

UTC Committee: November 17, 2016 Meeting Attendance

In Person:

Dennis Whitmer
Darla Daniel
Steve Brainerd
Connie Eyster
Carl Stevens
Barbara Delvano
Jeff Kadavy
Jonathan Haskell
Georgine Kryda
Connie Wood

On Phone:

None

UNIFORM TRUST CODE COMMITTEE
MINUTES
November 17, 2016

Minutes from October 20, 2016 meeting approved.

1. Discussion of Gene's memo on 15-16-101. We discussed registration of a revocable trust. Current law is permissive on registration of a revocable trust but Part 2 of the UTC (as amended) prohibits registration of a revocable trust until it becomes irrevocable. Gene also pointed out that the current statute permits registration of multiple trusts in one registration. Part 2 is silent on this matter. **Committee will**

2. Update on Section 1013 of the Act – this section defines what needs to be in a certificate of trust. Bankers have looked at their own bill on these matters. Darla spoke to the Bankers Association about the fact that this exists already in the UTC. They intend to adopt, as a whole, 1013 into their bill (so that if both their bill and the UTC passes, we would need to amend both). Can discuss with legislative drafting “when” we pass the UTC – perhaps a cross-reference would be better.

3. Discussion of 1010 and 1011. These provisions are conceptually consistent with the *Lachner* case – that as long as you disclose your fiduciary capacity (same as current 15-16-306) the trustee receives protection from personal liability for acts taken as a fiduciary. *Lachner* was codified in section 15-5-507 of the UTC (trust property not subject to personal obligations of the trustee, even if the trustee becomes insolvent). Since we are not adopting Part 5 at this time. Should we move 507 into 1010? Discussion about where 507 should go. Should we adopt just this part of part 5 and reserve the rest? Gene thinks we should abandon 507 for now and take up all of part 5 later. Barbara thinks we should add it to Part 10 and rename this part. Gene concerned about the lack of uniformity.

15-5-1010. Limitation on personal liability of trustee.

(a) EXCEPT AS OTHERWISE PROVIDED IN THE CONTRACT, A TRUSTEE IS NOT PERSONALLY LIABLE ON A CONTRACT PROPERLY ENTERED INTO IN THE TRUSTEE'S FIDUCIARY CAPACITY IN THE COURSE OF ADMINISTERING THE TRUST IF THE TRUSTEE IN THE CONTRACT DISCLOSED THE FIDUCIARY CAPACITY.

(b) A TRUSTEE IS PERSONALLY LIABLE FOR TORTS COMMITTED IN THE COURSE OF ADMINISTERING A TRUST, OR FOR OBLIGATIONS ARISING FROM OWNERSHIP OR CONTROL OF TRUST PROPERTY, INCLUDING LIABILITY FOR VIOLATION OF ENVIRONMENTAL LAW, ONLY IF THE TRUSTEE IS PERSONALLY AT FAULT.

(c) A CLAIM BASED ON A CONTRACT ENTERED INTO BY A TRUSTEE IN THE TRUSTEE'S FIDUCIARY CAPACITY, ON AN OBLIGATION ARISING FROM OWNERSHIP OR CONTROL OF TRUST PROPERTY, OR ON A TORT COMMITTED IN THE COURSE OF ADMINISTERING A TRUST, MAY BE ASSERTED IN A JUDICIAL PROCEEDING AGAINST THE TRUSTEE IN THE TRUSTEE'S FIDUCIARY CAPACITY, WHETHER OR NOT THE TRUSTEE IS PERSONALLY LIABLE FOR THE CLAIM.

(d) THE QUESTION OF LIABILITY AS BETWEEN THE TRUST ESTATE AND THE TRUSTEE INDIVIDUALLY MAY BE DETERMINED:

(1) IN A PROCEEDING PURSUANT TO SECTION 15-10-504;

(2) IN A PROCEEDING FOR ACCOUNTING, SURCHARGE, INDEMNIFICATION, SANCTIONS, OR REMOVAL; OR

(3) IN OTHER APPROPRIATE PROCEEDINGS.

(e) A TRUSTEE IS NOT PERSONALLY LIABLE FOR MAKING A DISTRIBUTION OF PROPERTY THAT DOES NOT TAKE INTO CONSIDERATION THE POSSIBLE BIRTH OF A POSTHUMOUSLY CONCEIVED CHILD UNLESS, PRIOR TO THE DISTRIBUTION, THE TRUSTEE RECEIVED NOTICE OR ACQUIRED ACTUAL KNOWLEDGE THAT:

(1) THERE IS OR MAY BE AN INTENTION TO USE AN INDIVIDUAL'S GENETIC MATERIAL TO CREATE A CHILD; AND

(2) THE BIRTH OF THE CHILD COULD AFFECT THE DISTRIBUTION OF THE TRUST ASSETS.

