

Article 81 – Colorado Business, Investment and Financial Trusts Act

Preface

This draft¹ of a proposed Colorado business, investment and financial trusts act provides a statutory framework for the common law business trust – which is a form of unincorporated association with trustees who conduct the activities of the association for the benefit of the owners of the association.

The common law business trust is recognized by the courts of Colorado and the other states of the United States. The existence of business trusts in Colorado is also recognized by section 2-4-401(8), C.R.S., the definition of person for the purpose of Colorado statutes. Beginning with Massachusetts in 1909, a majority of the states have adopted business trust statutes.²

Today the business trust format is used mainly for investment and financial activities. The term *trust entity* was selected to identify the entity formed under the proposed act instead of the term business trust because the entity will be more often used for activities other than the conduct of a business. The term *trust* is retained because the trust relationship between the trustees and the beneficial owners is what distinguishes the trust entity from the other entities in the world of business, investment and finance.

The term *trust entity*, like the term statutory trust used in the Delaware Statutory Trust Act (Delaware act), is also selected instead of the term

¹ This draft of a Colorado Business, Investment and Financial Trusts Act is a work in progress of the Entity Drafting Committee of the Business Law Section of the Colorado Bar Association. This draft is being circulated for comments and suggestions and has not been approved by the committee, the section or the association. Your participation in this regard is solicited. Please email John DeBruyn, who has taken the lead in drafting the proposed act, at jdebruyn@debruyn.com or call him at 303-377-1724.

² The current total is 30 states that have adopted business trust statutes. (The total excludes states, like Colorado, that have merely included business trusts within the statutory definition of person.) The initial Massachusetts statute was limited to rules for court proceedings and service of process involving common law business trusts. Generally, today, business trust statutes cover more aspects of the entity, provide for the formation of a business trust under the statute by filing with the state, and recognize that a common law business trust may be formed without filing with the state.

business trust so that *trust entities* used for investment and financial activities may avoid an unwarranted characterization as business trusts for purposes of the federal bankruptcy act.³ Under the bankruptcy act business trusts and other forms of unincorporated associations are classified as corporations. The draft provides for a form of trust entity, the statutory trust, which does not include an association of its beneficial owners like a business trust so that the entity is less likely to be classified as a business trust or a corporation under the bankruptcy act.

The business trust and the statutory trust have freely transferable ownership interests. Freely transferable ownership interests are generally regarded as a corporate characteristic. However, a trust entity may be formed under the proposed act without having either freely transferable beneficial interests or an association of the owners like a business trust. This form of trust entity is even less likely to be classified as a business trust or a corporation under the bankruptcy act.

Except for the fiduciary relationship between the trustees and the beneficial owners, the Colorado trust entity is patterned on the Colorado LLC. A trust entity may be formed to carry on any activity for which a Colorado LLC may be formed. The provisions of the proposed act concerning the fiduciary relationship, which is not part of a Colorado LLC, are adapted from the Delaware act. The other provisions, concerning the other aspects of the trust entity, are adapted from the Colorado Limited Liability Company Act, article 80 of title 7, C.R.S.⁴

³ This was the stated rationale for the change in the Delaware act, made in 2002, from the term business trust to the term statutory trust. Before the change was made, the act was called the Delaware Business Trust Act.

⁴ In addition, section 7-81-108(3), in the proposed act, applies the Colorado Limited Liability Company Act, to supplement the proposed act with respect to any matters that are not covered by the proposed act. There is a similar arrangement between limited partnerships and general partnerships under section 7-62-1104. That section links the limited partnership act to the general partnership acts, articles 60 and 64 of title 7, to deal with any matters relating to a limited partnership that are not covered by the limited partnership act.

Article 81 – Colorado Business, Investment and Financial Trusts Act

7-81-101. Short title. This article shall be known and may be cited as the “Colorado Business, Investment and Financial Trusts Act”.

7-81-102. Definitions– use of other terms – activities. (1) **Definitions.** In this article unless the context otherwise requires:

⁵ (a) “Activities” with respect to a trust entity means the activity or activities for which the trust entity is formed.

(b) "Beneficial interest" means an ownership interest with respect to a trust entity.

(c) "Beneficial owner" means an owner of a beneficial interest.

