

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

August 5, 2020

- 1. Introductions**
- 2. Approval of March 4, 2020 Minutes**
- 3. Announcements**
- 4. Legislative Report**
- 5. SRC Approved Proposals**
 - a. Active Matters**
 - (i) CUTC Part 5**
 - b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons**
 - (i) Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)ⁱ**
- 6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees**
 - a. UTC Subcommittee Part 5 (Connie Eyster, Co-Chair)**
 - b. Legislation Review Joint Subcommittee (Michael D. Holder, Chair)**
 - c. Advance Legislative Response Team (Marco Chayet and Letty Maxfield, Co-Chairs)**
 - d. ADR Legislation (C. Jean Stewart, Chair)**
 - e. Uniform Fiduciary Income and Principal Act Subcommittee (Gene Zuspann, Chair and Georgine Kryda)**
 - f. Child Support in Probate Subcommittee (Pat Mellen, Chair)**
 - g. Uniform Electronic Wills Act (Letty Maxfield and Herb Tucker, Co-Chairs)**
 - h. Witness Requirements in Advanced Directives (Carl Stevens)**

- i. **Uniform Probate Code (UPC) 2019 Revisions (Bette Heller)**
- 7. **Inactive Matters**
 - a. **Changes to Conservator’s Report (Lindsay Andrew)**
- 8. **Report from Elder Law Section**
- 9. **Report from Other Sections of the Bar**
- 10. **New Matters**
 - a. **SB 129 - Amendment (Letty Maxfield)**
- 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) (Gordon Williams)**
 - d. **~~Uniform Directed Trust Act Subcommittee (Kevin Millard, Co-Chair, and Kelly Cooper, Co-Chair)~~**

ⁱ Judicial (State Court Administrator) would only agree to become the sponsoring agency of this legislation if the seven separate categories under the definition of “original estate planning document” was pared down to the single category of “will documents.” This was insisted upon to minimize the size of the “pilot program” Judicial envisioned would be needed to initially implement the legislation in partnership with (and utilizing the technological resources of) the Colorado State Archives office. Once Judicial has completed it’s pilot program and the electronic document upload, storage, and retrieval system for “will documents” is operating as intended under the statute, the other six categories of “original estate planning documents” as they appear in § 15-23-103(14) in HB19-1229 as originally introduced on March 8, 2019 should be restored to the Act by amendment. See <https://leg.colorado.gov/bills/hb19-1229>.

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

March 4, 2020

1. Introductions

Co-Chair Lauren da Cunha called the meeting to order at 1:40 p.m. There were introductions from those in attendance and on the phone/online.

2. Approval of February 5, 2020 Minutes

The minutes from the February 5, 2020 meeting were unanimously approved.

3. Announcements

SRC will meet the first Wednesday of August. There will be no meetings in June and July.

Kathy Seidel had two announcements to share with the group.

The Probate Trial and Procedure Committee is forming a subcommittee to look into the Compensation and Cost Recovery Act. Mark Darling and Marcie McMinimee are chairing the subcommittee, please reach out to either of them if you are interested in joining.

The Trust and Estate Section request from the Colorado Court of Appeals to submit an amicus brief regarding the *Trevino* case.* The case turns on whether a personal representative can use a POD account to pay a debt of the decedent that had not defaulted and that had another signer. If you are interested in helping to write the brief, please reach out to Kathy.

*Upon learning that *Trevino* was to be discussed and before any discussion was had, Mike Holder, an attorney in the case, left the room.

4. Legislative Report

Letty Maxfield provided the Legislative Report. The remote notary bill is still working its way through the Capitol but it has been amended to include a provision that allows privileged documents to remain privileged despite the use of a remote notary.

5. SRC Approved Proposals

a. Active Matters - Work to Finalize Required

- (i) Amendment to ethical rules re Colorado Electronic Abandoned Estate Planning Documents Act**

Frank Hill provided that report. The committee that oversees Colorado's ethical rules set up a subcommittee to review with the Colorado Electronic Abandoned Estate Planning Documents Act (CEAEPDA) subcommittee the purposed changes that would need to take place to allow attorneys to utilize CEAEPDA. They had their first meeting and will meet again in two weeks. The meetings have gone well and they plan on presenting to the full committee in a couple of months.

b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons

- (i) **Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)ⁱ**

6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees

a. UTC Subcommittee Part 5 (Connie Eyster, Co-Chair)

This subcommittee did not meet this month. There is no report.

b. Legislation Review Joint Subcommittee (Michael D. Holder, Chair)

No report.

c. Advance Legislative Response Team (Marco Chayet and Letty Maxfield, Co-Chairs)

Elder law has voted to disband the Advance Legislative Response Team as changes to the way the Colorado Bar Association operates no longer makes this subcommittee necessary.

d. ADR Legislation (C. Jean Stewart, Chair)

No report.

e. Uniform Fiduciary Income and Principal Act Subcommittee (Gene Zuspann, Chair and Georgine Kryda)

The subcommittee will finish reviewing the substantive portions in their April meeting. They plan on presenting to SRC in May.

f. Child Support in Probate Subcommittee (Pat Mellen, Chair)

No report.

g. Uniform Electronic Wills Act (Letty Maxfield and Herb Tucker, Co-Chairs)

The subcommittee will continue to review the Act into next year. They plan on presenting to SRC in October 2021.

h. Witness Requirements in Advanced Directives (Carl Stevens)

The report was given by Gordon Williams. The subcommittee did not have any problem with Advance Directives only need to be notarized. They noted that it appears that the Advance Directive statute allows the Court to change the Advance Directive if there satisfactory evidence. The subcommittee will discuss whether the decision to require only notarization will be opposed proponents of the Right to Life.

i. Uniform Probate Code (UPC) 2019 Revisions (Bette Heller and Darla Daniels, Co-Charis)

The subcommittee continues to meet and is still reviewing the non-substantive changes.

