this will help cut off your responsibility and liability to answer beneficiaries' questions and take actions on behalf of the beneficiaries that go beyond your Trustee duties and could eventually get you into trouble.

- **Manage the beneficiaries' expectations.** Again, the attorney may be able to assist you here. The beneficiaries need to have a clear idea of what the timing and manner of your response will be to their questions, phone calls, e-mails, and other correspondence (also see the next tip below). If a beneficiary will be having his or her inheritance held in Trust, rather than distributed out directly to him or her, you should set up a clearly defined system for periodic meetings, defer non-urgent matters until then and use those times for determining their needs, paying their bills and/or distributing money to them.

- **Establish your communication "rules".** What is your preferred manner for beneficiaries to contact you - - by phone (and at which phone number), e-mail, fax, or regular mail? When is the best time for them to contact you? How soon after their contact can they expect a response from you and in what manner? How often or when will you hold periodic meetings and/or provide them with reports or accountings? Once these rules have been set and explained to the

beneficiaries, be firm in enforcing these rules. If a beneficiary repeatedly acts in violation of these rules, you may have to let him or her know that you will no longer deal with him or her unless and until they obtain their own legal counsel and then you will deal directly with that counsel; or, you may threaten to resign as Trustee unless the beneficiary starts obeying your rules (this may be particularly effective if the next Successor Trustee is likely to be less "friendly" to the beneficiary)!

- **Be civil and courteous at all times.** This may be very difficult when a beneficiary becomes frustrated with the pace of the Trust administration, which typically can take anywhere from six months to two years, or a beneficiary is emotional, greedy and/or contentious. If a beneficiary deals with you in an uncivil or discourteous manner, you need to immediately put your foot down and let him or her know that you will not deal with him or her until he or she has calmed down and can communicate with you appropriately. If a beneficiary continues to be uncivil, discourteous or contentious with you, you need to then advise that beneficiary that he or she should obtain their own legal counsel and have that legal counsel contact you in their place.

- **Keep your emotions out of it.** You must keep your personal feelings toward a beneficiary, whether good or bad, from influencing your decision-making. This can often occur when a beneficiary is also a relative of yours. Decisions based upon emotion, rather than reason, may cause you to unconsciously breach your duties as Trustee and subject you to liability. If your position as Trustee becomes an "emotional hot seat", you may need to consider bringing in a Co-Trustee (if the Trust document permits) or resigning and bring in the Successor Co-Trustee. If a beneficiary is intentionally causing you emotional strain, you can explain that you will bring in a Co-Trustee or the Successor Trustee, who may be a lot less compassionate and responsive to the beneficiary's needs - - often times the beneficiary will then decide to "clean up" his or her behavior!

- **Respond timely to beneficiaries' phone calls, other communications and reasonable requests.** If you are unable to immediately do so, at least get back to them right away and let them know the specific time frame and manner in which you will respond fully to them. Then, make sure you calendar this for yourself and do follow-up in the time and manner promised. Your attorney may be a big help to you in managing responses to beneficiaries, but be conscious of the fact that the attorney may not expect this to be a part of his or her job, particularly if you have engaged the attorney on a fixed or flat fee basis and the attorney has only built in a limited amount of time for dealing directly with beneficiary issues; be aware that you may need to pay additional fees if the attorney must repeatedly help you in dealing with the beneficiaries, but on the other hand those additional fees may be well worth it!

- **Understand the beneficiaries' rights.** These may vary depending upon state law and the Trust document itself. Generally speaking, the rights of the

beneficiaries include, but are not necessarily limited to: receiving a copy of the Trust document (and possibly other pertinent legal documents); notification of a change of Trustee; obtaining notification of any court filings; getting a list of the original Trust assets and their values; receiving a periodic accounting (see the Chapter, "Accounting to the Beneficiaries"); depending on the terms of the Trust, requesting distributions when they need them, provided they can justify the reason and provide any necessary backup; subject to the limitations of the law and the Trust document; challenging your Trustee actions and/or removing you as Trustee; and obtaining a list of the assets upon distribution from the Trust and their values. (Also see the Chapter, "Your Trustee Duties").

- **Resolve any disputes between you and the beneficiaries as quickly as possible and in the most friendly and inexpensive manner possible.** First, attempt to put together an agreement of all the parties. This may sometimes need to be memorialized in writing and signed by everyone. The beneficiaries may need to be represented by independent counsel or waive their right to this independent representation. If that doesn't work, then look to the Trust document for any dispute resolution procedure that may be outlined there; for example, it may dictate or permit the use of an arbitrator or mediator, a panel of advisors, or a third party "Trust Protector" to resolve disputes. Next, if the document does not provide a definite dispute resolution process, you may wish to voluntarily seek a third-party mediator for your dispute; there are numerous ways to obtain the services of such a mediator, including contacting the State Bar Association, the American Arbitration Association, or the American Mediation Association. If all that doesn't work, then your last resort is to go to Probate Court. Obviously, because of the delays, expenses, and publicity involved, this is your least desirable option. However, in terms of protecting you, the Trustee, from personal liability, seeking a court determination and court order may sometimes be the most appropriate alternative. You should consult with an attorney when undertaking any dispute resolution to be sure you are handling it in the most appropriate manner.

CHAPTER 9
YOUR TRUSTEE DUTIES

As a Trustee, you have the legal status of a "fiduciary." What this means is that you are acting on behalf of others (the Trust beneficiaries) and you owe to them certain legal duties. Another way to look at this more simply is that, as a Trustee, you have been placed in a position of "trust."

The extent of your duties depends somewhat on the language of the Trust document itself. However, regardless of the Trust document, most states impose certain legal duties or obligations upon you in their laws, often known as their "fiduciary", "trust administration or "probate" statutes. Keep in mind that both the Trust document and specific state law may need to be consulted (which is another reason you may want to engage an attorney to assist you).

The checklist below is intended as only a very general and brief overview of your major Trustee duties. Also, be aware that we have not included, in the checklist below, certain other duties that are described elsewhere throughout this Manual. If this checklist of duties seems a bit overwhelming, just remember that *you will be fine so long as you exercise some good, honest common sense* and seek qualified professional advice whenever you are unsure of your duties.

Your Trustee duties include, but are not limited to:

- **Duty to identify and locate Trust assets.** If you are also acting in the capacity of the executor under the Grantor's Will (which "pours over" assets into the Trust if they weren't transferred into it during the Grantor's lifetime) you must also identify and locate any assets which the Grantor may have had outside of the Trust. You may want to consult with the Grantor's attorney, CPA, financial advisor and other professional advisors to help identify and locate all the Grantor's assets. Also, if the Trust was prepared by THE RAINS LAW FIRM, LLC, you should look for the Grantor's burgundy and gold (or emerald green and gold) three-ring binder which on the outside reads "Estate Planning Portfolio". There are a few tabbed sections of that portfolio binder entitled "Trust Property List" and "Location List" which may contain valuable information (if they were completed by the Grantor). Also, look in the front and back pockets of the binder for any such information. You should receive and review all of the Grantor's mail, which may contain statements of assets, property tax bills, and other documentation that may evidence the existence of assets. You should search the home, safe deposit box, and any other known "hiding places" for lists of assets, statements, certificates, deeds, promissory notes, and valuable personal property like jewelry. Look at the Grantor's insurance coverage for a list of any valuables as well. You should, as soon as possible, make a list of all valuable items in the Grantor's home (not

necessarily every little item), just in case others decide to start "borrowing" things!

- **Duty to control, maintain and preserve Trust property.** You need to place valuable personal property under your immediate control, like securities, deeds, promissory notes, jewelry, valuable antiques, etc. You should take these items and put them in a safe place or safe deposit box. You need to maintain, repair and preserve certain Trust assets, such as real estate, and preserve Trust principal by investing wisely (see the Chapter, "Investing Trust Assets"). You also need to maintain insurance coverages on real estate and personal property and be sure that they are updated to reflect current market values.
- **Duty to keep Trust property separate and identified as Trust property.** Trust property should properly be held in the name of the Trust. Your name may appear on title as Trustee of the Trust, but Trust property should not be held in your personal name alone (see the Chapter, "Maintaining Title to Assets"). Be careful not to commingle Trust property with any of your own personal property and assets.

- **Duty to follow the terms of the Trust and the laws governing Trust administration.** You should be familiar with the terms of the Trust and be sure to carry them out (See the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)"). The laws governing Trust administration are discussed generally throughout this Manual. (For more detailed information regarding Colorado law, see C.R.S. §15-16-101 et seq.) If you have any doubt whatsoever as to whether you are properly following the terms of the Trust and the laws governing Trust administration, you should contact a qualified estate attorney right away.
  - **Duty to exercise the standard of care of a "prudent" person under like circumstances.** If you have special skills that should assist you in Trust administration, such as an accounting, legal or business background, you may be held to a higher standard based on those skills. Basically, you need to act carefully and reasonably, regardless of your background and skills.
  - **Duty of loyalty and impartiality.** In taking actions as a fiduciary, you most solely consider the interests of the Trust beneficiaries as a whole, and not your interest as Trustee or as an individual beneficiary of the Trust. You must deal with beneficiaries impartially, and not favor one over another, unless the Trust provides otherwise. In particular, if you are also a beneficiary, you must take great care not to even appear to favor yourself over other beneficiaries; the slightest "appearance of impropriety" may cause you trouble even if you've done nothing wrong. Also, when making investment decisions you must not favor either the current beneficiaries or future or remainder beneficiaries, unless the Trust directs you to (see the Chapter, "Investing Trust Assets").

- **Duty to avoid conflicts of interest**. You must not engage in transactions, either directly or through a third party, that will involve, or potentially create, a conflict of interest between you and the Trust, or between you and the Trust beneficiaries. For example, if you are a professional or own a business, you should not engage your own or your businesses' services. You may not take actions that benefit you or someone related to you, to the current or potential detriment of the beneficiaries, and you cannot use Trust property for your own profit, or for any other non-Trust purpose. For example, unless special Trust terms permit, you should not invest Trust assets in your own business or use Trust assets to acquire property from you; you should not purchase property from or take loans from the Trust; and you should not co-own property with the Trust. You may, under certain circumstances, take actions that may otherwise be considered conflicts of interest if you first obtain the informed consent of the beneficiaries or a court order of approval (see the Chapter, "Your Liability as Trustee"). Alternatively, you may decide to simply resign as Trustee so that the conflict will no longer exist.

