

Memorandum

To: Dennis Whitmer

From: Kevin D. Millard

Date: January 21, 2017

Re: Uniform Trust Code Articles 2 and 3

This is the next installment of my comments and questions about the proposed Colorado Uniform Trust Code. This memo addresses Articles 2 and 3 of the UTC.

1. Article 2, Judicial Proceedings.

1.1 15-5-203, Subject matter jurisdiction, and 15-5-204, Venue. I will generally defer to the litigators on these sections, but I will say that it is not apparent to me why we need this level of complexity as compared to the UTC language. I do have a couple of specific questions and comments:

(A) Section 15-5-203 refers to the “District Court.” For purposes of the probate code, CRS § 15-10-201(10) says, “‘Court’ means the court or division thereof having jurisdiction in matters relating to the affairs of decedents and protected persons. This court is the district court, except in the city and county of Denver where it is the probate court.” Should there be a similar provision in the trust code?

(B) Why is section 15-5-203(a) limited to proceedings brought by a trustee or a *qualified* beneficiary, rather than any beneficiary? For example, suppose that the trustee and qualified beneficiaries are about to enter into a nonjudicial settlement agreement about some matter, with a qualified beneficiary purporting to represent his or her children, who are non-qualified beneficiaries, and one of those children thinks that the representation involves a conflict of interest or is otherwise inadequate. Shouldn’t the court have jurisdiction over a proceeding brought by that non-qualified beneficiary?

1.2 Sections 15-5-205–15-5-209, Trust registration.

(A) I have no objection to retaining a trust registration system, but I am not sure it makes sense to retain trust registration but make it optional. If registration is optional, I predict that the vast majority of trusts will not be registered, which will lead to a loss of revenue for the courts and might result in a fiscal note for the UTC. I would predict a similar

result if trust registration were eliminated.

- (B) In § 15-5-206(c), what was the thinking behind expanding the class of persons who must receive notice of the registration of a trust?
- (C) In § 15-5-206(d), the statement that interested persons “have the responsibility to protect their own rights and interests in the trust estate in a manner provided by the provisions of 15-5-109” does not make sense. Section 15-5-109 deals with methods of giving notice in nonjudicial proceedings. And the reference at the end of that sentence to “interested persons as identified in section 15-5-201” also does not make sense because § 15-5-201 deals not with identifying interested persons but with the court’s role in the administration of a trust. Why not just end the sentence after “protect their own rights and interests in the trust estate”?
- (D) If trust registration is going to be optional, I think it needs to be clarified whose option it is. Section 15-5-205 seems to give the option to the trustee, but section 15-5-207 then requires the trustee to register the trust if the settlor or a qualified beneficiary makes a demand. Then, § 15-5-209 allows the trustee to withdraw the registration of a trust. Read literally, it looks like the trustee could elect not to register the trust, then be required to register the trust because the settlor or a beneficiary makes a demand, then withdraw the registration, then receive another demand for registration, etc.
- (E) Section 15-5-209 refers to “interested persons as defined in this part 2” and “those interested persons identified in section 15-5-201.” The term “interested person is defined in § 15-5-103(9), not in part two, and I don’t see where § 15-5-201 identifies any subclass of interested persons.

2. Article 3, Representation.

2.1 Section 15-5-301(c) include a cross-reference to § 15-5-602. The UTC subcommittee web page does not include a proposed version of Article 6 of the UTC. I assume that is because Colorado has already adopted most of Article 6 as CRS §§ 15-16-701 et seq. Is the thought that CRS §§ 15-16-701 et seq. will be moved into the Colorado version of the UTC and become §§ 15-5-601 et seq.? If so, the cross reference in § 15-5-301(c) to § 15-5-602 will work; otherwise, the cross-reference will need to be modified.

2.2 Section 15-5-301.5(d) imposes a good faith (defined as honesty in fact)

standard of care on a representative acting under § 15-5-303(a)(6) (a parent or person appointed by a parent) or under § 15-5-305 (a representative appointed by the court). What was the thinking behind using such a low standard of care?

- 2.3 Subject to the overriding “no-conflict-of-interest” requirement, § 15-5-303(6) allows a parent to appoint another person to represent the parent’s minor or unborn child if there is no conservator or guardian. Under § 15-5-301(d), a settlor may not represent a beneficiary with respect to the termination or modification of the trust. That limitation was added to the UTC because of concern that allowing a settlor-parent to represent a beneficiary with respect to termination or modification might cause inclusion of the trust property in the settlor-parent’s gross estate under Internal Revenue Code § 2036 or 2038. It strikes me as not much of a stretch to extend that concern to a representative appointed by the settlor-parent, because the representative appointed by the parent could be someone under the control of the parent or with whom the parent has an agreement or understanding as to how the representative will act.
- (A) One approach to this issue might be to modify § 15-5-301(d) to prohibit either a parent or a person appointed by a parent from representing a beneficiary with respect to termination or modification of the trust.
- (B) But the issue may be broader than that. The IRS world-view is that, if the settlor of a trust can remove a trustee and appoint a trustee who does not satisfy the IRS’s idea of an “independent” trustee, then the settlor is deemed to have all of the powers of the trustee. See Treas. Reg. §§ 20.2036-1(b)(3) and 20.2038-1(a)(3); Rev. Rul. 95-58, 1995-2 C.B. 191. So perhaps it would be better, in § 15-5-303(a)(6), either (1) to allow only a parent who is not the settlor to appoint a person who can represent the parent’s child, or (2) require a person appointed as a representative by the beneficiary’s settlor-parent to meet the same standard of independence that the IRS applies to a power to appoint a trustee, that is, that the person appointed may not be “related or subordinate to” the settlor-parent within the meaning of IRC § 672(c).
- 2.4 The Uniform Trust Decanting Act includes a provision (§ 8) on representation, which cross-references the state’s existing law on representation. When we enacted the Uniform Trust Decanting Act, because Colorado did not have a statute on representation other than § 15-10-403, which applies only in formal proceedings, we added representation provisions, in CRS § 15-16-908, based on UTC Article 3. When Colorado adopts the UTC, there should be a conforming amendment to § 15-16-908 so that it will

track the cross-referencing approach of § 8 of the Uniform Trust Decanting Act.