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2020 Legislative Update

Colorado West Estate Planning

Presentation Appendix

November 18, 2020

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NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

SENATE BILL 20-129

BY SENATOR(S) Holbert and Ginal, Cooke, Coram, Gardner, Hisey, Moreno, Scott, Smallwood, Tate;
also REPRESENTATIVE(S) Froelich and Ransom, Soper, Becker.

CONCERNING THE PROTECTION OF INDIVIDUALS SUBJECT TO A FIDUCIARY.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 15-14-102, **add** (7.5) and (13.5) as follows:

15-14-102. Definitions. In parts 1 to 4 of this article 14:

(7.5) "MEMBER OF THE SUPPORTIVE COMMUNITY" MEANS A PERSON WHOM THE RESPONDENT, WARD, OR PROTECTED PERSON HAS TRUSTED FOR THE ONE-YEAR PERIOD IMMEDIATELY PRECEDING THE FILING OF A PETITION PURSUANT TO SECTION 15-14-304 OR 15-14-403 TO ENGAGE IN SUPPORTED DECISION-MAKING AND WHO MAY HAVE RELEVANT INFORMATION ABOUT THE RESPONDENT'S, WARD'S, OR PROTECTED PERSON'S DESIRES AND PERSONAL VALUES.

(13.5) "SUPPORTED DECISION-MAKING" MEANS THE WAY AN ADULT

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

WITH A DISABILITY OR DIMINISHED CAPACITY HAS MADE OR IS MAKING HIS OR HER OWN DECISIONS BY USING FRIENDS, FAMILY MEMBERS, PROFESSIONALS, AND OTHER PEOPLE HE OR SHE TRUSTS TO:

(a) HELP UNDERSTAND THE ISSUES AND CHOICES;

(b) ASK QUESTIONS;

(c) RECEIVE EXPLANATIONS IN LANGUAGE HE OR SHE UNDERSTANDS;

(d) COMMUNICATE HIS OR HER DECISIONS TO OTHERS IF NECESSARY; OR

(e) FACILITATE THE EXERCISE OF DECISIONS REGARDING HIS OR HER DAY-TO-DAY HEALTH, SAFETY, WELFARE, OR FINANCIAL AFFAIRS.

SECTION 2. In Colorado Revised Statutes, **add** 15-14-113.5 as follows:

15-14-113.5. Appointments without notice - investigation - report - procedures. (1) A VISITOR APPOINTED PURSUANT TO SECTION 15-14-312 (5) OR 15-14-412 (3)(b) MUST BE A PERSON WHO HAS SUCH TRAINING AS THE COURT DEEMS APPROPRIATE.

(2) A VISITOR APPOINTED PURSUANT TO SECTION 15-14-312 (5) OR 15-14-412 (3)(b) SHALL INTERVIEW THE RESPONDENT IN PERSON AND, TO THE EXTENT THAT THE RESPONDENT IS ABLE TO UNDERSTAND:

(a) EXPLAIN TO THE RESPONDENT THE SUBSTANCE OF THE PETITION; THE NATURE, PURPOSE, AND EFFECT OF THE PROCEEDING; THE RESPONDENT'S RIGHT TO A HEARING PURSUANT TO SECTION 15-14-312 (2), IF APPLICABLE; AND THE POWERS AND DUTIES OF THE EMERGENCY GUARDIAN OR SPECIAL CONSERVATOR;

(b) IDENTIFY AND DETERMINE THE RESPONDENT'S VIEW ON ANY MEMBER OF THE SUPPORTIVE COMMUNITY, AS DEFINED IN SECTION 15-14-102 (7.5), WHOSE PARTICIPATION IN THE PROCEEDINGS MAY SERVE THE RESPONDENT'S BEST INTERESTS;

(c) INFORM THE RESPONDENT OF THE NAME, CONTACT INFORMATION,

AND APPOINTMENT OF HIS OR HER COURT-APPOINTED COUNSEL OR HIS OR HER RIGHT TO EMPLOY AND CONSULT WITH A LAWYER AT THE RESPONDENT'S OWN EXPENSE; AND

(d) INFORM THE RESPONDENT THAT ALL COSTS AND EXPENSES OF THE PROCEEDING, INCLUDING THE RESPONDENT'S ATTORNEY FEES, WILL BE PAID FROM THE RESPONDENT'S ESTATE UNLESS THE COURT DIRECTS OTHERWISE.

(3) IN ADDITION TO THE DUTIES IMPOSED BY SUBSECTION (2) OF THIS SECTION, THE VISITOR SHALL:

(a) INTERVIEW THE PERSON OR PERSONS IDENTIFIED BY THE RESPONDENT AS MEMBERS OF THE SUPPORTIVE COMMUNITY ABOUT THE MEMBER'S RELATIONSHIP, ROLE, AND PARTICIPATION IN SUPPORTED DECISION-MAKING ON BEHALF OF THE RESPONDENT; THE MEMBER'S VIEW ON THE RESPONDENT'S LIMITATIONS; AND WHETHER THE RESPONDENT'S NEEDS MAY BE MET BY LESS RESTRICTIVE MEANS; AND

(b) MAKE ANY OTHER INVESTIGATION THE COURT DIRECTS.

(4) THE VISITOR SHALL PROMPTLY FILE A REPORT IN WRITING WITH THE COURT, WHICH MUST INCLUDE:

(a) THE NAME, ADDRESS, AND CONTACT INFORMATION FOR ANY MEMBER OF THE SUPPORTIVE COMMUNITY;

(b) A SUMMARY OF THE NATURE AND TYPE OF SUPPORTED DECISION-MAKING ENGAGED IN BY THE RESPONDENT WITH THE ASSISTANCE OF MEMBERS OF THE SUPPORTIVE COMMUNITY;

(c) RECOMMENDATIONS ON WHETHER ANY MEMBER OF THE SUPPORTIVE COMMUNITY SHOULD BE GRANTED PERMISSION TO PARTICIPATE IN THE PROCEEDINGS PURSUANT TO SECTION 15-14-308 (2) OR 15-10-201 (27);

(d) RECOMMENDATIONS REGARDING THE APPROPRIATENESS OF EMERGENCY GUARDIANSHIP OR SPECIAL CONSERVATORSHIP, INCLUDING WHETHER LESS RESTRICTIVE MEANS OF INTERVENTION WERE AVAILABLE AND ARE AVAILABLE;

(e) RECOMMENDATIONS ON WHETHER THE POWERS OF THE EMERGENCY GUARDIANSHIP OR SPECIAL CONSERVATORSHIP SHOULD BE LIMITED BASED ON THE DESIRES AND PERSONAL VALUES OF THE RESPONDENT AS EXPRESSED BY THE RESPONDENT AND THE MEMBERS OF THE SUPPORTIVE COMMUNITY; AND

(f) ANY OTHER MATTERS THE COURT DIRECTS.

(5) WITHIN SEVEN DAYS AFTER RECEIVING THE VISITOR'S REPORT, THE COURT SHALL REVIEW THE REPORT AND ENTER AN ORDER MAKING THE FOLLOWING SPECIFIC FINDINGS:

(a) WHETHER ANY MEMBER OF THE SUPPORTIVE COMMUNITY HAS PERMISSION TO PARTICIPATE IN THE PROCEEDINGS AS SUCH PARTICIPATION IS FOUND TO BE IN THE RESPONDENT'S BEST INTERESTS, PENDING FURTHER FINDINGS AND ORDER OF THE COURT;

(b) LIMITING THE POWERS OF THE EMERGENCY GUARDIAN OR SPECIAL CONSERVATOR AS RECOMMENDED BY THE VISITOR, PENDING FURTHER FINDINGS AND ORDER OF THE COURT; AND

(c) ANY OTHER MATTERS THAT THE COURT DEEMS APPROPRIATE TO PRESERVE AND PROTECT THE RIGHTS OF THE RESPONDENT.

SECTION 3. In Colorado Revised Statutes, 15-14-312, **add** (5) as follows:

15-14-312. Emergency guardian. (5) IF THE COURT APPOINTS AN EMERGENCY GUARDIAN WITHOUT NOTICE TO THE RESPONDENT OR ANY OTHER PERSON ENTITLED TO NOTICE PURSUANT TO SECTION 15-14-309 (2) AND THE PERSON APPOINTED IS A PROFESSIONAL WITHOUT PRIORITY TO SERVE PURSUANT TO SECTION 15-14-310 (1) OR PROTECTIVE SERVICES PURSUANT TO SECTION 26-3.1-104, THE COURT SHALL, UPON ENTRY OF THE ORDER OF APPOINTMENT OF EMERGENCY GUARDIAN, SIMULTANEOUSLY APPOINT A VISITOR TO INVESTIGATE AND REPORT TO THE COURT WITHIN FOURTEEN DAYS AFTER THE APPOINTMENT AS PROVIDED IN SECTION 15-14-113.5.

SECTION 4. In Colorado Revised Statutes, 15-14-412, **amend** (3) as follows:

15-14-412. Protective arrangements and single transactions. (3) (a) The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The special conservator has the authority conferred by the order and shall serve until discharged by order after report to the court.

(b) IF THE COURT APPOINTS A SPECIAL CONSERVATOR WITHOUT NOTICE TO THE RESPONDENT, PROTECTED PERSON, OR ANY OTHER PERSON ENTITLED TO NOTICE PURSUANT TO SECTION 15-14-404 (2) AND THE PERSON APPOINTED IS A PROFESSIONAL WITHOUT PRIORITY TO SERVE PURSUANT TO SECTION 15-14-310 (1) OR A PUBLIC ADMINISTRATOR PURSUANT TO SECTION 15-12-622, THE COURT SHALL, UPON ENTRY OF THE ORDER OF APPOINTMENT OF SPECIAL CONSERVATOR, SIMULTANEOUSLY APPOINT A VISITOR TO INVESTIGATE AND REPORT TO THE COURT WITHIN FOURTEEN DAYS AFTER THE APPOINTMENT AS PROVIDED IN SECTION 15-14-113.5.

