

**Colorado Bar Association Trusts & Estates Section
Uniform Trust Code Part 5 (Creditors' Rights) Subcommittee
of the Statutory Revisions Committee**

Minutes of December 4, 2019

Participants

In person:	By phone:
• Connie Eyster, Chair	• John Buckley
• Steve Brainerd	• Darla Daniel
• Marc Darling	• Joe Hodges
• Mike Holder	• Georgine Kryda
• Stan Kent	• Matt McClintock
• Eric Solem	
• Carl Stevens	

The meeting was held at CBA offices, 1290 Broadway, Suite 1700 in Denver.
The meeting was called to order at 9:05 a.m. by the Chair and adjourned at 10:30 a.m.
Minutes of 11/6/19 were approved.

Section 503, Exceptions to spendthrift provisions. – Connie

See Connie's emailed handout of 503. Final "clean" version appears below.

15-5-503. Exceptions to spendthrift provision.

(a) DEFINITIONS.

(1) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(2) CHILD SUPPORT ORDER MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

(b) A SPENDTHRIFT PROVISION IS UNENFORCEABLE AGAINST:

(1) A CHILD WHO IS AN OBLIGEE PURSUANT TO A CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR; AND

(2) A JUDGMENT CREDITOR WHO HAS PROVIDED ESSENTIAL SERVICES FOR THE PROTECTION OF A BENEFICIARY'S INTEREST IN THE TRUST.

SUBSECTION (b) DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

(c) THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO OBTAIN FROM A COURT AN ORDER ATTACHING PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES.

VOTE: SECTION 503 UNANIMOUSLY APPROVED.

Section 504, Exceptions to spendthrift provisions. – Steve B., John B., & Mike H.

See Steve's handout from John, Mike and Steve (below).

15-5-504. Discretionary Trusts; Effect of Standard.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

- (1) the discretion is expressed in the form of a standard of distribution; or
- (2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

- (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and
- (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

THIS SUBSECTION ~~(b)(c)~~, ~~HOWEVER~~, DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF THE ITS APPLICATION OF SUCH A PROVISION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF THE ITS APPLICATION OF SUCH A PROVISION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING SUCH PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

VOTE: SECTION 504 UNANIMOUSLY APPROVED.

Section 411, Modification or Termination of Noncharitable Irrevocable Trust by Consent – Eric S.

See handout from Eric S. (below).

15-5-411. Modification or termination of noncharitable irrevocable trust by consent

(1) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to a trust's modification or termination may be given by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(2) Other than a trust established under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d)(4), a noncharitable irrevocable trust may:

- (a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or
- (b) Be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) A spendthrift provision in the terms of a trust is not presumed to constitute a material purpose of the trust.

(4) Upon termination of a trust pursuant to subsection (1), (2) or (6) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(5) If not all of the beneficiaries consent to a proposed modification or termination of a trust pursuant to subsection (1), (2) or (6) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and

(b) The interests of a beneficiary who does not consent will be adequately protected.

(6) A trust established under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d)(4), may:

(a) Be terminated upon consent of all of the beneficiaries and the trustee,

(b) Be modified upon consent of all of the beneficiaries or if the court concludes that modification meets the criteria in subsection (5).

- Consensus regarding 411(2) remaining as is.
- Comments regarding “trustee” at end of (6)(a):
 - Connie: Is “only” necessary here? Also, is “beneficiaries” the right class? Should it be limited to consent of the disabled person and the trustee? Is the Department a necessary party?
 - Eric S.: “Only” seems to be redundant. Beneficiary is the right class. Department is a necessary party because by statute it is a beneficiary under Colorado law. Modification by Court should use same criteria as (5) because more expansive than (6)(b).”
- Connie initiated discussion regarding the need for 411(6).
- Connie: proposes striking language in (2) pertaining solely to special needs trusts, and make the language applicable to all trusts.
 - Discussion regarding what is the “material purpose” of the trust.

FOR FEBRUARY: Eric S. to speak with Elder Law Section

Section 501. Rights of Beneficiary’s Creditor or Assignee.

15-5-501. Rights of Beneficiary’s Creditor or Assignee.

Except as provided in Section 15-5-504, to the extent a beneficiary’s interest is not subject to a spendthrift provision or is a discretionary trust interest as provided in Section 15-5-504, the court may authorize a creditor or assignee of the beneficiary to attach present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. **NOTHING IN THIS PART 5 MODIFIES OTHER**

COLORADO LAW GOVERNING (A) LIMITATIONS ON THE AMOUNTS THAT MAY APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR (B) THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.