7. Inactive Matters

a. Changes to Conservator's Report (Lindsay Andrew)

No report.

8. Report from Elder Law Section

No report.

9. Report from Other Sections of the Bar

No reports.

10. New Matters

a. SB 129 - Amendment (Letty Maxfield)

This bill regards emergency guardianship pre-meetings. The proposed amendments require the use of a court visitor to assess whether there is anyone in the local community who can serve as guardian in place of a government entity. The proposed amendment has been accepted and is moving forward in the Capitol.

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) (Gordon Williams)**
- d. ~~Uniform Directed Trust Act Subcommittee (Kevin Millard, Co-Chair, and Kelly Cooper, Co-Chair)~~**

Lauren da Cunha adjourned the meeting at 1:58 p.m.

Respectfully submitted,
/s/ Lauren da Cunha

ⁱ Judicial (State Court Administrator) would only agree to become the sponsoring agency of this legislation if the seven separate categories under the definition of “original estate planning document” was pared down to the single category of “will documents.” This was insisted upon to minimize the size of the “pilot program” Judicial envisioned would be needed to initially implement the legislation in partnership with (and utilizing the technological resources of) the Colorado State Archives office. Once Judicial has completed it’s pilot program and the electronic document upload, storage, and retrieval system for “will documents” is operating as intended under the statute, the other six categories of “original estate planning documents” as they appear in § 15-23-103(14) in HB19-1229 as originally introduced on March 8, 2019 should be restored to the Act by amendment. See <https://leg.colorado.gov/bills/hb19-1229>.

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, 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.

Comparison of Proposed 501 and 501 as drafted in the UTC.

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, 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.

Uniform Law Comments.

General Comment to Article 5

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. Section 501 applies if the trust does not contain a spendthrift provision or the spendthrift provision, if any, does not apply to the beneficiary's interest. Section 502 states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of exception creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Comment Amended in 2004

ULC
Comment to
Section 501

This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503.

Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. *See* (Third) of Trusts §56 (2003); Restatement (Second) of Trusts §§147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. *See, e.g.*, Cal. Prob. Code Section 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

2005 Amendment. A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to

negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in Section 503. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.

Colorado Committee Report

- 1) It bears repeating that §501 applies to situations where there is no spendthrift protection afforded by the terms of the trusts. Spendthrift trusts have been recognized in Colorado as a matter of common law since at least 1938 but the protection depends on the stated intent of the settlor as determined from the trust terms. *Snyder v. O'Connor*, 102 Colo. 567, 81 P.2d 773 (1938); *Newell v. Tubbs*, 103 Colo. 224, 84 P.2d 820 (1938).
- 2) See the discussion under proposed §502(2) as to the fact that no expansive language will need to be included in the trust and a simple statement the interest is subject to a spendthrift trust will be sufficient. The effect of such a statement is in the definitions of the current Colorado Uniform Trust Code (CUTC) enacted by the General Assembly in 2018. Spendthrift provisions are defined in CUTC §15-5-103(19) as a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.
- 3) The addition of the last sentence to the proposed section that other Colorado law must be considered as a limitation on amounts available for satisfaction of creditor claims was added by the Committee to codify a position that is set forth in the national Uniform Law Comments. The consensus was that any ambiguity on this question should be resolved by expressly providing that other creditor laws of the state should apply to limit any award that a judge may determine appropriate.
- 4) Although unrelated to §501 it should be pointed out that a section regarding spendthrift trusts is found in the modification provisions of Part. 4 of the CUTC as adopted in 2018. C.R.S. §15-5-411(3) provides that a spendthrift provision is not "presumed" to be a material purpose of the trust for purposes of modification under §411(1).

15-5-502. SPENDTHRIFT PROVISION.

(1) A SPENDTHRIFT PROVISION IS VALID ONLY IF IT RESTRAINS BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF A BENEFICIARY'S INTEREST.

(2) A TERM OF A TRUST PROVIDING THAT THE INTEREST OF A BENEFICIARY IS HELD SUBJECT TO A "SPENDTHRIFT TRUST," OR WORDS OF SIMILAR IMPORT, IS SUFFICIENT TO RESTRAIN BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF THE BENEFICIARY'S INTEREST.

(3) A BENEFICIARY MAY NOT TRANSFER AN INTEREST IN A TRUST IN VIOLATION OF A VALID SPENDTHRIFT PROVISION AND, EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH THE INTEREST OR A DISTRIBUTION BY THE TRUSTEE BEFORE ITS RECEIPT BY THE BENEFICIARY.

(4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY'S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY'S BENEFIT, AND NO TRUSTEE IS LIABLE TO ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

(5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY'S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE'S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

Comparison of Proposed Colorado 502 and 502 as drafted in the UTC:

15-5-502. Spendthrift Provision.

(1) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(2) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY’S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY’S BENEFIT, AND NO TRUSTEE IS LIABLE TO ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

(5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY’S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE’S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

Uniform Law Comments.

Comment to Section 502

Under this section, a settlor has the power to restrain the transfer of a beneficiary’s interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift provision, see Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary’s interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary’s creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under

this Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2).

Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a “spendthrift trust” or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts §58(2), (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor’s benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary’s purported assignment. The trustee may recommence distributions to the beneficiary at any time. The beneficiary, not having made a binding transfer, can withdraw the beneficiary’s direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).

