

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
AGENDA**

August 17, 2017

- 1. Introductions**
- 2. Approval of May 18, 2017 (Regular) and July 20, 2017 (Special CTC) Minutes**
- 3. Announcements**
- 4. SRC Approved Proposals**
 - a. Active Matters - Work to Finalize Required**
 - (i) Deposit of Original Documents Subcommittee (Timothy Bounds, Co-Chair, and Peter W. Bullard, Co-Chair)**
 - (ii) Public Administrator Subcommittee (Melissa R. Schwartz, Chair)**
 - b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons**
 - (i) Proposed Amendment to § 15-14-707, C.R.S. (John Burrus)**
- 5. Legislative Report – Jeremy Schupbach**
- 6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees**
 - a. UTC Subcommittee (Dennis N. Whitmer, Chair)**
 - b. Uniform Directed Trustee Act Subcommittee (Kevin Millard, Co-Chair, and Kelly Cooper, Co-Chair)**
 - c. Legislation Review Joint Subcommittee (Michael D. Holder, Chair)**

- d. **Proposed Amendment to Comply with IRC 1.643(a)(3) (Eugene P. Zuspann, Chair)**
 - e. **Advance Legislative Response Team (Spencer J. Crona, Chair)**
 - f. **ADR Legislation (C. Jean Stewart, Chair)**
- 7. **Inactive Matters**
 - a. **Authorize Revisor to Publish Comments to Uniform Acts (Sonny Wiegand, Co-Chair, and Susan L. Boothby, Co-Chair)**
 - b. **HSA Funds Subcommittee (Gordon Williams, Chair)**
- 8. **Report from Elder Law Section – Arlene Barringer**
- 9. **Report from Other Sections of the Bar**
- 10. **New Matters**
- 11. **Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**
 - a. **Bankruptcy/Inherited IRAs (approved in 2015-2016)**
 - b. **Changes to the Uniform Power of Appointment Act (approved in 2015-2016)**
 - c. **Disclosure of Fiduciary Fees, §§ 15-10-602 and 15-12-705, C.R.S. (approved in 2015-2016)**

CBA TRUST AND ESTATE SECTION
COLORADO TRUST CODE SPECIAL MEETING MINUTES

July 20, 2017

1. Welcome and Introduction

- Leia Ursery, incoming chair of the Statutory Revisions Committee, called the meeting to order at approximately 1:33 p.m. Leia noted that the meeting was not being called by the SRC itself, so that the format would be different for this special meeting to answer questions and comments about the proposed Uniform Trust Code (“UTC”) adaptation, which will be referred to as the Colorado Trust Code (“CTC”).
- An attendance sheet was not circulated for this meeting. Several members from the bar associations various sections were in attendance either in person or via the telephone.

2. Announcements

- Kelly Dickson Cooper noted that today’s meeting was a “Q&A” format. There will be a vote on the proposed statute at the August meeting of the Statutory Revisions Committee. Kelly noted that the subcommittee has been working on the proposed statute for over five (5) years.
- Connie Eyster and Dennis Whitmer opened the floor to questions from the members in attendance.

3. Question and Answer Session

- Dennis explained that the CTC subcommittee has reviewed the entire UTC and incorporated the provisions into the CTC with the following exceptions: creditor claims (part 5) and revocable trusts (part 6). Both parts of the UTC are already incorporated into the Colorado Probate Code. Dennis advised the attendees that a final version of the CTC with comments can be found on the UTC webpage (<http://www.cobar.org/For-Members/CBA-Sections/Trust-and-Estate/Uniform-Trust-Code>).
- Dennis and Connie discussed that the draft statute incorporates changes that were made to the 2005 version. The proposed changes were made to incorporate Colorado law, while others were made for consistency purposes.
- The subcommittee as a whole noted that there was a good deal of collaboration from other committees regarding the provisions which were being changed or amended.
- Dennis mentioned that during the presentation at the Estate Planning retreat, there were some sections of the CTC that were the product of extensive discussion and debate among several different groups, such as attorneys, bankers, trust officers, other sections of the bar. The result of this is that even minor changes that were considered and compromised on may affect other provisions of the bill, or raise issues with other sections of the bar and the legislature. Dennis said that the subcommittee will likely take up part 5 (creditor claims) in the future.
- Connie Eyster gave a background on the UTC, stating that the UTC was promulgated because the law on trusts in many states is or was non-existent. Accordingly, the purpose of the UTC is to fill in gaps where the law is not clear. To date, thirty-three (33)

