

**Colorado Bar Association Trusts & Estates Section
Uniform Fiduciary Income & Principal Act Subcommittee
of the Statutory Revisions Committee**

Minutes of April 3, 2019

Participants

In person:	By phone:
• Aaron Azari	• Peggy Gardner
• Susan Boothby	
• Darla Daniel	
• Russ Gamble	
• Mimi Goodman	
• Jonathan Haskill	
• Stan Kent	
• Georgine Kryda, Chair	
• Herb Tucker	
• Lisa Willcox	
• Molly Zwerdinger	

Initial Assignments

UFIPA Article	Lead Reviewer(s)
1 General Provisions	Stan K.
2 Fiduciary Duties and Judicial Review	Herb T. & Darla D.
3 Unitrust	Susan B.
4 Allocation of Receipts During Administration	Russ G. & Peggy G. & Walt. K.
5 Allocation of Disbursement During Administration	Jonathan H.
6 Death of Decedent	Georgine K. & Steve B.
7 Apportionment at Beginning and End of Income Interest	Klaralee C.
8 Miscellaneous Provisions	Unassigned

The meeting was held at the CBA Offices, 1290 Broadway, Suite 1700 in Denver. The meeting was called to order at 10:30 a.m. by the Chair and adjourned at noon. Minutes of March 6, 2019 were approved with correction of April 6, 2019 to April 3, 2019.

Section 203(i) - Herb

Herb presented the background of the issue: This committee originally voted to change 203(i) regarding the power to adjust as a result of Herb looking at §104(f) of the 1996 act and the comment regarding a prohibition of a power to adjust. Our (Colorado) change was to remove “expressly prohibits” and to add “explicitly forbids.” This committee encountered the same issue in UFIPA §302(a)(1).

The committee’s consensus is that it prefers Herb’s language (“forbids”), but recognizes three concerns:

- We would need to change the CO version of UFIPA throughout, and

- We prefer consistency with the UTC language – and with the case law that will develop based on interpretation of the UTC language.
- Only source of “forbid” is in the 1981 law review article included in Herb’s materials.

UNANIMOUS VOTE TO RETURN TO UTC LANGUAGE.

Herb to present final 203(i) for vote in May. Lisa noted that 203(i) has had subsequent changes.

Section 302 – Susan

UNANIMOUS VOTE TO APPROVE CONSISTENCY OF 302(D) WITH UTC LANGUAGE AND 203(i).

Section 303 – Susan

UNANIMOUS VOTE TO APPROVE 303.

Section 304, Notice – Susan

- This section gets us into the actual notice that needs to be sent.
- See Susan’s email of 4/2/19 and ACTEC article by Ronald D. Aucutt, “The Uniform Fiduciary Income and Principal Act Significant Changes.”
 - For unitrust, most important takeaway is that for anything that gives a beneficiary a special tax benefit, one can do a conversion but it has to be on a calendar year and it has to use the 3-5%.
 - Our statute requires an interested trustee (trustee is also a beneficiary) to get court approval to make the conversion.
 - UFIPA does not require court approval, but requires the old provisions (CY and 3-5%) for an interested trustee to do a unitrust conversion.
- Follow Alternative A because Colorado has adopted the Uniform Trust Code (“CUTC”) and the Uniform Directed Trust Act (“UDTA”).
- UNANIMOUS VOTE TO APPROVE THE FOLLOWING WORDING:

SECTION 304. NOTICE.

- (a) A notice required by Section 303(b)(2) must be sent in a manner authorized under C.R.S. § 15-5-109 to:
- (1) the qualified beneficiaries determined under C.R.S. § 15-5-109(16);
 - (2) each person acting as trust director of the trust under the 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 C.R.S. §§ 15-5-301 through 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.
- Discussion regarding need to give notice to trust director.
 - Trust director is anyone with power over a trustee and the trustee must comply, even if the trust director is not acting in a fiduciary capacity.
 - Technically correct that the trust director does not need to be given notice because as Lisa pointed out, the UTDA, which Colorado adopted without changes, excludes notice to the trust director.
 - Consensus: Best practice is to provide notice to the trust director.

Section 305 – Unitrust Policy

- This reference to “policy” is new.
- The committee read Susan’s Santa Fe style handout from 1/21/19.
- Under current law, a Colorado trustee is required to send a copy of law with the proposed change; here, a trustee is required to explain the policy.
 - Consensus: UFIPA approach is better because less dense than sending a statute, but increases liability for trustee.

- What does a unitrust policy explanation look like?
 - Darla: UTC 415 gives laundry list; is there something similar in UFIPA?
 - Susan: Yes. See page 2 of her handout, C.R.S. § 15-1-404.5 (5) Determination of matters in administration of unitrust.
 - There is a lot of information to convey to a beneficiary presently. Under UFIPA, it is called a “policy” with notice.
 - Aaron: Notice works well. Going from notice to policy seems to elevate complexity.
 - What is the value added if go from “notice” to “policy”? Policy has behavioral component/impact.
 - Corporate trustees have plenty of policies at administrative level, but not at specific trust or account level.
 - Stan: Section 303(a)(1) states: A fiduciary without court approval may convert to a unitrust if a trustee adopts a unitrust policy for the trust.
 - Can we use a different word other than “policy”?
 - It’s a record of how the trustee arrived at the decision.
 - If in court, are you defending a policy, a notice, or a statement?
 - Jonathan: One is usually converting to a unitrust because there’s conflict, so it’s not a bad thing to have the reasons documented for the conversion – although there may be disagreement regarding the wording of the policy.
 - Corporate trustees are likely to be confused.
- Decision to read 306 – 309 before voting on 305.

Section 306 – Unitrust Rate

- Underline “309(b)(1)” because that subsection concerns specific tax-benefit trusts.

Section 307 – Applicable Value

Section 308 – Period

Section 309 – Special Tax Benefits; Other Rules.

- See NCCUSL Comments regarding contents of a unitrust policy.

Discussion of Sections 305 through 309

- If go outside of 3-5%, better have detailed policy, and notice becomes critical.
- Concerns regarding an independent trustee’s ability to go outside of 3-5% to purposely “blow up” an irrevocable trust.
 - But, trustees also need this flexibility for many types of accounts.

- UTC also gives trustees a lot of flexibility as long as the changes do not violate a material purpose of the trust.
- All beneficiaries should be looking out for their own interests. If have qualified beneficiaries, then it's up to them to monitor and evaluate the policy.
- Modern trust theory: qualified beneficiary who is also trustee is not independent and thus is limited to the 3-5%.
 - What if a beneficiary finds independent trustee to go beyond the 3-5% and is thus able to disregard the remaindermen?
- Expect more litigation and to see corporate fiduciaries excluding assets with problem valuations and stay in the 3-5% range.
- Aaron: A corporate trustee would never go outside 3-5% because of the protections of the statute.
- Comfortable with using the word “policy” now?
 - Suggestion: “In this act, ‘policy’ is a road map for unitrust conversion and administration.”
 - Russ: Is there a risk of modifying the underlying irrevocable trust?
 - Susan: Back to notice to qualified beneficiaries and of them protecting their interests (or being represented by counsel who are watching on the beneficiaries’ behalf). Cannot do a unitrust conversion if do not have qualified beneficiaries.

For the May meeting:

- Read latest version of 203(i);
- Herb to provide final language for 203(i) [which will agree with 302(d)];
- Confirm final wording of 304 in these minutes;
- Review 305 – 309 and Aucutt’s article, and vote on 305 - 309;
- Start Part 4; and
- Decide whether to hold summer meetings.

The next meeting will be on May 1, 2019 at **10:30 a.m. to noon** at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.