Colorado Committee Report:

- 1) No Colorado case has addressed whether a spendthrift clause must prohibit both a voluntary and involuntary transfer of the beneficial interest. However, without setting out a formal definition the Colorado Supreme Court in *Newell V. Tubbs*, 103 Colo. 224, 84 P.2d 820, (Colo. 1938) stated that: “A spendthrift trust is 'a trust created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his improvidence or incapacity.” This language was cited most recently in *In Re Cohen*, 8 P.3d 429 (Colo. 1999).
- 2) Some other states have provided that a spendthrift clause can allow for the voluntary transfer of an interest and only prohibit involuntary transfers. Examples of states that have opted to allow such a result: Wyoming has adopted §502 without subsection (1) (note: the uniform law formats subsections with letters rather than numerals which are used by legislative drafting in Colorado). Florida adopted subsection (1) but exempted trusts adopted prior to the enactment. Kansas amended subsection (1) to only provide that a spendthrift trust is valid. It added another subsection that a beneficiary could not transfer an interest in violation of a spendthrift clause. Wisconsin amended its definition

of spendthrift to provide that a spendthrift provision means a term of a trust that restrains either or both of a voluntary or involuntary transfer of a beneficiary's interest. The Committee elected to adopt the position taken by the UTC.

- 3) Subsections (4) and (5) were added to §502 based upon additions considered and adopted by various other states concerning trust administration issues encountered by Trustees. There is concern that Trustees face uncertainty and liability regarding distributions for the benefit of a beneficiary rather than directly to a beneficiary and in regard to real property and tangible personal property owned by the trust but used by the beneficiary. These provisions also have applicability to situations where the beneficiary is incapacitated and in regard to Supplemental Needs Trusts. These provisions were generally modeled after Ohio and Tennessee revisions to the UTC.
- 4) A Conforming Amendment was made to C.R.S. § 15-5-816 at the time that the Committee adopted proposed §502. The committee approved the following suggested language:

15-5-816. Specific powers of trustee

(1) Without limiting the authority conferred by section 15-5-815, and in addition to the powers conferred pursuant to the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15, a trustee may:

(u) Pay an amount distributable to a beneficiary BY PAYING IT DIRECTLY TO THE BENEFICIARY OR BY APPLYING IT FOR THE BENEFICIARY'S BENEFIT AND, IN THE CASE OF A BENEFICIARY who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit or by:

- (I) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;
- (II) Paying it to the beneficiary's custodian pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, or custodial trustee pursuant to the "Colorado Uniform Custodial Trust Act", article 1.5 of this title 15, and for that purpose, creating a custodianship of [sic] custodial trust;
- (III) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
- (IV) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

15-5-503. Exceptions to spendthrift provision.

(a) DEFINITIONS.

(1) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(2) CHILD SUPPORT ORDER MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

(b) A SPENDTHRIFT PROVISION IS UNENFORCEABLE AGAINST:

(1) A CHILD WHO IS AN OBLIGEE PURSUANT TO A CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR; AND

(2) A JUDGMENT CREDITOR WHO HAS PROVIDED ESSENTIAL SERVICES FOR THE PROTECTION OF A BENEFICIARY'S INTEREST IN THE TRUST.

THIS SUBSECTION (b) DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

(c) THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO OBTAIN FROM A COURT AN ORDER ATTACHING 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.

Comparison of Proposed 503 and 503 as drafted in the UTC:

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) DEFINITIONS.

(1) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(2) CHILD SUPPORT ORDER MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

~~(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.~~

(b) A spendthrift provision is unenforceable against:

(1) ~~a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance~~WHO IS AN OBLIGEE PURSUANT TO A CURRENT CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR;

(2) a judgment creditor who has provided ESSENTIAL services for the protection of a beneficiary's interest in the trust; and

~~(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.~~

THIS SUBSECTION (b) DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

~~(c) A claimant against which a spendthrift provision cannot be enforced may~~THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO obtain from a court an order attaching 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.

Uniform Law Comments.

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction and specifies the remedies such exemption creditors may take to satisfy their claims.

The exception in subsection (b)(1) for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion.

Subsection (b)(1), unlike 85 Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution. Subsection (b)(1) refers both to "support" and "maintenance" in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of "child" in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State. For the definition of "state," which includes Puerto Rico and other American possessions, see Section 103(17).

The definition of "child" in subsection (a) is not exclusive. The definition clarifies that a "child" includes an individual awarded child support in any state. The definition does not expressly include but neither does it exclude persons awarded child support in some other country or political subdivision, such as a Canadian province.

The exception in subsection (b)(2) for a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust is in accord with Restatement (Third) of Trusts Section 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. See Restatement (Third) of Trusts Section 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (b)(3), which is similar to Restatement (Third) of Trusts Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift

restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 157-157.5 (4th ed. 1987).

Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions of present or future distributions. Depending on other creditor law of the state, additional remedies may be available should a beneficiary's interest not be subject to a spendthrift provision. Section 501, which applies in such situations, provides that the creditor may reach the beneficiary's interest under that section by attachment or "other means." Subsection (c), similar to Section 501, clarifies that the court has the authority to limit the creditor's relief as appropriate under the circumstances.

Colorado Committee Report:

(1) Colorado law does not currently contemplate exception creditors to a spendthrift clause. *In re Estate of Beren*, 321 P.3d 615 (Colo. App. 2013) "Spendthrift trusts are valid and enforceable in Colorado. *In re Cohen*, [8 P.3d 429, 430 n. 1](#) (Colo.1999); see *In re Portner*, [109 B.R. 977, 987 \(Bkrtcy.D.Colo.1989\)](#) (In Colorado, "spendthrift trusts are determined exclusively by common law because there are no statutory provisions regulating their existence."). Such trusts "provide a fund for the maintenance of the beneficiary, and at the same time ... secure it against his improvidence or incapacity." *Portner*, [109 B.R. at 987](#). Funds under the discretionary control of a trustee subject to a spendthrift provision cannot be garnished. *Brasser v. Hutchison*, [37 Colo.App. 528, 531, 549 P.2d 801, 803](#) (1976). But once such funds have been distributed, they

are within the reach of creditors. *See generally* [Restatement \(Third\) of Trusts § 58](#) cmt. d(2) (2003) (“After the income or principal of a spendthrift trust has been distributed to a beneficiary ... it can be reached by creditors.”).” Thus, because the spendthrift provision, even assuming its validity, no longer protected those trust funds that had become subject to mandatory distribution, the trial court properly allowed garnishment of those funds.”