(d) “Business trust” means a business trust, which is a form of trust entity, formed as provided in section 7-81-103(1)(b)(IV) and (2)(a).

(e) “Fiduciary relationship” means a fiduciary relationship with respect to the property and activities of a trust entity.

(f) "Governing instruments" means the writings ~~of the trustees and beneficial owners of a trust entity~~ as to it's the affairs of a trust entity and the conduct of its activities.

(g) “Statutory trust” means a statutory trust, which is a form of trust entity, formed as provided in section 7-81-103(1)(b)(IV) and (2)(a).

(h) “Transferee” means an assignee or a transferee:

(I) Of a beneficial interest with respect to a trust entity other than a business trust or statutory trust; and

(II) Who has not been admitted as a beneficial owner.

(i) “Trust entity” means an entity that is formed under this article.

⁵ Keith Whitelaw suggested rationalization between the use of the terms “activity” and “activities” through out article 81. “Activities” is now the defined term and is used in all of the operative provisions of article 81 in the place of “activity”.

(j) “Trustee” means a manager of a trust entity.

(2) **Use of other terms.** The governing instruments of a trust entity may adopt other terms to refer to the trustees, beneficial owners, beneficial interests, and governing instruments of the trust entity.

⁶ (3) **Nature of activities.** The activities for which a trust entity may be formed shall be limited to the activities for which a domestic limited liability company may be formed under article 80 of this title.

7-81-103. Trust entities with limited liability – business trust and statutory trust. (1) **Formation – statement of trust entity.** (a) One or more persons may form a trust entity by delivering a statement of trust entity to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(b) The statement of trust entity shall state:

(I) The domestic entity name of the trust entity which domestic entity name shall comply with part 6 of article 90 of this title;

(II) The principal office address of its principal office;

(III) The registered agent name and registered agent address of its registered agent; and

(IV) If the trust entity is formed as a business trust or a statutory trust, a ~~statement~~ that the trust entity is formed as a business trust or as a statutory trust, as the case may be.

(c) The statement of trust entity may state any other matters relating to the trust entity.

⁷ (d) An amendment to the statement of trust entity under section 7-81-209 as provided by section 7-81-108(3) is invalid unless approved by the same persons

⁶ Keith Whitelaw also noted that the rule limiting the activities of a trust entity to activities for which an LLC may be formed under article 80, formerly located in section 7-81-102(1)(a)(II), was context sensitive because the rule was located in section 7-81-102(1) which begins “unless the context requires otherwise.” This was resolved by moving and renumbering the rule to become section 7-81-102(2)(a).

⁷ The required approval or consent of the beneficial owners, in sections 7-81-103(1)(d), 7-81-106(4)(a), 7-81-107(2)(b)(I) and (3)(c) and 7-81-112(1)(a)(I), was changed to the same persons who may amend the governing instruments. The default rule in that regard is in section 7-81-108(1)(b)(II).

and in the same manner as required to amend the governing instruments of a trust entity.

(2) **Business trust and statutory trust.** (a) If the statement of trust entity states that the trust entity is formed as a business trust or a statutory trust, it shall be so formed and shall constitute the corresponding form of trust entity, a business trust or a statutory trust, as the case may be.

(b) The form of a trust entity formed as provided in subsection (1) of this section may be changed from one of the several forms, a business trust, a statutory trust, or a trust entity that is not formed as a business trust or a statutory trust, to one of the other such forms by an amendment to its statement of trust entity. A trust entity that changes from one of such forms to another is for all purposes the same entity that existed before it changed.

⁸ (3) **Application of articles 80 and 90.** (a) The application of part 2 of article 80 of this title, relating to formation, as provided by section 7-81-108(3) is limited to trust entities formed under this section.

(b) Part 5 of article 90 of this title, providing for annual reports, and part 7 of such article, providing for registered agents and service of process, shall apply to trust entities formed under this section and not to trust entities formed under section 7-80-104.

7-81-104. Trust entity with beneficial owner liability for trade or business activities. (1) **Investment or financial activity trust defined.** In this subsection (1) and subsection (2) of this section:

(a)(I) “Investment or financial activity trust” means an unincorporated entity or arrangement that includes a relationship with respect to its property and activities which relationship corresponds to a fiduciary relationship as described in section 7-81-106(1) or (1) and (5).