states have enacted some version of the UTC. Connie identified each of the parts of the UTC which were considered by the subcommittee. Parts 6 (revocable trusts) and 9 (prudent investor act), which are already incorporated into the Probate Code, will either be placed into the CTC or left where they are in the Probate Code.

- Susan Fox asked a questions about a Trustee's power to hire advisors and/or professionals, and how the Trustee's role would interact with an agent under a medical power of attorney in certain circumstances. Dennis responded that the CTC is not getting rid of the existing Fiduciaries' Powers Act, which allows a Trustee to hire professionals. The relationship between a Trustee and an agent under a medical power of attorney is addressed in the Uniform Power of Attorney act, which is already in the Probate Code. Steve Brainerd added that the proposed CTC allows Trustees to delegate administrative tasks.
- Mimi Goodman asked about why the definitions of a charitable organization is different for purposes of "qualified beneficiaries" versus "others treated as qualified beneficiaries." Connie Eyster explained that the comments to the UTC discuss charitable trusts not having beneficiaries in the usual sense, so that the subcommittee felt it was necessary to include charitable trusts in the definition of "qualified beneficiaries." Connie also noted that UTC/CTC provisions are the default – i.e. they can be drafted around. There are certain mandatory provisions located in proposed § 15-5-105.
- There was a question about how the proposed statute would affect trusts already in existence. Dennis Whitmer and Connie Eyster addressed this by saying the CTC will apply to all trusts created on, before, or after the effective date. Connie noted that specific questions of administration will dictate whether the CTC applies, but that many of the provisions have their roots in the common law and restatement(s) on trusts, so it is not likely to dramatically alter how current trusts are administered under the proposed CTC. Connie did caution that – again, the CTC is being proposed to provide clarity, so there is always the possibility of an uncertain outcome. Dennis added that if a trusts violates a provision of the CTC, it is likely that it is already an invalid trust. Connie noted that if applying the CTC would be contrary to the Settlor's intent, then the provision would not apply.
- Mark Darling commented that the flexibility of the CTC is similar to that which is already in the Probate Code. There are ways to seek relief if applying UTC/CTC would cause a problem or thwart a Settlor's intent.
- Kelly Dickson Cooper asked whether representation standards would be different for the Probate Code, CTC, decanting statutes, and virtual representation statutes. Mark Darling addressed this by stating that the committee's goal was to meet a consensus of all groups involved so that they could get a bill drafted, and then go back and figure out inconsistencies. Mark noted that conforming amendments will have to be implemented along with the CTC. Connie Eyster will be working on conforming amendments. Darla Daniel stated that the virtual representation statutes apply in 'formal' proceedings, so that trusts operate outside of them. Darla noted that the decanting provisions in the CTC are substantially the same as in other statutes.
- Mimi Goodman asked about fiduciary powers in the CTC and Fiduciaries' Powers Act. Darla Daniel and Dennis Whitmer confirmed that the parts of the UTC dealing with

fiduciary powers were intentionally taken out so that this specific issue would still be governed by the Fiduciaries' Powers Act. Connie Eyster noted that proposed § 15-5-816 is clear that the provisions of the CTC are in addition to those already stated in the Fiduciaries' Powers Act. There will be no issues with drafting a provision in a trust that specifically incorporates the Fiduciaries' Powers Act.

