

UTC Committee: December 15, 2016 Meeting Attendance

In Person:

Dennis Whitmer
Marc Darling
Darla Daniel
Steve Brainerd
Carl Stevens
Barbara Delvano
Jeff Kadavy
Jonathan Haskell
Georgine Kryda
Connie Wood
Mike Holder
Barbara Dalvano
Connie Wood
Gene Zuspann

On Phone:

Connie Eyster
Joe Hodges

UNIFORM TRUST CODE COMMITTEE
MINUTES
December 15, 2016

Minutes from November 17, 2016 meeting approved with changes. Gene was added to the “attendee” list.

1. Discussion of 1005 regarding use of “sent” rather than “received.” (Proposed language below). Marc, as a litigator, thinks better to have “received” if we are going to use the shorter 6 month period. Alternatively, if want to use the one-year period, then “sent” is okay with him. This is a balancing statute – wanting to provide fiduciaries a benefit and expanded protection, but at the same time want to make sure there is sufficient notice and opportunity for objection.

Jeff Kadavy said he would prefer “sent” because it is difficult to prove that someone received the materials. Jeff also says that there is a high volume of trusts rather than conservatorships and so it is more of a burden for trustees than other fiduciaries.

Marc says – it will be inconsistent with conservatorships and estates where the rule is six months and “received.” Is it worth to get the benefit of the six month window to demonstrate that they received notice? If want to persuade judge that the beneficiary had an opportunity to object and didn’t – then it is better to show notice was provided and received. Marc also reminds us that there is a lesser burden on trustees than on personal representatives under the UTC – only “adequate disclosure” rather than “full disclosure.” If the fiduciary is going to receive such a great benefit, then there should be a higher burden for service.

Gene and several other committee members concerned about how to prove receipt. There are many ways when something can be sent but the mail is not actually received – even using tools like certified receipt or process servers. Barbara Dalvano also mentioned that the UPC rules were created in 1974 – and there have been many changes in technology and transmission of information since then – perhaps the UTC (1 year and sent) has the better rule for our modern times.

15-5-1005. Limitation of actions against trustee.

(a) A BENEFICIARY MAY NOT COMMENCE A PROCEEDING AGAINST A TRUSTEE FOR BREACH OF TRUST MORE THAN ~~ONE YEAR~~ SIX MONTHS AFTER THE DATE THAT THE BENEFICIARY OR A ~~REPRESENTATIVE OF~~ PERSON WHO MAY REPRESENT AND BIND THE BENEFICIARY, AS PROVIDED IN PART 3 OF THIS ARTICLE, WAS SENT RECEIVED A REPORT THAT ADEQUATELY DISCLOSED THE
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EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST AND INFORMED THE BENEFICIARY OF THE TIME ALLOWED FOR COMMENCING A PROCEEDING.

(b) A REPORT ADEQUATELY DISCLOSES THE EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST IF IT PROVIDES SUFFICIENT INFORMATION SO THAT THE BENEFICIARY OR REPRESENTATIVE KNOWS ~~OR SHOULD HAVE KNOWN~~ OF THE POTENTIAL CLAIM OR SHOULD HAVE INQUIRED INTO ITS EXISTENCE.

(c) IF SUBSECTION (A) OF THIS SECTION DOES NOT APPLY, A JUDICIAL PROCEEDING BY A BENEFICIARY AGAINST A TRUSTEE FOR BREACH OF TRUST MUST BE COMMENCED WITHIN ~~FIVE~~ THREE YEARS AFTER THE FIRST TO OCCUR OF:

- (1) THE REMOVAL, OR RESIGNATION, ~~OR DEATH~~ OF THE TRUSTEE;
- (2) THE TERMINATION OF THE BENEFICIARY'S INTEREST IN THE TRUST; OR
- (3) THE TERMINATION OF THE TRUST.

(d) FOR PURPOSES OF SUBSECTION (A) OF THIS SECTION, A BENEFICIARY IS DEEMED TO HAVE BEEN SENT ~~RECEIVED~~ A REPORT IF:

(1) IN THE CASE OF A BENEFICIARY ~~WHO IS AN ADULT AND~~ ~~HAS~~ HAVING CAPACITY, IT IS SENT TO ~~RECEIVED BY~~ THE BENEFICIARY; OR

(2) IN THE CASE OF A BENEFICIARY WHO, UNDER PART 3 OF THIS ARTICLE, MAY BE REPRESENTED AND BOUND BY ANOTHER PERSON, IT IS SENT TO ~~RECEIVED BY~~ THE OTHER PERSON.

(e) THIS SECTION DOES NOT PRECLUDE AN ACTION TO RECOVER FOR FRAUD OR MISREPRESENTATION RELATED TO THE REPORT.

~~———— (f) IF A TRUSTEE DIES, THEN A DISTRIBUTE OR A BENEFICIARY MUST COMMENCE A JUDICIAL PROCEEDING FOR BREACH OF TRUST AGAINST THE TRUSTEE'S ESTATE WITHIN THE TIMEFRAMES SPECIFIED IN THE COLORADO PROBATE CODE FOR SUCH ACTIONS.~~

Steve B. reminded us that in 2014 we made changes in 15-16-704, creating a limitation on action contesting the validity of a trust to the earlier of the 3-year period after death or 120 days after the beneficiary was sent a copy of the trust instrument. So, there is recent statutory support for shorter limits on timeframes and use of “sent” rather than “received.”