- **Duty to enforce claims of the Trust and defend claims against the Trust.** For example, if the Trust is entitled to ownership or control of assets not properly in the Trust, or to damages (such as by way a lawsuit relating to the death of the Grantor), or to reimbursement by others for expenses paid, you have a duty to enforce these claims. If someone sues the Trust, attempts to obtain ownership or control of Trust assets, otherwise interferes with the proper administration of the Trust, or contests the terms of the Trust, you have a duty to defend against them. The expenses involved in enforcing or defending claims, including attorney and other professional fees, may usually be paid from the Trust, unless your actions are unlawful or involve gross negligence or willful misconduct, and so long as the expenses are reasonable.

- **Duty to act reasonably when exercising any discretion.** There are a number of situations where the Trust document and state law may give you a varying degree of discretion in your decision making. Probably, the biggest issues that will involve your discretion will include selling or otherwise disposing of Trust property, allocating Trust assets to individual beneficiaries' shares, and determining whether and in what amounts to distribute to beneficiaries when the Trust provides for your discretion in doing so. It's usually a good idea to maintain, in writing, the reasons why you exercise (or decide not to exercise) your discretion in a particular way, in case your action (or inaction) is later called into question.

- **Duty to account to the beneficiaries.** The nature and timing of this accounting will depend on the terms of the Trust, as well as state law. Usually, this accounting will be required at least once annually, although it may be subject to being waived by the beneficiaries in the interest of saving the time and expense involved (which may essentially come out of their inheritance!). The accounting should include all Trust receipts (whether income or

principal), expenses paid, and transactions (particularly purchases, sales, and opening and closing of accounts). You can obtain professional assistance with this accounting and the cost of this accounting typically can be paid from the Trust. (For more details, see the Chapter, "Accounting to the Beneficiaries").

- **Duty not to delegate improperly.** As Trustee, you can delegate the carrying out of certain tasks for which you clearly need qualified assistance, such as the preparation of legal documents by an attorney, preparation of tax returns by a CPA, and investment of Trust assets by a financial advisor. You may, from time to time, also delegate daily administrative items, like writing checks and managing real estate. However, even though you may delegate certain tasks, you may not delegate your duties. In other words, you are always ultimately responsible for properly hiring, supervising and monitoring those to whom you delegate tasks, to be sure that they do the work correctly and in a manner consistent with your duties as Trustee.

- ***(If the Trust provides for Co-Trustees, in other words some other person, bank or Trust company has been named to act along with you):*** **Duty to be sure that all Co-Trustees participate in the Trust Administration and Duty to prevent any other Co-Trustee from committing a breach of Trust.** Although the Trust document may provide for one Co-Trustee to delegate certain actions to another, such as the ability to sign on transactions, or checks, this does not absolve the Co-Trustee who has delegated the task from personal responsibility to be sure actions are taken properly. In other words, you may be held liable for another Co-Trustee's acts! Therefore, any delegation between Co-Trustees should not be done lightly and, if done, you should monitor periodically the actions of the Co-Trustee to whom you have delegated. The Trust document and local law may need to be consulted to determine whether all the Co-Trustees, or only a majority, must agree upon and consent to certain actions. If any conflict arises between you and a Co-Trustee, you may each need to seek independent legal counsel to represent you and determine the most appropriate resolution process.

- **Duty to maintain confidentiality.** The Trust document, records and accounting are to be kept confidential and only released to the beneficiaries to whom you must give notice of certain actions or to whom you must account. Generally speaking, the Trust document does not need to be filed with a Court or Recorder's Office, or otherwise made public record. Obviously, from time to time, certain third parties like your attorney, CPA or financial advisor may require access to confidential information, or tax authorities or real estate escrow or title companies may require certain limited disclosures. You should always be cautious about revealing any confidential information and consult with your attorney first if you have any doubts as to whether a disclosure is appropriate.

CHAPTER 10
YOUR TRUSTEE POWERS

Here, we examine in more detail the powers given to you as Trustee so that you may carry out the duties described in the previous chapter. Your powers are dependent mainly on the terms of the Trust document. (In THE RAINS LAW FIRM, LLC Living Trust, your primary Trustee powers can be found under the section of the Trust entitled, "Trustee Provisions," Paragraph A, "Trustee Powers"; other, more specific powers can be found in various other sections throughout the Trust.) Your Trustee powers are also dependent somewhat on state law, which may supplement or even in some cases override certain provisions of the Trust.

Listed below are the Trustee powers that generally apply in most cases. Note that that we have merely named each of these powers, rather than gone into specific detail as to the instructions, guidelines and limitations on the exercise of each of these powers. **You need to look at the actual Trust language for any specific instructions, guidelines or limitations, and should also consult the other chapters of this Manual, before exercising the powers below, particularly those noted by an asterisk (*).**

Your Trustee powers generally include, but may not be limited to, the powers to:

- Invest.*
- Retain property.
- Abandon property.
- Hold property in the name of the Trustee for the Trust.
- Operate and sell a business.*
- Manage securities.
- Purchase securities and bonds.
- Sell and lease Trust assets.
- Give financial assistance to the estates of the Grantor and the beneficiaries (or to other trusts set up by the Grantor for the beneficiaries).
- Lend money.*
- Borrow.
- Purchase and maintain insurance.
- Employ professionals and pay reasonable compensation.
- Pay expenses of the administration.
- Deal with creditors of the Grantor.

- Litigate (including *defending* against Trust contests or other lawsuits).
- Make tax elections.
- Determine what is principal and income of the Trust.*
- Exercise discretion in payment of income and principal to certain beneficiaries.*
- Accept contributions to the Trust.
- Seek court reformation of the Trust agreement or modify its terms by an agreement between the Trustee and beneficiaries approved by the court.
- Pay income taxes.
- Pay estate, death and generation skipping taxes of the Grantor and beneficiaries.
- Permit beneficiaries to use or reside upon certain Trust assets.*
- Delegate certain powers, such as banking authority.*
- Make non-pro rata allocations and distributions between and to beneficiaries or their "sub-trusts".
- Resign or restrict you own powers.
- Distribute assets in kind or liquidate them and distribute cash.*
- Pay your own Trustee fees.*
- Take actions to permit a beneficiary to obtain government assistance (such as "Medicaid" nursing care benefits).
- Change the legal location or "situs" of the Trust.
- Directly or indirectly call in a "Trust Protector" or third party to assist in taking actions outside your powers.*

Note: There may be a "catchall" provision in the Trust that enables you to have and additional powers necessary to carry out the terms of the Trust and your duties as Trustee. However, these additional powers cannot be in violation of state law and therefore you should consult with an attorney before exercising any power not listed in the Trust document.

Remember, although you may delegate some of your powers (if permitted under the Trust document), such as signing on a bank account, you cannot delegate your duty to carry out your powers properly. You are responsible for any acts or omissions by someone to whom you may delegate (see the Chapter, "Your Trustee Duties").

CHAPTER 11
YOUR LIABILITY AS TRUSTEE

You must always be conscious of the fact that you may be held *personally liable* (out of your own pocket) for damages or losses to the Trust and its beneficiaries resulting from your failure to exercise your powers properly or to fulfill your duties as Trustee. Your liability is established under state law and may only be restricted by the Trust document or waived by the beneficiaries to a limited extent.

The best way to determine whether you have created or may create a liability for yourself is to periodically review the Trustee duties and Trustee powers listed in the preceding chapters (and in the Trust document itself). It simply isn't feasible to list here every single potential liability you may have as Trustee.

You may be held liable if you do the opposite of any of the duties previously listed (or misuse a power). This may include, but is not limited to, the following:

- Failing to maintain, conserve, and protect Trust assets.
- Borrowing or investing Trust assets for your own benefit (engaging in "self-dealing" or acting with a "conflict of interest").
- Paying yourself excessive Trustee fees.
- Failing to invest Trust assets prudently.
- Failing to make distributions to beneficiaries in the time, manner, and amounts provided for by the Trust (you basically have one year from the Grantor's date of death to begin making distributions to the primary or current beneficiaries, particularly specific gifts of cash, or report to them why this is not possible and when they can expect to receive payment; you may be "surcharged" for interest accruing after one year). (See the Chapter, "Making Distributions to Beneficiaries").
- Failing to properly render accountings to the beneficiaries (however, these accountings may be waived by the beneficiaries; see the Chapter, "Accounting to the Beneficiaries").
- Incurring penalties relating to erroneous or late income, gift or estate tax returns filed by you on behalf of the Grantor and/or the Trust (or relating to your failure to file such returns).

If you have good reason to believe that an action you intend to take may somehow violate or *appear* to violate either your Trustee duties or powers, you should have an attorney assist you in sending a **"Notice of Intended Action"** to the beneficiaries. Then, if you do not receive any objections within a certain period of time, you may proceed without liability so long as you do so exactly in accordance with the terms of your notice. In some cases, you might want to go the extra step of having the Probate Court approve your intended action before carrying

it out. This gives the beneficiaries a forum to protest the action, provided they do so within a limited period of time, and makes it much more difficult for them to later argue that they were not given proper notice, or they did not have an opportunity to obtain their own legal counsel and timely object to the action. In most cases, if you simply keep beneficiaries informed of what you are doing or intend to do, their consent may be amicably obtained without the need for formal written notice or a Court order (see the Chapter, "Tips on Working Successfully With the Beneficiaries").

If you wish to protect yourself and the Trust and its beneficiaries, in the event you may be accused of or held liable for an act or omission, you may want to obtain a **"fidelity bond"** or **"errors and omissions insurance"**. These may not be required by the Trust document, but may be a good idea if you can obtain them at a reasonable cost; the expense of these may not be payable by the Trust and you should ask your attorney beforehand.

CHAPTER 12
MAINTAINING TITLE TO ASSETS, TRANSACTING BUSINESS & PAYING EXPENSES

As a general rule, all assets should always be properly titled in the Trust. Typically, the ownership should reflect the following or similar wording, "your name, Trustee of the _____ Trust dated _____." The most notable exceptions to watch out for are retirement accounts, IRAs and annuities. The transfer of title to these assets into the Trust may cause adverse income tax consequences. You should check with your attorney, financial advisor and/or CPA who is familiar with the intricacies of these accounts before attempting to re-title them.

All moneys received should also be deposited into an account in the name of the Trust, including income from investments and proceeds from the liquidation or sale of assets. **An interest-bearing checking account should be opened** for the Trust, if none exists in the Trust name. Never place any assets or moneys received into accounts in your own name, even if you intend to transfer them later to a Trust account. The only exception to this would be where there is a brief interim period between the date of disability or death of the Grantor and the opening of a Trust account, or between the date of disability or death and the transfer of an existing account already in the Trust into your own name as Trustee.