As mentioned in the Comments to the UTC, both the Restatement (Second) of Trusts, §157 (Restatement (Third) of Trusts §59 do provide for certain exception creditors. Under the Restatement (Second) of Trusts, the following claimants could reach a beneficiary’s interest in the trust to satisfy a valid claim, despite a spendthrift clause: spousal and child support claimants, claimants who provided necessary services to a beneficiary, claimants who provided services and materials to preserve a beneficiary’s interest in the trust, and the US or a State. Under the Restatement (Third) of Trusts, only child and spousal support creditors, as well as creditors providing services necessary for the protection of the beneficiary’s interest in the trust, are named as exception creditors. Comment (a) to §59 of the Restatement (Third) Trusts, does provide, however, that governmental claims are, implicitly, exempted from enforcement of a spendthrift provision.

(2) The Committee, early in its discussions, reviewed the law in other states who have enacted the UTC. Of the approximately thirty-three jurisdictions reviewed, there were 12 states that did not allow for exception creditors, who had reserved Section 503 for possible enactment at a later date, or who did not include either children or spouses as exception creditors. Of those states that had enacted a version of the UTC, 8 states allowed for child support claimants as exception creditors, but not spousal creditors. Approximately 13 of the states either adopted the UTC verbatim or allowed for spousal creditors in some modified way.

No Exception Creditors: KY, ME, MN, CT, NJ

Reserved: AK, KS, MA, MS, MO, MT

Neither children nor spousal creditors: TN

Children exception creditors, but not spouses: AZ, DC, NC, SC, VT, VA, WV, UT

Allows spousal creditors in some way: FL, MD, MI, ND, OH, WI, WY, PA

Verbatim UTC language: AL, NH, NM, OR, IL

(3) After discussion, the committee determined that although Colorado does not currently have caselaw that supports allowing any exception creditors, the majority of states that have adopted the UTC have included child support claimants as exception creditors, and accordingly the committee drafted Section 503 with this intent. The language allowing child support claimants as exception creditors was drafted in close consultation with Kim Willoughby, as a liaison from the Family Law Section.

(4) After additional discussion, the committee also decided to include claimants who provided services to a beneficiary to assist that person in protecting their interest in the trust. The committee determined that without such a term, a beneficiary of limited means may be prevented from securing legal or other counsel to preserve their beneficial interest. This is consistent with, although perhaps broader than, the Cost and Compensation Act, §15-10-602, which allows counsel for a nonfiduciary to recover compensation when those services result in an order beneficiary to the trust, respondent, ward, or protected person. The Committee added “essential” as a modifier to the type of services, as suggested by the UTC Comments (“This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights under the trust.”), as a mechanism for limiting abuse.

(5) The committee chose, like several other states, to adopt language that made clear that the few exception creditors permitted under §503, should not impact special needs trusts. The language addressing special needs trusts was reviewed and approved by members of the Elder Law Committee.

(6) Although Government Claimants are not expressly included as exception creditors in this statute, such creditors may nonetheless be able to reach trust assets to satisfy their claims. *See* UTC Comments to §503; Reporter’s Note, Restatement (Third) Trusts, §59 (citing caselaw that federal taxing authorities would be able to reach the assets of a spendthrift trust, but that state taxing authorities’ ability to do so is less clear). The committee decided not to include government claimants as express exception creditors in order to preserve any opportunity a beneficiary may have to prevent governmental claims from bypassing a spendthrift clause.

Proposed CUTC 504

15-5-504. Discretionary Trusts; Effect of Standard.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child; and

(2) the court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

This subsection does not apply to a special needs trust, supplemental needs trust, or similar trust established for a person if its application could invalidate such a trust’s exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if its application has the effect or potential effect of rendering such person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee’s or cotrustee’s discretion to make distributions for the trustee’s or cotrustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor’s claim were the beneficiary not acting as trustee or cotrustee.

Comparison of Proposed CUTC 504 and UTC Section 504

15-5-504. Discretionary Trusts; Effect of Standard.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, ~~spouse or former spouse~~; and

(2) the court shall direct the trustee to pay to the child, ~~spouse or former spouse~~ such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

This subsection does not apply to a special needs trust, supplemental needs trust, or similar trust established for a person if its application could invalidate such a trust’s exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if its application has the effect or potential effect of rendering such person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee’s or cotrustee’s discretion to make distributions for the trustee’s or cotrustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor’s claim were the beneficiary not acting as trustee or cotrustee.

NCCUSL Comments

This section addresses the ability of a beneficiary’s creditor to reach the beneficiary’s discretionary trust interest, whether or not the exercise of the trustee’s discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter’s Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the

distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The effect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. See Section 814 cmt.

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

2004 Amendment. Section 504(e)

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's discretion to make distributions for the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee.

In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b). Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.

The Code does not specifically address the extent to which a creditor of a trustee-beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard.

For the definition of "ascertainable standard," see Section 103(2).