Gene would like another month to take a look at what kind of protection is being offered here. 1005 protects against action for breach of trust – what other actions can be made against the trustee that are not a “breach of trust?” Gene would like to see alternative language that gives a procedure such that “if the trustee does something” and then the “beneficiary does something” then the trustee gets the benefit of the statute. Gene does like 1 year and “sent.”

MOTION: Approve the statutory time limits as written by the UTC with 1 year and “sent” (as set forth above)

MOTION PASSES.

Additional concern about the following paragraph, which the committee has recommended deleting:

~~—————(f) IF A TRUSTEE DIES, THEN A DISTRIBUTEE OR A BENEFICIARY MUST COMMENCE A JUDICIAL PROCEEDING FOR BREACH OF TRUST AGAINST THE TRUSTEE’S ESTATE WITHIN THE TIMEFRAMES SPECIFIED IN THE COLORADO PROBATE CODE FOR SUCH ACTIONS.~~

This paragraph was added so that we could tie in the probate code statutes of limitations for estates. If this paragraph is deleted – Marc is concerned that it creates a trap for the unwary. If “or death” is struck in (c)(1), then it may be okay to strike (f) – but keeping (f) would provide some additional guidance that the death of a trustee can create different time periods for commencing an action for breach of trust. Marc would be satisfied with removing (f) – if that concept is included in the Colorado comments

MOTIONS (by Barbara and Gene and others): To accept 1005 as written below (which language is essentially UTC language):

15-5-1005. Limitation of actions against trustee.

(a) A BENEFICIARY MAY NOT COMMENCE A PROCEEDING AGAINST A TRUSTEE FOR BREACH OF TRUST MORE THAN ONE YEAR AFTER THE DATE THAT THE BENEFICIARY OR A ~~REPRESENTATIVE OF~~ PERSON WHO MAY REPRESENT AND BIND THE BENEFICIARY, AS PROVIDED IN PART 3 OF THIS ARTICLE, WAS SENT RECEIVED A REPORT THAT ADEQUATELY DISCLOSED THE EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST AND INFORMED THE BENEFICIARY OF THE TIME ALLOWED FOR COMMENCING A PROCEEDING.

(b) A REPORT ADEQUATELY DISCLOSES THE EXISTENCE OF A POTENTIAL CLAIM FOR BREACH OF TRUST IF IT PROVIDES SUFFICIENT INFORMATION SO THAT THE BENEFICIARY OR REPRESENTATIVE KNOWS OR SHOULD HAVE KNOWN OF THE POTENTIAL CLAIM OR SHOULD HAVE INQUIRED INTO ITS EXISTENCE.

(c) IF SUBSECTION (A) OF THIS SECTION DOES NOT APPLY, A JUDICIAL PROCEEDING BY A BENEFICIARY AGAINST A TRUSTEE FOR BREACH OF TRUST MUST BE COMMENCED WITHIN ~~FIVE~~ THREE YEARS AFTER THE FIRST TO OCCUR OF:

- (1) THE REMOVAL; OR RESIGNATION, ~~OR DEATH~~ OF THE TRUSTEE;
- (2) THE TERMINATION OF THE BENEFICIARY'S INTEREST IN THE TRUST; OR
- (3) THE TERMINATION OF THE TRUST.

(d) FOR PURPOSES OF SUBSECTION (A) OF THIS SECTION, A BENEFICIARY IS DEEMED TO HAVE BEEN SENT RECEIVED A REPORT IF:

(1) IN THE CASE OF A BENEFICIARY WHO IS AN ADULT AND ~~HAS~~ HAVING CAPACITY, IT IS SENT TO RECEIVED BY THE BENEFICIARY; OR

(2) IN THE CASE OF A BENEFICIARY WHO, UNDER PART 3 OF THIS ARTICLE, MAY BE REPRESENTED AND BOUND BY ANOTHER PERSON, IT IS SENT TO RECEIVED BY THE OTHER PERSON.

(e) THIS SECTION DOES NOT PRECLUDE AN ACTION TO RECOVER FOR FRAUD OR MISREPRESENTATION RELATED TO THE REPORT.

(f) IF A TRUSTEE DIES, THEN A DISTRIBUTE OR A BENEFICIARY MUST COMMENCE A JUDICIAL PROCEEDING FOR BREACH OF TRUST AGAINST THE TRUSTEE'S ESTATE WITHIN THE TIMEFRAMES SPECIFIED IN THE COLORADO PROBATE CODE FOR SUCH ACTIONS.

