

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

Minutes of February 5, 2020

Participants

In person:	By phone:
• Connie Eyster, Chair	• John Buckley
• Steve Brainerd	• Joe Hodges
• Walter Kelly	• Jean Stewart
• Stan Kent	
• Michael Kirtland	
• Georgine Kryda	
• Carl Stevens	

The meeting was held at CBA offices, 1290 Broadway, Suite 1700 in Denver.
The meeting was called to order at 9:10 a.m. by the Chair and adjourned at 10:30 a.m.
Minutes of 12/4/19 were approved.

Section 501. Rights of Beneficiary's Creditor or Assignee – Steve B.

Discussion: To the best of the attendees' knowledge, the issues raised by Mike Holder regarding potential cross references to other statutes regarding collections and garnishments have been satisfied. Thus, the committee reviewed and finalized the following wording for 15-5-501.

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 BE APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR (B) THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.**

VOTE: SECTION 501 UNANIMOUSLY APPROVED.

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

Eric S. emailed that he is in favor of the new language in 411 on terminations and modifications of non-charitable irrevocable trusts. The committee is awaiting Eric's report of his discussion with Elder Law regarding 411.

Section 505, Creditor's Claim Against Settlor. – Georgine & Connie

Georgine recapped the committee's history regarding 505 in the:

- Nov. 6, 2019 minutes;
- UTC 505 Memo of Dec. 2, 2019; and
- Draft Language for 505 (See attachments to Connie's email of 2/4/20).

Connie read UTC 505.

Discussion centered on 505(a)(1)&(2) with respect to the:

- treatment of joint trusts;
- Pandy v. Independent Bank, 2016 CO 49, 372 P.3d 1047 (Colo. 2016) – which is prior to the Colorado Uniform Trust Code (CUTC), but which the Colorado Supreme Court en banc granted access to the entire trust;
- definition of “settlor”;
- what is considered as “contribution,” “gift,” and “interest”;
- potential for fraudulent conveyances;
- impact of property titled in one spouse's name, but intended to be marital property;
- presence of a schedule of property denoting respective interests, versus presumption of 50/50 equitable interest;
- impact of typical language of “entire joint trust can be used for benefit of either settlor, but each settlor may withdraw only up to 50% of the trust” – with and without presence of a spouse having one or more creditors;
- revocable versus irrevocable trusts; and
- what committee members are seeing in practice:
 - can always convey assets outright to a spouse with the understanding that the recipient-spouse would create a trust of which the initial conveyor-spouse is the beneficiary,
 - clients are transferring assets “up the chain” to parents to get a step up in basis, and then assets fall into a trust for benefit of children, and
 - something feels different regarding a trust for a spouse's lifetime benefit where the spouse can push assets to someone else, otherwise reverting to settlor.

The principal hypothetical was: What if A buys a house 100% with A's money and titles it as Tenants-in-Common with B? Five years later, A's creditors claim they are entitled to the entire house, but that is not going to be the outcome. How is this different from a joint trust?

- Once put property in joint tenancy (JTWROS or TIC), then have made a gift.
- What's the difference between real estate and cash?
 - Revocation language: If settlor can withdraw 100%.

- Carl S.: What if one spouse is not on title when the property is contributed to the trust?
 - Consensus: Gift or recognition that property was equitably owned by both (even when titled in one spouse's name only).

Proposed language circulated, discussed, but not yet approved:

- for the end of each of 505(a)(1)&(2): If a trust has more than one settlor, the amount a creditor or assignee of a particular settlor may reach may not exceed the portion of the trust of which the person is deemed the settlor as provided in 15-5-103;
- for 505(a)(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.~~

Jean S. made three points:

1. The court may view a case one way if a testamentary power is being exercised, but may view it differently if a general power of appointment is being used to pass assets through/into a trust where the assets will be protected from creditors.
2. The domestic relations realm has an exercise/non-exercise distinction based on University National Bank v. Rhoadarmer, 827 P.2d 561 (Colo. App.1991).
 - a. Connie: "Non-exercise" is the second side of the "exercise/non-exercise" coin.
 - b. John B. agreed regarding the bilateral nature of exercise/non-exercise of powers, and making any exceptions clear for the court.
3. It makes judges nervous to see statutory provisions starting with "unless the context provides/requires otherwise ..." We have the common law to provide context.

Consensus:

- Keep "settlor" as defined in at 15-15-103, but perhaps add "as defined in this Code".
 - Carl S.: Note that definition of "settlor" is "establishes" or "contributes to."
 - Connie: Settlor defined by contribution. How to define contribution?
 - Cannot protect what the settlor contributes, but can still reach.
- Intended result: If one can withdraw 100% of something, and have a creditor, then one is up against Rhoadarmer.
 - But, if we use the proposed language above, we would not be changing the result because the definition of settlor would be based on that settlor's contribution, which seems awkward.

Steve B. proposed: We could live with the language we have. "With respect to jointly owned revocable trusts, then [RULE]." Then, we would have carve-outs for revocable trusts.

Did community property states change their definition of settlor?

- Arizona relied on its community property laws.

For March 4, 2020:

- Eric Solem's report from his discussion with Elder Law re: 15-5-411;
- Continue with 15-5-505, Connie and Georgine to revisit with respect to joint trusts, and to propose language; and
- Discussion regarding next steps.

The next meeting will be on March 4, 2020 at 9 a.m. at the CBA offices, 1290 Broadway, Suite 1700 in Denver.

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. If a trust has more than one settlor or contributor, 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. The settlor’s contribution shall not include any property to the extent that a third party holds a power to revoke or withdraw such property.

Commented [CTE1]: This language appeared in the 2005 bill, and also is in the AZ Trust Code provisions.

Commented [CTE2]: This is language I drafted to address the joint trust issue.

(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. This paragraph does not apply to any trust from which any distribution to the settlor can be made as a result of the exercise of a power of appointment held by a third party.

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Commented [CTE3]: This language is from the AZ statute and is an alternative to the language in (i)

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Commented [CTE4]: Consider adding this language from the Ohio statute

(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;

Commented [CTE5]: “nonexercise” is not part of the Ohio statute, but consider whether it could/should be added. After our discussion in February, I would be okay with removing “nonexercise.”

(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;

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~~(B)~~(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 [CTE6]: 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].