(II) An investment or financial activity trust may also include an association which corresponds to an unincorporated association as described in section 7-81-106(1)(c).

⁸ Part 2 of article 80 does not apply to trust entities formed under section 7-80-104 because they do not have filings with the secretary of state. The application of parts 5 and 7 of article 90 is similarly limited. Section 7-81-103(2)(b) trumps part 3 of article 80 which would otherwise apply parts 5 and 7 of article 90 to trust entities formed under section 7-81-104.

(b) “Investment or financial activity trust” excludes a limited liability partnership, a limited partnership, a limited partnership association, a limited liability company and a trust entity formed under section 7-81-103.

(2) **Formation – governing instruments.** (a) An investment or financial activity trust may be formed as a trust entity under this section by the adoption of governing instruments that create, establish or otherwise form the investment or financial activity trust and provide in substance that:

(I) The investment or financial activity trust or the fiduciary relationship which is part of the investment or financial activity trust is governed by or otherwise subject to this section; or

(II) If established, the unincorporated association which is part of the investment or financial activity trust is governed by or otherwise subject to this section; or

(III) The liability of the owners of the ownership interests in the investment or financial activity trust is governed by or otherwise subject to this section.

(b) The governing instruments of a trust entity formed under this section may adopt a term other than investment or financial activity trust to refer to the trust entity.

(c) The authority of the trustees and others to act on behalf of a trust entity formed under this section is conferred ~~by or in accordance with~~ under the provisions of the governing instruments, this article and article 80 of this title applied as provided by section 7-81-108(1)(a) and (3).

⁹ (2) Statement of trade name. Article 71 of this title, providing for registration of trade names, shall apply to a trust entity formed under this section to the extent provided in section 7-81-106.5.

(4) **Liability – trade or business activities.** (a) In this subsection (3), “trade or business” has the same meaning as that term has for income tax purposes under section 162(a) of the federal internal revenue code.

⁹ Article 71 is made applicable to trust entities formed under section 7-81-104 on the same basis as general partnerships, other than limited liability partnerships, which are not required to have trade name statements unless they do business under the names of all of their partners.

(b) The liability of a beneficial owner of a trust entity formed under this section with respect to the conduct of a trade or business by the trust entity shall be the same as that of a partner under article 64 of this title with respect to the conduct of a trade or business by a domestic partnership other than a domestic limited liability partnership.

¹⁰ **7-81-105. Limited liability of trustees and beneficial owners.** (1) Except as otherwise provided in subsection (2) of this section and section 7-81-104(4), trustees and beneficial owners of a trust entity are not liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the trust entity.

(2)(a) In any case in which a party seeks to hold the beneficial owners of a trust entity personally responsible for the alleged improper actions of the trust entity, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(b) For purposes of this section, the failure of a trust entity to observe the formalities or requirements relating to the management of its activities and affairs is not in itself a ground for imposing personal liability on the beneficial owners for liabilities of the trust entity.

7-81-106. Composition, continuity, management and trustees – optional provisions. (1) **Fiduciary relationship – unincorporated association.** (a) A trust entity shall be composed of a fiduciary relationship between one or more trustees as fiduciaries and one or more beneficial owners as beneficiaries. The fiduciary relationship is integrated into, and is a part of, the trust entity.

(b) The fiduciary relationship is governed by the law of this state applicable to express trusts generally to the extent that the application of such law to such fiduciary relationship is not inconsistent with the provisions of the governing instruments, this article and article 80 of this title ~~which provisions govern matters relating to the trust entity~~ applied as provided by section 7-81-108(1)(a) and (3).

¹⁰ In this version, Michael Sabien's question about leaving the matter of limited liability to the default rules is answered by setting the limited liability provisions of article 80 forth in a new section 7-81-105. The two subsections, section 7-80-105(1) and (2), are derived from sections 7-80-705 and 7-80-107, respectively.

(c) An unincorporated association of the beneficial owners, if established by the governing instruments of a trust entity other than a statutory trust, shall be an additional component of the trust entity that is integrated into, and is a part of, the trust entity.