Sometimes, all assets of the Grantor are not in the Trust at the time of his or her disability or death. This may, depending upon the circumstances, require you to act to transfer title to those assets into the Trust. Certain assets outside of the Trust may be held in joint tenancy or have a beneficiary designation, in which case they may pass outside the Trust "by operation of law" directly to the other joint tenant(s) or beneficiary(ies). Even though these assets may pass in this manner, it may be possible that the Trust (or the Grantor's estate) has a claim for a portion or all of the assets; you may need to investigate the source of the funds that created or maintained that asset and with the help of an attorney, determine whether there is a claim that you, as executor or Trustee, may need to make on behalf of the estate or Trust. Assets that stand outside the Trust in the Grantor's name alone may be transferable into the Trust through a simple affidavit process not requiring court approval. However, depending on the law of the state where the asset is located, if the value exceeds a certain amount, a full court probate of the Will may need to be opened in order to transfer the assets into the Trust. This may be particularly true of real estate. If the Grantor is not deceased, but merely incapacitated, it is possible that you may transfer title to assets into the Trust utilizing his or her Durable Power of Attorney for Property. You will need to consult with an attorney to be sure that the proper power is granted and that the transfers are done legally in accordance with the terms of the Power of Attorney.

When transacting business on behalf of the Trust, you should sign documents in the same manner as the holding of title above; in other words, you should sign "as Trustee of the _____ Trust dated _____." (Some places may allow you to just use your name plus the word "Trustee".) You may require a "Trust Certification" to properly evidence your

authority to sign as Trustee. This document will typically have attached to it copies of doctor letters (or other documents) evidencing the Grantor's incapacity, or if the Grantor is deceased then a death certificate, along with a copy of the Trust or at least the pertinent sections naming you as Trustee and listing your Trustee powers. Some third parties will provide you with their own form of Trust Certification to complete, but in order to expedite your transacting of business, it is recommended that you have an attorney prepare one for you that you can copy and reuse numerous times and not worry about completing properly. Remember, you should not transact business in your own name alone, without the word "Trustee" behind your name and, preferably, with wording indicating that you are doing so on behalf of the Trust name.

Sometimes, third parties with whom you are transacting business may request confirmation of your power to enter a certain type of transaction. Oftentimes, you can get a letter from an attorney reciting your power under the Trust document and confirming your authority to act. Sometimes you may require a court's approval (or you may want a court's approval to protect yourself from liability). Situations where this issue may arise include where you are borrowing and utilizing Trust assets as security, or where you are entering unusual types of investing, such as "buying on margin" or "puts and calls" (but watch out - - "unusual investments" may be too risky and unsuitable for the Trust; see the Chapter, "Investing Trust Assets"). If you are managing an operating business that is in the form of a separate legal entity, such as a corporation, limited liability company, or family limited partnership, you also need to comply with the legal procedures specific to the entity and should definitely seek the assistance of an attorney when transacting this kind of business. (Also see the Chapter, "Investing Trust Assets.") If you intend to sell or liquidate major Trust assets, the beneficiaries may need to be notified, and, again, you should seek the advice of an attorney before doing so and may want to seek court approval.

Your approach to paying expenses of the Trust should be similar to that of paying your own personal expenses, namely, expenses should meet the general standards of being "reasonable" and "necessary." The Trust document may provide additional guidelines as to the types of expenses that can be paid or procedure for their payment. Reasonable and necessary expenses would include things such as funeral, burial and medical expenses, credit card bills, utilities, property and income taxes, and other basic living expenses of the Grantor and beneficiaries (where the Trust provides for your payment of expenses on behalf of beneficiaries). Reasonable and necessary professional fees, such as for an attorney, accountant, financial advisor, property manager and appraiser can be paid from the Trust as long as they relate to Trust property and activities. **You may also be entitled to pay yourself a Trustee fee**, depending upon the terms of the Trust document; you should see an attorney about the appropriate amount and timing of its payment. The carrying costs of real estate, including normal maintenance and repairs, can be paid by the Trust during the time the property is held in the Trust. This may even include fix-up expenses if the property is to be sold by the Trust prior to distributions being made to the beneficiaries. However, you cannot pay for the fix-up or improvement of real property just prior to its distribution to the beneficiaries; this should be an expense paid for directly by the beneficiaries. If you personally pay any reasonable and necessary expenses related to the Trust, or to the Grantor's death (such as funeral expenses), you may reimburse yourself but be sure to maintain detailed

backup in case these reimbursed expenses are ever questioned. Out of caution, you should consult with an attorney before paying yourself any expense reimbursements.

Third parties may file **creditor claims** for bills unpaid by the Grantor. These may or may not be paid by you depending upon the terms of the Trust; in most cases, they can be paid as long as they are legitimate. It is your duty to determine whether a creditor claim is legitimate and to dispute claims that do not appear to be so. If you are concerned that there may be creditor claims outstanding that you do not know of, and you may want to cut off the period for creditors to file claims, you may want to publish a notice to creditors; you should see an attorney to help with the decision and wording and placement of the publication.

If you have any doubt about whether or not to pay an expense from the Trust, you should get the advice of an attorney first.

CHAPTER 13
INVESTING TRUST ASSETS

This area may be somewhat tricky for you even if you are an experienced investor. It's not just about making good investments.

First, **the kinds of investments you can make, the relative amounts and timing of those investments, and whether they can favor income for current beneficiaries or growth for contingent or remainder beneficiaries may be dependent somewhat on the terms of the Trust document,** particularly the paragraphs describing the Trustee's investment powers. Second, state laws, such as a state's "Principal and Income Act" and/or "Prudent Investor Act" may supersede the terms of the Trust, or permit the Trust terms to supersede the state laws! All this may be too difficult for you to sort out alone and is an area where you may wish to consult with an attorney.

Also keep in mind that, although you have the duties, as Trustee, to make assets income producing and to preserve the Trust principal, you do *not* have a requirement to maximize income and/or growth of principal. On the other hand, merely placing all Trust assets into super-conservative but "safe" investments, like certificates of deposits and government bonds, may not meet your requirement to create a "reasonable return." **The easiest and generally safest rule of thumb is to *act as would a "prudent person"*** handling the same investment under the same circumstances, always weighing the risk/reward ratio of each investment decision against the needs of the Trust (and the beneficiaries) for liquidity, income and/or growth. If you are not an accomplished investor, it is almost always advisable for you to hire a professional financial planner/investment advisor to assist you. Look for a "Registered Investment Advisor", preferably also a "Certified Financial Planner®" (or "CFP®") because they must pass certain examinations to be licensed and are more highly regulated as to their activities. Of course, the investment advisor's credentials, years of experience and references should also be checked. Remember, even though you may delegate certain investment responsibilities to this advisor, you are still ultimately liable for selecting an appropriately skilled advisor, overseeing the advisor, and approving his or her decisions.

A good rule of thumb to live by is that any **excess cash** not immediately needed for purposes of administration, such as for the immediate payment of expenses or distributions to or on behalf of beneficiaries, **should be placed in interest-bearing or income producing investments** with sufficient liquidity so that you can access again a portion of this cash when reasonably anticipated for future administration needs. Another good rule of thumb is that **when you are in doubt about Trust investments, choose on the side of conservatism.** Beneficiaries are far less likely to object to not getting enough income or growth of principal, than to object because of your losing principal!

Several special issues may arise when investing, particularly with respect to (1) a closely held business owned by Trust (including rental real estate), (2) retirement accounts, IRAs and annuities, (3) life insurance, and (4) sales of Trust assets and investments.

With respect to a **closely held business** owned by to the Trust (as opposed to shares in a business publicly traded on the stock market), the first key decision that must be made is whether or not to continue or wrap up, sell or liquidate the business. Sometimes, outside experts can be brought in to assist in the operation of the business, such as a property manager for rental real estate. At other times, the business may suffer a serious loss in value if it is not wrapped up, liquidated or sold promptly. Before making this key decision, you should see the business' or Grantor's accountant or other key personnel involved and possibly even the business' attorney. Sometimes, you, as Trustee, may be taking upon yourself far too much risk to continue to own and operate a business whether or not you are skilled to do so. The issue of whether to continue or wrap up, liquidate or sell the business may be impacted by agreements not part of the Trust, such as operating agreements or buy-sell agreements between business partners or between the Grantor-business owner and key personnel. You should look for such agreements and have them reviewed by an attorney before making any decisions with respect to the business.

Retirement plans, IRAs and annuities are usually not even assets owned by the Trust. Nevertheless, you may be required to properly monitor and invest these assets under the Grantor's Durable Power of Attorney, if he or she is alive but disabled, or as executor of his or her estate (his or her non-Trust assets) under the Grantor's Will if he or she is deceased. These types of assets **have peculiar limitations or requirements on the kind of investments that can be made inside of them and the amounts and timing of withdrawals, as well as unique income tax rules that apply to withdrawals.** You should seek the assistance of a financial advisor who has expertise in dealing with these types of investment assets. Whatever decisions are made with the financial advisor should be run by the attorney before implementing them, as any changes to these accounts could have a bearing on the trust administration and/or estate planning done (or to be done) by the attorney.

Life insurance may require proper periodic review, if the Grantor is disabled, or prompt collection of proceeds due if the Grantor-insured has deceased. Again, the assistance of an experienced insurance agent and/or investment advisor may be warranted.

Finally, any decisions with respect to the **sales of major assets** must be carefully considered and properly documented. Sales of major assets may become advisable or even necessary because of your Trustee duty to avoid loss through depreciation in value of the assets, or your duty to raise cash for the payment of expenses, taxes, or (in some cases) for the making of distributions to beneficiaries. The sale of assets should always be as close as possible to their "fair market value", which may need to first be established through a qualified appraisal, particularly in the case of real estate or a business. You should always consult both the Trust document and an attorney before making any sales of major assets, to be sure that you have the proper authority to do so or, if necessary, to obtain it. The attorney can also advise you as to whether it may be appropriate or required for you to give notice of your intended action to the beneficiaries or seek court approval, in advance of the sale. (See the Chapter, "Your Liability as a Trustee"). Oftentimes, in a friendly family situation, merely obtaining the verbal consent of the beneficiaries to such sales may be sufficient. However, remember that you may still have some potential liability as Trustee unless you have any such agreement placed in writing and the beneficiaries are represented by independent counsel or you get advance

court approval. You should always, at the least, document your reasons for any sales of major assets, just in case your action is called into question at a later time.

