

PART 10

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

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.

NCCUSL COMMENTS

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under

respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

Subsection (c) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

Colorado Comments

Colorado Prudent Investor Rule §15-1.1-109 provides that a trustee may delegate investment in management functions; however, the trustee shall exercise reasonable care, skill and caution in selecting the agent. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. The trustee who exercises reasonable care, skill and caution in selecting an agent, and in monitoring and overseeing what the agent is doing, will generally not be liable to the beneficiaries for the decisions or acts of the agent to whom the function was delegated.

- The Colorado Court of Appeals held *In the Trust Agreement of Julius F. Seaman*, 841 P.2d 403 (Colo. App. 1992), that where co-trustees delegated their fiduciary responsibilities to a single trustee, they were estopped from bringing claims for breach of fiduciary duty.
- In *Vento v. Colorado National Bank of Pueblo*, 907 P.2d 642 (Colo. App. 1995), reh'g denied (1995), cert. denied (1995) the Colorado Court of Appeals held that the trustee breached his fiduciary duty in failing to seek advice of an independent mining expert during renegotiations of a lease.
- In *In the Matter of the Martha R. Gray Testamentary Trust*, 00PR1758 (Jan. 8, 2004), the Denver Probate Court applied proportionate liability pursuant to C.R.S. § 13-21-111.5(1) in lieu of joint and several liability where two co-trustees failed to monitor trust administration by the third co-trustee.

Additional Colorado UTC 2016 Comments/Recommendation

1. Section 1010 is referenced in 15-5-105(b)(11).
2. *Seeman* and *Vento* are still good law (as of 6/21/2016).
3. No Colorado case law re: 15-1.1-109.
4. Here in Section 1010, the trustee is only required to disclose the trustee's fiduciary capacity, not the identity of the trust itself as required pursuant to C.R.S. § 15-16-306(1).
 - a. No Colorado case law re: 15-16-306(1).
 - b. *Galdjie v. Darwish*, 113 Cal.App.4th 1331, __ Cal.Rptr.3d __ California Court of Appeals, Second District, Fourth Division (Dec. 4, 2003) at 1347 observes:

“Against this background, the Legislature repealed section 2267 of the Civil Code in 1986 and substituted sections 18000 and 18004 of the Probate Code to make clear that trustees would not be personally liable, and generally need not fear loss of their personal assets, when acting on behalf of a trust in dealing with third parties. (1986 Cal.Stats. ch. 820, § 7.) The purpose behind the enactment of section 18000, as explained by the Law Revision Commission, is to "excuse[] the trustee from personal liability on a contract whether either the trustee's representative capacity or the identity of the trust is revealed.”

- c. *Van Gundy v. Van Gundy*, 292 P.3d 1201, (Colo.App. 2012) based on 15-1.1-101 Trustee did not breach his fiduciary duty under the trust agreement where trustee purchased stock on margin and failed to diversify, and where the trust agreement stated trustee would have the power and discretion
 “[t]o invest and reinvest in common stocks, preferred stocks, investment trusts, bonds, securities and other property, real or personal, foreign or domestic, including any undivided interest in any one or more common trust funds maintained by any corporate trustee, *whether or not such investments be of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such investment or reinvestment may have upon the diversity of the investments.*”
 (Emphasis added.)
 - d. *Head v. Head*, 323 P.3d 505, 261 Or.App. 478 (Or.App. 2014)
 - i. At 483: “defendants raised an affirmative defense of "reliance on trust instrument, ORS 130.825.”
 - ii. ORS 130.825, Reliance on trust instrument: A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance. Cite as ORS 130.825 History. 2005 c. 348, §88
5. Recommend: Add subsections (d), (e), and (f) based on C.R.S. §§ 15-16-306(4),(6), & (7), respectively.

REFERENCE MATERIAL

C.R.S. § 15-1.1-109. Delegation of investment and management functions

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

HISTORY: Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

C.R.S. § 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.

Restatement (Second) of Trusts § 264