(f) IF A TRUSTEE HAS REVIEWED THE RECORDS OF THE COUNTY CLERK AND RECORDER IN EVERY COUNTY IN COLORADO IN WHICH THE TRUSTEE HAS ACTUAL KNOWLEDGE THAT THE DECEDENT WAS DOMICILED AT ANY TIME DURING THE THREE YEARS PRIOR TO THE DECEDENT'S DEATH AND THE TRUSTEE DOES NOT HAVE ACTUAL NOTICE OR ACTUAL KNOWLEDGE OF THE EXISTENCE OF A VALID, UNREVOKED DESIGNATED BENEFICIARY AGREEMENT IN WHICH THE DECEDENT GRANTED THE RIGHT OF INTESTATE SUCCESSION, THE TRUSTEE SHALL NOT BE INDIVIDUALLY LIABLE FOR DISTRIBUTIONS MADE TO DEVISEES OR HEIRS AT LAW THAT DO NOT TAKE INTO CONSIDERATION THE DESIGNATED BENEFICIARY AGREEMENT.

15-5-1011. Interest as a general partner.

(a) EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (c) OF THIS SECTION OR UNLESS PERSONAL LIABILITY IS IMPOSED IN THE CONTRACT, A TRUSTEE WHO HOLDS AN INTEREST AS A GENERAL PARTNER IN A GENERAL OR LIMITED PARTNERSHIP IS NOT PERSONALLY LIABLE ON A CONTRACT ENTERED INTO BY THE PARTNERSHIP AFTER THE TRUST'S ACQUISITION OF THE INTEREST IF THE FIDUCIARY CAPACITY WAS DISCLOSED IN THE CONTRACT OR IN A STATEMENT PREVIOUSLY FILED PURSUANT TO THE "COLORADO UNIFORM PARTNERSHIP ACT (1997)", ARTICLE 64 OF TITLE 7, C.R.S., OR THE "COLORADO UNIFORM LIMITED PARTNERSHIP ACT OF 1981", ARTICLE 62 OF TITLE 7, C.R.S.

(b) EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (c) OF THIS SECTION, A TRUSTEE WHO HOLDS AN INTEREST AS A GENERAL PARTNER IS NOT PERSONALLY LIABLE FOR TORTS COMMITTED BY THE PARTNERSHIP OR FOR OBLIGATIONS ARISING FROM OWNERSHIP OR CONTROL OF THE INTEREST UNLESS THE TRUSTEE IS PERSONALLY AT FAULT.

(c) THE IMMUNITY PROVIDED BY THIS SECTION DOES NOT APPLY IF AN INTEREST IN THE PARTNERSHIP IS HELD BY THE TRUSTEE IN A CAPACITY OTHER THAN THAT OF TRUSTEE OR IS HELD BY THE TRUSTEE'S SPOUSE OR ONE OR MORE OF THE TRUSTEE'S DESCENDANTS, SIBLINGS, OR PARENTS, OR THE SPOUSE OF ANY OF THEM.

(d) IF THE TRUSTEE OF A REVOCABLE TRUST HOLDS AN INTEREST AS A GENERAL PARTNER, THE SETTLOR IS PERSONALLY LIABLE FOR CONTRACTS AND OTHER OBLIGATIONS OF THE PARTNERSHIP AS IF THE SETTLOR WERE A GENERAL PARTNER.

MOTION to leave 507 for now not a part of the statute and deal with it when we raise Part 5 issues later.

MOTION PASSES.

MOTION to accept 1011 as written above.

MOTION PASSES.

4. Discussion of 1005. Revisit the issue of the Suggestion to adopt UTC period of one year, rather than six months period that was recommended by the 2005 subcommittee. These changes were recommended by the 2005 subcommittee to keep the time frame consistent with current Colorado law. and change language back to “sent” rather than “received.” Discussion that “sent” is better for the UTC because it is defined in Section 109 as to what constitutes “sent.”

15-5-1005. Limitation of actions against trustee.