CHAPTER 14
RECORDKEEPING

This is the area that most intimidates many first-time Trustees. However, *if you follow a few organizational tips and regularly spend about an hour or two a week in handling and filing paperwork, you should do fine.*

The rules relating to recordkeeping are pretty much common sense. You need to set up and maintain a separate **interesting bearing checking account** in the name of the Trust, where you will deposit all receipts (whether income, principal, proceeds of sale or liquidation of an asset, life insurance proceeds, etc.). You will also pay all expenses from this account. (See the Chapter, "Maintaining Title to Assets, Transacting Business and Paying Expenses"). You should always pay all Trust expenses by check from this account in order to keep a clear record. If you need cash from other accounts or Trust assets to cover your expenses, you should deposit these into the Trust checking account before paying an expense. You should not pay expenses in cash (except for very minor items, say less than $50) or use you own personal accounts in hopes of having yourself reimbursed later (this then can become an accounting problem and be questioned later by the beneficiaries). (Note: the exceptions to using one checking account for all Trust activity may occur if the Trust owns a business or rental real estate; in those cases, each business or property should keep its own checking account so income and expenses are broken out for accounting and tax purposes.) Keep in mind that, if and when this checking account holds a large balance, beyond the projected short-term liquidity needs of the estate and Trust, you have a duty to invest the excess for greater income/or growth (see the Chapter, "Investing Trust Assets").

You should maintain a separate **checkbook register** for the account, where you record the date, amount and source of each deposit, as well as the date, amount, payee, and purpose of each check. It may be a little more work, but a better idea, to deposit each individual receipt separately, rather than lump a number of items together into one deposit slip, because you may need to break out each individual item at a later time. When writing checks, if you have a bill statement, you should note in writing on the statement the check number; that way it will be easy to provide backup evidence, if later requested, of what each check payment was for. You may want to keep your checkbook register on computer, which certainly can make it easier to write checks and keep your balance. For example, you may want to use the "QuickBooks" or "Quicken" software program. You should probably consult with your accountant first for his or her recommendations of the best format and program for maintaining your checkbook register, since he or she will later need to utilize this information in preparation of income tax returns.

Remember, it is important to **balance the checking account/checkbook register on a monthly basis**. If this is difficult for you to do, you may want to have somebody else do it for you and, assuming their fee is reasonable, you may pay their fee from the Trust account. Just don't have that same person also provide services for you personally, such as also paying your bills or balancing your personal checking account; otherwise, there may be a question

later as to whether you paid fees from the Trust that benefited you personally and were not truly Trust-related.

Other than properly utilizing your Trust checking account, the only other key aspect of recordkeeping that you need to stay on top of is **maintaining careful records of all transactions.** This simply means properly *organizing and using a simple file system.* There are basically three sets of files that you will keep: (1) files for individual assets (such as banking accounts, certificates of deposit, stocks, bonds, mutual funds, IRAs, annuities, retirement plans, individual pieces of real estate), where you'll place such items as periodic statements, important correspondence and appraisals; (2) files for each regular or recurring payee (person or company you write checks to monthly), where you'll place copies of paid bills marked with the payment check number (you may also want to keep a "miscellaneous payee" file for non-recurring bills); and, (3) a tax file for each calendar year, where you'll place copies of estimated tax vouchers, income reporting forms received from third-parties (such as 1098s), and all IRS/state tax authority correspondence and notices.

In summary, you as Trustee are expected to maintain the same type of recordkeeping that you would do for yourself, assuming you are organized! *If you are not organized, you should immediately seek the assistance of someone qualified to do the recordkeeping for you!* Be assured that, so long as when you first assume the role of Trustee you handle the challenge of gathering and organizing the various records the Grantor left behind, you'll be okay—but again, if that seems too overwhelming or confusing, simply seek professional help, and remember that the Trust can pay for it!

CHAPTER 15
INCOME TAXES

This is definitely an area where you will need to work closely with other qualified professionals -- principally, your accountant or tax preparer and your financial advisor.

The most immediate issues that occur right after you assume your role as Trustee involve: (1) handling the **Grantor's IRAs** and company retirement plans (which may not be owned and controlled by the Trust, but are probably controlled by and accessible to you pursuant to the Grantor's "Durable Power of Attorney for Property" and/or Will); and (2) filing the Grantor's **income tax return for the immediate preceding calendar year (if it has not yet been filed) and for the current year.** With respect to the IRAs, there may have been minimum distributions that the Grantor was required to take in the prior or current calendar year and need to be taken by you to avoid potential tax penalties. If the Grantor has died, then depending on the Grantor's age and the beneficiaries of his IRAs (and other retirement plans), there may be certain distribution choices that need to be exercised anywhere from nine months after the Grantor's date of death, up to September 30 of the year after the date of death. If the Grantor has died there may also be a number of elections that need to be timely made on the income tax return.

Another income tax-related action that should take place as soon as possible is **obtaining a taxpayer identification number from the IRS for the Trust.** While the Grantor is living and acting as Trustee, the Living Trust is considered a "grantor Trust" which does not require a separate taxpayer identification number or a separate tax return; all income and expenses simply flow onto the Grantor's personal income tax return. However, once the grantor becomes incapacitated or otherwise cannot serve as Trustee, or has died, the Trust is then considered a separate taxpayer, which requires a separate taxpayer identification number and a separate income tax return. The exception is when the Grantor and his or her spouse were both serving as Co-Trustees and now the other is named to serve as sole Trustee; in this case a new taxpayer identification number may not be required. Any time the Living Trust divides into smaller individual trusts, these new "sub-trusts" may require their own new numbers. For example, upon the death of the first spouse of a married couple, the Living Trust may divide into "A, B and C" Trusts (see the Chapter, "Estate Taxes"). The "A" (or Survivor's) Trust usually does not require a separate taxpayer identification number and income tax return, but the "B" and "C" Trusts will. Upon ultimate distribution of the Trust assets (in the case of a married couple, at the surviving spouse's death), some beneficiaries may receive their inheritance directly, while others may have their inheritance held in continuing trusts (such as a young or spendthrift person, someone receiving needs-based government benefits, or someone receiving his or her inheritance in a protected "Personal Asset Trust[SM]"). When each beneficiary's individual Trust is setup (usually at the end of the initial Trust administration), each individual Trust will require a taxpayer identification number and tax return.

When we speak about tax returns, keep in mind that there will not only be Federal income tax returns (Form 1041), but also, depending on the legal location of the Trust (or Trust "situs", which your attorney and accountant will need to determine), there may also be a state income tax return due. (In Colorado, this is done on Form 105). Some states do not have an income tax, but may have another tax for which the Trust may be required to file a return, such an "intangible property" tax.

Whether or not a Trust will actually pay any income taxes basically depends on whether the Trust or the beneficiaries of the Trust end up with the trust income by the end of the Trust year (plus a 65-day grace period after the end of the tax year). In other words, the Trust will be required to file income tax returns, but *if a Trust distributes its potentially taxable income through this period, the beneficiaries will report the income they have received on their own personal income tax returns, and they will be responsible for paying the taxes.* Since individuals are usually in a lower income tax bracket than a trust, you should consult with your accountant toward the end of each tax year to determine whether distributions to beneficiaries should be made (if the Trust terms permit and in what amounts). However, you cannot always let the "tax tail wag the dog" and may want to pay higher income taxes at the Trust level, rather than distribute to a beneficiary who may squander the money or use it for less than worthwhile purposes, or lose the protection that the Trust may be able to afford him or her against a spouse in a divorce, creditors, lawsuits, and loss of government needs-based benefits; therefore, the question of whether to make distributions to beneficiaries may also be one to run by your attorney.

Upon the death of the first spouse of a married couple, assuming that "A, B and C" Trusts are to be established, you will need to review with your attorney the effect that allocation of certain assets to each of these new Trusts will have in the future for income tax purposes. For example, if the surviving spouse's residence is allocated to the A Trust, then if that property is later sold within his or her lifetime, he or she may be able to fully utilize the federal capital gains exclusion (currently $250,000); however, this exclusion is not available to the B and C Trusts. Assets allocated to the A and C Trusts will be allowed a "step-up" in their income tax basis to the fair market value of those assets at the date of the death of the second spouse; this will effectively allow depreciable properties like real estate to generate greater tax deductions, and will reduce potential capital gains taxes when those A and C assets are later sold. Again, you cannot let the income "tax tail wag the dog", as there may be very sound estate tax and other reasons for allocating the home to the B and C Trusts and the other growth-oriented assets to the B Trust. *These are issues you will need to review with your attorney at the time that the allocation of assets to the A, B and C are made.* (See also, Chapter 15, "Estate Taxes").

There are several other key income tax-related issues that you will want to review with your accountant. Keep in mind that this is not an exhaustive list.

- ❑ Determination of the taxable year of the Trust, whether a calendar year or a fiscal year ending on the last day of a month other than December.
- ❑ The effect and desirability of withdrawals from retirement plans, IRAs and annuities. These withdrawals will likely represent taxable income, whereas if the

monies can be kept in these accounts, they may continue to be able to compound on a tax-deferred basis until withdrawals are later desirable or mandated.

- ❑ Payment of quarterly estimated income taxes. Waiting to pay taxes until the filing date for the return may subject you to penalties and interest.
- ❑ The income tax-capital gains tax effect of sales of Trust assets. Again, we cannot let the income "tax tail wag the dog" and there may be very sound, practical reasons why sales need to take place regardless of the income tax consequences (See the Chapter, "Investing Trust Assets").
- ❑ Finally, keep in mind that income tax planning is closely interrelated to your investment decisions, and the tax impact of an investment decision should be discussed with your financial advisor and, as necessary, you accountant as well. For example, decisions related to withdrawals of retirement plans, IRAs and annuities, the making of sales, and selection of investments (whether taxable, tax-free, tax-deferred, and tax-sheltered) all have potential income tax consequences that must be considered prior to acting.

While all this may sound a little "mind-boggling", remember that a good CPA can help make all these matters easy for you and his or her reasonable fees may be paid from the Trust!

CHAPTER 16
ESTATE TAXES

Of all the areas of Trust administration following the death of a Grantor (or his or her spouse), this is the one where you must definitely seek immediate professional help! The liability exposure to you, if you don't, may be hundreds of thousands or even millions of dollars! Be sure to choose an attorney or accountant who has experience in preparing numerous estate tax returns (IRS Form 706) and handling estate tax audits. Many attorneys are good estate planners and also can handle the Trust administration well, and many accountants are excellent at preparing income tax returns and handling audits of them, but only a few attorneys and accountants have substantial experience in the area of estate taxes.