Colorado Committee Report (including 2005 Committee Comments)

(1) While trusts with valid spendthrift provisions directly prevent beneficiaries from assigning their interests and creditors of such beneficiaries from attaching their interests, the very nature of beneficial interests in discretionary trusts and trusts subject to a standard indirectly bar the reach of creditors of a beneficiary. A creditor who has attached a discretionary interest (because of the absence of a spendthrift provision or because a spendthrift exception applies)

cannot, as a general rule, force exercise of discretion. Thus, there is indirect protection against creditor claims.

(2) Colorado courts have tended to follow the Restatements with respect to trust administrative law. The Restatement (Second) of Trusts provided as follows:

§154. Trusts for Support

Except as stated in §§156 and 157, if by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.

§155. Discretionary Trusts

(1) Except as stated in § 156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.

(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.

(3) Colorado courts have followed the Restatement (Second) position with respect to discretionary trusts in determining whether a discretionary interest is "property" for purposes of division of property in divorce. Absent an abuse of discretion, a beneficiary cannot compel exercise of discretion and therefore, the discretionary interest is not "property" for this purpose. See for example *In Re Marriage of Rosenblum*, 602 P.2d 892 (Colo. App. 1979); *In Re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); and *In Re McCart*, 847 P.2d 184 (Colo. App. 1992.)

These decisions do not address whether and under what circumstances a beneficiary's creditor can force an exercise of discretion.

(4) The Restatement (Third) provides as follows:

§60. Transfer or Attachment of Discretionary Interests

Subject to the rules stated in sections 58 and 59 (on spendthrift trusts), if the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The

amounts a creditor can reach may be limited to provide for the beneficiary's needs (Comment c), or the amounts may be increased where the beneficiary is either the settlor (Comment f) or holds the discretionary power to determine his or her own distributions (Comment g).

Restatement (Third) of Trusts reiterates the common law right of a beneficiary's creditor to attach the beneficiary's discretionary interest unless a valid spendthrift provision applies to the interest. Restatement (Third) of Trusts Section 60 cmt. a. And under Restatement (Third), self-settled discretionary interests are not protected against creditor claims whether or not there is a spendthrift provision. Restatement (Third) of Trusts Section 60 cmt. f. However, the Restatement (Third) of Trusts, departs from Restatement (Second) as follows:

(a) The Restatement (Third) applies this principle to discretionary interests whether expressed in the form of a standard or not. Restatement (Third) of Trusts Section 60 cmt. a and Rptr's Notes on cmt. a.

(b) The Restatement (Third) points out that it is rare that a beneficiary is so powerless taking into account the beneficiary's circumstances, the terms of the discretionary power and the purposes of the trust. Thus, the exercise or non-exercise of discretion is always subject to judicial review to prevent abuse. Restatement (Third) of Trusts Section 60 cmt. e.

(c) Under the Restatement (Third), where a discretionary beneficiary is also trustee, his or her creditors are able to reach the maximum amount that the trustee/beneficiary can properly take. Restatement (Third) of Trusts Section 60 cmt. g.

(5) Compared with either Restatement's position, the rule codified in the UTC and proposed for the CUTC is much more protective of discretionary interests with respect to creditor claims. Section 504 makes it clear that, whether or not there is a spendthrift provision in the terms of the trust, no creditor of a beneficiary can compel a distribution that is subject to the trustee's discretion whether such discretion is expressed in the form of a standard or not, even if the trustee has abused discretion or failed to comply with the standard. Thus, under the UTC, even a creditor who has provided support to the beneficiary of a support trust is unable to force exercise of discretion.

Further, Subsection 504(e) eliminates the problematic position taken in Restatement (Third) Section 60 cmt g, protecting estate plans that employ a traditional family trust arrangement of which a surviving spouse serves as trustee, provided the trustee's power to make discretionary distributions to her/himself is limited by an ascertainable standard.

(6) Section 504(c) of the UTC makes a public policy exception with respect to a discretionary beneficiary's child, spouse or former spouse who has a judgment for support. Such a creditor can force exercise of discretion but only if the trustee has abused discretion or failed to comply with the standard. However, this provision only authorizes the court to force exercise of discretion in satisfaction of the judgment. It does not require it. If a court does act, the UTC requires

the court to direct the trustee to distribute to the creditor only an amount that is equitable taking into account the discretionary beneficiary's circumstances.

In keeping with Section 503, and for the reasons expressed in the report for that , Section, proposed Section 504 makes only a child – not a spouse or former spouse – an exception creditor. Among those states that have adopted the UTC, the following positions have been taken with respect to exception creditors:

Alabama – adopted 504 verbatim

Arizona – excepts child only (does not apply exceptions to special needs trusts)

Arkansas – omitted 504(c)

District of Columbia – reserved

Florida – creditors, including exception creditors under 504(2) (child, spouse, former spouse), may not compel a distribution or attach or otherwise reach the interest a beneficiary might have as a result of the trustee's discretion to make distributions to or for the benefit of the beneficiary

Kansas – omitted 504

Kentucky – excepts child and spouse

Maine – omitted 504(c)

Maryland – excepts (a) trust property subject to withdrawal power, and (b) contributions to trust by beneficiary

Mass. – reserved 504

Michigan – no exceptions to discretionary trust provision; trust property not subject to enforcement of a judgment until income or principal is distributed directly to trust beneficiary.

Minn. – no exception creditors

Mississippi – reserved all of Part 5

Missouri – creditor cannot attach, force judicial sale, or compel distributions or reach by any other means present or future discretionary distributions

Montana – no exception creditors

Nebraska – adopted 504 verbatim

New Hampshire – court may compel discretionary distribution to child, spouse, or former spouse in such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused discretion; and, with respect to alimony, only for

and to the extent that the judgment or court order expressly specifies the alimony amount attributable to the most basic food, shelter and medical needs of the former spouse.