(a) A BENEFICIARY MAY NOT COMMENCE A PROCEEDING AGAINST A TRUSTEE FOR BREACH OF TRUST MORE THAN ~~ONE YEAR~~ SIX MONTHS AFTER THE DATE THAT THE BENEFICIARY OR A ~~REPRESENTATIVE OF~~ PERSON WHO MAY REPRESENT AND BIND THE BENEFICIARY, AS PROVIDED IN PART 3 OF THIS ARTICLE, WAS-SENT RECEIVED A REPORT THAT ADEQUATELY DISCLOSED THE EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST AND INFORMED THE BENEFICIARY OF THE TIME ALLOWED FOR COMMENCING A PROCEEDING.

(b) A REPORT ADEQUATELY DISCLOSES THE EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST IF IT PROVIDES SUFFICIENT INFORMATION SO THAT THE BENEFICIARY OR

REPRESENTATIVE KNOWS ~~OR SHOULD HAVE KNOWN~~ OF THE POTENTIAL CLAIM OR SHOULD HAVE INQUIRED INTO ITS EXISTENCE.

(c) IF SUBSECTION (A) OF THIS SECTION DOES NOT APPLY, A JUDICIAL PROCEEDING BY A BENEFICIARY AGAINST A TRUSTEE FOR BREACH OF TRUST MUST BE COMMENCED WITHIN ~~FIVE~~ THREE YEARS AFTER THE FIRST TO OCCUR OF:

- (1) THE REMOVAL, OR RESIGNATION, ~~OR DEATH~~ OF THE TRUSTEE;
- (2) THE TERMINATION OF THE BENEFICIARY'S INTEREST IN THE TRUST; OR
- (3) THE TERMINATION OF THE TRUST.

(d) FOR PURPOSES OF SUBSECTION (A) OF THIS SECTION, A BENEFICIARY IS DEEMED TO HAVE BEEN SENT ~~RECEIVED~~ A REPORT IF:

(1) IN THE CASE OF A BENEFICIARY ~~WHO IS AN ADULT AND~~ ~~HAS~~ HAVING CAPACITY, IT IS SENT TO ~~RECEIVED BY~~ THE BENEFICIARY; OR

(2) IN THE CASE OF A BENEFICIARY WHO, UNDER PART 3 OF THIS ARTICLE, MAY BE REPRESENTED AND BOUND BY ANOTHER PERSON, IT IS SENT TO ~~RECEIVED BY~~ THE OTHER PERSON.

(e) THIS SECTION DOES NOT PRECLUDE AN ACTION TO RECOVER FOR FRAUD OR MISREPRESENTATION RELATED TO THE REPORT.

~~(f) IF A TRUSTEE DIES, THEN A DISTRIBUTEE OR A BENEFICIARY MUST COMMENCE A JUDICIAL PROCEEDING FOR BREACH OF TRUST AGAINST THE TRUSTEE'S ESTATE WITHIN THE TIMEFRAMES SPECIFIED IN THE COLORADO PROBATE CODE FOR SUCH ACTIONS.~~

Next Month we will review 1005 as set forth above. Committee in agreement on using “sent” rather than received and the six month time period. Committee could not reach agreement on time frame for claims against a deceased trustee’s estate without the input of litigators. Discuss with Marc next month.

5. Although the committee reviewed and approved 1013 in September, Gene wants to review language of 1013(a)(4) and others where language “pending transaction,” because sometimes a certificate of trust is provided where there is no pending transaction. For example, Gene sometimes drafts a certificate of trust when the trust is created to be used in the future. After discussion, the committee decided not to make any changes because it is likely that the entire powers granted under the trust agreement will be part of certificates of trust anyway.

15-5-1013. Certification of trust.

(a) INSTEAD OF FURNISHING A COPY OF THE TRUST INSTRUMENT TO A PERSON OTHER THAN A BENEFICIARY, THE TRUSTEE MAY FURNISH TO THE PERSON A CERTIFICATION OF TRUST CONTAINING THE FOLLOWING INFORMATION:

- (1) THAT THE TRUST EXISTS AND THE DATE THE TRUST INSTRUMENT WAS EXECUTED;
- (2) THE IDENTITY OF THE SETTLOR;
- (3) THE IDENTITY AND ADDRESS OF THE CURRENTLY ACTING TRUSTEE;
- (4) THE POWERS OF THE TRUSTEE IN THE PENDING TRANSACTION;
- (5) THE REVOCABILITY OR IRREVOCABILITY OF THE TRUST AND THE IDENTITY OF ANY PERSON HOLDING A POWER TO REVOKE THE TRUST;
- (6) THE AUTHORITY OF COTRUSTEES TO SIGN OR OTHERWISE AUTHENTICATE AND WHETHER ALL OR LESS THAN ALL ARE REQUIRED IN ORDER TO EXERCISE POWERS OF THE TRUSTEE; AND
- (7) THE NAME IN WHICH TITLE TO TRUST PROPERTY MAY BE TAKEN.