There are basically four key steps in handling estate taxes: (1) estimate any estate taxes due and set aside funds for payment; (2) prepare and timely file the Form 706, if required; (3) pay any taxes due in a timely manner; (4) follow through after the return is filed, until you receive a "closing letter" from the IRS.

Here's a little more detail:

- **Estimate any estate taxes due and set funds aside for their payment.** One of the very first steps in administering the Trust following the death of a Grantor is the identification of all Trust assets, as well as non-Trust assets in which the Grantor had an interest, and obtaining date of death valuations for them (see the Chapters, "Checklist of Immediate Actions Upon the Death of the First Spouse" and "Checklist of Immediate Actions Upon Death of an Individual (or the Surviving Spouse)"). A determination will need to be made not only of whether a Federal estate tax is due, but also whether there will be any separate state death or inheritance taxes due. Fewer estates and Trusts are liable for federal estate taxes than was the case before, because the tax exemption has been increasing; however, don't assume that no tax will be required, because the total assets of the Grantor, after being valued and appraised, are often worth a lot more than you think! Colorado no longer has these types of taxes, however, if property is located in another state, or the Grantor had his or her primary residence in another state, it is possible that there may be additional state taxes due. Even though all assets may not be completely identified and valued immediately, an estimate of taxes due should be made no later than seven months after the date of death, since the tax payment will be due on the date nine months after the date of death. You will need several months to determine what funds can be used to pay the taxes, whether current liquid assets of the Trust and/or assets of the probate estate of the Grantor (if any) will be sufficient, or if you will need to obtain a loan such as from the Grantor's Irrevocable Life Insurance Trust (if any), the beneficiaries themselves, or a third-party lender, or you will need to sell or liquidate Trust assets. Obviously, these decisions will require the input of your accountant (for the tax consequences), your attorney (to determine how this will affect ultimate

distribution of the Trust, and to document everything legally), and your financial advisor (who will need to assist you in the decision of where to take the cash from and/or which assets to sell). **IF YOU TAKE OVER AS TRUSTEE MORE THAN SIX MONTHS AFTER THE DATE OF DEATH OF THE GRANTOR,** YOU NEED TO CONSULT WITH YOUR ATTORNEY, ACCOUNTANT AND FINANCIAL ADVISOR AS SOON AS POSSIBLE REGARDING THESE ISSUES! IF YOU ARE DEALING WITH THE DEATH OF A FIRST SPOUSE OF A MARRIED COUPLE, YOU WILL NEED TO ALSO DISCUSS WITH THESE ADVISORS THE ISSUE OF A POSSIBLE "DISCLAIMER" BY THE SURVIVING SPOUSE, WHICH MUST OCCUR IN WRITING WITHIN NINE MONTHS OF THE DATE OF THE FIRST SPOUSE AND MAY BE ADVISABLE TO REDUCE ESTATE TAXES IN THE FUTURE UPON THE DEATH OF THE SURVIVING SPOUSE.

- **Prepare and file the estate tax return in a timely manner.** Although the estate tax is due within nine months of the date of death of the Grantor, you may extend the time for filing the return for an additional six months, if you file a timely extension request. (However, this does not extend the time to make the estimated tax payment discussed above.) Keep in mind that an estate tax return may be required even though there may be no estate taxes due. For example, in most cases no federal estate taxes are due on the death of the first spouse. Also, there may be allowable expense deductions that will reduce the estate taxes to zero. However, if the "gross estate" exceeds the estate tax exemption or exclusion amount that applied at the date of death, a return is technically required. This exemption for a death occurring in the year 2012 is $5,120,000. It may be subject to increase or decrease in future years. Since currently the law is in a state of flux, you will need to have your attorney or accountant verify the applicable exemption amount. At the first spouse's death in a married couple, the gross estate is comprised of that spouse's half of the community property, plus his or her separate property (the attorney may need to help you with the determination of what is community and separate property, by receiving asset titles as well as consulting any pre-marital or post-marital property agreements that the married couple may have executed). On the death of the surviving spouse of a married couple, the gross estate is comprised of the surviving spouse's half of the community property (typically, what is held in the "A" or "Survivor's" Trust and/or his or her individual Living Trust, or in his or her own name, plus the assets, if any, of the "C" or "Marital" Trust). In preparing the estate tax return, it is important to determine whether the Grantor has made any previous gifts in excess of his or her available exclusion (currently $13,000 per year in total value of any assets); if so, any prior gift tax returns must be located or requested from the IRS and/or late gift tax returns may need to be filed; the amount of gifts in excess of annual exclusion amounts must be recorded and deducted from the exemption that can be used for estate tax purposes; the failure to deal with prior gifts can result in an unanticipated estate tax, and the failure to pay that tax may subject you personally to significant penalties.

- **In preparing the estate tax return, there are a few strategies that may be employed to reduce estate taxes.** This is one of the reasons why you should choose to have the estate tax return prepared by someone who has a great deal of experience. These planning techniques include: discounting the value of assets which are only partly owned in the "A" and/or "C" Trusts (fractional interest discounting); valuation discounting for lack of control or lack of marketability, such as when the Trust holds an ownership interest in a closely held business, limited liability company, or a family limited partnership; aggressively low valuations, provided a qualified appraiser provides you with written support; and electing to treat certain expenses as deductible on the estate tax return, rather than on the Trust income tax return (Form 1041 Federal and Form 105 Colorado). The decision as to whether you will take Trustee fees or not (which are income taxable to you) will also impact the estate tax calculation because Trustee fees are deductible. There are other planning strategies and elections, such as "alternate valuation" and "special use valuation" that occasionally may apply and can be used to also reduce the estate tax. Again, an experienced preparer of estate tax returns should be able to assist you with these various elections and planning options.

- **Timely payment of the estate taxes.** As stated above, the estate tax is due to be paid on the date nine months after the date of death of the Grantor, even though the return itself may be extended for an additional six months. If the exact amount of the tax due cannot be calculated at the ninth month, then a good faith estimate must be made. If it is determined, at the time the return is later filed, that the estimated payment, if any, made at the nine-month date was insufficient to cover the entire tax due, the remainder must be paid with the return. Note that the failure to pay the entire tax due on the nine-month date will then result in interest accruing on the unpaid portion after that date; the IRS will calculate this interest and bill you shortly after your filing of the estate tax return, at which time you should pay this interest amount once you have checked the accuracy of the calculation. If the underpayment at the nine-month date was substantial, the IRS may attempt to assess penalties as well, and you should definitely have the estate tax return preparer decide whether there is a "reasonable cause" excuse for the prior under-payment that may be communicated to the IRS in the hope that they will waive these penalties; you should not immediately pay any penalty notice received from the IRS until you have weighed this possibility of obtaining a waiver. As stated above, there are various ways that you may raise funds to pay the estate taxes; but there is still a possibility that this may be difficult to do, or might be financially impracticable (such as selling assets in a depressed market). If the full remainder of the tax due cannot be paid with the estate tax return, it may be possible to elect a deferral of payment through either a "hardship exemption" or "installment payment program." Again, you should consult with your tax preparer with regard to these options before simply liquidating assets. Note that the taxes can be paid from the Trust and will usually be deducted on a pro rata basis from each beneficiary's inheritance; however, this will depend on the Trust

document as well as state law. If assets pass to people directly, outside of the Trust, such as IRAs or life insurance proceeds, you, as Trustee, may have a right and duty to claim reimbursement from those beneficiaries of the portion of the estate tax attributable to the asset they received; again, however, this is matter of the terms of the Trust document, as well as both Federal and local law, and you will need to consult with an attorney about this issue.

- ❑ **Follow up until you receive the IRS "closing letter".** After a certain period of time, generally between six and eighteen months after the filing of the estate tax return, the IRS will issue a closing letter accepting the return as filed, if it does not spot any significant issues. You should know that virtually all estate tax returns where a tax is due and/or paid will be audited in some respect by the IRS. You may only receive a simple letter requesting additional information as to certain issues they identified on the return. Many times, your preparer's response to these questions can finalize the matter so that you then receive the closing letter. At other times, less frequently, the IRS will open a full audit of the estate tax return, which generally will include a meeting with your tax preparer (which you should *not* attend!) and a more detailed look at various backup information they will request. The audit may result in no changes, or changes that result in a refund, or an increase in the tax due; you then have certain rights to contest the IRS audit examination report, if you wish to do so, and you will need to coordinate these efforts with both your attorney and estate tax return preparer. In any event, during the time between the filing of the return and the issuance of the closing letter to you, it is important that you respond timely to any IRS notices and requests; preferably, you should have your attorney or estate tax return preparer do the response on your behalf. Until you receive the closing letter, you should not distribute all Trust assets to the beneficiaries, just in case any additional taxes, penalty or interest become due; your tax preparer and/or attorney can assist you in determining the *"reserve"* you should hold until getting the closing letter (see the Chapter, "Termination of the Trust").

- ❑ Once you have received the closing letter, this will place you in a position to make **final distribution of the Trust** to the beneficiaries or to Trust shares ("sub-trusts") to be set up for them (see the Chapter, "Making Distributions to the Beneficiaries"). A copy of the closing letter and estate tax return (along with any final agreed upon changes by the IRS) should be given to each of the beneficiaries and to the income tax preparer for the Trust. The *"stepped-up" tax basis* for depreciation of certain assets and for determination of capital gains upon the future sale of assets will be set by the date of death values accepted on the estate tax return, and this new basis may in turn reduce the current and/or future income taxes of the Trust and the beneficiaries.

CHAPTER 17
ACCOUNTING TO THE BENEFICIARIES

Your duty to prepare an accounting for the beneficiaries is dependent somewhat on the terms of the Trust document, as well as state law. Your attorney should be able to quickly identify the accounting required in your situation.

Before we go deeper into this issue of accounting, keep in mind that, more often than not, **if you, the Trustee, and the beneficiaries are friendly parties, they may waive entirely the need for you to prepare any formal accounting,** since it will save time and expense that otherwise will be paid out of the Trust and effectively reduce the beneficiaries' inheritance. We recommend that any such waiver of accounting by the beneficiaries be done properly in writing and that they be advised of and have the opportunity to exercise their right to independent counsel prior to signing it. *If there are any current or potential future conflicts between the beneficiaries and you, the Trustee, or between any of the beneficiaries, you will probably want to prepare the required formal accounting in order to protect yourself against possible future liability.*

If the accounting is not waived by all the beneficiaries entitled to the accounting (as detailed below), then you must fulfill your duty to account to them for all Trust income, expenses and transactions, on *at least an annual basis* (the Trust may require more than one accounting each year). Keep in mind that, even if all beneficiaries are willing to sign a written waiver of the accounting, it may sometimes be a good idea to proceed with it anyway. The beneficiaries may not fully understand your job and why you are entitled to Trustee compensation (above and beyond what you might also be receiving as an inheritance) and by providing them with a detailed accounting, they are probably less likely to contest your fee (typically taken by you at the end of the Trust administration process.) When the beneficiaries are provided all the pertinent accounting information, they are less likely to make certain negative assumptions regarding your decisions, which can also help reduce potential conflicts. Furthermore, once the statute of limitations (generally, three years) has passed since your delivery of an accounting, your Trustee liability is forever closed, unless your accounting is fraudulent or grossly negligent.