SECTION 5. In Colorado Revised Statutes, 15-10-503, **amend** (1) as follows:

15-10-503. Power of a court to address the conduct of a fiduciary - emergencies - nonemergencies. (1) **Emergency situations - court action without the requirement of prior notice or hearing.** If it appears to a court that an emergency exists because a fiduciary's actions or omissions pose an imminent risk of substantial harm to a ward's or protected person's health, safety, or welfare or to the financial interests of an estate, the court may, on its own motion or upon the request of an interested person, without a hearing and without following any of the procedures authorized by section 15-10-502, order the immediate restraint, restriction, or suspension of the powers of the fiduciary; direct the fiduciary to appear before the court; or take such further action as the court deems appropriate to protect the ward or protected person or the assets of the estate. If a court restrains, restricts, or suspends the powers of a fiduciary, the court shall set a hearing and direct that notice be given pursuant to section 15-10-505. The clerk of the court shall immediately note the restraint, restriction, or suspension on the fiduciary's letters, if any. Any action for the removal, surcharge, or sanction of a fiduciary shall be governed by this section. THE COURT SHALL RULE ON ITS MOTION OR THE INTERESTED PERSON'S REQUEST WITHIN FOURTEEN DAYS AFTER THE MOTION OR REQUEST IS MADE.

SECTION 6. Act subject to petition - effective date - applicability. (1) This act takes effect September 1, 2020; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within the ninety-day period after final adjournment of the general assembly, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to appointments made on or after the applicable effective date of this act.

Leroy M. Garcia PRESIDENT OF THE SENATE	KC Becker SPEAKER OF THE HOUSE OF REPRESENTATIVES
Cindi L. Markwell SECRETARY OF THE SENATE	Robin Jones CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

APPROVED_____
(Date and Time)

_____
Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

SENATE BILL 20-096

BY SENATOR(S) Rodriguez and Holbert, Bridges, Fields, Ginal, Lee, Marble, Priola, Smallwood, Sonnenberg, Story, Tate, Todd, Williams A.; also REPRESENTATIVE(S) Duran and Carver, Arndt, Bird, Caraveo, Champion, Coleman, Cutter, Exum, Garnett, Gonzales-Gutierrez, Gray, Herod, Humphrey, Jackson, Jaquez Lewis, Kennedy, Kipp, Lontine, Melton, Michaelson Jenet, Ransom, Rich, Saine, Singer, Sirota, Snyder, Soper, Titone, Valdez A., Valdez D., Van Winkle, Young, Becker.

CONCERNING AN AUTHORIZATION FOR NOTARIES PUBLIC TO PERFORM NOTARIAL ACTS USING AUDIO-VIDEO COMMUNICATION, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly recognizes the importance of protecting personal information that is disclosed and recorded, including both audio and video, during the remote notarization process. Data privacy is an essential part of Colorado's authorization of remote notarization and the security of personal data from unauthorized use or theft is of critical importance in the implementation of remote notarization requirements in Colorado.

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Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

SECTION 2. In Colorado Revised Statutes, 24-21-502, **add** (1.3), (1.7), (10.5), (11.3), (11.5), (11.7), and (15.5) as follows:

24-21-502. Definitions. In this part 5:

(1.3) "AUDIO-VIDEO COMMUNICATION" MEANS COMMUNICATION BY WHICH AN INDIVIDUAL IS ABLE TO SEE, HEAR, AND COMMUNICATE WITH A REMOTELY LOCATED INDIVIDUAL IN REAL TIME USING ELECTRONIC MEANS.

(1.7) "CREDENTIAL" MEANS A TANGIBLE RECORD EVIDENCING THE IDENTITY OF AN INDIVIDUAL.

(10.5) "REAL-TIME" OR "IN REAL TIME" MEANS, WITH RESPECT TO AN INTERACTION BETWEEN INDIVIDUALS BY MEANS OF AUDIO-VIDEO COMMUNICATION, THAT THE INDIVIDUALS CAN SEE AND HEAR EACH OTHER SUBSTANTIALLY SIMULTANEOUSLY AND WITHOUT INTERRUPTION OR DISCONNECTION. DELAYS OF A FEW SECONDS THAT ARE INHERENT IN THE METHOD OF COMMUNICATION DO NOT PREVENT THE INTERACTION FROM BEING CONSIDERED TO HAVE OCCURRED IN REAL TIME.

(11.3) "REMOTELY LOCATED INDIVIDUAL" MEANS AN INDIVIDUAL WHO IS NOT IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT UNDER THIS SECTION.

(11.5) "REMOTE NOTARIZATION" MEANS AN ELECTRONIC NOTARIAL ACT PERFORMED WITH RESPECT ONLY TO AN ELECTRONIC RECORD BY MEANS OF REAL-TIME AUDIO-VIDEO COMMUNICATION IN ACCORDANCE WITH SECTION 24-21-514.5 AND RULES ADOPTED BY THE SECRETARY OF STATE.

(11.7) "REMOTE NOTARIZATION SYSTEM" MEANS AN ELECTRONIC DEVICE OR PROCESS THAT:

(a) ALLOWS A NOTARY PUBLIC AND A REMOTELY LOCATED INDIVIDUAL TO COMMUNICATE WITH EACH OTHER SIMULTANEOUSLY BY SIGHT AND SOUND; AND

(b) WHEN NECESSARY AND CONSISTENT WITH OTHER APPLICABLE LAW, FACILITATES COMMUNICATION WITH A REMOTELY LOCATED INDIVIDUAL WHO HAS A VISION, HEARING, OR SPEECH IMPAIRMENT.

(15.5) "TAMPER-EVIDENT" MEANS THE USE OF A SET OF APPLICATIONS, PROGRAMS, HARDWARE, SOFTWARE, OR OTHER TECHNOLOGIES THAT WILL DISPLAY EVIDENCE OF ANY CHANGES MADE TO AN ELECTRONIC RECORD.

SECTION 3. In Colorado Revised Statutes, **amend** 24-21-506 as follows:

24-21-506. Personal appearance required - definition. (1) If a notarial act relates to a statement made in or a signature executed on a record, the individual making the statement or executing the signature shall appear personally before the notarial officer.

(2) FOR PURPOSES OF THIS SECTION, "APPEAR PERSONALLY" MEANS:

(a) BEING IN THE SAME PHYSICAL LOCATION AS ANOTHER INDIVIDUAL AND CLOSE ENOUGH TO SEE, HEAR, COMMUNICATE WITH, AND EXCHANGE TANGIBLE IDENTIFICATION CREDENTIALS WITH THAT INDIVIDUAL; OR

(b) INTERACTING WITH A REMOTELY LOCATED INDIVIDUAL BY MEANS OF REAL-TIME AUDIO-VIDEO COMMUNICATION IN COMPLIANCE WITH SECTION 24-21-514.5 AND RULES ADOPTED BY THE SECRETARY OF STATE.

SECTION 4. In Colorado Revised Statutes, **add** 24-21-514.5 as follows:

24-21-514.5. Audio-video communication - definitions. (1) AS USED IN THIS SECTION:

(a) "CREDENTIAL ANALYSIS" MEANS A PROCESS OR SERVICE THAT COMPLIES WITH ANY RULES ADOPTED BY THE SECRETARY OF STATE THROUGH WHICH A THIRD PARTY AFFIRMS THE VALIDITY OF A GOVERNMENT-ISSUED IDENTIFICATION CREDENTIAL THROUGH THE REVIEW OF PUBLIC OR PROPRIETARY DATA SOURCES.

(b) "DYNAMIC, KNOWLEDGE-BASED AUTHENTICATION ASSESSMENT" MEANS AN IDENTITY ASSESSMENT THAT IS BASED ON A SET OF QUESTIONS FORMULATED FROM PUBLIC OR PRIVATE DATA SOURCES FOR WHICH THE REMOTELY LOCATED INDIVIDUAL TAKING THE ASSESSMENT HAS NOT

PREVIOUSLY PROVIDED AN ANSWER AND THAT MEETS ANY RULES ADOPTED BY THE SECRETARY OF STATE.

(c) "OUTSIDE THE UNITED STATES" MEANS A LOCATION OUTSIDE THE GEOGRAPHIC BOUNDARIES OF THE UNITED STATES, PUERTO RICO, THE UNITED STATES VIRGIN ISLANDS, AND ANY TERRITORY OR INSULAR POSSESSION SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

(d) "PUBLIC KEY CERTIFICATE" MEANS AN ELECTRONIC CREDENTIAL THAT IS USED TO IDENTIFY A REMOTELY LOCATED INDIVIDUAL WHO SIGNED AN ELECTRONIC RECORD WITH THE CREDENTIAL.

(e) "REMOTE PRESENTATION" MEANS TRANSMISSION TO THE NOTARY PUBLIC THROUGH COMMUNICATION TECHNOLOGY OF AN IMAGE OF A GOVERNMENT-ISSUED IDENTIFICATION CREDENTIAL THAT IS OF SUFFICIENT QUALITY TO ENABLE THE NOTARY PUBLIC TO:

(I) IDENTIFY THE REMOTELY LOCATED INDIVIDUAL SEEKING THE NOTARY PUBLIC'S SERVICES; AND

(II) PERFORM CREDENTIAL ANALYSIS.

(2) (a) EXCEPT AS PROVIDED IN SUBSECTION (2)(b) OF THIS SECTION, A NOTARY PUBLIC MAY PERFORM A REMOTE NOTARIZATION ONLY WITH RESPECT TO AN ELECTRONIC RECORD AND IN COMPLIANCE WITH THIS SECTION AND ANY RULES ADOPTED BY THE SECRETARY OF STATE FOR A REMOTELY LOCATED INDIVIDUAL WHO IS LOCATED:

(I) IN THIS STATE;

(II) OUTSIDE OF THIS STATE BUT WITHIN THE UNITED STATES; OR

(III) OUTSIDE THE UNITED STATES IF:

(A) THE NOTARY PUBLIC HAS NO ACTUAL KNOWLEDGE THAT THE NOTARIAL ACT IS PROHIBITED IN THE JURISDICTION IN WHICH THE REMOTELY LOCATED INDIVIDUAL IS PHYSICALLY LOCATED AT THE TIME OF THE ACT; AND

(B) THE REMOTELY LOCATED INDIVIDUAL CONFIRMS TO THE NOTARY

PUBLIC THAT THE REQUESTED NOTARIAL ACT AND THE RECORD RELATE TO: A MATTER THAT WILL BE FILED WITH OR IS CURRENTLY BEFORE A COURT, GOVERNMENTAL ENTITY, OR OTHER ENTITY IN THE UNITED STATES; PROPERTY LOCATED IN THE UNITED STATES; OR A TRANSACTION SUBSTANTIALLY CONNECTED TO THE UNITED STATES.

