

PART 3
REPRESENTATION
General Comment

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustee, guardians, and conservators), and what is known as virtual representation.

Section 301 is the introductory section. The representation principles of this article have numerous applications under this Code. The representation principles of this article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 302 – 305 cover the different types of representation. Section 302 deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered in C.R.S. § 15-1-703 [which will become CTC 15-5-603], which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Section 303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind, or appoint another to represent and bind, a minor or unborn child. Section 304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust (see Section 105). Settlers are free to specify their own methods for providing substituted notice and obtaining substituted consent.

PART 3
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Colorado Comments

No changes were made to Section 304.

Minor, nonsubstantive changes were made to Section 301 and 305(a) to correct statutory references.

New 301.5: Scope of Representative’s Authority and Duty of Certain Representatives:

The language from UTC 305(b) and 305(c) were moved to new section 301.5, and additional language was added. Original sections 305(b) and 305(c) were deleted.

Section 15-5-301.5(a) is new language.

Section 15-5-301.5(b) is the same UTC 305(b), with the addition of a clarifying phrase. This section permits a representative to exercise substituted judgment in acting on behalf of the person represented in considering the general benefit accruing to the living members of the family of the person represented.

Section 15-5-301.5(c) is the same as UTC 305(c), with the addition of the word “represented”.

Section 15-5-301.5(d) is new. This section places a duty of good faith on parents acting as a representative, parent-appointed representatives, and representatives appointed by the court. Section 15-5-301.5(d) does not apply to other representatives acting under Part 3 because they exercise their authority by virtue of an office which has defined fiduciary duties.

302 – Representation by a holder of a general testamentary power of appointment: A sentence was added to the end of 302 as a cross-reference to existing C.R.S. § 15-10-403(3)(a).

C.R.S. § 15-10-403(3) describes who may be bound by orders binding others in formal proceedings involving trusts or estates of decedents, in judicially supervised settlements, and in select other matters; 403(3)(a) specifically addresses holders of presently exercisable powers of appointment.

A similar cross-reference back to CTC 302 should also be added to C.R.S. § 15-10-403(3)(a), as follows:

“15-10-403(3)(a). . . For persons who may be represented and bound by holders of a general testamentary power of appointment, see section 15-5-302.”

303 – Representation by fiduciaries and parents: The following underlined language was added to 303(a)(6):

“A parent may represent and bind, or appoint another person to represent and bind, the parent’s minor or unborn child if a conservator or guardian for the child has not been appointed; provided that a person appointed by a settlor to represent the settlor’s minor or unborn child may not be related or subordinate to the settlor within the meaning of IRC §672(c).”

The **first** underlined phrase was added to allow a parent who has power to represent his or her child to appoint a third party to do so, so long as the appointed person has no conflict and there is no guardian or conservator appointed for the child.

The **second** underlined phrase was added due to the committee's recognition of possible estate tax inclusion issues where a settlor-parent appoints a related or subordinate party to represent the settlor's minor or unborn child. Allowing a settlor-parent to appoint a person who is not independent from the settlor to act on behalf of a child could cause estate tax inclusion problems for many irrevocable trusts intended for tax purposes.

Additionally, the committee recommended the following change to C.R.S. § 15-10-403(3)(b) to make Section 303 and existing C.R.S. § 15-10-403 consistent with respect to a trustee's ability to bind beneficiaries:

~~“(b) To the extent there is no conflict of interest . . . orders binding a trustee bind the beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties;”~~

305 – Appointment of representative: Paragraph (a) is unchanged.

Paragraphs (b) and (c) were deleted; text was added as new 301.5 in their stead. See 301.5 discussion.