

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

**Minutes of September 20, 2018**

**Participants**

In person:	By phone:
• Gene Zuspann, Chair	• Peggy Gardner
• Susan Boothby	
• Peter Bullard	
• Klaralee Charlton	
• Darla Daniel	
• Connie Eyster	
• Jeff Kadavy	
• Stan Kent	
• Georgine Kryda	
• Elizabeth Pierce-Durance	
• 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.
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 called to order at 10:35 a.m. by the Chair and adjourned at 11:30 a.m.

**DISCUSSED PRIOR TO 9/20/2018**

We will be following the “Santa Fe” style.

- Proposed act
- Current Colorado law
- Refer to the 1955 Act (see discussion below)
- [Darla Daniel has thumb drive of old T&E records. Gene to ask her for a Word copy of the 2001 review by T&E of UPIA.]

Initial observations (Gene):

- 104 is now 203.
- UFIPA added a section on Unitrust.

- There may be an issue with old trusts not under UPIA of 2001 (e.g., trusts that could not adjust, marital trust with spouse as trustee, family trust using family members as adverse trustees, elect out provisions).

### **Initial issue identification and notes**

401: Trust income is usually reported on a K-1, which doesn't follow accounting income.

505 (&506) Example: Assume Taxable Income of \$100K from investments passed through to Trust, but the Trust receives only \$40K cash (usually an FLP without other assets).

- Under 501, \$40K is income and, if trust is required to distribute all income, then trust has no cash to pay tax.
- Adjust between income and principal by allocating the \$40K to principal, so have enough cash to pay taxes.
  - Effect is to reduce income by the tax.
  - Works unless no distribution from FLP.
- Problem: Trust has no cash to pay tax on income of \$100K
  - Alternative: Trustee could find a way to liquidate part of \$100K

Move to get trust officers (e.g., Darla D., Michelle M., Dan Rich) to meet with our subcommittee

Many Trust officers are unaware of 2009 changes to 2001 law with respect to mineral and natural resource interests.

Gene: 408 changed at suggestion of ACTEC retirement benefits committee.

- Internal income of the plan becomes income of the trust

Article 1 definitions do not appear to be pulled from Uniform Trust Code (ex. no "qualified beneficiary").

Put the 1955 Act into the analysis because:

- There was a belief that the 1997 Act did not sufficiently cover life estates.
  - Gene believes UFIPA addresses life estates.
- There are trusts still governed by 1955 Act because they didn't qualify for the 2001 Act.
- Initial preference was to get rid of 1955 Act, but we need to refer to both acts (1955 & current) as we review UFIPA.

This subcommittee's objective is to revamp Colorado's 2001 Act to be consistent with the proposed UFIPA.

Administrative:

- Gene asked the committee to carefully consider any proposed changes to UFIPA.
- Committee members agreed to contact the lead reviewer(s) for each article based on members' interests and on the fact that some articles contain more sections than others.
- Stan's 25 handouts and analysis of Article 1 were cited as examples for how to proceed.
- Stan cautioned to wait to see how definitions are employed in black letter of UFIPA.

### **Section 101**

- The title of UFIPA was changed to avoid confusion with UPIA (Uniform Prudent Investor Act) and to emphasize “Fiduciary” (broader scope of applicability).
  - Read Uniform Law comment.
  - See Colorado subcommittee comment re: statutory history.
  - Part 7 of Colorado’s Uniform Principal & Income Act is the entire 2000 Act.
- Section title corrected to: “Uniform Fiduciary Income and Principal Act”
- Unanimous vote to approve.

### **Section 102, para. 1: Accounting period**

- Discussion of “approximately”
  - Used due to prevalence of a 52- or 53-week year, and
  - Potential scenario with mid-month date of death and selection of fiscal (versus calendar) year
  - See Current Colorado Law box.
- Unanimous vote to approve.

### **Section 102, para. 2: Beneficiary**

- Definition differs from that in the Uniform Principal and Income Act, Uniform Probate Code, and Uniform Trust Decanting Code.
- Discussion of whether to retain “legatee.”
  - Favor retention because other states may have “legatee” in their statutes.
- Remember that UFIPA applies to more than Wills and trusts (e.g., life estates).
- WAIT to vote.