(b) A NOTARY PUBLIC SHALL NOT USE A REMOTE NOTARIZATION SYSTEM TO NOTARIZE:

(I) A RECORD RELATING TO THE ELECTORAL PROCESS; OR

(II) A WILL, CODICIL, DOCUMENT PURPORTING TO BE A WILL OR CODICIL, OR ANY ACKNOWLEDGMENT REQUIRED UNDER SECTION 15-11-502 OR 15-11-504.

(3) BEFORE A NOTARY PUBLIC PERFORMS THE NOTARY PUBLIC'S INITIAL NOTARIZATION USING A REMOTE NOTARIZATION SYSTEM, THE NOTARY PUBLIC SHALL NOTIFY THE SECRETARY OF STATE THAT THE NOTARY PUBLIC WILL BE PERFORMING REMOTE NOTARIZATIONS AND SHALL IDENTIFY EACH REMOTE NOTARIZATION SYSTEM THAT THE NOTARY PUBLIC INTENDS TO USE. THE REMOTE NOTARIZATION SYSTEM MUST CONFORM TO THIS PART 5 AND ANY RULES ADOPTED BY THE SECRETARY OF STATE. THE NOTICE MUST BE SUBMITTED IN THE FORMAT REQUIRED BY THE SECRETARY OF STATE AND MUST:

(a) INCLUDE AN AFFIRMATION THAT THE NOTARY PUBLIC HAS READ AND WILL COMPLY WITH THIS SECTION AND ALL RULES ADOPTED BY THE SECRETARY OF STATE; AND

(b) BE ACCOMPANIED BY PROOF THAT THE NOTARY PUBLIC HAS SUCCESSFULLY COMPLETED ANY TRAINING AND EXAMINATION REQUIRED BY THE SECRETARY OF STATE.

(4) A NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT FOR A REMOTELY LOCATED INDIVIDUAL BY MEANS OF AUDIO-VIDEO COMMUNICATION MUST:

(a) BE LOCATED WITHIN THIS STATE AT THE TIME THE NOTARIAL ACT IS PERFORMED;

(b) EXECUTE THE NOTARIAL ACT IN A SINGLE, REAL-TIME SESSION;

(c) CONFIRM THAT ANY RECORD THAT IS SIGNED, ACKNOWLEDGED, OR OTHERWISE PRESENTED FOR NOTARIZATION BY THE REMOTELY LOCATED INDIVIDUAL IS THE SAME RECORD SIGNED BY THE NOTARY PUBLIC;

(d) CONFIRM THAT THE QUALITY OF THE AUDIO-VIDEO COMMUNICATION IS SUFFICIENT TO MAKE THE DETERMINATIONS REQUIRED FOR THE NOTARIAL ACT UNDER THIS PART 5 AND ANY OTHER LAW OF THIS STATE; AND

(e) IDENTIFY THE VENUE FOR THE NOTARIAL ACT AS THE JURISDICTION WITHIN THE STATE OF COLORADO WHERE THE NOTARY PUBLIC IS PHYSICALLY LOCATED WHILE PERFORMING THE ACT.

(5) A REMOTE NOTARIZATION SYSTEM USED TO PERFORM REMOTE NOTARIZATIONS MUST:

(a) REQUIRE THE NOTARY PUBLIC, THE REMOTELY LOCATED INDIVIDUAL, AND ANY REQUIRED WITNESS TO ACCESS THE SYSTEM THROUGH AN AUTHENTICATION PROCEDURE THAT COMPLIES WITH RULES ADOPTED BY THE SECRETARY OF STATE REGARDING SECURITY AND ACCESS;

(b) ENABLE THE NOTARY PUBLIC TO VERIFY THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL AND ANY REQUIRED WITNESS BY MEANS OF PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE OF IDENTITY IN COMPLIANCE WITH SUBSECTION (6) OF THIS SECTION; AND

(c) CONFIRM THAT THE NOTARY PUBLIC, THE REMOTELY LOCATED INDIVIDUAL, AND ANY REQUIRED WITNESS ARE VIEWING THE SAME RECORD AND THAT ALL SIGNATURES, CHANGES, AND ATTACHMENTS TO THE RECORD ARE MADE IN REAL TIME.

(6) (a) A NOTARY PUBLIC SHALL DETERMINE FROM PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE OF IDENTITY AS DESCRIBED IN SUBSECTION (6)(b) OF THIS SECTION THAT THE REMOTELY LOCATED INDIVIDUAL APPEARING BEFORE THE NOTARY PUBLIC BY MEANS OF AUDIO-VIDEO COMMUNICATION IS THE INDIVIDUAL THAT HE OR SHE PURPORTS TO BE.

(b) A NOTARY PUBLIC HAS SATISFACTORY EVIDENCE OF IDENTITY IF THE NOTARY PUBLIC CAN IDENTIFY THE REMOTELY LOCATED INDIVIDUAL WHO PERSONALLY APPEARS BEFORE THE NOTARY PUBLIC BY MEANS OF AUDIO-VIDEO COMMUNICATION BY USING AT LEAST ONE OF THE FOLLOWING METHODS:

(I) THE OATH OR AFFIRMATION OF A CREDIBLE WITNESS WHO PERSONALLY KNOWS THE REMOTELY LOCATED INDIVIDUAL, IS PERSONALLY KNOWN TO THE NOTARY PUBLIC, AND IS IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC OR THE REMOTELY LOCATED INDIVIDUAL DURING THE REMOTE NOTARIZATION;

(II) REMOTE PRESENTATION AND CREDENTIAL ANALYSIS OF A GOVERNMENT-ISSUED IDENTIFICATION CREDENTIAL, AND THE DATA CONTAINED ON THE CREDENTIAL, THAT CONTAINS THE SIGNATURE AND A PHOTOGRAPH OF THE REMOTELY LOCATED INDIVIDUAL, AND AT LEAST ONE OF THE FOLLOWING:

(A) A DYNAMIC, KNOWLEDGE-BASED AUTHENTICATION ASSESSMENT BY A TRUSTED THIRD PARTY THAT COMPLIES WITH RULES ADOPTED BY THE SECRETARY OF STATE;

(B) A VALID PUBLIC KEY CERTIFICATE THAT COMPLIES WITH RULES ADOPTED BY THE SECRETARY OF STATE; OR

(C) AN IDENTITY VERIFICATION BY A TRUSTED THIRD PARTY THAT COMPLIES WITH RULES ADOPTED BY THE SECRETARY OF STATE; OR

(III) ANY OTHER METHOD THAT COMPLIES WITH RULES ADOPTED BY THE SECRETARY OF STATE.

(7) WITHOUT LIMITING THE AUTHORITY OF A NOTARY PUBLIC UNDER SECTION 24-21-508 TO REFUSE TO PERFORM A NOTARIAL ACT, A NOTARY PUBLIC MAY REFUSE TO PERFORM A NOTARIAL ACT UNDER THIS SECTION IF THE NOTARY PUBLIC IS NOT SATISFIED THAT THE REQUIREMENTS OF THIS SECTION ARE MET.

(8) THE CERTIFICATE OF NOTARIAL ACT FOR A REMOTE NOTARIZATION MUST, IN ADDITION TO COMPLYING WITH THE REQUIREMENTS OF SECTION 24-21-515, INDICATE THAT THE NOTARIAL ACT WAS PERFORMED

USING AUDIO-VIDEO COMMUNICATION TECHNOLOGY.

(9) (a) A NOTARY PUBLIC SHALL CREATE AN AUDIO-VIDEO RECORDING OF A REMOTE NOTARIZATION IF:

(I) THE NOTARY PUBLIC FIRST DISCLOSES TO THE REMOTELY LOCATED INDIVIDUAL THE FACT OF THE RECORDING AND THE DETAILS OF ITS INTENDED STORAGE, INCLUDING WHERE AND FOR HOW LONG IT WILL BE STORED;

(II) THE REMOTELY LOCATED INDIVIDUAL EXPLICITLY CONSENTS TO BOTH THE RECORDING AND THE STORAGE OF THE RECORDING; AND

(III) THE RECORDING IS STORED AND SECURED IN COMPLIANCE WITH RULES ADOPTED BY THE SECRETARY OF STATE.

(b) THE AUDIO-VIDEO RECORDING REQUIRED BY THIS SUBSECTION (9) MUST BE IN ADDITION TO THE JOURNAL ENTRY FOR THE NOTARIAL ACT WHERE REQUIRED BY SECTION 24-21-519. THE RECORDING MUST INCLUDE THE INFORMATION DESCRIBED IN THIS SUBSECTION (9)(b). A NOTARY PUBLIC SHALL MAKE A GOOD-FAITH EFFORT TO NOT INCLUDE ANY OTHER INFORMATION ON THE RECORDING. ANY OTHER INFORMATION INCLUDED ON THE RECORDING IS NOT ADMISSIBLE IN ANY COURT OF LAW, LEGAL PROCEEDING, OR ADMINISTRATIVE HEARING FOR ANY PURPOSE, NOR IS THE INFORMATION ADMISSIBLE IN ANY PROCEEDING IN ANY OTHER COURT OF LAW, LEGAL PROCEEDING, OR ADMINISTRATIVE HEARING IF COLORADO LAW APPLIES WITH RESPECT TO REMOTE NOTARIZATION. THE RECORDING MUST INCLUDE:

(I) AT THE COMMENCEMENT OF THE RECORDING, A RECITATION BY THE NOTARY PUBLIC OF INFORMATION SUFFICIENT TO IDENTIFY THE NOTARIAL ACT, INCLUDING THE NAME OF THE NOTARY PUBLIC, THE DATE AND TIME OF THE NOTARIAL ACT, A DESCRIPTION OF THE NATURE OF THE DOCUMENT OR DOCUMENTS TO WHICH THE NOTARIAL ACT IS TO RELATE, THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL WHOSE SIGNATURE IS TO BE THE SUBJECT OF THE NOTARIAL ACT AND OF ANY PERSON WHO WILL ACT AS A CREDIBLE WITNESS TO IDENTIFY THE INDIVIDUAL SIGNER, AND THE METHOD OR METHODS BY WHICH THE REMOTELY LOCATED INDIVIDUAL AND ANY CREDIBLE WITNESS WILL BE IDENTIFIED TO THE NOTARY PUBLIC;

