

Council of the Trust and Estate Section, Colorado Bar Association

Notice of and Agenda for the September 2, 2020 Meeting

To: Council Members
Trust and Estate Section of the Colorado Bar Association

From: Molly T. Zwerdlinger
Secretary/Treasurer
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Notice of Meeting

The next monthly meeting of the 2020-2021 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, September 2, 2020, 3:15 p.m.***
Place: ***THIS MEETING WILL BE CALL-IN ONLY DUE TO COVID 19***

Call-In Instructions

Call-in instructions are as follows: 1.425.436.6390
Access Code: 420360

Minutes of Previous Meeting, Financial Reports & Attachments

1. Minutes of the August 5, 2020 meeting of the Council
2. Financial spreadsheets as of July 31, 2020
3. Real estate template deeds
4. Memorandum from Real Estate Section meeting
5. UFIPA (Act, Redlined Act, Memo, Summary Table)
6. Wills in Colorado flyer/pamphlet
7. CUTC Part 5 (Proposed Changes to 15-5-411 and 15-5-816, Report to SRC, Connie Eyster email, SRC Minutes from 8/5/20 meeting re CUTC Part 5)

Trust and Estate Section Council Agenda
September 2, 2020

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise his/her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the August 5, 2020, meeting of the Council
2. Chair's Report and Administrative Matters (Spencer Crona)
3. Secretary/Treasurer's report (Molly Zwerdinger)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Lauren DaCunha)
9. Legislative Liaison (Darla Daniel & Steve Brainerd)
 - a. CAPS Update (Andrew White)
10. Council Notes (Kristin Dittus)
11. CLE/Estate Planning Retreat (Tim Bounds)
12. Orange Book Forms Committee (Lisa Hardin)
13. Rules and Forms Committee (Gordon Williams)
14. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
15. Diversity & Inclusivity Committee (Melissa Schwartz)
 - a. Diversity Request for Council Members (Mark Masters)
16. Probate Trial and Procedures Committee (Kathy Seidel & Norv Brasch)
17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (Josie Faix)
19. Trust & Estate Practice Support Committee (Jennifer Hazelton & William Ellison)

20. The Colorado Lawyer (Emily Bowman)

21. Communications Representative/Ambassador Program (Lindsay Andrew)

22. Board of Governors Representative (Jonathan Haskell)

23. Miscellaneous/FYI

24. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association
Minutes of August 5, 2020, Meeting**

Council met on Wednesday, August 5, 2020 via audio-visual conference due to the ongoing COVID19 situation. The meeting was called to order at approximately 3:17p.m. by Spencer Crona, Chair.

The following members of Council participated by Zoom/phone and constituted a quorum:

Spencer Crona, Chair
Tim Bounds, Vice Chair
Molly Zwerdinger, Secretary
Josie Faix, Chair Pro-Tem
Louisa Ritsick (2nd year member)
Kristin Dittus (2nd year member)
Charles Spence (2nd year member)
Georgine Kryda (1st year member), Tax Section Liaison
Amy Symons (1st year member)
Simon Tolbert (1st year member)

Also in attendance were:

Patrick Thiessen, Elder Law Section Liaison
Darla Daniel, Legislative Liaison
Lisa Hardin, Orange Book Forms Committee
Andy White, CBA Legislative Liaison
Katie Roberts, CBA Staff
Dylan Metzner, Statutory Revisions Committee Vice Chair
David Kirch
Connie Eyster
Melissa Schwartz
Sandra Sigler
Leia Ursery
Stan Kent

1. Approval of Minutes of Prior Meeting

The Minutes of the May 6, 2020, Council meeting were approved unanimously.

2. Chair's Report (Spencer Crona)

The Bar website needed some corrections. Need to address failings on probate judiciary at some point throughout this year.

3. Secretary/Treasurer Report (Molly Zwerdinger)

Molly reviewed the financial reports for June and year-to-date. Council dinner likely not going to happen because of COVID, going to budget \$4,500 for virtual event. \$1,000 budget for Diversity and Inclusion. CLE not going to request refund for retreat this year because virtual retreat is going to cost something similar to in-person retreat. CLE is asking \$6,250 for 2021 retreat as a current placeholder. All requests are approved. Senior Law Handbook is going to send a request for funds.

4. Tax Section Liaison (Georgine M. Kryda)

Does not meet until September. Georgine approved by Council to continue as our Liaison. Going to be focused on membership numbers and involvement. Want to co-sponsor a few events and CLEs.

5. Elder Law Section Liaison (Patrick Thiessen)

At last meeting the Section reviewed Senate Bill 129 which is effective as of 9/1/21 concerning appointment of court visitor in emergency and special conservatorship cases. Colorado Guardianship Assc. is doing meetings virtually and next meeting is 9/8/20.

6. Real Estate Section Liaison (Chad Rounds)

No memorandum this month. David Kirch presented new deeds and real estate forms to Council. Want to add these forms to real estate green book. The old forms are from the 1970's and have not been revised since then. Will ask for approval from CLE to include new forms in Green Book. Going to ask for approval at September meeting.

7. Family Law Section Liaison (Kim Willoughby)

There was no report from the Family Law Section.

8. Statutory Revisions Committee (Dylan Metzner)

Connie Eyster reported on CUTC Part 5 approval from SRC. 15-5- 816 suggested additional amendment and 15-4-411 amendment to allow special needs trusts to be

terminated with approval of court and agreement of beneficiaries. Going to take up approval at Council in September and timing should work for ULC and LPC.

9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)

The plan is that CUTC Part 5 and UFIPA go to the legislature in January. Want UFIPA ready to be voted on in September for Council approval.

10. Legislative Update (Andy White)

Andy agreed with above in No.9.

11. Council Notes (Kristin Dittus)

On track, and always requesting articles.

12. Continuing Legal Education & Estate Planning Retreat (Tim Bounds)

Tim reported that the 2020 Retreat will be virtual. The virtual platform for the Retreat is presented by CLE. It provides social and meeting spaces. Brainstorming ideas for silent auction. CLE programs moving forward are going to be virtual for 2020-2021 year. Legislative Update will be in October. Planning on in-person for Retreat in 2021 in Aspen.

13. Orange Book Forms Committee (Lisa Hardin)

Met throughout the entire summer and made it through engagement/disengagement letters. Working on adding dementia options in advanced directives.

14. Rules & Forms Committee (Gordon Williams)

There was no report.

15. Civic & Community Affairs (Sandra Sigler)

Events for seniors this year are going to be innovative; with virtual senior law series in Grand Junction as example. Boulder has series of 9 webinars from September to October and El Paso has virtual Senior Law Day. Handbooks will be distributed through a different mechanism this year. Denver Senior Law Day is moved to October virtually.

Brochure to be reviewed this month and approval request in September.

16. Diversity & Inclusivity Committee (Melissa Schwartz)

Melissa is going to revisit plans to redistribute responsibility among Council for D&I work.

17. Probate Trial & Procedures Committee (Kathy Seidel & Norv Brasch):

Report on SB 129 consumed most of the meeting. Amicus Brief on Trevino case was presented and well received.

18. Colorado Estate Planning Handbook (David Johns)

There was no report.

19. Green Book (Josie Faix)

David Johns and Josie are going to get together to review. Will have changes regarding real estate forms but no other major changes.

20. New T&E Practice Support Committee (Jennifer Hazelton & William Ellison)

There was no report.

21. The Colorado Lawyer (Emily Bowman & David Kirch)

Two proposed articles relating to mental health certifications/legal disability and case law related to common law marriage.

22. Communications Representative & Ambassador Coordinator (Lindsey Andrew)

Two new ambassadors signed up since March. Still need more ambassadors.

23. Board of Governors Representative (Jonathan Haskell)

There was no report.

24. Other Business

Update on Elder Law Retreat: will be held August 27th and 28th virtually.

ADJOURNMENT

The meeting was adjourned at 5:02p.m. The next Council meeting will be held in September 2020.

Respectfully submitted

/s/ Molly T. Zwerdinger, Secretary

Colorado Bar Association
Trust & Estate Summary
 For the Month Ending July 31, 2020

		July	YTD	Budget	Variance	%	Last FY
Beginning balance	01-3160-31600		\$28,848.32		\$28,848.32	0%	\$22,262.87
Trust & Estate Section- General							
Revenue	01-4???-31600	23,610.00	23,610.00		23,610.00	0%	27,930.00
Expenses	01-5???-31600	(1,020.00)	(1,020.00)		(1,020.00)	0%	(8,549.16)
Statutory Revisions Committee							
CLE							
Council Notes							
Community & Civic Affairs							
Rules & Forms Committee							
Orange Book Forms							
Local Liaison							
Uniform Trust Code							
Admin. Chair							
Estate Planning Handbook							
Admin Council Dinner							
Legislative Liaison							
Internet Editor							
Technology Committee							
Real Estate Liaison							
Green Book							
The Colorado Lawyer							
Diversity Committee							
Judicial Liaison							
Member Vouchers							
Uniform Trust Code							
Transfer Deposit							
Young Lawyer Society							
Beginning Balance	01-3160-31600		28,848.32		28,848.32	0%	22,262.87
Total Revenue All Sources	01-4???-316??	23,610.00	23,610.00		23,610.00	0%	27,930.00
Total Expenses All Sources	01-5???-316??	(1,020.00)	(1,020.00)		(1,020.00)	0%	(8,549.16)
Ending Balance		22,590.00	51,438.32		51,438.32	0%	41,643.71

Colorado Bar Association
Trust & Estate
For the Month Ending July 31, 2020

		July	YTD	Budget	Variance	%	Last FY
Beginning balance	01-3160-31600		\$28,848.32		\$28,848.32	0%	\$22,262.87
Trust & Estate Section							
Revenue							
Dues Income Section	01-4050-31600	23,610.00	23,610.00		23,610.00	0%	27,930.00
Total Revenue Trust & Estate Sect		23,610.00	23,610.00		23,610.00	0%	27,930.00
Expenses							
Internet/E-Mail Access	01-5413-31600					0%	(544.99)
Administration Fee	01-5494-31600	(1,020.00)	(1,020.00)		(1,020.00)	0%	(504.17)
Grants/Contributions	01-5500-31600					0%	(7,500.00)
Total Expenses Trust & Estate Sec		(1,020.00)	(1,020.00)		(1,020.00)	0%	(8,549.16)
Statutory Revisions Committee							
Revenue							
Rev. Elderlaw Joint Task Force							
Rev. Uninform POA Act							
Rev. Uniform Trust Code							
Expenses							
Exp. Elderlaw Joint Task Force							
Exp. Uninform POA Act							
Exp. Uniform Trust Code							
CLE							
Revenue							
Revenue Joint CLE							
Revenue CLE Retreat							
Revenue CLE Section Only							

Colorado Bar Association
Trust & Estate
 For the Month Ending July 31, 2020

	July	YTD	Budget	Variance	%	Last FY
Expenses						
Expenses Joint CLE						
Expenses CLE Retreat						
Expenses CLE Section Only						
Council Notes						
Revenue						
Expenses						
Community & Civic Affairs						
Revenue						
Expenses						
Rules & Forms Committee						
Revenue						
Expenses						
Orange Book Forms						
Revenue						
Expenses						
Local Liaison						
Revenue						
Expenses						
Uniform Trust Code						
Revenue						
Expenses						
Transfer Deposits						
Revenue						

Colorado Bar Association
Trust & Estate
 For the Month Ending July 31, 2020

	July	YTD	Budget	Variance	%	Last FY
Expenses						
Admin. Chair						
Revenue						
Expenses						
Estate Planning Handbook						
Revenue						
Expenses						
Admin Council Dinner						
Revenue						
Expenses						
Legislative Liaison						
Revenue						
Expenses						
Internet Editor						
Revenue						
Expenses						
Technology Committee						
Revenue						
Expenses						
Real Estate Liaison						
Revenue						
Expenses						
Green Book						
Revenue						
Expenses						

Colorado Bar Association
Trust & Estate
 For the Month Ending July 31, 2020

		July	YTD	Budget	Variance	%	Last FY
The Colorado Lawyer							
Revenue							
Expenses							
T&E Diversity Committee							
Revenue							
Expenses							
Judicial Liaison							
Revenue							
Expenses							
Member Vouchers							
Expenses							
T&E Young Lawyer Society							
Revenue							
Expenses							
Beginning Balance	01-3160-31600		\$28,848.32		\$28,848.32	0%	\$22,262.87
Total Revenue All Sources	01-4???-316??	23,610.00	23,610.00		23,610.00	0%	27,930.00
Total Expense All Sources	01-5???-316??	(1,020.00)	(1,020.00)		(1,020.00)	0%	(8,549.16)
Ending Balance		22,590.00	51,438.32		51,438.32	0%	41,643.71

 **DRAFT**

PERSONAL REPRESENTATIVE'S DEED

(Distribution)

THIS DEED is dated _____, and is
made between _____
as Personal Representative of the Estate of _____,
Deceased, Grantor, and _____,
Grantee[s], whose legal address is _____
of the _____ *County of _____, State of _____.

WHEREAS, the decedent died on the date of _____ and Grantor was duly appointed Personal Representative of said Estate by the _____ Court in and for the _____ *County of _____ and State of Colorado, Probate No. _____, on the date of _____, and is now qualified and acting in said capacity.

NOW THEREFORE, pursuant to the powers conferred upon Grantor by the Colorado Probate Code, Grantor does hereby sell,** convey, assign, transfer, and release unto Grantee[s](in joint tenancy),*** being entitled to distribution, the following described real property situate in the _____ *County of _____, State of Colorado:

[Legal Description]

also known by street and number as:
assessor's schedule or parcel number:****

With all appurtenances.*****

As used herein, the singular includes the plural and the plural the singular.

GRANTOR

as Personal Representative of the Estate of _____
_____, Deceased

STATE OF COLORADO

_____*COUNTY OF _____ ss.

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____ as Personal Representative of the Estate of _____, Deceased.*****

Witness my hand and official seal.
My commission expires:*****

Notary Public

*If in Denver or Broomfield, insert "City and."

**It is unclear whether the language "sell" is necessary in a personal representative's deed of distribution to preserve its bargain and sale character. It is included in this model deed. It is up to practitioners to decide what their comfort level is for including or excluding the "sell" language.

***Strike as required.

****Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

*****There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

*****See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

***** If the notary stamp does not include the expiration date, the notary should include the date on this line.

 **DRAFT**

PERSONAL REPRESENTATIVE'S DEED
(Sale)

THIS DEED is dated _____, and
is made between _____
as Personal Representative of the Estate of _____,
Deceased, Grantor, and _____,
Grantee[s], whose legal address is _____
of the _____ *County of _____, State of _____.

WHEREAS, the decedent died on the date of _____ and Grantor was duly appointed Personal Representative of said Estate by the _____ Court in and for the _____ *County of _____ and State of Colorado, Probate No. _____, on the date of _____, and is now qualified and acting in said capacity.

NOW THEREFORE, pursuant to the powers conferred upon Grantor by the Colorado Probate Code, Grantor does hereby sell and convey unto Grantee[s] (in joint tenancy),** for and in consideration of _____ Dollars, (\$ _____), the following described real property situate in the _____ *County of _____, State of Colorado:

[Legal Description]

also known by street and number as:
assessor's schedule or parcel number:***

With all appurtenances.****

As used herein, the singular includes the plural and the plural the singular.

GRANTOR

As Personal Representative of the Estate of _____,
Deceased

STATE OF COLORADO

*COUNTY OF _____ ss.

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____ as Personal Representative of the Estate of _____, Deceased.*****

Witness my hand and official seal.
My commission expires:***** _____.

Notary Public

*If in Denver or Broomfield, insert "City and."

** Strike as required.

*** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

**** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

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 DRAFT

**TRUSTEE'S DEED
(Distribution)**

THIS DEED is dated _____, and is made between _____
as Trustee of the _____ Trust dated _____,
Grantor, and _____, Grantee[s], whose legal address is _____
of the _____ *County of _____, State of _____.

NOW THEREFORE, Grantor, as trustee and pursuant to the powers conferred upon Grantor by the Colorado Uniform Trust Code and the trust agreement, as amended from time to time, or other instruments governing the trust, does hereby sell,** convey, assign, transfer, and release unto Grantee[s] (in joint tenancy),*** being entitled to distribution of the property pursuant to the terms of the Trust, the real property situate in the _____ *County of _____ and State of Colorado, described as follows:

[Legal Description]

also known by street address as:
assessor's schedule or parcel number:****

With all appurtenances.*****

As used herein, the singular includes the plural and the plural the singular.

IN WITNESS WHEREOF, Grantor has executed this deed the date set forth above.

GRANTOR

as Trustee of the _____
Trust, dated _____

STATE OF COLORADO
_____ *COUNTY OF _____ ss.

The foregoing instrument was acknowledged before me this _____ day of _____,
20_____, by _____ as Trustee of _____
Trust dated _____,*****

Witness my hand and official seal.

Notary Public
My commission expires:*****

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

*If in Denver or Broomfield, insert "City and."

** It is unclear whether the language "sell" is necessary in a trustee's deed of distribution to preserve its bargain and sale character. It is included in this model deed. It is up to practitioners to decide what their comfort level is for including or excluding the "sell" language.

***Strike if applicable.

**** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

***** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

***** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

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 DRAFT

**TRUSTEE'S DEED
(Sale)**

THIS DEED is dated _____, and is made between _____
as Trustee of the _____ Trust dated _____,
Grantor, and _____, Grantee[s], whose legal address is _____
_____ of the _____ *County of _____,
State of _____.

NOW THEREFORE, Grantor, as trustee and pursuant to the powers conferred upon Grantor by the Colorado Uniform Trust Code and the trust agreement, as amended from time to time, or other instruments governing the trust, does hereby sell and convey unto Grantee[s] (in joint tenancy),** for and in consideration of _____
DOLLARS, (\$____), the following described real property situate in the _____ *County of _____
_____ and State of Colorado, described as follows:

[Legal Description]

also known by street address as:
assessor's schedule or parcel number:***

With all appurtenances.****

As used herein, the singular includes the plural and the plural the singular.

IN WITNESS WHEREOF, Grantor has executed this deed the date set forth above.

GRANTOR

as Trustee of the _____
Trust, dated _____

STATE OF COLORADO

_____ *COUNTY OF _____ ss.

The foregoing instrument was acknowledged before me this _____ day of _____,
20____ by _____ as Trustee of _____
Trust dated _____,*****

Witness my hand and official seal.

Notary Public
My commission expires:***** _____

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

*If in Denver or Broomfield, insert "City and."

**Strike if applicable.

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**** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

***** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

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CONSERVATOR'S DEED

DRAFT

THIS DEED is dated _____, and is made between _____ as Conservator of the Estate of _____, Protected Person, Grantor, and _____, Grantee[s], whose legal address is _____ of the _____ *County of _____, State of _____.

WHEREAS Grantor was appointed as Conservator of the Estate of the Protected Person by the _____ Court in and for the _____ *County _____, State of Colorado, Case No. _____, on _____, and is now qualified and acting in said capacity.

NOW THEREFORE, pursuant to the powers conferred upon Grantor by the Colorado Probate Code, Grantor does hereby sell and convey unto Grantee[s] (in joint tenancy)** for and in consideration of _____ DOLLARS, (\$ _____), the following described real property situate in the _____ *County of _____, State of Colorado:

[Legal Description]

also known by street address as:
assessor's schedule or parcel number:***

With all appurtenances.****

As used herein, the singular includes the plural and the plural the singular.

IN WITNESS WHEREOF, Grantor has executed this deed on the date set forth above.

GRANTOR

as Conservator of the Estate of _____
_____, Protected Person

STATE OF COLORADO
_____ *COUNTY OF _____ ss.

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____ as Conservator of the Estate of _____, Protected Person.*****

Witness my hand and official seal.

Notary Public

My commission expires:*****

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

*If in Denver or Broomfield, insert "City and."

**Strike if applicable.

*** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

**** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

***** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

***** If the notary stamp does not include the expiration date, include the date on this line.

Witness my hand and official seal.

My commission expires: ***** _____

Notary Public

Name and Address of Person Creating Newly Created Legal Description (§ 38-35-106.5, C.R.S.)

*(Note to Assessor and Treasurer: This address is for identification purposes only, all notices and tax statements should continue to be sent to grantor.)

** If in Denver or Broomfield, insert "City and."

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DRAFT

REVOCATION OF BENEFICIARY DEED

(§§15-15-401, et seq., Colorado Revised Statutes)
CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as Grantor, hereby REVOKES all previously executed beneficiary deeds concerning the following described real property located in the _____
*County of _____, State of Colorado:

[Legal Description]

also known by street address as: _____
assessor's schedule or parcel number:** _____

With all appurtenances.***

Executed on _____ (date).

Grantor

STATE OF COLORADO)
) ss.
*COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 20____ by _____

Witness my hand and official seal.

My commission expires:***** _____

Notary Public

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

*If in Denver or Broomfield, insert "City and."

** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

*** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances."

Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

**** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

*****If the notary stamp does not include the expiration date, include the date on this line.

 DRAFT

DEED RESERVING LIFE ESTATE

Grantor, _____, for the consideration of _____
DOLLARS, (\$ _____), in hand paid, hereby sells and conveys unto _____,
Grantee[s], whose legal address is _____,
of the _____ *County of _____, State of _____ **, (in joint
tenancy), *** the following described real property, reserving a life estate to Grantor in and to the same real property and
appurtenances, **** situate in the _____ *County of _____ and State of Colorado, to wit:

[Legal Description]

also known by street address as:
assessor's schedule or parcel number:*****

As used herein, the singular includes the plural and the plural the singular.

GRANTOR, in making this grant, reserves to Grantor the sole use, control, benefit, and income of the described real
property, including without limitation the appurtenances, **** during Grantor's lifetime.

[GRANTOR] OR [GRANTEES], shall pay for maintenance, repairs, taxes, insurance, mortgage, and assessments
during Grantor's lifetime.

Signed this _____ day of _____, 20_____.

GRANTOR

[GRANTOR'S NAME]

STATE OF COLORADO)
) ss.
_____ *COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 20_____
by _____ *****

Witness my hand and official seal.
My commission expires:*****

Notary Public

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

*If in Denver or Broomfield, insert "City and."

**Update the address in the conveyance if Grantees are not paying property taxes during Grantor's lifetime.

***Strike as required.

**** There is some uncertainty regarding whether or not mineral and water rights are "appurtenances." Generally, mineral rights are not considered "appurtenances" and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be "appurtenant." Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

***** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

***** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

*****If the notary stamp does not include the expiration date, include the date on this line.

DRAFT

DEED TO DIFFERENT LIFE ESTATE AND REMAINDER GRANTEES

Grantor, _____, for the consideration of _____
_____ DOLLARS, (\$ _____), in hand paid, hereby sells and conveys a life estate in the real property,
including without limitation the appurtenances,* unto _____
_____, Life Estate Grantee, whose legal address is _____, of the
_____ **County of _____, State of _____, *** and a remainder
unto _____, Remainder Grantee[s], whose legal address is _____
_____, of the _____ **County of _____, State of _____,
(in joint tenancy),**** upon the death of Life Estate Grantee, in and to the following real property, including without
limitation the appurtenances,* situate in the _____ **County of _____ and State of Colorado, to wit:

[Legal Description]

also known by street address as:
assessor's schedule or parcel number:*****

As used herein, the singular includes the plural and the plural the singular.

LIFE ESTATE GRANTEE, shall have the sole use, control, benefit, and income of the described real property,
including without limitation the appurtenances,* during Life Estate Grantee's lifetime.

[LIFE ESTATE GRANTEE] OR [REMAINDER GRANTEES], shall pay for maintenance, repairs, taxes,
insurance, mortgage, and assessments during Life Estate Grantee's lifetime.

Signed this ____ day of _____, 20 ____.

GRANTOR

[GRANTOR'S NAME]

STATE OF COLORADO)
) SS.
**COUNTY OF _____)

This foregoing instrument was acknowledged before me this _____ day of _____, 20____ by _____

Witness my hand and official seal.
My commission expires*****

Notary Public

Name and Address of Person Creating Newly Created Legal Description (§38-35-106.5, C.R.S.)

* There is some uncertainty regarding whether or not mineral and water rights are “appurtenances.” Generally, mineral rights are not considered “appurtenances” and will be conveyed whether or not this phrase is included in the deed unless expressly reserved. Water rights may or may not be “appurtenant.” Best practice is to specifically include in the deed known existing water rights. When dealing with known issues regarding mineral and water rights, practitioner should conduct additional legal research as these areas are complex and nuanced.

** If in Denver or Broomfield, insert “City and.”

***Update the address in the conveyance if Life Estate Grantee is not paying property taxes during Life Estate Grantee’s lifetime.

****Strike as required.

***** Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor’s information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

***** See CRS § 24-21-516 for alternative acknowledgement language. Both the state and the county in which the notarial act is performed should be stated. If the notarial act is performed using statutorily authorized remote notarization, the certification should also include all additional language prescribed by the remote notarization rules, e.g. that the act was done remotely using audio-visual communication.

*****If the notary stamp does not include the expiration date, include the date on this line.

SUPPLEMENTARY AFFIDAVIT PURSUANT TO
C.R.S. § 38-31-102¹

 DRAFT

STATE OF COLORADO
_____ ² County of _____ ³

In the matter of the title to real property, and pursuant to C.R.S. § 38-31-102, the Affiant,
_____ [NAME OF AFFIANT], being first duly sworn upon oath or by affirmation, states
that Affiant is of legal age and has personal knowledge of the facts stated herein and that the person
referred to

- in the certificate or verification of death recorded on _____ at Reception No.
_____, in the Clerk and Recorder's Office of _____ County, Colorado; or
 in the attached certificate or verification of death⁴,

is one and the same person as _____ [NAME OF DECEASED] who is
named in the instrument recorded on _____ at Reception No. _____, in the Clerk and
Recorder's Office of _____ County, Colorado, which conveyed the real property described
below, situate in the _____ County of _____ and State of Colorado, to wit:

[LEGAL DESCRIPTION OF PROPERTY] ⁵

also known by street and number as: _____ [ADDRESS OF REAL ESTATE]
assessor's schedule number or parcel number:⁶ _____

Affiant

[PRINTED NAME OF AFFIANT]

Signed and sworn to or affirmed before me by Affiant, _____, on
_____, in the _____ ⁷ County of _____ ⁸.

Witness my hand and official seal.
My commission expires:⁹ _____

Notary Public¹⁰

¹ *Purpose of Affidavit.* This affidavit is designed to comply with the requirements of C.R.S. § 38-31-102, as amended in 2016, which provides that a certificate or verification of death of a joint tenant, life tenant, owner of real property under a beneficiary deed, or any other person whose interest in real property terminates upon their death to the same extent as a joint tenant, may be recorded in the county where the real property is located, together with a supplementary affidavit.

² If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

³ The county in which the oath is administered to the affiant or the affirmation is taken should be entered in this field.

⁴ *Order of Recordings.* The decedent's certificate or verification of death may either be recorded as an attachment to this affidavit or as a separate prior recording. If the decedent's certificate or verification of death is recorded as a separate prior recording, the reception number of the recorded decedent's certificate or verification of death should be stated in this affidavit.

⁵ The legal description of the property being referenced in this affidavit should be same as the legal description of the property on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed, unless you are aware of some change in description since the vesting deed. Do not rely on the property description provided by a county assessor's office. The assessor's office can use an abbreviated legal description which is not the complete and actual legal description. The best practice may entail obtaining an Ownership and Encumbrance Report or a more detailed title report on the property at issue. A schedule with the property's legal description may also be attached to this affidavit. When doing so, this field should read "See attached Schedule [SCHEDULE NUMBER/LETTER]." As an alternative, this field may refer to the property description on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed.

⁶ Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed:

⁷ If this affidavit is being notarized in Denver or Broomfield, this field should read "City and". If this affidavit is being notarized in any other county, this field should be left blank.

⁸ The county in which the oath is administered to the affiant or the affirmation is taken should be entered in this field.

⁹ If the notary stamp does not include the expiration date, include the date on this line.

¹⁰ For affidavits affecting real property, practitioner must decide whether in the particular situation at hand also including an acknowledgement with the jurat, either separately or combining the two, would be useful. The jurat is to put the individual under oath and subject to penalties of perjury. The acknowledgement is to receive the presumptions that go along with an acknowledgement as to title and the benefits towards marketability of the subject property, including those under C.R.S. § 38-35-101(3) and C.R.S. § 38-35-104.