Finally, the reasonable cost of the accounting is payable from Trust assets (you typically will need an attorney and/or accountant to prepare the final accounting in the proper format, after a review of the information you have provided, to be sure it is complete and the accounting will not be false or misleading).

Assuming the accounting is not waived by the beneficiaries, then besides the regular annual accounting, **an accounting is usually due upon the occurrence of any of the following events:** (1) when a Trust becomes irrevocable by the Grantor (sometimes this may occur upon the incapacity of the Grantor, but most often happens upon the death of the Grantor); (2) if the deceased Grantor is the first spouse of a married couple, this accounting requirement may continue to apply to the "B" ("Exemption") and "C" ("Marital") Trusts that may be established after his or her death.); (3) upon final distribution of Trust assets and/or full

distribution of a particular beneficiary's share of the Trust; and, (4) when there is a change of Trustee because of your resignation or removal (See the Chapter, "Transition to Another Trustee"). Your attorney can help you determine when an accounting may be necessary and the format in which it must be presented.

Generally speaking, the beneficiaries who are entitled to the accounting are only those to whom income and/or principal is required to be currently distributed (or may be distributed in your discretion). An accounting does not usually need to be delivered to all future contingent and remainder beneficiaries. The attorney can help determine whether the Trust document or state law changes these general rules. The beneficiaries who are entitled to the accounting are the ones who must all waive the accounting if the determination is made not to prepare it.

If a beneficiary has questions about your accounting, you should answer them truthfully and as quickly as possible, in order to avoid creating a conflict. If, after receiving any requested information or explanation, a beneficiary objects to your accounting, you may then wish to proceed with filing a formal accounting with the appropriate local court (in Colorado, the Probate Court), so that the matter may be resolved by the final court-approved accounting and you will be absolved of any further liability. Obviously, this can create considerable delays in distributing the beneficiaries' inheritance, as well as considerable additional Trust expense which, effectively, will reduce their inheritances. Therefore, you should only file a formal court accounting after careful consideration of the pros and cons with your attorney for the Trust.

Assuming you will be filing an accounting, there is no reason to be unduly afraid or anxious about this preparation, provided that you maintained good recordkeeping (as described in the Chapter, "Recordkeeping") and prepared the information necessary for your accountant to prepare the Trust income taxes (as described in the Chapter, "Income Taxes"). Usually, the only types of transactions that may pose some complexity for the accountant occur when the tracing of funds must be done in detail, such as when assets are sold and the proceeds reinvested, or accounts are opened and closed, or when money is shifted between accounts. **If all Trust transactions have been done through one single Trust checking account (as recommended in the Chapter, "Maintaining Title to Assets, Transacting Business and Paying Expenses"), and you have maintained a proper account statement in your files (as recommended in the Chapter, "Recordkeeping"), the preparation of an accounting should not become an overly burdensome and complex affair.** Again, remember, you can seek professional assistance and pay a professional's reasonable fees from Trust assets.

CHAPTER 18
MAKING DISTRIBUTIONS TO THE BENEFICIARIES

Note: This chapter contains information which may apply during the lifetime of the Surviving Spouse, as well as after the Surviving Spouse has passed.

Typically, the period of Trust administration (the entire process of collecting and valuing assets, and paying debts, expenses and taxes) lasts anywhere from 6 months to one and one-half years. Sometimes, preliminary or "advance" distributions of a portion of the beneficiaries' inheritance may be made before the entire Trust administration is completed (particularly when there is a Surviving Spouse); however, unless the Trust document requires such distributions or there clearly are excess funds available, distributions are normally not made to beneficiaries until the end of the administration period.

In all cases, **prior to making any distributions to beneficiaries, the Trust document itself must be consulted to determine *when*** (see the Chapter, "Reviewing the Trust (and Other Estate Plan Documents)"). Sometimes, the Trust document may provide for specific bequests or gifts of certain dollar amounts or of certain Trust properties and those distributions may be made prior to the wrap-up of the administration period. There may also be powers of the Trustee to invade income and/or principal for the needs of beneficiaries (including the Surviving Spouse), such as their health, support, maintenance and education; and if their needs are urgent, it may be appropriate for distributions to be made to them prior to the administration period ending. The Trust may also call for mandatory distributions of income and/or principal that may be required to commence as soon as possible after the Grantor's date of death. Sometimes principal distributions are to be made over time, rather than all at once (such as when a beneficiary reaches certain ages), in which case the Trustee will stay in charge of some of the assets after initial distributions are made. Sometimes complete distribution will happen all at once upon termination of the Trust (see the Chapter, "Termination of the Trust").

The Trust document must also be consulted to determine *to whom* distributions will be made. For example, a named beneficiary may be deceased, in which case a determination must be made as to whom will receive that deceased beneficiary's share. It is also necessary to determine whether payments must be made directly to the beneficiary, or may be made to a third-party for his or her benefit (such as directly paying educational or health bills). Also, a beneficiary may exercise a "disclaimer" of his or her interest, which would then pass his or her interest to the next person named as if he or she was deceased. Furthermore, there may have been in existence a Power of Appointment, either retained by the Grantor or some other party, which might re-direct a portion or all of the Trust assets, within the limitations set forth under the terms in the Power of Appointment (thereby effectively changing the terms stated in the Trust document).

After determining when the distributions are required to be made, and to whom they will be made, **the next issue is to determine *what amount* of distribution will be made to each beneficiary.** Typically, each beneficiary will receive a share of the "remainder" of the estate,

after the payment of all debts, expenses (including professional fees such as to the Trustee, attorney, and accountant), and taxes (including both income and estate taxes). If a federal estate tax return has been filed, a "reserve" for any IRS audit changes and additional taxes, penalties and/or interest may be held by the Trustee, and the rest of the "remainder" distributed; then, once the IRS "closing letter" is received, the reserve may be distributed (see the Chapter, "Estate Taxes"). However, as stated above, the Trust document may provide for set dollar amounts or specific assets to be distributed to one or more beneficiaries "off the top" before this "remainder" amount is determined. Again, the Trust document must be reviewed.

Assuming there are no directions as to specific dollar amounts or specific assets going to particular beneficiaries, it must then be determined to what extent the Trustee has the latitude to **determine *what type of assets* will be distributed to each beneficiary.** For example, the Trust document may provide that distributions may occur "in-kind", meaning specific assets may be distributed to satisfy the amount to which the beneficiary is entitled, based on the appraised values (either at the date of the Grantor's death or date of distribution, depending on the terms of the Trust document). The Trust may also provide that "in-kind" distributions may be made on a "non-pro rata" basis, meaning that beneficiaries with equal shares need not receive an equal part of each and every asset, but rather may receive part or all of any particular asset, so long as the total distributions to the beneficiaries are equivalent in value.

In particular, **it is recommended that the Trustee not immediately start distributing personal property, such as the contents of the home,** until such time as the Trust document and Will have been reviewed to determine if there are any specific bequests, and the Trustee has made a diligent search for any other instructions the Grantor may have left behind (such as in THE RAINS LAW FIRM, LLC's "Estate Planning Portfolio Book"). Whether or not any directions outside of the Will and Trust are binding on the Trustee is a matter of law that will need to be determined by the Trustee's attorney; many times it is advisable for the Trustee to follow these informal wishes of the Grantor if for no other reason than to maintain harmony amongst the beneficiaries, assuming they are all in agreement with these distributions. The best course of action is to check with an attorney before making any distributions of personal property (or any other assets!).

Sometimes the Trust will provide for what are called **"discretionary" distributions**. This means that the timing and amount of distributions, and whether they are "in-kind" or "in-cash", may be up to the judgment of the Trustee, which must be exercised reasonably and according to the purposes designated in the Trust. For example, often there are powers to invade and distribute income and/or principal for "health, support, maintenance and education". This may be further defined by such statements as "in accordance with the standard of living to which the person was accustomed at the time of the Grantor's death". The beneficiary's other income and assets may or may not need to be considered, depending on the Trust document. Again, the making of discretionary distributions is an area where the advice of an attorney should be sought. In addition, the timing and amount of discretionary distributions may affect the income taxation of the Trust and/or beneficiary, therefore it is advisable for the Trustee to consult the accountant.

The next question that must be addressed is ***how* distributions will occur.** Will they be outright, that is given directly to the beneficiary (or have title placed in the beneficiary's

name), or will they be held in Trust by the Trustee, or will they be distributed to a new Trust created under the Grantor's Living Trust specifically to receive the distributions? Review of the Trust document with an attorney will be critical in answering these questions. If distributions are to be to a new Trust, the Trustee will usually need to create the new Trust by re-titling assets in the new Trust name and obtaining a new tax identification number for that Trust. This newly created Trust for the beneficiary may or may not provide for the Trustee of the Living Trust to continue to serve as Trustee; the Trustee may become another individual or bank or trust company. Sometimes, the Trustee may be the beneficiary himself or herself. When assets are re-titled into the Trust, they will need to reflect the new Trustee's name. A document should also be prepared by the attorney to evidence the new Trustee's acceptance of that position. You and your attorney may also wish to instruct the new Trustee as to how to properly implement the Trust in accordance with the terms of the Living Trust (see the Chapter, "Transition to Another Trustee").

Before you make any distributions, you should advise your attorney, so he or she can check that you are appropriately addressing the above issues. Keep in mind, at the death of the first spouse of a married couple, the Trust may be divided into "sub-trusts" and each sub-trust may have different provisions in terms of the persons to whom distributions may be made, their amounts, their timing, the assets to be used and for what purposes the distributions can be made.

Retirement benefits, IRAs and annuities are assets requiring special attention. Most likely, these assets will pass by beneficiary designation outside of the Trust directly to the named beneficiaries. However, sometimes they do flow through the Living Trust (or a separate "Standalone Retirement Trust"). It will be very important to consult with the attorney and/or accountant before any withdrawals are made from these assets in order to distribute them to beneficiaries, as well as before title to these assets are transferred to beneficiaries. There can be significant adverse income tax consequences if distributions are made from these accounts or these accounts themselves are distributed without proper advance consideration.