MOTION APPROVED

2. Uniform Law Commissioners – having concerns about our process for review of statute and publication of state specific comments. Darla suggested that maybe our section should give them a primer on our process so that the Uniform Law Commissioners will feel more comfortable with our work product. In the Uniform Tax Apportionment Act, Steve and Barbara wrote very detailed Colorado comments in order to explain why our state statute differs from the Uniform law. Steve says, this is unlikely to happen again. There may be a movement afoot to give uniformity to section process – review of uniform laws. Marc reminds us that there is no guarantee – under any circumstances, that the Colorado comments will be published.

3. Update on Section 1013 of the Act – this section defines what needs to be in a certificate of trust. Bankers have looked at their own bill on these matters – in 11-105-111 (see materials provided by Darla, attached to minutes). Paragraph (2) of 11-105-111, there is a new section that addresses reliance on certificates of trust for lending purposes. Darla thinks the changes made are mostly consistent with 1013 and is “as good as we are going to get.”

4. With regard to effective date provisions (Part 11), these really need to reviewed by Stan Kent in conjunction with effective dates enacted under the UPC and other probate code concerns. Connie will connect with Kevin Millard and Stan Kent on Part 11.

5. 15-16-701, et seq. has been negotiated and needs to be included in the trust code as it currently exists.

6. Discussion of Part 4 and Part 7 summary of different parts of the UTC and Colorado comments. What should be provided to SRC? What should the Colorado comments look like? Do we need to have Colorado comments completed before providing this material to SRC? Yes. Colorado comments should only include reference to significant changes to the statute – but should include comments from the 2005 document.

DENNIS WILL SEND THE 2005 DOCUMENT OUT TO THE COMMITTEE AGAIN so that each committee will have that document to use to create the new Colorado comments.

Committee agrees that it will cause confusion if we try to include the 2005 comments and the reasons why the statute has been changed. It would be helpful to create comments that explain and changes to Uniform Law and explain (quickly) if there was a change from the 2005 recommendation, and move on from there.

Meeting adjourned.

NEXT MEETING January 19, 2017

UTC ARTICLE 4 SUMMARY

Article 4, Creation, Validity, Modification and Termination of a Trust, has a self-evident set of rules. A trust is created when property is transferred to a trustee with the intent to create a trust relationship. There must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust).

It is not necessary to have a trust instrument to create a trust. Oral trusts are allowed, but the standard of proof for an oral trust is the higher "clear and convincing evidence" standard.

There are clear (default) rules that apply upon consent of the parties to the trust or that govern a court in modifying or terminating a trust. A court may apply the doctrine of cy pres to charitable trusts, when the charitable purpose is no longer obtainable. A comparable charitable purpose may be selected.

UTC ARTICLE 4 COLORADO VERSION SUMMARY

The Goal of the Colorado UTC Subcommittee is to conform to the uniform law as originally drafted when possible, and only make substantive changes when necessary to provide clarity for the State of Colorado and its citizens.

411(a) details the procedure when the settlor and all beneficiaries consent to the modification or termination of an irrevocable trust. 411(b) provides for modification or termination of an irrevocable trust without the settlor's involvement if all of the beneficiaries consent and the court concludes that either (1) continuance of the trust is not necessary to achieve any material purpose of the trust; or (2) is not inconsistent with a material purpose of the trust. As in the uniform law, a spendthrift provision is not presumed to constitute a material purpose.

In addition, the Subcommittee proposes migrating the provisions of C.R.S. § 15-11-901, which deals with Pet and Honorary Trusts, to UTC Sections 408, 409, and 409.5, in order for Colorado's version of the UTC to be similar to other states' UTC numbering system. The same applies to C.R.S. § § 15-11-806 and 15-11-807 relating to reformation to correct mistakes and modification to achieve the settlor's tax objectives, which would be migrated to UTC Sections 415 and 416.

ARTICLE 7 OFFICE OF TRUSTEE Colorado Comments

The Goal of the Colorado UTC Subcommittee is to conform to the uniform law as originally drafted when possible, and only make substantive changes when necessary to retain accepted Colorado law or to provide clarity for the State of Colorado and its citizens.

701(a) (2) Language was added to avoid the interpretation that a provision in the trust specifying a method to accept or decline trusteeship is not construed to be the only method to do so unless the document clearly states this requirement. This language is in response to the Colorado Appellate Court Case _____.

701 (c) (1) Adds language that a person designated as trustee may send a rejection of trusteeship to any other acting trustee.

702 (c) Language was added to allow the settlor to specify in the terms of the trust whether the cost of a bond is charged to the trust.

703 (g) (2) The language was changed by the Colorado Committee to allow a cotrustee to pursue a broad range of remedies to address a cotrustee's breach of duty. The committee was concerned that the UTC language would be interpreted to require a cotrustee to engage in litigation to address a cotrustee's breach of duty.

704 (d) (2) The language was changed to provide adequate notice of the selection of a trustee to the Attorney General rather than requiring that the Attorney General concur with the selection.

705 (b) Language was added to insure that this section is not construed too broadly.

708 **Compensation of trustee.** The language was changed by the Colorado Committee to incorporate the existing Colorado Law which was enacted after extensive consideration and work by members of the Colorado Bar several years ago.

709 (b) The term reasonable was added to insure that the section applied to only reasonable advances.