(II) A DECLARATION BY THE REMOTELY LOCATED INDIVIDUAL THAT THE INDIVIDUAL'S SIGNATURE ON THE RECORD IS KNOWINGLY AND VOLUNTARILY MADE;

(III) IF THE REMOTELY LOCATED INDIVIDUAL FOR WHOM THE NOTARIAL ACT IS BEING PERFORMED IS IDENTIFIED BY PERSONAL KNOWLEDGE, AN EXPLANATION BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE REMOTELY LOCATED INDIVIDUAL AND HOW LONG THE NOTARY PUBLIC HAS KNOWN THE REMOTELY LOCATED INDIVIDUAL;

(IV) IF THE REMOTELY LOCATED INDIVIDUAL FOR WHOM THE NOTARIAL ACT IS BEING PERFORMED IS IDENTIFIED BY A CREDIBLE WITNESS:

(A) A STATEMENT BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE CREDIBLE WITNESS AND HOW LONG THE NOTARY PUBLIC HAS KNOWN THE CREDIBLE WITNESS; AND

(B) AN EXPLANATION BY THE CREDIBLE WITNESS AS TO HOW THE CREDIBLE WITNESS KNOWS THE REMOTELY LOCATED INDIVIDUAL AND HOW LONG THE CREDIBLE WITNESS HAS KNOWN THE REMOTELY LOCATED INDIVIDUAL; AND

(V) THE STATEMENTS, ACTS, AND CONDUCT NECESSARY TO PERFORM THE REQUESTED NOTARIAL ACT OR SUPERVISION OF SIGNING OR WITNESSING OF THE SUBJECT RECORD.

(c) THE PROVISIONS OF SECTION 24-21-519 THAT RELATE TO THE SECURITY, INSPECTION, COPYING, AND RETENTION AND DISPOSITION OF A NOTARY PUBLIC'S JOURNAL APPLY EQUALLY TO THE SECURITY, INSPECTION, COPYING, AND RETENTION AND DISPOSITION OF AUDIO-VIDEO RECORDINGS ALLOWED BY THIS SECTION.

(d) THE FAILURE OF A NOTARY PUBLIC TO PERFORM A DUTY OR MEET A REQUIREMENT SPECIFIED IN THIS SUBSECTION (9) DOES NOT INVALIDATE A REMOTE NOTARIZATION PERFORMED BY THE NOTARY PUBLIC. A NOTARY PUBLIC IS NOT LIABLE TO ANY PERSON FOR DAMAGES CLAIMED TO ARISE FROM A FAILURE TO PERFORM A DUTY OR MEET A REQUIREMENT SPECIFIED IN SUBSECTION (9)(b) OF THIS SECTION.

(10) REGARDLESS OF THE PHYSICAL LOCATION OF THE REMOTELY LOCATED INDIVIDUAL AT THE TIME OF THE NOTARIAL ACT, THE VALIDITY OF A REMOTE NOTARIZATION PERFORMED BY A NOTARY IN THIS STATE IS GOVERNED BY THE LAWS OF THIS STATE, INCLUDING ANY RULES ADOPTED BY THE SECRETARY OF STATE PURSUANT TO THIS PART 5.

(11) TO BE ELIGIBLE FOR APPROVAL BY THE SECRETARY OF STATE UNDER SECTION 24-21-527 (1)(h), A PROVIDER OF A REMOTE NOTARIZATION SYSTEM OR STORAGE SYSTEM MUST:

(a) CERTIFY TO THE SECRETARY OF STATE THAT THE PROVIDER AND THE SYSTEM COMPLY WITH THE REQUIREMENTS OF THIS SECTION AND THE RULES ADOPTED UNDER SECTION 24-21-527;

(b) MAINTAIN A USUAL PLACE OF BUSINESS IN THIS STATE OR, IF A FOREIGN ENTITY, APPOINT AND MAINTAIN A REGISTERED AGENT, IN ACCORDANCE WITH SECTION 7-90-701 BY FILING A STATEMENT OF FOREIGN ENTITY AUTHORITY IN ACCORDANCE WITH SECTION 7-90-803, WITH AUTHORITY TO ACCEPT SERVICE OF PROCESS IN CONNECTION WITH A CIVIL ACTION OR OTHER PROCEEDING; AND

(c) NOT USE, SELL, OR OFFER TO SELL TO ANOTHER PERSON OR TRANSFER TO ANOTHER PERSON FOR USE OR SALE ANY PERSONAL INFORMATION OBTAINED UNDER THIS SECTION THAT IDENTIFIES A REMOTELY LOCATED INDIVIDUAL, A WITNESS TO A REMOTE NOTARIZATION, OR A PERSON NAMED IN A RECORD PRESENTED FOR REMOTE NOTARIZATION, EXCEPT:

(I) AS NECESSARY TO FACILITATE PERFORMANCE OF A NOTARIAL ACT;

(II) TO EFFECT, ADMINISTER, ENFORCE, SERVICE, OR PROCESS A RECORD PROVIDED BY OR ON BEHALF OF THE INDIVIDUAL OR THE TRANSACTION OF WHICH THE RECORD IS A PART;

(III) IN ACCORDANCE WITH THIS PART 5 AND THE RULES ADOPTED PURSUANT TO THIS PART 5 OR OTHER APPLICABLE FEDERAL, STATE, OR LOCAL LAW, OR TO COMPLY WITH A LAWFUL SUBPOENA OR COURT ORDER; OR

(IV) IN CONNECTION WITH A PROPOSED OR ACTUAL SALE, MERGER, TRANSFER, OR EXCHANGE OF ALL OR A PORTION OF A BUSINESS OR

OPERATING UNIT OF THE PROVIDER, IF THE PERSONAL INFORMATION CONCERNS ONLY CUSTOMERS OF THE BUSINESS OR UNIT AND THE TRANSFEREE AGREES TO COMPLY WITH THE RESTRICTIONS SET FORTH IN THIS SUBSECTION (11).

(12) SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 21, IF A RECORD IS PRIVILEGED PURSUANT TO SECTION 13-90-107 (1)(b), THE CORRESPONDING ELECTRONIC RECORD SECURED AND STORED BY THE REMOTE NOTARIZATION SYSTEM AS PROVIDED IN THIS ARTICLE 21 REMAINS PRIVILEGED.

SECTION 5. In Colorado Revised Statutes, 24-21-515, **amend** (3)(d) and (4) as follows:

24-21-515. Certificate of notarial act. (3) A certificate of a notarial act is sufficient if it meets the requirements of subsections (1) and (2) of this section and:

(d) Sets forth ~~the~~ actions of the notarial officer ~~and the actions~~ THAT are sufficient to meet the requirements of the notarial act as provided in sections 24-21-505, 24-21-506, and 24-21-507 AND, IF APPLICABLE, SECTION 24-21-514.5 or law of this state other than this part 5.

(4) By executing a certificate of a notarial act, a notarial officer certifies that the officer has complied with the requirements and made the determinations specified in sections 24-21-504, 24-21-505, and 24-21-506 AND, IF APPLICABLE, SECTION 24-21-514.5.

SECTION 6. In Colorado Revised Statutes, 24-21-519, **amend** (2) as follows:

24-21-519. Journal. (2) (a) A journal may be created on a tangible medium or in an electronic format. If a journal is maintained on a tangible medium, it must be a permanent, bound register with numbered pages. If a journal is maintained in an electronic format, it must be in a permanent, tamper-evident electronic format complying with the rules of the secretary of state.

(b) A NOTARY PUBLIC WHO PERFORMS A REMOTE NOTARIZATION SHALL MAINTAIN A JOURNAL IN AN ELECTRONIC FORMAT WITH REGARD TO

EACH REMOTE NOTARIZATION.

SECTION 7. In Colorado Revised Statutes, 24-21-527, **amend** (1)(e); and **add** (1)(g), (1)(h), and (3) as follows:

24-21-527. Rules - definitions - repeal. (1) The secretary of state may adopt rules to implement this part 5 in accordance with article 4 of this title 24. Rules adopted regarding the performance of notarial acts with respect to electronic records may not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification. The rules may:

(e) Include provisions to prevent fraud or mistake in the performance of notarial acts; ~~and~~

(g) PRESCRIBE THE MANNER OF PERFORMING NOTARIAL ACTS USING AUDIO-VIDEO COMMUNICATION TECHNOLOGY, INCLUDING PROVISIONS TO ENSURE THE SECURITY, INTEGRITY, AND ACCESSIBILITY OF RECORDS RELATING TO THOSE ACTS; AND

(h) PRESCRIBE REQUIREMENTS FOR THE APPROVAL AND USE OF REMOTE NOTARIZATION SYSTEMS AND STORAGE SYSTEMS.

(3) (a) AS USED IN THIS SUBSECTION (3):

(I) "INTERIM PERIOD" MEANS THE PERIOD BEGINNING ON MARCH 30, 2020, AND ENDING ON DECEMBER 31, 2020.

(II) "TEMPORARY RULE" MEANS RULE 5 OF THE NOTARY PROGRAM RULES AS ADOPTED BY THE SECRETARY OF STATE EFFECTIVE MARCH 30, 2020, AND PUBLISHED AT 8 CCR 1505-11, AND ANY ANALOGOUS SUCCESSOR EMERGENCY RULE OF THE NOTARY PROGRAM THAT AUTHORIZES REMOTE NOTARIZATIONS.

(b) DURING THE INTERIM PERIOD:

(I) A NOTARY PUBLIC COMMISSIONED BY THE SECRETARY OF STATE MAY PERFORM NOTARIAL ACTS WITH RESPECT TO A REMOTELY LOCATED INDIVIDUAL USING AUDIO-VIDEO COMMUNICATION IN ACCORDANCE WITH, AND SUBJECT TO THE LIMITATIONS AND RESTRICTIONS SET FORTH IN, THE

TEMPORARY RULE; AND

(II) INSOFAR AS IT RELATES TO ANY NOTARIAL ACT PERMITTED BY THE TEMPORARY RULE AND PERFORMED DURING THE INTERIM PERIOD, ANY REQUIREMENT IN THIS PART 5 OR TITLE 38 THAT AN INDIVIDUAL MAKING A STATEMENT OR EXECUTING A SIGNATURE APPEAR PERSONALLY BEFORE A NOTARIAL OFFICER IS SATISFIED BY THE PROCEDURES SPECIFIED IN AND PERMITTED BY THE TEMPORARY RULE.