For February 5, 2020:

- Revisit 15-5-411;
- Continue with 15-5-501;
- Continue with 15-5-505; and
- Discussion regarding next steps.

The next meeting will be on February 5, 2020 at 9 a.m. at the CBA offices, 1290 Broadway, Suite 1700 in Denver.

Uniform Trust Code Part 5 (Creditors' Rights) Subcommittee
Notes Regarding Section 505, Creditor's Claim Against Settlor
for the December 4, 2019 Meeting

Background

- At the November 6, 2019 meeting, the subcommittee considered the fact that many of the states which have already enacted Section 505, Creditor's Claim Against Settlor, have customized the ULC's proposed language – particularly in § 505(a)(3), and/or with additional considerations.
- Chair, Connie Eyster, and Georgine Kryda met on November 19, 2019 to review Georgine's spreadsheet compilation of Section 505 as enacted by the other states, and now present these notes to assist the subcommittee with finalizing its proposed language for Colorado's version of Section 505 at its December 4, 2019 meeting.

Key Questions for Section 505 and Language from other States' Statutes

Connie and Georgine considered four key questions for Section 505, and identified language from other states' statutes that may be useful for Colorado's version of Section 505.

1. What if the settlor is a beneficiary as a result of the exercise of a power of appointment, or the choice of someone else? That is, what if there is an intervening action?

a. Missouri:

505(3). With respect to an irrevocable trust with a spendthrift provision, a spendthrift provision will prevent the settlor's creditors from satisfying claims from the trust assets except:

(1) Where the conveyance of assets to the trust was fraudulent as to creditors pursuant to the provisions of chapter 428; or

(2) To the extent of the settlor's beneficial interest in the trust assets, if at the time the trust became irrevocable:

(a) The settlor was the sole beneficiary of either the income or principal of the trust or retained the power to amend the trust; or

(b) The settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.

505(4). In the event that a trust meets the requirements set forth in subsection 3 of this section, a settlor's creditors may not reach the settlor's beneficial interest in that trust regardless of any testamentary power of appointment retained by the settlor that is exercisable by the settlor in favor of any appointees other than the settlor, the settlor's estate, the settlor's creditors, or the creditors of the settlor's estate.

b. Ohio:

505(3). None of the following shall be considered an amount that can be distributed to or for the benefit of the settlor:

(a) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor only as a result of the exercise of a power of appointment held in a nonfiduciary capacity by any person other than the settlor;

(b) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor of a trust pursuant to the power of the trustee to make distributions or pursuant to the power of another in a fiduciary capacity to direct distributions, if and to the extent that the distributions could be made from trust property the value of which was included in the gross estate of the settlor's spouse for federal estate tax purposes under section 2041 or 2044 of the Internal Revenue Code or that was treated as a transfer by the settlor's spouse under section 2514 or 2519 of the Internal Revenue Code;

(c) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax.

2. How should holders of Crummey powers be addressed? Should a power of withdrawal make assets available to creditors [as long as the powerholder is not the settlor]? Suggest that Colorado not limit protection as other states have.

a. North Carolina:

505(b). For purposes of this section, with respect to a power of withdrawal over property of a trust exercisable by a holder of the power other than the settlor of the trust, both of the following shall apply:

(1) The property subject to the exercise of the power shall be subject to the claims of the creditors of the holder only when and to the extent that the holder exercises the power.

(2) The lapse, release, or waiver of a power shall not be deemed to be an exercise of the power and shall not cause the holder to be treated as a settlor of the trust.

b. Arkansas:

505(b). For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on January 1, 2005.

