

**Colorado Bar Association Trusts & Estates Section
Uniform Fiduciary Income & Principal Act Subcommittee
of the Statutory Revisions Committee**

Minutes of November 15, 2018

Participants

In person:	By phone:
• Susan Boothby	Jonathan Haskell
• Darla Daniel	Joe Hodges
• Connie Eyster	
• Russ Gamble	
• Peggy Gardner	
• Walter Kelly	
• Stan Kent	
• Georgine Kryda, Temporary Chair for 11/15/18	
• Michelle Mieras	
• Elizabeth Pierce-Durance	
• Herb Tucker	
• Lisa Willcox	
• Molly Zwerdinger	

Initial Assignments

UFIPA Article	Lead Reviewer(s)
1 General Provisions	Stan K.
2 Fiduciary Duties and Judicial Review	Herb T. & Darla D.
3 Unitrust	Susan B.
4 Allocation of Receipts During Administration	Russ G. & Peggy G. & Walt. K.
5 Allocation of Disbursement During Administration	Jonathan H.
6 Death of Decedent	Georgine K. & Steve B.
7 Apportionment at Beginning and End of Income Interest	Klaralee C.
8 Miscellaneous Provisions	Unassigned

The meeting was called to order at 10:35 a.m. by the Temporary Chair and adjourned at 11:40 a.m.

Minutes of 10/18/18 were approved.

Section 202 (continued from end of 10/18/18 meeting): Fiduciary Duties and Judicial Review - Darla

- Reading of the UFIPA final text.
- Darla’s handout brought in parts of current Colorado (CO) Uniform Principal and Income Act (UPIA), which appear to be consolidated by UFIPA in this Section 202.
- Unlike 201 which is 15-1-403, there is no counterpart of “fiduciary decision” in the current UPIA for 202.

- Darla: How does the committee feel about specifying the level of review court can have?
 - The discussion of Colorado Uniform Trust Code (CUTC) 15-5-814, for example, cited *Jones* and other cases to address what constitutes abuse of discretion.
 - Stan: 202 is a narrower concept because it is cabined to income and principal, and thus may not be objectionable to those who believe courts should not have oversight over trusts.
 - Herb: The judicial toolbox contains an ability to surcharge for abuse of discretion. Should we consider making a similar reference here? Susan voiced support for Herb’s suggestion.
 - Discussion: Breach of fiduciary duty and surcharge are in the toolbox, which is why we looked at 814 for “abuse of discretion.”
 - 202(c) seems to be following toolbox for breach of duty.
 - Is abuse of discretion a breach of fiduciary duty?
 - Consensus: Yes.
 - Darla: Look at 814(1)(a)&(b) and 15-5-1001 at back of Darla’s handout (p. 5):
 - Herb: likes definition of “abuse of discretion”
 - Para (d) at end of 202 = optional (bracketed)
 - Courts have usually kicked back requests for instruction due to the lack of controversy.
 - Thus, Darla favors omitting (d).
 - Herb: If a personal representative (PR) can petition for instruction, why not a trustee?
 - What if have uncooperative beneficiaries?
 - Also, doesn’t the ability to petition help to insulate the attorney with respect to fees because, for example, the attorney can identify having spent \$5,000 on this specific petition for instruction.
 - Susan: Allows petition
 - Darla: Has not looked at 202(d).
 - Stan: No one has; CO may be first state to include it.
 - Susan: Motion to follow up Herb’s suggestion to reference toolbox in (c)
 - Darla to follow up and report back in December, and notes:
 - 15-5-1001: similar to CUTC (Marc Darling’s work)
 - Fits with 203
 - Move to approve 202 subject to Darla’s inclusion of reference to C.R.S. § 15-10-501. Passes unanimously.