(c) THE SECRETARY OF STATE MAY AMEND THE TEMPORARY RULE IN ACCORDANCE WITH ARTICLE 4 OF THIS TITLE 24, BUT THE AMENDMENT MUST NOT PERMIT THE PERFORMANCE OF A REMOTE NOTARIZATION WITH RESPECT TO A RECORD DESCRIBED IN SECTION 5.2.2 OF THE TEMPORARY RULE OTHER THAN IN ACCORDANCE WITH THE PROVISIONS OF THE TEMPORARY RULE AS IT EXISTED ON THE EFFECTIVE DATE OF THIS SUBSECTION (3).

(d) A NOTARIAL ACT PERFORMED DURING THE INTERIM PERIOD WITH RESPECT TO A REMOTELY LOCATED INDIVIDUAL THAT COMPLIED WITH THE TEMPORARY RULE IS NOT INVALID DUE TO THE LACK OF EXPRESS STATUTORY AUTHORITY FOR THE NOTARIAL ACT.

(e) THE SECRETARY OF STATE SHALL UPDATE THE APPLICABLE JOINT COMMITTEE OF REFERENCE DURING THE DEPARTMENT OF STATE'S 2020 PRESENTATION MADE PURSUANT TO SECTION 2-7-203 REGARDING THE IMPLEMENTATION OF THIS SUBSECTION (3).

(f) SUBSECTIONS (3)(b), (3)(c), AND (3)(e) OF THIS SECTION AND THIS SUBSECTION (3)(f) ARE REPEALED, EFFECTIVE DECEMBER 31, 2020.

SECTION 8. In Colorado Revised Statutes, 10-11-122, **add** (4) as follows:

10-11-122. Title commitments - rules. (4) (a) IF A TITLE INSURANCE AGENT OR TITLE INSURANCE COMPANY IS REQUIRED TO PROVIDE THE STATEMENT REQUIRED BY SUBSECTION (1) OF THIS SECTION, THE AGENT OR COMPANY SHALL ALSO PROVIDE A STATEMENT SUBSTANTIALLY AS FOLLOWS:

COLORADO NOTARIES MAY REMOTELY NOTARIZE REAL ESTATE DEEDS AND OTHER

DOCUMENTS USING REAL-TIME AUDIO-VIDEO COMMUNICATION TECHNOLOGY. YOU MAY CHOOSE NOT TO USE REMOTE NOTARIZATION FOR ANY DOCUMENT.

(b) FAILURE OF A PERSON TO PROVIDE THE STATEMENT REQUIRED BY THIS SUBSECTION (4) DOES NOT SUBJECT THE PERSON TO ANY LIABILITY UNDER THIS ARTICLE 11 OR TO THE PENALTY PROVISIONS OF SECTION 10-3-111 AND DOES NOT AFFECT OR INVALIDATE ANY PROVISIONS OF THE COMMITMENT FOR TITLE INSURANCE.

SECTION 9. Appropriation. (1) For the 2020-21 state fiscal year, $132,795 is appropriated to the department of state. This appropriation is from the department of state cash fund created in section 24-21-104 (3)(b), C.R.S. To implement this act, the department may use this appropriation as follows:

(a) $57,910 for use by the business and licensing division for personal services, which amount is based on an assumption that the division will require an additional 1.1 FTE;

(b) $7,685 for use by the business and licensing division for operating expenses; and

(c) $67,200 for use by the information technology division for personal services.

SECTION 10. Effective date - applicability. (1) This act:

(a) Takes effect upon passage; except that sections 1 through 6 and 8 of this act take effect December 31, 2020; and

(b) Applies to conduct occurring on or after March 30, 2020.

SECTION 11. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.

Leroy M. Garcia PRESIDENT OF THE SENATE	KC Becker SPEAKER OF THE HOUSE OF REPRESENTATIVES
Cindi L. Markwell SECRETARY OF THE SENATE	Robin Jones CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

APPROVED_____
(Date and Time)

_____
Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

Colorado Bar Association

1290 BROADWAY, STE. 1700
DENVER CO 80203-4336
303-860-1115
COBAR.ORG

To: The Honorable Tracy Kraft-Tharp
Chair, Colorado House Committee on Business Affairs and Labor

From: CBA Legislative Policy Committee
Staff contact – Andy White, CBA Legislative Director

Date: May 27, 2020

Re: Senate Bill 20-096 Testimony

The Colorado Bar Association ("CBA") appreciates the continued leadership of Representatives Carver and Duran in their sponsorship of SB20-096, in particular their efforts to balance the needs of various stakeholders.

However, despite these efforts, CBA believes SB20-096 needs further amendments to close gaps in the privacy protections of the current bill. While CBA endorses the concept of remote notarization and does not oppose the aim of SB20-096, it is important for CBA to register its concerns about the potential impact the bill, if passed in its present form, will have on the privacy of Colorado citizens who use remote notarization.

This is the fourth year in which remote notary legislation has been considered by the General Assembly. CBA has been involved in discussions and negotiations about remote notary legislation every year. CBA and other Colorado stakeholders have devoted countless hours to developing the best remote notary legislation possible for Colorado citizens. These efforts by CBA included participation in the remote notary task force organized by the Colorado Secretary of State's office in 2017, as well as crafting language and providing testimony before legislative committees in each session.

Throughout this process, CBA emphasized that it does not oppose remote notarization but views it as a useful tool in the right circumstances. In areas where conventional notarial services are sparse, and for individuals with limited mobility, the option of interacting remotely with a notary public should be available. More recently, during the COVID-19 pandemic, the need to minimize face-to-face interactions has added statewide urgency to an issue that was previously a matter of convenience and efficiency. But in making this tool available to Coloradans, the General Assembly should consider, and

mitigate to the extent possible, the additional risks posed by the use of remote online technology.

When notarization is done in person, the notary relies on methods of identification such as personal inspection of a driver's license or other government-issued identification to confirm the identity of the signer. The signer knows exactly what personally identifying information the notary has seen. The notary sees the document to be notarized being signed (or receives in real time the signer's oral acknowledgment of a previous signing) but does not read more of the document than is necessary to complete the certificate of the notarial act. The notary, unless the notary has a dual role such as also being the closer for a title company or a bank, or an administrative assistant in a law firm, does not retain the original or a copy of notarized document.

By its nature, the traditional in-person notarization process limits who sees personal information of the signer and of third parties who may be identified in the notarized document, who retains that information, and perhaps more importantly, who retains copies of the notarized document. This limitation protects the privacy interests of the individuals involved and avoids waiver of legal privileges relating to the contents of these documents. Sharing of information by the notary is not usually an issue and if sharing occurs, the extent of sharing will be defined by the context, *i.e.*, the notary is a closer or administrative assistant who is acting for the benefit of the signer. While there is no face-to-face interaction under the Secretary of State's temporary remote notarization rule during the current health emergency, the information exchanged between the signer and the notary remains largely the same. The notary retains, at least temporarily, a copy of the subject document, but the document is not stored online in a data repository.

In contrast, the present version of SB20-096 will result in far more data about signers and third parties being stored in data repositories, and copies of all notarized documents will be stored in data repositories as well. In addition, the language of SB20-096 requires the involvement of one or more third parties in what was previously an interaction between the notary and the signer of the document being notarized (proposed new CRS 24-21-514.5(1)(a), proposed new CRS 24-21-514.5(6)(b)(II)(A) and (C)). The electronically stored information generated by the third party's involvement will be stored in the data repository (CRS 24-21-514.5(9)(a)(I) and (II), 24-21-514.5(11) and 24-21-527(1)(h)) as part of the record of the remote notarization transaction, including personally identifiable information of the individual signer and any witnesses involved.

The proposed addition of CRS 24-21-514.5(11)(c) in SB20-096 would limit some post-transaction use of information obtained during the course of a remote notarization, but would permit information to be used, transferred or sold "in accordance with" other federal, state or local law. To the extent other law regulates the use of such information, it generally permits use or sharing of information with the consent of the person who provided the

information. As anyone knows who has engaged in online commerce, "consent" is typically evidenced by clicking to accept unseen terms and conditions. If the user declines to consent to everything contained in the terms and conditions, the transaction will not proceed.

For example, a leading proprietary remote notary platform requires users to accept a 14-page privacy policy and a 29-page terms of use agreement that can be changed unilaterally by the platform at any time, leaves little confidence in actual protections, and includes consents to sharing of personal information with present and future affiliates and business partners. Few users will read these provisions, and fewer still will understand their significance or consult with lawyers before accepting them.

While CBA does not oppose SB20-096, CBA remains concerned about the privacy of personally identifiable information accessed by remote businesses, including remote notary platforms. Colorado citizens have an expectation of privacy under both the U.S. and the Colorado constitutions. CBA commits to be an active and constructive stakeholder when the Secretary of State considers administrative rules to implement SB20-096, as well as when the General Assembly considers data privacy bills intended to give Colorado citizens greater control over the use of personally identifiable information.

cc: The Honorable Monica Duran
The Honorable Terri Carver
Colorado House Committee on Business and Labor
The Honorable Jared Polis
The Honorable Phil Weiser
The Honorable Jenna Griswold

STATE OF COLORADO
Department of State
1700 Broadway
Suite 200
Denver, CO 80290

Jena Griswold
Secretary of State

Ian Rayder
Deputy Secretary of State

Notice of Temporary Adoption

Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

June 26, 2020

I. Adopted Rule Amendments

As authorized by the Colorado Notaries Public Act[1] and the State Administrative Procedure Act[2], the Colorado Secretary of State gives notice that the following amendments to the Notary Program Rules[3] are adopted on a temporary basis and effective immediately. (SMALL CAPS indicate proposed additions to the current rules. ~~Stricken type~~ indicates proposed deletions from current rules. *Annotations* may be included):

Current 8 CCR 1505-11 is amended as follows:

Readopting Rule 5:

RULE 5 – REMOTE NOTARIZATION

5.1 DEFINITIONS

AS USED IN THESE RULES, UNLESS STATED OTHERWISE:

5.1.1 "AUDIO-VIDEO COMMUNICATION" MEANS COMMUNICATION BY WHICH AN INDIVIDUAL IS ABLE TO SEE, HEAR, AND COMMUNICATE WITH A REMOTELY LOCATED INDIVIDUAL IN REAL TIME USING ELECTRONIC MEANS.

