**Colorado Bar Association Trusts & Estates Section**

**Uniform Fiduciary Income & Principal Act Subcommittee**

**of the Statutory Revisions Committee**

**Minutes of August 7, 2019**

**Participants**

|  |  |
| --- | --- |
| In person: | By phone:  |
| * Susan Boothby
 | * Aaron Azari
 |
| * Klaralee Charlton
 | * Michelle Mieras
 |
| * Darla Daniel
 |  |
| * Russ Gamble
 |  |
| * Peggy Gardner
 |  |
| * Mimi Goodman
 |  |
| * Kate Keiser
 |  |
| * Walter Kelly
 |  |
| * Stan Kent
 |  |
| * Georgine Kryda, Chair
 |  |
| * Hayley Lambourn
 |  |
| * Dan Rich
 |  |
| * Tracy Tirey
 |  |
| * Lisa Willcox
 |  |

**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 | Kate K. |

The meeting was held at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.

The meeting was called to order at 10:40 a.m. by the Chair and adjourned at noon.

Minutes of May 1, 2019were approved with one change.

**New Committee Members Introduced**

* Kate Keiser and Hayley Lambourn introduced themselves.

**Summer Follow-ups**

* Georgine said that she would be working with the Statutory Revision Committee (SRC) chair to add all UFIPA Committee minutes and sections as approved to the Web site.
* Darla reported on her discussion of the ordering rule for Section 309(a)(2) with Aaron Azari, Michelle Mieras, and Dan Rich.
	+ Aaron: a bank fiduciary usually uses the IRS default (FIFO-type) rule; thus, if a trustee has an ability to reorder, it could create a conflict.
		- Would prefer a default rule to follow IRS rule and then permit opt out.
	+ Darla, per Aaron’s notes: Section 309(a)(2) deals with unitrusts; Current Colorado statute has a default rule, but this new § 309(a)(2) does not have a default.
	+ Dan: Like the idea of the IRS default with opt out
	+ Michelle: Agrees.
	+ Susan B. to draft language same rule as in current Colorado unitrust statute, and review IRS default rule, and
		- Include “subject to terms of the trust”; and
		- Run past Darla, Aaron, Michelle, and Dan.

**Part 4, Allocation of Receipts During Administration – Russ, Peggy, Walter**

**Section 402 – Distribution from Trust or Estate - Russ**

* Section 402 has a phrase regarding unitrust distribution that is not in Section 412.
* Do we need an ordering rule with respect to C.R.S. §15-1-455(2)?
* Dan: Trust as principal or as additional income?
	+ Will IRS recognize the discretion of the trustee to minimize income tax?
		- Ex. if the Schedule K-1 doesnot account for the full 4%, the trust picks up the additional interest income on the trust’s return vs. pushing it out to beneficiaries.
	+ Dan: Is it principal-income (i.e., goes out with the rest of DNI unless unitrust, in which case taxability goes out)?
* Kate K.: Fiduciary has the interest, not the trust, but is this intended to be limited only to the trust scenario? Broader language appears to make sense.
* **402 UNANIMOUS APPROVAL**