### **Section 102, para. 3: Court**

- We have definitions of “court” throughout Colorado Title 15.
- Do we need to define “court” in UFIPA?
  - Yes, because UFIPA will not be in the Probate Code (ex. life estate).
  - Discussion of appropriate jurisdiction for life estate.
- WAIT to vote.

### **Section 102, para. 4: Current Income Beneficiary**

- Discussion re: “qualified beneficiary”
  - Note that Colorado added the definition to the Uniform Trust Code (UTC) by drawing from UPIA.
- WAIT to vote.

### **Section 102, para. 5: Distribution**

- “Distribution” not defined in UTC.
- Definition of “distribution” in Colorado Probate Code refers to testamentary trust.
- WAIT to vote.

### **Section 102, para. 6: Estate**

- WAIT to vote.

**Section 102, para. 7: Fiduciary**

- Discussion re: whether a life tenant is traditionally a fiduciary?
  - 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).
- WAIT to vote.

**Section 102, para. 8: Income**

- “Current return” includes proceeds from sale of something; may include mineral rights.
- WAIT to vote.

**Section 102, para. 9: Income Interest**

- Broad definition. Stan to correct typos in subsection cites.
- Discussion of whether there a right if trustee may make purely discretionary distributions.
  - There is a right to have a court review possible abuse of discretion.
- UFIPA extends principal and income accounting to life estates.
- WAIT to vote.

**Section 102, para. 10: Independent Person**

- Colorado will have the UTC, so use language in the first bracket.
- Still have IRC § 672 (and regs) problem in (C) as leave out some persons who may be appropriate (e.g., child of sibling).
- Regarding (E), would an attorney/law firm acting as an independent person in transactions be considered as an employee?
- WAIT to vote.
  - No issues with (A) or (B).
  - Need to see what an independent person can do under other UFIPA sections.

**Section 102, para. 11: Mandatory Income Interest**

- Para. 9, Income Interest, is broad; whereas para. 11 carves out narrow mandatory interest.
- WAIT to vote.

**Section 102, para. 12: Net Income**

- WAIT to vote until after Articles 2 and 3 reviewed because there appears to be no adjustment from income to principal.
  - Thus far, we have seen only a possible adjustment from principal to income.

**Section 102, para. 13: Person**

- Discussion of why Uniform Law Commission (ULC) insists on estate or trust being considered a “person” (versus a fiduciary relationship) continued. Key question is who can hold title to property.
- Move to approve with retention of both “trust” and “estate” in the definition.
- Unanimous vote to approve.

**Section 102, para. 14: Personal Representative**

- Unanimous vote to approve.

**Section 102, para. 15: Principal**

- Stan to remove “property” and cites to C.R.S. §§ 15-10-201 and 15-5-103 from final report.
- Unanimous vote to approve.

**Section 102, para. 16: Record**

- This is a standard definition.
- Unanimous vote to approve.

**Section 102, para. 17: Settlor**

- “Portion” used in decanting statute and in trust code, versus “part.”
- Wait to see how “part” is used in UFIPA, and revisit use of “portion.”
- WAIT to vote, but reserving approval.

**Section 102, para. 18: Successor Beneficiary**

- Discussion of the use of “entitled” (also used by current law) versus “eligible.” For example, a beneficiary of a discretionary trust is not entitled to a distribution.
- Colorado subcommittee notes the word “entitled” and wonders whether the word should be “eligible.”
- Discussion of using “and/or” for income or principal.
- WAIT to vote, but reserving approval.

