

Memorandum

To: Dennis Whitmer
From: Kevin D. Millard
Date: January 18, 2017
Re: Uniform Trust Code

Thanks to you and your committee for all of the time and hard work that you have put into preparing the Uniform Trust Code for introduction in the Colorado legislature. I understand that, in the near future, the proposed Colorado UTC will be presented to the Statutory Revisions Committee. I am in the process of reviewing the UTC provisions posted on the T&E section website and am writing this memo to provide my input on Part One of the UTC. I will cover the other parts in subsequent memos. My intent is to alert you to comments (many of which are nonsubstantive) and questions before the discussion at an SRC meeting or meetings.

1. Section 15-5-103—Definitions

1.1 Section 15-5-103(2), definition of “Alternative Dispute Resolution”:

- (A) There is an extraneous semi-colon between “Alternative Dispute Resolution” and “means.”
- (B) Should the reference to “governing instrument” be to “governing instrument for a trust”? As you know, “governing instrument” is defined much more broadly for purposes of the probate code, in CRS § 15-10-201(22). I know that the UTC will be a separate, new article under title 15, and not part of the probate code, so this is not technically a conflict, but it might avoid confusion to be more specific in the UTC definition. On the other hand, if we are going to enact a statute that allows for mandatory ADR provisions, should it be limited to trusts or should it also apply to wills? The latter would argue for putting this definition, and the operative provision now in § 15-5-113, somewhere else in the statutes.

1.2 Section 15-5-103(2), definition of “Ascertainable Standard.” I assume that the reference to the Internal Revenue Code as in effect on January 1, 2015 will be changed to a later date.

1.3 Section 15-5-103(15), definition of “Qualified Beneficiary.”

- (A) This term is already defined in the Principal and Income Act, CRS § 15-1-402(10.5), the Directed Trustees Act, CRS § 15-16-801(6) (by cross-

reference to the definition in § 15-1-402(10.5), and the Decanting Act, CRS § 15-16-902(2), and is used in CRS § 15-16-601(2)(a)(I) (relating to an insurable interest held by a trustee) (again by cross-referencing the definition in § 15-1-402(10.5)). Will here be conforming amendments? I am not questioning the definition as you have it in the UTC provision; I just worry that having the same term defined, slightly differently, in so many different places may lead to confusion.

(B) In the second line of § 15-5-103(15)(B), I think that “THE DISTRIBUTEEES IN SUBPARAGRAPH (A)” should read “THE DISTRIBUTEEES DESCRIBED IN SUBPARAGRAPH (A).”

(C) In § 15-5-103(15)(B), the reference to “THIS SUBPARAGRAPH (13)” needs to be updated. It is now subparagraph (15).

1.4 Section 15-5-103(17), definition of “Settlor.” What is the reason for the addition of the words “has the power of withdrawal over” near the end of this section? If we are going to treat the holder of a withdrawal power as a settlor of the trust for all purposes, does that mean we look to the intent of the powerholder (e.g., the holder of a Crummey power in an insurance trust) in interpreting the trust? And if the powerholder’s intent conflicts with the intent of the “true” settlor, which controls?

1.5 Section 15-5-103(18), definition of “spendthrift provision.” My understanding is that part 5 of the UTC will not be included in the UTC to be proposed in Colorado. If that’s correct, is this definition necessary? (The answer to this question may become obvious to me as I read the other provisions of the proposed Colorado UTC.)

1.6 Section 15-5-103(20), definition of “terms of a trust.” What is the reason for striking “by other evidence that would be admissible”? The UTC concept of the terms of a trust is already the law in Colorado in other contexts, specifically the Principal and Income Act, CRS § 15-1-402(12), the Powers of Appointment Act, CRS § 15-2.5-102(19) (defining “terms of the instrument”), and the Decanting Act, CRS § 15-16-902(28).

2. Section 15-5-105, Default and mandatory rules.

2.1 In the second line of subsection (a), there is a comma missing between “DUTIES” and “RIGHTS.”

2.2 In § 15-5-105(b)(13), should “consistent with settlor’s intent” be “not inconsistent with settlor’s intent”? My thought is that there might be something about which we

don't really know, explicitly, what the settlor's intent was, but where a court should be able to take action so long as the action does not conflict with what we do know about the settlor's intent.

3. Section 15-5-106, Common law of trusts—principles of equity. It seems to me that other statutory law (for example, the principal and income tax, the decanting act, etc.), not just common law, should supplement the trust code.
4. Section 15-5-108, Principal place of administration. Paragraph (a)(3) doesn't work grammatically as a part of subsection (a). Perhaps it should be a separate subsection?
5. Section 15-5-109, Methods and waiver of notice in matters other than judicial proceedings. In the last line of subsection (a), I think the word "of" is missing between "location" and "such a person."
6. Section 15-5-112, Rules of construction. In the penultimate line, there is an extraneous hyphen between "the" and "interpretation."
7. Section 15-5-113, Alternative Dispute Resolution. Would a mandatory arbitration provision apply if the issue is the validity of the trust itself? Is that somehow covered by the "except on a ground that exists at law or in equity for the revocation of a contract" language? I don't object to authorizing mandatory ADR provisions, other than on the issue of the validity of the trust, but I don't think this section is clear.