

Memorandum

To: Dennis Whitmer
From: Kevin D. Millard
Date: February 6, 2017
Re: Uniform Trust Code Articles 7, 8, and 9

This is the fourth installment of my comments and questions about the proposed Colorado Uniform Trust Code. This memo addresses Articles 7, 8, and 9 of the UTC. There is nothing yet posted on your committee's webpage for Articles 10 and 11. I will look at those Articles when they are available.

1. Article 7, Office of Trustee.

- 1.1 Section 15-5-701, Accepting or Declining Trusteeship. I agree with the addition of the language at the end of subsection (a)(2) about what makes a method exclusive, but I don't think it goes quite far enough. As written, some judges might read the statute to mean that unless the trust document uses one of the magic words "sole," "exclusive," and "only," the specific method is not exclusive. *Cf. In re Estate of McCreath*, 240 P.3d 413, 421 (Colo. App. 2009). I suggest that the language be expanded along the line of the language in C.R.S. § 15-16-702(3)(b), regarding methods for revoking or amending a trust, which was added for the purpose of overturning that aspect of *McCreath*. Thus, the added sentence at the end of § 15-5-701(a)(2) could be revised to read:

A provision in a trust specifying a method to accept or decline trusteeship does not make the specified method exclusive unless the specified method is referred to as the "sole", "exclusive", or "only" method of accepting or declining trusteeship *or the provision includes similar language manifesting the settlor's intent that the trusteeship may not be accepted or declined by any other method.*

1.2 Section 15-5-703, Cotrustees.

- (A) What was the reasoning behind deleting the words "under other law" after "disqualification" in subsections (c) and (d)?
- (B) In subsection (g)(2), the word "to" at the beginning of paragraph (2) is superfluous because the introductory clause of (g) already ends with the word "to."

(C) I don't have a problem with what I think was the intent behind the revised language of subsection (g)(2), but I think the language "at trust expense," which is now at the end of the clause, is misplaced. Read literally, it seems to say that the cotrustee's serious breach of trust must have been at trust expense. I assume you mean that the other cotrustee is to pursue a remedy at trust expense. I suggest re-wording paragraph (2) to read either: "at trust expense, pursue a remedy for a cotrustee's serious breach of trust," or "pursue a remedy, at trust expense, for a cotrustee's serious breach of trust."

1.3 Section 15-5-704, Vacancy in trusteeship—appointment of successor. There is a typo in subsection (e): "additional trustee of special fiduciary" should be "additional trustee *or* special fiduciary."

1.4 Section 15-5-706, Removal of trustee. In subsection (c), the cross reference to section 1001(b) needs to be changed to work with the numbering of the Colorado statutes. I assume this will be section 15-5-1001(b).

1.5 Section 15-5-709, Reimbursement of expenses. There is a typo in subsection (a)(2): the word "expenses" is doubled.

2. Article 8, Duties and Powers of Trustee.

2.1 Section 15-5-808, Powers to direct. At the Uniform Law Commission level, section 808 of the UTC, other than subsection (a) (which will be moved to article 6 of the UTC), is very likely going to be deleted in connection with the finalization of the Uniform Directed Trust Act, which is scheduled for its final reading this summer. I suggest that Colorado do the same: move § 15-5-808(a) to part 6 and delete the rest of § 808, including subsection (c).

2.2 Section 15-5-810, Record-keeping and identification of trust property. In subsection (c)(2), the cross-reference to section 816(7)(b) needs to be changed to work with the numbering of the Colorado statutes.

2.3 Section 15-5-813, Duty to inform and report.

(A) In subsection (b)(1), "portions of the trust instrument which describe or affect the beneficiary's interest" should be changed back to the uniform language, "portions of the trust instrument *that* describe or affect the beneficiary's interest." The word "that" should be used in a restrictive clause; "which" is nonrestrictive. Bryan A. Garner, *Garner's Modern American Usage* 806–07 (3d ed. 2009). "That" is correctly used,

instead of “which,” in subsection (b)(3).

- (B) In subsection (e), the references to January 1, 2015, need to be changed to whatever the effective date of the Colorado Uniform Trust Code will be.
- (C) I can live with the trustee’s duty to inform and report being limited to qualified beneficiaries, but you cannot take away the court’s right to require a trustee to account. *Ferguson v. Mueller*, 169 P.2d 610, 612 (Colo. 1946) (“a provision in the instrument creating the trust that the trustee shall not be required to report his doings to a court does not oust an equity court of jurisdiction to require accounting.”); see C.R.S. § 15-10-502(1)(a). Consequently, subsection (f) should be modified, for example: “Nothing in this section 813 shall be construed to impose on the trustee a duty to inform or report to any person other than a qualified beneficiary *or as directed by the court.*”

2.4 Section 15-5-814, Discretionary powers—tax savings.

- (A) Will C.R.S. § 15-1-1401 be repealed in light of subsection (b)? (That would be my preference.)
- (B) In subsection (d)(1), the reference to January 1, 2015, needs to be changed to whatever the effective date of the Colorado Uniform Trust Code will be.

2.5 Section 15-5-815, General powers of trustee.

- (A) Why was the word “or” used at the end of subsection (a)(1) rather than “and” as in the uniform language?
- (B) There are references in subsections (b) and (c) to “this code.” In the previous provisions, you have been referring to this “article.” In the UTC, “article” means something different from the meaning of an “article” of the Colorado statutes. See C.R.S. § 2-5-101(2). Maybe you should do something like what we now have in C.R.S. § 15-10-101 with regard to the probate code (“Articles 10 to 17 of this title shall be known and may be cited as the ‘Colorado Probate Code’ and is referred to in said articles as ‘this code’ or ‘code.’”). That is, your proposed § 15-5-101 could be revised to read: “This article 5 of title 15 shall be known and may be cited as the ‘Colorado Uniform Trust Code’ and is referred to in this article as ‘this code’ or ‘code.’” Then you could use “code”

when you are referring to all of the trust code.

(C) What was the reasoning behind deleting paragraphs (18) through (20)?

3. Article 9, Uniform Prudent Investor Act. Article 9 of the UTC is a holding spot for the Uniform Prudent Investor Act. I assume that the intent is for Colorado to leave its version of the prudent investor act in place, at C.R.S. §§ 15-1.1-101 et seq., and not try to incorporate it into the trust code. That makes sense in light of Colorado's expansion of the UPIA to other fiduciary relationships in addition to trusts. C.R.S. § 15-1.1-115(2).