AFFIDAVIT PURSUANT TO
C.R.S. § 38-31-103¹

 DRAFT

STATE OF COLORADO
_____ ² County of _____ ³

Pursuant to C.R.S. § 38-31-103, the Affiants, _____ [NAME OF AFFIANT #1] and
_____ [NAME OF AFFIANT #2], being first duly sworn upon oath or by
affirmation, state:

that Affiants are of legal age;

that Affiants have personal knowledge of the facts;

that Affiants have no record interest in the real property described below;

that a certificate of death, verification of death document, or certified copy thereof for _____

[NAME OF DECEDENT] cannot be procured because _____;

that the date and place of death of _____ [NAME OF DECEDENT] was

_____ ; and that _____ [NAME OF DECEDENT]

referred to in this affidavit was at the time of death an owner of an interest in the real property described

below situate in the _____ County of _____ and State of Colorado, to wit:

[LEGAL DESCRIPTION OF PROPERTY] ⁴

also known by street and number as: _____ [ADDRESS OF REAL ESTATE]

assessor's schedule number or parcel number: ⁵ _____

which interest terminated at the death of the above named decedent.

Affiant

[PRINTED NAME OF AFFIANT #1]

Signed and sworn to or affirmed before me by Affiant, _____, on
_____, in the _____⁶ County of _____⁷.

Witness my hand and official seal.

My commission expires:⁸ _____

Notary Public⁹

Affiant

[PRINTED NAME OF AFFIANT #2]

Signed and sworn to or affirmed before me by Affiant, _____, on
_____, in the _____ County of _____.

Witness my hand and official seal.

My commission expires: _____

Notary Public

¹ *Purpose of Affidavit.* This affidavit is designed to comply with the requirements of C.R.S. § 38-31-103, as amended in 2014, which provides that such an affidavit can be recorded in the county where the described real property is located as prima facie proof of the death of an owner of a recorded interest in the described real property which terminates upon death of the owner, in the case in which a certificate of death or a verification of death cannot be obtained. Note there must be at least two affiants.

² If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

³ The county in which the oath is administered to the affiants or the affirmation is taken should be entered in this field.

⁴ The legal description of the property being referenced in this affidavit should be same as the legal description of the property on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed, unless you are aware of some change in description since the vesting deed. Do not rely on the property description provided by a county assessor's office. The assessor's office can use an abbreviated legal description which is not the complete and actual legal description. The best practice may entail obtaining an Ownership and Encumbrance Report or a

more detailed title report on the property at issue. A schedule with the property's legal description may also be attached to this affidavit. When doing so, this field should read "See attached Schedule [SCHEDULE NUMBER/LETTER]." As an alternative, this field may refer to the property description on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed.

⁵ Practitioner may prefer to not include this information in the deed. CRS § 38-35-122(1) expressly invites its inclusion but does not require it. CRS § 38-35-122(2) states any discrepancy to be resolved in favor of the legal description. The possibility of an error in the assessor's information must be considered as it could still lead to perceived ambiguities in what property is being conveyed.

⁶ If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

⁷ The county in which the oath is administered to the affiants or the affirmation is taken should be entered in this field.

⁸ If the notary stamp does not include the expiration date, include the date on this line.

⁹ For affidavits affecting real property, practitioner must decide whether in the particular situation at hand also including an acknowledgement with the jurat, either separately or combining the two, would be useful. The jurat is to put the individual under oath and subject to penalties of perjury. The acknowledgement is to receive the presumptions that go along with an acknowledgement as to title and the benefits towards marketability of the subject property, including those under C.R.S. § 38-35-101(3) and C.R.S. § 38-35-104.

**AFFIDAVIT FOR GRANTEE ACTING IN A
REPRESENTATIVE CAPACITY
PURSUANT TO C.R.S. § 38-30-108¹**

DRAFT

STATE OF COLORADO

_____ ² County of _____ ³

I, _____ [NAME OF AFFIANT], for the purpose of complying with Section 38-30-108, C.R.S., state:

1. _____ is the grantee in a representative capacity named in an instrument conveying an interest in real property.
2. The instrument was recorded at _____ [Reception/Film No.] [Book/Page No.] on _____ [date] in the records of the Clerk and Recorder of the _____ ⁴ County of _____, Colorado.
3. In the instrument, the interest was transferred to the undersigned as:

- | | |
|--|--|
| <input type="checkbox"/> Trustee | <input type="checkbox"/> Attorney-in-Fact |
| <input type="checkbox"/> Agent | <input type="checkbox"/> Personal Representative |
| <input type="checkbox"/> Conservator | <input type="checkbox"/> Nominee |
| <input type="checkbox"/> Executor | <input type="checkbox"/> Custodian |
| <input type="checkbox"/> Administrator | <input type="checkbox"/> Other _____ |

4.⁵ The undersigned also states (complete at least one of the following):

- a. The name of the person represented is _____.
- b. The statute, trust or other agreement, or the court appointment under which the grantee is acting is: _____.
- c. The description of the representative capacity of the undersigned was recorded at _____ [Reception/Film No.] [Book/Page No.] on _____ [date] in the records of the Clerk and Recorder of the _____ ⁶ County of _____, Colorado.

Dated: _____

Affiant

[PRINT NAME OF AFFIANT]

Signed and sworn to or affirmed before me by Affiant, _____, on _____, in the _____ ⁷ County of _____ ⁸.

Witness my hand and seal.

My commission expires:⁹ _____

Notary Public¹⁰

¹ *Purpose of Affidavit.* This affidavit is designed to comply with the requirements of C.R.S. § 38-30-108, as amended in 2001. It might be used when an instrument conveying an interest in real property, in which the grantee is described as a person acting in a representative capacity, does not also (1) name the person so represented; (2) identify the statute, the trust or other agreement, or the court appointment under which the grantee is acting; or (3) refer, by proper description to book, page, document number, or file to an instrument, order, decree, or other writing containing any such description of the representative capacity of the grantee that is recorded with the county clerk and recorder in the county where the real property is located. This statutory provision provides that such an affidavit executed by or on behalf of the grantee may be recorded with the county clerk and recorder of the county where the subject real estate is located and shall serve as notice to all persons of the representative capacity of the grantee with respect to the interest in real property so conveyed.

² If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

³ The county in which the oath is administered to the affiants or the affirmation is taken should be entered in this field.

⁴ If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

⁵ Affiants are encouraged to include all applicable information under 4. This may be necessary, for example, to expedite the title process.

⁶ If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

⁷ If this affidavit is being notarized in Denver or Broomfield, this field should read "City and." If this affidavit is being notarized in any other county, this field should be left blank.

⁸ The county in which the oath is administered to the affiants or the affirmation is taken should be entered in this field.

⁹ If the notary stamp does not include the expiration date, include the date on this line.

¹⁰ For affidavits affecting real property, practitioner must decide whether in the particular situation at hand also including an acknowledgement with the jurat, either separately or combining the two, would be useful. The jurat is to put the individual under oath and subject to penalties of perjury. The acknowledgement is to receive the presumptions that go along with an acknowledgement as to title and the benefits towards marketability of the subject property, including those under C.R.S. § 38-35-101(3) and C.R.S. § 38-35-104.

DRAFT

STATEMENT OF AUTHORITY

1. This Statement of Authority relates to an entity¹ named _____, and is executed on behalf of the entity pursuant to the provisions of Section 38-30-172, C.R.S.

2. The type of entity is a:

- checkbox corporation
checkbox nonprofit corporation
checkbox limited liability company
checkbox general partnership
checkbox limited partnership
checkbox other: _____
checkbox registered limited liability partnership
checkbox registered limited liability limited partnership
checkbox limited partnership association
checkbox government or governmental subdivision or agency
checkbox trust (Section 38-30-108.5, C.R.S.)

3. The entity is formed under the laws of: _____

4. The mailing address for the entity is: _____

5. The checkbox name checkbox position of each person authorized to execute instruments conveying, encumbering, or otherwise affecting title to real property on behalf of the entity is: _____

6.2 The authority of the foregoing person(s) to bind the entity is checkbox not limited checkbox limited as follows: _____

7. Other matters concerning the manner in which the entity deals with interests in real property: _____

Executed this _____ day of _____, 20____.3

Signature (Type or Print Name Below)

STATE OF COLORADO)
) ss.
_____4COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 20__ by _____

Witness my hand and official seal.

1 This form should not be used unless the entity is capable of holding title to real property.
2 The absence of any limitation shall be prima facie evidence that no such limitation exists.
3 The statement of authority must be recorded to obtain the benefits of the statute.
4 If in Denver or Broomfield, insert "City and."

My commission expires:⁵ _____

Notary Public⁶

⁵ If the notary stamp does not include the expiration date, include the date on this line.

⁶ Practitioner must decide whether in the particular situation at hand also including a jurat with the acknowledgement, either separately or combining the two, would be useful. The jurat is to put the individual under oath and subject to penalties of perjury.

General Notes on Use for Deeds

DRAFT

The preferred approach in drafting the property description on a deed or other instrument (including water and mineral interests) is to use the precise language from the vesting instrument, a copy of which can often be obtained via an Ownership and Encumbrance Report from a title company. The legal description of the property being referenced in the transferring deed should be same as the legal description of the property on the deed vesting title, unless you are aware of some change in description since the vesting deed. Do not rely on the property description provided by a county assessor's office. The assessor's office can use an abbreviated legal description which is not the complete and actual legal description. The best practice may entail obtaining an Ownership and Encumbrance Report or a more detailed title report on the property at issue. A schedule with the property's legal description may also be attached. When doing so, this field should read "See attached Schedule [SCHEDULE NUMBER/LETTER]." As an alternative, this field may refer to the property description on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed. In addition, the precise name of the prior grantee should be used as the name of the grantor for the subsequent deed. Every deed should include an address for the grantee (to provide an address for purposes of mailing tax notices pursuant to C.R.S. §38-35-109(2)) and must be acknowledged. It is also important to state if multiple grantees are taking title as joint tenants. If not specified in the deed, the conveyance will be deemed to vest the grantees as tenants in common.

There are four basic types of deeds: general warranty deed (which warrants title to the property both prior to and after the grantor acquired title to the property), special warranty deed (which warrants against title defects during the period of time the grantor owned the property), bargain and sale deed (which contains no warranties of title, but does convey any after-acquired title to the property), and quitclaim deed (which contains no warranties whatsoever and does not convey after-acquired title). Personal representative, trustee, and conservator's deeds should be bargain and sale deeds. To be a bargain and sale deed, the deed should include the words "sell(s) and convey(s)." General warranty deeds are addressed at C.R.S. §38-30-113(1)(a), and special warranty deeds and bargain and sale deeds are addressed at C.R.S. §38-30-113(1)(b) and (1)(c). When transferring real property to a grantee, title insurance might be recommended to the grantee regardless of the type of deed being utilized to make the transfer, particularly if there are circumstances that can create uncertainty as to title, including prior deeds drafted by a party without professional assistance. It is a good practice to also advise the grantee as to the need for transfer of casualty and liability insurance protection.

A Real Property Transfer Declaration (TD-1000) can be completed and submitted at the time of sale of real property so that the appropriate documentary fee can be calculated and any necessary allocation of sales or use taxes can be made.

More information on the different forms of deed can be found in "Which Deed Should I Use?", 48 *Colo. Law.* 34 (Jan. 2019).

DRAFT

Personal Representative's Deeds-Notes on Use

Two different forms of personal representative deeds are provided. One deed form is a Deed of Distribution that can be used by the personal representative of either a testate or intestate estate to distribute the real estate to either the devisees or the heirs of the estate, as the case may be. The other deed form is to be used in the case of a sale of the real estate by the personal representative for valuable consideration.

Along with the deed, a certified copy of the court document evidencing the authority of the personal representative to convey title to the real estate should be recorded with the Clerk and Recorder of the County in which the real estate is located. In the case of a testate estate, this document would be Letters Testamentary. In the case of an intestate estate, this document would be Letters of Administration.

The deed forms provided are bargain and sale deeds which make no warranties of title, but do convey after acquired title. A fiduciary is prohibited from giving general warranties of title.

 DRAFT

Trustee's Deeds Notes on Use

This deed presumes that the grantor is the trustee of a trust. In Colorado, the preferred titling of real property in trust, however, is in the name of the trust itself rather than the name of the trustee. This mode of titling is explicitly authorized by C.R.S. §38-30-108.5. This approach greatly simplifies the subsequent transfer of real property out of the trust in the event the trusteeship changes, such as the death or incapacity of the original trustee. This approach also avoids any argument that the real property is subject to the trustee's individual creditors. See *Lagae v. Lackner*, 996 P.2d 1281 (Colo. 2000) and R. Sterling Ambler, "Title to Colorado Real Property Held in Trust," 31 *Colo. Law.* 87 (May 2002).

If the trust itself is named in the deed to real property, a statement of authority can be relied upon as evidence of the existence of the trust and authority of the trustee to deal with the real property. C.R.S. §38-30-172. When there is a change in the trustee, the successor trustee can simply execute and record a new statement of authority.

It may be desirable for any trustee holding title to real property in his or her name as trustee to execute a deed conveying the property directly into the trust itself to avoid future transfer problems.

If the consideration for the deed is less than \$500, it may be desirable to add a statement to that effect on the deed to indicate no need for payment of a documentary fee. C.R.S. §39-13-102.

If real property is transferred to a revocable trust, the practitioner may want to advise the client to add the trust to the client's homeowner's insurance. Furthermore, an endorsement to the title policy may be needed to maintain title insurance coverage.

 DRAFT

CONSERVATOR'S DEED – NOTES ON USE

Conservator's deeds are used to convey an interest in real property that is held by a Protected Person. Conservators are given title as Trustee to all of a Protected Person's property under C.R.S. § 15-14-421, unless otherwise ordered by the court, and as such, have the authority to convey that property in the best interests of the Protected Person. See also, C.R.S. § 15-14-425. Once a Conservator has been appointed, any transfers of the property cannot be legally accomplished by the Protected Person. See C.R.S. § 15-14-422. However, recording the Conservator's Letters of Conservatorship will avoid the Protected Person taking action that will give rise to a claim against the Protected Person's Estate.

While this deed is in a form to transfer the property interest to one Grantee, it may be used to transfer a property interest to multiple Grantees. If the drafter is attempting to transfer to multiple parties, it is important to add if the interest is to be received by Grantees as joint tenants. If not specified in the deed the default is tenancy in common.

The Order Appointing Conservator may limit the authority of the Conservator to transfer certain assets and may also require Court approval of actions taken by the Conservator. See C.R.S. § 15-14-411 and 421.

A Conservator must disclose his or her representative capacity and identify the estate in order to avoid personal liability, however, there are still instances where a Conservator can be personally liable for obligations arising from the ownership or control of the Protected Person's property. See C.R.S. § 15-14-430. Persons dealing with the Conservator in good faith and for value are protected under C.R.S. § 15-14-424.

Beneficiary Deed Note on Use

The CBA-CLE form uses substantially the same language as set forth in C.R.S. § 15-15-404 for a Colorado beneficiary deed. The statute does not require that its specific language be used; rather, it requires only that a beneficiary deed contain the words “conveys on death” or “transfers on death,” or otherwise indicates that a transfer is to be effective upon the death of the grantor.

This beneficiary deed is the equivalent of a bargain and sale deed; that is, it conveys the grantor’s after-acquired title without any warranties (C.R.S. § 15-15-404(2)). Any person or entity receiving title to real property by way of a beneficiary deed will take title subject to any encumbrances on the property, such as a mortgage or a lien, in effect on the date of the grantor’s death (C.R.S. § 15-15-407(2)).

Note the language in capitals regarding disqualification from Medicaid. A person who applies for or receives “medical assistance”, including Medicaid, which would entitle the state to assert a claim for recovery of costs or assets, overpayments, penalties, adjustments, or liens, cannot receive such assistance if they have a beneficiary deed in effect. Any real property subject to a beneficiary deed signed and recorded by a person who applies for or is receiving medical assistance will be a “countable resource” (that is, property voluntarily transferred without fair and valuable consideration) for the purpose of qualifying for Medicaid (*see* C.R.S. § 15-15-403).

Finally, title companies will often refuse to transfer or insure title after the death of the grantor of property under a beneficiary deed because of the provisions of C.R.S. § 15-15-407(3), which gives a person “with an interest in the property” (such as an omitted heir or a lienholder) 4 months after the date of the grantor’s death to record a document memorializing their interest. If no such person records any documents, the grantee-beneficiary takes title to the property subject only to any encumbrances existing as of the date of death of the grantor (C.R.S. § 15-15-410(1)).

The practitioner may wish to review the following Colorado Lawyer articles on beneficiary deeds:

- “*Practical Considerations in the Use of Colorado Beneficiary Deeds*”, 44 Colo.Law. 41, January 2015;
- “*Beneficiary Deeds in Colorado – Part I: Overview of Legislation – Estate and Trust Forum*”, 34 Colo.Law. 79, June 2005; and
- “*Beneficiary Deeds in Colorado – Part II: Practical Applications – Real Estate Law Newsletter*”, 34 Colo.Law. 103, June 2005.

 DRAFT

Revocation of Beneficiary Deed Notes on Use

The CBA-CLE form uses substantially the same language as set forth in C.R.S. § 15-15-405 for the revocation of a Colorado beneficiary deed. The statute does not require that its specific language be used; rather, it requires only that a revocation of a beneficiary deed (i) describe the real property affected, (ii) revoke the deed, and (iii) be recorded before the death of the grantor in the recorder's office for the county in which the real property is located (C.R.S. § 15-15-405(1)).

Note that a subsequently recorded beneficiary deed will also automatically revoke all prior beneficiary designations made in an earlier-recorded beneficiary deed, without specific reference to the prior beneficiary deed, as long as it is recorded before the death of the grantor (C.R.S. § 15-15-405(2)).

DRAFT

Deeds Conveying a Life Estate - Notes on Use

Colorado law allows the grant of a life estate. See *Million v. Botefur*, 9 P.2d 284 (1932); *Kendall v. Wiles*, 483 P.2d 388 (Colo. App. 1971). Any language that reflects the intent of a grantor to create a life estate is sufficient. See *Willis V. Carpenter & Holly S. Hoxeng*, *Colorado Real Estate Practice* § 3.7 (CLE in Colorado, Inc. 2015).

Two separate deeds are provided to convey either (i) the real property to a grantee reserving a life estate in the grantor (Deed Reserving Life Estate) or (ii) a life estate in the real property to a certain grantee and a remainder interest to a different grantee (Deed to Different Life Estate and Remainder Grantees). The grant language found in the Deed to Different Life Estate and Remainder Grantees could be adapted for use in a Personal Representative's Deed of Distribution to implement a testamentary devise of a separate life estate and a remainder interest.

Once the practitioner selects the appropriate deed, the practitioner should customize the text in that deed as it relates to who will be responsible for expenses related to the property. As a practical matter, it is best for the deed to identify which interest holder pays for maintenance, repairs, taxes, insurance, and assessments. The client may want to separate the obligations for maintenance or repairs from other obligations, and/or may want to have more specification of the obligations for maintenance or repairs. The practitioner should consider advising the client to confer with any title insurance company that had insured the grantor's title about adding the grantee as an additional insured on the title insurance policy and/or using a warranty deed.

 DRAFT

SUPPLEMENTARY AFFIDAVIT NOTES ON USE

1. Purpose of Affidavit. This affidavit is designed to comply with the requirements of C.R.S. § 38-31-102, as amended in 2016, which provides that a certificate or verification of death of a joint tenant, life tenant, owner of real property under a beneficiary deed, or any other person whose interest in real property terminates upon their death to the same extent as a joint tenant, may be recorded in the county where the real property is located, together with a supplementary affidavit.
2. *Order of Recordings*. The decedent's certificate or verification of death may either be recorded as an attachment to this affidavit or as a separate prior recording. If the decedent's certificate or verification of death is recorded as a separate prior recording, the reception number of the recorded decedent's certificate or verification of death should be stated in this affidavit.
3. The legal description of the property being referenced in this affidavit should be the same as the legal description of the property on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed, unless you are aware of some change in description since the vesting deed. Do not rely on the property description provided by a county assessor's office. The assessor's office can use an abbreviated legal description which is not the complete and actual legal description. The best practice may entail obtaining an Ownership and Encumbrance Report or a more detailed title report on the property at issue. A schedule with the property's legal description may also be attached to this affidavit. When doing so, this field should read "See attached Schedule [SCHEDULE NUMBER/LETTER]." As an alternative, this field may refer to the property description on the deed vesting title in the relevant joint tenancy, life estate, or beneficiary deed.

 DRAFT

Statement of Authority Notes on Use

The statement of authority must be recorded to obtain the benefits of the statute (C.R.S. § 38-30-172(5)). Upon recording, a statement of authority shall constitute prima facie evidence of the facts recited in the statement of authority insofar as the facts affect title to real property and prima facie evidence of the authority of the person executing the statement of authority to execute and record the statement of authority on behalf of the entity.

This form should not be used unless the entity is capable of holding title to real property.

The absence of any limitation shall be prima facie evidence that no such limitation exists. C.R.S. § 38-30-172(6).

In situations where there are two trustees who can act on behalf of a trust, it is recommended that the practitioner clarifies in paragraph 6 of the statement of authority whether a trustee can act independently without joinder of the other trustee(s). This information should be available in the trust agreement.

Hi Dylan and Molly –

I have a very brief follow up to the CUTC materials previously sent and discussed at SRC last month. The issue is a conforming amendment to the CUTC if we enact Part 5 – as explained below:

CRS 15-5-105, includes the “mandatory” provisions of the CUTC that cannot be modified by trust agreement. The uniform act identified all of Part 5 as a portion of the UTC that could not be drafted around. When the CUTC was enacted, we reserved 15-5-105(2)(e), so that if Part 5 became law, we could add Part 5 as a mandatory provision of the CUTC.

Specifically, 15-5-105(2)(e) should be revised as follows:

“(e) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;”

Dylan – should we bring this up at SRC or is this something that Council can address on its own? I have emailed the Part 5 subcommittee about this issue with no one raising any objections or concerns. It would be great if we could discuss it briefly at SRC next week, but I know you have a full agenda.

Molly – I will for sure bring this up in my presentation of Part 5 to Council, but would you mind including this email in the materials as well?

Thanks,

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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 Caubbe, 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.

KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC
MEMORANDUM

TO: CBA Council of the Trust and Estate Section

FROM: Chad Rounds

RE: Summary of 8/18/20 CBA Real Estate Section Council Meeting

DATE: 8/19/20

I attended the CBA Real Estate Section Council ("RESC") meeting on 8/18/20. It was conducted on Zoom. The following is my report on matters discussed which CBA Trust and Estate Section Council ("TESC") might find of interest:

#1) New Chair

It was the first council meeting with Jean Arnold as chair. Her theme this year is "Lawyers as Leaders" and "Wellbeing and Inclusion."

#2) Annual Real Estate Symposium

The first part of the 2020 virtual real estate symposium occurred on July 17th. The second part will be on September 2nd and 3rd. The attendance for this virtual symposium is down 25% from recent years when it was in-person up in the mountains.

#3) Removal of Race-Based Restrictive Covenants

There was a discussion on how race-based restrictive covenants could be removed or redacted from the public records. While these old recorded community covenants with race restrictions are no longer enforceable, they are still brought to light with title searches. While each community could vote to amend its declaration, the hope is that a broader state wide fix to this issue can be found through possible legislation. The RESC agreed to create a new taskforce to look into this issue.

#4) Trust and Estate Related Real Estate Forms:

I let the RESC know that the trust and estate related real estate forms which they reviewed have been presented to the TESC by David Kirch and the plan is to have them be voted on at the September meeting.

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.

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;

1. SRC Approved Proposals

a. Active Matters

(i) **CUTC Part 5**

Connie Eyster, Carl Stevens, Steve Brainard, and Darla Daniel presented the Subcommittee's report. After the report and review of the supplemental materials provided by the Subcommittee, Stan Kent moved (Jennifer Spitz seconded) to accept the Subcommittee's recommendations. Motion passed unanimously.

History of establishment of CUTC Part 5 Subcommittee. CUTC was enacted but the decision was made to reserve Part 5 (addressing creditor claims) because of concern as to whether consensus could be reached as to Part 5. Rather than hold up CUTC it was determined to address Part 5 after CUTC was addressed.

The Subcommittee has completed its charge and is ready to report back to SRC.

- Carl Stevens reported on Sections 501 and 502. Carl wished to thank Kevin Millard and Gene Zuspann
- - Overview of Section 501
 - This section only applies to trusts without a spendthrift provision. This section authorizes a court to attach present or future distributions to a beneficiary if a creditor is trying to get paid.
 - Subcommittee recommended UTC language with addition of the last sentence which is not UTC language. This addition was made because the Subcommittee believed it best to codify a position that is set forth in the national Uniform Law Comments and to avoid any ambiguity on this question.
 - Overview of Section 502
 - Deals with including spendthrift provisions in the trust and whether those provisions must specifically prohibit voluntary and involuntary transfers.
 - Subcommittee recommended adopting Subsections (1) (2) and (3) as drafted in UTC. (1) requires prohibition of both voluntary and involuntary transfers of a beneficiary's interest in order for the

spendthrift provision to be valid. (2) provides that terms of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust” is sufficient to restrain both voluntary and involuntary transfers. (3) A creditor or assignee of beneficiary may not reach interest or distribution before its receipt by the beneficiary.

- New subsections 4- Trustee may make distribution on behalf of beneficiary (i.e. to pay for tuition) so long as it doesn't touch the hands of the beneficiary creditors cannot touch that distribution.
 - New subsection 5- Allowing a beneficiary to use or occupy real property or tangible personal property owned by the trust does not cause such assets to be reached by the beneficiaries creditors.
 - A conforming amendment is suggested to CRS 15-5-816 in order to authorize a trustee to make distributions for the benefit of a beneficiary.
- Connie Eyster reported on Section 503
 - Exceptions to the spendthrift provision.
 - Child support
 - Judgment creditor providing essential services to protect beneficiaries interest
 - Difference in UTC (did not include spousal creditors or employment creditors). Modified child support language (working with Kim Willoughby family law succession).
 - Less than half of the states (roughly 13) accepted 503. 1/3 of the estates reserved it. 8 states allowed children but not spouses. SC thought it consistent with good policy and what other states have done to allow children, child support and judgment creditors who provided essentially services to beneficiary. Want to make sure beneficiaries have resources to retain attorneys and other advisors. Even though state federal agencies may have authority we are not specifically including in the statute
 - Steve Brainerd reported on Section 504
 - Section 504 addresses the ability of the creditor of a beneficiary to get their hands on the beneficiary's interest in a discretionary trust. Whether or not the discretionary trust contains a spendthrift provision.
 - Subsection (b)- Provides the general rule which precludes a creditor from compelling a distribution from the trust even if

the trustee has failed to comply with a standard of distribution which is set forth in the trust or if the trustee has abused their discretion in some manner

- Two important things (“abuse discretion or failed to comply with a distribution standard”).
 - This section like Restatement Third of Trusts eliminates the distinction between discretionary trusts and support trusts and buys into the developing law that indicates even support trusts have an element of discretion and it is too difficult to determine where the line between pure discretion and discretion in the name of support or some other standard lies. This section unifies the law surrounding discretionary and support trust.
 - A creditor under this section is precluded from compelling a distribution even where a beneficiary might have the right to say the trustee abused the discretion or failed to apply a standard. The ability to compel these distributions lie with the beneficiary not the trustee. The creditor does not have the ability to stand in the shoes of creditors. This is a departure from RST 2nd and 3rd which gives the creditor the ability to step into the beneficiaries shoes to compel a distribution if trustee abused discretion or made improper distribution.
- Subsection (c) creates exception to (b) general rule
 - Exception would be claims of child for support.
- Subsection (e)
 - Added after the original UTC had been published. Under RST 3rd Sec .60 cmt g provides that where a beneficiary is also the trustee that the beneficial interest of the beneficiary/trustee could be reached by the beneficiary/trustees creditors. *Many folks objected to this when Restatement 3rd came out.*
 - 504(e) was added to provide that 504 will apply even if the beneficiary is a trustee or co-trustee.
- Connie Eyster reported on Section 505
 - Addresses creditors ability to make a claim against the interest of settlor.
 - When creditor can reach:

- Revocable Trust
 - (a)(2)- addresses Irrevocable Trusts
 - Creditor can reach maximum amount attributable to settlor's interest in an irrevocable self-settled trust (i.e. Settlor creates an irrevocable trust and is also a beneficiary of that trust) and if more than one settlor, than to the extent of the settlor's contribution.
 - Exceptions
 - Settlor has interest only as result of exercise/nonexercise of power of appointment by third party. (I.e. person exercised power of appointment that person is not deemed settlor).
 - Lifetime QTIP Trust for Spouse and retains reversionary interest.
 - Settlor has right to be reimbursed for tax payments.
 - SNT.
- Darla Daniels reported on Section 506
 - Deals with **overdue mandatory distributions**. Regardless of spendthrift provision, if there is a mandatory distribution is not made, then Creditor may reach.
 - 506(a) second sentence defines mandatory distribution--
- Connie Eyster reported on Section 507
 - Trust property is not subject to personal obligations of the Trustee.
- Connie Eyster reported on Conforming Amendments
 - 15-5-816 (Addresses powers of Trustee)
 - Need to clarify that a distribution to a beneficiary (816(1)(U)) is one to the beneficiary or for the beneficiary's benefit.
 - 15-5-411 (Modification)
 - Elder law (Eric Solemn) was concerned about 411 applying to SNTs. Now elder law is not concerned about this and actually think it makes sense to allow beneficiaries of SNT to petition a court for modification.

