

COLORADO UNIFORM TRUST CODE REVIEW

BOULDER COUNTY ESTATE PLANNING COUNCIL

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BY

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Brief History¹

The primary motivation for drafting the Uniform Trust Code arose from a recognition that the trust law in many States is thin – and there is a need for a Code to provide precise, comprehensive, and easily accessible guidance on trust law questions. On issues where the law is unclear or unknown, the Code will for the first time provide a uniform rule.

The UTC has been enacted in 33 jurisdictions in some form and is being considered in Illinois.² As a frame of reference, the Uniform Probate Code has only been enacted in about 20 states.

The committee of the Trust and Estate Section of the Colorado Bar Association that first reviewed the UTC, produced a bill for enactment in 2005. That effort failed for a variety of reasons, but primarily because the trust and estate legal community could not reach consensus on provisions of the UTC regarding creditor's claims. In the current effort to enact a trust code, and to avoid the conflict that prevented the entire act from being considered in 2005, provisions regarding creditor's claims (Part 5 of the UTC) have been reserved and are not part of the existing bill.

The Colorado Uniform Trust Code strives to maintain uniformity as much as possible. Changes to uniform law were made where necessary to retain important Colorado policy in existing laws. For example, the judicial tool box in C.R.S. §15-10-501, *et seq.*, the cost and compensation act in C.R.S. §15-10-601, *et seq.*, trust registration provisions, the pet trust statute, and many other unique aspects of trust law in Colorado, have been retained.

The new act, signed into law on April 26, 2018,³ with an effective date of January 1, 2019, will repeal Article 16 of Title 15, almost in its entirety. For the moment, both the provisions regarding Directed Trustees (C.R.S. §15-16-801, *et seq.*) and the Decanting Act, (C.R.S. §15-16-901, *et seq.*) will remain in Article 16. A committee of the Trust and Estate Section of the CBA is currently reviewing the Uniform Directed Trust Act, which, if enacted, would replace the existing Directed Trustee statute. It seems likely that the new Directed Trust statute and the Decanting Act will eventually be moved into (or near) the CUTC, once any minor inconsistencies in definitions are reviewed and addressed.

¹ These materials were prepared by Constance Tromble Eyster, and reviewed and edited by Stephen Brainerd, Marc Darling, Darla Daniel, and Carl Stevens for the Colorado Estate Planning Retreat in June of this year.

² The UTC has been enacted in Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

³ The enactment of the Colorado Uniform Trust Code could not have been accomplished without the dedicated efforts of the members of the two UTC Subcommittees who reviewed, analyzed, and revised the uniform law to create legislation appropriate for Colorado. The tireless and impressive efforts of these many individuals are deeply appreciated.

PART ONE: GENERAL PROVISIONS AND DEFINITIONS

I. Scope and Definitions.

- A. The CUTC applies to all trusts, charitable and non-charitable, oral and written, except for certain trusts with unique purposes, such as business trusts, land trusts, voting trusts, common trust funds, security arrangements, liquidation trusts, trusts created by a deposit arrangement in a financial institution, trusts created for paying debts or employee benefits, or any arrangement under which a person is a nominee or escrowee for another.
- B. Most of the definitions included in the CUTC will look familiar to practitioners, as they will be very similar to the definitions found in the UPC, C.R.S. §15-10-201. Some definitions, however, will be new or are unique to trusts.
1. “Alternative Dispute Resolution” is a defined term in the CUTC and its purpose will be discussed below. It is defined as “a method of non-judicial dispute resolution as set forth in the trust instrument, which may include but is not limited to a method prescribed under the uniform arbitration act (C.R.S. §13-22-201).” C.R.S. §15-5-103(2)
 2. “Beneficiary” includes a person who has a present or future interest in a trust, and a person (other than a trustee) who has a power of appointment over the property. A “beneficiary” does not include an appointee under a power of appointment unless or until the power is exercised and the trustee has knowledge of the exercise and identity of the appointee. C.R.S. §15-5-103(4)
 3. “Interested Person” has a substantially more limited meaning in the CUTC than in the UPC. In the CUTC, the term “interested person” is used primarily in Part 2 of the CUTC, which deals with judicial settlements, trust registration, and court action to address matters of trust administration. In the CUTC, “interested persons” are “qualified beneficiaries and other persons having a property right in or claim against a trust estate which may reasonably and materially be affected by a judicial proceeding under this Code. It also includes fiduciaries and other persons having authority to act under the terms of the trust.” C.R.S. §15-5-103(10). This definition was drafted to limit “interested persons” to individuals with a material interest in the trust issue at hand, and to dispense with individuals who have only a remote or tangential interest.

“Qualified Beneficiary” is a term that appears frequently in the CUTC, in particular in matters regarding disclosure, notice, and consent. The definition has previously been used in other uniform acts adopted into Colorado. A “qualified beneficiary” is a beneficiary who, on the date of the beneficiary’s qualification is “a distributee or permissible distributee of trust income or principal” or “would be a distributee

or permissible distributee of trust income or principal” if the interests of the current beneficiaries terminated on that date. C.R.S. §15-5-103(15) The term “Beneficiary” is also defined separately and includes present as well as future beneficial interests and holders of powers of appointment other than trustees. C.R.S. §15-5-103(4). Others such as “charities” and “beneficiaries” who notify the trustee may be treated as “qualified beneficiaries.” C.R.S. §15-5-110).

4. “Terms of a Trust” is a definition found in several places in current statutes. All of the definitions are similar, but not quite the same.⁴ The definition found in the CUTC is one that was crafted by consensus among practitioners involved in the drafting of this and other trust and estate statutes. The CUTC definition states “‘Terms of a Trust’ means the manifestation of the settlor’s intent regarding a trust’s provisions, as expressed in the trust instrument, or as may be established by other evidence in a judicial proceeding, or a nonjudicial settlement agreement pursuant to Section 15-5-111 or by alternative dispute resolution pursuant to Section 15-5-113.” The UTC would have allowed the terms of the trust to be defined by terms that “would be admissible” in a judicial proceeding. The committee reviewing the CUTC felt that this more liberal definition added a lack of clarity to the terms of the trust, and accordingly modified the definition to include only those terms established in a judicial proceeding or other formal means.

II. Default Statute.

The CUTC is primarily a default statute. Most of the provisions of the Code can be overridden by settlor intent as expressed in the trust instrument. Some provisions of the CUTC are mandatory, however, and cannot be modified. The provisions of the CUTC that cannot be modified are listed in C.R.S. §15-5-105, and are as follows:

- A. Minimum requirements for creating a trust. Part 4 of the CUTC governs what is required to create a trust, which is consistent with existing Colorado law. A trust is only created if (1) a settlor with capacity indicates intention to create a trust, or a statute,

⁴ Other definitions of “Terms of a Trust” are found in the Uniform Principal and Income Act, C.R.S. §15- 1-402(12)(“Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.); in the Uniform Power of Appointment Act, 15-2.5-102(19) (“Terms of the instrument” means the manifestation of the intent of the maker of the instrument regarding the instrument’s provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.); and the Colorado Uniform Trust Decanting Act, §15-16-902(28) (“Terms of the trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.)

or a statute, judgement or decree authorizes the creation of a trust, (2) the trust has a definite beneficiary, (3) the trustee has duties to perform, and (4) the same person is not sole trustee and beneficiary. Note that, with regard to the last factor, a person is not the “sole” beneficiary, even if that person is the sole current distributee, so long as there are beneficiaries with future interests in the trust. C.R.S. §15-5-402.