**DISCUSSED ON 9/20/2018****Section 102, para. 19: Terms of Trust**

- Stan to single-space final report.
- Discussion of desirability of following CUTC definition of “terms of trust” in (A) & (B).
- Colorado subcommittee recommends rewriting (A) and (B) to follow CUTC language.
- Clarification in Section 104 regarding when and how UFIPA applies to a trust.
  - What if a trust in Illinois is changed by a director, and the place of administration is in Colorado?
- Change A(ii) and B(iii); add B(iv) for arbitration.
- Need to make consistent w/UTC
- APPROVED UNANIMOUSLY

### **Section 102, para. 20: Trust**

- Footer says 5/17/18
- Similar to, but slightly different from, UTC
- Definitions are what are used in UFIPA
- APPROVED UNANIMOUSLY

### **Section 102, para. 21: Trustee**

- Close to what have in Colorado statutes
- Is there a problem if Trustee does not include life tenant?
  - Suzy Harris raised this issue. It is why Colorado adopted the 1955 Act. This version of UFIPA has more on life estates than the 1955 Act.
- In a trust, the Trustee has legal title and beneficiary has a life estate.
- Life estate is not a trust under UFIPA, but UFIPA has provisions that are not workable (per Gene) with respect to life estates.
- APPROVED UNANIMOUSLY

### **Section 102, para. 22: Will**

- Same as current Colorado Probate Code definition, which is 50 years old
- APPROVED UNANIMOUSLY

### **Definitional Issues** – see how used in UFIPA

Gene: The index of defined terms lists terms and where referenced in UFIPA.

Wait until we finish our initial review and then check for consistency.

### **Section 103: Scope**

- Para. 3 is in the draft we received, but not in UFIPA as approved by the ULC.
- We started this review before the ULC approved final version of UFIPA on 7/25/18.
- Gene to obtain latest version of UFIPA, and will obtain copy with changes noted.
- Okay with 103(2) because life estate was intended to apply to the 2001 UFIPA.
- Vote to approve 103 w/o (3) = APPROVED UNANIMOUSLY
- Stan: included existing statutes on applicability;
  - It is confusing because Colorado did not enact 1931 UPIA until 1955; never enacted 1962 UPIA; did enact 1977 UPIA; and then re-enacted 1955 UPIA (which is primarily 1931 Act), but when Colorado enacts this version of UPIA, Colorado will have clean definitions and applications of income and principal.

### **Section 104: Governing Law**

- Discussion of potential IRC § 2036 power, which would create a problem with QTIPs where trustee (i.e., surviving spouse) is beneficiary.
- Agreement reached that new power to adjust appears to solve the prior problems.
- Stan noted the shift with principal place of administration.
  - See ULC Comments.
    - Prior to “Despite”, this was the law prior to UFIPA.
    - “Despite” = Flip, because UFIPA will be governed by place of administration rather than where the trust was written.

- Q: Is there an effect on existing trusts, like where a trust says which law governs?
- The issue comes up in 802, “Effect on Existing Trusts.”
- Gene: All need to ponder because Gene often designates the 1955 Act in the Trust; thus, Gene’s trusts probably fall outside of this provision; but if one moves the trust to WY, then one changes the principal and income allocations.
- Stan: The application section says UFIPA applies to existing trusts except as provided.
  - Darla: The last sentence in 104, “subject to a life estate,” is in the final version of UFIPA.
- Stan to obtain mark-up and prepare revised reports and send to Gene and Georgine.
  - Expect clarifications
  - Will clean up in Oct. 2018
- Each subcommittee will need to review each section. Georgine to send markup to all committee members.
  - Compare each subcommittee’s work to date based on draft of 4/10/18 with final version of UFIPA of 7/25/18.

#### **201: Fiduciary Duties & General Principles**

- 201(a)(1): “reasonable” kept, but only the first reference. Good faith still applies.
- 201(a)(2): See comments.
- 201(a)(3): See n. 3 and “terms of trust”
- 201(a)(4): stated as imperative with exception
  - Preference for existing language
  - Reminder these are default provisions
  - Stan: We get to the same place if we keep same language we are looking at.
  - Darla: Existing C.R.S. § 15-5-403(3) is preferred.
  - Stan: Can make comments black letter law (e.g., prefatory comments).
  - Gene: Add some language at beginning, in Section 103 Scope, but need to apply to definitions. Suggested language: “This act contains default provisions.”
  - Where to put that these are default provisions?
  - Stan: Look at Section 802.

**The next meeting** will be on October 18, 2018 at 10:30 a.m. in the Capitol Room and will include Stan’s updates to his initial reports for Article 1 and continue review of Article 2.