5.1.2 "OUTSIDE THE UNITED STATES" MEANS A LOCATION OUTSIDE THE GEOGRAPHIC BOUNDARIES OF THE UNITED STATES, PUERTO RICO, THE UNITED STATES VIRGIN ISLANDS, AND ANY TERRITORY OR INSULAR POSSESSION SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

5.1.3 "REAL TIME" OR "IN REAL TIME" MEANS, WITH RESPECT TO AN INTERACTION BETWEEN INDIVIDUALS BY MEANS OF AUDIO-VIDEO COMMUNICATION, THAT THE INDIVIDUALS CAN SEE AND HEAR EACH OTHER SUBSTANTIALLY SIMULTANEOUSLY AND WITHOUT INTERRUPTION OR DISCONNECTION. DELAYS OF A FEW SECONDS THAT ARE INHERENT IN THE METHOD OF COMMUNICATION DO NOT PREVENT THE INTERACTION FROM BEING CONSIDERED TO HAVE OCCURRED IN REAL TIME.

[1] Article 21, Title 24 of the Colorado Revised Statutes.
[2] Section 24-4-103(3)(a), C.R.S. (2019).
[3] 8 CCR 1505-11.

5.1.4 "REMOTELY LOCATED INDIVIDUAL" MEANS AN INDIVIDUAL WHO IS NOT IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT UNDER THIS RULE 5.

5.1.5 "REMOTE NOTARIZATION" MEANS AN ELECTRONIC NOTARIAL ACT PERFORMED WITH RESPECT TO A RECORD BY MEANS OF REAL-TIME AUDIO-VIDEO COMMUNICATION IN ACCORDANCE WITH RULE 5.

5.1.6 "REMOTE NOTARIZATION SYSTEM" MEANS ANY ELECTRONIC DEVICE OR PROCESS THAT ALLOWS A NOTARY PUBLIC AND A REMOTELY LOCATED INDIVIDUAL TO COMMUNICATE WITH EACH OTHER SIMULTANEOUSLY BY SIGHT AND SOUND SUCH AS MAINSTREAM VIDEOCONFERENCING TECHNOLOGIES, INCLUDING THOSE IN PHONE APPLICATION FORM, THAT WILL RECORD THE ENTIRE COMMUNICATION.

5.1.7 "REMOTE PRESENTATION" MEANS THE TRANSMISSION TO THE NOTARY PUBLIC THROUGH THE DEVICES OR PROCESSES REFERENCED IN RULE 5.1.6 OF AN IMAGE OF A GOVERNMENT-ISSUED IDENTIFICATION THAT IS SUFFICIENT QUALITY TO ENABLE THE NOTARY PUBLIC TO IDENTIFY THE REMOTELY LOCATED INDIVIDUAL SEEKING THE NOTARY PUBLIC'S SERVICES.

5.2 REQUIREMENTS TO PERFORM REMOTE NOTARIZATION

5.2.1 A NOTARY PUBLIC MAY PERFORM A REMOTE NOTARIZATION ONLY FOR A REMOTELY LOCATED INDIVIDUAL WHO IS LOCATED IN THE STATE OF COLORADO.

5.2.2 EXCLUSIONS

A NOTARY PUBLIC MUST NOT USE A REMOTE NOTARIZATION SYSTEM TO NOTARIZE:

(A) A RECORD RELATING TO THE ELECTORAL PROCESS; OR

(B) A WILL AS DEFINED UNDER SECTION 15-10-201(59), C.R.S., EXCEPT AS REQUIRED IN ACCORDANCE WITH 5.2.9(C).

5.2.3 A NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT FOR A REMOTELY LOCATED INDIVIDUAL BY MEANS OF AUDIO-VIDEO COMMUNICATION MUST BE CURRENTLY COMMISSIONED IN THE STATE OF COLORADO AND LOCATED IN THE STATE OF COLORADO AT THE TIME THE NOTARIAL ACT IS PERFORMED.

5.2.4 THE REMOTE NOTARIZATION SYSTEM USED TO PERFORM REMOTE NOTARIZATIONS MUST BE SUFFICIENT TO:

(A) ENABLE THE NOTARY PUBLIC TO VERIFY THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL AND ANY REQUIRED WITNESS BY MEANS OF PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE OF IDENTITY;

(B) ENABLE THE NOTARY PUBLIC TO VERIFY THAT THE NOTARY PUBLIC, THE REMOTELY LOCATED INDIVIDUAL, AND ANY REQUIRED WITNESS ARE VIEWING THE SAME RECORD AND THAT ALL SIGNATURES, CHANGES, AND ATTACHMENTS TO THE RECORD MADE BY THE REMOTELY LOCATED INDIVIDUAL AND ANY REQUIRED WITNESS ARE MADE IN REAL TIME; AND

(C) RECORD THE INTERACTION SUCH THAT THE VERIFICATIONS MAY BE CLEARLY VIEWED AT A LATER DATE.

5.2.5 REQUIREMENTS FOR ENSURING SATISFACTORY EVIDENCE OF IDENTITY

(A) A NOTARY MUST DETERMINE FROM PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE THAT THE REMOTELY LOCATED INDIVIDUAL APPEARING BEFORE THE NOTARY PUBLIC BY MEANS OF AUDIO-VIDEO COMMUNICATION IS THE INDIVIDUAL THAT HE OR SHE CLAIMS TO BE.

(B) A NOTARY PUBLIC HAS SATISFACTORY EVIDENCE OF IDENTITY IF THE NOTARY PUBLIC CAN IDENTIFY THE REMOTELY LOCATED INDIVIDUAL BY MEANS OF AUDIO-VIDEO COMMUNICATION BY USING AT LEAST ONE OF THE FOLLOWING METHODS:

(1) THE OATH OR AFFIRMATION OF A CREDIBLE WITNESS WHO PERSONALLY KNOWS THE REMOTELY LOCATED INDIVIDUAL, IS PERSONALLY KNOWN TO THE NOTARY PUBLIC OR PRESENTS EVIDENCE OF IDENTITY WITH GOVERNMENT-ISSUED IDENTIFICATION AS REQUIRED BY SECTION 24-21-507, C.R.S., AND IS IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC OR THE REMOTELY LOCATED INDIVIDUAL;

(2) REMOTE PRESENTATION OF A GOVERNMENT-ISSUED IDENTIFICATION AND THE DATA CONTAINED ON THE IDENTIFICATION OF THE REMOTELY LOCATED INDIVIDUAL AS REQUIRED BY SECTION 24-21-507, C.R.S..

5.2.6 CONSISTENT WITH SECTION 24-21-508, C.R.S., A NOTARY PUBLIC MAY REFUSE TO PERFORM A NOTARIAL ACT UNDER RULE 5 IF THE NOTARY PUBLIC IS NOT SATISFIED THAT THE REQUIREMENTS OF THIS RULE 5 ARE MET.

5.2.7 THE CERTIFICATE OF NOTARIAL ACT FOR A REMOTE NOTARIZATION MUST, IN ADDITION TO COMPLYING WITH THE REQUIREMENTS OF SECTION 24-21-515, C.R.S., INDICATE THAT THE NOTARIAL ACT WAS PERFORMED USING AUDIO-VIDEO TECHNOLOGY.

5.2.8 REQUIREMENTS FOR AUDIO-VIDEO RECORDING

(A) A NOTARY PUBLIC MUST CREATE AN AUDIO-VIDEO RECORDING OF A REMOTE NOTARIZATION AND MUST:

(1) FIRST DISCLOSE TO THE REMOTELY LOCATED INDIVIDUAL THE FACT OF THE RECORDING AND THE DETAILS OF ITS INTENDED STORAGE, INCLUDING WHERE AND FOR HOW LONG IT WILL BE STORED;

(2) ENSURE THAT THE REMOTELY LOCATED INDIVIDUAL EXPLICITLY CONSENTS TO BOTH THE RECORDING AND THE STORAGE OF THE RECORDING; AND

(3) SECURELY STORE THE RECORDING FOR A PERIOD OF TEN YEARS IN COMPLIANCE WITH SECTION 24-21-519, C.R.S.

(B) THE NOTARY MUST MAKE A GOOD FAITH EFFORT TO ONLY INCLUDE THE INFORMATION REQUIRED IN RULE 5.2.8(C).

(C) THE AUDIO-VIDEO RECORDING MUST CONTAIN :

(1) AT THE BEGINNING OF THE RECORDING, A RECITATION BY THE NOTARY PUBLIC SUFFICIENT TO IDENTIFY THE NOTARIAL ACT INCLUDING:

(A) THE NAME OF THE NOTARY PUBLIC;

(B) THE DATE AND TIME OF THE NOTARIAL ACT;

(C) A DESCRIPTION OF THE DOCUMENT OR DOCUMENTS TO WHICH THE NOTARIAL ACT RELATES;

(D) THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL WHOSE SIGNATURE WILL BE THE SUBJECT OF THE NOTARIAL ACT;

(E) THE IDENTITY OF ANY PERSON WHO WILL ACT AS A CREDIBLE WITNESS, IF REQUIRED, TO IDENTIFY THE SIGNER; AND

(F) THE METHOD OR METHODS BY WHICH THE REMOTELY LOCATED INDIVIDUAL AND ANY WITNESS, IF REQUIRED, WILL BE IDENTIFIED TO THE NOTARY PUBLIC.

(2) A DECLARATION BY THE REMOTELY LOCATED INDIVIDUAL THAT HIS OR HER ACTIONS BEFORE THE NOTARY PUBLIC ARE KNOWINGLY AND VOLUNTARILY MADE;

(3) IF THE REMOTELY LOCATED INDIVIDUAL FOR WHOM THE NOTARIAL ACT IS BEING PERFORMED IS IDENTIFIED BY PERSONAL KNOWLEDGE, AN EXPLANATION BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE REMOTELY LOCATED INDIVIDUAL AND FOR HOW LONG;

(4) IF THE REMOTELY LOCATED INDIVIDUAL IS IDENTIFIED BY A CREDIBLE WITNESS:

(A) A STATEMENT BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE CREDIBLE WITNESS AND FOR HOW LONG THE NOTARY PUBLIC HAS KNOWN THE CREDIBLE WITNESS OR EVIDENCE OF IDENTITY USING GOVERNMENT-ISSUED IDENTIFICATION AS REQUIRED BY SECTION 24-21-507, C.R.S.; AND

(B) AN EXPLANATION BY THE CREDIBLE WITNESS AS TO HOW THE CREDIBLE WITNESS KNOWS THE REMOTELY LOCATED INDIVIDUAL;

(5) ANY OTHER STATEMENTS, ACTS, AND CONDUCT NECESSARY TO PERFORM THE REQUESTED NOTARIAL ACT.