- B. The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. The trustee’s duties are substantially set forth in Part 8 of the CUTC. *See* C.R.S. §15-5-801 (Duty to Administer Trust); C.R.S. §15-5-802 (Duty of Loyalty); C.R.S. §15-5-814 (setting forth duties to act in good faith when exercising discretionary powers); C.R.S. §15-5-1008 (exculpatory term of a trust is unenforceable to extent it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).
- C. The requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful, not contrary to public policy and possible to achieve. *See* C.R.S. §15-5-404 (Trust Purposes).
- D. The power of the court to modify or terminate a trust under Sections 15-5-410 to 15-5-416. These Sections of the CUTC, discussed below, allow trusts to be terminated or modified by a court or by consent of beneficiaries (in certain circumstances). These statutory provisions relating to the powers of a court to modify or terminate a trust cannot be modified by the terms of a trust agreement.
- E. The power of the court under Section 15-5-702 to require, dispense with, modify, or terminate a bond. Section 702 of the CUTC generally requires a trustee to give bond only if the court finds that a bond is necessary to protect the interests of the beneficiaries. This power of the court is not modifiable by the terms of a trust.
- F. The power of the court under Section 15-5-708(2) to adjust a trustee’s compensation specified in the terms of the trust that is unreasonably low or high. Under Section 708(2) of the CUTC, the reasonableness of a trustee’s compensation as set forth in a trust agreement, can be raised or lowered by the court. The court’s determination of reasonableness shall be determined based on the factors set forth in the current cost and compensation act, C.R.S. §15-10-601, *et seq.*, and taking into consideration whether the current duties of the trustee are substantially different from those originally contemplated in the trust agreement. This power of the court is not modifiable by the terms of a trust.
- G. The duty under Section 15-5-813(2)(b) and (2)(c) to provide notice of the existence of an irrevocable trust, of the identity of the trustee, and of the right to request trustee’s

reports to current distributees or permissible distributees of such trust at any age, or to other qualified beneficiaries of such trust who have attained twenty-five years of age.

1. Under the CUTC, it is clear that if a beneficiary is currently eligible to receive distributions from a trust, then the trustee must provide certain minimum notifications to that beneficiary; which duty is consistent with current Colorado law (*see* C.R.S. §15-16-303). This provision is included in the CUTC specifically to prevent a settlor from waiving required notices – even if the settlor desires to prevent beneficiaries from having knowledge of a trust or the trustee’s bounty.
2. If a beneficiary is a “qualified beneficiary” (who is not eligible for current distributions), and over the age of 25, then the trustee must provide notifications to such persons as well. If the qualified beneficiary is not eligible for current distributions, and is under the age of 25, then the trust agreement can state that the trustee does not need to provide the mandatory notifications to such persons. This provision was included in the CUTC to allow settlors the option of preventing the trust or its contents from being disclosed to young persons who do not have a present interest in the trust. This latitude should not be confused with the trustee’s duties, which remain to act in the best interests of all beneficiaries, regardless of whether such persons are aware of the existence of the trust.
3. Under current C.R.S. §15-16-303, a “beneficiary” is entitled to this information. A “beneficiary” under the CPC includes any person who has any present or future interest in a trust, vested or contingent. This CPC definition is potentially broader in scope than the CUTC, and leaves some uncertainty regarding who is entitled to receive information regarding trust matters. The CUTC adds more clarity regarding the persons to whom a trustee owes duties of notification.

H. The duty under Section 15-5-813(1) to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust. Even though a settlor can waive a trustee’s duty to provide notice of a trust to a qualified beneficiary who is under the age of 25 and who is not a current beneficiary, if that person discovers their interest and requests such information, the trust agreement cannot waive the trustee’s obligations to provide such information to the qualified beneficiary.

I. The effect of an exculpatory term under Section 15-5-1008.

1. Generally, Section 1008 of the CUTC provides that an exculpatory term of a trust will be unenforceable if it (a) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries, or (b) was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

2. In addition, an exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. As a practice pointer, in circumstances where the drafting attorney will serve as trustee or if a bank or other trust company will serve as trustee and has requested that certain language be included in the trust agreement, then those provisions should be specifically called to the attention of the settlor in writing. A drafting attorney/trustee should also suggest to the client that he or she may want to obtain independent counsel to review exculpatory terms.⁵
- J. The rights under Sections 15-5-1010 to 15-5-1013 of a person other than a trustee or beneficiary. These Sections of the CUTC generally address whether and to what extent a trustee is liable (personally or in a fiduciary capacity) to third parties. The class of potential claimants can include parties to a contract; persons injured by an act of the trustee; persons impacted by the acts of the trustee when serving as a general partner of a partnership; and banks, institutions, or other persons relying on the trustee's authority to act on behalf of the trust. The rights of these third parties cannot be modified by the terms of the trust.
- K. Periods of limitation for commencing a judicial proceeding. A settlor cannot alter statutes of limitations applicable to trusts such as those found in C.R.S. §15-5-603 (period of limitation for contesting the validity of a revocable trust – formerly C.R.S. §15-16-704) and C.R.S. §15-5-1005 (limitation of action against a trustee).
- L. Consistent with the terms of the trust and the provisions of this Code, the power of the court to take such action and exercise such jurisdiction not inconsistent with settlor's intent, as may be necessary in the interests of justice. The original uniform language for this provision was altered slightly in the CUTC to make clear that while a settlor cannot modify a court's power to take such action as is necessary in the interests of justice, the court's authority can be modified in the trust agreement to direct that such action can only be taken in a manner consistent with the settlor's intent.
- M. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 15-5-203 and 15-5-204, unless the trust instrument requires alternative dispute resolution. Under Section 203 of the CUTC, the District Court (or

⁵ Although beyond the scope of these materials, while it is permissible for a lawyer to serve both as scrivener and as fiduciary, the lawyer should be aware of the possible conflicts of interest that can arise in such circumstances, as set forth in C.R.P.C. 1.7 and 1.8. Further information specifically on exculpatory clauses in such circumstances can be found in the ACTEC Commentaries on Model Rules of Professional Conduct (5th ed. 2016), and the ACTEC Engagement Letters: A Guide for Practitioners (2017).

in the case of the City and County of Denver, the Probate Court) is given jurisdiction of proceedings concerning trusts and their administration. Section 204 specifies the proper venue for proceedings involving trusts. These rules governing jurisdiction and venue cannot be modified in the trust agreement, however, a settlor can require parties to first pursue some form of alternate dispute resolution before filing a court action.

- N. If Part 5 regarding creditor's claims is added to the CUTC in the future, then it is likely that another mandatory provision will be added. The uniform language of the UTC provides that a settlor cannot modify the effect of a spendthrift provision or the rights of certain preferred creditors and assignees as set forth in the Code. This language was omitted from the CUTC, pending possible future enactment of Part 5.

III. Governing Law and Place of Administration.

A. Governing Law.

1. Section 107 of the CUTC allows the settlor the ability to designate the law that applies to the terms of the trust, unless designating the law of that jurisdiction is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. The jurisdiction selected need not have any other connection to the trust. However, public policies in other states may invalidate the settlor's choice of law and should be reviewed carefully in this regard. Our current statute, C.R.S. §15-11-703, is similar to C.R.S. §15-5-107. That statute states that a trust instrument will be governed by the law chosen by the settlor unless contrary to provisions relating to the elective share, exempt property and family allowances, and other public policies of the State of Colorado.
2. If the settlor does not select a governing law, then the law of the jurisdiction with the most significant relationship to the matter at issue will apply. C.R.S. §15-5-107(1)(b).