(2) **Continuity of existence – distinct entity.** (a) The existence of a trust entity continues indefinitely and without regard to either the lapse of time or the association, death, incapacity, termination, bankruptcy, dissociation or other change in status of any or all of its trustees and beneficial owners.

(b) A trust entity is distinct from its beneficiaries and trustees.

(3) **Management – powers.** (a)(I) Except as otherwise provided under subparagraph (II) of this paragraph (a), decisions with respect to a trust entity shall be made by a majority of the trustees.

¹¹ (II)(A) In this subparagraph (II), “specified provisions” means the provisions of paragraph (a) of subsection (4) of this section and sections 7-81-103(1)(d), 7-81-107(2)(b)(I) and (3)(c), 7-81-108(b)(I) and (II) and 7-81-112(1)(a)(I).

(B) Except as otherwise provided under the specified provisions, the consent of each trustee is necessary to authorize an act of the trust entity, or of any trustee or other person on behalf of the trust entity, that is not in the ordinary course of the business and other activities of the trust entity.

(C) An act with respect to a trust entity performed under the specified provisions does not require the consent of the trustees under this subsection (3).

(D) Except as may be required for an act with respect to a trust entity under the specified provisions, the consent of the beneficial owners is not required to authorize any act by, or on behalf of, a trust entity.

¹² (b)(I) In this paragraph (b), “enumerated powers” mean the powers enumerated in section 7-80-104(1)(a) to (n) applied with respect to a trust entity as provided by section 7-81-108(3).

¹¹ The specified provisions, in the order of reference, relate to (1) designation of trustees, (2) amendment of statement of trust entity, (3) distributions by agreement, (4) admission of beneficial owners, (5) amendment of governing instruments, and (6) consent to dissolution.

¹² The powers of the trustee in the context of a business trust take the place of the agency authority of a manager in the context of an LLC. Section 7-81-106(3)(b)(III)(A) adapts the scope of agency authority under sections 7-80-405(b)(1) and 7-80-803.5 to limit the routine exercise of powers by a trustee.

(II)(A) The enumerated powers are vested in the trust entity.

(B) If the trustees are the fiduciaries of the fiduciary relationship of a trust entity, the enumerated powers are also vested in the trustees.

(C) The power to exercise the enumerated powers on behalf of the trust entity is vested in the trustees.

¹³ (III)(A) An act of a trustee, including the execution of an instrument in the name of the trust entity, for apparently carrying on in the ordinary course of the business and other activities of the trust entity or activities of the kind carried on by the trust entity or for winding up after dissolution binds the trust entity, unless the trustee had no authority to act for trust entity in the particular matter and the person with whom the trustee was dealing had notice that the trustee lacked authority; and

(B) An act of a trustee, including the execution of an instrument in the name of the trust entity, with the consent of each of the trustees binds the trust.

(IV) If the trustees are the fiduciaries of the fiduciary relationship, the powers vested in a trustee, including the holding of title to property of the trust entity, may be exercised by the trustee as provided in subparagraph (III) of this paragraph (b) in the name of the trustee as a trustee on behalf of the trust entity with the same effect as if such powers were exercised, and such property was held, in the name of the trust entity.

(V) This paragraph (b) applies in the place of section 7-80-405(1)(b) relating to agency authority which would but for this subparagraph (V) apply to the trustees as provided by section 7-81-108(3).

(4) Trustee designation and removal – trustees as beneficial owner – trustee’s creditors. (a) ¹⁴ Trustees may be designated and removed by the same persons and in the same manner as required to amend the governing instruments of a trust entity.

¹³ Section 7-81-106(3)(b)(III)(A) adapts the scope of agency authority under sections 7-80-405(b)(1) and 7-80-803.5 to limit the routine exercise of powers by a trustee.

¹⁴ The required approval or consent of the beneficial owners, in sections 7-81-103(1)(d), 7-81-106(4)(a), 7-81-107(2)(b)(I) and (3)(c) and 7-81-112(1)(a)(I), was changed to the same persons who may amend the governing instruments. The default rule in that regard is in section 7-81-108(1)(b)(II).