(D) THE PROVISIONS OF SECTION 24-21-519, C.R.S., THAT RELATE TO THE SECURITY, INSPECTION, COPYING, RETENTION, AND DISPOSITION OF A NOTARY PUBLIC'S JOURNAL APPLY EQUALLY TO THE SECURITY, INSPECTION, COPYING, RETENTION, AND DISPOSITION OF AUDIO-VIDEO RECORDINGS REQUIRED BY THIS SECTION.

5.2.9 TRANSMITTAL OF RECORD TO BE NOTARIZED

(A) AFTER THE NOTARY PUBLIC PERFORMS THE NOTARIAL ACT, THE REMOTELY LOCATED INDIVIDUAL MUST TRANSMIT A LEGIBLE COPY OF THE RECORD BY FAX, EMAIL, OR OTHER ELECTRONIC MEANS DIRECTLY TO THE NOTARY ON THE SAME DATE THAT THE ACT TOOK PLACE; AND

(B) THE NOTARY PUBLIC MUST NOTARIZE THE TRANSMITTED COPY OF THE DOCUMENT AS SOON AS RECEIVED AND TRANSMIT THE SAME BACK TO THE PERSON.

(C) IF THE RECORD IS A WILL, AS DEFINED UNDER SECTION 15-10-201(59) C.R.S.:

(1) THE ORIGINAL SIGNED RECORD MUST BE PRESENTED TO THE NOTARY PUBLIC WITHIN 15 CALENDAR DAYS OF THE DATE OF THE REMOTE NOTARIZATION; AND

(2) WITHIN THREE CALENDAR DAYS OF RECEIVING THE SIGNED RECORD, THE NOTARY PUBLIC MUST CONFIRM THAT SUCH RECORD IS IDENTICAL TO THE RECORD REMOTELY NOTARIZED UNDER RULE 5.2, AND, IF SO, AFFIX THE NOTARY PUBLIC'S SIGNATURE AND SEAL ON TO THE ORIGINAL SIGNED RECORD, REFLECTING THE DATE OF THE REMOTE NOTARIZATION.

(3) A WILL OF A REMOTELY LOCATED TESTATOR IS NOT ACKNOWLEDGED IN ACCORDANCE WITH SECTION 15-11-502(1)(C)(II), C.R.S. UNLESS IT IS NOTARIZED PURSUANT TO ALL THE REQUIREMENTS OF 5.2.9(C).

5.3 A NOTARY PUBLIC MUST RECORD ALL REMOTE NOTARIZATIONS IN HIS OR HER NOTARY JOURNAL.

5.4 NOTARIES PERFORMING REMOTE NOTARIZATION, MAINSTREAM VIDEOCONFERENCING TECHNOLOGY COMPANIES AND REMOTE NOTARIZATION VENDORS MUST NOT USE, SELL, OR OFFER TO SELL TO ANOTHER PERSON OR TRANSFER TO ANOTHER PERSON ANY PERSONAL INFORMATION, INCLUDING RELATED TO THE INDIVIDUAL OR THE TRANSACTION, OBTAINED UNDER THIS RULE 5 THAT PERTAINS TO THE REMOTELY LOCATED INDIVIDUAL, A WITNESS TO A REMOTE NOTARIZATION, OR AN INDIVIDUAL NAMED IN A RECORD PRESENTED FOR REMOTE NOTARIZATION, EXCEPT:

5.4.1 AS NECESSARY TO FACILITATE PERFORMANCE OF A NOTARIAL ACT;

5.4.2 TO EFFECT, ADMINISTER, ENFORCE SERVICE, OR PROCESS A RECORD PROVIDED BY OR ON BEHALF OF THE INDIVIDUAL OR THE TRANSACTION OF WHICH THE RECORD IS A PART;

5.4.3 IN ACCORDANCE WITH THIS RULE 5 OR OTHER APPLICABLE FEDERAL, STATE OR LOCAL LAW;

5.4.4 TO COMPLY WITH A LAWFUL SUBPOENA OR COURT ORDER; OR

5.4.5 IN CONNECTION WITH A PROPOSED OR ACTUAL SALE, MERGER, TRANSFER, OR EXCHANGE OF ALL OR A PORTION OF A BUSINESS OR OPERATING UNIT OF THE PROVIDER IF THE PERSONAL INFORMATION CONCERNS ONLY CUSTOMERS OR THE BUSINESS OR UNIT AND THE TRANSFEREE AGREES TO COMPLY WITH THE RESTRICTIONS SET FORTH IN THIS RULE 5.4.

II. Basis, Purpose, and Specific Statutory Authority

A Statement of Basis, Purpose, and Specific Statutory Authority follows this notice and is incorporated by reference.

III. Statement of Justification and Reasons for Adoption of Temporary Rules

A statement of the Secretary of State's findings to justify the immediate adoption of this new rule on a temporary basis follows this notice and is incorporated by reference.[4]

IV. Effective Date of Adopted Rules

These rule amendments are effective immediately.

Dated this 26th day of June, 2020,

Ian Rayder
Deputy Secretary of State

For

Jena Griswold
Colorado Secretary of State

[4] Section 24-4-103(6), C.R.S. (2019).

STATE OF COLORADO
Department of State
1700 Broadway
Suite 200
Denver, CO 80290

Jena Griswold
Secretary of State

Ian Rayder
Deputy Secretary of State

Statement of Basis, Purpose, and Specific Statutory Authority

Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

June 26, 2020

I. Basis and Purpose

This statement explains amendments to the Colorado Secretary of State Notary Program Rules. The purpose of the changes is to ensure the uniform and proper administration, implementation, and enforcement of the Colorado Revised Uniform Law On Notarial Acts (RULONA)[1] and to answer questions arising under the Act. Specifically, the changes include:

- Readopting Rule 5 - Remote Notarization

On March 10, 2020, the Colorado Governor declared a disaster emergency due to the COVID-19 contagion. On March 28, 2020, the Colorado Governor issued Executive Order D 2020 019, suspending the requirement for personal appearance before a notary officer as set forth in Section 24-21-506, C.R.S. Executive Order D 2020 087, which extended Executive Orders D 2020 019, 030, and 047, expire on June 28, 2020. Today, June 26, 2020, the Colorado Governor signed Senate Bill 20-096 concerning an authorization for notaries public to perform notarial acts using audio-video communication. In accordance with new statutory authority, the Secretary readopts Rule 5 on a temporary basis as is necessary to authorize and establish minimum standards for remote notarizations. For reference, temporary Rule 5 was initially adopted on March 30, 2020, under CCR Tracking #2020-00167.

II. Rulemaking Authority

The statutory authority is as follows:

- Section 24-21-527(1)(a), C.R.S., (2020), which authorizes the Secretary of State to "[p]rescribe the manner of performing notarial acts regarding tangible and electronic records[.]"

- Section 24-21-527(1)(c), C.R.S., (2020), which authorizes the Secretary of State to "[i]nclude provisions to ensure integrity in the creation, transmittal, storage, or authentication of electronic records or signatures[.]"

[1] Article 21, Title 24 of the Colorado Revised Statutes.

- Section 24-21-527(1)(e), C.R.S., (2020), which authorizes the Secretary of State to "[i]nclude provisions to prevent fraud or mistake in the performance of notarial acts[.]"

- Section 24-21-527(1)(g), C.R.S., (2020), which authorizes the Secretary of State to "[p]rescribe the manner of performing notarial acts using audio-video communication technology, including provisions to ensure the security, integrity, and accessibility of records relating to those acts[.]"

- Section 24-21-527(1)(h), C.R.S., (2020), which authorizes the Secretary of State to "[p]rescribe requirements for the approval and use of remote notarization systems and storage systems."

STATE OF COLORADO
Department of State
1700 Broadway
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Denver, CO 80290

Jena Griswold
Secretary of State

Ian Rayder
Deputy Secretary of State

Statement of Justification and Reasons for Adoption of Temporary Rules

Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

June 26, 2020

Readopting Rule: 5

The Secretary of State finds that certain amendments to the existing notary program rules must be adopted and effective immediately to ensure the uniform and proper administration, implementation, and enforcement of the Colorado Revised Uniform Law on Notarial Acts (RULONA)[1].

On March 10, 2020, the Colorado Governor declared a disaster emergency due to the COVID-19 contagion. On March 28, 2020, the Colorado Governor issued Executive Order D 2020 019, suspending the requirement for personal appearance before a notary officer as set forth in Section 24-21-506, C.R.S. Executive Order D 2020 087, which extended Executive Orders D 2020 019, 030, and 047, expire on June 28, 2020. Today, June 26, 2020, the Colorado Governor signed Senate Bill 20-096 concerning an authorization for notaries public to perform notarial acts using audio-video communication. In accordance with new statutory authority, the Secretary readopts Rule 5 on a temporary basis as is necessary to authorize and establish minimum standards for remote notarizations. For reference, temporary Rule 5 was initially adopted on March 30, 2020, under CCR Tracking #2020-00167.

For these reasons, and in accordance with the State Administrative Procedure Act, the Secretary of State finds that temporary adoption of the amendments to existing notary program rules is imperatively necessary to comply with state and federal law and to promote public interests.[2]

[1] Article 24, Title 21 of the Colorado Revised Statutes.
[2] Section 24-4-103(3) (6), C.R.S. (2019).