(b) A CERTIFICATION OF TRUST MAY BE SIGNED OR OTHERWISE AUTHENTICATED BY ANY TRUSTEE.

(c) A CERTIFICATION OF TRUST MUST STATE THAT THE TRUST HAS NOT BEEN REVOKED, MODIFIED, OR AMENDED IN ANY MANNER THAT WOULD CAUSE THE REPRESENTATIONS CONTAINED IN THE CERTIFICATION OF TRUST TO BE INCORRECT.

(d) A CERTIFICATION OF TRUST NEED NOT CONTAIN THE DISPOSITIVE TERMS OF A TRUST.

(e) A RECIPIENT OF A CERTIFICATION OF TRUST MAY REQUIRE THE TRUSTEE TO FURNISH COPIES OF THOSE EXCERPTS FROM THE ORIGINAL TRUST INSTRUMENT AND LATER AMENDMENTS THAT DESIGNATE THE TRUSTEE AND CONFER UPON THE TRUSTEE THE POWER TO ACT IN THE PENDING TRANSACTION.

(f) A PERSON WHO ACTS IN RELIANCE UPON A CERTIFICATION OF TRUST WITHOUT KNOWLEDGE THAT THE REPRESENTATIONS CONTAINED THEREIN ARE INCORRECT IS NOT LIABLE TO ANY PERSON FOR SO ACTING AND MAY ASSUME WITHOUT INQUIRY THE EXISTENCE OF THE FACTS CONTAINED IN THE CERTIFICATION. KNOWLEDGE OF THE TERMS OF THE TRUST MAY NOT BE INFERRED SOLELY FROM THE FACT THAT A COPY OF ALL OR PART OF THE TRUST INSTRUMENT IS HELD BY THE PERSON RELYING UPON THE CERTIFICATION.

(g) A PERSON WHO IN GOOD FAITH ENTERS INTO A TRANSACTION IN RELIANCE UPON A CERTIFICATION OF TRUST MAY ENFORCE THE TRANSACTION AGAINST THE TRUST PROPERTY AS IF THE REPRESENTATIONS CONTAINED IN THE CERTIFICATION WERE CORRECT.

(h) A PERSON MAKING A DEMAND FOR THE TRUST INSTRUMENT IN ADDITION TO A CERTIFICATION OF TRUST OR EXCERPTS IS LIABLE FOR COSTS, EXPENSES, ATTORNEY FEES, AND DAMAGES IF THE COURT DETERMINES THAT THE PERSON DID NOT ACT IN GOOD FAITH IN DEMANDING THE TRUST INSTRUMENT.

(i) THIS SECTION DOES NOT LIMIT THE RIGHT OF A PERSON TO OBTAIN A COPY OF THE TRUST INSTRUMENT IN A JUDICIAL PROCEEDING CONCERNING THE TRUST.

6. Review of Part 11.

15-5-1101. Uniformity of application and construction. IN APPLYING AND CONSTRUING THIS UNIFORM ACT, CONSIDERATION MUST BE GIVEN TO THE NEED TO PROMOTE UNIFORMITY OF THE LAW WITH RESPECT TO ITS SUBJECT MATTER AMONG {W1051585 CTE}

STATES THAT ENACT IT.

Discussion – no changes suggested or recommended.

15-5-1102. Electronic records and signatures. THE PROVISIONS OF THIS ARTICLE GOVERNING THE LEGAL EFFECT, VALIDITY, OR ENFORCEABILITY OF ELECTRONIC RECORDS OR ELECTRONIC SIGNATURES, AND OF CONTRACTS FORMED OR PERFORMED WITH THE USE OF SUCH RECORDS OR SIGNATURES, CONFORM TO THE REQUIREMENTS OF SECTION 102 OF THE FEDERAL "ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT", 15 U.S.C. SEC. 7002, AND SUPERSEDE, MODIFY, AND LIMIT THE REQUIREMENTS OF THE FEDERAL "ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT".

Discussion – no changes suggested or recommended. Purpose of this statute is to look to state law to make decisions regarding electronic signatures.

15-5-1103. Severability clause. IF ANY PROVISION OF THIS ARTICLE OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCES IS HELD INVALID, THE INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS ARTICLE THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ARTICLE ARE SEVERABLE.

Discussion – no changes suggested or recommended.

15-5-1104. Effective date. THIS ARTICLE TAKES EFFECT ON JANUARY 1, 2015.

Discussion – change to January 1, _____.