Council will review SRC minutes and Subcommittee's materials regarding the 505 presentation and plan on voting on September 2nd.

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and reviewed by the

SUBCOMMITTEE OF THE STATUTORY REVISIONS COMMITTEE (“SRC”) OF THE
TRUSTS & ESTATES (“T&E”) SECTION OF THE COLORADO BAR ASSOCIATION

for consideration by the SRC and T&E Council on September 2, 2020

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

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UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Income and Principal Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Accounting period” means a calendar year, unless a fiduciary selects another period of 12 calendar months or approximately 12 calendar months. The term includes a part of a calendar year or another period of 12 calendar months or approximately 12 calendar months which begins when an income interest begins or ends when an income interest ends.

(2) “Asset-backed security” means a security that is serviced primarily by the cash flows of a discrete pool of fixed or revolving receivables or other financial assets that by their terms convert into cash within a finite time. The term includes rights or other assets that ensure the servicing or timely distribution of proceeds to the holder of the asset-backed security. The term does not include an asset to which Section 401, 409, or 414 applies.

(3) “Beneficiary” includes:

(A) for a trust:

(i) a current beneficiary, including a current income beneficiary and a beneficiary that may receive only principal;

(ii) a remainder beneficiary; and

(iii) any other successor beneficiary;

(B) for an estate, an heir[, legatee,] and devisee; ~~and~~

(C) Reserved.

(4) “Court” means [the court in this state having jurisdiction relating to a trust or estate.

(5) “Current income beneficiary” means a beneficiary to which a fiduciary may distribute net income, whether or not the fiduciary also may distribute principal to the beneficiary.

(6) “Distribution” means a payment or transfer by a fiduciary to a beneficiary in the beneficiary’s capacity as a beneficiary, made under the terms of the trust, without

consideration other than the beneficiary's right to receive the payment or transfer under the terms of the trust. "Distribute", "distributed", and "distributee" have corresponding meanings.

(7) "Estate" means a decedent's estate. The term includes the property of the decedent as the estate is originally constituted and the property of the estate as it exists at any time during administration.

(8) "Fiduciary" includes a trustee,[trust director determined under [Section 2(9) of the Uniform Directed Trust Act,]] personal representative, and person acting under a delegation from a fiduciary. The term includes a person that holds property for a successor beneficiary whose interest may be affected by an allocation of receipts and expenditures between income and principal. If there are two or more co-fiduciaries, the term includes all co-fiduciaries acting under the terms of the trust and applicable law.

(9) "Income" means money or other property a fiduciary receives as current return from principal. The term includes a part of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [Article] 4.

(10) "Income interest" means the right of a current income beneficiary to receive all or part of net income, whether the terms of the trust require the net income to be distributed or authorize the net income to be distributed in the fiduciary's discretion. The term includes the right of a current beneficiary to use property held by a fiduciary.

(11) "Independent person" means a person that is not:

(A) for a trust:

(i) [a qualified beneficiary determined under [Uniform Trust Code Section 103(13)]] [a beneficiary that is a distributee or permissible distributee of trust income or principal or would be a distributee or permissible distributee of trust income or principal if either the trust or the interests of the distributees or permissible distributees of trust income or principal were terminated, assuming no power of appointment is exercised];

(ii) a settlor of the trust; or

(iii) an individual whose legal obligation to support a beneficiary may be satisfied by a distribution from the trust;

(B) for an estate, a beneficiary;

(C) a spouse, parent, brother, sister, or issue of an individual described in subparagraph (A) or (B);

(D) a corporation, partnership, limited liability company, or other entity in which persons described in subparagraphs (A) through (C), in the aggregate, have voting control; or

(E) an employee of a person described in subparagraph (A), (B), (C), or (D).

(12) “Mandatory income interest” means the right of a current income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(13) “Net income” means the total allocations during an accounting period to income under the terms of a trust and this [act] minus the disbursements during the period, other than distributions, allocated to income under the terms of the trust and this [act]. To the extent the trust is a unitrust under [Article] 3, the term means the unitrust amount determined under [Article] 3. The term includes an adjustment from principal to income under Section 203. The term does not include an adjustment from income to principal under Section 203.

(14) “Person” means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(15) “Personal representative” means an executor, administrator, successor personal representative, special administrator, or person that performs substantially the same function with respect to an estate under the law governing the person’s status.

(16) “Principal” means property held in trust for distribution to, production of income for, or use by a current or successor beneficiary.

(17) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(18) “Settlor” means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, the term includes each person, to the extent of the trust property attributable to that person’s contribution, except to the extent another person has the power to revoke or withdraw that portion.

(19) “Special tax benefit” means:

(A) exclusion of a transfer to a trust from gifts described in Section 2503(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2503(b)[, as amended,] because of the qualification of an income interest in the trust as a present interest in property;

(B) status as a qualified subchapter S trust described in Section 1361(d)(3) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(d)(3)[, as amended,] at a time the trust holds stock of an S corporation described in Section 1361(a)(1) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(a)(1)[, as amended];

(C) an estate or gift tax marital deduction for a transfer to a trust under Section 2056 or 2523 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056 or 2523[, as amended,] which depends or depended in whole or in part on the right of the settlor's spouse to receive the net income of the trust;

(D) exemption in whole or in part of a trust from the federal generation-skipping transfer tax imposed by Section 2601 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2601[, as amended,] because the trust was irrevocable on September 25, 1985, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended,], could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended,], could occur with respect to the trust; or

(E) an inclusion ratio, as defined in Section 2642(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2642(a)[, as amended,], of the trust which is less than one, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended,], could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended,], could occur with respect to the trust.

(20) "Successive interest" means the interest of a successor beneficiary.

(21) "Successor beneficiary" means a person entitled to receive income or principal or to use property when an income interest or other current interest ends.

(22) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

- (i) expressed in the trust instrument; or
- (ii) established by other evidence that would be admissible in a judicial

proceeding;

(B) the trust's provisions as established, determined, or amended by:

- (i) a trustee or trust director in accordance with applicable law;
- (ii) court order;
- (iii) a nonjudicial settlement agreement under section 15-5-111, C.R.S.; or
- (iv) by alternative dispute resolution under section 15-5-113, C.R.S.; or

(C) for an estate or a will.

(D) RESERVED.

(23) "Trust":

(A) includes:

- (i) an express trust, private or charitable, with additions to the trust, wherever and however created; and
- (ii) a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust; and

(B) does not include:

- (i) a constructive trust;
- (ii) a resulting trust, conservatorship, guardianship, multi-party account, custodial arrangement for a minor, business trust, voting trust, security arrangement, liquidation trust, or trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, retirement benefits, or employee benefits of any kind; or
- (iii) an arrangement under which a person is a nominee, escrowee, or agent for another.

(24) "Trustee" means a person, other than a personal representative, that owns or holds property for the benefit of a beneficiary. The term includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(25) “Will” means any testamentary instrument recognized by applicable law which makes a legally effective disposition of an individual’s property, effective at the individual’s death. The term includes a codicil or other amendment to a testamentary instrument.

SECTION 103. SCOPE. Except as otherwise provided in the terms of a trust, A WILL, or this [act], this [act] applies to:

- (1) a trust or estate; and
- (2) Reserved.

SECTION 104. GOVERNING LAW. Except as otherwise provided in the terms of a trust or this [act], this [act] applies when this state is the principal place of administration of a trust or estate. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration of a trust to this state, the trustee submits to the application of this [act] to any matter within the scope of this [act] involving the trust.

[ARTICLE] 2
FIDUCIARY DUTIES AND JUDICIAL REVIEW

SECTION 201. FIDUCIARY DUTIES; GENERAL PRINCIPLES.

(a) In making an allocation or determination or exercising discretion under this [act], a fiduciary shall:

- (1) act in good faith, based on what is fair and reasonable to all beneficiaries;
- (2) administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries;
- (3) administer the trust or estate in accordance with the terms of the trust, even if there is a different provision in this [act]; and
- (4) administer the trust or estate in accordance with this [act], except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.

(b) A fiduciary's allocation, determination, or exercise of discretion under this [act] is presumed to be fair and reasonable to all beneficiaries. A fiduciary may exercise a discretionary power of administration given to the fiduciary by the terms of the trust, and an exercise of the power which produces a result different from a result required or permitted by this [act] does not create an inference that the fiduciary abused the fiduciary's discretion.

(c) A fiduciary shall:

- (1) add a receipt to principal, to the extent neither the terms of the trust nor this [act] allocates the receipt between income and principal; and
- (2) charge a disbursement to principal, to the extent neither the terms of the trust nor this [act] allocates the disbursement between income and principal.

(d) A fiduciary may exercise the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3), if the fiduciary determines the exercise of the power will assist the fiduciary to administer the trust or estate impartially.

(e) Factors the fiduciary must consider in making the determination under subsection (d) include:

- (1) the terms of the trust;
- (2) the nature, distribution standards, and expected duration of the trust;

- (3) the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7;
- (4) the desirability of liquidity and regularity of income;
- (5) the desirability of the preservation and appreciation of principal;
- (6) the extent to which an asset is used or may be used by a beneficiary;
- (7) the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;
- (8) whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;
- (9) the extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;
- (10) the effect of current and reasonably expected economic conditions; and
- (11) the reasonably expected tax consequences of the exercise of the power.

SECTION 202. JUDICIAL REVIEW OF EXERCISE OF DISCRETIONARY POWER[; REQUEST FOR INSTRUCTION].

(a) In this section, “fiduciary decision” means:

- (1) a fiduciary’s allocation between income and principal or other determination regarding income and principal required or authorized by the terms of the trust or this [act];
- (2) the fiduciary’s exercise or nonexercise of a discretionary power regarding income and principal granted by the terms of the trust or this [act], including the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3); or
- (3) the fiduciary’s implementation of a decision described in paragraph (1) or (2).

(b) The court may not order a fiduciary to change a fiduciary decision unless the court determines that the fiduciary decision was an abuse of the fiduciary’s discretion.

(c) If the court determines that a fiduciary decision was an abuse of the fiduciary’s discretion, the court may order a remedy authorized by law, including Uniform Trust Code Section 1001 and Part 5 of Article 10 of Title 15, C.R.S. To place the beneficiaries in the positions the beneficiaries would have occupied if there had not been an abuse of the fiduciary’s discretion, the court may order:

(1) the fiduciary to exercise or refrain from exercising the power to adjust under Section 203;

(2) the fiduciary to exercise or refrain from exercising the power to convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3);

(3) the fiduciary to distribute an amount to a beneficiary;

(4) a beneficiary to return some or all of a distribution; or

(5) the fiduciary to withhold an amount from one or more future distributions to a beneficiary.

[(d) On [petition] by a fiduciary for instruction, the court may determine whether a proposed fiduciary decision will result in an abuse of the fiduciary's discretion. If the [petition] describes the proposed decision, contains sufficient information to inform the beneficiary of the reasons for making the proposed decision and the facts on which the fiduciary relies, and explains how the beneficiary will be affected by the proposed decision, a beneficiary that opposes the proposed decision has the burden to establish that it will result in an abuse of the fiduciary's discretion.]

SECTION 203. FIDUCIARY'S POWER TO ADJUST.

(a) Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.

(b) This section does not create a duty to exercise or consider the power to adjust under subsection (a) or to inform a beneficiary about the applicability of this section.

(c) A fiduciary that in good faith exercises or fails to exercise the power to adjust under subsection (a) is not liable to a person affected by the exercise or failure to exercise.

(d) In deciding whether and to what extent to exercise the power to adjust under subsection (a), a fiduciary shall consider all factors the fiduciary considers relevant, including relevant factors in Section 201(e) and the application of Sections 401(i), 408, and 413.

(e) A fiduciary may not exercise the power under subsection (a) to make an adjustment or under Section 408 to make a determination that an allocation is insubstantial if:

(1) the adjustment or determination would reduce the amount payable to a current

income beneficiary from a trust that qualifies for a special tax benefit, except to the extent the adjustment is made to provide for a reasonable apportionment of the total return of the trust between the current income beneficiary and successor beneficiaries;

(2) the adjustment or determination would change the amount payable to a beneficiary, as a fixed annuity or a fixed fraction of the value of the trust assets, under the terms of the trust;

(3) the adjustment or determination would reduce an amount that is permanently set aside for a charitable purpose under the terms of the trust, unless both income and principal are set aside for the charitable purpose;

(4) possessing or exercising the power would cause a person to be treated as the owner of all or part of the trust for federal income tax purposes;

(5) possessing or exercising the power would cause all or part of the value of the trust assets to be included in the gross estate of an individual for federal estate tax purposes;

(6) possessing or exercising the power would cause an individual to be treated as making a gift for federal gift tax purposes;

(7) the fiduciary is not an independent person;

(8) the trust is irrevocable and provides for income to be paid to the settlor and possessing or exercising the power would cause the adjusted principal or income to be considered an available resource or available income under a public-benefit program; or

(9) the trust is a unitrust under [Article] 3.

(f) If subsection (e)(4), (5), (6), or (7) applies to a fiduciary:

(1) a co-fiduciary to which subsection (e)(4) through (7) does not apply may exercise the power to adjust, unless the exercise of the power by the remaining co-fiduciary or co-fiduciaries is not permitted by the terms of the trust or law other than this [act]; or

(2) if there is no co-fiduciary to which subsection (e)(4) through (7) does not apply, the fiduciary may appoint a co-fiduciary to which subsection (e)(4) through (7) does not apply, which may be a special fiduciary with limited powers, and the appointed co-fiduciary may exercise the power to adjust under subsection (a), unless the appointment of a co-fiduciary or the exercise of the power by a co-fiduciary is not permitted by the terms of the trust or law other than this [act].

(g) A fiduciary may release or delegate to a co-fiduciary the power to adjust under subsection (a) if the fiduciary determines that the fiduciary's possession or exercise of the power will or may:

(1) cause a result described in subsection (e)(1) through (6) or (8); or
(2) deprive the trust of a tax benefit or impose a tax burden not described in subsection (e)(1) through (6).

(h) A fiduciary's release or delegation to a co-fiduciary under subsection (g) of the power to adjust under subsection (a):

(1) must be in a record;

(2) applies to the entire power, unless the release or delegation provides a limitation, which may be a limitation to the power to adjust:

(A) from income to principal;

(B) from principal to income;

(C) for specified property; or

(D) in specified circumstances;

(3) for a delegation, may be modified by a re-delegation under this subsection by the co-fiduciary to which the delegation is made; and

(4) subject to paragraph (3), is permanent, unless the release or delegation provides a specified period, including a period measured by the life of an individual or the lives of more than one individual.

(i) Terms of a trust which deny or limit the power to adjust between income and principal do not affect the application of this section, unless the terms of the trust expressly deny or limit the power to adjust under subsection (a).

(j) The exercise of the power to adjust under subsection (a) in any accounting period may apply to the current period, the immediately preceding period, and one or more subsequent periods.

(k) A description of the exercise of the power to adjust under subsection (a) must be:

(1) included in a report, if any, sent to beneficiaries under Colorado Uniform Trust Code Section 813(c); or

(2) communicated at least annually to {the qualified beneficiaries determined under Colorado Uniform Trust Code Section 103(16), including the Attorney General when applicable [all beneficiaries that receive or are entitled to receive income from the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the notice is sent, assuming no power of appointment is exercised]}.

204 – NOTICE OF ACTION

(1) IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

(A) “QUALIFIED BENEFICIARY” HAS THE MEANING SET FORTH IN SUBSECTION 15-5-103(16).

(B) “OBJECTION PERIOD” HAS THE MEANING SET FORTH IN SECTION 304(D)(5).

(2) A FIDUCIARY MAY GIVE A NOTICE OF PROPOSED ACTION REGARDING A MATTER GOVERNED BY SUBPARTS 1 THROUGH 8 OF THIS PART [4] AS PROVIDED IN THIS SECTION. FOR THE PURPOSE OF THIS SECTION, A PROPOSED ACTION INCLUDES A COURSE OF ACTION AND A DECISION NOT TO TAKE ACTION.

(3) THE FIDUCIARY SHALL MAIL NOTICE OF THE PROPOSED ACTION TO ALL QUALIFIED BENEFICIARIES AND THE FIDUCIARY MAY GIVE NOTICE TO OTHER BENEFICIARIES. A BENEFICIARY SHALL BE BOUND UNDER THIS SECTION WITH RESPECT TO SUCH PROPOSED ACTION IF THE BENEFICIARY RECEIVES ACTUAL NOTICE OR IF THE BENEFICIARY WOULD BE BOUND UNDER THE PROVISIONS OF TITLE 15, ARTICLE 5, PART 3.

(4) NOTICE OF PROPOSED ACTION NEED NOT BE GIVEN TO ANY BENEFICIARY WHO CONSENTS IN WRITING TO THE PROPOSED ACTION. THE CONSENT MAY BE EXECUTED AT ANY TIME BEFORE OR AFTER THE PROPOSED ACTION IS TAKEN.

(5) THE NOTICE OF PROPOSED ACTION SHALL STATE THAT IT IS GIVEN PURSUANT TO THIS SECTION AND SHALL FOLLOW THE PROCEDURES SET OUT IN SECTION 304 REGARDING NOTICE.

(6) A BENEFICIARY MAY OBJECT TO THE PROPOSED ACTION BY MAILING A WRITTEN OBJECTION TO THE FIDUCIARY AT THE ADDRESS STATED IN THE NOTICE OF PROPOSED ACTION WITHIN THE OBJECTION PERIOD.

(7) A FIDUCIARY IS NOT LIABLE TO A BENEFICIARY TO WHOM NOTICE IS GIVEN FOR AN ACTION REGARDING A MATTER GOVERNED BY THIS PART IF THE FIDUCIARY DOES NOT RECEIVE A WRITTEN OBJECTION TO THE PROPOSED ACTION FROM THE BENEFICIARY WITHIN THE OBJECTION PERIOD AND THE OTHER REQUIREMENTS OF THIS SECTION ARE SATISFIED. IF NO BENEFICIARY WHO RECEIVES NOTICE OBJECTS UNDER THIS SECTION, THE FIDUCIARY IS NOT LIABLE TO THE BENEFICIARIES RECEIVING NOTICE WITH RESPECT TO THE PROPOSED ACTION.

(8) IF THE FIDUCIARY RECEIVES A WRITTEN OBJECTION WITHIN THE OBJECTION PERIOD, EITHER THE FIDUCIARY OR A BENEFICIARY MAY PETITION THE COURT TO HAVE THE PROPOSED ACTION PERFORMED AS PROPOSED, PERFORMED WITH MODIFICATIONS, OR DENIED. IN THE PROCEEDING, A BENEFICIARY OBJECTING TO THE PROPOSED ACTION HAS THE BURDEN OF PROVING THAT THE FIDUCIARY'S PROPOSED ACTION SHOULD NOT BE PERFORMED. A BENEFICIARY WHO HAS NOT OBJECTED IS NOT ESTOPPED FROM OPPOSING THE PROPOSED ACTION IN THE PROCEEDING. IF THE FIDUCIARY DECIDES NOT TO IMPLEMENT THE PROPOSED ACTION, THE FIDUCIARY SHALL NOTIFY THE BENEFICIARIES OF THE DECISION NOT TO TAKE THE ACTION AND THE REASONS FOR THE DECISION, AND THE FIDUCIARY'S DECISION NOT TO IMPLEMENT THE PROPOSED ACTION DOES NOT ITSELF GIVE RISE TO LIABILITY TO ANY BENEFICIARY. A BENEFICIARY MAY PETITION THE COURT TO HAVE THE ACTION PERFORMED, AND HAS THE BURDEN OF PROVING THAT IT SHOULD BE PERFORMED.

[ARTICLE] 3
UNITRUST

SECTION 301. DEFINITIONS. In this [article]:

- (1) “Applicable value” means the amount of the net fair market value of a trust taken into account under Section 307.
- (2) “Express unitrust” means a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount.
- (3) “Income trust” means a trust that is not a unitrust.
- (4) “Net fair market value of a trust” means the fair market value of the assets of the trust, less the noncontingent liabilities of the trust.
- (5) “Unitrust” means a trust for which net income is a unitrust amount. The term includes an express unitrust.
- (6) “Unitrust amount” means an amount computed by multiplying a determined value of a trust by a determined percentage. For a unitrust administered under a unitrust policy, the term means the applicable value, multiplied by the unitrust rate.
- (7) “Unitrust policy” means a policy described in Sections 305 through 309 and adopted under Section 303.
- (8) “Unitrust rate” means the rate used to compute the unitrust amount under paragraph (6) for a unitrust administered under a unitrust policy.

SECTION 302. APPLICATION; DUTIES AND REMEDIES.

- (a) Except as otherwise provided in subsection (b), this [article] applies to:
 - (1) an income trust, unless the terms of the trust expressly prohibit use of this [article] by a specific reference to this [article] or an explicit expression of intent that net income not be calculated as a unitrust amount; and
 - (2) an express unitrust, except to the extent the terms of the trust explicitly:
 - (A) prohibit use of this [article] by a specific reference to this [article];
 - (B) prohibit conversion to an income trust; or
 - (C) limit changes to the method of calculating the unitrust amount.
- (b) This [article] does not apply to a trust described in Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b) of the Internal Revenue Code of 1986[, as

amended,] 26 U.S.C. Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b)[, as amended].

(c) An income trust to which this [article] applies under subsection (a)(1) may be converted to a unitrust under this [article] regardless of the terms of the trust concerning distributions. Conversion to a unitrust under this [article] does not affect other terms of the trust concerning distributions of income or principal.

(d) This [article] applies to an estate only to the extent a trust is a beneficiary of the estate. To the extent of the trust's interest in the estate, the estate may be administered as a unitrust, the administration of the estate as a unitrust may be discontinued, or the percentage or method used to calculate the unitrust amount may be changed, in the same manner as for a trust under this [article].

(e) This [article] does not create a duty to take or consider action under this [article] or to inform a beneficiary about the applicability of this [article].

(f) A fiduciary that in good faith takes or fails to take an action under this [article] is not liable to a person affected by the action or inaction.

SECTION 303. AUTHORITY OF FIDUCIARY.

(a) A fiduciary, without court approval, by complying with subsections (b) and (f), may:

(1) convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:

(A) that in administering the trust the net income of the trust will be a unitrust amount rather than net income determined without regard to this [article]; and

(B) the percentage and method used to calculate the unitrust amount;

(2) change the percentage or method used to calculate a unitrust amount for a unitrust if the fiduciary adopts in a record a unitrust policy or an amendment or replacement of a unitrust policy providing changes in the percentage or method used to calculate the unitrust amount; or

(3) convert a unitrust to an income trust if the fiduciary adopts in a record a determination that, in administering the trust, the net income of the trust will be net income determined without regard to this [article] rather than a unitrust amount.

(b) A fiduciary may take an action under subsection (a) if:

(1) the fiduciary determines that the action will assist the fiduciary to administer a

trust impartially;

(2) the fiduciary sends a notice in a record, in the manner required by Section 304, describing and proposing to take the action;

(3) the fiduciary sends a copy of the notice under paragraph (2) to each settlor of the trust which is:

(A) if an individual, living; or

(B) if not an individual, in existence;

(4) at least one member of each class[of the qualified beneficiaries determined under [Uniform Trust Code Section 103(13)], other than [the Attorney General],] receiving the notice under paragraph (2) is:

(A) if an individual, legally competent; [or]

(B) if not an individual, in existence; [or]

(C) represented in the manner provided in Section 304(b);] and

(5) the fiduciary does not receive, by the date specified in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record to the action proposed under paragraph (2) from a person to which the notice under paragraph (2) is sent.

(c) If a fiduciary receives, not later than the date stated in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record described in Section 304[(d)(4)][(c)(4)] to a proposed action, the fiduciary or a beneficiary may request the court to have the proposed action taken as proposed, taken with modifications, or prevented. A person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection, whether or not the person:

(1) consented under Section 304[(c)][(b)]; or

(2) objected under Section 304[(d)(4)][(c)(4)].

(d) If, after sending a notice under subsection (b)(2), a fiduciary decides not to take the action proposed in the notice, the fiduciary shall notify in a record each person described in Section 304(a) of the decision not to take the action and the reasons for the decision.

(e) If a beneficiary requests in a record that a fiduciary take an action described in subsection (a) and the fiduciary declines to act or does not act within 90 days after receiving the request, the beneficiary may request the court to direct the fiduciary to take the action requested.

(f) In deciding whether and how to take an action authorized by subsection (a), or whether and how to respond to a request by a beneficiary under subsection (e), a fiduciary

shall consider all factors relevant to the trust and the beneficiaries, including relevant factors in Section 201(e).

(g) A fiduciary may release or delegate the power to convert an income trust to a unitrust under subsection (a)(1), change the percentage or method used to calculate a unitrust amount under subsection (a)(2), or convert a unitrust to an income trust under subsection (a)(3), for a reason described in Section 203(g) and in the manner described in Section 203(h).

SECTION 304. NOTICE.

(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under Section 15-5-109, C.R.S., to:

- (1) the qualified beneficiaries determined under Section 15-5-103(16), C.R.S., other than [the Attorney General; and
- (2) each person acting as trust director of the trust under the Colorado Uniform Directed Trust Act; and
- (3) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person is not then serving as a trustee or person described in paragraph (2).

(b) The representation provisions of sections 15-5-301 through 15-5-305, C.R.S., apply to notice under this section.

(c) A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.

(d) A notice required by Section 303(b)(2) must include:

- (1) the action proposed under Section 303(b)(2);
- (2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);
- (3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or replacement of the unitrust policy adopted under Section 303(a)(2);
- (4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;

(5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;

(6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;

(7) the name and contact information of the fiduciary; and

(8) the name and contact information of a person that may be contacted for additional information.

SECTION 305. UNITRUST POLICY.

(a) In administering a unitrust under this [article], a fiduciary shall follow a unitrust policy adopted under Section 303(a)(1) or (2) or amended or replaced under Section 303(a)(2).

(b) A unitrust policy must provide:

(1) the unitrust rate or the method for determining the unitrust rate under Section 306;

(2) the method for determining the applicable value under Section 307; and

(3) the rules described in Sections 306 through 309 which apply in the administration of the unitrust, whether the rules are:

(A) mandatory, as provided in Sections 307(a) and 308(a); or

(B) optional, as provided in Sections 306, 307(b), 308(b), and 309(a), to the extent the fiduciary elects to adopt those rules.

SECTION 306. UNITRUST RATE.

(a) Except as otherwise provided in Section 309(b)(1), a unitrust rate may be:

(1) a fixed unitrust rate; or

(2) a unitrust rate that is determined for each period using:

(A) a market index or other published data; or

(B) a mathematical blend of market indices or other published data over a stated number of preceding periods.

(b) Except as otherwise provided in Section 309(b)(1), a unitrust policy may provide:

(1) a limit on how high the unitrust rate determined under subsection (a)(2) may rise;

(2) a limit on how low the unitrust rate determined under subsection (a)(2) may fall;

(3) a limit on how much the unitrust rate determined under subsection (a)(2) may increase over the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods;

(4) a limit on how much the unitrust rate determined under subsection (a)(2) may decrease below the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods; or

(5) a mathematical blend of any of the unitrust rates determined under subsection (a)(2) and paragraphs (1) through (4).

SECTION 307. APPLICABLE VALUE.

(a) A unitrust policy must provide the method for determining the fair market value of an asset for the purpose of determining the unitrust amount, including:

(1) the frequency of valuing the asset, which need not require a valuation in every period; and

(2) the date for valuing the asset in each period in which the asset is valued.

