

HIGHLIGHTS OF THE PROPOSED COLORADO UNIFORM TRUST CODE (CUTC)

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Southeast Denver Estate Planning Council

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The Colorado Uniform Trust Code

Background. Starting in late 2013, a subcommittee of the Trust & Estate Section began working to bring the Uniform Trust Code to Colorado. This is a consensus product our subcommittee developed through a long process, incorporating much work that had been done by a prior Colorado T&E subcommittee who studied the UTC from 2001-2005.

The majority of the CUTC is *uniform law*. Our subcommittee's charge in late 2013 was to attempt to *preserve uniformity* wherever possible. Where the CUTC subcommittee made changes to uniform law, it was generally to avoid changes or disruptions to existing Colorado law, or to maintain consistency with existing Colorado statutes such as the Colorado Probate Code, Uniform Prudent Investor Act, etc. When we deviated from uniform law, those changes were discussed at length.

Finished parts of the CUTC are available to CBA members on the T&E Section webpage, here:

<http://www.cobar.org/For-Members/CBA-Sections/Trust-and-Estate/Uniform-Trust-Code>

Text added by our subcommittee, or the prior T&E subcommittee, is underlined. Deleted text is marked with ~~strikeouts~~. Text that is neither underlined nor struck though is uniform law. If you have questions about the rationale or policy decisions for pieces of this code that are uniform law, I would recommend you visit the NCCUSL website and review the uniform law commissioner's comments. They are very instructive in reviewing specific code sections. Here is a link to the Uniform Trust Code, with comments:

http://www.uniformlaws.org/shared/docs/trust_code/UTC_Final_2017jan25.pdf

Where Will the CUTC Be Housed?

The CUTC is not going to be part of the Probate Code. It is going to be a new, stand-alone Trust Code located in Article 5 of Title 15. Even so, there will be overlap, and the CUTC drafting subcommittee will be working on tweaks to harmonize the trust code with the probate code this fall. One example: what many litigators know as the Judicial Tool Box (15-10-501 et seq.) and the Compensation and Cost Recovery Act (15-10-601 et seq.) are being expressly incorporated into the CUTC to provide uniformity and consistency with the manner in which probate fiduciaries are dealt with by our courts when problems arise, and how they and their attorneys and related persons/agents are compensated for services rendered.

Other existing sections of the Probate Code (mostly those dealing with trusts) also will be brought over in whole cloth (e.g., 15-11-901, et seq. dealing with honorary trusts and trusts for pets, and 15-16-701 et seq. concerning revocable trusts, which is derived from Uniform Trust Code Part 6). In keeping with this approach, Article 16 of the Probate Code (15-16-101, et seq., which currently governs trusts) will be repealed, replaced by the CUTC.

Timing. The draft Colorado Uniform Trust Code has been available for review by the Trust and Estate Section membership as a whole for several months. A vote is scheduled for the Trust & Estate Section's statutory revisions subcommittee at the August 17, 2017 meeting. If approved, T&E Council will then send the draft bill to LPC for approval. A draft has already been sent to the Real Estate and Business Law Sections of the Colorado Bar, as well as the Colorado Bankers Association. The draft CUTC will be circulated to other stakeholders for review during the fall of 2017. Representatives from our subcommittee plan to meet with Colorado's Uniform Law Commissionersto review the draft bill in September, and then introduce it in the legislature in January of 2018.

Structure. The materials that follow are highlights of the proposed code, presented sequentially (in order numerically, and with direct reference to the proposed statutory section numbers where they will be located in the CUTC).

LET'S BEGIN:

PART 1 – General Provisions and Definitions

15-5-103 (9). This section introduces a new definition of “interested person” that is intentionally narrower than that found in the Probate Code (15-10-201 [27]). The focus is to include only those persons with a reasonably material interest in the trust issue at hand. One of our goals was to try to limit judicial proceedings to only those with a sizeable dog in the fight, and thus dispense with interlopers and those having only remote and tangential interests in a given matter. In other words,

tighten the universe of participants in proceedings in an attempt to restrain costs and minimize the scope and duration of the proceedings.

15-5-103 (20). The UTC proposed a definition of the “terms of a trust” that would include the obvious - manifestations of the settlor’s intent expressed in the trust instrument – but it also proposed to include manifestations “... as may be established by other evidence that would be admissible in a judicial proceeding...” without requiring a proceeding or other mechanism to disclose the other evidence or test whether the other evidence would in fact be admissible. It was also silent on who would determine what evidence “would be admissible” in a proceeding when a proceeding isn’t held, and what would happen if someone objected to 1) whether that other evidence would have been admissible, or 2) to the interpretation given to that evidence to begin with (assuming it would be admissible).