**403(a)(b)(c)&(d) – Business or Other Activity Conducted by Fiduciary**

* Russ read Santa Fe style UFIPA and Colorado law
* Sections 403(a)&(b) – Peggy requested example of when one would do this.
	+ Russ’ example: Trust has an apartment building owned in the trustee’s name.
	+ Incorporate separate business as part of the trust’s accounting
	+ Darla’s example: Directed trust with external trustee
	+ Walter asked how tax gets paid.
		- Dan & Mimi answered: There is a different section regarding allocation of income receipts; what we have here will be net of expenses.
		- Dan’s example: IBM stock, trust gets net taxable impact of income and need to decide what is best for the trust.
	+ Dan’s other example: depletion
* Russ: Section 403 is similar to Section 401 (interest in entities) in that the trustee has discretion to determine how applied.
	+ Dan: For operation of the entity, the trustee has to determine if it is partially principal to replenish depletable resources (business decision in part), but some sections dictate percentages (e.g., water, timber).
* 403(c): Colorado law 413 is similar to UFIPA.
	+ Dan: Colorado law has traditional UPIA principles and UFIPA (new law) allows for business adjustments for continued operation of the business.
* See comments on p. 58 of UFIPA:
	+ **Separate accounting.** The 2018 Act adds subsection (c)(2) to the wording that was used in the 1997 Act to accommodate the concept of “separate accounting” in a trust the only activity of which (other than making distributions to beneficiaries) is the conduct of a business. It may not be reasonable to assume that receipts not distributed to beneficiaries have been “retained” for use in the business, if that permits discretionary distributions to beneficiaries, in effect, to define trust income. That might be especially awkward if discretionary distributions of either income or principal or both to multiple beneficiaries are not made pro rata. In such a case, the fiduciary is permitted to designate which distributions in effect define trust income, and which distributions are discretionary distributions under the terms of the trust not intended to be a standard or precedent for defining income.
	+ Should also be in 1/27/19 version of UFIPA.
* Darla: Current Colorado statute does not include Section 403(c)(2), but it seems inherent that business decisions, such as working capital, would be included.
* Dan: If setting aside money for depreciation or depletion, there is a tax reduction; but can have phantom income. Donot see how can do this with a simple trust.
	+ Mimi: Could have reserves.
	+ Committee: Thus, it could be a risky maneuver.
* Remove (c)(2)? No.
	+ Darla’s example: What if a beneficiary is concerned that the trustee is retaining too much working capital?
		- Susan: Still have reasonableness standard in (c)(2)
* 403(d)(3) of UFIPA refers to livestock and seeming 15-1-461 of the 1955 Act.
* Presumption of “reasonableness” is discussed in comments to UFIPA Section 201(a)(1).
* Mimi: Is there a C.R.S. § 15-1-405 type of notice proceeding in UFIPA?
* Darla: One needs to be clear on “beneficiary” vs. “qualified beneficiary.”
* **403 UNANIMOUS APPROVAL**

**404 – Principal Receipts - Peggy**

* Not much different from current Colorado law or 1955 UPIA.
* Dan’s example: If sell the apartment building for $100K gain, it is all principal.
* **404 UNANIMOUS APPROVAL**

**405 – Rental Property - Peggy**

* Current Colorado law is similar to UFIPA Section 405
* Discussion: 405 appears logical
* **405 UNANIMOUS APPROVAL**

**406 – Receipt on Obligation to be Paid in Money - Peggy**

* **406 UNANIMOUS APPROVAL**

**407 – Insurance Policy or Contract - Peggy**

* Logical, and current Colorado law is similar
* Dan: Has no problem with liability insurance, but be aware of talk of changing the tax law regarding life insurance, in which case accretion would not be addressed here.
	+ Tax law changes: If the value of the policy is appreciating annually, want to tax the appreciation per annum.
* 407(c) is not income; Here, we are talking only about the allocation of income.
	+ If there is a loss of profits or a loss of assets, then can replace.
* **407 UNANIMOUS APPROVAL**

**UFIPA Sections 408 – 416**are similar to other sections except for section 411, which is probably the most relevant for Colorado practitioners. Walter to pick up in September.

**For the September 4, 2019meeting:**

* Susan to provide a final version of Section 304 (exclusive of brackets);
* Susan to:
	+ draft ordering rule for Section 309(a)(2) based on present Colorado unitrust statute (i.e., default to follow IRS rule, permit opt out) and include “subject to terms of the trust” language; and
	+ circulate her proposed language among Darla, Aaron, Michelle, and Dan for review and initial comment prior to distributing to the entire subcommittee; and
* Walter to continue with Section 408 and Article 4.

**The next meeting** will be on September 4, 2019at 10:30 a.m. to noon at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.