It is always advisable for the Trustee to *obtain receipts* from beneficiaries when distributions are made. Cancelled checks or copies of deeds may serve as their own receipt. With other assets, the Trustee may or may not require a receipt, depending on the nature of the asset and how it is transferred. If the distribution is done at the time the Trust is terminating, the beneficiary may be concurrently entitled to an inventory and accounting (see the Chapters, "Accounting to the Beneficiaries" and "Termination of the Trust"). When complete distribution of a beneficiary's share is made, the beneficiary should sign a *settlement and release agreement* and/or receipt so it is clear that the Trustee has made all final distributions and that there are no additional distributions expected.

Warning: Be very careful when making loans from the Trust, even if they are to be considered an "advance" against future distributions. The Trust document must permit loans and typically will specify what the terms of any loans are to be, such as interest rate, length of payments and security (sometimes there is just a "reasonableness" requirement that is in the discretion of the Trustee). Any loans should definitely be documented by notes signed by the recipients. No loans should be made without consulting the attorney, to determine whether the funds should instead be kept in reserve for future expenses and taxes. Making loans to

one beneficiary but not to another, or in different amounts, may place you, the Trustee, in a position of possible conflict. Because of the tremendous liability you, the Trustee, may have, if loans are inappropriately made, you should definitely see your attorney before making any loans to beneficiaries (or any other parties).

Also, here are a few words of caution about **your Trustee fees.** You may or may not be entitled to compensation for acting as Trustee, depending on the terms of the Trust document. The amount of Trustee fees you may take may also be limited by the Trust document or state law. If you do get paid Trustee fees, these will be taxable income to you. If you are also a beneficiary, your other distributions from the Trust may not be taxable income to you. Therefore, you should consult with a CPA to determine whether or not you wish to take your Trustee fees, as you are not required to do so. The bulk of your Trustee fees should usually be paid at the end of the Trust administration. Your fees may not be excessive and must be reasonably related to the nature of and amount of work you performed. You should consult an attorney regarding the proper amount of your fees and timing of their payment.

CHAPTER 19
TRANSITION TO ANOTHER TRUSTEE

There are a number of situations when a currently acting Trustee (whether the Grantor, the first Successor Trustee or a later Successor Trustee) is replaced by a new Trustee. These typically are:

- the Trustee no longer desires to act;
- the Trustee becomes disabled;
- the Trustee is removed;
- the Trustee dies; or,
- Trust assets are distributed to a new Trust with a different Trustee.

Each of these circumstances involves a different procedure for transition of power from one Trustee to the next.

When the current Trustee is no longer willing to act, for whatever reason, he or she may merely *resign*. This often happens when the original Grantor becomes elderly and no longer wishes to handle his or her paperwork and financial decisions. The Trustee resignation document may be fairly simple. However, there are issues surrounding a Trustee resignation that need to be dealt with properly. First, the Trustee should understand that, after resigning, he or she may not be able to again resume the position of Trustee (either because he or she will become too disabled to do so or the document does not allow him or her to do so). Second, the Trustee must have the necessary legal capacity to sign a knowledgeable resignation (if you are in doubt as to the Trustee's capacity, you should probably skip ahead to the "doctor letters" procedures below). Third, the resignation should not be made under any form of influence or coercion by others, particularly that of a Successor Trustee or a beneficiary of the Trust. Fourth, it is probably a good idea to have the resigning Trustee's signature on the resignation notarized, in case anyone, including a financial institution, should later question the authenticity of the resigning Trustee's signature.

If the resigning Trustee is also a Grantor, it may be more advantageous for he or she to sign an amended Living Trust, which states that the person he or she now wishes to serve as Trustee has been appointed to serve in that capacity immediately, either solely or as a Co-Trustee with the Grantor. By doing an amended Living Trust, the Grantor is affirmatively stating in the document that the next Trustee is to act and therefore there is less likelihood of other persons questioning the new Trustee's authority to act. The Grantor is also spared the emotional disappointment of having to acknowledge his or her deteriorating capacity, which sometimes occurs when the Grantor has to sign a resignation. Alternatively, by naming a new person to act as a Co-Trustee with the Grantor, even if the Grantor delegates most actions to the new Trustee, the Grantor can feel a lot more comfortable with the fact that he or she will still be involved in handling his or her own affairs. If the Grantor is the surviving spouse of a married

couple, the Trust document will need to be consulted to be sure the Grantor has the requisite power to amend (sometimes a surviving spouse can only amend the "Survivor's Trust" and not the "Exemption Trust" or "Marital Trust").

If the existing Grantor-Trustee is not legally capable of signing a resignation or amending the Trust *(may be incapacitated),* it may be necessary for you, as the named successor Trustee (or existing Co-Trustee), to take certain actions. These actions are dependent upon the terms of the Trust document. Typically, you will need to obtain *doctor letters.* The number of letters needed and exact language these letters should include is, again, dictated by the exact language of the Trust. Generally, each of the doctor letters should be on the physician's letterhead and should include the following statements: (1) the physician is duly licensed to practice medicine in his or her state; (2) the doctor has attended to or is currently attending to the care of the Trustee and recently examined him or her; (3) a brief description of the incapacity ailments which the Trustee suffers from; and, (4) in the opinion of the doctor, the Trustee is no longer capable of handling his or her own affairs due to the described ailments. The doctor letters do not need to be notarized. You may need to present the Grantor-Trustee's "HIPAA Authorization" in order to allow the doctors to release the medical information contained in the letters; if it cannot be located, it may be possible for you to execute one under the Grantor's Power of Attorney document, or the Grantor's attorney may be able to write a letter to the doctors, enabling you to access the medical information. If it is not possible to get these two doctor letters, there are other alternatives for declaring the Trustee incapacitated so that the next Trustee may act. The Trust itself may contain a *backup procedure for a "Trust Protector" or some other third-party or "panel" to make the determination of incapacity.* The last alternative, if none of the above procedures work or are available, is for you or some other party to file a *petition in the Probate Court* to have a judge determine the Trustee's incapacity. (See also the Chapter, "Checklist of Immediate Actions Upon Disability or Incapacity" regarding the situation where the Trustee is the Grantor).

The succession of Trusteeship, upon the *death* of a Trustee, is a fairly simple matter. An original death certificate (not a photocopy or other facsimile) will be needed to establish the death, after which the further procedures discussed below will occur.

In some cases, a Trustee may be *removed,* so that the next Trustee may act. Sometimes, the Trust document itself will provide that either certain beneficiaries or a "panel" or a third-party such as a "Trust Protector" has the ability to remove the Trustee whether or not there is cause. Regardless of the terms of the Trust document, it is also possible for the Trust beneficiaries to remove the acting Trustee, if he or she is not properly fulfilling his or her duties or not properly exercising his or her powers, by filing a petition with the Probate Court and proving the reasons for removal.

Finally, the current Trustee may be effectively replaced when **distributions are required to be made from the Trust to another Trust** (either created out of the original Trust, or under a separate trust document) **and a different Trustee is named.** (See the Chapter, "Making Distributions to the Beneficiaries" and "Termination of the Trust").

Regardless of the circumstances that may cause the change of Trustee, the remaining process of the new Trustee taking over involves substantially the same steps. First, you

must *confirm that the right person(s) are stepping in* as the next Successor Trustee. This requires consulting the Trust document. Sometimes, there is no Successor Trustee named in the document. For example, there may have been two Successor Trustees named in the document, but both are no longer able to act or are deceased. The Trust will usually provide some mechanism for determining the next Trustee without the need to go into court. For example, the Trust may say that the last Trustee to act may appoint a Successor (sometimes the type of party that can appointed may be limited to a bank or Trust company or someone who is not a beneficiary of the Trust). This mechanism may not work if there is no living and competent Trustee who can make this appointment or the last Trustee to act does not wish to take on the responsibility of making this appointment. The Trust may contain a second default mechanism, whereby the current Trust beneficiaries (entitled to income and/or principal at the current time) may by a vote appoint a new Trustee (again, the power may be limited to appointing only certain types of parties). Another default mechanism that could exist is for a "panel" or a "Trust Protector" to appoint a new Trustee to fill the vacancy. If all of these mechanisms fail or are not available under the Trust document, then it may be necessary to file a petition with the Probate Court and have the court appoint the next Trustee.

Assuming it has been clearly resolved who may legally act as the Successor Trustee, and you have the legal documents setting forth the circumstances under which the current Trustee can no longer serve (the resignation, doctor letters, death certificate, removal document, etc.), **the following steps need to take place to finalize the transfer of Trusteeship.** First, the new Trustee should sign an *"Acceptance of the Position of Trustee",* which should also be properly notarized, to evidence his or her agreement to serve as the new Trustee. Second, the attorney should prepare a new *"Trust Certification",* stating that the Successor Trustee is empowered to act pursuant to the terms of the Trust. This Trust Certification should have attached to it the above referred legal document establishing the occurrence of the need for a change of Trustee, as well as a copy of the Trust document, including any amendments. A Trust Certification will often be needed when the new Trustee goes to third-parties (banks, brokerage houses, realtors, IRA custodians, etc.), in order to take over control of the Trust assets. Next, the new Trustee may be required under state law (as is the case in Colorado) to send a *"Notification" of the change of Trustee to the Trust beneficiaries* (See the Chapter, "Your Trustee Duties"). Next, it is advisable (and in certain Trust documents, may be required) for the new Trustee to provide a *"HIPAA Authorization"* to the next named Successor Trustee. This authorization to access the new Trustee's medical records may be limited in scope so that the next Successor Trustee can only see the records for the purposes of establishing the disability of the new Trustee (should that occur in the future); this will enable the next Successor Trustee to act more quickly when needed, without first going to Court. The outgoing Trustee may be required to provide an *Accounting* of the assets, income and expenses of the Trust during that Trustee's control of the Trust (See the Chapter, "Accounting to the Beneficiaries"). Obviously, the outgoing Trustee will need to *transfer all documents and files* of the Trust to the new Trustee; it is advisable to obtain a written *receipt* from the incoming Successor Trustee. In some cases, if the Trust document does not already provide that each Trustee will only be liable for certain acts or omissions which occurred while he or she was serving as Trustee, it may be advisable to have this receipt accompanied by a *"cross-indemnification"* document prepared by an attorney.