- Susan Fox asked for clarification on proposed § 15-5-814. Darla Daniel stated that this specific provision and part 6 (revocable trusts) are implicated so the answer would depend on guidance from other sections of the CTC. Connie added that the specific provision at issue is a savings clause – i.e. so that someone who is a Trustee and a beneficiary does not have estate inclusion issues.
- Walter Kelly asked about approval by LPC and how far along the subcommittee was in this process. Darla Daniel noted that she and Mark Darling are working on a memorandum to address concerns from the bankers association. Meanwhile, other sections of the Bar are still reviewing the proposed statute. It would be premature to send to LPC until SRC has voted on the proposed statute and conforming amendments. Leia Ursery noted that the proposed statute requires SRC approval first before LPC convenes in January 2018.
- Kelly Dickson Cooper asked if any proposed changes would be addressed by SRC or by the executive council. Mark Darling and Dennis Whitmer addressed this question by stating that what the change is and who suggests it will factor in, but it will ultimately be the decision of executive council. In the interim, any input on proposed changes will likely be done in SRC.
- Mark Darling noted that Dave Kirch had asked about whether the provisions in the Probate Code about a party concealing assets and “no contest” clauses would be incorporated into CTC. Kelly Dickson Cooper Mark Darling both weighed in that the provisions of the proposed CTC will incorporate current Colorado case law and statutory codes regarding no contest clauses.
- Dennis Whitmer addressed a discussion he had with Dave Kirch and Kevin Millard regarding ascertainable standards language and estate tax inclusion. Dennis said the subcommittee is happy to address those items, but will likely postpone addressing them directly until they begin to look at conforming amendments.
- Dennis Whitmer and Mark Darling led a discussion about judicial settlements under the proposed CTC. The UTC has a provision for non-judicial settlements, but not judicial settlements. The UTC has more details on modifications, amendments, and termination of trusts than the Probate Code does. The goal of the changes to the proposed CTC were to say that judges and courts cannot ignore modifications and terminations when looking at judicial settlements. Mark still thinks the two sections (judicial settlements and non-judicial settlements) need more work to make them more consistent, but now there will be a process for handling private settlements and judicial settlements with respect to trusts.

- Dennis Whitmer noted that the subcommittee assigned each section to 2-3 members, so if there are any questions about a specific section, the respective subcommittee members who were assigned to that Section will be happy to answer.
- Leia Ursery reminded the attendees that there is a website for the subcommittee and where it could be found: <http://www.cobar.org/For-Members/CBA-Sections/Trust-and-Estate/Uniform-Trust-Code>.
- Mark Darling added that thought process behind drafting this statute was to address concerns and questions regarding specific provisions, but the bill as drafted needs to be moving toward the legislature because of time constraints.
- Leia Ursery closed by reminding all attendees that the August meeting of the Statutory Revisions Committee will be to vote on the proposed statute as drafted. There will not be a time at the August SRC meeting for discussing revisions, comments, etc. Accordingly, any questions or suggestions should be addressed to the subcommittee directly prior to the August SRC meeting.
- The meeting was adjourned at approximately 2:36 p.m.

Respectfully submitted,

Tim Bounds

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
MINUTES**

May 18, 2017

1. Welcome and Introduction

Josie M. Faix called the meeting to order at 1:35 p.m.

2. Approval of Minutes

The minutes of the April 20, 2017 meeting were approved unanimously.

3. Announcements

John Lauce is retiring as the Boulder County Probate Registrar and this will be his last Super Thursday meeting. We thanked him for his service.

4. UTC Subcommittee (Dennis N. Whitmer, Chair, dnwhitmer@hfwpc.com)

Dennis provided a brief introduction of the Subcommittee's work and a history of the last effort to pursue Uniform Trust Code legislation in 2005. The Subcommittee used the 2005 revisions to the Uniform Trust Code as the starting point for its work. This time, the Subcommittee requested input from all interest groups and the version presented to the Committee at this time is supported. The Subcommittee's work represents a balancing of several considerations, including the settlor's powers, requirements for an enforceable trust, and the powers of the courts. The Subcommittee divided itself into several groups and each group tackled a different part of the Uniform Trust Code; once each group completed its review, the results were presented to and discussed by the Subcommittee as a whole. Dennis thanked Connie Eyster for serving as the Subcommittee's recorder and Michael Kirkland for serving as a liaison from the Elder Law Section.

