

## PART 10

### LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

**15-5-1007. Event affecting administration or distribution.** IF THE HAPPENING OF AN EVENT, INCLUDING MARRIAGE, DIVORCE, PERFORMANCE OF EDUCATIONAL REQUIREMENTS, OR DEATH, AFFECTS THE ADMINISTRATION OR DISTRIBUTION OF A TRUST, A TRUSTEE WHO HAS EXERCISED REASONABLE CARE TO ASCERTAIN THE HAPPENING OF THE EVENT IS NOT LIABLE FOR A LOSS RESULTING FROM THE TRUSTEE'S LACK OF KNOWLEDGE.

NCCUSL comments:

This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

The 2005 UTC committee recommended adopting 1007 as is.

The 2016 Part 10 Subcommittee raises the following issues:

- UTC §§ 1007 and 1008 contain protections of the trustee which are not in UTC § 1011.
- C.R.S. § 15-16-306 addresses the personal liability of a trustee to third parties; however, Article 16 would be eliminated. The subcommittee also asks whether there are parallels to C.R.S. § 15-12-703 (personal liability of PRs) to cross-reference or incorporate in the UTC provision.
- If the UTC replaces C.R.S. § 15-16-306, what do we do with C.R.S. §§ 15-16-306(7, posthumously conceived children) & (8, Designated Beneficiary Agreements)?
  - How consistent do we want to make the trust code with the probate code with respect to posthumously conceived children?
  - Is a Designated Beneficiary Agreement (DBA) still meaningful? Do DBAs need to be addressed in the UTC?
- Has the UTC committee decided that the trustee(s) shall always receive notice of non-judicial settlements? The subcommittee believes that the trustee should always receive notice of non-judicial settlements.

## REFERENCE MATERIAL

- Restatement (Second) of Trusts, § 226 is attached. Section 226 itself states:

“If by the terms of the trust it is the duty of the trustee to pay or convey the trust property or any part thereof to a beneficiary, he is liable if he pays or conveys to a person who is neither the beneficiary nor one to whom the beneficiary or the court has authorized him to make such payment or conveyance.”
- Restatement (Second) of Trusts, § 261 addresses trustee liability in general. A copy of § 261 is attached. Section 261 states:

“The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust.”
- C.R.S. § 15-1.1-101 states:

“(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust. (b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.”

- In *Estate of McCart*, 847 P.2d 184 (Colo. App. 1992, rehearing denied 1992, cert. denied 1993), the Court of Appeals held that the trustee abused his fiduciary duty by failing to make discretionary distributions to a beneficiary who had remarried. A copy of *McCart* is also provided.

- C.R.S. § 15-16-306 states:

15-16-306. Personal liability of trustee to third parties

(1) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(2) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(3) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration, may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(4) The question of liability as between the trust estate and the trustee individually may be determined:

(a) In a proceeding pursuant to [section 15-10-504](#);

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In other appropriate proceedings.

(5) and (6) Repealed.

(7) 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:

(a) There is or may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the trust assets.

(8) 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.

**HISTORY:** Source: L. 73: R&RE, p. 1644, § 1. C.R.S. 1963: § 153-7-306. L. 77: (5) and (6) repealed, p. 837, § 27, effective July 1. L. 2008: (4) amended, p. 486, § 16, effective July 1. L. 2010: (7) added, ([SB 10-199](#)), [ch. 374](#), [p. 1753](#), [§ 17](#), effective July 1. L. 2011: IP(7) and (7)(a) amended, ([SB 11-083](#)), [ch. 101](#), [p. 317](#), [§ 25](#), effective August 10; IP(7) amended, ([HB 11-1303](#)), [ch. 264](#), [p. 1154](#), [§ 23](#), effective August 10. L. 2012: (8) added, ([SB 12-131](#)), [ch. 114](#), [p. 394](#), [§ 3](#), effective April 13.

- C.R.S. § 15-12-703 states:

15-12-703. General duties - relation and liability to persons interested in estate - duty to search for a designated beneficiary agreement - 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](#). 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 shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent.

(3) Repealed.