(b) If the trust relationship of a trust entity exists between one or more trustees as fiduciaries and only one beneficial owner or transferee as beneficiary, the trust entity shall have at least one trustee who is not also a beneficial owner or transferee.

(c) A creditor of a trustee does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property or activities of a trust entity.

(5) Optional provisions – fiduciary relationship – purpose – series and classes. To the extent provided by the governing instruments of a trust entity:

(a) The fiduciary relationship shall exist between the trustees as fiduciaries and the trust entity as the beneficiary or between the trust entity as fiduciary and the beneficial owners as beneficiaries.

(b) The nature of, and principles applicable to, the fiduciary relationship, and to the interests of the parties to the fiduciary relationship and their obligations to each other, shall be the same or similar to the corresponding relationship, interests and obligations between a sole proprietor and a person acting on behalf of the sole proprietor as an agent, attorney-in-fact, nominee, custodian, or in a similar capacity or more than one of such capacities.

(c) The activities to be conducted by or on behalf of the trust entity shall be limited by a purpose for the trust entity or shall not be so limited so that the activities may be conducted for any lawful purpose.

¹⁵ (d)(I) The trust entity shall be divided into two or more series or funds with each consisting of property, activities, obligations, a fiduciary relationship and other attributes of a trust entity which attributes may be separate or shared and which series, funds, and attributes shall be integrated into, and be a part of, the trust entity.

(II) The trust entity and each such series or fund shall have one or more classes or series of trustees, beneficial owners, and beneficial interests with such relative rights, obligations, powers, authority, and other attributes as may be provided in the governing instruments.

¹⁵ Seriously boiled down version of Delaware act series and class provisions without, the problematic, liability insulation between series.

7-81-107. Beneficial interests – distributions – transfers – creditors – optional provisions. (1) **Interest in property – nature and share.** (a) A beneficial interest includes an undivided interest with respect to the property and ~~the~~ activities of a trust entity. However, a beneficial owner has no interest in specific property or activities of a trust entity.

(b) The undivided interest of a beneficial owner shall be in the proportion that the value of the contributions made by the beneficial owner has to the value of the contributions made by all of the beneficial owners. The value of the contributions shall be as stated in the records that a trust entity is required to maintain under section 7-80-408(1)(e) as provided by section 7-81-108(3).

(c) A beneficial interest is personal property and equitable in nature.

(2) **Profit and loss, distributions and withdrawal.** (a) The profits and losses and distributions of cash and other assets of a trust entity shall be allocated among the beneficial owners on the basis of their respective undivided interests with respect to the property and activities of the trust entity.

(b) Except as otherwise provided under paragraph (c) of this subsection (2), a beneficial owner is entitled to receive distributions from a trust entity before the dissolution and winding up of the trust entity:

¹⁶ (I) As agreed by the same persons and in the same manner as required to amend the governing instruments of a trust entity; and

(II) To the extent and at the times or upon the happening of the events stated in the governing instruments. ~~or as otherwise agreed by all of the trustees and beneficial owners.~~

(c)(I) Sections 7-80-602 and 7-80-603 relating to withdrawal and resignation shall apply as provided by section 7-81-108(3) only with respect to a beneficial owner of a trust entity other than a business trust or a statutory trust.

(II) Section 7-80-606 relating to limitations on distributions applies as provided by section 7-81-108(3).

¹⁶ The required approval or consent of the beneficial owners, in sections 7-81-103(1)(d), 7-81-106(4)(a), 7-81-107(2)(b)(I) and (3)(c) and 7-81-112(1)(a)(I), was changed to the same persons who may amend the governing instruments. The default rule in that regard is in section 7-81-108(1)(b)(II).

(3) Transfer of beneficial interests – admission of beneficial owners. (a) A person who purchases or otherwise acquires a beneficial interest with respect to a trust entity that is a business trust or statutory trust becomes a beneficial owner of the beneficial interest as provided by “Uniform Commercial Code – Investment Securities”, article 8 of title 4, C.R.S.

(b) A transferee of a beneficial interest with respect to a trust entity other than a business trust or a statutory trust is only entitled to receive the share of profits or other compensation by way of income and the return of contributions to which the beneficial owner of the beneficial interest would otherwise be entitled and has no right to participate in the management of the ~~business and other~~ activities of the trust entity or to become a beneficial owner.