Connie Eyster provided further background and context. The Subcommittee's goal is to establish more extensive law on trusts in Colorado and to clarify and resolve existing conflicts. While the Subcommittee tried to maintain uniformity, it felt it was important to maintain existing concepts under Colorado law and to build consensus among the various interest groups (i.e. litigators and drafters). At this point, some version of the Uniform Trust Code has been passed in 33 states; Colorado and Illinois are hoping for legislation in 2018.

The proposed legislation will be referred to as the "Colorado Trust Code." The Subcommittee's work includes Parts 1, 2, 3, 4, 7, 8, 10 and 11 of the Uniform Trust Code. Part 5 (relating to creditor claims) has been reserved for now as it remains problematic. Part 6 will incorporate existing §§ 15-16-701 et seq., C.R.S. ("Revocable Trusts") and Part 9 already exists under §§ 15-1.1-101 et seq., C.R.S. ("Uniform Prudent

Investor Act”). As part of the Subcommittee’s work product, comments have been included after each Part to more specifically identify changes and compromises made.

Dennis presented on Part 1 - General Provisions and Definitions. In addition to definitions, Part 1 contains both default and mandatory rules and affirms that the Colorado Trust Code will be supplemented by common law, principles of equity and other Colorado statutes. Finally, Part 1 includes provisions on the method for and waiver of notice in non-judicial proceedings.

Stephen Brainerd and Marc Darling presented on Part 2 - Judicial Proceedings. In addition to provisions concerning venue for judicial proceedings, the major adjustment will concern trust registration statements, which will no longer be mandatory. Over the summer, the Subcommittee will continue to work on language to ensure consistency between judicial and non-judicial proceedings.

Darla Daniel presented on Part 3 - Representation. It is important to note that there provisions are default in nature and can be modified by more specific provisions in the trust agreement.

Jonathan Haskell and Jeffrey Kadavy presented on Part 4 - Creation, Validity, Modification and Termination.

Dennis presented on Part 7 - Office of Trustee.

Darla presented on Part 8 - Duties and Powers. The Subcommittee did not make any changes to 11 of the 17 sections in Part 8.

Marc presented on Part 10 - Liability. Marc cautioned that the statute of limitations will be substantially changed. Currently, there is a 6-month limitation upon the provision of a final accounting and breach of trust actions must be commenced within 3 years of the date facts are known or should have been known. The Colorado Trust Code will provide a 1-year limitation period upon the provision of inventories, interim accountings and final accountings. With respect to breach of trust, the 3-year limitation period will run from the date a beneficiary’s interest terminates; the date the trust terminates; the removal or resignation of a trustee; or the date facts are known or should have been known.

In terms of conforming amendments, the Subcommittee presently anticipates the following:

- §§ 15-16-101 through 15-16-401, C.R.S. will likely be repealed in their entirety;
- §§ 15-16-501 et seq., C.R.S. and §§ 15-16-601 et seq., C.R.S. will likely be incorporated into the Colorado Trust Code; and
- §§ 15-16-801 et seq., C.R.S. and §§ 15-16-901 et seq., C.R.S. will likely be preserved for now.

The Subcommittee will continue to work on conforming definitions in Title 15 and other sections such as §§ 15-10-201 and 15-11-701, C.R.S. need to be reviewed. The additional work will be ready for presentation at the July 2017 meeting.

The Subcommittee plans to contact other CBA Sections (e.g. Real Estate, Business, Family, Tax) and the Judicial Branch over the summer.

There will be a special question-and-answer session on Friday afternoon of the Estate Planning Retreat (June 9, 2017) and a special meeting on July 20, 2017. There will be a final vote on the proposed legislation at the normal August 2017 meeting. If approved, we will start locating appropriate bill sponsors and approaching outside groups.

If anyone has questions, suggestions, etc., please contact the Subcommittee as soon as possible.

Meeting adjourned at 3:00 p.m.

Respectfully submitted,
/s/ Leia G. Ursery
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