

Memorandum

To: Dennis Whitmer
From: Kevin D. Millard
Date: January 30, 2017
Re: Uniform Trust Code Articles, 4, 5, and 6

This is the third installment of my comments and questions about the proposed Colorado Uniform Trust Code. This memo addresses Articles 4, 5, and 6 of the UTC.

1. Article 4, Creation, Validity, Modification, and Termination of Trust
 - 1.1 Section 15-5-401, Methods of creating trust. I think paragraph (a)(4) needs clarification. Do the words “authorizing the creation of a trust” refer to all three of the words “statute, judgment, or decree” or only to “decree”?
 - (A) If the intent is the former, then the statute, judgment, or decree only *authorizes* the creation of the trust; something else must actually create the trust, the statute doesn’t say what that something else is.
 - (B) If the intent is that “authorizing the creation of a trust” refers only to a decree, you have the same issue but only with respect to a decree, and as to a statute, the section would say “A trust may be created by: ... (4) a Statute” Can you give me an example of trust created by a statute, as opposed to a trust created by a judgment or decree as authorized by a statute? If there are such trusts in Colorado, should they be subject to the trust code?
 - (C) Under the second possible interpretation, “judgment” is left in limbo. Does the judgment create the trust or does the judgment authorize the creation of the trust, in which case what is it that actually creates the trust?
 - 1.2 Why was the last sentence of UTC § 410(b) (“The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.”) omitted from proposed C.R.S. § 15-5-410(b)? It strikes me as anomalous to give the settlor standing to enforce a charitable trust in § 15-5-405(c) but not give the settlor standing to ask the court to apply cy pres to a charitable trust.
 - 1.3 Sections 15-5-415, Reformation to correct mistakes, and 15-5-416, Modification to achieve settlor’s tax objectives. How will these sections be

coordinated with existing C.R.S. §§ 15-11-806 and 15-11-807, which are identical except that they apply more broadly to “governing instruments,” not just trusts? Because the latter sections have been the law in Colorado for 6½ years, wouldn’t it make more sense to keep §§ 15-11-806 and -807? The trust code could include cross-references to those sections, but I don’t think that is necessary in light of proposed § 15-5-106 (assuming that that section is modified to refer to other statutory as well as other common law).

- 1.4 Section 15-5-417, Combination and division of trusts. Will existing C.R.S. § 15-16-401 be repealed in light of this section?
2. Article 5, Creditor’s Claims; Spendthrift and Discretionary Trusts. It is my understanding that, because this topic was so controversial when the UTC was considered on prior occasions, your subcommittee is recommending that the UTC be enacted in Colorado without article 5, leaving those issues to current and future case law development. I am fine with that approach.
3. Article 6, Revocable Trusts
 - 3.1 Your subcommittee’s web page does not include a “Final Part 6.” I assume that is because Colorado previously adopted most of part 6 (with some modifications) as C.R.S. §§ 15-16-701 et seq.
 - 3.2 It seems to me that existing §§ 15-16-701 through 15-16-704 should be moved from the probate code into the trust code.
 - 3.3 The one section of Article 6 that we did not adopt in Colorado was section 601, dealing with a settlor’s capacity to create, amend, or revoke a revocable trust. My recollection is that we decided not to include that section because there had been a separate T&E section subcommittee trying to deal with the standard of capacity necessary for various estate planning documents, but that subcommittee could not reach consensus and disbanded. So I think that section 601 should be omitted and the issue of settlor capacity should be left to case-law development.