B. Principal Place of Administration.

1. Similar to Section 107, under C.R.S. §15-5-108, the settlor can choose the principal place of administration, but only if the trustee's principal place of business is located in or the trustee is a resident of that jurisdiction, or the administration occurs in the jurisdiction.
2. Section 108 of the CUTC also provides a process for the trustee to use when changing the place of administration. The trustee must provide 60-day notice of the transfer of the place of administration to qualified beneficiaries. If a qualified beneficiary objects, then the transfer is suspended, until the matter is resolved – such as by a nonjudicial settlement agreement or obtaining court approval.

IV. Notice.

- A. Provisions regarding virtual representation are governed by Part 3 of the UTC. Sections 109 and 110 of the CUTC address a trustee's obligations regarding notice of matters set forth in the CUTC. Notice of a judicial proceeding (other than a judicial settlement agreement under the CUTC), must be given as required by applicable rules of civil procedure, the CPC, and the Colorado Rules of Probate Procedure. C.R.S. §15-5-109(4)
- B. Notice under the CUTC must be given in a manner reasonably likely to result in receipt. It can be done by mail, personal delivery, or by electronic message. If the trustee is not able to identify the person entitled to notice, or the location of a person is unknown, then the trustee does not need to provide notice. In portions of the Code that require the consent of a beneficiary, however, the fact that a beneficiary is unknown or cannot be found, does not waive the need for their consent. Their consent may be obtained virtually, but it cannot be ignored.
- C. Notice sometimes must be sent more broadly than the Code might initially suggest. Under Section 110 of the CUTC, a beneficiary who requests notice must be treated as a qualified beneficiary, even if they do not otherwise fall within that definition. Other persons treated as qualified beneficiaries include a person appointed to enforce a pet trust, or the attorney general with respect to a charitable trust with its principal place of administration in this State.

V. Nonjudicial Settlement Agreements.

- A. Similar to existing statute C.R.S. §15-12-912 (Private agreements among successors to decedent binding on personal representative), the CUTC allows certain persons impacted by an issue involving trusts to reach an enforceable agreement without court approval. C.R.S. §15-5-111.
- B. The statute identifies the persons who must be included in the nonjudicial settlement agreement as those persons "whose interests in the trust would be materially affected by its provisions were the settlement to be approved by the court at the time it was entered into by the parties." The intent behind this portion of the CUTC is to clarify the class of persons who are critical to the settlement agreement. In some instances, this may be broader than the persons who would have standing as parties in a judicial proceeding.
- C. Nonjudicial settlement agreements will not be valid if they would violate a material purpose of the trust, or if it includes terms and conditions that could not be properly approved by a court.

- D. Persons whose interest may be affected by a nonjudicial settlement agreement can request that the court approve or disprove the settlement agreement.

VI. Coordination with Other Statutes.

The CUTC expressly incorporates the rules of construction applicable to trusts that may exist in other Colorado statutes, including but not limited to the statutes governing the interpretation and disposition of property under Articles 10 – 17 of the Colorado Probate Code. Those sections of the CPC include, for example, statutes dealing with the identification of descendants who are adopted or born by assisted reproduction technologies, class gifts, simultaneous death, the rule against perpetuities, disclaimers, slayer statute, and revocation upon dissolution of marriage, among others. These statutes as they apply to trusts and are not inconsistent with the CUTC, will continue to apply under C.R.S. §15-5-112.

VII. Alternative Dispute Resolution.

Unique to the CUTC is a provision addressing a settlor’s decision to designate in a trust instrument a method of alternative dispute resolution. These clauses, if included in a trust, will be valid and enforceable, unless they can be held invalid on the same grounds as a trust would be deemed invalid (for example, lack of capacity or undue influence). Whether or not a settlor includes an ADR provision in a trust agreement, the court may order parties to a trust proceeding to participate in some form of ADR, so long as the court’s order is consistent with any ADR provision in the trust agreement.

PART TWO: JUDICIAL PROCEEDINGS

I. Role of Court in Administration of a Trust.

- A. Sections 201 through 204 of the CUTC, consistent with current Colorado law, provide that a court can intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person, or as provided by law. Although a list of the kinds of matters in which a court can act are listed in Section 201 (expanding upon the terms of existing C.R.S. §15-16-201), this list is not exclusive.
- B. The impact of the new definition for “interested person” (discussed above in Part One at paragraph B3, on page 2 above) will be felt in several areas of the CUTC (e.g., non-judicial settlement agreements and when giving notice) but most pointedly in judicial proceedings involving trusts. Litigants will now have the ability to limit the number of participants in a proceeding to just those persons who have important interests in the outcome of the issues that are the subject of the proceedings. By reducing the universe

of potential parties in proceedings, the CUTC intends to limit the scope and expense of going to court. There will still be times when a prudent litigant will wisely choose to include all trust interests in a proceeding (e.g., when a modification or termination of a trust is at issue), but in many cases the smaller the crowd, the quicker and generally less expensive the result.

- C. Whether or not a court has jurisdiction over a trustee or a beneficiary is governed by Sections 202 and 203. Generally, a trustee submits to personal jurisdiction in this State if the trust has its principal place of administration here, or if the trust is registered in this State. A beneficiary is subject to the general jurisdiction of Colorado courts if the trustee is, and by accepting a distribution from the trust, the court also acquires personal jurisdiction over the beneficiary. Note: these are not the exclusive ways in which personal jurisdiction over the trustee or a beneficiary may attach.
- D. As discussed above, the provisions of Sections 203 (subject matter jurisdiction) and 204 (venue) cannot be modified by the trust agreement, except by an ADR clause (see discussion in Part One, paragraph VII, on page 9 above). The CUTC does, however, allow a settlor to expressly choose a county of venue in the trust agreement, if that county has a substantial relationship to the present administration of the trust.

II. Trust Registration.

- A. The current trust registration system in Colorado (found in C.R.S. §15-16-101 through 105) has been substantially preserved in Sections 205 – 209 of the CUTC. Under the CUTC, however, registration of a trust is optional unless requested by a beneficiary. Although the registration of a trust will no longer be mandatory under the CUTC, a trustee might nonetheless choose to register the trust in order to take advantage of the higher priority for venue, or to establish a principal place of administration under C.R.S. §§15-5-202 and 15-5-204.
- B. The trust registration provisions in the CUTC also modify the existing statutes by specifying the persons who receive a copy of the trust registration statement. Section 206(3) provides that upon registering a trust, the trustee must provide notice to all cotrustees, qualified beneficiaries, and other fiduciaries and persons having authority to act under the terms of the trust. A trustee may release a trust registration statement through the process specified in C.R.S. §15-5-209, which replaces the existing judicial process contemplated in Rule 8.6 of the Colorado Rules of Probate Procedure.