New Mexico – enacted 504 verbatim

North Carolina – excepts child only

North Dakota – adopted 504 verbatim

Ohio – unless the settlor has explicitly provided in the trust that the beneficiary's child or spouse or both are excluded from benefiting from the trust, if there is a failure to apply standard or an abuse of discretion, then the court may order a distribution only if it is available for the beneficiary's support – but not for the satisfaction of a judgment for the support of a former spouse.

Oregon – omitted 504

Pennsylvania – adopted 504 verbatim

South Carolina – excepts child only (but does not apply to special needs trusts)

Tennessee – no exception creditors

Utah – adopted 504 verbatim

Vermont – adopted 504 verbatim

Virginia – excepts child only

West Virginia – excepts child only

Wisconsin – substantial reworking of text: no exception creditors; specifically provides that interest in discretionary trust is not “property”; general principles do not apply if beneficiary can make purely discretionary distributions to self or without consent of adverse party

Wyoming – no exception creditors; and may not compel a distribution or reach or attach the interest of a beneficiary until a distribution is received by the beneficiary, even if the trustee makes distributions directly to third parties for the benefit of the beneficiary.

(7) For the reasons discussed in the report for Section 503, the Committee proposes, like several other states, to ensure that special needs trusts are not adversely affected by the limited exception creditor provisions of Section 504(b).

15-5-505. 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.

(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.

(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 OF A POWER OF APPOINTMENT HELD IN A NONFIDUCIARY CAPACITY BY ANY PERSON OTHER THAN THE SETTLOR;

(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;

(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.

(3) AFTER THE DEATH OF A SETTLOR, 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.

(B) RESERVED.

Comparison of Proposed 505 and 505 as drafted in the UTC:

15-5-505. 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.

(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.

(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 OF A POWER OF APPOINTMENT HELD IN A NONFIDUCIARY CAPACITY BY ANY PERSON OTHER THAN THE SETTLOR;

(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;

(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.

(3) After the death of a settlor, ~~and subject to the settlor's right to direct the source from which liabilities will be paid,~~ 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].~~

Uniform Law Comments.

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts Section 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103(15).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable

trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a \$10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the \$10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes Section 14-7705(g) and Texas Property Code Section 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC Sections 2041(b)(2) or 2514(e) [greater of 5% or \$5,000], or IRC Section 2503(b) [\$10,000 in 2001].

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1-13.7 (1986).

Colorado Committee Report:

(1) Regarding UTC Subsection (a)(1): Consistent with the Uniform Law Commission (“ULC”) comments, and the 2005 committee’s comments, the Committee found no reason to challenge the diminishing significance of the common law view that a revocable trust is subject to the settlor’s creditors only if the settlor reserved the power to revoke [*Restatement (Second) of Trusts* §330, comment o (1959)]. Thus, the Committee recommended no changes to the UTC’s proposed language that a revocable trust is subject to the claims of the settlor’s creditors while the settlor is living.

(2) Regarding UTC Subsection (a)(2): Consistent with the ULC comments and the 2005 committee’s comments, the Committee agreed that a creditor of a settlor, who is also a beneficiary of a trust, may reach only the interest attributable to that settlor/beneficiary. The Committee then examined the definition of “settlor,” and how to define the interest attributable to a settlor under various scenarios such as where:

- a. a joint trust, qualified terminable interest property (“QTIP”), spousal lifetime access trust (“SLAT”), special needs trust (“SNT”) exists;
- b. property is titled in one spouse’s name but is intended to be marital property;
- c. a schedule of property denotes respective interests in the property (versus the presumption of a 50/50 equitable interest); and
- d. distinctions between “contribution,” “gift,” and “interest.”

The Committee considered Pandy v. Independent Bank, 372 P.3d 1047 (Colo. 2016) (judgment creditor allowed to seek to enforce its judgment against entire trust estate of a revocable trust co-settled by debtor), which case was decided prior to enactment of the Colorado Uniform Trust Code (CUTC).

The Committee also noted that other states had taken a variety of approaches to their respective enactments of CUTC §505 and concluded that the addition of Subsections (a)(2)(i)&(ii) were warranted to provide clarity regarding the interest of a settlor who is also a beneficiary of an irrevocable trust.

(3) Regarding proposed Subsection (a)(2)(i): The Committee specifically sought to address the issue of: What if the settlor is a beneficiary as a result of the exercise of a power of appointment, or the choice of someone else? That is, what if there is an intervening action between settling the trust and the settlor becoming a beneficiary of that trust? The proposed language is taken from the Ohio statute, which the Committee decided most clearly addressed the concerns regarding a beneficial interest received by the settlor through the exercise of a power of appointment by a third party.

(4) Regarding proposed Subsection (a)(2)(ii): The Committee considered whether an exception should be recommended for special needs trusts (SNTs). The proposed language is taken from Vermont statute, which expressly addressed SNTs, and includes a reference to the federal statute regarding self-settled SNTs.

(5) Regarding UTC Subsection (a)(3): The Committee decided that adding a reference to the allowances in § 15-15-103, C.R.S. (addressing liability of nonprobate assets for debts of the decedent), and deleting the stricken text, provided the most succinct and straightforward means of addressing the allowances to which revocable property in a trust may be subject upon the death of the settlor.

(6) Regarding UTC Subsection (b): The Committee chose to follow the 2005 committee's recommendation not to overrule the ruling in University National Bank v. Rhoadarmer, 827 P.2d 561 (Colo. App. 1991), and reserved the subsection for a future decision by the legislature regarding this policy matter.

15-5-506. Overdue Distribution.