Once the new Trustee takes over, it may also be necessary to obtain a *new tax identification number* for the Trust (See the Chapter, "Income Taxes") and to *transfer asset titles* into the name of the new Trustee (See the Chapter, "Maintaining Title to Assets, Transacting Business and Paying Expenses").

What happens if the outgoing Trustee left because of resignation or disability and later wishes to again act as Trustee or is no longer incapacitated? First, the Trust document must be reviewed to see what it provides regarding this matter. If the resigning Trustee was not required by the Trust document to "irrevocably" resign, or the resignation document did not include this language, it may be possible for that prior Trustee to resume the Trusteeship. If the prior Trustee was a Grantor, there may be a "come-back-in" provision stating that, once the Grantor obtains doctor letters stating he or she again *has* the capacity to act as Trustee, he or she can step back in immediately (removing the Successor Trustee by the same doctor letter process described previously). The Trust document may also provide for a third-party, such as a "panel" or a "Trust Protector", to declare that the Grantor is once again able to act and reinstate him or her as the Trustee, removing the Successor. If the Grantor can otherwise prove his or her capacity, it may also be possible for the Grantor to amend the Trust, again placing himself or herself as acting Trustee. In the event that you are the acting Successor Trustee and the Grantor now is of the opinion that he or she is capable of handling his or her own affairs, but you and/or the Grantor's doctors believe that the Grantor lacks the capacity to do so, it may be necessary for either you or the Grantor or a beneficiary of the Trust to file a petition in the Probate Court to have a judge determine the issue of the Grantor's capacity to again act as Trustee. Whenever there are substantial concerns about the current Trustee continuing to act or the previous Trustee trying to again act, the Probate Court judge's order is the ultimate solution.

Note that a Successor Trustee named in the Trust document is <u>not</u> required to take on the position of the Trustee, and if he or she does not wish to do so may simply *decline* to act. This should be done in a notarized writing and delivered to the next named Successor Trustee, so he or she may then proceed with the steps outlined above (the same applies to a Trustee resignation after a Trustee has already begun to act). The decision to decline to act (or resign) should be considered fully, as the declining (or resigning) person may not be able to later step back in and serve as Trustee should he or she change his or her mind or circumstances change.

CHAPTER 20
TERMINATION OF THE TRUST

The time at which the Trust, or a share of the Trust held for a specific beneficiary, is terminated and how this termination takes place are *dependent on the terms of the Trust document.* For example, it may provide that, at a certain age, a beneficiary receives a portion of his or her share "outright", meaning that the titles to assets are transferred into his or her name or cash assets are directly given to him or her. Alternatively, the Trust may provide that the timing of final distribution and termination of the Trust is up to the discretion of the Trustee. Also, the Trust may alternatively provide that distributions are made into a new trust (or "sub-trust") for the beneficiary, rather than directly to the beneficiary. Finally, the Trust terms may not indicate to whom, when and how final distributions of the Trust are to occur, but rather give a third-party (such as the current or previous beneficiary) a "Power of Appointment" to determine these, which must be exercised through an outside legal document. The Trustee may need to find out if any such document exists and then follow the terms of that exercise of that "Power of Appointment". (See the Chapter, "Making Distributions to the Beneficiaries").

Prior to the final distributions to the beneficiaries and the termination of the Trust, you as Trustee should withhold a reasonable amount as a *"reserve"* for the payment of the following: creditor claims that may yet be filed if the statute of limitations has not yet ended; and potentially outstanding real property, income, estate or inheritance taxes. If the Grantor was not in business, and at least a year has lapsed since the Grantor's death, it is likely that no further creditors will present claims and therefore there may be no need for a reserve for creditor purposes (or for only a very small reserve). With respect to potential taxes, you should consider having your accountant file a request for *"tax releases"* wherever possible to do so, so that the taxing authorities will release you, at an early date, from the personal liability for the real property, income, estate and inheritance taxes. Early tax releases may avoid the need to maintain a large reserve; however, the request for tax clearance may sometimes spark the audit of a return that may have otherwise been accepted without audit. In the case of a federal estate tax return (Form 706), since almost all these returns involving the payment of tax are audited, *a "prompt audit" may be requested,* in which case the IRS must audit the return or provide you with a final closing letter within 18 months. It is usually best to maintain a reserve projected by the attorney and/or accountant who prepared the Form 706, until such time as you receive a final closing letter. Other potential tax exposure should also be estimated in order to determine the amount of the reserve. If the reserve is relatively small (less than about $10,000), it should be placed in a non-interest-bearing account so that additional income tax returns will not be required to be filed following distribution of the bulk of the estate. If the reserve is larger, it may need to be placed in an *interest-bearing account* and final income tax returns for the Trust will need to be filed after the reserve is distributed.

If the Grantor received any benefits under "Medicaid", you should notify the Colorado Department of Health Care Policy and Financing and Health First Colorado, in writing, of the Grantor's death, as the Department may file a claim for reimbursement of some or all of the

benefits and you will want to be sure there is no such outstanding claim prior to establishing and distributing the reserve. (If a claim is made by the Department for reimbursement, you should probably consult an attorney skilled in this area to determine the validity of the claim).

Certain legal documentation should accompany the final termination of a Trust (and release of any reserve). You, as Trustee, should obtain written *receipts from the beneficiaries* (or if the assets go to a Trust, from the Trustee). Depending upon any limitations by state law, these receipts should include an acknowledgement that each person has received any and all distributions due to him or her and releases the Trustee from any further liability. In these receipts (or a "Final Settlement Agreement"), the beneficiaries should promise to pay any legitimate Trust expenses that may surface after their distributions; if for any reason you do not believe a beneficiary will fulfill this promise when called upon, you may want to still maintain some Trust funds in reserve for a reasonable period of time. You should consult with an attorney about this, as well as about the transfer of assets other than cash. The actual transfer of assets may require *title transfer documents,* such as assignments and deeds, which you should have an attorney prepare.

If, during the process of terminating the Trust, you as Trustee become aware of or foresee any difficulties with the beneficiaries, any creditors or other third-parties, you may wish to consult with an attorney and determine whether it may be appropriate to file a *petition with the Probate Court* for approval of the final distribution and termination of the Trust.

Finally, when a Trust is terminated, do not forget that *"final" income tax returns* may be required for the Trust. Since the liability for taxes in the year of termination of the Trust flows to the beneficiaries who receive distributions, you do not need to continue to hold a reserve until these final returns are filed and any audit period passes.

CHAPTER 21
YOUR (AND THE BENEFICIARIES') OWN ESTATE PLAN

Acting as Trustee without having an estate plan of your own is like being a cobbler without shoes. Obviously, you should have your own estate plan to protect you and your loved ones in the event of your own disability or death.

The only area of estate planning that may be *required* of you in order to properly serve as Trustee may be executing a **HIPAA Authorization.** This permits access to your personal health and medical information, in the event that you have difficulty serving as Trustee, so that the next Trustee may take the necessary actions to replace you. Even if this HIPAA Authorization is not an actual requirement in the Trust document, it may still be *advisable* provided that the Successor Trustee's access to your health and medical information is limited for the purposes of determining your legal capacity to act as Trustee. (See the Chapter, "Transition to Another Trustee").

As for the rest of your estate plan, it's a prudent idea to get one established and in proper order, regardless of whether it is required in order for you to serve as Trustee. Most likely, you should have a ***basic estate plan*** consisting of a Living Trust, Pour Over Will, Durable Power of Attorney for Property, Property Agreement (if married) and health documents ("Advance Healthcare Directive" or "Durable Power of Attorney for Healthcare" and "Living Will"). Depending on the size of your own estate (keeping in mind any amounts that you may stand to inherit under the Grantor's Living Trust), the type of your assets and needs of your beneficiaries, ***additional "advanced" estate planning*** may be warranted, such as an Standalone Retirement Trust, Irrevocable Life Insurance Trust, Gifting Trust, Personal Residence Trust, Charitable Remainder Trust, and Family Limited Partnership, to name a few.

Remember, even if you have done some or all of this estate planning for yourself, be sure to periodically *review* it! Your estate plan may no longer accurately reflect your wishes and intentions, because it can become outdated as a result of law changes, changes in the needs and situations of your beneficiaries (or changes in your relationships with them), and new planning strategies. Whether you have an estate plan already, or you would like to set one up, contact THE RAINS LAW FIRM, LLC for a *free initial consultation*, if you qualify. Each Trust beneficiary should probably go through the same process of establishing (or reviewing and revising) their estate plans.

With respect to the beneficiaries (and you may also be a beneficiary as well as Trustee), there are two *immediate* estate planning actions that need to be taken that do relate to the administration of the Grantor's Living Trust. First, there may be certain disclaimer planning that the beneficiaries must consider and complete in writing no later than nine (9) months of the Grantor's death; this is especially true with respect to the Grantor's surviving spouse, if any. Second, the surviving spouse and other potential beneficiaries may have been granted certain "Powers of Appointment" under the Grantor's Trust which allow them to direct the future inheritance of Trust property. It may be advisable for a non-spouse beneficiary to exercise his or her power of appointment over the Grantor's Living Trust at the same time that they establish their own Trust plan (or revise the one they have). Even if

beneficiaries do not have Powers of Appointment, they should not wait until after they receive their inheritance from the Trust in order to set up their own estate plan; in fact, a beneficiary may set up his or her own Living Trust and execute an "anticipatory assignment" of the expected inheritance into his or her new Trust, in the event he or she should become incapacitated or die before that takes place, so that the inheritance will be properly managed and distributed in accordance with the beneficiary's desires.

Often times, the attorney assisting you with the administration of the Grantor's Living Trust may also assist you and/or the beneficiaries in setting up or revising your estate plans. Sometimes, this may present a potential conflict and the attorney may advise you and/or the beneficiaries to obtain your own independent legal counsel with respect to your estate planning. If you and/or the beneficiaries do your estate planning with the attorney assisting in the administration of the Grantor's Living Trust, you will probably need to enter a separate engagement agreement to do so and the legal fees involved are generally not payable from the assets of the Grantor's Living Trust.

CHAPTER 22
IMPORTANT ADDRESSES AND PHONE NUMBERS

It's a good idea to keep in one place, that is convenient and immediately accessible, the key contact information for the beneficiaries, your key Trust administration professionals and advisors, and your next Successor Trustee. We have enclosed the following pages as a simple format for you to use. You may wish to not only write the information in this Manual, but also record it somewhere on a computer so that it may be easily accessed by you (and updated when necessary) if you are not at home or do not have this Manual with you when you need any of this information. Also keep in mind that collecting and keeping this information up to date may not only be important for you, but may be required by your attorney, CPA and other advisors when they are assisting you.