(b) Except as otherwise provided in Section 309(b)(2), a unitrust policy may provide methods for determining the amount of the net fair market value of the trust to take into account in determining the applicable value, including:

(1) obtaining an appraisal of an asset for which fair market value is not readily available;

(2) exclusion of specific assets or groups or types of assets;

(3) other exceptions or modifications of the treatment of specific assets or groups or types of assets;

(4) identification and treatment of cash or property held for distribution;

(5) use of:

(A) an average of fair market values over a stated number of preceding periods; or

(B) another mathematical blend of fair market values over a stated number of preceding periods;

(6) a limit on how much the applicable value of all assets, groups of assets, or individual assets may increase over:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(7) a limit on how much the applicable value of all assets, groups of assets, or individual assets may decrease below:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(8) the treatment of accrued income and other features of an asset which affect value; and

(9) determining the liabilities of the trust, including treatment of liabilities to conform with the treatment of assets under paragraphs (1) through (8).

SECTION 308. PERIOD.

(a) A unitrust policy must provide the period used under Sections 306 and 307. Except as otherwise provided in Section 309(b)(3), the period may be:

(1) a calendar year;

(2) a 12-month period other than a calendar year;

(3) a calendar quarter;

(4) a three-month period other than a calendar quarter; or

(5) another period.

(b) Except as otherwise provided in Section 309(b), a unitrust policy may provide standards for:

(1) using fewer preceding periods under Section 306(a)(2)(B) or (b)(3) or (4) if:

(A) the trust was not in existence in a preceding period; or

(B) market indices or other published data are not available for a preceding period;

(2) using fewer preceding periods under Section 307(b)(5)(A) or (B), (6)(B), or (7)(B) if:

(A) the trust was not in existence in a preceding period; or

(B) fair market values are not available for a preceding period; and
(3) prorating the unitrust amount on a daily basis for a part of a period in which the trust or the administration of the trust as a unitrust or the interest of any beneficiary commences or terminates.

SECTION 309. SPECIAL TAX BENEFITS; OTHER RULES.

(a) A unitrust policy may:

(1) provide methods and standards for:

(A) determining the timing of distributions;

(B) making distributions in cash or in kind or partly in cash and partly in kind; or

(C) correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;

(2) specify sources and the order of sources, including categories of income for federal income tax purposes, from which distributions of a unitrust amount are paid; or

(3) provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.

(b) If a trust qualifies for a special tax benefit or a fiduciary is not an independent person:

(1) the unitrust rate established under Section 306 may not be less than three percent or more than five percent;

(2) the only provisions of Section 307 which apply are Section 307(a) and (b)(1), (4), (5)(A), and (9);

(3) the only period that may be used under Section 308 is a calendar year under Section 308(a)(1); and

(4) the only other provisions of Section 308 which apply are Section 308(b)(2)(A) and (3).

(c) Unless otherwise provided by the terms of unitrust policy or the terms of the trust, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:

(1) Net income determined as if the trust was not a unitrust;

(2) Other ordinary income as determined for federal income tax purposes;

(3) Net realized short-term capital gains as determined for federal income tax purposes;

- (4) Net realized long-term capital gains as determined for federal income tax purposes;
- (5) Trust principal comprising assets for which there is a readily available market value; and
- (6) Other trust principal.

[ARTICLE] 4
ALLOCATION OF RECEIPTS

[PART] 1
RECEIPTS FROM ENTITY

SECTION 401. CHARACTER OF RECEIPTS FROM ENTITY.

(a) In this section:

(1) “Capital distribution” means an entity distribution of money which is a:

(A) return of capital; or

(B) distribution in total or partial liquidation of the entity.

(2) “Entity”:

(A) means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization or arrangement in which a fiduciary owns or holds an interest, whether or not the entity is a taxpayer for federal income tax purposes; and

(B) does not include:

(i) a trust or estate to which Section 402 applies;

(ii) a business or other activity to which Section 403 applies which is not conducted by an entity described in subparagraph (A);

(iii) an asset-backed security; or

(iv) an instrument or arrangement to which Section 416 applies.

(3) “Entity distribution” means a payment or transfer by an entity made to a person in the person’s capacity as an owner or holder of an interest in the entity.

(b) In this section, an attribute or action of an entity includes an attribute or action of any other entity in which the entity owns or holds an interest, including an interest owned or held indirectly through another entity.

(c) Except as otherwise provided in subsection (d)(2) through (4), a fiduciary shall allocate to income:

(1) money received in an entity distribution; and

(2) tangible personal property of nominal value received from the entity.

(d) A fiduciary shall allocate to principal:

(1) property received in an entity distribution which is not:

(A) money; or

(B) tangible personal property of nominal value;

(2) money received in an entity distribution in an exchange for part or all of the fiduciary's interest in the entity, to the extent the entity distribution reduces the fiduciary's interest in the entity relative to the interests of other persons that own or hold interests in the entity;

(3) money received in an entity distribution that the fiduciary determines or estimates is a capital distribution; and

(4) money received in an entity distribution from an entity that is:

(A) a regulated investment company or real estate investment trust if the money received is a capital gain dividend for federal income tax purposes; or

(B) treated for federal income tax purposes comparably to the treatment described in subparagraph (A).

(e) A fiduciary may determine or estimate that money received in an entity distribution is a capital distribution:

(1) by relying without inquiry or investigation on a characterization of the entity distribution provided by or on behalf of the entity, unless the fiduciary:

(A) determines, on the basis of information known to the fiduciary, that the characterization is or may be incorrect; or

(B) owns or holds more than 50 percent of the voting interest in the entity;

(2) by determining or estimating, on the basis of information known to the fiduciary or provided to the fiduciary by or on behalf of the entity, that the total amount of money and property received by the fiduciary in the entity distribution or a series of related entity distributions is or will be greater than 20 percent of the fair market value of the fiduciary's interest in the entity; or

(3) if neither paragraph (1) nor (2) applies, by considering the factors in subsection (f) and the information known to the fiduciary or provided to the fiduciary by or on behalf of the entity.

(f) In making a determination or estimate under subsection (e)(3), a fiduciary may consider:

(1) a characterization of an entity distribution provided by or on behalf of the entity;

(2) the amount of money or property received in:

(A) the entity distribution; or

(B) what the fiduciary determines is or will be a series of related entity distributions;

(3) the amount described in paragraph (2) compared to the amount the fiduciary determines or estimates is, during the current or preceding accounting periods:

(A) the entity's operating income;

(B) the proceeds of the entity's sale or other disposition of:

(i) all or part of the business or other activity conducted by the entity;

(ii) one or more business assets that are not sold to customers in the ordinary course of the business or other activity conducted by the entity; or

(iii) one or more assets other than business assets, unless the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets;

(C) if the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets, the gain realized on the disposition;

(D) the entity's regular, periodic entity distributions;

(E) the amount of money the entity has accumulated;

(F) the amount of money the entity has borrowed;

(G) the amount of money the entity has received from the sources described in Sections 407, 410, 411, and 412; and

(H) the amount of money the entity has received from a source not otherwise described in this paragraph; and

(4) any other factor the fiduciary determines is relevant.

(g) If, after applying subsections (c) through (f), a fiduciary determines that a part of an entity distribution is a capital distribution but is in doubt about the amount of the entity distribution which is a capital distribution, the fiduciary shall allocate to principal the amount of the entity distribution which is in doubt.

(h) If a fiduciary receives additional information about the application of this section to an entity distribution before the fiduciary has paid part of the entity distribution to a

beneficiary, the fiduciary may consider the additional information before making the payment to the beneficiary and may change a decision to make the payment to the beneficiary.

(i) If a fiduciary receives additional information about the application of this section to an entity distribution after the fiduciary has paid part of the entity distribution to a beneficiary, the fiduciary is not required to change or recover the payment to the beneficiary but may consider that information in determining whether to exercise the power to adjust under Section 203.

SECTION 402. DISTRIBUTION FROM TRUST OR ESTATE. A fiduciary shall allocate to income an amount received as a distribution of income, including a unitrust distribution under [Article] 3, from a trust or estate in which the fiduciary has an interest, other than an interest the fiduciary purchased in a trust that is an investment entity, and shall allocate to principal an amount received as a distribution of principal from the trust or estate. If a fiduciary purchases, or receives from a settlor, an interest in a trust that is an investment entity, Section 401, 415, or 416 applies to a receipt from the trust.

SECTION 403. BUSINESS OR OTHER ACTIVITY CONDUCTED BY FIDUCIARY.

(a) This section applies to a business or other activity conducted by a fiduciary if the fiduciary determines that it is in the interests of the beneficiaries to account separately for the business or other activity instead of:

(1) accounting for the business or other activity as part of the fiduciary's general accounting records; or

(2) conducting the business or other activity through an entity described in Section 401(a)(2)(A).

(b) A fiduciary may account separately under this section for the transactions of a business or other activity, whether or not assets of the business or other activity are segregated from other assets held by the fiduciary.

(c) A fiduciary that accounts separately under this section for a business or other activity:

(1) may determine:

(A) the extent to which the net cash receipts of the business or other activity must be retained for:

(i) working capital;

(ii) the acquisition or replacement of fixed assets; and
(iii) other reasonably foreseeable needs of the business or other activity; and

(B) the extent to which the remaining net cash receipts are accounted for as principal or income in the fiduciary's general accounting records for the trust;

(2) may make a determination under paragraph (1) separately and differently from the fiduciary's decisions concerning distributions of income or principal; and

(3) shall account for the net amount received from the sale of an asset of the business or other activity, other than a sale in the ordinary course of the business or other activity, as principal in the fiduciary's general accounting records for the trust, to the extent the fiduciary determines that the net amount received is no longer required in the conduct of the business or other activity.

(d) Activities for which a fiduciary may account separately under this section include:

- (1) retail, manufacturing, service, and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) managing rental properties;
- (5) extracting minerals, water, and other natural resources;
- (6) growing and cutting timber;
- (7) an activity to which Section 414, 415, or 416 applies; and
- (8) any other business conducted by the fiduciary.

[PART] 2

RECEIPTS NOT NORMALLY APPORTIONED

SECTION 404. PRINCIPAL RECEIPTS. A fiduciary shall allocate to principal:

(1) to the extent not allocated to income under this [act], an asset received from:

- (A) an individual during the individual's lifetime;
- (B) an estate;
- (C) a trust on termination of an income interest; or
- (D) a payor under a contract naming the fiduciary as beneficiary;

(2) except as otherwise provided in this [article], money or other property received from the sale, exchange, liquidation, or change in form of a principal asset;

(3) an amount recovered from a third party to reimburse the fiduciary because of a disbursement described in Section 502(a) or for another reason to the extent not based on loss of income;

(4) proceeds of property taken by eminent domain, except that proceeds awarded for loss of income in an accounting period are income if a current income beneficiary had a mandatory income interest during the period;

(5) net income received in an accounting period during which there is no beneficiary to which a fiduciary may or must distribute income; and

(6) other receipts as provided in [Part] 3.

SECTION 405. RENTAL PROPERTY. To the extent a fiduciary does not account for the management of rental property as a business under Section 403, the fiduciary shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods:

(1) must be added to principal and held subject to the terms of the lease, except as otherwise provided by law other than this [act]; and

(2) is not allocated to income or available for distribution to a beneficiary until the fiduciary's contractual obligations have been satisfied with respect to that amount.

SECTION 406. RECEIPT ON OBLIGATION TO BE PAID IN MONEY.

(a) This section does not apply to an obligation to which Section 409, 410, 411, 412, 414, 415, or 416 applies.

(b) A fiduciary shall allocate to income, without provision for amortization of premium, an amount received as interest on an obligation to pay money to the fiduciary, including an amount received as consideration for prepaying principal.

(c) A fiduciary shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the fiduciary. A fiduciary shall allocate to income the increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable or redeemable, at maturity or another future time, in an amount that exceeds the amount in consideration of which it was issued.

SECTION 407. INSURANCE POLICY OR CONTRACT.

(a) This section does not apply to a contract to which Section 409 applies.

(b) Except as otherwise provided in subsection (c), a fiduciary shall allocate to principal the proceeds of a life insurance policy or other contract received by the fiduciary as beneficiary, including a contract that insures against damage to, destruction of, or loss of title to an asset. The fiduciary shall allocate dividends on an insurance policy to income to the extent premiums on the policy are paid from income and to principal to the extent premiums on the policy are paid from principal.

(c) A fiduciary shall allocate to income proceeds of a contract that insures the fiduciary against loss of:

- a. occupancy or other use by a current income beneficiary;
- b. income; or
- c. subject to Section 403, profits from a business.

[PART] 3

RECEIPTS NORMALLY APPORTIONED

SECTION 408. INSUBSTANTIAL ALLOCATION NOT REQUIRED.

(a) If a fiduciary determines that an allocation between income and principal required by Section 409, 410, 411, 412, or 415 is insubstantial, the fiduciary may allocate the entire amount to principal, unless Section 203(e) applies to the allocation.

(b) A fiduciary may presume an allocation is insubstantial under subsection (a) if:

- (1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; and
- (2) the asset producing the receipt to be allocated has a fair market value less than 10 percent of the total fair market value of the assets owned or held by the fiduciary at the beginning of the accounting period.

(c) The power to make a determination under subsection (a) may be:

- (1) exercised by a co-fiduciary in the manner described in Section 203(f); or
- (2) released or delegated for a reason described in Section 203(g) and in the manner described in Section 203(h).

SECTION 409. DEFERRED COMPENSATION, ANNUITY, OR SIMILAR PAYMENT.

(a) In this section:

(1) “Internal income of a separate fund” means the amount determined under subsection (b).

(2) “Marital trust” means a trust:

(A) of which the settlor’s surviving spouse is the only current income beneficiary and is entitled to a distribution of all the current net income of the trust; and

(B) that qualifies for a marital deduction with respect to the settlor’s estate under 26 U.S.C. Section 2056, as amended, because:

(i) an election to qualify for a marital deduction under 26 U.S.C. Section 2056(b)(7), as amended, has been made; or

(ii) the trust qualifies for a marital deduction under 26 U.S.C. Section 2056(b)(5), as amended.

(3) “Payment” means an amount a fiduciary may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future amounts the fiduciary may receive. The term includes an amount received in money or property from the payor’s general assets or from a separate fund created by the payor.

(4) “Separate fund” includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) For each accounting period, the following rules apply to a separate fund:

(1) The fiduciary shall determine the internal income of the separate fund as if the separate fund were a trust subject to this [act].

(2) If the fiduciary cannot determine the internal income of the separate fund under paragraph (1), the internal income of the separate fund is deemed to equal four percent of the value of the separate fund, according to the most recent statement of value preceding the beginning of the accounting period.

(3) If the fiduciary cannot determine the value of the separate fund under paragraph (2), the value of the separate fund is deemed to equal the present value of the expected future payments, as determined under 26 U.S.C. Section 7520, as amended, for the month preceding the beginning of the accounting period for which the computation is made.

(c) A fiduciary shall allocate a payment received from a separate fund during an accounting period to income, to the extent of the internal income of the separate fund during the period, and the balance to principal.

(d) The fiduciary of a marital trust shall:

(1) withdraw from a separate fund the amount the current income beneficiary of the trust requests the fiduciary to withdraw, not greater than the amount by which the internal income of the separate fund during the accounting period exceeds the amount the fiduciary otherwise receives from the separate fund during the period;

(2) transfer from principal to income the amount the current income beneficiary requests the fiduciary to transfer, not greater than the amount by which the internal income of the separate fund during the period exceeds the amount the fiduciary receives from the separate fund during the period after the application of paragraph (1); and

(3) distribute to the current income beneficiary as income:

(A) the amount of the internal income of the separate fund received or withdrawn during the period; and

(B) the amount transferred from principal to income under paragraph (2).

(e) For a trust, other than a marital trust, of which one or more current income beneficiaries are entitled to a distribution of all the current net income, the fiduciary shall transfer from principal to income the amount by which the internal income of a separate fund during the accounting period exceeds the amount the fiduciary receives from the separate fund during the period.

SECTION 410. LIQUIDATING ASSET.

(a) In this section, “liquidating asset” means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a limited time. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance.

(b) This section does not apply to a receipt subject to Section 401, 409, 411, 412, 414, 415, 416, or 503.

(c) A fiduciary shall allocate:

(1) to income:

(A) a receipt produced by a liquidating asset, to the extent the receipt does not exceed [insert a number at least three and not more than five] percent of the value of the asset; or

(B) if the fiduciary cannot determine the value of the asset, 10 percent of the receipt; and

(2) to principal, the balance of the receipt.

SECTION 411. MINERALS, WATER, AND OTHER NATURAL RESOURCES.

(a) To the extent a fiduciary does not account for a receipt from an interest in minerals, water, or other natural resources as a business under Section 403, the fiduciary shall allocate the receipt:

(1) to income, to the extent received:

(A) as delay rental or annual rent on a lease;

(B) as a factor for interest or the equivalent of interest under an agreement creating a production payment; or

(C) on account of an interest in renewable water;

(2) to principal, if received from a production payment, to the extent paragraph (1)(B) does not apply; or

(3) between income and principal equitably, to the extent received:

(A) on account of an interest in non-renewable water;

(B) as a royalty, shut-in-well payment, take-or-pay payment, or bonus; or

(C) from a working interest or any other interest not provided for in paragraph (1) or (2) or subparagraph (A) or (B).

(b) This section applies to an interest owned or held by a fiduciary whether or not a settlor was extracting minerals, water, or other natural resources before the fiduciary owned or held the interest.

(c) An allocation of a receipt under subsection (a)(3) is presumed to be equitable if the amount allocated to principal is equal to the amount allowed by the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended,] as a deduction for depletion of the interest.

(d) If a fiduciary owns or holds an interest in minerals, water, or other natural resources before [the effective date of this [act]], the fiduciary may allocate receipts from the interest as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in minerals, water, or other natural

resources on or after [the effective date of this [act]], the fiduciary shall allocate receipts from the interest as provided in this section.

SECTION 412. TIMBER.

(a) To the extent a fiduciary does not account for receipts from the sale of timber and related products as a business under Section 403, the fiduciary shall allocate the net receipts:

(1) to income, to the extent the amount of timber cut from the land does not exceed the rate of growth of the timber;

(2) to principal, to the extent the amount of timber cut from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) between income and principal if the net receipts are from the lease of land used for growing and cutting timber or from a contract to cut timber from land, by determining the amount of timber cut from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) to principal, to the extent advance payments, bonuses, and other payments are not allocated under paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated under subsection (a), a fiduciary shall deduct and transfer to principal a reasonable amount for depletion.

(c) This section applies to land owned or held by a fiduciary whether or not a settlor was cutting timber from the land before the fiduciary owned or held the property.

(d) If a fiduciary owns or holds an interest in land used for growing and cutting timber before [the effective date of this [act]], the fiduciary may allocate net receipts from the sale of timber and related products as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in land used for growing and cutting timber on or after [the effective date of this [act]], the fiduciary shall allocate net receipts from the sale of timber and related products as provided in this section.

SECTION 413. MARITAL DEDUCTION PROPERTY NOT PRODUCTIVE OF INCOME.

(a) If a trust received property for which a gift or estate tax marital deduction was allowed and the settlor's spouse holds a mandatory income interest in the trust, the spouse may require the trustee, to the extent the trust assets otherwise do not provide the spouse with sufficient income from or use of the trust assets to qualify for the deduction, to:

(1) make property productive of income;

- (2) convert property to property productive of income within a reasonable time; or
- (3) exercise the power to adjust under Section 203.

(b) The trustee may decide which action or combination of actions in subsection (a) to take.

SECTION 414. DERIVATIVE OR OPTION.

(a) In this section, “derivative” means a contract, instrument, other arrangement, or combination of contracts, instruments, or other arrangements, the value, rights, and obligations of which are, in whole or in part, dependent on or derived from an underlying tangible or intangible asset, group of tangible or intangible assets, index, or occurrence of an event. The term includes stocks, fixed income securities, and financial instruments and arrangements based on indices, commodities, interest rates, weather-related events, and credit-default events.

(b) To the extent a fiduciary does not account for a transaction in derivatives as a business under Section 403, the fiduciary shall allocate 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction to income and the balance to principal.

(c) Subsection (d) applies if:

(1) a fiduciary:

(A) grants an option to buy property from a trust, whether or not the trust owns the property when the option is granted;

(B) grants an option that permits another person to sell property to the trust; or

(C) acquires an option to buy property for the trust or an option to sell an asset owned by the trust; and

(2) the fiduciary or other owner of the asset is required to deliver the asset if the option is exercised.

(d) If this subsection applies, the fiduciary shall allocate 10 percent to income and the balance to principal of the following amounts:

(1) an amount received for granting the option;

(2) an amount paid to acquire the option; and

(3) gain or loss realized on the exercise, exchange, settlement, offset, closing, or expiration of the option.

SECTION 415. ASSET-BACKED SECURITY.

(a) Except as otherwise provided in subsection (b), a fiduciary shall allocate to income a receipt from or related to an asset-backed security, to the extent the payor identifies the payment as being from interest or other current return, and to principal the balance of the receipt.

(b) If a fiduciary receives one or more payments in exchange for part or all of the fiduciary's interest in an asset-backed security, including a liquidation or redemption of the fiduciary's interest in the security, the fiduciary shall allocate to income 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction, and to principal the balance of the receipts and disbursements.

SECTION 416. OTHER FINANCIAL INSTRUMENT OR ARRANGEMENT. A fiduciary shall allocate receipts from or related to a financial instrument or arrangement not otherwise addressed by this [act]. The allocation must be consistent with Sections 414 and 415.

[ARTICLE] 5

ALLOCATION OF DISBURSEMENTS

SECTION 501. DISBURSEMENT FROM INCOME. Subject to Section 504, and except as otherwise provided in Section 601(c)(2) or (3), a fiduciary shall disburse from income:

(1) one-half of:

(A) the regular compensation of the fiduciary and any person providing investment advisory, custodial, or other services to the fiduciary, to the extent income is sufficient; and

(B) an expense for an accounting, judicial or nonjudicial proceeding, or other matter that involves both income and successive interests, to the extent income is sufficient;

(2) the balance of the disbursements described in paragraph (1), to the extent a fiduciary that is an independent person determines that making those disbursements from income would be in the interests of the beneficiaries;

(3) another ordinary expense incurred in connection with administration, management, or preservation of property and distribution of income, including interest, an ordinary repair, regularly recurring tax assessed against principal, and an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily an income interest, to the extent income is sufficient; and

(4) a premium on insurance covering loss of a principal asset or income from or use of the asset.

SECTION 502. DISBURSEMENT FROM PRINCIPAL.

(a) Subject to Section 505, and except as otherwise provided in Section 601(c)(2), a fiduciary shall disburse from principal:

(1) the balance of the disbursements described in Section 501(1) and (3), after application of Section 501(2);

(2) the fiduciary's compensation calculated on principal as a fee for acceptance, distribution, or termination;

(3) a payment of an expense to prepare for or execute a sale or other disposition of property;

(4) a payment on the principal of a trust debt;

(5) a payment of an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily principal, including a proceeding to construe the terms of the trust or protect property;

(6) a payment of a premium for insurance, including title insurance, not described in Section 501(4), of which the fiduciary is the owner and beneficiary;

(7) a payment of an estate or inheritance tax or other tax imposed because of the death of a decedent, including penalties, apportioned to the trust; and

(8) a payment:

(A) related to environmental matters, including:

(i) reclamation;

(ii) assessing environmental conditions;

(iii) remedying and removing environmental contamination;

(iv) monitoring remedial activities and the release of substances;

(v) preventing future releases of substances;

(vi) collecting amounts from persons liable or potentially liable for the costs of activities described in clauses (i) through (v);

(vii) penalties imposed under environmental laws or regulations;

(viii) other actions to comply with environmental laws or regulations;

(ix) statutory or common law claims by third parties; and

(x) defending claims based on environmental matters; and

(B) for a premium for insurance for matters described in subparagraph (A).

(b) If a principal asset is encumbered with an obligation that requires income from the asset to be paid directly to a creditor, the fiduciary shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

SECTION 503. TRANSFER FROM INCOME TO PRINCIPAL FOR DEPRECIATION.

(a) In this section, “depreciation” means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a tangible asset having a useful life of more than one year.

(b) A fiduciary may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

- (1) of the part of real property used or available for use by a beneficiary as a residence;
- (2) of tangible personal property held or made available for the personal use or enjoyment of a beneficiary; or
- (3) under this section, to the extent the fiduciary accounts:
 - (A) under Section 410 for the asset; or
 - (B) under Section 403 for the business or other activity in which the asset is used.
 - (C) An amount transferred to principal under this section need not be separately held.

SECTION 504. REIMBURSEMENT OF INCOME FROM PRINCIPAL.

(a) If a fiduciary makes or expects to make an income disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from principal to income in one or more accounting periods to reimburse income.

(b) To the extent the fiduciary has not been and does not expect to be reimbursed by a third party, income disbursements to which subsection (a) applies include:

- (1) an amount chargeable to principal but paid from income because principal is illiquid;
- (2) a disbursement made to prepare property for sale, including improvements and commissions; and
- (3) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to an income disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

SECTION 505. REIMBURSEMENT OF PRINCIPAL FROM INCOME.

(a) If a fiduciary makes or expects to make a principal disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or provide a reserve for future principal disbursements.

(b) To the extent a fiduciary has not been and does not expect to be reimbursed by a third party, principal disbursements to which subsection (a) applies include:

(1) an amount chargeable to income but paid from principal because income is not sufficient;

(2) the cost of an improvement to principal, whether a change to an existing asset or the construction of a new asset, including a special assessment;

(3) a disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and commissions;

(4) a periodic payment on an obligation secured by a principal asset, to the extent the amount transferred from income to principal for depreciation is less than the periodic payment; and

(5) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to a principal disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

SECTION 506. INCOME TAXES.

(a) A tax required to be paid by a fiduciary which is based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a fiduciary which is based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) Subject to subsection (d) and Sections 504, 505, and 507, a tax required to be paid by a fiduciary on a share of an entity's taxable income in an accounting period must be paid from:

(1) income and principal proportionately to the allocation between income and principal of receipts from the entity in the period; and

(2) principal to the extent the tax exceeds the receipts from the entity in the period.

(d) After applying subsections (a) through (c), a fiduciary shall adjust income or principal receipts, to the extent the taxes the fiduciary pays are reduced because of a deduction for a payment made to a beneficiary.

SECTION 507. ADJUSTMENT BETWEEN INCOME AND PRINCIPAL BECAUSE OF TAXES.

(a) A fiduciary may make an adjustment between income and principal to offset the shifting of economic interests or tax benefits between current income beneficiaries and successor beneficiaries which arises from:

(1) an election or decision the fiduciary makes regarding a tax matter, other than a decision to claim an income tax deduction to which subsection (b) applies;

(2) an income tax or other tax imposed on the fiduciary or a beneficiary as a result of a transaction involving the fiduciary or a distribution by the fiduciary; or

(3) ownership by the fiduciary of an interest in an entity a part of whose taxable income, whether or not distributed, is includable in the taxable income of the fiduciary or a beneficiary.

(b) If the amount of an estate tax marital or charitable deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes and, as a result, estate taxes paid from principal are increased and income taxes paid by the fiduciary or a beneficiary are decreased, the fiduciary shall charge each beneficiary that benefits from the decrease in income tax to reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax, to the extent the principal used to pay the increase would have qualified for a marital or charitable deduction but for the payment. The share of the reimbursement for each fiduciary or beneficiary whose income taxes are reduced must be the same as its share of the total decrease in income tax.

(c) A fiduciary that charges a beneficiary under subsection (b) may offset the charge by obtaining payment from the beneficiary, withholding an amount from future distributions to the beneficiary, or adopting another method or combination of methods.

[ARTICLE] 6

DEATH OF INDIVIDUAL OR TERMINATION OF INCOME INTEREST

SECTION 601. DETERMINATION AND DISTRIBUTION OF NET INCOME.

(a) This section applies when:

- (1) the death of an individual results in the creation of an estate or trust; or
- (2) an income interest in a trust terminates, whether the trust continues or is distributed.

(b) A fiduciary of an estate or trust with an income interest that terminates shall determine, under subsection [(g)][(e)] and [Articles] 4, 5, and 7, the amount of net income and net principal receipts received from property specifically given to a beneficiary. The fiduciary shall distribute the net income and net principal receipts to the beneficiary that is to receive the specific property.