Sensing uncertainty, the prospects for confusion and the possibility of unintended exposure, the Colorado UTC Committee modified the definition of “terms of a trust” to, of course, recognize the express terms in a trust instrument, but also such terms as would be established by a court order or by a non-judicial settlement agreement among the parties (discussion below) or by ADR compelled by the express terms of the trust (new and also discussed below).

Note: There are some recent enactments of trust legislation which have borrowed some or all of UTC’s unmodified “terms of trust” definition that will have to be harmonized with CUTC’s definition.

15-5-105. The Uniform Trust Code is primarily a default statute, meaning that most of the Code’s provisions can be overridden in the terms of the trust. There are a few provisions which are *mandatory*, and cannot be overridden, in Section 105(b). Examples:

(1) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(2) the duty to provide notice of the existence of an irrevocable trust, the trustee’s identity, and the right to request reports to current distributees or permissible distributees of any age; or to other qualified beneficiaries once they reach age 25 (note the CUTC’s definition of “qualified beneficiary” is the same as the existing definition of this term in the Colorado Uniform Principal and Income Act, 15-1-402(10.5) – see CUTC Section 813);

(3) the duty to respond to a request for information from a qualified beneficiary;

(4) the power of a court to take action “consistent with the terms of the trust and settlor’s intent in the interests of justice”;

(5) the court’s subject matter jurisdiction and venue, except to the extent the trust provides for ADR.

15-5-108. Details a process to be used for transferring the principal place of administration of a trust, with provisions for notice of, and the effect of objections on, a proposed transfer.

15-5-109. Notice and the sending of documents in non-judicial proceedings. Requires efforts be undertaken to give notice and provide documents that are “reasonably suitable under the circumstances and likely to result in receipt”. Mailing by first class mail and delivery to the last-known residence or place of business are retained as acceptable forms of notice as is personal service. A “properly directed electronic message” is now authorized.

If such efforts are made, then a trustee need not give notice or provide a document to a person whose identity or location is unknown and not reasonably ascertainable but the trustee “shall” maintain documentation of its efforts.

15-5-111. A slightly broader treatment of non-judicial settlement agreements than the UTC proposed, accomplished by expanding the universe of parties allowed to participate and be bound by them. Nonjudicial settlement agreements cannot violate a material purpose of the trust, and must include terms that could be approved by a court. This provision will also allow persons whose interests may be affected by the agreement (even if not a party to it) to ask the court to approve or disapprove of it.

15-5-112. Allows the settlor to set forth the trust’s own rules of construction which will govern if contrary to the rules set forth in the Probate Code.

15-5-113. New ADR provision. Provides that except on a ground that exists at law or equity for the revocation or invalidation of a contract, settlors will be able to designate a method of binding ADR in the trust instrument which is valid, enforceable and binding on beneficiaries and their assigns. The method/trust provisions may include rules of notice and procedure. It will allow courts to enter orders of ADR that do not eliminate or negate the method set forth in a trust except on the aforesaid grounds relating to revoking/invalidating a contract.

This approach was taken from Colorado Revised Statutes § 13-22-206, which in the context of agreements to arbitrate states that: “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.”

PART 2 – JUDICIAL PROCEEDINGS

15-5-204. The settlor can now establish venue in the terms of the trust. If not, there is a stated priority of locations for venue in trust proceedings.

15-5-205. Trust Registration will no longer be mandatory. It will be permissive unless requested by a beneficiary. If registered, the court of registration will have a high priority as to venue.

15-5-210. This section deals with Judicially Approved Settlements. This is not uniform (i.e., not part of the UTC) but was the product of the prior Colorado UTC subcommittee’s work in 2001-2005. The CUTC subcommittee is still tweaking this section.

PART 3 - REPRESENTATION

15-5-301 to 305 deal extensively with matters of “representation,” who may represent whom (including virtual representation), and the scope of a representative’s authority and duty. 305(b) and (c) were not deleted, but rather moved, to new 301.5.

PART 4 – CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST

15-5-408 through 409.5 – Pet and Honorary Trusts. These sections are already Colorado law, C.R.S. 15-11-901, and will be moved into Part 4 of the CUTC.