III. Judicially Approved Settlement Agreements.

The UTC did not include a provision addressing the process for judicially approving a settlement agreement. Colorado practitioners who wanted clarity on this issue, such as exists in sections of the CPC (*see* C.R.S. §§15-10-403, 15-12-1101, and 15-12-1102), added Section 210 for that purpose. “Interested Persons” must receive notice of any request for a judicially

approved settlement agreement and the settlement must be set forth in writing. A settlement approved by the court will be binding on all parties thereto if the court finds that the matter being settled was brought in good faith and that the proposed settlement is just and reasonable.

PART THREE: REPRESENTATION

I. Representation Generally.

- A. Representation under Article 3 is useful in many contexts under the CUTC, such as when settling a dispute, giving notice of trust registrations, accounts, and other matters, or acquiring consents. It is important to note, however, that the representation rules under Part 3 of the CUTC do NOT apply for the purpose of giving notice of a judicial proceeding. Notice of a judicial proceeding must comply with the Rules of Civil Procedure, the Colorado Rules of Probate Procedure, and the CPC. *See* C.R.S. §15-5-109. Accordingly, when giving notice of a judicial proceeding, practitioners should continue to look to C.R.S. §15-10-403, or other applicable rules of procedure, for matters of representation. An exception to this rule is with regard to “judicially approved settlements” under C.R.S. §15-5-210, which expressly allows notice to be given as provided in Part 3.
- B. Consistent with current Colorado law, under the CUTC, a person represented by another person, is bound by notice given to that other person. Section 301 of the CUTC also provides that consent given by a person representing another person is binding unless the person being represented objects before the consent becomes effective. The representative of a settlor who lacks capacity can receive notice and give consent on behalf of the settlor. The settlor, however, may not represent and bind a beneficiary with respect to the termination or modification of a trust.
- C. The holder of a general *testamentary* power of appointment will be able to represent and bind permissible appointees and takers in default, so long as there is no conflict of interest between such persons. Section 302 of the CUTC expressly cross-references current C.R.S. §15-10-403(3)(a), which provides that orders binding a *presently exercisable* general power of appointment, bind others to the extent their interests are subject to the power.

II. Fiduciaries, Parents, Persons with Substantially Identical Interests.

- A. Section 303 of the CUTC governs whether fiduciaries or parents can represent and bind a person. This section of the Code is substantially similar to current C.R.S. §15-10-403. As one might expect, a conservator, guardian, agent with power of attorney, trustee and personal representative can all bind the persons they represent (in the priority set forth in the statute), so long as there is no conflict of interest. Note that,

just as set forth under current law, a guardian can only bind a ward if a conservator has not been appointed.

- B. A parent can bind a minor child, and under a provision unique to the CUTC, can appoint another person to represent and bind the child, so long as no guardian or conservator has been appointed and so long as there is no conflict of interest between the representative and the child. Language was included in C.R.S. §15-5-303(1)(f) to prohibit a parent, who is also the settlor, from appointing a person who is related or subordinate to the settlor as a representative. Under CUTC Section 301.5(4), a representative appointed by a parent must act in good faith on behalf of the person represented. As used in this section of the CUTC, “good faith” means “honesty in fact.”
- C. Unless otherwise represented, a minor, incapacitated person, unborn person, an unknown person, or a person whose location cannot be ascertained, may be represented by a person having a substantially identical interest, if there is no conflict of interest. This section 304 of the CUTC is nearly identical to existing C.R.S. §15-10-403(3)(d).

III. Appointment of Representative.

A court can appoint a representative to receive notice, give consent, or otherwise act on behalf of a minor, an incapacitated person, a protected person, an unborn individual, a person whose identity is unknown, or a person whose location cannot be ascertained, if that person is not otherwise represented under Part 3 of the CUTC. C.R.S. §15-5-305. Under CUTC Section 301.5(4), a representative appointed by the court must act in good faith on behalf of the person represented.

PART FOUR: **CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST**

I. Creating a Trust.

- A. Sections 401 and 402 of the CUTC set forth the methods of creating a trust and the requirements for creation. Under Section 401, three of the four methods of creating a trust require a transfer of property (including a testamentary transfer by pour-over will), although these methods are not exclusive. Section 401 also expressly acknowledges that creation of a trust can be accomplished by statute, judgment, or decree authorizing the creation.
- B. Regardless of the method of creation, a trust can nonetheless fail if it does not meet certain requirements for creation set forth in Section 402. These requirements, which cannot be modified by the trust agreement, (see C.R.S. §15-5-105(2)(a)) are:

1. The Settlor must have capacity to create a trust and indicate an intention to create the trust, or a statute, judgment or decree must authorize the creation of a trust.
 2. The trust must have a definite beneficiary or is a charitable trust, a pet trust, or a trust for a noncharitable purpose as set forth in C.R.S. §15-5-409 (such as a cemetery trust). A definite beneficiary is one that can be ascertained now or in the future, subject to the rule against perpetuities. A trustee can have the power to select a beneficiary from an indefinite class.
 3. The trustee must have duties to perform.
 4. The same person cannot be both the trustee and the sole beneficiary, under the doctrine of merger.
- C. A trust must have purposes that are lawful and not contrary to public policy. *See* C.R.S. §15-5-404. This requirement also cannot be modified by the terms of the trust agreement under C.R.S. §15-5-105(2)(c). A trust will also be found invalid if induced by fraud, duress or undue influence. *See* C.R.S. §15-5-406.
- D. A trust is valid if its creation complies with the jurisdiction where the trust instrument was executed; where the settlor was domiciled, had an abode, or was a national; where the trustee was domiciled or had its place of business; or where any trust property was located. Section 15-5-403. This part of the CUTC allows a trust to be valid if it complies with the law in a state where the trustee or settlor had significant contacts. Section 403 of the CUTC is slightly broader than its companion under the CPC, C.R.S. §15-11-506. That section of the probate code states that a written will is valid if its execution complies with the law of the place where the will was executed, or where the testator was domiciled, had a place of abode, or was a national at the time of execution or at the time of death. Under Section 403, the validity of trust is tied not just to the moment the settlor signs a trust agreement, but to the entire process of creation, which includes the funding of the trust under C.R.S. §15-5-401.
- E. A trust need not be evidenced by a written instrument. Under C.R.S. §15-5-407, an oral trust and its terms may be established by clear and convincing evidence.

II. Pet Trusts and Other Noncharitable Trusts.

CUTC §§15-5-408, -409, and 409.5 simply move existing statute C.R.S. §15-11-901, governing pet trusts and other noncharitable trusts without a definite beneficiary (such as cemetery trusts) into the CUTC. No changes were made to those statutes other than to slightly modify their formatting.