¹⁷ (c) Except as otherwise provided under paragraph (a) of this subsection (3), persons may be admitted as beneficial owners by the same persons and in the same manner as required to amend the governing instruments of a trust entity.

(4) Creditors of beneficial owners. (a) The rights and remedies of a creditor of a beneficial owner of a trust entity that is a business trust or statutory trust are the same as the rights and remedies of a creditor of a shareholder of a domestic corporation.

¹⁸ (b) On application to the district court by any judgment creditor of a beneficial owner of a trust entity other than a business trust or statutory trust, the district court may charge the beneficial interest of the beneficial owner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee of the beneficial interest. This article shall not deprive any such beneficial owner of the benefit of any exemption laws applicable to the beneficial interest of such beneficial owner.

¹⁷ The required approval or consent of the beneficial owners, in sections 7-81-103(1)(d), 7-81-106(4)(a), 7-81-107(2)(b)(I) and (3)(c) and 7-81-112(1)(a)(I), was changed to the same persons who may amend the governing instruments. The default rule in that regard is in section 7-81-108(1)(b)(II).

¹⁸ Paragraph (b) applies to non-transferable beneficial interests. This version of the provision, suggested by Doug Cain, places these beneficial interests in parity with a partner’s interest in a limited partnership under article 62 of title 7, C.R.S. The language in this version is the same as section 7-62-703 which applies to creditors of partners of limited partnerships. Article 81 is linked to article 80 with its creditor provision for LLCs, section 7-80-703. This linkage parallels the corresponding arrangement for creditors of partners of limited partnerships because article 62 is similarly linked to article 60 with its creditor provision for pre-1997 general partnerships, section 7-60-128. See note 4 on page 2 regarding linkage.

(c) A creditor of a beneficial owner does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property or activities of a trust entity.

(5) Optional provisions relating to beneficial interests and owners. To the extent provided by the governing instruments of a trust entity:

(a) A beneficial interest shall not include any right to an allocation of profits and losses or distribution of any property or other economic interests with respect to the trust entity or its property or activities and shall be limited to other rights, powers, authority and interests with respect to trust entity and its property and activities.

(b) A beneficial interest shall not be encumbered, assigned or otherwise transferred except as permitted by the governing instruments.

(c) An assignee or other holder of any right, power or other interest, legal or equitable, with respect to a beneficial interest other than the beneficial owner shall be regarded and otherwise treated as a beneficial owner or transferee.

(d) A beneficial owner or transferee who fails to make a contribution that the beneficial owner or transferee is obligated to make or fails to perform in accordance with, or to comply with the terms and conditions of, the governing instruments shall be subject to penalties for or consequences of the failure as shall be provided by the governing instruments including, but not limited to, forced sale or forfeiture of the beneficial interest of the beneficial owner or transferee.

(e)(I) A beneficial interest shall be characterized as real property to the extent of the interests of the beneficial owner with respect to the real property of the trust entity and characterized as personal property to the extent of the interests of the beneficial owner with respect to the personal property of the trust entity.

(II) Personal property of a trust entity, which personal property is associated with and insubstantial in relation to the real property of the trust entity, shall be treated as real property for the purpose determining the character of a beneficial interest.

(f) The rights, interests and obligations of a beneficial owner with respect to part or all of the property of the trust entity shall be the same or similar to the

rights, interests and obligations that a sole owner or tenant in common would have with respect to such property.

(g) The situs of a beneficial interest shall be in this state.

7-81-108. Governing instruments – article 80 – foreign entities – construction. (1) **Governing instruments – controlling provisions.** (a)(I) As used in this paragraph (a) and in paragraph (c) of subsection (3) of this section:

¹⁹ (A) “Article 80 controlling provisions” mean the provisions set forth in subsection (2) of this section which correspond to the provisions of section 7-80-108(1.5) and (2)(a), (d) and (e).

(B) “Article 80 default provisions” mean the other provisions of article 80 of this title applied as provided by subsection (3) of this section.