(a) IN THIS SECTION, “MANDATORY DISTRIBUTION” MEANS A DISTRIBUTION OF INCOME OR PRINCIPAL WHICH THE TRUSTEE IS REQUIRED TO MAKE TO A BENEFICIARY UNDER THE TERMS OF THE TRUST, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST. THE TERM DOES NOT INCLUDE A DISTRIBUTION SUBJECT TO THE EXERCISE OF THE TRUSTEE’S DISCRETION EVEN IF (1) THE DISCRETION IS EXPRESSED IN THE FORM OF A STANDARD OF DISTRIBUTION, OR (2) THE TERMS OF THE TRUST AUTHORIZING A DISTRIBUTION COUPLE LANGUAGE OF DISCRETION WITH LANGUAGE OF DIRECTION.

(b) WHETHER OR NOT A TRUST CONTAINS A SPENDTHRIFT PROVISION, A CREDITOR OR ASSIGNEE OF A BENEFICIARY MAY REACH A MANDATORY DISTRIBUTION OF INCOME OR PRINCIPAL, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST, IF THE TRUSTEE HAS NOT MADE THE DISTRIBUTION TO THE BENEFICIARY WITHIN A REASONABLE TIME AFTER THE DESIGNATED DISTRIBUTION DATE.

Comparison of Proposed 506 and 506 as drafted in the UTC:

The sections are identical, except for this change in the first sentence of 506(a):

(a) IN THIS SECTION, “MANDATORY DISTRIBUTION” MEANS A DISTRIBUTION OF INCOME OR PRINCIPAL ~~THAT~~ WHICH THE TRUSTEE IS REQUIRED TO MAKE TO A BENEFICIARY UNDER THE TERMS OF THE TRUST, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST.

Uniform Law Comments.

The effect of a spendthrift provision is generally to insulate totally a beneficiary’s interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary’s creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed 101 to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary’s personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, “designated distribution date” was substituted for “required distribution date” in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2005 Amendment. The amendment adds a clarifying definition of “mandatory distribution” in subsection (a), which is based on an Ohio proposal. The amendment:

- tracks the traditional understanding that a mandatory distribution includes a provision requiring that a beneficiary be paid the income of a trust or receive principal upon termination;
- correlates the definition of “mandatory distribution” in this section to the broad definition of discretionary trust used in Section 504. Under both Sections 504 and 506, a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary’s support;
- addresses the situation where the terms of the trust couple language of discretion with language of direction. An example of such a provision is “my trustees shall, in their absolute discretion, distribute such amounts as are necessary for the beneficiary’s support.” Despite the presence of the imperative “shall,” the provision is discretionary, not mandatory. For a more elaborate example of such a discretionary “shall” provision, see *Marsman v. Nasca*, 573 N.E. 2d 1025 (Mass. Ct. App. 1991).
- is clarifying. No change of substance is intended by this amendment. This amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as a provision requiring that the beneficiary receive an income or receive principal upon termination of the trust.

Colorado Committee Report (from 2005):

If a trustee fails to make a distribution to a beneficiary within a "reasonable time" after the express terms of the trust require the distribution to be made, the trustee has become an agent for the beneficiary and the creditors of such beneficiary may attach the distribution held back by the trustee. Such a distribution has already become an asset of the beneficiary.

It had been argued that some discretionary trust terms might be construed as creating "mandatory" interests (e.g. "trustee shall distribute principal and income for the beneficiary's support") and that 506 "creates" a right in the beneficiary to compel them. Therefore, it had been argued, a creditor could "stand in the shoes" of the beneficiary and compel the distribution. The drafters did not intend this result. A mandatory distribution is one that the trustee does not have discretion to withhold. Moreover, the intent of article 5 is to treat all discretionary trusts, whether expressed in the form of a standard or not, as discretionary for purposes of defining creditor's rights. New subsection (a) is being added to make the intent of 506 clear.

In some contexts, the word "shall" has been construed to mean "may" and vice versa. For discussion of the misuse of the word "shall" in legal documents see Brian A. Garner, *A Dictionary of Modern Legal Usage*, p. 939-942 (2nd, ed., Oxford University Press).

Restatement (Third) of Trusts Section 58 cmt. d:

Overdue or delayed distributions. The statement in the Comment concerning what might be called “overdue” or “delayed” distributions involves a little-developed area. [Restatement Second, Trusts § 153\(2\)](#), and Comment *c* thereto, would seem to support the position of this Comment with respect to rights in *principal* (if the beneficiary “is entitled to have the principal paid or conveyed to him immediately” a restraint is not valid), but *id.* [§ 152](#), Comment *h*, is not supportive with respect to *income*. On the latter, compare [Travelers Bank & Trust Co. v. Birge, 136 Conn. 21, 68 A.2d 138 \(1949\)](#), with [Jarcho Bros., Inc. v. Leverich, 240 App.Div. 783, 265 N.Y. Supp. 919 \(1933\)](#), and [Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688 \(1955\)](#), and also Bogert & Bogert, *The Law of Trusts and Trustees*, *supra* at [§ 227 \(pp. 514-515\)](#), which, after properly recognizing that “[i]f the trust income is accumulated pending payment upon a regular payment date, most courts agree that the protection of the spendthrift provisions remains applicable,” goes on to acknowledge the Restatement Second of Trusts position (above) where the trustee may have failed to pay the accumulated income on a quarterly or other payment date, before continuing: “However the beneficiary may attempt to avoid receipt of an income payment by requesting that the trustee hold the accumulated income on his demand, ... or by agreement with the trustee to alter the payment dates. In any such case it would seem that the accumulated income has become absolutely due and owing the beneficiary and should be subject to the claims of his creditors. Two theories may be advanced for this conclusion. The first is that as to the accumulated income the trust has become a dry or passive trust and becomes fully executed. The second theory is that by this conduct the beneficiary has unilaterally altered the terms of the trust and has therefore made himself the settlor of the accumulated income under his own revocable trust.”