(c) A fiduciary shall determine the income and net income of an estate or income interest in a trust which terminates, other than the amount of net income determined under subsection (b), under [Articles] 4, 5, and 7 and by:

(1) including in net income all income from property used or sold to discharge liabilities;

(2) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on estate and inheritance taxes and other taxes imposed because of the decedent's death, but the fiduciary may pay the expenses from income of property passing to a trust for which the fiduciary claims a federal estate tax marital or charitable deduction only to the extent:

(A) the payment of the expenses from income will not cause the reduction or loss of the deduction; or

(B) the fiduciary makes an adjustment under Section 507(b); and

(3) paying from principal other disbursements made or incurred in connection with the settlement of the estate or the winding up of an income interest that terminates, including:

(A) to the extent authorized by the decedent's will, the terms of the trust, or applicable law, debts, funeral expenses, disposition of remains, family allowances, estate and inheritance taxes, and other taxes imposed because of the decedent's death; and

(B) related penalties that are apportioned, by the decedent's will, the terms of the trust, or applicable law, to the estate or income interest that terminates.

[(d) If a decedent's will, the terms of a trust, or applicable law provides for the payment of interest or the equivalent of interest to a beneficiary that receives a pecuniary amount outright, the fiduciary shall make the payment from net income determined under subsection (c) or from principal to the extent net income is insufficient.

(e) Reserved.

(f) A fiduciary shall distribute net income[remaining after payments required by subsections (d) and (e)] in the manner described in Section 602 to all other beneficiaries, including a beneficiary that receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(g) A fiduciary may not reduce principal or income receipts from property described in subsection (b) because of a payment described in Section 501 or 502, to the extent the decedent's will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property must be determined by including the amount the fiduciary receives or pays regarding the property, whether the amount accrued or became due before, on, or after the date of the decedent's death or an income interest's terminating event, and making a reasonable provision for an amount the estate or income interest may become obligated to pay after the property is distributed.

SECTION 602. DISTRIBUTION TO SUCCESSOR BENEFICIARY.

(a) Except to the extent [Article] 3 applies for a beneficiary that is a trust, each beneficiary described in Section [601(f)][601(d)] is entitled to receive a share of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to which this section applies, each beneficiary, including a beneficiary that does not receive part of the distribution, is entitled, as of each distribution date, to a share of the net income the fiduciary received after the decedent's death, an income interest's other terminating event, or the preceding distribution by the fiduciary.

(b) In determining a beneficiary's share of net income under subsection (a), the following rules apply:

(1) The beneficiary is entitled to receive a share of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date.

(2) The beneficiary's fractional interest under paragraph (1) must be calculated:

(A) on the aggregate value of the assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(B) without regard to:

(i) property specifically given to a beneficiary under the decedent's will or the terms of the trust; and

(ii) property required to pay pecuniary amounts not in trust.

(3) The distribution date under paragraph (1) may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which the assets are distributed.

(c) To the extent a fiduciary does not distribute under this section all the collected but undistributed net income to each beneficiary as of a distribution date, the fiduciary shall maintain records showing the interest of each beneficiary in the net income.

(d) If this section applies to income from an asset, a fiduciary may apply the rules in this section to net gain or loss realized from the disposition of the asset after the decedent's death, an income interest's terminating event, or the preceding distribution by the fiduciary.

[ARTICLE] 7

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

SECTION 701. WHEN RIGHT TO INCOME BEGINS AND ENDS.

(a) An income beneficiary is entitled to net income in accordance with the terms of the trust from the date an income interest begins. The income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to:

- (1) the trust for the current income beneficiary; or
- (2) a successive interest for a successor beneficiary.

(b) An asset becomes subject to a trust under subsection (a)(1):

- (1) for an asset that is transferred to the trust during the settlor's life, on the date the asset is transferred;
- (2) for an asset that becomes subject to the trust because of a decedent's death, on the date of the decedent's death, even if there is an intervening period of administration of the decedent's estate; or
- (3) for an asset that is transferred to a fiduciary by a third party because of a decedent's death, on the date of the decedent's death.

(c) An asset becomes subject to a successive interest under subsection (a)(2) on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to which a fiduciary may or must distribute income.

SECTION 702. APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN DECEDENT DIES OR INCOME INTEREST BEGINS.

(a) A fiduciary shall allocate an income receipt or disbursement, other than a receipt to which Section 601(b) applies, to principal if its due date occurs before the date on which:

- (1) for an estate, the decedent died; or
- (2) for a trust or successive interest, an income interest begins.

(b) If the due date of a periodic income receipt or disbursement occurs on or after the date on which a decedent died or an income interest begins, a fiduciary shall allocate the receipt or disbursement to income.

(c) If an income receipt or disbursement is not periodic or has no due date, a fiduciary shall treat the receipt or disbursement under this section as accruing from day to day. The fiduciary shall allocate to principal the portion of the receipt or disbursement accruing before the date on which a decedent died or an income interest begins, and to income the balance.

(d) A receipt or disbursement is periodic under subsections (b) and (c) if:

(1) the receipt or disbursement must be paid at regular intervals under an obligation to make payments; or

(2) the payor customarily makes payments at regular intervals.

(e) An item of income or obligation is due under this section on the date the payor is required to make a payment. If a payment date is not stated, there is no due date.

(f) Distributions to shareholders or other owners from an entity to which Section 401 applies are due:

(1) on the date fixed by or on behalf of the entity for determining the persons entitled to receive the distribution;

(2) if no date is fixed, on the date of the decision by or on behalf of the entity to make the distribution; or

(3) if no date is fixed and the fiduciary does not know the date of the decision by or on behalf of the entity to make the distribution, on the date the fiduciary learns of the decision.

SECTION 703. APPORTIONMENT WHEN INCOME INTEREST ENDS.

(a) In this section, “undistributed income” means net income received on or before the date on which an income interest ends. The term does not include an item of income or expense which is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) Except as otherwise provided in subsection (c), when a mandatory income interest of a beneficiary ends, the fiduciary shall pay the beneficiary’s share of the undistributed income that is not disposed of under the terms of the trust to the beneficiary or, if the beneficiary does not survive the date the interest ends, to the beneficiary’s estate.

(c) If a beneficiary has an unqualified power to withdraw more than five percent of the value of a trust immediately before an income interest ends:

(1) the fiduciary shall allocate to principal the undistributed income from the portion of the trust which may be withdrawn; and

(2) subsection (b) applies only to the balance of the undistributed income.

(d) When a fiduciary's obligation to pay a fixed annuity or a fixed fraction of the value of assets ends, the fiduciary shall prorate the final payment as required to preserve an income tax, gift tax, estate tax, or other tax benefit.

[ARTICLE] 8
MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT . This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 803. APPLICATION TO TRUST OR ESTATE.

Except as provided in the terms of the trust and this Section 803, this act shall take effect on the Effective Date.

(1) This [act] shall not apply to a trust established under a will or trust agreement existing and irrevocable on July 1, 2001, if a trustee of the trust has elected to apply the "Uniform Principal and Income Act" of this state in effect on June 30, 2001.

(2) This [act] shall not apply to a trust existing on July 1, 2001, in which no trustee had the authority to act under section 15-1-404 of the Uniform Principal and Income Act effective July 1, 2001, unless a trustee of the trust elected to apply the Uniform Principal and Income Act as it existed after July 1, 2001, as amended.

(3) Notwithstanding the provisions of subsection (1) of this section, this [act] subparts 1 through 6 of this part 4 shall not apply to any trust or decedent's estate existing on the effective date, in which no fiduciary has the authority to act under section 203 section 15-1-404 unless a fiduciary elects to apply subparts 1 through 7 of this part 4. The law in effect in Colorado as of June 30, 2001 will apply to this the trust or estate unless a fiduciary makes such election. The fiduciary may make this election at any time.

(4) Once an election is made pursuant to this section, the election shall be irrevocable. The fiduciary shall give notice of such an election to the beneficiaries of the trust in accordance with section 204. If such notice complies with section 204, the provisions of said section shall apply to such election

[SECTION 804. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

SECTION 805. REPEALS; CONFORMING AMENDMENTS.

(A) This [act] repeals §§ 15-1-401 through 15-1-467, C.R.S.

~~(b)....~~

~~(c)....~~

SECTION 806. EFFECTIVE DATE. This [act] takes effect July 1, 2021.

MEMORANDUM

TO: Lauren Da Cunha and Dylan Metzner, Chair and Vice Chair of the Statutory Revisions Committee of the Trusts & Estates Section of the Colorado Bar Association

FROM: Georgine Kryda and Eugene Zuspann, Chairs of the Subcommittee Reviewing the Uniform Fiduciary Income and Principal Act

DATE: August 19, 2020

RE: UFIPA Subcommittee Recommendations

Introduction and Recommendation

In April 2018, a subcommittee of the Statutory Revisions Committee (“SRC”) of the Trusts & Estates (“T&E”) Section of the Colorado Bar Association (“CBA”) began reviewing the Uniform Fiduciary Income and Principal Act (“UFIPA”). That subcommittee has completed its review, and now recommends that the SRC, T&E, and CBA support the UFIPA with the modifications discussed below.

Materials Available on the UFIPA Website

The UFIPA subcommittee’s Website at <https://www.cobar.org/For-Members/CBA-Sections/Trust-Estate/Committees/UFIPA> contains the following materials:

1. Final version of the UFIPA by the Uniform Law Commission as of January 2019;
2. Minutes of all subcommittee meetings from April 2018 through August 2020;
3. Approved sections of UFIPA by the subcommittee in “Santa Fe” style;
4. The entire UFIPA as proposed for enactment in Colorado, and as red-lined, by the subcommittee; and
5. Table summarizing review of UFIPA and noting changes proposed by the subcommittee.

Composition of the Subcommittee

As reflected in the minutes, the subcommittee consisted of a broad range of practitioners from individual planners and advisors, to corporate trustees. Some attorneys concentrated on specific types of trust assets, such as mineral interests, that are prevalent in Colorado trusts; whereas other attorneys contributed their perspectives from decades of trust administration.

The Subcommittee’s Overall Impression of UFIPA

Overall, the subcommittee was favorably impressed by the wording and organization of the UFIPA text, which clarifies and complements Colorado’s existing Uniform Principal and Income Act (“UPIA”), which is codified at C.R.S. §§ 15-1-401, *et seq.*

The Purpose of UFIPA

UFIPA introduces a more comprehensive set of default rules for trust accounting based on the equitable allocation of total return than currently exists in Colorado law. UFIPA also provides more guidance for how a fiduciary should account for returns for a variety of asset classes, such as business assets and natural resources, than does UPIA under current law. Thus, UFIPA assists fiduciaries in logically and consistently accounting for receipts, while maintaining equity in making distributions to beneficiaries.

UFIPA's Predecessors in Colorado

The subcommittee benefited greatly from the history provided by Gene Zuspann and Stan Kent of Colorado's earlier adoptions of the Uniform Principal and Income Acts ("UPIAs"), which had also been proposed by the Uniform Law Commission ("ULC").

- The ULC promulgated the *Principal and Income Act* in 1931 ("1931 UPIA").
 - Colorado enacted the *1931 UPIA* in 1955 ("1955 Act").
- The ULC promulgated a revised *Uniform and Principal Income Act* in 1962 ("1962 UPIA").
 - Colorado did not adopt the *1962 UPIA*.
- The ULC revised and reorganized (into six parts) the 1931 and 1962 UPIAs in 1997 ("1997 UPIA").
 - Colorado enacted the *1997 UPIA* in 2000 (the "2000 Act").
 - At the same time, Colorado repealed the *1955 Act* (the *1931 UPIA*).
- In 2009, Colorado reenacted the *1955 Act* as Part 7 of the *2000 Act*.

The subcommittee did not want to inadvertently and adversely affect existing trust instruments which may be based on UPIA.

The Subcommittee's Specific Recommended Changes to the ULC's UFIPA Text

The subcommittee makes the following specific recommended changes to the ULC's final version of UFIPA:

1. Removal/reservation of references to "life estate," "life tenant," and "term interest":
 - a. 102(3)(B) changed to "for an estate, an heir, legatee, and devisee."
 - b. 102(3)(C) changed to "Reserved."
 - c. 102(4) changed to "'Court' means the court in this state having jurisdiction relating to a trust, OR estate."
 - d. 102(8) removed "life tenant" from the definition of "fiduciary."
 - e. 102(22)(B)(iii) adds "section 15-5-111, C.R.S." as the reference to the CUTC.
 - f. 102(22)(B)(iv) adds "by alternative dispute resolution under section 15-5-113, C.R.S."
 - g. 102(22)(C) is changed to "for an estate, or a will".
 - h. 103 adds "a will and changes (2) to Reserved.
 - i. 104 removes references to life estate and to term interest.

2. Article 2, Fiduciary Duties and Judicial Review, and Section 302 change references from the “UTC” to the “CUTC.”
3. New Section 204 adds a Notice of Action [by a fiduciary].
 - a. This new section was added in the 2001 UPIA because trustees wanted to be able to give notice before taking an action, and to have the matter settled before the proposed action was initiated
4. Section 304 required selection from several alternatives for each subsection; thus, a “clean” version of the approved text is on page 9 of the table summarizing review.
5. Section 309 adds a default ordering rule under Section 309(c) for unitrusts.
6. For Section 409, Deferred Compensation, Annuity, or Similar Payment, the subcommittee favors using “26 U.S.C. Section 7520 as amended” throughout, and selected four (4) percent as the rate of interest for Section 409(b)(2).
7. For Article 6, Death of Individual or Termination of Income Interest, the subcommittee:
 - a. declined to recommend enactment of Section 601(e) whereby the fiduciary would be required to pay the same rate of interest on a pecuniary amount outright from a trust after an income interest ended as the beneficiary would receive if the pecuniary amount were paid under a Will; and
 - b. adopted Section 602 with the UTC language, but added new Section 204 as a notice of action by a fiduciary.
8. For Article 8, Miscellaneous Provisions, the subcommittee expanded Section 803 to address trusts that may still be administered under the 1955 Act.

Conclusion

For the foregoing reasons, the UFIPA subcommittee recommends that the SRC, T&E, and CBA support the UFIPA with the modifications as indicated in the red-lined version of UFIPA and explained above.

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and reviewed by the

**SUBCOMMITTEE OF THE STATUTORY REVISIONS COMMITTEE (“SRC”) OF THE
TRUSTS & ESTATES (“T&E”) SECTION OF THE COLORADO BAR ASSOCIATION**

for consideration by the SRC and T&E Council on September 2, 2020

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

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UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

[ARTICLE] 1
GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Income and Principal Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Accounting period” means a calendar year, unless a fiduciary selects another period of 12 calendar months or approximately 12 calendar months. The term includes a part of a calendar year or another period of 12 calendar months or approximately 12 calendar months which begins when an income interest begins or ends when an income interest ends.

(2) “Asset-backed security” means a security that is serviced primarily by the cash flows of a discrete pool of fixed or revolving receivables or other financial assets that by their terms convert into cash within a finite time. The term includes rights or other assets that ensure the servicing or timely distribution of proceeds to the holder of the asset-backed security. The term does not include an asset to which Section 401, 409, or 414 applies.

(3) “Beneficiary” includes:

(A) for a trust:

- (i) a current beneficiary, including a current income beneficiary and a beneficiary that may receive only principal;
- (ii) a remainder beneficiary; and
- (iii) any other successor beneficiary;

(B) for an estate, an heir[, legatee,] and devisee, ~~and~~

(C) ~~RESERVED for a life estate or term interest, a person that holds a life estate, term interest, or remainder or other interest following a life estate or term interest.~~

(4) “Court” means [the court in this state having jurisdiction relating to a trust, **OR** ~~estate, or life estate or other term interest described in Section 103(2).~~

(5) “Current income beneficiary” means a beneficiary to which a fiduciary may distribute net income, whether or not the fiduciary also may distribute principal to the beneficiary.

Commented [GK1]: Remove reference to life estate or term interest

Commented [GK2]: Remove reference to life estate or term interest

(6) “Distribution” means a payment or transfer by a fiduciary to a beneficiary in the beneficiary’s capacity as a beneficiary, made under the terms of the trust, without consideration other than the beneficiary’s right to receive the payment or transfer under the terms of the trust. “Distribute”, “distributed”, and “distributee” have corresponding meanings.

(7) “Estate” means a decedent’s estate. The term includes the property of the decedent as the estate is originally constituted and the property of the estate as it exists at any time during administration.

(8) “Fiduciary” includes a trustee,[trust director determined under [Section 2(9) of the Uniform Directed Trust Act,]] personal representative, ~~life tenant, holder of a term interest,~~ and person acting under a delegation from a fiduciary. The term includes a person that holds property for a successor beneficiary whose interest may be affected by an allocation of receipts and expenditures between income and principal. If there are two or more co-fiduciaries, the term includes all co-fiduciaries acting under the terms of the trust and applicable law.

Commented [GK3]: Remove reference to life estate or term interest

(9) “Income” means money or other property a fiduciary receives as current return from principal. The term includes a part of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [Article] 4.

(10) “Income interest” means the right of a current income beneficiary to receive all or part of net income, whether the terms of the trust require the net income to be distributed or authorize the net income to be distributed in the fiduciary’s discretion. The term includes the right of a current beneficiary to use property held by a fiduciary.

(11) “Independent person” means a person that is not:

(A) for a trust:

(i) [a qualified beneficiary determined under [Uniform Trust Code Section 103(13)]] [a beneficiary that is a distributee or permissible distributee of trust income or principal or would be a distributee or permissible distributee of trust income or principal if either the trust or the interests of the distributees or permissible distributees of trust income or principal were terminated, assuming no power of appointment is exercised];

(ii) a settlor of the trust; or

(iii) an individual whose legal obligation to support a beneficiary may be satisfied by a distribution from the trust;

(B) for an estate, a beneficiary;

(C) a spouse, parent, brother, sister, or issue of an individual described in subparagraph (A) or (B);

(D) a corporation, partnership, limited liability company, or other entity in which persons described in subparagraphs (A) through (C), in the aggregate, have voting control; or

(E) an employee of a person described in subparagraph (A), (B), (C), or (D).

(12) “Mandatory income interest” means the right of a current income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(13) “Net income” means the total allocations during an accounting period to income under the terms of a trust and this [act] minus the disbursements during the period, other than distributions, allocated to income under the terms of the trust and this [act]. To the extent the trust is a unitrust under [Article] 3, the term means the unitrust amount determined under [Article] 3. The term includes an adjustment from principal to income under Section 203. The term does not include an adjustment from income to principal under Section 203.

(14) “Person” means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(15) “Personal representative” means an executor, administrator, successor personal representative, special administrator, or person that performs substantially the same function with respect to an estate under the law governing the person’s status.

(16) “Principal” means property held in trust for distribution to, production of income for, or use by a current or successor beneficiary.

(17) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(18) “Settlor” means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, the term includes each person, to the extent of the trust property attributable to that person’s contribution, except to the extent another person has the power to revoke or withdraw that portion.

(19) “Special tax benefit” means:

(A) exclusion of a transfer to a trust from gifts described in Section 2503(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2503(b)[, as amended,] because of the qualification of an income interest in the trust as a present interest in property;

(B) status as a qualified subchapter S trust described in Section 1361(d)(3) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(d)(3)[, as amended,] at a time the trust holds stock of an S corporation described in Section 1361(a)(1) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(a)(1)[, as amended];

(C) an estate or gift tax marital deduction for a transfer to a trust under Section 2056 or 2523 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056 or 2523[, as amended,] which depends or depended in whole or in part on the right of the settlor's spouse to receive the net income of the trust;

(D) exemption in whole or in part of a trust from the federal generation-skipping transfer tax imposed by Section 2601 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2601[, as amended,] because the trust was irrevocable on September 25, 1985, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended,] could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended,] could occur with respect to the trust; or

(E) an inclusion ratio, as defined in Section 2642(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2642(a)[, as amended,] of the trust which is less than one, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended,] could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended,] could occur with respect to the trust.

(20) "Successive interest" means the interest of a successor beneficiary.

(21) "Successor beneficiary" means a person entitled to receive income or principal or to use property when an income interest or other current interest ends.

(22) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

- (i) expressed in the trust instrument; or
- (ii) established by other evidence that would be admissible in a judicial proceeding;

(B) the trust's provisions as established, determined, or amended by:

- (i) a trustee or trust director in accordance with applicable law; [or]
- (ii) court order; ~~or~~
- (iii) a nonjudicial settlement agreement under SECTION 15-5-111, C.R.S. ~~[Uniform Trust Code Section 111];~~ OR
- (iv) BY ALTERNATIVE DISPUTE RESOLUTION UNDER SECTION 15-5-113, C.R.S.; OR

(C) for an estate; OR a will; ~~or~~

(D) RESERVED for a life estate or term interest, the corresponding manifestation of the rights of the beneficiaries.

(23) "Trust":

(A) includes:

- (i) an express trust, private or charitable, with additions to the trust, wherever and however created; and
- (ii) a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust; and

(B) does not include:

- (i) a constructive trust;
- (ii) a resulting trust, conservatorship, guardianship, multi-party account, custodial arrangement for a minor, business trust, voting trust, security arrangement, liquidation trust, or trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, retirement benefits, or employee benefits of any kind; or
- (iii) an arrangement under which a person is a nominee, escrowee, or

Commented [GK4]: Add references to CRS and remove references to life estate or term interest

agent for another.

(24) “Trustee” means a person, other than a personal representative, that owns or holds property for the benefit of a beneficiary. The term includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(25) “Will” means any testamentary instrument recognized by applicable law which makes a legally effective disposition of an individual’s property, effective at the individual’s death. The term includes a codicil or other amendment to a testamentary instrument.

SECTION 103. SCOPE. Except as otherwise provided in the terms of a trust, A WILL, or this [act], this [act] applies to:

(1) a trust or estate; and

(2) ~~RESERVED a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons.~~

Commented [GK5]: Remove reference to life estate or term interest

SECTION 104. GOVERNING LAW. Except as otherwise provided in the terms of a trust or this [act], this [act] applies when this state is the principal place of administration of a trust or estate ~~or the situs of property that is not held in a trust or estate and is subject to a life estate or other term interest described in Section 103(2).~~ By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration of a trust to this state, the trustee submits to the application of this [act] to any matter within the scope of this [act] involving the trust.

Commented [GK6]: Remove reference to life estate or term interest

[ARTICLE] 2

FIDUCIARY DUTIES AND JUDICIAL REVIEW

SECTION 201. FIDUCIARY DUTIES; GENERAL PRINCIPLES.

(a) In making an allocation or determination or exercising discretion under this [act], a fiduciary shall:

- (1) act in good faith, based on what is fair and reasonable to all beneficiaries;
- (2) administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries;
- (3) administer the trust or estate in accordance with the terms of the trust, even if there is a different provision in this [act]; and
- (4) administer the trust or estate in accordance with this [act], except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.

(b) A fiduciary's allocation, determination, or exercise of discretion under this [act] is presumed to be fair and reasonable to all beneficiaries. A fiduciary may exercise a discretionary power of administration given to the fiduciary by the terms of the trust, and an exercise of the power which produces a result different from a result required or permitted by this [act] does not create an inference that the fiduciary abused the fiduciary's discretion.

(c) A fiduciary shall:

- (1) add a receipt to principal, to the extent neither the terms of the trust nor this [act] allocates the receipt between income and principal; and
- (2) charge a disbursement to principal, to the extent neither the terms of the trust nor this [act] allocates the disbursement between income and principal.

(d) A fiduciary may exercise the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3), if the fiduciary determines the exercise of the power will assist the fiduciary to administer the trust or estate impartially.

(e) Factors the fiduciary must consider in making the determination under subsection (d) include:

- (1) the terms of the trust;
- (2) the nature, distribution standards, and expected duration of the trust;

- (3) the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7;
- (4) the desirability of liquidity and regularity of income;
- (5) the desirability of the preservation and appreciation of principal;
- (6) the extent to which an asset is used or may be used by a beneficiary;
- (7) the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;
- (8) whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;
- (9) the extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;
- (10) the effect of current and reasonably expected economic conditions; and
- (11) the reasonably expected tax consequences of the exercise of the power.

SECTION 202. JUDICIAL REVIEW OF EXERCISE OF DISCRETIONARY POWER[; REQUEST FOR INSTRUCTION].

(a) In this section, “fiduciary decision” means:

- (1) a fiduciary’s allocation between income and principal or other determination regarding income and principal required or authorized by the terms of the trust or this [act];
- (2) the fiduciary’s exercise or nonexercise of a discretionary power regarding income and principal granted by the terms of the trust or this [act], including the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3); or
- (3) the fiduciary’s implementation of a decision described in paragraph (1) or (2).

(b) The court may not order a fiduciary to change a fiduciary decision unless the court determines that the fiduciary decision was an abuse of the fiduciary’s discretion.

(c) If the court determines that a fiduciary decision was an abuse of the fiduciary’s discretion, the court may order a remedy authorized by law, including Uniform Trust Code Section 1001 AND PART 5 OF ARTICLE 10 OF TITLE 15, C.R.S. To place the beneficiaries in the positions the beneficiaries would have occupied if there had not been an abuse of the fiduciary’s discretion, the court may order:

Commented [GK7]: Add references to C.R.S.

(1) the fiduciary to exercise or refrain from exercising the power to adjust under Section 203;

(2) the fiduciary to exercise or refrain from exercising the power to convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3);

(3) the fiduciary to distribute an amount to a beneficiary;

(4) a beneficiary to return some or all of a distribution; or

(5) the fiduciary to withhold an amount from one or more future distributions to a beneficiary.

[(d) On [petition] by a fiduciary for instruction, the court may determine whether a proposed fiduciary decision will result in an abuse of the fiduciary's discretion. If the [petition] describes the proposed decision, contains sufficient information to inform the beneficiary of the reasons for making the proposed decision and the facts on which the fiduciary relies, and explains how the beneficiary will be affected by the proposed decision, a beneficiary that opposes the proposed decision has the burden to establish that it will result in an abuse of the fiduciary's discretion.]

SECTION 203. FIDUCIARY'S POWER TO ADJUST.

(a) Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.

(b) This section does not create a duty to exercise or consider the power to adjust under subsection (a) or to inform a beneficiary about the applicability of this section.

(c) A fiduciary that in good faith exercises or fails to exercise the power to adjust under subsection (a) is not liable to a person affected by the exercise or failure to exercise.

(d) In deciding whether and to what extent to exercise the power to adjust under subsection (a), a fiduciary shall consider all factors the fiduciary considers relevant, including relevant factors in Section 201(e) and the application of Sections 401(i), 408, and 413.

(e) A fiduciary may not exercise the power under subsection (a) to make an adjustment or under Section 408 to make a determination that an allocation is insubstantial if:

(1) the adjustment or determination would reduce the amount payable to a current

income beneficiary from a trust that qualifies for a special tax benefit, except to the extent the adjustment is made to provide for a reasonable apportionment of the total return of the trust between the current income beneficiary and successor beneficiaries;

(2) the adjustment or determination would change the amount payable to a beneficiary, as a fixed annuity or a fixed fraction of the value of the trust assets, under the terms of the trust;

(3) the adjustment or determination would reduce an amount that is permanently set aside for a charitable purpose under the terms of the trust, unless both income and principal are set aside for the charitable purpose;

(4) possessing or exercising the power would cause a person to be treated as the owner of all or part of the trust for federal income tax purposes;

(5) possessing or exercising the power would cause all or part of the value of the trust assets to be included in the gross estate of an individual for federal estate tax purposes;

(6) possessing or exercising the power would cause an individual to be treated as making a gift for federal gift tax purposes;

(7) the fiduciary is not an independent person;

(8) the trust is irrevocable and provides for income to be paid to the settlor and possessing or exercising the power would cause the adjusted principal or income to be considered an available resource or available income under a public-benefit program; or

(9) the trust is a unitrust under [Article] 3.

(f) If subsection (e)(4), (5), (6), or (7) applies to a fiduciary:

(1) a co-fiduciary to which subsection (e)(4) through (7) does not apply may exercise the power to adjust, unless the exercise of the power by the remaining co-fiduciary or co-fiduciaries is not permitted by the terms of the trust or law other than this [act]; or

(2) if there is no co-fiduciary to which subsection (e)(4) through (7) does not apply, the fiduciary may appoint a co-fiduciary to which subsection (e)(4) through (7) does not apply, which may be a special fiduciary with limited powers, and the appointed co-fiduciary may exercise the power to adjust under subsection (a), unless the appointment of a co-fiduciary or the exercise of the power by a co-fiduciary is not permitted by the terms of the trust or law other than this [act].

(g) A fiduciary may release or delegate to a co-fiduciary the power to adjust under subsection (a) if the fiduciary determines that the fiduciary's possession or exercise of the power will or may:

(1) cause a result described in subsection (e)(1) through (6) or (8); or
(2) deprive the trust of a tax benefit or impose a tax burden not described in subsection (e)(1) through (6).