(II) Except as otherwise provided by the article 80 controlling provisions, the provisions of the governing instruments of a trust entity shall:

(A) Govern matters related to its affairs and the conduct of its activities and the matters so governed shall include, without limitation, the rights, obligations, powers, authority, limitations, qualifications, and relations among the trustees, the beneficial owners, the transferees, the trust entity and any persons who consent to be bound by the governing instruments;

(B) Control over the provisions of this article to the extent of any inconsistency between the provisions of the governing instruments and the provisions of this article; and

(C) Control over the article 80 default provisions to the extent of any inconsistency between the provisions of the governing instruments and the article 80 default provisions. ~~that would but for this subsection (C) govern matters relating to the trust entity as provided by subsection (3) of this section.~~

(III) To the extent the governing instruments do not otherwise provide, the provisions of this article ~~and the article 80 default provisions~~ shall control.

(b)(I) The initial governing instruments of a trust entity shall be adopted in writing by all of its trustees, if any, and beneficial owners, if any, at the time.

¹⁹ Michael Sabien’s question about leaving the limited liability to linkage prompted consideration of a similar up grade for the controlling provisions of article 80 that are now set forth in section 7-81-108(2).

(II) Additional governing instruments may be adopted, amendment, restatement, repeal or revocation of and a governing instrument of a trust entity requires may be amended, restated, repealed or revoked a consent in writing adopted by of all of its trustees, if any, and beneficial owners, if any, at the time, and, if there are no beneficial owners, then all of its trustees at the time, and if there are no beneficial owners or trustees, then all of the transferees holding the beneficial interest of the last remaining beneficial owner.

(III) More than one trust entity may be governed by a single governing instrument or set of governing instruments.

(2) **Controlling provisions.** (a) To the extent that a trustee, beneficial owner or other person that is a party to, or is otherwise bound by, the governing instruments has duties, including, but not limited to, fiduciary duties, to a trust entity or to another trustee or beneficial owner, or other person that is a party to or is otherwise bound by a governing instrument, the duties of such trustee, beneficial owner or other person may be restricted or eliminated by provisions in the governing instruments, as long as any such provision is not manifestly unreasonable.

(b) A governing instrument may not:

(I) Unreasonably restrict the rights of trustees and beneficial owners under section 7-80-408 that apply as provided by subsection (3) of this section with respect to records and other information and to formal accountings;

(II) Eliminate the obligation of good faith and fair dealing under section 7-80-404(3) that applies as provided by subsection (3) of this section with respect to trustees and beneficial owners; except that the governing instrument may prescribe the standards by which the performance of the obligation is to be measured, if such standards are not unreasonable; or

(III) Restrict rights of, or impose duties on, persons other than the beneficial owners and transferees without the consent of such persons.

(3) **Application of article 80 – default provisions.** (a) For the purpose of applying the provisions of article 80 of this title as provided by this article unless the context in such article 80 requires otherwise: trustee corresponds to manager, beneficial owner corresponds to member, beneficial interest corresponds to ownership interest of a member, transferee corresponds to

assignee or transferee, governing instruments correspond to operating agreement, trust entity corresponds to limited liability company, and statement of trust entity corresponds to articles of organization.

(b) Except as otherwise provided under the provisions of the governing instruments and this article applied as provided by paragraph (a) of subsection (1) of this section, matters relating to a trust entity shall be governed by the provisions of article 80 of this title applicable to corresponding matters relating to a domestic limited liability company with managers who are vested with its management under its articles of organization.

²⁰ (c) The specification in this article of particular article 80 default provisions as provisions to be applied as provided in this section (3) shall not operate to limit the application as provided by paragraphs (a) and (b) of this subsection (3) of the other provisions of article 80 of this title.

²¹ (4) **Application of article 90 – Foreign trust entities.** ~~(e) Part 5 of article 90 of this title, providing for annual reports, part 7 of such article, providing for registered agents and service of process, and part 8 of such article 90 of this title,~~ providing for the transaction of business or the conduct of activities by foreign entities, shall apply to a foreign trust entity.

(5) **Construction.** (a) In paragraphs (b) to (e) of this subsection (4), “this article” includes provisions of articles 71, 80 and 90 of this title to the extent that such provisions are made applicable with respect to a trust entity as provided by this article.

(b) It is the intent of this article to give the maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.