III. Modification or Termination of a Trust.

A. Modification or Termination by Consent.

1. Section 411 of the CUTC governs modification or termination of a trust by consent and court approval. These provisions codify terms appearing in the Restatement (Second) of Trusts §338, and Restatement (Third) of Trusts §65.
2. Under C.R.S. §15-5-411(1), a settlor and all of the beneficiaries can consent to the modification or termination of a trust, even if contrary to a material purpose of the trust. This ability of a settlor and beneficiaries to join together to amend or terminate an irrevocable trust has already been recognized by the Colorado Court of Appeals (*In re Green Valley Financial Holdings*, 32 P.3d 643, 646 (Colo. App. 2001)). A settlor's consent under this section can be given by a representative only in limited circumstances. An agent under a power of attorney can give consent to the extent expressly authorized in the document or the trust. A conservator or guardian for the settlor can consent with the approval of the court. On a practical note, practitioners should consider whether the consent of the settlor to the modification or termination of a trust would have an adverse tax result, prior to proceeding under C.R.S. §15-5-411(a).
3. Without the consent of the settlor, a trust may be terminated upon the consent of all of the beneficiaries if the court concludes either (a) that continuing the trust is not necessary to achieve any material purpose of the trust, C.R.S. §15-5-411(2)(a), or (b) that modification is not inconsistent with a material purpose of the trust. C.R.S. §15-5-411(2)(b).
4. While a "material purpose" is not defined in the statute, Section 411(3) states that a spendthrift provision is NOT presumed to constitute a material purpose of the trust. If the spendthrift provision is intended to be a material term of the trust, it would be best for a settlor to expressly state that intent in the trust agreement.
5. Even if not all of the beneficiaries consent to a proposed modification or termination, the court may nonetheless approve the modification or termination, if the court believes that the trust could have been terminated or modified if all the beneficiaries had agreed, and the interests of a beneficiary who did not consent will be adequately protected. C.R.S. §15-5-411(5).

B. Unanticipated Circumstances.

The court may also modify administrative or dispositive terms of a trust or terminate a trust, as a result of circumstances unanticipated by the settlor, if doing so will further the purposes of the trust. Modification should be done in accordance with the settlor's

probable intention. The court can also modify administrative terms of a trust if the existing terms would result in impractical, wasteful, or impaired trust administration. C.R.S. §15-5-412. This provision broadens the court's ability to provide equitable deviation to terminate or modify a trust in a manner consistent with the provisions of Restatement (Third) of Trusts, §66.

C. Cy Pres.

The doctrine of *cy pres* is codified in CUTC Section 413, permitting a court to modify a trust created for charitable purposes if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful. If a failure of a charitable purpose would result in distribution of trust property to a noncharitable beneficiary, then the terms of the trust will prevail over the court's authority to modify the trust only if the trust property reverts to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust's creation.

D. Uneconomic Trusts.

A trust worth less than \$100,000 may be terminated by the trustee, after notice to the qualified beneficiaries, if the trustee concludes that the value of the trust property is not sufficient to justify the cost of administration. In addition, a court may modify or terminate a trust, or remove a trustee, if the court determines that the trust is uneconomical. C.R.S. §15-5-414

E. Correction of Mistakes and Modification to Achieve Tax Objectives.

Sections 415 and 416 of the CUTC previously were codified as C.R.S. §§15-11-806 and -807. The CUTC brings those provisions back into this Part 4.

F. Combination or Division of Trusts.

Helpfully, the CUTC specifically allows a trustee the ability to combine or divide trusts after notice to qualified beneficiaries. Section 15-5-417 permits a trustee to combine trusts or divide trusts, even if the terms of the trusts are not identical, so long as the result does not impair the rights of any beneficiary or adversely affect the purposes of the trust. The combination or division of trusts does not require approval of the court.

PART 5: CREDITOR'S CLAIMS, SPENDTHRIFT AND DISCRETIONARY TRUSTS

[Reserved] As noted in the brief history Part 5 was reserved due to controversy when the UTC was introduced to Colorado in 2005. The committee will continue to study this part and anyone with an interest is invited to attend committee meetings.

PART 6: REVOCABLE TRUSTS

Part 6 of the UTC was previously enacted in Colorado as C.R.S. §§15-16-702 through -704. Those provisions have been transferred to the CUTC as C.R.S. §§15-5-601 through -603.

PART 7: OFFICE OF TRUSTEE

I. Being a Trustee.

A. Accepting or Declining Trusteeship.

1. A person becomes a trustee by accepting the trusteeship in the method provided in the trust. If the trust does not provide a method for accepting the trusteeship, then actions such as accepting delivery of trust property, exercising powers as a trustee, or performing duties of a trustee can constitute acceptance of the trusteeship.
2. A person can decline the trusteeship, and if a person knows they have been appointed but fails to act within a reasonable time, they will be deemed to have rejected the trusteeship. A person can, however, act to preserve trust property, without accepting the trusteeship, if they reject the trusteeship within a reasonable time thereafter. C.R.S. §15-5-701(2), (3).
3. The methods identified in Section 701 of the CUTC for accepting or declining a trusteeship are not exclusive. Even if the trust agreement specifies a method for accepting or declining the trusteeship, those methods will not be exclusive unless the method is described as “sole” or “exclusive” or similar language in the trust agreement. This broadening of the methods for accepting or declining trusteeship is an incorporation of current C.R.S. §15-16-702, enacted in response to the Colorado Court of Appeals decision, *In re Estate of McCreath*, 240 P.3d 413, 421 (Colo. App. 2009).

B. Bond. A trustee may be required by the court or to give a bond, if the court finds that it is needed to protect the interest of the beneficiaries or the trust agreement requires a bond and the court has not waived that requirement. C.R.S. §15-5-702. The court’s ability to require a bond cannot be modified by the terms of the trust agreement. C.R.S. §15-5-105(2)(f).

C. Resignation of Trustee. Again providing default rules, the CUTC identifies a method for resigning as trustee by providing 30-day notice to the qualified beneficiaries, the settlor (if then living), and all cotrustees. A trustee can also resign with the approval of the court. C.R.S. §15-5-705.

D. Removal of Trustee.

1. A trustee can be removed by a court upon the request of a settlor, cotrustee, or a beneficiary. C.R.S. §15-5-706. The court may also remove a trustee on its own initiative.
2. The court's power to remove a trustee is limited to circumstances in which there has been a serious breach of trust, where the lack of cooperation among cotrustees impairs the administration of the trust, or where the removal would be in the best interests of the beneficiaries because of the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively.
3. The court also has the power to remove a trustee in circumstances where (a) all of the qualified beneficiaries consent (or there has been a substantial change in circumstances), and (b) the removal serves the interests of all of the beneficiaries, the removal is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available. This section of the CUTC, found in 706(2)(d), may provide relief to beneficiaries who are dissatisfied with an existing trustee, but were not given a removal power in the terms of the trust agreement – for example, because the trust was drafted at a time when it was less common to include a removal clause in the trust agreement.
4. When assessing whether removal of a trustee would be in the “interests of the beneficiaries,” this assessment will be made based on the interests of the beneficiaries as they define for themselves, but rather on the beneficial interests of the beneficiaries as provided in the terms of the trust. *See*, C.R.S. §15-5-103(4)(11)(defining “interests of the beneficiaries”).

E. Compensation of Trustee. Section 708 of the CUTC makes clear that a trustee is entitled to compensation, whether or not the terms of the trust agreement specify the amount. The reasonableness of a trustee's compensation will be determined under the cost and compensation act found in C.R.S. §15-10-601, *et seq.* The court's ability to adjust a trustee's compensation is a power that cannot be modified by the terms of the trust. C.R.S. §15-5-105(2)(g).

F. Reimbursement for Expenses. A trustee is entitled to be reimbursed for expenses that were *properly* incurred in the administration of the trust. In addition, a trustee can be reimbursed for expenses *not properly* incurred in the administration of the trust, but only to prevent unjust enrichment to the trust.

II. Cotrustees.

A. The CUTC provides default rules governing cotrustees, which like most other portions of the CUTC can be changed by express terms of the trust. For example, Section 703 states that cotrustees can act by majority decision if they are unable to achieve

unanimous agreement. Further, if there is a vacancy in the cotrusteeship, the other cotrustees may act for the trust without the need to fill the vacancy. C.R.S. §15-5-703.