(h) A fiduciary's release or delegation to a co-fiduciary under subsection (g) of the power to adjust under subsection (a):

(1) must be in a record;

(2) applies to the entire power, unless the release or delegation provides a limitation, which may be a limitation to the power to adjust:

(A) from income to principal;

(B) from principal to income;

(C) for specified property; or

(D) in specified circumstances;

(3) for a delegation, may be modified by a re-delegation under this subsection by the co-fiduciary to which the delegation is made; and

(4) subject to paragraph (3), is permanent, unless the release or delegation provides a specified period, including a period measured by the life of an individual or the lives of more than one individual.

(i) Terms of a trust which deny or limit the power to adjust between income and principal do not affect the application of this section, unless the terms of the trust expressly deny or limit the power to adjust under subsection (a).

(j) The exercise of the power to adjust under subsection (a) in any accounting period may apply to the current period, the immediately preceding period, and one or more subsequent periods.

(k) A description of the exercise of the power to adjust under subsection (a) must be:

(1) included in a report, if any, sent to beneficiaries under ~~§~~ **COLORADO** Uniform Trust Code Section 813(c); or

(2) communicated at least annually to ~~the~~ qualified beneficiaries determined under ~~§~~ **COLORADO** Uniform Trust Code Section 103(163), ~~other than~~ ~~including~~ the Attorney General **WHEN APPLICABLE** ~~]]~~ all beneficiaries that receive or are entitled to receive income from the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the notice is sent, assuming no power of appointment is exercised].

Commented [GK8]: Reference to Colorado UTC

Commented [GK9]:

Commented [GK10]: Reference to Colorado UTC

204 – NOTICE OF ACTION

Commented [GK11]: New section

(1) IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

(A) “QUALIFIED BENEFICIARY” HAS THE MEANING SET FORTH IN SUBSECTION 15-5-103(16).

(B) “OBJECTION PERIOD” HAS THE MEANING SET FORTH IN SECTION 304(D)(5).

(2) A FIDUCIARY MAY GIVE A NOTICE OF PROPOSED ACTION REGARDING A MATTER GOVERNED BY SUBPARTS 1 THROUGH 8 OF THIS PART [4] AS PROVIDED IN THIS SECTION. FOR THE PURPOSE OF THIS SECTION, A PROPOSED ACTION INCLUDES A COURSE OF ACTION AND A DECISION NOT TO TAKE ACTION.

(3) THE FIDUCIARY SHALL MAIL NOTICE OF THE PROPOSED ACTION TO ALL QUALIFIED BENEFICIARIES AND THE FIDUCIARY MAY GIVE NOTICE TO OTHER BENEFICIARIES. A BENEFICIARY SHALL BE BOUND UNDER THIS SECTION WITH RESPECT TO SUCH PROPOSED ACTION IF THE BENEFICIARY RECEIVES ACTUAL NOTICE OR IF THE BENEFICIARY WOULD BE BOUND UNDER THE PROVISIONS OF TITLE 15, ARTICLE 5, PART 3.

(4) NOTICE OF PROPOSED ACTION NEED NOT BE GIVEN TO ANY BENEFICIARY WHO CONSENTS IN WRITING TO THE PROPOSED ACTION. THE CONSENT MAY BE EXECUTED AT ANY TIME BEFORE OR AFTER THE PROPOSED ACTION IS TAKEN.

(5) THE NOTICE OF PROPOSED ACTION SHALL STATE THAT IT IS GIVEN PURSUANT TO THIS SECTION AND SHALL FOLLOW THE PROCEDURES SET OUT IN SECTION 304 REGARDING NOTICE.

(6) A BENEFICIARY MAY OBJECT TO THE PROPOSED ACTION BY MAILING A WRITTEN OBJECTION TO THE FIDUCIARY AT THE ADDRESS STATED IN THE NOTICE OF PROPOSED ACTION WITHIN THE OBJECTION PERIOD.

(7) A FIDUCIARY IS NOT LIABLE TO A BENEFICIARY TO WHOM NOTICE IS GIVEN FOR AN ACTION REGARDING A MATTER GOVERNED BY THIS PART IF THE FIDUCIARY DOES NOT RECEIVE A WRITTEN OBJECTION TO THE PROPOSED ACTION FROM THE BENEFICIARY WITHIN THE OBJECTION PERIOD AND THE OTHER REQUIREMENTS OF THIS SECTION ARE SATISFIED. IF NO BENEFICIARY WHO RECEIVES NOTICE OBJECTS UNDER THIS SECTION, THE FIDUCIARY IS NOT LIABLE TO THE BENEFICIARIES RECEIVING NOTICE WITH RESPECT TO THE PROPOSED ACTION.

(8) IF THE FIDUCIARY RECEIVES A WRITTEN OBJECTION WITHIN THE OBJECTION PERIOD, EITHER THE FIDUCIARY OR A BENEFICIARY MAY PETITION THE COURT TO HAVE THE PROPOSED ACTION PERFORMED AS PROPOSED, PERFORMED WITH MODIFICATIONS, OR DENIED. IN THE PROCEEDING, A BENEFICIARY OBJECTING TO THE PROPOSED ACTION HAS THE BURDEN OF PROVING THAT THE FIDUCIARY'S PROPOSED ACTION SHOULD NOT BE PERFORMED. A BENEFICIARY WHO HAS NOT OBJECTED IS NOT ESTOPPED FROM OPPOSING THE PROPOSED ACTION IN THE PROCEEDING. IF THE FIDUCIARY DECIDES NOT TO IMPLEMENT THE PROPOSED ACTION, THE FIDUCIARY SHALL NOTIFY THE BENEFICIARIES OF THE DECISION NOT TO TAKE THE ACTION AND THE REASONS FOR THE DECISION, AND THE FIDUCIARY'S DECISION NOT TO IMPLEMENT THE PROPOSED ACTION DOES NOT ITSELF GIVE RISE TO LIABILITY TO ANY BENEFICIARY. A BENEFICIARY MAY PETITION THE COURT TO HAVE THE ACTION PERFORMED, AND HAS THE BURDEN OF PROVING THAT IT SHOULD BE PERFORMED.

[ARTICLE] 3

UNITRUST

SECTION 301. DEFINITIONS. In this [article]:

- (1) “Applicable value” means the amount of the net fair market value of a trust taken into account under Section 307.
- (2) “Express unitrust” means a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount.
- (3) “Income trust” means a trust that is not a unitrust.
- (4) “Net fair market value of a trust” means the fair market value of the assets of the trust, less the noncontingent liabilities of the trust.
- (5) “Unitrust” means a trust for which net income is a unitrust amount. The term includes an express unitrust.
- (6) “Unitrust amount” means an amount computed by multiplying a determined value of a trust by a determined percentage. For a unitrust administered under a unitrust policy, the term means the applicable value, multiplied by the unitrust rate.
- (7) “Unitrust policy” means a policy described in Sections 305 through 309 and adopted under Section 303.
- (8) “Unitrust rate” means the rate used to compute the unitrust amount under paragraph (6) for a unitrust administered under a unitrust policy.

SECTION 302. APPLICATION; DUTIES AND REMEDIES.

- (a) Except as otherwise provided in subsection (b), this [article] applies to:
 - (1) an income trust, unless the terms of the trust expressly prohibit use of this [article] by a specific reference to this [article] or an explicit expression of intent that net income not be calculated as a unitrust amount; and
 - (2) an express unitrust, except to the extent the terms of the trust explicitly:
 - (A) prohibit use of this [article] by a specific reference to this [article];
 - (B) prohibit conversion to an income trust; or
 - (C) limit changes to the method of calculating the unitrust amount.
- (b) This [article] does not apply to a trust described in Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b) of the Internal Revenue Code of 1986[, as

amended,] 26 U.S.C. Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b)[, as amended].

(c) An income trust to which this [article] applies under subsection (a)(1) may be converted to a unitrust under this [article] regardless of the terms of the trust concerning distributions. Conversion to a unitrust under this [article] does not affect other terms of the trust concerning distributions of income or principal.

(d) This [article] applies to an estate only to the extent a trust is a beneficiary of the estate. To the extent of the trust's interest in the estate, the estate may be administered as a unitrust, the administration of the estate as a unitrust may be discontinued, or the percentage or method used to calculate the unitrust amount may be changed, in the same manner as for a trust under this [article].

(e) This [article] does not create a duty to take or consider action under this [article] or to inform a beneficiary about the applicability of this [article].

(f) A fiduciary that in good faith takes or fails to take an action under this [article] is not liable to a person affected by the action or inaction.

SECTION 303. AUTHORITY OF FIDUCIARY.

(a) A fiduciary, without court approval, by complying with subsections (b) and (f), may:

(1) convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:

(A) that in administering the trust the net income of the trust will be a unitrust amount rather than net income determined without regard to this [article]; and

(B) the percentage and method used to calculate the unitrust amount;

(2) change the percentage or method used to calculate a unitrust amount for a unitrust if the fiduciary adopts in a record a unitrust policy or an amendment or replacement of a unitrust policy providing changes in the percentage or method used to calculate the unitrust amount; or

(3) convert a unitrust to an income trust if the fiduciary adopts in a record a determination that, in administering the trust, the net income of the trust will be net income determined without regard to this [article] rather than a unitrust amount.

(b) A fiduciary may take an action under subsection (a) if:

(1) the fiduciary determines that the action will assist the fiduciary to administer a

trust impartially;

(2) the fiduciary sends a notice in a record, in the manner required by Section 304, describing and proposing to take the action;

(3) the fiduciary sends a copy of the notice under paragraph (2) to each settlor of the trust which is:

(A) if an individual, living; or

(B) if not an individual, in existence;

(4) at least one member of each class[of the qualified beneficiaries determined under [Uniform Trust Code Section 103(13)], other than [the Attorney General],] receiving the notice under paragraph (2) is:

(A) if an individual, legally competent; [or]

(B) if not an individual, in existence; [or]

(C) represented in the manner provided in Section 304(b);] and

(5) the fiduciary does not receive, by the date specified in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record to the action proposed under paragraph (2) from a person to which the notice under paragraph (2) is sent.

(c) If a fiduciary receives, not later than the date stated in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record described in Section 304[(d)(4)][(c)(4)] to a proposed action, the fiduciary or a beneficiary may request the court to have the proposed action taken as proposed, taken with modifications, or prevented. A person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection, whether or not the person:

(1) consented under Section 304[(c)][(b)]; or

(2) objected under Section 304[(d)(4)][(c)(4)].

(d) If, after sending a notice under subsection (b)(2), a fiduciary decides not to take the action proposed in the notice, the fiduciary shall notify in a record each person described in Section 304(a) of the decision not to take the action and the reasons for the decision.

(e) If a beneficiary requests in a record that a fiduciary take an action described in subsection (a) and the fiduciary declines to act or does not act within 90 days after receiving the request, the beneficiary may request the court to direct the fiduciary to take the action requested.

(f) In deciding whether and how to take an action authorized by subsection (a), or whether and how to respond to a request by a beneficiary under subsection (e), a fiduciary

shall consider all factors relevant to the trust and the beneficiaries, including relevant factors in Section 201(e).

(g) A fiduciary may release or delegate the power to convert an income trust to a unitrust under subsection (a)(1), change the percentage or method used to calculate a unitrust amount under subsection (a)(2), or convert a unitrust to an income trust under subsection (a)(3), for a reason described in Section 203(g) and in the manner described in Section 203(h).

SECTION 304. NOTICE.

Alternative A

(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under SECTION 15-5-109 ~~[Uniform Trust Code Section 109]~~ to:

~~(1) the qualified beneficiaries determined under SECTION 15-5-103(16) [Uniform Trust Code Section 103(13)], other than [the Attorney General]; and~~

~~(2) each person acting as trust director of the trust under the COLORADO Uniform Directed Trust Act; AND~~

~~(3) each person that is granted a power BY over the trust by the terms of the trust TO APPOINT OR REMOVE A TRUSTEE OR PERSON DESCRIBED IN PARAGRAPH (2), to the extent the power is exercisable when the person is not then serving as a trustee OR PERSON DESCRIBED IN PARAGRAPH (2).:~~

~~(A) including a:~~

~~(i) power over the investment, management, or distribution of trust property or other matters of trust administration; and~~

~~(ii) power to appoint or remove a trustee or person described in this paragraph; and~~

~~(B) excluding a:~~

~~(i) power of appointment;~~

~~(ii) power of a beneficiary over the trust, to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by the beneficiary under [Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power; and~~

~~(iii) power over the trust if the terms of the trust provide that the power is held in a nonfiduciary capacity and the power must be held in a nonfiduciary capacity to~~

Commented [GK12]: Section 304 had many bracketed alternatives.

achieve a tax objective under the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended]]]; and

~~(4) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2);~~

(b) The representation provisions of SECTION 15-5-301 THROUGH 15-5-305, C.R.S., ~~[Uniform Trust Code Sections 301 through 305]~~ apply to notice under this section.

Alternative B

(a) A notice required by Section 303(b)(2) must be sent to:

~~(1) all beneficiaries that receive or are entitled to receive income from the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the notice is sent, assuming no power of appointment is exercised; [and]~~

~~(2) [each person acting as trust director of the trust under the Uniform Directed Trust Act][each person that is granted a power over the trust by the terms of the trust, to the extent the power is exercisable when the person is not then serving as a trustee:~~

~~(A) including a:~~

~~(i) power over the investment, management, or distribution of trust property or other matters of trust administration; and~~

~~(ii) power to appoint or remove a trustee or person described in this paragraph; and~~

~~(B) excluding a:~~

~~(i) power of appointment;~~

~~(ii) power of a beneficiary over the trust, to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary; and~~

~~(iii) power over the trust if the terms of the trust provide that the power is held in a nonfiduciary capacity and the power must be held in a nonfiduciary capacity to achieve a tax objective under the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended]]]; and~~

~~(3) each person that is granted a power by the terms of the trust to appoint or~~

~~remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2)].~~

End of Alternatives

~~{(c)}{(b)}~~ A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.

~~{(d)}{(e)}~~ A notice required by Section 303(b)(2) must include:

- (1) the action proposed under Section 303(b)(2);
- (2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);
- (3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or replacement of the unitrust policy adopted under Section 303(a)(2);
- (4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;
- (5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;
- (6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;
- (7) the name and contact information of the fiduciary; and
- (8) the name and contact information of a person that may be contacted for additional information.

SECTION 305. UNITRUST POLICY.

(a) In administering a unitrust under this [article], a fiduciary shall follow a unitrust policy adopted under Section 303(a)(1) or (2) or amended or replaced under Section 303(a)(2).

(b) A unitrust policy must provide:

- (1) the unitrust rate or the method for determining the unitrust rate under Section 306;

(2) the method for determining the applicable value under Section 307; and
(3) the rules described in Sections 306 through 309 which apply in the administration of the unitrust, whether the rules are:

(A) mandatory, as provided in Sections 307(a) and 308(a); or

(B) optional, as provided in Sections 306, 307(b), 308(b), and 309(a), to the extent the fiduciary elects to adopt those rules.

SECTION 306. UNITRUST RATE.

(a) Except as otherwise provided in Section 309(b)(1), a unitrust rate may be:

(1) a fixed unitrust rate; or

(2) a unitrust rate that is determined for each period using:

(A) a market index or other published data; or

(B) a mathematical blend of market indices or other published data over a stated number of preceding periods.

(b) Except as otherwise provided in Section 309(b)(1), a unitrust policy may provide:

(1) a limit on how high the unitrust rate determined under subsection (a)(2) may rise;

(2) a limit on how low the unitrust rate determined under subsection (a)(2) may fall;

(3) a limit on how much the unitrust rate determined under subsection (a)(2) may increase over the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods;

(4) a limit on how much the unitrust rate determined under subsection (a)(2) may decrease below the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods; or

(5) a mathematical blend of any of the unitrust rates determined under subsection (a)(2) and paragraphs (1) through (4).

SECTION 307. APPLICABLE VALUE.

(a) A unitrust policy must provide the method for determining the fair market value of an asset for the purpose of determining the unitrust amount, including:

(1) the frequency of valuing the asset, which need not require a valuation in every

period; and

(2) the date for valuing the asset in each period in which the asset is valued.

(b) Except as otherwise provided in Section 309(b)(2), a unitrust policy may provide methods for determining the amount of the net fair market value of the trust to take into account in determining the applicable value, including:

(1) obtaining an appraisal of an asset for which fair market value is not readily available;

(2) exclusion of specific assets or groups or types of assets;

(3) other exceptions or modifications of the treatment of specific assets or groups or types of assets;

(4) identification and treatment of cash or property held for distribution;

(5) use of:

(A) an average of fair market values over a stated number of preceding periods; or

(B) another mathematical blend of fair market values over a stated number of preceding periods;

(6) a limit on how much the applicable value of all assets, groups of assets, or individual assets may increase over:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(7) a limit on how much the applicable value of all assets, groups of assets, or individual assets may decrease below:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(8) the treatment of accrued income and other features of an asset which affect value; and

(9) determining the liabilities of the trust, including treatment of liabilities to conform with the treatment of assets under paragraphs (1) through (8).

SECTION 308. PERIOD.

(a) A unitrust policy must provide the period used under Sections 306 and 307. Except as otherwise provided in Section 309(b)(3), the period may be:

- (1) a calendar year;
- (2) a 12-month period other than a calendar year;
- (3) a calendar quarter;
- (4) a three-month period other than a calendar quarter; or
- (5) another period.

(b) Except as otherwise provided in Section 309(b), a unitrust policy may provide standards for:

- (1) using fewer preceding periods under Section 306(a)(2)(B) or (b)(3) or (4) if:
 - (A) the trust was not in existence in a preceding period; or
 - (B) market indices or other published data are not available for a preceding period;
- (2) using fewer preceding periods under Section 307(b)(5)(A) or (B), (6)(B), or (7)(B) if:
 - (A) the trust was not in existence in a preceding period; or
 - (B) fair market values are not available for a preceding period; and
- (3) prorating the unitrust amount on a daily basis for a part of a period in which the trust or the administration of the trust as a unitrust or the interest of any beneficiary commences or terminates.

SECTION 309. SPECIAL TAX BENEFITS; OTHER RULES.

(a) A unitrust policy may:

- (1) provide methods and standards for:
 - (A) determining the timing of distributions;
 - (B) making distributions in cash or in kind or partly in cash and partly in kind; or
 - (C) correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;
- (2) specify sources and the order of sources, including categories of income for federal income tax purposes, from which distributions of a unitrust amount are paid; or

(3) provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.

(b) If a trust qualifies for a special tax benefit or a fiduciary is not an independent person:

(1) the unitrust rate established under Section 306 may not be less than three percent or more than five percent;

(2) the only provisions of Section 307 which apply are Section 307(a) and (b)(1), (4), (5)(A), and (9);

(3) the only period that may be used under Section 308 is a calendar year under Section 308(a)(1); and

(4) the only other provisions of Section 308 which apply are Section 308(b)(2)(A) and (3).

(C) UNLESS OTHERWISE PROVIDED BY THE TERMS OF UNITRUST POLICY OR THE TERMS OF THE TRUST, THE DISTRIBUTION AMOUNT EACH YEAR SHALL BE DEEMED TO BE PAID FROM THE FOLLOWING SOURCES FOR THAT YEAR IN THE FOLLOWING ORDER:

(1) NET INCOME DETERMINED AS IF THE TRUST WAS NOT A UNITRUST;

(2) OTHER ORDINARY INCOME AS DETERMINED FOR FEDERAL INCOME TAX PURPOSES;

(3) NET REALIZED SHORT-TERM CAPITAL GAINS AS DETERMINED FOR FEDERAL INCOME TAX PURPOSES;

(4) NET REALIZED LONG-TERM CAPITAL GAINS AS DETERMINED FOR FEDERAL INCOME TAX PURPOSES;

(5) TRUST PRINCIPAL COMPRISING ASSETS FOR WHICH THERE IS A READILY AVAILABLE MARKET VALUE; AND

(6) OTHER TRUST PRINCIPAL.

Commented [GK13]: New ordering rule added

[ARTICLE] 4
ALLOCATION OF RECEIPTS

[PART] 1
RECEIPTS FROM ENTITY

SECTION 401. CHARACTER OF RECEIPTS FROM ENTITY.

(a) In this section:

(1) “Capital distribution” means an entity distribution of money which is a:

- (A) return of capital; or
- (B) distribution in total or partial liquidation of the entity.

(2) “Entity”:

(A) means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization or arrangement in which a fiduciary owns or holds an interest, whether or not the entity is a taxpayer for federal income tax purposes; and

(B) does not include:

- (i) a trust or estate to which Section 402 applies;
 - (ii) a business or other activity to which Section 403 applies
- which is not conducted by an entity described in subparagraph (A);
- (iii) an asset-backed security; or
 - (iv) an instrument or arrangement to which Section 416 applies.

(3) “Entity distribution” means a payment or transfer by an entity made to a person in the person’s capacity as an owner or holder of an interest in the entity.

(b) In this section, an attribute or action of an entity includes an attribute or action of any other entity in which the entity owns or holds an interest, including an interest owned or held indirectly through another entity.

(c) Except as otherwise provided in subsection (d)(2) through (4), a fiduciary shall allocate to income:

- (1) money received in an entity distribution; and
- (2) tangible personal property of nominal value received from the entity.

(d) A fiduciary shall allocate to principal:

(1) property received in an entity distribution which is not:

(A) money; or

(B) tangible personal property of nominal value;

(2) money received in an entity distribution in an exchange for part or all of the fiduciary's interest in the entity, to the extent the entity distribution reduces the fiduciary's interest in the entity relative to the interests of other persons that own or hold interests in the entity;

(3) money received in an entity distribution that the fiduciary determines or estimates is a capital distribution; and

(4) money received in an entity distribution from an entity that is:

(A) a regulated investment company or real estate investment trust if the money received is a capital gain dividend for federal income tax purposes; or

(B) treated for federal income tax purposes comparably to the treatment described in subparagraph (A).

(e) A fiduciary may determine or estimate that money received in an entity distribution is a capital distribution:

(1) by relying without inquiry or investigation on a characterization of the entity distribution provided by or on behalf of the entity, unless the fiduciary:

(A) determines, on the basis of information known to the fiduciary, that the characterization is or may be incorrect; or

(B) owns or holds more than 50 percent of the voting interest in the entity;

(2) by determining or estimating, on the basis of information known to the fiduciary or provided to the fiduciary by or on behalf of the entity, that the total amount of money and property received by the fiduciary in the entity distribution or a series of related entity distributions is or will be greater than 20 percent of the fair market value of the fiduciary's interest in the entity; or

(3) if neither paragraph (1) nor (2) applies, by considering the factors in subsection (f) and the information known to the fiduciary or provided to the fiduciary by or on behalf of the entity.

(f) In making a determination or estimate under subsection (e)(3), a fiduciary may consider:

(1) a characterization of an entity distribution provided by or on behalf of the entity;

(2) the amount of money or property received in:

(A) the entity distribution; or

(B) what the fiduciary determines is or will be a series of related entity distributions;

(3) the amount described in paragraph (2) compared to the amount the fiduciary determines or estimates is, during the current or preceding accounting periods:

(A) the entity's operating income;

(B) the proceeds of the entity's sale or other disposition of:

(i) all or part of the business or other activity conducted by the entity;

(ii) one or more business assets that are not sold to customers in the ordinary course of the business or other activity conducted by the entity; or

(iii) one or more assets other than business assets, unless the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets;

(C) if the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets, the gain realized on the disposition;

(D) the entity's regular, periodic entity distributions;

(E) the amount of money the entity has accumulated;

(F) the amount of money the entity has borrowed;

(G) the amount of money the entity has received from the sources described in Sections 407, 410, 411, and 412; and

(H) the amount of money the entity has received from a source not otherwise described in this paragraph; and

(4) any other factor the fiduciary determines is relevant.

(g) If, after applying subsections (c) through (f), a fiduciary determines that a part of an entity distribution is a capital distribution but is in doubt about the amount of the entity distribution which is a capital distribution, the fiduciary shall allocate to principal the amount of the entity distribution which is in doubt.

(h) If a fiduciary receives additional information about the application of this section to an entity distribution before the fiduciary has paid part of the entity distribution to a

beneficiary, the fiduciary may consider the additional information before making the payment to the beneficiary and may change a decision to make the payment to the beneficiary.

(i) If a fiduciary receives additional information about the application of this section to an entity distribution after the fiduciary has paid part of the entity distribution to a beneficiary, the fiduciary is not required to change or recover the payment to the beneficiary but may consider that information in determining whether to exercise the power to adjust under Section 203.

SECTION 402. DISTRIBUTION FROM TRUST OR ESTATE. A fiduciary shall allocate to income an amount received as a distribution of income, including a unitrust distribution under [Article] 3, from a trust or estate in which the fiduciary has an interest, other than an interest the fiduciary purchased in a trust that is an investment entity, and shall allocate to principal an amount received as a distribution of principal from the trust or estate. If a fiduciary purchases, or receives from a settlor, an interest in a trust that is an investment entity, Section 401, 415, or 416 applies to a receipt from the trust.

SECTION 403. BUSINESS OR OTHER ACTIVITY CONDUCTED BY FIDUCIARY.

(a) This section applies to a business or other activity conducted by a fiduciary if the fiduciary determines that it is in the interests of the beneficiaries to account separately for the business or other activity instead of:

(1) accounting for the business or other activity as part of the fiduciary's general accounting records; or

(2) conducting the business or other activity through an entity described in Section 401(a)(2)(A).

(b) A fiduciary may account separately under this section for the transactions of a business or other activity, whether or not assets of the business or other activity are segregated from other assets held by the fiduciary.

(c) A fiduciary that accounts separately under this section for a business or other activity:

(1) may determine:

(A) the extent to which the net cash receipts of the business or other activity must be retained for:

(i) working capital;

(ii) the acquisition or replacement of fixed assets; and
(iii) other reasonably foreseeable needs of the business or other activity; and

(B) the extent to which the remaining net cash receipts are accounted for as principal or income in the fiduciary's general accounting records for the trust;

(2) may make a determination under paragraph (1) separately and differently from the fiduciary's decisions concerning distributions of income or principal; and

(3) shall account for the net amount received from the sale of an asset of the business or other activity, other than a sale in the ordinary course of the business or other activity, as principal in the fiduciary's general accounting records for the trust, to the extent the fiduciary determines that the net amount received is no longer required in the conduct of the business or other activity.

(d) Activities for which a fiduciary may account separately under this section include:

- (1) retail, manufacturing, service, and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) managing rental properties;
- (5) extracting minerals, water, and other natural resources;
- (6) growing and cutting timber;
- (7) an activity to which Section 414, 415, or 416 applies; and
- (8) any other business conducted by the fiduciary.

[PART] 2

RECEIPTS NOT NORMALLY APPORTIONED

SECTION 404. PRINCIPAL RECEIPTS. A fiduciary shall allocate to principal:

(1) to the extent not allocated to income under this [act], an asset received from:

- (A) an individual during the individual's lifetime;
- (B) an estate;
- (C) a trust on termination of an income interest; or
- (D) a payor under a contract naming the fiduciary as beneficiary;

(2) except as otherwise provided in this [article], money or other property received from the sale, exchange, liquidation, or change in form of a principal asset;

(3) an amount recovered from a third party to reimburse the fiduciary because of a disbursement described in Section 502(a) or for another reason to the extent not based on loss of income;

(4) proceeds of property taken by eminent domain, except that proceeds awarded for loss of income in an accounting period are income if a current income beneficiary had a mandatory income interest during the period;

(5) net income received in an accounting period during which there is no beneficiary to which a fiduciary may or must distribute income; and

(6) other receipts as provided in [Part] 3.

SECTION 405. RENTAL PROPERTY. To the extent a fiduciary does not account for the management of rental property as a business under Section 403, the fiduciary shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods:

(1) must be added to principal and held subject to the terms of the lease, except as otherwise provided by law other than this [act]; and

(2) is not allocated to income or available for distribution to a beneficiary until the fiduciary's contractual obligations have been satisfied with respect to that amount.

SECTION 406. RECEIPT ON OBLIGATION TO BE PAID IN MONEY.

(a) This section does not apply to an obligation to which Section 409, 410, 411, 412, 414, 415, or 416 applies.

(b) A fiduciary shall allocate to income, without provision for amortization of premium, an amount received as interest on an obligation to pay money to the fiduciary, including an amount received as consideration for prepaying principal.

(c) A fiduciary shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the fiduciary. A fiduciary shall allocate to income the increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable or redeemable, at maturity or another future time, in an amount that exceeds the amount in consideration of which it was issued.

SECTION 407. INSURANCE POLICY OR CONTRACT.

(a) This section does not apply to a contract to which Section 409 applies.