(3.5) A personal representative shall not be surcharged for distributions made that do not take into consideration the possible birth of a posthumously conceived child unless prior to such distribution:

(a) The personal representative has received notice or has actual knowledge that there is an intention to use an individual's genetic material to create a child or has received written notice that there may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the decedent's estate.

(4) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

(5) A personal representative shall not be surcharged for distributions made that do not take into consideration a designated beneficiary agreement if:

(a) The personal representative has reviewed the records of the county clerk and recorder's office in every county in Colorado in which the personal representative has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death for a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession; and

(b) The personal representative has not received actual notice nor has actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession.

(6) Subject to the good faith standard of [section 15-10-602 \(6\)](#), the provisions of [section 15-10-605](#), and subsections (7) and (8) of this section, personal representatives, persons with priority for appointment as personal representative, and court-appointed fiduciaries may ascertain the testator's probable intent or estate planning purpose on issues involving the decedent's estate and, where not contrary to public policy or law, shall have standing and may prosecute or defend that intent or purpose, at the expense of the estate, in proceedings brought under this code.

(7) Without limiting the general applicability of subsection (6) of this section:

(a) (I) A person serving as personal representative or a person nominated as personal representative in a will or appointed as public or special administrator has standing, but no duty, to offer a will for probate. If such person declines or is unable to offer the will for probate, any person who is a successor of the decedent under the will may offer the will for probate and defend the validity of the will in proceedings under this code. In either case, the person may act notwithstanding the fact that he or she may be a devisee under the will. The will proponent's reasonable fees and costs are payable as an expense of administration.

(II) For purposes of this subsection (7), a proponent other than the nominated personal representative should be treated as a nominated personal representative in cases where the nominated personal representative has declined or is unable to offer the will for probate. Such treatment shall not confer upon the proponent a higher priority for appointment than was conferred upon such proponent pursuant to [section 15-12-203](#) before the will was offered for probate.

(b) The personal representative has standing to oppose, at estate expense, a person's claim to be an heir; an omitted spouse or child; a spouse, including a common law spouse; or a devisee.

(c) The personal representative has standing to oppose, at estate expense, a surviving spouse's attempt to invalidate a marital agreement that limits his or her share in the estate.

(d) Where a surviving spouse petitions for an elective share, the court proceeding is an action between the spouse and the interested person or persons whose interests may be affected, and the personal representative is a neutral party to the proceeding. In such a proceeding, the fees and costs reasonably incurred by the personal representative and his or her agents in providing basic information to the parties regarding the augmented estate are payable as an estate expense. The personal representative may prepare a calculation of the augmented estate at estate expense.

(8) (a) In any proceeding brought under this code where any personal representative, person with priority for appointment as a personal representative, nominated personal representative, or court-appointed fiduciary purports to participate in the proceeding at estate expense and has a material conflict of interest, any interested person may petition the court pursuant to [section 15-12-614 \(1\) \(b\)](#) or [15-12-713](#) for the appointment of an independent special administrator to represent, to the extent the court directs, the estate's interests in the litigation at estate expense.

(b) For purposes of this subsection (8), the fact that a personal representative, a person with priority for appointment as a personal representative, a nominated personal representative, or a court-appointed fiduciary is also a successor or a potential successor of the estate is not, in and of itself, a material conflict of interest.

**HISTORY:** Source: L. 73: R&RE, p. 1587, § 1. C.R.S. 1963: § 153-3-703.L. 75: (3) repealed, p. 606, § 62, effective July 1.L. 2010: (3.5) added, ([SB 10-199](#)), [ch. 374](#), [p. 1751](#), [§ 14](#), effective July 1.L. 2011: (3.5)(a) amended, ([SB 11-083](#)), [ch. 101](#), [p. 303](#), [§ 5](#), effective August 10.L. 2012: (5) added, ([SB 12-131](#)), [ch. 114](#), [p. 393](#), [§ 1](#), effective April 13.L. 2013: (6), (7), and (8) added, ([SB 13-077](#)), [ch. 190](#), [p. 767](#), [§ 3](#), effective August 7.