Section 203: Fiduciary’s Power of Adjust – Herb

Herb’s presentation of Section 203 references his three handouts:

1. UFIPA Section 203 in Santa Fe style
2. Summary of Section 203 Fiduciary’s Power to Adjust
3. Summary of Comments to Section 203 Fiduciary’s Power to Adjust

203(a),(b),&(c)

Summary of Section 203 Fiduciary's Power to Adjust

- Unsure why reference to “or estate.” Consensus: Save for discussion
 - a. May have estate that will be funding a trust.
 - b. Susan: Marital share is entitled to income.

Summary of Comments to Section 203 Fiduciary's Power to Adjust

- Comments of 203 in 2018 suggest 203 is update of 104 from 1997 act.
Herb: Three conditions must be met before adjust
 1. Fiduciary must be managing assets under prudent investor rule;
 2. Trust must address beneficiary's right to receive income; and
 3. Fiduciary must be unable to comply with duty to administer the trust impartially without the adjustment.See also Attorney Berry's comments (Section III of the handout).

203(d)

UFIPA in Santa Fe Style

- There is a reference to factors cited in 201(e). Note the use of “shall” vs. “must.”
 - Legislative drafting will deal with this issue
 - Stan: “shall” is a mandatory duty; “must” is a pre-condition; see new CO statute.
 - Condition precedent: See Summary of Section 203 for factors a fiduciary shall consider.
 - Herb: Skip the reference to allocation rules for now.
 - Herb: Slight modification from current act, but no major differences

203(e)

- 203(e) imposes limitations on a trustee's power to adjust because existence or exercise of power may create unwelcome federal tax results.
 - See 203(e)(1)-(9) and Summary of Comments, VI.
- New 203(e)(7) under 2018 UFIPA, where fiduciary is an independent person under definitions, is to allow QSST qualification and for GST issues. Discussion of why “independence” is required for a trustee.
 - Herb: Must the trustee be independent so there is no self-dealing? How does one tie independence to QSST and GST?
 - Connie: Diverting what should have gone to single beneficiary to a group?
 - Susan: If QSST, beneficiary makes the election and the trust sets out who is the income beneficiary if the trust owns S-corp stock. How is the QSST election an adjustment to the trust?
 - Stan: 203(e)(7) could simply be a typo; perhaps should have been (1)?
 - Which of 203(e)(#s) apply to a QSST problem?
 - Susan: Whether a trustee is interested or not, a trustee still cannot make adjustment without compromising QSST election.
- New 203(e)(8) addresses eligibility for public benefits.

203(f)

- Herb: The appointment of a co-fiduciary follows up on the notion that a fiduciary must be independent, and if the present fiduciary is not independent, one can be found.
 - Walt: How often exercise this power?
 - Darla: Depends upon trust instrument.
 - This is more broadly applicable than current statute.
 - Connie: This issue arose when capital gains rates increased.
 - Russ: DNI is to include capital gains.
 - Stan: If silent, capital gains are principal.

203(g): Release of Power or Delegation to co-fiduciary of all/part of the power to adjust if risk of tax burden

- Current statute is fairly similar to (g)

203(h): Release must be in a record.

- Comments provide potential limitations for duration of release of a power.

203(i): Express denial or limitation of the power to adjust required by the terms of the trust.

- Re-read 203(a): Confusing because (a) also refers to “terms of the trust.”
- Stan: Remember that this is the default rule.
- Question: Does the trust have to reference the statute?
- Stan & Peggy: Do not have to reference a specific code section; need to reference whether explicitly deny/allow powers to adjust.
- Discussion regarding confusing nature of sentence and possibly need to reference the code explicitly, perhaps like anti-lapse where testator effectively says, “I really mean it”?
- Stan: A sentence such as “I expressly deny the power to adjust under this instrument” satisfies this rule; but, provisions implying this power do not get us out of this default rule.

Administrative

Susan will not be here in December and will not be available to present on 301 Unitrusts.

For December Meeting:

- Darla to presents her additional language for 202.
- Herb to conclude his presentation of 203.
- Walt, Peggy, and Russ to begin presentation of Article 4.

The next meeting will be on December 20, 2018 at 10:30 a.m. in the Capitol Room.