(b) Except as otherwise provided in subsection (c), a fiduciary shall allocate to principal the proceeds of a life insurance policy or other contract received by the fiduciary as beneficiary, including a contract that insures against damage to, destruction of, or loss of title to an asset. The fiduciary shall allocate dividends on an insurance policy to income to the extent premiums on the policy are paid from income and to principal to the extent premiums on the policy are paid from principal.

(c) A fiduciary shall allocate to income proceeds of a contract that insures the fiduciary against loss of:

- a. occupancy or other use by a current income beneficiary;
- b. income; or
- c. subject to Section 403, profits from a business.

[PART] 3

RECEIPTS NORMALLY APPORTIONED

SECTION 408. INSUBSTANTIAL ALLOCATION NOT REQUIRED.

(a) If a fiduciary determines that an allocation between income and principal required by Section 409, 410, 411, 412, or 415 is insubstantial, the fiduciary may allocate the entire amount to principal, unless Section 203(e) applies to the allocation.

(b) A fiduciary may presume an allocation is insubstantial under subsection (a) if:

- (1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; and
- (2) the asset producing the receipt to be allocated has a fair market value less than 10 percent of the total fair market value of the assets owned or held by the fiduciary at the beginning of the accounting period.

(c) The power to make a determination under subsection (a) may be:

- (1) exercised by a co-fiduciary in the manner described in Section 203(f); or
- (2) released or delegated for a reason described in Section 203(g) and in the manner described in Section 203(h).

SECTION 409. DEFERRED COMPENSATION, ANNUITY, OR SIMILAR PAYMENT.

(a) In this section:

(1) “Internal income of a separate fund” means the amount determined under subsection (b).

(2) “Marital trust” means a trust:

(A) of which the settlor’s surviving spouse is the only current income beneficiary and is entitled to a distribution of all the current net income of the trust; and

(B) that qualifies for a marital deduction with respect to the settlor’s estate under ~~Section 2056 of the Internal Revenue Code of 1986[, as amended,]~~ 26 U.S.C. Section 2056~~[, as amended,]~~ because:

(i) an election to qualify for a marital deduction under ~~Section 2056(b)(7) of the Internal Revenue Code of 1986[, as amended,]~~ 26 U.S.C. Section 2056(b)(7)~~[, as amended,]~~ has been made; or

(ii) the trust qualifies for a marital deduction under ~~Section 2056(b)(5) of the Internal Revenue Code of 1986[, as amended,]~~ 26 U.S.C. Section 2056(b)(5)~~[, as amended,]~~.

(3) “Payment” means an amount a fiduciary may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future amounts the fiduciary may receive. The term includes an amount received in money or property from the payor’s general assets or from a separate fund created by the payor.

(4) “Separate fund” includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) For each accounting period, the following rules apply to a separate fund:

(1) The fiduciary shall determine the internal income of the separate fund as if the separate fund were a trust subject to this [act].

(2) If the fiduciary cannot determine the internal income of the separate fund under paragraph (1), the internal income of the separate fund is deemed to equal **FOUR** ~~insert a number at least three and not more than five~~ percent of the value of the separate fund,

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according to the most recent statement of value preceding the beginning of the accounting period.

(3) If the fiduciary cannot determine the value of the separate fund under paragraph (2), the value of the separate fund is deemed to equal the present value of the expected future payments, as determined under ~~Section 7520 of the Internal Revenue Code of 1986, as amended,~~ 26 U.S.C. Section 7520~~f, as amended,~~ for the month preceding the beginning of the accounting period for which the computation is made.

(c) A fiduciary shall allocate a payment received from a separate fund during an accounting period to income, to the extent of the internal income of the separate fund during the period, and the balance to principal.

(d) The fiduciary of a marital trust shall:

(1) withdraw from a separate fund the amount the current income beneficiary of the trust requests the fiduciary to withdraw, not greater than the amount by which the internal income of the separate fund during the accounting period exceeds the amount the fiduciary otherwise receives from the separate fund during the period;

(2) transfer from principal to income the amount the current income beneficiary requests the fiduciary to transfer, not greater than the amount by which the internal income of the separate fund during the period exceeds the amount the fiduciary receives from the separate fund during the period after the application of paragraph (1); and

(3) distribute to the current income beneficiary as income:

(A) the amount of the internal income of the separate fund received or withdrawn during the period; and

(B) the amount transferred from principal to income under paragraph (2).

(e) For a trust, other than a marital trust, of which one or more current income beneficiaries are entitled to a distribution of all the current net income, the fiduciary shall transfer from principal to income the amount by which the internal income of a separate fund during the accounting period exceeds the amount the fiduciary receives from the separate fund during the period.

SECTION 410. LIQUIDATING ASSET.

(a) In this section, “liquidating asset” means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a limited time. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of

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more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance.

(b) This section does not apply to a receipt subject to Section 401, 409, 411, 412, 414, 415, 416, or 503.

(c) A fiduciary shall allocate:

(1) to income:

(A) a receipt produced by a liquidating asset, to the extent the receipt does not exceed [insert a number at least three and not more than five] percent of the value of the asset; or

(B) if the fiduciary cannot determine the value of the asset, 10 percent of the receipt; and

(2) to principal, the balance of the receipt.

SECTION 411. MINERALS, WATER, AND OTHER NATURAL RESOURCES.

(a) To the extent a fiduciary does not account for a receipt from an interest in minerals, water, or other natural resources as a business under Section 403, the fiduciary shall allocate the receipt:

(1) to income, to the extent received:

(A) as delay rental or annual rent on a lease;

(B) as a factor for interest or the equivalent of interest under an agreement creating a production payment; or

(C) on account of an interest in renewable water;

(2) to principal, if received from a production payment, to the extent paragraph (1)(B) does not apply; or

(3) between income and principal equitably, to the extent received:

(A) on account of an interest in non-renewable water;

(B) as a royalty, shut-in-well payment, take-or-pay payment, or bonus; or

(C) from a working interest or any other interest not provided for in paragraph (1) or (2) or subparagraph (A) or (B).

(b) This section applies to an interest owned or held by a fiduciary whether or not a settlor was extracting minerals, water, or other natural resources before the fiduciary owned or held the interest.

(c) An allocation of a receipt under subsection (a)(3) is presumed to be equitable if the amount allocated to principal is equal to the amount allowed by the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended,] as a deduction for depletion of the interest.

(d) If a fiduciary owns or holds an interest in minerals, water, or other natural resources before [the effective date of this [act]], the fiduciary may allocate receipts from the interest as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in minerals, water, or other natural resources on or after [the effective date of this [act]], the fiduciary shall allocate receipts from the interest as provided in this section.

SECTION 412. TIMBER.

(a) To the extent a fiduciary does not account for receipts from the sale of timber and related products as a business under Section 403, the fiduciary shall allocate the net receipts:

- (1) to income, to the extent the amount of timber cut from the land does not exceed the rate of growth of the timber;
- (2) to principal, to the extent the amount of timber cut from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;
- (3) between income and principal if the net receipts are from the lease of land used for growing and cutting timber or from a contract to cut timber from land, by determining the amount of timber cut from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or
- (4) to principal, to the extent advance payments, bonuses, and other payments are not allocated under paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated under subsection (a), a fiduciary shall deduct and transfer to principal a reasonable amount for depletion.

(c) This section applies to land owned or held by a fiduciary whether or not a settlor was cutting timber from the land before the fiduciary owned or held the property.

(d) If a fiduciary owns or holds an interest in land used for growing and cutting timber before [the effective date of this [act]], the fiduciary may allocate net receipts from the sale of timber and related products as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in land used for growing and cutting timber on or after [the effective date of this [act]], the fiduciary shall allocate net receipts from the sale of timber and related products as provided in this section.

SECTION 413. MARITAL DEDUCTION PROPERTY NOT PRODUCTIVE OF INCOME.

(a) If a trust received property for which a gift or estate tax marital deduction was allowed and the settlor's spouse holds a mandatory income interest in the trust, the spouse may require the trustee, to the extent the trust assets otherwise do not provide the spouse with sufficient income from or use of the trust assets to qualify for the deduction, to:

- (1) make property productive of income;
- (2) convert property to property productive of income within a reasonable time; or
- (3) exercise the power to adjust under Section 203.

(b) The trustee may decide which action or combination of actions in subsection (a) to take.

SECTION 414. DERIVATIVE OR OPTION.

(a) In this section, "derivative" means a contract, instrument, other arrangement, or combination of contracts, instruments, or other arrangements, the value, rights, and obligations of which are, in whole or in part, dependent on or derived from an underlying tangible or intangible asset, group of tangible or intangible assets, index, or occurrence of an event. The term includes stocks, fixed income securities, and financial instruments and arrangements based on indices, commodities, interest rates, weather-related events, and credit-default events.

(b) To the extent a fiduciary does not account for a transaction in derivatives as a business under Section 403, the fiduciary shall allocate 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction to income and the balance to principal.

(c) Subsection (d) applies if:

(1) a fiduciary:

(A) grants an option to buy property from a trust, whether or not the trust owns the property when the option is granted;

(B) grants an option that permits another person to sell property to the trust; or

(C) acquires an option to buy property for the trust or an option to sell an asset owned by the trust; and

(2) the fiduciary or other owner of the asset is required to deliver the asset if the option is exercised.

(d) If this subsection applies, the fiduciary shall allocate 10 percent to income and the balance to principal of the following amounts:

- (1) an amount received for granting the option;
- (2) an amount paid to acquire the option; and
- (3) gain or loss realized on the exercise, exchange, settlement, offset, closing, or expiration of the option.

SECTION 415. ASSET-BACKED SECURITY.

(a) Except as otherwise provided in subsection (b), a fiduciary shall allocate to income a receipt from or related to an asset-backed security, to the extent the payor identifies the payment as being from interest or other current return, and to principal the balance of the receipt.

(b) If a fiduciary receives one or more payments in exchange for part or all of the fiduciary's interest in an asset-backed security, including a liquidation or redemption of the fiduciary's interest in the security, the fiduciary shall allocate to income 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction, and to principal the balance of the receipts and disbursements.

SECTION 416. OTHER FINANCIAL INSTRUMENT OR ARRANGEMENT. A

fiduciary shall allocate receipts from or related to a financial instrument or arrangement not otherwise addressed by this [act]. The allocation must be consistent with Sections 414 and 415.

[ARTICLE] 5
ALLOCATION OF DISBURSEMENTS

SECTION 501. DISBURSEMENT FROM INCOME. Subject to Section 504, and except as otherwise provided in Section 601(c)(2) or (3), a fiduciary shall disburse from income:

(1) one-half of:

(A) the regular compensation of the fiduciary and any person providing investment advisory, custodial, or other services to the fiduciary, to the extent income is sufficient; and

(B) an expense for an accounting, judicial or nonjudicial proceeding, or other matter that involves both income and successive interests, to the extent income is sufficient;

(2) the balance of the disbursements described in paragraph (1), to the extent a fiduciary that is an independent person determines that making those disbursements from income would be in the interests of the beneficiaries;

(3) another ordinary expense incurred in connection with administration, management, or preservation of property and distribution of income, including interest, an ordinary repair, regularly recurring tax assessed against principal, and an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily an income interest, to the extent income is sufficient; and

(4) a premium on insurance covering loss of a principal asset or income from or use of the asset.

SECTION 502. DISBURSEMENT FROM PRINCIPAL.

(a) Subject to Section 505, and except as otherwise provided in Section 601(c)(2), a fiduciary shall disburse from principal:

(1) the balance of the disbursements described in Section 501(1) and (3), after application of Section 501(2);

(2) the fiduciary's compensation calculated on principal as a fee for acceptance, distribution, or termination;

(3) a payment of an expense to prepare for or execute a sale or other disposition of property;

(4) a payment on the principal of a trust debt;

(5) a payment of an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily principal, including a proceeding to construe the terms of the trust or protect property;

(6) a payment of a premium for insurance, including title insurance, not described in Section 501(4), of which the fiduciary is the owner and beneficiary;

(7) a payment of an estate or inheritance tax or other tax imposed because of the death of a decedent, including penalties, apportioned to the trust; and

(8) a payment:

(A) related to environmental matters, including:

(i) reclamation;

(ii) assessing environmental conditions;

(iii) remedying and removing environmental contamination;

(iv) monitoring remedial activities and the release of substances;

(v) preventing future releases of substances;

(vi) collecting amounts from persons liable or potentially liable for the costs of activities described in clauses (i) through (v);

(vii) penalties imposed under environmental laws or regulations;

(viii) other actions to comply with environmental laws or

regulations;

(ix) statutory or common law claims by third parties; and

(x) defending claims based on environmental matters; and

(B) for a premium for insurance for matters described in subparagraph (A).

(b) If a principal asset is encumbered with an obligation that requires income from the asset to be paid directly to a creditor, the fiduciary shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

SECTION 503. TRANSFER FROM INCOME TO PRINCIPAL FOR DEPRECIATION.

(a) In this section, “depreciation” means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a tangible asset having a useful life of more than one year.

(b) A fiduciary may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of the part of real property used or available for use by a beneficiary as a residence;

(2) of tangible personal property held or made available for the personal use or enjoyment of a beneficiary; or

(3) under this section, to the extent the fiduciary accounts:

(A) under Section 410 for the asset; or

(B) under Section 403 for the business or other activity in which the asset is used.

(C) An amount transferred to principal under this section need not be separately held.

SECTION 504. REIMBURSEMENT OF INCOME FROM PRINCIPAL.

(a) If a fiduciary makes or expects to make an income disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from principal to income in one or more accounting periods to reimburse income.

(b) To the extent the fiduciary has not been and does not expect to be reimbursed by a third party, income disbursements to which subsection (a) applies include:

(1) an amount chargeable to principal but paid from income because principal is illiquid;

(2) a disbursement made to prepare property for sale, including improvements and commissions; and

(3) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to an income disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

SECTION 505. REIMBURSEMENT OF PRINCIPAL FROM INCOME.

(a) If a fiduciary makes or expects to make a principal disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or provide a reserve for future principal disbursements.

(b) To the extent a fiduciary has not been and does not expect to be reimbursed by a third party, principal disbursements to which subsection (a) applies include:

(1) an amount chargeable to income but paid from principal because income is not sufficient;

(2) the cost of an improvement to principal, whether a change to an existing asset or the construction of a new asset, including a special assessment;

(3) a disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and commissions;

(4) a periodic payment on an obligation secured by a principal asset, to the extent the amount transferred from income to principal for depreciation is less than the periodic payment; and

(5) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to a principal disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

SECTION 506. INCOME TAXES.

(a) A tax required to be paid by a fiduciary which is based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a fiduciary which is based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) Subject to subsection (d) and Sections 504, 505, and 507, a tax required to be paid by a fiduciary on a share of an entity's taxable income in an accounting period must be paid from:

(1) income and principal proportionately to the allocation between income and principal of receipts from the entity in the period; and

(2) principal to the extent the tax exceeds the receipts from the entity in the period.

(d) After applying subsections (a) through (c), a fiduciary shall adjust income or principal receipts, to the extent the taxes the fiduciary pays are reduced because of a deduction for a payment made to a beneficiary.

SECTION 507. ADJUSTMENT BETWEEN INCOME AND PRINCIPAL BECAUSE OF TAXES.

(a) A fiduciary may make an adjustment between income and principal to offset the shifting of economic interests or tax benefits between current income beneficiaries and successor beneficiaries which arises from:

(1) an election or decision the fiduciary makes regarding a tax matter, other than a decision to claim an income tax deduction to which subsection (b) applies;

(2) an income tax or other tax imposed on the fiduciary or a beneficiary as a result of a transaction involving the fiduciary or a distribution by the fiduciary; or

(3) ownership by the fiduciary of an interest in an entity a part of whose taxable income, whether or not distributed, is includable in the taxable income of the fiduciary or a beneficiary.

(b) If the amount of an estate tax marital or charitable deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes and, as a result, estate taxes paid from principal are increased and income taxes paid by the fiduciary or a beneficiary are decreased, the fiduciary shall charge each beneficiary that benefits from the decrease in income tax to reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax, to the extent the principal used to pay the increase would have qualified for a marital or charitable deduction but for the payment. The share of the reimbursement for each fiduciary or beneficiary whose income taxes are reduced must be the same as its share of the total decrease in income tax.

(c) A fiduciary that charges a beneficiary under subsection (b) may offset the charge by obtaining payment from the beneficiary, withholding an amount from future distributions to the beneficiary, or adopting another method or combination of methods.

[ARTICLE] 6

DEATH OF INDIVIDUAL OR TERMINATION OF INCOME INTEREST

SECTION 601. DETERMINATION AND DISTRIBUTION OF NET INCOME.

(a) This section applies when:

- (1) the death of an individual results in the creation of an estate or trust; or
- (2) an income interest in a trust terminates, whether the trust continues or is

distributed.

(b) A fiduciary of an estate or trust with an income interest that terminates shall determine, under subsection [(g)][(e)] and [Articles] 4, 5, and 7, the amount of net income and net principal receipts received from property specifically given to a beneficiary. The fiduciary shall distribute the net income and net principal receipts to the beneficiary that is to receive the specific property.

(c) A fiduciary shall determine the income and net income of an estate or income interest in a trust which terminates, other than the amount of net income determined under subsection (b), under [Articles] 4, 5, and 7 and by:

(1) including in net income all income from property used or sold to discharge liabilities;

(2) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on estate and inheritance taxes and other taxes imposed because of the decedent's death, but the fiduciary may pay the expenses from income of property passing to a trust for which the fiduciary claims a federal estate tax marital or charitable deduction only to the extent:

(A) the payment of the expenses from income will not cause the reduction or loss of the deduction; or

(B) the fiduciary makes an adjustment under Section 507(b); and

(3) paying from principal other disbursements made or incurred in connection with the settlement of the estate or the winding up of an income interest that terminates, including:

(A) to the extent authorized by the decedent's will, the terms of the trust, or applicable law, debts, funeral expenses, disposition of remains, family allowances, estate and inheritance taxes, and other taxes imposed because of the decedent's death; and

(B) related penalties that are apportioned, by the decedent's will, the terms of the trust, or applicable law, to the estate or income interest that terminates.

[(d) If a decedent's will, the terms of a trust, or applicable law provides for the payment of interest or the equivalent of interest to a beneficiary that receives a pecuniary amount outright, the fiduciary shall make the payment from net income determined under subsection (c) or from principal to the extent net income is insufficient.

(e) **RESERVED.** ~~If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends because of an income beneficiary's death, and no payment of interest or the equivalent of interest is provided for by the terms of the trust or applicable law, the fiduciary shall pay the interest or the equivalent of interest to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.]~~

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~~[(f)]~~[(d)] A fiduciary shall distribute net income[remaining after payments required by subsections (d) and (e)] in the manner described in Section 602 to all other beneficiaries, including a beneficiary that receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

~~[(g)]~~[(e)] A fiduciary may not reduce principal or income receipts from property described in subsection (b) because of a payment described in Section 501 or 502, to the extent the decedent's will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property must be determined by including the amount the fiduciary receives or pays regarding the property, whether the amount accrued or became due before, on, or after the date of the decedent's death or an income interest's terminating event, and making a reasonable provision for an amount the estate or income interest may become obligated to pay after the property is distributed.

SECTION 602. DISTRIBUTION TO SUCCESSOR BENEFICIARY.

(a) Except to the extent [Article] 3 applies for a beneficiary that is a trust, each beneficiary described in Section [601(f)][601(d)] is entitled to receive a share of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to which this section applies, each beneficiary, including a beneficiary that does not receive part of

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the distribution, is entitled, as of each distribution date, to a share of the net income the fiduciary received after the decedent's death, an income interest's other terminating event, or the preceding distribution by the fiduciary.

(b) In determining a beneficiary's share of net income under subsection (a), the following rules apply:

(1) The beneficiary is entitled to receive a share of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date.

(2) The beneficiary's fractional interest under paragraph (1) must be calculated:

(A) on the aggregate value of the assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(B) without regard to:

(i) property specifically given to a beneficiary under the decedent's will or the terms of the trust; and

(ii) property required to pay pecuniary amounts not in trust.

(3) The distribution date under paragraph (1) may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which the assets are distributed.

(c) To the extent a fiduciary does not distribute under this section all the collected but undistributed net income to each beneficiary as of a distribution date, the fiduciary shall maintain records showing the interest of each beneficiary in the net income.

(d) If this section applies to income from an asset, a fiduciary may apply the rules in this section to net gain or loss realized from the disposition of the asset after the decedent's death, an income interest's terminating event, or the preceding distribution by the fiduciary.

[ARTICLE] 7

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

SECTION 701. WHEN RIGHT TO INCOME BEGINS AND ENDS.

(a) An income beneficiary is entitled to net income in accordance with the terms of the trust from the date an income interest begins. The income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to:

- (1) the trust for the current income beneficiary; or
- (2) a successive interest for a successor beneficiary.

(b) An asset becomes subject to a trust under subsection (a)(1):

- (1) for an asset that is transferred to the trust during the settlor's life, on the date the asset is transferred;
- (2) for an asset that becomes subject to the trust because of a decedent's death, on the date of the decedent's death, even if there is an intervening period of administration of the decedent's estate; or
- (3) for an asset that is transferred to a fiduciary by a third party because of a decedent's death, on the date of the decedent's death.

(c) An asset becomes subject to a successive interest under subsection (a)(2) on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to which a fiduciary may or must distribute income.

SECTION 702. APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN DECEDENT DIES OR INCOME INTEREST BEGINS.

(a) A fiduciary shall allocate an income receipt or disbursement, other than a receipt to which Section 601(b) applies, to principal if its due date occurs before the date on which:

- (1) for an estate, the decedent died; or
- (2) for a trust or successive interest, an income interest begins.

(b) If the due date of a periodic income receipt or disbursement occurs on or after the date on which a decedent died or an income interest begins, a fiduciary shall allocate the receipt or disbursement to income.

(c) If an income receipt or disbursement is not periodic or has no due date, a fiduciary shall treat the receipt or disbursement under this section as accruing from day to day. The fiduciary shall allocate to principal the portion of the receipt or disbursement accruing before the date on which a decedent died or an income interest begins, and to income the balance.

(d) A receipt or disbursement is periodic under subsections (b) and (c) if:

(1) the receipt or disbursement must be paid at regular intervals under an obligation to make payments; or

(2) the payor customarily makes payments at regular intervals.

(e) An item of income or obligation is due under this section on the date the payor is required to make a payment. If a payment date is not stated, there is no due date.

(f) Distributions to shareholders or other owners from an entity to which Section 401 applies are due:

(1) on the date fixed by or on behalf of the entity for determining the persons entitled to receive the distribution;

(2) if no date is fixed, on the date of the decision by or on behalf of the entity to make the distribution; or

(3) if no date is fixed and the fiduciary does not know the date of the decision by or on behalf of the entity to make the distribution, on the date the fiduciary learns of the decision.

SECTION 703. APPORTIONMENT WHEN INCOME INTEREST ENDS.

(a) In this section, “undistributed income” means net income received on or before the date on which an income interest ends. The term does not include an item of income or expense which is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) Except as otherwise provided in subsection (c), when a mandatory income interest of a beneficiary ends, the fiduciary shall pay the beneficiary’s share of the undistributed income that is not disposed of under the terms of the trust to the beneficiary or, if the beneficiary does not survive the date the interest ends, to the beneficiary’s estate.

(c) If a beneficiary has an unqualified power to withdraw more than five percent of the value of a trust immediately before an income interest ends:

(1) the fiduciary shall allocate to principal the undistributed income from the portion of the trust which may be withdrawn; and

(2) subsection (b) applies only to the balance of the undistributed income.

(d) When a fiduciary's obligation to pay a fixed annuity or a fixed fraction of the value of assets ends, the fiduciary shall prorate the final payment as required to preserve an income tax, gift tax, estate tax, or other tax benefit.

[ARTICLE] 8
MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT . This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 803. APPLICATION TO TRUST OR ESTATE. ~~This [act] applies to a trust or estate existing or created on or after [the effective date of this [act]], except as otherwise expressly provided in the terms of the trust or this [act].~~

EXCEPT AS PROVIDED IN THE TERMS OF THE TRUST AND THIS SECTION 803, THIS ACT SHALL TAKE EFFECT ON THE EFFECTIVE DATE.

(1) THIS [ACT] SHALL NOT APPLY TO A TRUST ESTABLISHED UNDER A WILL OR TRUST AGREEMENT EXISTING AND IRREVOCABLE ON JULY 1, 2001, IF A TRUSTEE OF THE TRUST HAS ELECTED TO APPLY THE "UNIFORM PRINCIPAL AND INCOME ACT" OF THIS STATE IN EFFECT ON JUNE 30, 2001.

(2) THIS [ACT] SHALL NOT APPLY TO A TRUST EXISTING ON JULY 1, 2001, IN WHICH NO TRUSTEE HAD THE AUTHORITY TO ACT UNDER SECTION 15-1-404 OF THE UNIFORM PRINCIPAL AND INCOME ACT EFFECTIVE JULY 1, 2001, UNLESS A TRUSTEE OF THE TRUST ELECTED TO APPLY THE UNIFORM PRINCIPAL AND INCOME ACT AS IT EXISTED AFTER JULY 1, 2001, AS AMENDED.

(3) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (1) OF THIS SECTION, THIS [ACT] SUBPARTS 1 THROUGH 6 OF THIS PART 4 SHALL NOT APPLY TO ANY TRUST OR DECEDENT'S ESTATE EXISTING ON THE EFFECTIVE DATE, IN WHICH NO FIDUCIARY HAS THE AUTHORITY TO ACT UNDER SECTION 203 SECTION 15-1-404 UNLESS A FIDUCIARY ELECTS TO APPLY SUBPARTS 1 THROUGH 7 OF THIS PART 4. THE LAW IN EFFECT IN COLORADO AS OF JUNE 30,

Commented [GK18]: Revised to accommodate trusts still being administered under the 1955 UPIA Act.

2001 WILL APPLY TO THIS THE TRUST OR ESTATE UNLESS A FIDUCIARY MAKES SUCH ELECTION. THE FIDUCIARY MAY MAKE THIS ELECTION AT ANY TIME.

(4) ONCE AN ELECTION IS MADE PURSUANT TO THIS SECTION, THE ELECTION SHALL BE IRREVOCABLE. THE FIDUCIARY SHALL GIVE NOTICE OF SUCH AN ELECTION TO THE BENEFICIARIES OF THE TRUST IN ACCORDANCE WITH SECTION 204. IF SUCH NOTICE COMPLIES WITH SECTION 204, THE PROVISIONS OF SAID SECTION SHALL APPLY TO SUCH ELECTION.

[SECTION 804. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

SECTION 805. REPEALS; CONFORMING AMENDMENTS.

(A) THIS [ACT] REPEALS §§ 15-1-401 THROUGH 15-1-467, C.R.S.

~~(b)....~~

~~(e)....~~

SECTION 806. EFFECTIVE DATE. This [act] takes effect JULY 1, 2021.

Commented [GK19]: Repeals existing UPIA.

Commented [GK20]: Effective date.