3. How should QTIPs and SLATs be addressed?

a. **Wisconsin** (Stan had not favored):

701.0505(2)(e)1.c. An irrevocable trust for the settlor's spouse if after the death of the settlor's spouse the settlor is a beneficiary of the trust or an irrevocable trust that receives property from the trust.

b. **Ohio** (appears simpler for QTIP, and (B)(3) addresses the tax reimbursement clause seen in IGITs; but missing a SLAT provision or where the settlor is one of several beneficiaries for discretionary distributions):

(B) For purposes of this section, all of the following apply:

(3) None of the following shall be considered an amount that can be distributed to or for the benefit of the settlor:

(a) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor only as a result of the exercise of a power of appointment held in a nonfiduciary capacity by any person other than the settlor;

(b) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor of a trust pursuant to the power of the trustee to make distributions or pursuant to the power of another in a fiduciary capacity to direct distributions, if and to the extent that the distributions could be made from trust property the value of which was included in the gross estate of the settlor's spouse for federal estate tax purposes under section 2041 or 2044 of the Internal Revenue Code or that was treated as a transfer by the settlor's spouse under section 2514 or 2519 of the Internal Revenue Code;

(c) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax.

4. Do we need an exception for self-settled special needs trusts (SNTs)? Perhaps add bracketed text?

a. **North Dakota:**

(505) 1. The following rules apply whether or not the terms of a trust contain a spendthrift provision. During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors to the extent that the property would be subject to creditors' claims if the property had not been placed in the trust. With respect to an irrevocable trust, other than a special needs trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the

portion of the trust attributable to that settlor's contribution. After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable immediately before the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. For purposes of this section, "statutory allowances" includes any homestead exception under chapter 47-18 and the allowances included in title 30.1. 2. For purposes of this section during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power and, upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or section 2503(b) of the Internal Revenue Code of 1986, or corresponding future provisions of federal tax law.

b. Vermont (a2 contains the reference to SNTs):

505(a). Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach shall not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution. This subdivision shall not apply to an irrevocable "special needs trust" established for a disabled person as described in 42 U.S.C. Section 1396p(d)(4) or similar federal law governing the transfer to such a trust.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

15-5-411. Modification or termination of noncharitable irrevocable trust by consent

(1) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to a trust's modification or termination may be given by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(2) ~~Other than a trust established by court order under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p(d)(4), Aa~~ noncharitable irrevocable trust may:

(a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or

(b) Be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) A spendthrift provision in the terms of a trust is not presumed to constitute a material purpose of the trust.

(4) Upon termination of a trust pursuant to subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(5) If not all of the beneficiaries consent to a proposed modification or termination of a trust pursuant to subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and

(b) The interests of a beneficiary who does not consent will be adequately protected.

15-5-501. Rights of Beneficiary's Creditor or Assignee.

Except as provided in Section 15-5-504, to the extent a beneficiary's interest is not subject to a spendthrift provision ~~or is a discretionary trust interest as provided in Section 15-5-504~~, the court may authorize a creditor or assignee of the beneficiary to attach present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. NOTHING IN THIS PART 5 MODIFIES OTHER COLORADO LAW GOVERNING (A) LIMITATIONS ON THE AMOUNTS THAT MAY APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR (B) THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.

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SECTION 505. CREDITOR’S CLAIM AGAINST SETTLOR.

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

- (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.
- (2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor’s benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor’s interest in the portion of the trust attributable to that settlor’s contribution.

- (i) None of the following shall be considered an amount that can be distributed to or for the benefit of the settlor:
 - (A) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor only as a result of the exercise (or nonexercise) of a power of appointment held in a nonfiduciary capacity by any person other than the settlor;
 - (B) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor of a trust pursuant to the power of the trustee to make distributions or pursuant to the power of another in a fiduciary capacity to direct distributions, if and to the extent that the distributions could be made from trust property the value of which was included in the gross estate of the settlor's spouse for federal estate tax purposes under section 2041 or 2044 of the Internal Revenue Code or that was treated as a transfer by the settlor's spouse under section 2514 or 2519 of the Internal Revenue Code;
 - (C) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax.
- (ii) This subdivision shall not apply to an irrevocable "special needs trust" established for a disabled person as described in 42 U.S.C. Section 1396p(d)(4) or similar federal law governing the transfer to such a trust.

Commented [CTE1]: Consider adding this language from the Ohio statute

Commented [CTE2]: "nonexercise" is not part of the Ohio statute, but consider whether it could/should be added.

Commented [CTE3]: Consider adding this language from Vermont

(3) After the death of a settlor, ~~and subject to the settlor's right to direct the source from which liabilities will be paid, and, except as otherwise provided by §13-54-102 C.R.S. or other applicable statutes,~~ the property of a trust that was revocable at the settlor's death is subject to claims AND ALLOWANCES AS PROVIDED IN § 15-15-103, C.R.S. of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

(b) RESERVED. For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].