- B. Section 703 also addresses delegation among cotrustees and the liability of cotrustees for actions of other cotrustees.
 - 1. A cotrustee may not delegate to another cotrustee a function that the cotrustees are reasonably expected to perform jointly. C.R.S. §15-5-703(5); -703(8).
 - 2. Cotrustees can decline to participate in the action of another cotrustee and avoid liability for that action, except that a cotrustee must exercise reasonable care to prevent another cotrustee from committing a serious breach of trust and must exercise reasonable care to pursue a remedy for a cotrustee's serious breach of trust. C.R.S. §15-5-703(6)(7)

III. Vacancy in Trusteeship.

If there is a vacancy in the trusteeship, Section 704 provides default rules for filling that vacancy, as needed, including who has priority for serving as a successor trustee. The CUTC retains the court's authority to appoint an additional trustee or special fiduciary, even when there is no vacancy, if the court considers the appointment necessary for the administration of the trust.

PART 8: DUTIES AND POWERS OF TRUSTEE

I. Duties

- A. Administration of the Trust. The CUTC retains the traditional duties of the trustee to administer a trust in good faith, in the best interests of the beneficiaries, and in accordance with its terms. C.R.S. §15-5-801. This duty cannot be modified by the terms of the trust. C.R.S. §15-5-105(2)(b).
- B. Loyalty. A trustee's duty of loyalty is codified in Section 802 of the CUTC, which includes detailed provisions regarding self-dealing and other transactions involving a trustee's conflict of interest.
 - 1. In instances of self-dealing, the transaction at issue can be voided unless the transaction was authorized by the terms of the trust, the transaction was approved by the court; the statute of limitations for addressing the matter has expired, the beneficiary consented to the conduct, ratified the transaction, or released the trustee with respect to the transaction; or the transaction involves a contract or claim in which the trustee was involved prior to becoming trustee.
 - 2. A transaction between the trustee and another person will be presumed to be an act of self-dealing if it is entered into between the trustee and his or her spouse, between

the trustee and his or her descendants, siblings, parents (or their spouses), between the trustee and his or her agent or attorney, or between the trustee and a company in which the trustee has a significant interest. C.R.S. §15-5-802(3).

3. Transactions between the trustee and a beneficiary that do not involve trust property but occur during the existence of the trust, and from which the trustee retains an advantage, are also voidable unless the trustee proves that the transaction was fair to the beneficiary. C.R.S. §15-5-802(4).
 4. Transactions not concerning trust property in which the trustee engages in an individual capacity, is a conflict of interest if the transaction concerns an opportunity properly belonging to the trust. C.R.S. §15-5-802(5).
 5. A trustee, primarily a bank or trust company, who invests in securities of an investment company to which the trustee or its affiliate provides services, is not a conflict of interest if the bank complies with the Colorado Uniform Prudent Investor Act. Fees can be charged for these services rendered in a capacity, other than trustee, however the trustee has to provide annual notice of those fees to the persons entitled to receive an annual report. C.R.S. §15-5-802(6).
 6. Certain transactions that are fair to the beneficiaries are not precluded by the CUTC, such as agreements relating to the appointment or compensation of the trustee, transactions involving the same person as trustee and as a fiduciary in another capacity (such as conservator, guardian, personal representative, or trustee of another trust), deposit of funds in a financial institution operated by the trustee, and advancements by the trustee for the protection of the trust. C.R.S. §15-5-802(8).
 7. If a trustee is contemplating a transaction that may be precluded under the CUTC, then a court may appoint a special fiduciary to make a decision regarding the proposed transaction.
- C. Impartiality and Prudence. The duties of a trustee to act impartially and to administer a trust in the manner of a prudent person are codified in Sections 803 and 804 of the CUTC. These duties are currently set forth in C.R.S. §15-16-302 (which will be repealed) and in the Colorado Uniform Prudent Investor Act, §15-1.1-101, *et seq.* Upon enactment of the CUTC, these Sections should be read in concert with the Prudent Investor Act. A trustee with special skills or expertise, has a duty to use those special skills or expertise in the administration of the trust. C.R.S. §15-5-806, see also C.R.S. §15-1.1-102(8)(f). The trustee must also take reasonable steps to collect, control and protect trust property. C.R.S. §§15-5-809, -812.
- D. Delegation of Duties by Trustee. A trustee may delegate his or her duties to another person, but must exercise reasonable care in selecting the agent, establishing the scope

and terms of the delegation, and periodically reviewing the agent's actions. The trustee has an ongoing duty to monitor the agent's actions. If the trustee complies with these duties, the trustee will not be liable for the decisions or actions of the agent to whom the duty or function was delegated. C.R.S. §15-5-807, see also, C.R.S. §15-1.1-109 (Delegation of Investment and Management Functions).

- E. Duty to Keep Records and Identify Trust Property. The trustee must keep the trust property separate from the trustee's own property, and must keep adequate records of the administration of the trust. C.R.S. § 15-5-810. The trustee must title trust assets in the name of the trust, with the exception of tangible personal property that typically does not have a title document, and property held in nominee form. The CUTC also allows a trustee to invest property belonging to two or more trusts as a whole, so long as the trustee maintains adequate records clearly indicating each trust's interest. This provision of the CUTC is an exception to existing statute C.R.S. §15-1-501, which requires a fiduciary to keep the property of each fiduciary account separate and distinct from the property of every other fiduciary account.
- F. Defense of Claims. The trustee has a duty to take reasonable steps to enforce claims of the trust and defend claims against the trust of which the trustee has knowledge. C.R.S. §15-5-811. In addition, a trustee must take reasonable steps to compel a former trustee or other person to deliver property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee. C.R.S. §15-5-812.
- G. Duty to Inform and Report. The trustee has duties to keep beneficiaries informed, which are similar to the duties that currently exist in C.R.S. §15-16-303, but which are much more detailed and specific.
1. The trustee must keep qualified beneficiaries reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests. A trustee shall also promptly respond to requests for information related to the administration of the trust, unless unreasonable under the circumstances. §15-5-813(1). These are mandatory duties that cannot be changed by the terms of the trust. C.R.S. §15-5-105(2)(i).
 2. Upon request of a qualified beneficiary, a trustee must furnish the beneficiary with a copy of the portions of the trust agreement that describe or affect the beneficiary's interest. C.R.S. §15-5-813(2)(a).
 3. Within 60 days after accepting a trusteeship, the trustee shall notify the qualified beneficiaries of the acceptance and of the trustee's contact information. C.R.S. §15-5-813(2)(b). This is also a mandatory term that cannot be modified by the terms of a trust, except with regard to certain qualified beneficiaries who have not attained the age of 25. C.R.S. §15-5-105(2)(h). Notwithstanding the foregoing, this part of

the CUTC does not apply to a trustee who accepts a trusteeship before the effective date of the CUTC, to an irrevocable trust created before that effective date, or to a revocable trust that became irrevocable before the effective date. C.R.S. §15-5-813(5).

4. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, the trustee shall notify the qualified beneficiaries of the trust's existence, the identity of the settlor, of the right to request portions of the trust agreement that describes the beneficiary's interest, and the right to a trustee's report. C.R.S. §15-5-813(2)(c). This is a mandatory term that cannot be modified by the terms of a trust, except with regard to certain qualified beneficiaries who have not attained the age of 25. C.R.S. §15-5-105(2)(h). Notwithstanding the foregoing, this part of the CUTC does not apply to a trustee who accepts a trusteeship before the effective date of the CUTC, to an irrevocable trust created before that effective date, or to a revocable trust that became irrevocable before the effective date. C.R.S. §15-5-813(5).
5. The trustee must notify qualified beneficiaries, in advance, of any change in the method or rate of the trustee's compensation. C.R.S. §15-5-813(2)(d).
6. A report of the trust property, liabilities, receipts, and disbursements (including trustee compensation), a list of the trust assets and their values (if feasible) must be sent to distributees and permissible distributees of trust income and principal on an annual basis, whether or not those persons request the report. C.R.S. §15-5-813(3). Other qualified beneficiaries are also entitled to such information upon request. A qualified beneficiary may waive the right to receive an annual report or other information, and may later withdraw that waiver.
7. In advising trustees regarding their duties to inform and report to beneficiaries, practitioners should be aware that even though a trustee may not be required to provide information or reports to a particular beneficiary, the person requesting information may nonetheless have an interest or right in the trust that is impacted by the trustee's actions, and which is actionable. In other words, these provisions addressing a trustee's duties do not grant the trustee protection from liability if an action for breach of trust is brought by someone who was not strictly entitled to receive information or other reports from the trustee.

II. Powers.

A. Discretionary Powers.

1. A trustee with discretionary power of distribution must exercise that power in good faith, even if terms such as “sole” or “absolute” discretion are used to describe the trustee’s authority. A trustee’s exercise of discretion will necessarily be governed by the terms and purposes of the trust, the interests of the beneficiaries, and relevant fiduciary duties. A trustee will not be liable for the exercise or failure to exercise a discretionary power if done honestly and with proper motive. C.R.S. §15-5-814.
2. As tax savings matters, the CUTC limits a trustee’s authority to make distributions to himself or herself as a beneficiary. Such distributions must be made only in accordance with an ascertainable standard. Further, the trustee cannot make distributions that would satisfy the trustee’s personal legal obligations. C.R.S. §15-5-814(2). These provisions do not apply to a revocable trust, a trust which qualifies for the federal estate or gift tax marital deduction, or a §2503(c) trust created for a minor. Further, as with most of the CUTC, these statutes are default provisions and may be expressly overridden by the terms of the trust. C.R.S. §15-5-814(4). These savings clauses currently exist in substantially similar form in C.R.S. §15-1-1401.

B. General and Specific Powers.

1. A trustee has all of the powers conferred by the trust and other powers appropriate to achieve the investment or management of the trust. In addition, the CUTC expressly incorporates the powers afforded to trustees under the Colorado Fiduciaries Powers Act, C.R.S. §15-1-801, *et seq.*
2. In addition to the general powers granted to a trustee, the CUTC grants specific powers to a trustee under §15-5-816, most of which are very similar to those found in the Colorado Fiduciary Powers Act. All of these powers are subject to alteration by the terms of the trust. One power of note are those powers that allow the trustee to take action with respect to the trust property to address concerns about the possible violation of environmental laws. C.R.S. §15-5-816(1)(m). The trustee also the power to settle claims, including by alternative dispute resolution methods. C.R.S. §15-5-816(1)(n),(w).

C. Distribution On Termination.

1. Upon termination, the trustee can send the beneficiaries a proposal for distribution. The beneficiary will have 30 days to object to the proposal, which right expires at the end of the 30 days, but only if the trustee notified the beneficiary of the right to object and the time period involved. C.R.S. §15-5-817(1). A beneficiary’s right to

object is not lost, however, at the end of the 30-day period with respect to matters not disclosed in the proposal for distribution.

2. A trustee should act expeditiously in making distributions upon termination of a trust, but can keep a reasonable reserve for final debts and expenses. C.R.S. §15-5-817(2).
3. A release of liability obtained by the trustee from a beneficiary will be invalid if it was induced by improper conduct of the trustee, or the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach. C.R.S. §15-5-817(3).

PART 9: UNIFORM PRUDENT INVESTOR ACT

[Reserved]

PART 10: LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

I. Remedies and Damages for Breaches of Trust.

- A. Remedies. If a trustee violates a duty owed to a beneficiary, then the court may impose a variety of remedies for that breach including the following set forth in CUTC §1001:
 1. Compel or enjoin the trustee from acting.
 2. Require the trustee to fix the breach by paying money, restoring property, or being surcharged or sanctioned.
 3. Require the trustee to account and report to the beneficiaries.
 4. Appoint a special fiduciary, and remove, restrain, or restrict the trustee.
 5. Reduce or deny compensation, or disgorge compensation previously paid.
 6. Void an act of the trustee and impose a lien or constructive trust on property.
 7. Any other appropriate relief.
- B. Damages.
 1. A trustee who commits a breach of trust, in addition to other remedies, is liable to the beneficiaries affected. The trustee will have to pay the greater of (a) the amount required to restore the trust had the breach not been made, or (b) the profit the

trustee received (other than reasonable compensation) by reason of the breach. C.R.S. §15-5-1002(1).

2. Where more than one trustee is liable for a breach, a trustee is entitled to contribution from the other cotrustees. A trustee is not entitled to contribution if that trustee was more at fault than the other cotrustees, or if the trustee committed the breach in bad faith or with reckless indifference to the trust's purposes or the interests of the beneficiaries. C.R.S. §15-5-1002(2). If the trustee received a benefit from the breach, then the trustee is not entitled to contribution to the extent of the benefit received.
3. Even in the absence of a breach of trust, the trustee is accountable to an affected beneficiary for profit made by the trustee arising from the administration of the trust. C.R.S. §15-5-1003(1). Although a trustee is entitled to compensation for services rendered, a trustee is not permitted to profit personally from the administration of the trust. Most instances of personal benefit received by a trustee will be a breach of loyalty, but even in absence of a breach (for example, where a trustee receives a bonus or commission from actions relating to the trust administration) the trustee must account for that profit to the beneficiaries. Note however, that under C.R.S. §15-5-802(6), a bank or trust company that uses an affiliate to invest the trust assets, may charge reasonable compensation for both the trustee and investment services, and may earn a profit on the investments, so long as the beneficiaries are provided with adequate notice.
4. Section 1003(2) of the CUTC makes clear that a trustee is not an insurer. If there is no breach of trust, a trustee is not liable for a loss in the value of trust property nor for not having made a profit.
5. Except as otherwise provided in the Code (see, e.g., C.R.S. §15-5-708, C.R.S.), the fees and costs of Trustees, Attorneys' and third parties involved in trust litigation, will be governed by the cost and compensation act, C.R.S. §15-10-601, *et seq.* §15-5-1004.

II. Statutes of Limitation for Breaches of Trust.

- A. One-Year Rule. A beneficiary may not commence an action against a trustee for breach of trust more than one year after the date that the beneficiary was *sent 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. C.R.S. §15-5-1005. To take advantage of this statute of limitations, the report sent by the trustee must provide sufficient information so that the beneficiary knows of the potential claim or should have inquired into its existence. In contrast, under the existing statute, C.R.S. §15-16-307, "full" disclosure was required. It is anticipated that this liberalization of the disclosure standard will be meaningful in defending breach of trust actions involving Subsection 1.