{W1051585 CTE}

15-5-1105. Repeals. (Reserved)

Discussion – no changes suggested or recommended.

15-5-1106. Application to existing relationships. (a) EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, ON ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE:

(1) THIS ARTICLE APPLIES TO ALL TRUSTS CREATED BEFORE, ON, OR AFTER ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE;

(2) THIS ARTICLE APPLIES TO ALL JUDICIAL PROCEEDINGS CONCERNING TRUSTS COMMENCED ON OR AFTER ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE;

(3) THIS ARTICLE APPLIES TO JUDICIAL PROCEEDINGS CONCERNING TRUSTS COMMENCED BEFORE ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE, UNLESS THE COURT FINDS THAT APPLICATION OF A PARTICULAR PROVISION OF THIS ARTICLE WOULD SUBSTANTIALLY INTERFERE WITH THE EFFECTIVE CONDUCT OF THE JUDICIAL PROCEEDINGS OR PREJUDICE THE RIGHTS OF THE PARTIES, IN WHICH CASE THE PARTICULAR PROVISION OF THIS ARTICLE DOES NOT APPLY AND THE SUPERSEDED LAW APPLIES;

(4) ANY RULE OF CONSTRUCTION OR PRESUMPTION PROVIDED IN THIS ARTICLE APPLIES TO TRUST INSTRUMENTS EXECUTED BEFORE ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE, UNLESS THERE IS A CLEAR INDICATION OF A CONTRARY INTENT IN THE TERMS OF THE TRUST; AND
{W1051585 CTE}

(5) AN ACT DONE BEFORE ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE, IS NOT AFFECTED BY THIS ARTICLE.

(b) IF A RIGHT IS ACQUIRED, EXTINGUISHED, OR BARRED UPON THE EXPIRATION OF A PRESCRIBED PERIOD THAT HAS COMMENCED TO RUN UNDER ANY OTHER STATUTE BEFORE ~~JANUARY 1, 2015~~ THE EFFECTIVE DATE, THAT STATUTE CONTINUES TO APPLY TO THE RIGHT EVEN IF IT HAS BEEN REPEALED OR SUPERSEDED.

Committee will review Part 11 over the next month and discuss in December.

1. **SECTION** In Colorado Revised Statutes, 2-5-102, **add** (13) as follows:

2-5-102. Inclusions - nonstatutory. (13) THE REVISOR OF STATUTES SHALL INCLUDE IN THE PUBLICATION OF THE AMENDMENTS TO ARTICLE 5 OF TITLE 15, C.R.S., AS NONSTATUTORY MATTER, FOLLOWING EACH SECTION OF ARTICLE 5 OF TITLE 15, C.R.S., THE FULL TEXT OF THE OFFICIAL COMMENTS TO THAT ARTICLE, CONTAINED IN THE OFFICIAL VOLUME CONTAINING THE OFFICIAL TEXT OF THE "UNIFORM TRUST CODE", ISSUED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, WITH ANY CHANGES IN THE OFFICIAL COMMENTS OR COLORADO COMMENTS TO CORRESPOND TO COLORADO CHANGES IN THE UNIFORM ACT.

2. **SECTION** In Colorado Revised Statutes, 11-106-105, **amend** (1) introductory portion as follows:

11-106-105. Substitution of Colorado bank or Colorado trust company. (1)

In addition to the procedures initiated by an interested party concerning internal affairs of {W1051585 CTE}

~~their~~ THE PARTY'S trust under ~~section 15-16-201~~ PART 2 OF ARTICLE 5 OF TITLE 15, C.R.S., or procedures otherwise permitted by Colorado law, and unless a will, agreement, or trust instrument otherwise provides, a company may be substituted as fiduciary for all or a part of the fiduciary business of another company without court approval if:

3. **SECTION** In Colorado Revised Statutes, 15-12-703, **amend** (1) as follows:

15-12-703. General duties - relation and liability to persons interested in estate - standing to sue. (1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by ~~section 15-16-302~~ SECTIONS 15-5-801 TO 15-5-806. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. ~~He~~ A PERSONAL REPRESENTATIVE shall use the authority conferred upon him OR HER by this code, the terms of the will, if any, and any order in proceedings to which he OR SHE is party for the best interests of successors to the estate.

4. **SECTION** In Colorado Revised Statutes, 15-12-913, **amend** (1) as follows:

15-12-913. Distributions to trustee. (1) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in ~~section 15-16-303~~ 15-5-813.

5. **SECTION** In Colorado Revised Statutes, **amend** 15-16-103 as follows:

Meeting adjourned.

NEXT MEETING December 15, 2016