(c) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(d) The specification in this article of particular matters that may be addressed in the governing instruments of a trust entity does not limit the scope of the matters that may be governed by the governing instruments.

²⁰ Particular provisions of article 80 are specified in other sections of article 81 as being applicable to trust entities as provided in section 7-81-108(3). Perhaps there could be an inference that provisions not so specified are not applicable to trust entities as generally provided, whether so specified or not.

²¹ The cross reference to the other article 90 provisions, applicable with respect to trust entities formed under section 7-81-103 was moved to subsection (3) of that section. What is left here in section 7-81-108(4) should perhaps be moved into a new section 7-81-113, relating to foreign trust entities.

(e) This article is a general act intended as a unified coverage of its subject matter. However, this article does not preclude the formation or recognition under the law of this state of any entity or arrangement that is similar to a trust entity.

7-81-111. Jurisdiction – venue – dispute resolution. (1) **Jurisdiction of courts.** (a) The courts of this state shall have jurisdiction over the formation and internal affairs of a trust entity, including without limitation, the enforcement of its governing instruments and any proceedings under this article or under article 80 of this title as provided by section 7-81-108(3).

(b) A trust entity and its trustees, beneficial owners, transferees, and any persons who consent to be bound by its governing instruments are subject to the jurisdiction of the courts of this state in such matters.

(2) **Venue.** (a) In this subsection (2), “principal office” with respect to a trust entity formed under section 7-81-103 refers to the principal office as defined in section 7-90-102(52) and with respect to a trust entity formed under section 7-81-104 refers instead to the principal office designated as provided by the governing instruments or, if not so provided, as designated by the trust entity, from time to time, in a writing.

(b) A judicial proceeding within the jurisdiction of the courts of this state as provided by subsection (1) of this section with respect to a trust entity shall be brought in the district court for the county in this state where the street address of the principal office of the trust entity is located or, if the trust entity does not have its principal office in this state, the district court for the county where the street address of the registered office of the trust entity in this state is located, or if the trust entity has no principal office in this state and no registered agent, in the district court for the city and county of Denver.

(3) **Dispute resolution – optional provision.** To the extent provided in the governing instruments of a trust entity, controversies related to the internal affairs and other matters with respect to the trust entity which controversies are between or among any two or more of the trustees, the beneficial owners, the transferees, the trust entity and any persons who consent to be bound by the governing instruments shall be resolved and determined by mediation, arbitration or other forms of binding or nonbinding alternative dispute resolution as provided by the governing instruments.

7-81-112. Dissolution. (1) **Events of dissolution.** A trust entity is dissolved:

²² (a) Upon the consent given by the same persons and in the same manner as required to amend the governing instruments of a trust entity; or

(b) At the time or upon the occurrence of the events stated in the governing instruments.

(2) **Statement by trust entity formed under section 7-81-103.** Upon dissolution of a trust entity formed under section 7-81-103, the trust entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissolution stating:

(a) The domestic entity name of the trust entity; and

(b) The principal office address of the trust entity's principal office.

(3) **Rules for application of part 8 of article 80.** The application of part 8 of article 80 of this title as provided by section 7-81-108(3) with respect to a trust entity is clarified and modified as follows:

(a) Subsections (1) and (2) of this section and section 7-81-106(3)(b)(III) take the place of sections 7-80-801, 7-80-802 and 7-80-803.5, respectively.

(b) After the dissolution of a trust entity, the conduct of its activities is subject to the limitations of section 7-80-803.3.

(c) A dissolved trust entity may dispose of claims against it as provided by sections 7-90-911 and 7-90-912.

(d) Judicial proceedings that may be commenced by the attorney general under section 7-81-810(1) and (4)(a)(II) apply only with respect to a trust entity formed under section 7-81-103.

(e) The requirement of section 7-80-813(1) for the clerk of court to deliver a copy of a decree to the secretary of state for filing applies only with respect to a trust entity formed under section 7-81-103.

²² The required approval or consent of the beneficial owners, in sections 7-81-103(1)(d), 7-81-106(4)(a), 7-81-107(2)(b)(I) and (3)(c) and 7-81-112(1)(a)(I), was changed to the same persons who may amend the governing instruments. The default rule in that regard is in section 7-81-108(1)(b)(II).