Besides the new requirement that the beneficiary receive Notice of the one-year limitations period, the CUTC differs from the existing statute, which created a 6-month statute of limitations for actions against a trustee measured from the date a beneficiary “receives” a “final account or other statement” (C.R.S. §15-16-307). The period will now be a one-year statute of limitations, which begins to run on the date a “report” is sent, which report arguably includes not only final accountings, but also inventories, interim accountings, valuations, and other documents provided to a beneficiary disclosing matters of trust administration.

- B. Three-Year Rule. If the one-year rule does not apply, then a beneficiary may bring a breach of trust action within three years of the first to occur of the following:
 - 1. The removal or resignation of the trustee.
 - 2. The termination of the beneficiary’s interest in the trust.
 - 3. The termination of the trust.
- C. Death of a Trustee. The UTC would have applied the three-year rule to a breach of trust action after the death of a trustee. However, this provision was not included in the CUTC because the claims periods (analogous to a statute of limitation) applicable to decedent estates under the CPC already addresses claims against deceased fiduciaries (such as personal representatives, conservators/guardians, agents under powers of attorney, etc . . . (See, e.g., C.R.S. §15-12-801, *et seq.*).
- D. Other Means of Foreclosing Claims. The expirations of the statutes of limitation set forth in this Section 1005 of the CUTC are not the exclusive means of avoiding claims against a trustee. The trustee may have received the consent of the beneficiaries, a release, or the approval of the court with adequate notice. In addition, statutes of limitation, equitable principals, and other laws may apply to foreclose an action against a trustee.

III. Defenses and Exculpation of Trustee.

- A. Defenses.
 - 1. If a trustee reasonably relies on the terms of a trust, the trustee will not be liable to a beneficiary for a breach of trust that resulted from that reliance. C.R.S. §15-5-1006. This provision in the CUTC is similar to current C.R.S. §15-1.1-101(b) of the Uniform Prudent Investor Act (“A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.”)

2. A trustee is also not liable for a breach of trust that resulted from the trustee's lack of knowledge about the happening of an event (such as marriage, divorce, or death) so long as the trustee has exercised reasonable care to ascertain the happening of the event. C.R.S. §15-5-1007. Similar protections exist in other sections of the CUTC to protect a trustee who does not have knowledge of a particular event. *See* C.R.S. §15-5-103(4)(b) (excluding from the definition of "beneficiary" an appointee under a power of appointment of whom the trustee does not have knowledge); C.R.S. §15-5-1010 (protecting a trustee from surcharge for distributions made that do not take into consideration (1) the posthumous birth of a child, unless the trustee has knowledge of an individual's intention to use genetic material after the death of a beneficiary to create a child, and (2) a designated beneficiary agreement that was not recorded and of which the trustee does not have knowledge).
 3. The trustee is not liable to a beneficiary for a breach of trust if the beneficiary consented, released the trustee from liability, or ratified the transaction. This defense does not apply, however, if the consent, release, or ratification was induced by improper conduct of the trustee, or the beneficiary did not know his or her rights, or the material facts relating to the breach. C.R.S. §15-5-1009(1). In light of this Section of the CUTC, practitioners may want to review their procedures for obtaining beneficiary consent and releases, to ensure that the beneficiaries had sufficient information at the time of execution for those consents and releases to be valid.
- B. Exculpation. The terms of the trust may include an exculpation clause relieving the trustee of liability, however, that term will be unenforceable if (1) it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries, or (2) the clause was inserted as a result of an abuse by the trustee of a confidential relationship with the settlor. C.R.S. §15-5-1008. If the trustee drafts the exculpatory clause, or causes it to be drafted, it will be invalid unless the term is fair and its existence and contents were adequately communicated to the settlor. This Section 1008 of the CUTC is a mandatory statutory provision that cannot be modified by the terms of the trust. C.R.S. §15-5-105(1)(j).

IV. Personal Liability of a Trustee.

- A. Generally, a trustee will not be personally liable on contracts or transactions properly entered into in the course of administration. C.R.S. §15-5-1010(1).
- B. A trustee is personally liable for torts committed in the course of administering a trust, including liability for violations of environmental laws, but only if the trustee is personally at fault. C.R.S. §15-5-1010(2).

- C. A trustee is not liable for making certain distributions that do not take into account the possible posthumous birth of a child by assisted reproductive technologies, if the trustee did not have notice or actual knowledge of such intention to create a child. This part of Section 1010 of the CUTC is substantially similar to the protections afforded a personal representative under C.R.S. §15-12-703(3.5).
- D. A trustee also avoids liability for making a distribution that fails to take into account the existence of a “designated beneficiary agreement” if the trustee checked the county records and did not have actual knowledge of such an agreement. This Section of the CUTC is substantially similar to the protections afforded a personal representative under C.R.S. §15-12-703(5).
- E. In instances where the trustee holds an interest as a general partner in a partnership, the trustee is not personally liable on a contract entered into by the partnership, so long as the fiduciary capacity of the trustee was adequately disclosed. Nor is the trustee personally liable for torts committed by the partnership unless the trustee was personally at fault. These immunities do not apply if the trustee, as an individual, or the trustee’s spouse, descendants, siblings, or parents (or the spouse of any one of them) holds an interest in the partnership. The immunities further do not apply to the settlor of a revocable trust that holds an interest in a partnership as a general partner. C.R.S. §15-5-1011. The comments to this section of the CUTC clarify that the exceptions to immunities were added because Section 1011 was not intended to create a vehicle for families to shield assets from creditor claims.
- F. The rights afforded persons other than a trustee or beneficiary under Sections 1010 and 1011 of the CUTC are mandatory statutory provisions that cannot be modified by the terms of a trust. C.R.S. §15-5-105(2)(k).

V. Protections of persons dealing with trustee.

A person who acts in good faith in dealing with a trustee, without knowledge that the trustee is acting improperly, is protected from liability in the same manner as if the trustee had properly exercised the trustee’s power. A person acting in good faith is not required to investigate the extent or propriety of the trustee’s actions in order to obtain these protections. This same protection is afforded to persons who deal in good faith with a former trustee without knowledge that the trustee’s authority has terminated. Similar protections afforded to persons acting in good faith under other statutes, such as the Uniform Commercial Code, supersede the protections set forth in the CUTC. C.R.S. §15-5-1012(1). The rights afforded persons other than a trustee or beneficiary this Section 1012 are mandatory statutory provisions that cannot be modified by the terms of a trust. C.R.S. §15-5-105(2)(k).

VI. Certification of Trust.

As a protection to third parties dealing with trustees, and as a protection to settlors who desire to keep the terms of a trust confidential, the CUTC provides that a “certification of trust” may be used to provide a safe harbor to persons relying on the trustee’s authority to act. The contents of a certification of trust are set forth in C.R.S. §15-5-1013(1), (3). A person receiving a certification of trust may nonetheless require a trustee to furnish the relevant parts of the trust agreement that substantiate the information set forth in the certification of trust. A person who demands a copy of the trust agreement, in addition to the certification of trust or excerpts of the trust, will be liable for costs, expenses, attorneys’ fees and damages, if the court determines that the person did not act in good faith in making the request. C.R.S. §15-5-1013(8). This provision in the CUTC is similar to that found in the Power of Attorney Act, C.R.S §15-14-720(3), which subjects a person refusing to accept a power of attorney to reasonable attorneys’ fees and costs.

A trustee cannot use a certification of trust to satisfy a trustee’s obligations to furnish information to a beneficiary.