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
1. General Provisions	101. Short Title	5/17/18	5/17/18			<p>The ULC promulgated the <i>Principal and Income Act</i> in 1931 [<i>1931 UPIA</i>.] Colorado enacted the <i>1931 UPIA</i> in 1955 [<i>1955 Act</i>.]</p> <p>The ULC promulgated a revised <i>Uniform and Principal Income Act</i> in 1962. Colorado did not adopt the <i>1962 UPIA</i>.</p> <p>The ULC revised and reorganized (into six parts) the 1931 and 1962 <i>Acts</i> in 1997 [<i>1997 UPIA</i>.] Colorado enacted the <i>1997 UPIA</i> in 2000 [<i>2000 Act</i>.] At the same time, Colorado repealed the <i>1955 Act (The 1931 UPIA)</i>.</p> <p>In 2009, Colorado reenacted the <i>1955 Act</i> as Part 7 of the <i>2000 Act</i>.</p>
	102. Definitions	UPIA = Uniform Principal & Income Act; CPC = CO Probate Code; CUTDA = CO Uniform Trust Decanting Act; CUTC = CO Uniform Trust Code; RUFADAA = Revised Uniform Fiduciary Access to Digital Assets Act; UDPIA = Uniform Disclaimer of Property Interests Act; UPOAA = Uniform Powers of Appointment Act				
	1. Accounting Period	5/17/18	5/17/18		§ 15-1-402(1)	UPIA
	2. Asset-backed Securities	10/18/18: Wait to Discuss and to Vote 3/4/20: Approved			§ 15-1-425(1)	UPIA
	3. Beneficiary	5/17/18: Wait to Vote. Committee favors retaining “legatee” because other states may use the term. UFIPA applies to more than Wills and Trusts (life estates). 4/1/20: Approved 8/5/20: 102(3)(B) changed to “for an estate, an heir, legatee, and devisee.” 102(3)(C) changed to “Reserved”			§ 15-1-402(2) § 15-10-201(5) § 15-16-902(4) § 15-5-103(4)	UPIA, CPC, CUTDA, CUTC
	4. Court	5/17/18: Wait to Vote. We need a definition of “court” in UFIPA because UFIPA will not be in the CPC. 3/4/20: Approved 8/5/20: changed to ““Court” means the court in this state having jurisdiction relating to a trust, OR estate.”			§ 15-10-201(10) § 15-16-902(8) § 15-1-502(7)	CPC, CUTDA, RUFADAA
	5. Current Income Beneficiary	5/17/18: Wait to Vote. CO’s definition in CUTC was drawn from UPIA. 4/1/20: Approved			§ 15-1-402 § 15-16-902(9)	UPIA, CUTDA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	6. Distribution	5/17/18: Wait to Vote. "Distribution" is not defined in the UTC, and its definition in the CPC refers to testamentary trusts. 4/1/20: Approved			§ 15-10-201(15)	CPC
	7. Estate	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-10-201(17)	CPC
	8. Fiduciary	5/17/18: Wait to Vote. Discussion re: whether a life tenant is traditionally a fiduciary? <ul style="list-style-type: none"> Possibly, because intent of UFIPA is broad application to be able to allocate between income and principal. Perhaps cabin the definition of "fiduciary" to UFIPA? Appears to be consistent with C.R.S. 15-10-501 judicial toolbox to determine standing for fiduciary oversight. Possible definitions too in C.R.S. 15-10-601, C.R.S. 15-1-103(2). Possible relationship with UFIPA Section 102, para. 2, (D). 4/1/20: Approved 8/14/20: Approved without life tenant, holder of term interest			§ 15-1-103(2) § 15-10-201(19) § 15-1-402(3) § 15-10-501(3) § 15-10-601(2) § 15-16-902(3) § 15-1-1502(14) § 15-11-1202(4)	CPC, UPIA, CUTDA, RUFADAA, UDPIA
	9. Income	5/17/18: Wait to Vote. "Current return" includes proceeds from sale of something; may include mineral rights. 4/1/20: Approved			§ 15-1-402(4) § 15-1-453(1)(b)	UPIA & UPIA of 1955
	10. Income Interest	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-1-402	UPIA
	11. Independent Person	5/17/18: Wait to Vote. No issues with (A) or (B). Need to see what independent person can do under other UFIPA sections. 4/1/20: Approved			--	This section seems to track IRC §672 (c) and Treas. Regs.
	12. Mandatory Income Interest	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-1-402(7)	UPIA
	13. Net Income	5/17/18: Wait to vote until after Articles 2 and 3. There appears to be no adjustment from income to principal. 4/1/20: Approved			§ 15-1-402(8) § 15-1-453(1)(c)	UPIA & UPIA of 1955
	14. Person	5/17/18 8/16/18	8/16/18		§ 15-10-201(38) § 15-1-402(9) § 15-2.5-102(9) § 15-16-902(16) § 15-1-1502(17) § 15-5-103(13)	CPC, UPIA, UPOAA, CUTDA, RUFADAA, CUTC

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	15. Personal Representative	8/16/18	8/16/18		§ 15-10-201 § 15-1-1502	CPC, RUFADAA
	16. Principal	8/16/18	8/16/18		§ 15-1-402(10)	UPIA
	17. Record	8/16/18	8/16/18		§ 15-10-201(44.5) § 15-2.5-102(16) § 15-16-902(22) § 15-1-1502(22)	CPC, UPOAA, CUTDA, RUFADAA
	18. Settlor	8/16/18: Wait to vote, but reserving approval. Wait to see how “part” is used in UFIPA, and revisit use of “portion.” 4/1/20: Approved			§ 15-16-501(1) § 15-16-902(25) § 15-1-103(18)	Insurable Interest of Trustee, CUTDA, CUTC
	19. Special Tax Benefit	10/18/18: Wait to discuss and vote. 4/1/20: Approved			§ 15-16-919(1)	CUTDA
	20. Successive Interest	10/18/18	10/18/18		§ 15-1-408(3)	UPIA
	21. Successor Beneficiary	8/16/18: Wait to vote, but reserving approval because UFIPA uses the word “entitled” rather than the term “eligible.” The issue is whether “eligible” would be a better word. 4/1/20: Approved			§ 15-1-402(11) § 15-1-453(1)(e)	UPIA & UPIA of 1955
	22. Terms of Trust	9/20/18	9/20/18 & 10/18/18 8/5/20	102(22)(B)(iii) adds “ section 15-5-111 CRS; ” 102(22)(B)(iv) adds “ by alternative dispute resolution under section 15-5-113; ” 102(22)(C) changed to “for an estate, or a will.” 102(22)(D) “Reserved”	§ 15-1-402(12) § 15-2.5-102(19) § 15-16-902(28) § 15-5-103(21)	UPIA, UPOAA, CUTDA, CUTC
	23. Trust	9/20/18	9/20/18		§ 15-10-201(56)	CPC
	24. Trustee	9/20/18	9/20/18		§ 15-10-201(57) § 15-1-402(13) § 15-1-453(1)(g) § 15-16-902(3) § 15-1-1502(25) § 15-5-103(23)	CPC, UPIA, UPIA of 1955, RUFADAA, CUTC
	25. Will	9/20/18	9/20/18		§ 15-10-201(59) § 15-1-1502(27)	CPC, RUFADAA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	103. Scope	9/20/18	9/20/18 & 10/18/18 8/5/20	Except as otherwise provided in the terms of a trust, A WILL or this [act], this [act] applies to: (1) a trust or estate; and (2) RESERVED.	§ 15-1-434 § 15-1-454 § 15-1-455 § 15-16-903	1997 UPIA
	104. Governing law	9/20/18	9/20/18 & 8/5/20	Except as otherwise provided in the terms of a trust or this [act], this [act] applies when this state is the principal place of administration of a trust or estate. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits to the application of this [act] to any matter within the scope of this [act] involving the trust.	§ 15-16-905	CUTDA, Tentative Directed Trust Act
2. Fiduciary Duties and Judicial Review	201. Fiduciary Duties; General Principles	9/20/18 10/18/18	10/18/18		§ 15-1-403 § 15-1-402(12) § 15-5-105(2)(b) § 15-5-801 § 15-5-103(21)	See Santa Fe for Colorado Subcommittee Comments
	202. Judicial Review of Exercise of Discretionary Power[; Request for Instruction]	10/18/18 11/15/18	11/15/18: to add to 202(c) 12/20/18: Final	202(c) adds “including Uniform Trust Code Section 1001 and Part 5 of Article 10 of Title 15, C.R.S. ”	§ 15-1-403 § 15-1-404(7) § 15-1-404.5(7) § 15-5-201 § 15-5-814 § 15-5-1001	No counterpart of “fiduciary decision” in the current UPIA.
	203. Fiduciary’s Power to Adjust	11/15/18 12/20/18 2/6/19 4/3/19	2/6/19: 203(k)(1) & (2)	203(i) UFIPA wording 203(k)(1) changes “UTC Section 813(c)” to “ CUTC 813(1) ” 203(k)(2) changed to: “Communicated at least annually	§ 15-1-404	UPIA; See Santa Fe and minutes for discussion of “forbid,” “prohibit,” and

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
			4/3/19 & 5/1/19: 203(i)	to the qualified beneficiaries determined under CUTC Section 103(16), including the Attorney General when applicable. ”		return to UFIPA wording for 203(i)
New	204. Notice of Action	5/6/20 8/5/20	8/14/20	See discussion of 602 & below	§ 15-1-405	
3. Unitrust	301. Definitions	2/6/19 3/6/19	3/6/19		§ 15-1-404.5(10) § 15-1-404.5(4.5) § 15-1-402(10.5)	
	302. Application; Duties and Remedies	3/6/19 4/3/19		3/6/19: Passed, subject to issue of consistency between 203(i) & 302(d) 4/3/19: Approved with consistency of 302(d) with CUTC language & 203(i)	§ 15-1-404.5(1) § 15-1-404.5(13)(b) § 15-1-404.5(9) § 15-1-404.5(14) § 15-1-404.5(3)(d)(ii) § 15-1-404.5(11) § 15-1-404.5(12)	
	303. Authority of Fiduciary	3/6/19 4/3/19	4/3/19		§ 15-1-404.5(1) § 15-1-404.5(2) § 15-1-404.5(3) § 15-1-404.5(5) § 15-1-404.5(10) § 15-1-404.5(6)	
	304. Notice	4/3/19 5/1/19 11/6/19	4/3/19	See p. 9 below for Section 304 as approved without brackets for optional text.	§ 15-1-404.5(1)	
	305. Unitrust Policy	4/3/19	Read 305 – 309 together.		§ 15-1-404.5(5)	
	306. Unitrust Rate	4/3/19 5/1/19			§ 15-1-404.5(2) § 15-1-404.5(4)	
	307. Applicable Value	4/3/19 5/1/19	5/1/19:		§ 15-1-404.5(5)	
	308. Period	4/3/19 5/1/19	Approved Article 3 subject to ordering rule		§ 15-1-404.5(4.5)(b) § 15-1-404.5(5)	
	309. Special Tax Benefits; Other Rules	4/3/19 5/1/19 8/7/19		309 adds new (c):	§ 15.1.404.5(g)(iii)(B) § 15-1-404.5(5)	

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
			11/6/19: Approved 309 with ordering rule in 309(c)	<p><u>“(c) Unless otherwise provided by the terms of unitrust policy or the terms of the trust, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:</u></p> <p><u>(1) Net income determined as if the trust was not a unitrust;</u></p> <p><u>(2) Other ordinary income as determined for federal income tax purposes;</u></p> <p><u>(3) Net realized short-term capital gains as determined for federal income tax purposes;</u></p> <p><u>(4) Net realized long-term capital gains as determined for federal income tax purposes;</u></p> <p><u>(5) Trust principal comprising assets for which there is a readily available market value; and</u></p> <p><u>(6) Other trust principal.”</u></p>		
4. Allocation of Receipts: Part 1. Receipts from Entity	401. Character of Receipts from Entity	2/6/19 5/1/19	5/1/19		§ 15-1-411 § 15-1-456(2) § 15-1-458(3) & (6)	UPIA & UPIA of 1955 lack some UFIPA definitions
	402. Distribution from Trust or Estate	8/7/19	8/7/19		§ 15-1-412 § 15-1-467(4) § 15-1-453	UPIA & UPIA of 1955
	403. Business or Other Activity Conducted by Fiduciary	8/7/19	8/7/19		§ 15-1-413(2) § 15-1-460	UPIA & UPIA of 1955

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
4. Allocation of Receipts: Part 2. Receipts Not Normally Apportioned	404. Principal Receipts	8/7/19	8/7/19		§ 15-1-414 § 15-1-456 § 15-1-457	UPIA & UPIA of 1955
	405. Rental Property	8/7/19	8/7/19		§ 15-1-415 § 15-1-456	UPIA & UPIA of 1955
	406. Receipt on Obligation to be Paid in Money	8/7/19	8/7/19		§ 15-1-416 § 15-1-456	UPIA & UPIA of 1955
	407. Insurance Policy or Contract	8/7/19	8/7/19		§ 15-1-417 § 15-1-456	UPIA & UPIA of 1955
4. Allocation of Receipts: Part 3. Receipts Normally Apportioned	408. Insubstantial Allocation Not Required	9/4/19	9/4/19		§ 15-1-418	UPIA
	409. Deferred Compensation, Annuity, or Similar Payment	9/4/19	9/4/19	use “ 26 U.S.C. Section 7520 as amended ” throughout, and 409(b)(2) set at 4 percent	§ 15-1-419	UPIA
	410. Liquidating Asset	9/4/19	9/4/19		§ 15-1-420	UPIA
	411. Minerals, Water, and Other Natural Resources	10/2/19 11/6/19	10/2/19: Tentative approval 11/6/19: Final approval		§ 15-1-420 § 15-1-421.5	UPIA
	412. Timber	9/4/19	9/4/19		§ 15-1-422	UPIA
	413. Marital Deduction Property Not Productive of Income	10/2/19	10/2/19		§ 15-1-423	UPIA
	414. Derivative or Option	11/6/19	11/6/19		§ 15-1-424	UPIA
	415. Asset-backed Security	11/6/19	11/6/19		§ 15-1-425	UPIA
	416. Other Financial Instrument or Arrangement	11/6/19	11/6/19		--	
5. Allocation of Disbursements	501. Disbursement from Income	11/6/19	11/6/19		§ 15-1-426	UPIA
	502. Disbursement from Principal	12/4/19	12/4/19		§ 15-1-427	UPIA
	503. Transfer from Income to Principal for Depreciation	12/4/19	12/4/19		§ 15-1-428	UPIA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	504. Reimbursement of Income from Principal	12/4/19	12/4/19		--	
	505. Reimbursement of Principal from Income	12/4/19	12/4/19		§ 15-1-429	UPIA
	506. Income Taxes	12/4/19	12/4/19	506(c)(1): Latest UFIPA wording of 1/25/19 approved	§ 15-1-430	UPIA
	507. Adjustment Between Income and Principal Because of Taxes	12/4/19	12/4/19	507(a)(2): Latest UFIPA wording of 1/25/19 approved	§ 15-1-431	UPIA
6. Death of Individual or Termination of Income Interest	601. Determination and Distribution of Net Income	12/4/19 2/5/20 3/4/20 4/1/20 5/6/20	5/6/20	601(e) changed to "Reserved"	§ 15-12-904 § 15-1-406	CPC, UPIA
	602. Distribution to Successor Beneficiary	2/5/20 3/4/20 4/1/20 5/6/20	5/6/20	Add 204 Notice of Fiduciary Action	§ 15-1-407	UPIA
7. Apportionment at Beginning and End of Income Interest	701. When right to Income Begins and Ends	3/4/20	3/4/20			
	702. Apportionment of Receipts and Disbursement When Decedent Dies or Income Interest Begins	3/4/20	3/4/20			
	703. Apportionment When Income Interest Ends	3/4/20	3/4/20			
8. Miscellaneous Provisions	801. Uniformity of Application and Construction	2/5/20	2/5/20		§ 15-1-432 § 15-5-1401	UPIA, CUTC
	802. Relation to Electronic Signatures in Global and National Commerce Act	2/5/20	2/5/20		§ 15-5-1402 § 15-2.5-602	UPIA, CUTC, UPOAA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	803. Application to Trust or Estate	2/5/20 4/1/20 5/6/20	8/14/20	See below	§ 15-1-435 § 15-1-436 § 15-5-1404	UPIA, CUTC
	[804. Severability]	2/5/20			§ 15-1-433 § 15-5-1403	UPIA, CUTC
	805. Repeals; Conforming Amendments	2/5/20 4/1/20	8/14/20	(a) This [act] repeals §§ 15-1-401 through 15-1-467, C.R.S.	--	
	806. Effective Date	2/5/20 4/1/20	8/14/20	This [act] takes effect July 1, 2021.	§ 15-1-434	UPIA

New 204 – NOTICE OF ACTION

(1) IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

(A) “QUALIFIED BENEFICIARY” HAS THE MEANING SET FORTH IN SUBSECTION 15-5-103(16).

(B) “OBJECTION PERIOD” HAS THE MEANING SET FORTH IN SECTION 304(D)(5).

(2) A FIDUCIARY MAY GIVE A NOTICE OF PROPOSED ACTION REGARDING A MATTER GOVERNED BY SUBPARTS 1 THROUGH 8 OF THIS PART [4] AS PROVIDED IN THIS SECTION. FOR THE PURPOSE OF THIS SECTION, A PROPOSED ACTION INCLUDES A COURSE OF ACTION AND A DECISION NOT TO TAKE ACTION.

(3) THE FIDUCIARY SHALL MAIL NOTICE OF THE PROPOSED ACTION TO ALL QUALIFIED BENEFICIARIES AND THE FIDUCIARY MAY GIVE NOTICE TO OTHER BENEFICIARIES. A BENEFICIARY SHALL BE BOUND UNDER THIS SECTION WITH RESPECT TO SUCH PROPOSED ACTION IF THE BENEFICIARY RECEIVES ACTUAL NOTICE OR IF THE BENEFICIARY WOULD BE BOUND UNDER THE PROVISIONS OF TITLE 15, ARTICLE 5, PART 3.

(4) NOTICE OF PROPOSED ACTION NEED NOT BE GIVEN TO ANY BENEFICIARY WHO CONSENTS IN WRITING TO THE PROPOSED ACTION. THE CONSENT MAY BE EXECUTED AT ANY TIME BEFORE OR AFTER THE PROPOSED ACTION IS TAKEN.

(5) THE NOTICE OF PROPOSED ACTION SHALL STATE THAT IT IS GIVEN PURSUANT TO THIS SECTION AND SHALL FOLLOW THE PROCEDURES SET OUT IN SECTION 304 REGARDING NOTICE.

(6) A BENEFICIARY MAY OBJECT TO THE PROPOSED ACTION BY MAILING A WRITTEN OBJECTION TO THE FIDUCIARY AT THE ADDRESS STATED IN THE NOTICE OF PROPOSED ACTION WITHIN THE OBJECTION PERIOD.

(7) A FIDUCIARY IS NOT LIABLE TO A BENEFICIARY TO WHOM NOTICE IS GIVEN FOR AN ACTION REGARDING A MATTER GOVERNED BY THIS PART IF THE FIDUCIARY DOES NOT RECEIVE A WRITTEN OBJECTION TO THE PROPOSED ACTION FROM THE BENEFICIARY WITHIN THE OBJECTION PERIOD AND THE OTHER REQUIREMENTS OF THIS SECTION ARE SATISFIED. IF NO BENEFICIARY WHO RECEIVES NOTICE OBJECTS UNDER THIS SECTION, THE FIDUCIARY IS NOT LIABLE TO THE BENEFICIARIES RECEIVING NOTICE WITH RESPECT TO THE PROPOSED ACTION.

(8) IF THE FIDUCIARY RECEIVES A WRITTEN OBJECTION WITHIN THE OBJECTION PERIOD, EITHER THE FIDUCIARY OR A BENEFICIARY MAY PETITION THE COURT TO HAVE THE PROPOSED ACTION PERFORMED AS PROPOSED, PERFORMED WITH MODIFICATIONS, OR DENIED. IN THE PROCEEDING, A BENEFICIARY OBJECTING TO THE PROPOSED ACTION HAS THE BURDEN OF PROVING THAT THE FIDUCIARY'S PROPOSED ACTION SHOULD NOT BE PERFORMED. A BENEFICIARY WHO HAS NOT OBJECTED IS NOT ESTOPPED FROM OPPOSING THE PROPOSED ACTION IN THE PROCEEDING. IF THE FIDUCIARY DECIDES NOT TO IMPLEMENT THE PROPOSED ACTION, THE FIDUCIARY SHALL NOTIFY THE BENEFICIARIES OF THE DECISION NOT TO TAKE THE ACTION AND THE REASONS FOR THE DECISION, AND THE FIDUCIARY'S DECISION NOT TO IMPLEMENT THE PROPOSED ACTION DOES NOT ITSELF GIVE RISE TO LIABILITY TO ANY BENEFICIARY. A BENEFICIARY MAY PETITION THE COURT TO HAVE THE ACTION PERFORMED, AND HAS THE BURDEN OF PROVING THAT IT SHOULD BE PERFORMED.

SECTION 304. NOTICE.

(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under CRS 15-5-1-109 to:

- (1) the qualified beneficiaries determined under CRS 15-5-103(16) other than the Attorney General; and
- (2) each person acting as trust director of the trust under the Colorado Uniform Directed Trust Act; and
- (3) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the

extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2).

(b) The representation provisions of 15-5-301 through 15-5-305 apply to notice under this section.

(c) A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.

(d) A notice required by Section 303(b)(2) must include:

- (1) the action proposed under Section 303(b)(2);
- (2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);
- (3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or

replacement of the unitrust policy adopted under Section 303(a)(2);

(4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;

(5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;

(6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;

(7) the name and contact information of the fiduciary; and

(8) the name and contact information of a person that may be contacted for additional information.

Legislative Note:

A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (a)(2)(B)(iii). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.

803, Application to Trust or Estate

EXCEPT AS PROVIDED IN THE TERMS OF THE TRUST AND THIS SECTION 803, THIS ACT SHALL TAKE EFFECT ON THE EFFECTIVE DATE.

(1) THIS [ACT] SHALL NOT APPLY TO A TRUST ESTABLISHED UNDER A WILL OR TRUST AGREEMENT EXISTING AND IRREVOCABLE ON JULY 1, 2001, IF A TRUSTEE OF THE TRUST HAS ELECTED TO APPLY THE "UNIFORM PRINCIPAL AND INCOME ACT" OF THIS STATE IN EFFECT ON JUNE 30, 2001.

(2) THIS [ACT] SHALL NOT APPLY TO A TRUST EXISTING ON JULY 1, 2001, IN WHICH NO TRUSTEE HAD THE AUTHORITY TO ACT UNDER SECTION 15-1-404 OF THE UNIFORM PRINCIPAL AND INCOME ACT EFFECTIVE JULY 1, 2001, UNLESS A TRUSTEE OF THE TRUST ELECTED TO APPLY THE UNIFORM PRINCIPAL AND INCOME ACT AS IT EXISTED AFTER JULY 1, 2001, AS AMENDED.

(3) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (1) OF THIS SECTION, THIS [ACT] SUBPARTS 1 THROUGH 6 OF THIS PART 4 SHALL NOT APPLY TO ANY TRUST OR DECEDENT'S ESTATE EXISTING ON THE EFFECTIVE DATE, IN WHICH NO FIDUCIARY HAS THE AUTHORITY TO ACT UNDER SECTION 203 SECTION 15-1-404 UNLESS A FIDUCIARY ELECTS TO APPLY SUBPARTS 1 THROUGH 7 OF THIS PART 4. THE LAW IN EFFECT IN COLORADO AS OF JUNE 30, 2001 WILL APPLY TO THIS THE TRUST OR ESTATE UNLESS A FIDUCIARY MAKES SUCH ELECTION. THE FIDUCIARY MAY MAKE THIS ELECTION AT ANY TIME.

(4) ONCE AN ELECTION IS MADE PURSUANT TO THIS SECTION, THE ELECTION SHALL BE IRREVOCABLE. THE FIDUCIARY SHALL GIVE NOTICE OF SUCH AN ELECTION TO THE BENEFICIARIES OF THE TRUST IN ACCORDANCE WITH SECTION 204. IF SUCH NOTICE COMPLIES WITH SECTION 204, THE PROVISIONS OF SAID SECTION SHALL APPLY TO SUCH ELECTION.

from a current or prior partner. If a decedent does not have children or a surviving spouse, generally his probate assets would be inherited first by his parents, if living, and then siblings and other relatives. If you want your assets to be inherited differently than stated in Colorado's intestacy laws, your estate planning documents can designate different wishes.

Can I change my will?

A will can be amended or revoked by a testator. An amendment to a will is called a codicil. In order to revoke your will or create a codicil, a testator must meet the same requirements as if he were creating a will. Specifically, a codicil must be in writing and signed by the testator. In order to revoke his will or create a codicil, a testator must understand the significance of his action and must not be unduly influenced or forced to do so by another person.

If you wish to make changes to your current will, do not write directly on your will. Writing in new clauses or scratching out parts of your will creates confusion about what you intended and may result in increased court involvement or fighting between your family members. It is clearer for your devisees and the court if you sign a codicil or an entirely new will in order to change your wishes.

When should I update my will?

Review your will and other estate planning documents every few years in case changes in your life, in the lives of your devisees or nominated personal representatives, or in the law necessitate changes to your current documents.

Colorado does recognize wills signed in other states. However if you recently moved to Colorado, you should consider speaking with a Colorado attorney to make sure the language of your will is supported by the laws of Colorado.

This brochure is published as a public service by the Colorado Bar Association and was authored and is reviewed and updated as needed by the Civic and Community Affairs Committee, a Subcommittee of the Trusts and Estates Section. Its purpose is to provide general information about the topic contained herein, which is a common legal issue that may come up in estate planning, probate, and/or elder law cases. The information in this brochure is current as of March 2020. You should ensure that there have not been any changes in the law that may affect your matter, which may require consulting with an attorney.

Wills in Colorado

Last Will and

Smithson, an adult residing at 123/456 North
and mind, declare this to be my Last Will
justly made by me.

I appoint Johnson Smithson as my Personal
and he be permitted to serve without Court
Smithson is unwilling or unable to serve,
representative, that he/she be per
posting bond.

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Est. in 1897
Colorado Bar Association

A will is a document often created in an estate plan. It can be titled as “Last Will and Testament of John Doe” or “Will of John Doe.” A will is made and signed by a testator (male) or testatrix (female) and provides instruction for what the testator wants to happen after his or her death.

Who can make a will?

A testator must be 18 years or older and of sound mind. A testator must generally know:

- what his assets are,
- who his family members are,
- how his will affects who will inherit from him, and
- his will must represent his wishes.

In addition, a testator must sign a will voluntarily and not be under any constraint or undue influence by another person.

What does a will do?

A will can accomplish multiple purposes:

- The most common purpose of a will is to designate who will inherit the testator’s assets after death. A person who is designated to receive an inheritance (“devise”) from a testator in a will is called a devisee.
- A testator can also nominate someone in his will to serve as his personal representative. A personal representative in Colorado is known as an executor in other states. A personal representative is the individual or entity who administers the estate of the person who died (“decedent”) after his death, pays debts of the decedent, and completes the decedent’s wishes for distribution of his assets to his devisees or heirs.
- A will can nominate someone to be a guardian for the testator’s minor or disabled child.
- Drafting a will includes consideration of applicable taxes after your death. You should consult with an attorney or tax professional if you have questions about taxes.

How is a will created?

A will must be in writing and signed by the testator. If the testator is physically unable to sign his will, another person can sign the will on behalf of the testator, with the testator’s permission. Colorado law requires that if another person is signing for the testator, the person can only do so if the testator gives that person permission and the person signs the document in the physical and conscious presence of the testator.

An attorney often creates a typed will for a client, with two witnesses and/or a notary public to witness the testator’s signature. Colorado does recognize holographic wills, which are wills written and signed in the testator’s own handwriting. Holographic wills are not required to have the signature of witnesses or a notary public. However, you should be careful about creating your own will. Wills that are created without the advice of an attorney are frequently found to be confusing or insufficient, which may cause delay, expense or litigation. As explained below, not all assets can be controlled by a will. [It is important to understand how your assets are titled and what your estate planning options are before you create a will on your own.](#)

Does a will dispose of all of my assets?

Some assets are not governed or distributed by the terms of a will. These assets are often called non-probate assets. An asset that has a beneficiary designation, payable-on-death (POD) designation, or transfer-on-death (TOD) designation is a contract with that financial institution and is not controlled by the terms of your will. In addition, if you own an asset with another person as a joint tenant or joint owner, that asset will pass to the other joint owner(s) after your death and is not controlled by your will.

If your assets do not have these designations, are owned as tenants-in-common, or are owned by you alone, they generally are considered probate assets and would be distributed under the terms of a will.

To better understand which of your assets would be governed by the terms of your will, seek the advice of an attorney, reference the Colorado Senior Law Handbook, or reference the following brochures: Joint Tenancy, Probate in Colorado, and Estate Planning.

What is a personal property memorandum?

A personal property memorandum is a document that can direct who you want to inherit specific personal property items, such as household goods and jewelry. You cannot give away money through a personal property memorandum. If you create a personal property memorandum yourself, you should sign and date the document and make sure it can be found with your will. You can change your memorandum at any time, and it is easier for your heirs to understand your wishes if you create a whole new document instead of marking on the original version.

Do I have to include all my family in my will?

You may give your assets to whomever you wish. However, Colorado law provides protections for surviving spouses who are left out of a will, and children who were born after the will was executed when no provisions were made for them. If you have questions about your estate planning options, you should consider speaking with an attorney.

What if I don’t have a will?

A person who does not have a will is termed to have died intestate. Colorado has laws that designate how a decedent’s probate assets would pass upon his death if he dies intestate. Colorado’s intestacy laws assume that a decedent would want his probate assets to pass first to his spouse and children. If a decedent has a blended family, Colorado’s intestacy laws contain very specific terms to provide amounts to the surviving spouse or the decedent’s children

Wills in Colorado

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