15-5-410 and 411. These sections deal with modification and termination of trusts. 411(a) details the procedure for court approval when the settlor and all beneficiaries consent to a modification or termination. 411(b) provides for modification or termination of an irrevocable trust if all of the beneficiaries consent and the court concludes that either 1) continuance of the trust is not necessary to achieve any material purpose of the trust; or 2) is no inconsistent with a material purpose of the trust. 411(c) provides that spendthrift provisions will not be presumed to be a material purpose of a trust, in the absence of other evidence.

15-5-414. Establishes that uneconomical trusts having a value of less than \$100,000 may be modified or terminated if the value of the trust property is insufficient to justify the cost of administration.

15-5-415 and 416. These sections are already Colorado law, and will be moved from 15-11-806 and 807 into Part 4 of the CUTC.

PART 5 – RESERVED. This Part deals with Creditor’s Claims, and has been reserved for future study.

PART 6 – REVOCABLE TRUSTS. Colorado has already adopted Part 6 of the UTC, which is housed at 15-16-701 to 704. These sections will be moved into Part 6 of the CUTC and renumbered to 15-5-601 *et seq.*

PART 7 – OFFICE OF TRUSTEE

15-5-701 (a) (2). Provides a default statutory guideline for the acceptance or declination to act as trustee. As proposed, a provision in a trust setting forth a method to accept or decline a trusteeship

will not be deemed the exclusive method to accept or decline unless the trust clearly states that it is the exclusive method.

15-5-703(g). Among other things, describes and clarifies what responsibilities and options a co-trustee has to remedy/address a fellow trustee's breach of duty.

15-5-706. Addresses removal of the trustee. Express grounds include: "a serious breach," lack of cooperation among co-trustees which impairs administration, unwillingness or persistent failure to administer effectively, "substantial change of circumstances" or removal requested by all qualified beneficiaries and is not inconsistent with a material purpose.

PART 8 – DUTIES AND POWERS OF TRUSTEE

15-5-801 et seq. deal extensively with the Duties and Powers of Trustees. It does a nice job of consolidating in one place Colorado's existing statutes and case law relating to duties and powers of trustees. There is not a lot that is new there, but having clearer statutory duties and powers applicable to trustees will hopefully provide greater certainty.

15-5-808. This section is reserved. Colorado already has an existing Directed Trustee Act, which will be incorporated into the CUTC at a later date.

PART 9 – This is the Uniform Prudent Investor Act, which is already Colorado law, found at 15-1.1-101, et seq. The CUTC makes no changes to this Act. It will remain at 15-1.1-101.

PART 10 – LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

15-5-1005. Addresses limitations on breach of trust actions against trustees brought by beneficiaries. Changes the scope and mechanism in the current statute (15-16-306 and 307) and a similar statute (15-12-1005) in the Probate Code. Provides beneficiaries with one year from the date that a "*report*" (defined in 15-5-813[c] to be broader than a final account and arguably includes inventories, interim accountings, valuations, if feasible, etc.) is "*sent*" (not "*received*" as current statutes provide) to a beneficiary, for that beneficiary to commence a breach of trust action against a trustee.

If that factual context does not apply, e.g. the breach is not disclosed in or discoverable from a report, then our current 3 year statute of limitations period applies (rather than the 5 years proposed in the original UTC). That three year period is triggered by (accrues from) the removal or resignation of a trustee, or the termination of the beneficiary's interest in the trust or the termination of the trust. The UTC Committee rejected the UTC's intent to have it also triggered by the death of a trustee since such actions are already covered by the decedent claim sections of the Probate Code, which impose shorter

durations for the bringing of claims against the estates of decedents. Note this section does not preclude actions for fraud and misrepresentation related to the report.

Part 11 – MISCELLANEOUS PROVISIONS

15-5-1104. Effective date. While the actual date has not been decided upon yet, it is currently anticipated that the CUTC will apply to trusts created “before, on, or after” January 1, 2019 or 20, and likely the latter, if the T&E Section decides to provide a one year get educated period for our practitioners and the rest of the bar as it has before when seeking to enact large scale additions to our probate jurisprudence.

It will also apply to judicial proceedings involving trusts that are commenced after the January 1 of the year specified, and proceedings commenced before then unless the court decides that it would interfere with the effective conduct of those proceedings or prejudice the rights of the parties.

Rules of construction or presumptions provided in the new trust code will apply to trusts executed before the effective date unless a clear indication of a contrary intent is expressed in the terms of the trust.

*A big thank you to Marc Darling for allowing me to utilize his materials in this outline.