See [MacDonald v. Joslyn, 17 Ill.App.3d 52, 307 N.E.2d 601 \(1974\)](#) (regular quarterly income payment to life beneficiary not made when beneficiary could not be located; judgment creditors allowed to reach the income despite state's statutory restraint on involuntary alienation). More importantly for present purposes, unduly delayed distributions of *either* income or principal seem properly subject to the presently exercisable general power of appointment or withdrawal (or “equivalent to ownership”) rule of Comment *b* of this Section, for which in all other contexts the authorities seem solidly supportive.

Notes of Decisions on UTC 506

Under Kansas law, the court and creditors are not powerless to compel a trustee's distribution under a trust. [In re Hilgers, Bkrcty.D.Kan.2006, 352 B.R. 298](#), affirmed [371 B.R. 465](#), affirmed [279 Fed.Appx. 662, 2008 WL 2127657](#).

Under Arkansas law, if trustee fails to make a timely distribution from spendthrift trust, the distribution, even while under control of trustee, can be reached by creditors of beneficiary. [In re Reagan, W.D.Ark.2010, 433 B.R. 263](#), affirmed [649 F.3d 831](#).

Under Kansas law, trustees of three revocable trusts had duty to expeditiously wind up estates and make distributions to remainder beneficiaries when trusts terminated upon death of last life beneficiary, and trustees' unjustified failure to do so within reasonable time entitled creditors of one remainder beneficiary to reach distributions that were then due to such beneficiary. [In re Hilgers, 10th Cir.BAP \(Kan.\) 2007, 371 B.R. 465](#), affirmed [279 Fed.Appx. 662, 2008 WL 2127657](#).

Spendthrift provision in instrument creating revocable trust, stating that “[t]he interest of any beneficiary in the income and/or principal of any trust created under this Agreement shall not be subject to alienation [or] anticipation,” did not protect the specific bequests that successor trustee was directed to make upon death of the settlor, the original trustee of trust, or prevent bequests to which debtor was entitled upon settlor's death, prior to commencement of debtor's bankruptcy case, from entering bankruptcy estate; spendthrift provision protected only the residuary estate that was held in trust for benefit of named beneficiaries. [In re Caubble, Bkrcty.E.D.Ark.2014, 505 B.R. 857](#).

Spendthrift provisions of revocable trusts for which Chapter 7 debtor was remainder beneficiary ceased to be effective prior to debtor's bankruptcy filing under Kansas law, due to termination of trusts upon death of last life beneficiary and provision of Kansas Uniform Trust Code (KUTC) entitling creditors of trust beneficiaries to reach mandatory distributions when not made by trustee within reasonable time after mandated distribution date, and therefore debtor's interests in trusts became property of his bankruptcy estate and were subject to turnover to Chapter 7 trustee. [In re Hilgers, 10th Cir.BAP \(Kan.\) 2007, 371 B.R. 465](#), affirmed [279 Fed.Appx. 662, 2008 WL 2127657](#).

15-5-507. Personal Obligations of Trustee

TRUST PROPERTY IS NOT SUBJECT TO PERSONAL OBLIGATIONS OF THE TRUSTEE, EVEN IF THE TRUSTEE BECOMES INSOLVENT OR BANKRUPT.

No changes from the UTC are recommended for the proposed Colorado statute.

Uniform Law Comments.

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).

Colorado Committee Report.

UTC Section 507 was created and added during the UTC drafting process. Colorado attorney James R. Walker served as an Observer on the UTC Drafting Committee. During an informal discussion with Professor John Langbein, Mr. Walker mentioned the recent *Lagae v. Lackner* Colorado Supreme Court decision, 996 P.2d 1281 (Colo. 2000), holding that a trustee's personal creditor could not attach a beneficiary's equitable interest in trust property. Mr. Walker also noted that the concept of trust property immunity for trustee personal obligations was not set forth in the black letter provisions of the Restatements. Instead, Mr. Walker expressed, you have to "dig" the concept out of the Restatement comments. *See, e.g.*, Restatement (Second) Trusts § 12 cmt. (a).

Following this discussion, the next version of the UTC contained Section 507. Most likely, it was Professor Langbein who added the Drafting Committee narrative regarding Anglo-American Trust and the Hague convention.

Lagae's program stemmed from the real estate "curative" statute passed in the 1930s. This curative statute created a remedy for "as trustee" deeds by allowing the deed to carry both legal and equitable title. The problem and the *Lagae* holding are explained in a July 2000 CBA *Trust & Estate Section Council Notes* article.

15-5-816. Specific powers of trustee

(1) Without limiting the authority conferred by section 15-5-815, and in addition to the powers conferred pursuant to the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15, a trustee may:

(u) Pay an amount distributable to a beneficiary BY PAYING IT DIRECTLY TO THE BENEFICIARY OR BY APPLYING IT FOR THE BENEFICIARY'S BENEFIT AND, IN THE CASE OF A BENEFICIARY who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit or by:

(I) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(II) Paying it to the beneficiary's custodian pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, or custodial trustee pursuant to the "Colorado Uniform Custodial Trust Act", article 1.5 of this title 15, and for that purpose, creating a custodianship of [sic] custodial trust;

(III) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(IV) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

15-5-411. Modification or termination of noncharitable irrevocable trust by consent

(1) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to a trust's modification or termination may be given by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(2) ~~Other than a trust established by court order under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p(d)(4), Aa~~ noncharitable irrevocable trust may:

(a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or

(b) Be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) A spendthrift provision in the terms of a trust is not presumed to constitute a material purpose of the trust.

(4) Upon termination of a trust pursuant to subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(5) If not all of the beneficiaries consent to a proposed modification or termination of a trust pursuant to subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and

(b) The interests of a beneficiary who does not consent will be adequately protected.