STATE OF COLORADO
Department of State
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Notice of Temporary Adoption

Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

October 15, 2020

I. Adopted Rule Amendments

As authorized by the Colorado Notaries Public Act[1] and the State Administrative Procedure Act[2], the Colorado Secretary of State gives notice that the following amendments to the Notary Program Rules[3] are adopted on a temporary basis and effective immediately. (SMALL CAPS indicate proposed additions to the current rules. ~~Stricken type~~ indicates proposed deletions from current rules. *Annotations* may be included):

Current 8 CCR 1505-11 is amended as follows:

Readopting Rule 5:

RULE 5 – REMOTE NOTARIZATION

5.1 DEFINITIONS

AS USED IN THESE RULES, UNLESS STATED OTHERWISE:

5.1.1 "AUDIO-VIDEO COMMUNICATION" MEANS COMMUNICATION BY WHICH AN INDIVIDUAL IS ABLE TO SEE, HEAR, AND COMMUNICATE WITH A REMOTELY LOCATED INDIVIDUAL IN REAL TIME USING ELECTRONIC MEANS.

5.1.2 "OUTSIDE THE UNITED STATES" MEANS A LOCATION OUTSIDE THE GEOGRAPHIC BOUNDARIES OF THE UNITED STATES, PUERTO RICO, THE UNITED STATES VIRGIN ISLANDS, AND ANY TERRITORY OR INSULAR POSSESSION SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

5.1.3 "REAL TIME" OR "IN REAL TIME" MEANS, WITH RESPECT TO AN INTERACTION BETWEEN INDIVIDUALS BY MEANS OF AUDIO-VIDEO COMMUNICATION, THAT THE INDIVIDUALS CAN SEE AND HEAR EACH OTHER SUBSTANTIALLY SIMULTANEOUSLY AND WITHOUT INTERRUPTION OR DISCONNECTION. DELAYS OF A FEW SECONDS THAT ARE INHERENT IN THE METHOD OF COMMUNICATION DO NOT PREVENT THE INTERACTION FROM BEING CONSIDERED TO HAVE OCCURRED IN REAL TIME.

[1] Article 21, Title 24 of the Colorado Revised Statutes.
[2] Section 24-4-103(3)(a), C.R.S. (2020).
[3] 8 CCR 1505-11.

5.1.4 "REMOTELY LOCATED INDIVIDUAL" MEANS AN INDIVIDUAL WHO IS NOT IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT UNDER THIS RULE 5.

5.1.5 "REMOTE NOTARIZATION" MEANS AN ELECTRONIC NOTARIAL ACT PERFORMED WITH RESPECT TO A RECORD BY MEANS OF REAL-TIME AUDIO-VIDEO COMMUNICATION IN ACCORDANCE WITH RULE 5.

5.1.6 "REMOTE NOTARIZATION SYSTEM" MEANS ANY ELECTRONIC DEVICE OR PROCESS THAT ALLOWS A NOTARY PUBLIC AND A REMOTELY LOCATED INDIVIDUAL TO COMMUNICATE WITH EACH OTHER SIMULTANEOUSLY BY SIGHT AND SOUND SUCH AS MAINSTREAM VIDEOCONFERENCING TECHNOLOGIES, INCLUDING THOSE IN PHONE APPLICATION FORM, THAT WILL RECORD THE ENTIRE COMMUNICATION.

5.1.7 "REMOTE PRESENTATION" MEANS THE TRANSMISSION TO THE NOTARY PUBLIC THROUGH THE DEVICES OR PROCESSES REFERENCED IN RULE 5.1.6 OF AN IMAGE OF A GOVERNMENT-ISSUED IDENTIFICATION THAT IS SUFFICIENT QUALITY TO ENABLE THE NOTARY PUBLIC TO IDENTIFY THE REMOTELY LOCATED INDIVIDUAL SEEKING THE NOTARY PUBLIC'S SERVICES.

5.2 REQUIREMENTS TO PERFORM REMOTE NOTARIZATION

5.2.1 A NOTARY PUBLIC MAY PERFORM A REMOTE NOTARIZATION ONLY FOR A REMOTELY LOCATED INDIVIDUAL WHO IS LOCATED IN THE STATE OF COLORADO.

5.2.2 EXCLUSIONS

A NOTARY PUBLIC MUST NOT USE A REMOTE NOTARIZATION SYSTEM TO NOTARIZE:

(A) A RECORD RELATING TO THE ELECTORAL PROCESS; OR

(B) A WILL AS DEFINED UNDER SECTION 15-10-201(59), C.R.S., EXCEPT AS REQUIRED IN ACCORDANCE WITH 5.2.9(C).

5.2.3 A NOTARY PUBLIC WHO PERFORMS A NOTARIAL ACT FOR A REMOTELY LOCATED INDIVIDUAL BY MEANS OF AUDIO-VIDEO COMMUNICATION MUST BE CURRENTLY COMMISSIONED IN THE STATE OF COLORADO AND LOCATED IN THE STATE OF COLORADO AT THE TIME THE NOTARIAL ACT IS PERFORMED.

5.2.4 THE REMOTE NOTARIZATION SYSTEM USED TO PERFORM REMOTE NOTARIZATIONS MUST BE SUFFICIENT TO:

(A) ENABLE THE NOTARY PUBLIC TO VERIFY THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL AND ANY REQUIRED WITNESS BY MEANS OF PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE OF IDENTITY;

(B) ENABLE THE NOTARY PUBLIC TO VERIFY THAT THE NOTARY PUBLIC, THE REMOTELY LOCATED INDIVIDUAL, AND ANY REQUIRED WITNESS ARE VIEWING THE SAME RECORD AND THAT ALL SIGNATURES, CHANGES, AND ATTACHMENTS TO THE RECORD MADE BY THE REMOTELY LOCATED INDIVIDUAL AND ANY REQUIRED WITNESS ARE MADE IN REAL TIME; AND

(C) RECORD THE INTERACTION SUCH THAT THE VERIFICATIONS MAY BE CLEARLY VIEWED AT A LATER DATE.

5.2.5 REQUIREMENTS FOR ENSURING SATISFACTORY EVIDENCE OF IDENTITY

(A) A NOTARY MUST DETERMINE FROM PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE THAT THE REMOTELY LOCATED INDIVIDUAL APPEARING BEFORE THE NOTARY PUBLIC BY MEANS OF AUDIO-VIDEO COMMUNICATION IS THE INDIVIDUAL THAT HE OR SHE CLAIMS TO BE.

(B) A NOTARY PUBLIC HAS SATISFACTORY EVIDENCE OF IDENTITY IF THE NOTARY PUBLIC CAN IDENTIFY THE REMOTELY LOCATED INDIVIDUAL BY MEANS OF AUDIO-VIDEO COMMUNICATION BY USING AT LEAST ONE OF THE FOLLOWING METHODS:

(1) THE OATH OR AFFIRMATION OF A CREDIBLE WITNESS WHO PERSONALLY KNOWS THE REMOTELY LOCATED INDIVIDUAL, IS PERSONALLY KNOWN TO THE NOTARY PUBLIC OR PRESENTS EVIDENCE OF IDENTITY WITH GOVERNMENT-ISSUED IDENTIFICATION AS REQUIRED BY SECTION 24-21-507, C.R.S., AND IS IN THE PHYSICAL PRESENCE OF THE NOTARY PUBLIC OR THE REMOTELY LOCATED INDIVIDUAL;

(2) REMOTE PRESENTATION OF A GOVERNMENT-ISSUED IDENTIFICATION AND THE DATA CONTAINED ON THE IDENTIFICATION OF THE REMOTELY LOCATED INDIVIDUAL AS REQUIRED BY SECTION 24-21-507, C.R.S..

5.2.6 CONSISTENT WITH SECTION 24-21-508, C.R.S., A NOTARY PUBLIC MAY REFUSE TO PERFORM A NOTARIAL ACT UNDER RULE 5 IF THE NOTARY PUBLIC IS NOT SATISFIED THAT THE REQUIREMENTS OF THIS RULE 5 ARE MET.

5.2.7 THE CERTIFICATE OF NOTARIAL ACT FOR A REMOTE NOTARIZATION MUST, IN ADDITION TO COMPLYING WITH THE REQUIREMENTS OF SECTION 24-21-515, C.R.S., INDICATE THAT THE NOTARIAL ACT WAS PERFORMED USING AUDIO-VIDEO TECHNOLOGY.

5.2.8 REQUIREMENTS FOR AUDIO-VIDEO RECORDING

(A) A NOTARY PUBLIC MUST CREATE AN AUDIO-VIDEO RECORDING OF A REMOTE NOTARIZATION AND MUST:

(1) FIRST DISCLOSE TO THE REMOTELY LOCATED INDIVIDUAL THE FACT OF THE RECORDING AND THE DETAILS OF ITS INTENDED STORAGE, INCLUDING WHERE AND FOR HOW LONG IT WILL BE STORED;

(2) ENSURE THAT THE REMOTELY LOCATED INDIVIDUAL EXPLICITLY CONSENTS TO BOTH THE RECORDING AND THE STORAGE OF THE RECORDING; AND

(3) SECURELY STORE THE RECORDING FOR A PERIOD OF TEN YEARS IN COMPLIANCE WITH SECTION 24-21-519, C.R.S.

(B) THE NOTARY MUST MAKE A GOOD FAITH EFFORT TO ONLY INCLUDE THE INFORMATION REQUIRED IN RULE 5.2.8(C).

(C) THE AUDIO-VIDEO RECORDING MUST CONTAIN :

(1) AT THE BEGINNING OF THE RECORDING, A RECITATION BY THE NOTARY PUBLIC SUFFICIENT TO IDENTIFY THE NOTARIAL ACT INCLUDING:

(A) THE NAME OF THE NOTARY PUBLIC;

(B) THE DATE AND TIME OF THE NOTARIAL ACT;

(C) A DESCRIPTION OF THE DOCUMENT OR DOCUMENTS TO WHICH THE NOTARIAL ACT RELATES;

(D) THE IDENTITY OF THE REMOTELY LOCATED INDIVIDUAL WHOSE SIGNATURE WILL BE THE SUBJECT OF THE NOTARIAL ACT;

(E) THE IDENTITY OF ANY PERSON WHO WILL ACT AS A CREDIBLE WITNESS, IF REQUIRED, TO IDENTIFY THE SIGNER; AND

(F) THE METHOD OR METHODS BY WHICH THE REMOTELY LOCATED INDIVIDUAL AND ANY WITNESS, IF REQUIRED, WILL BE IDENTIFIED TO THE NOTARY PUBLIC.

(2) A DECLARATION BY THE REMOTELY LOCATED INDIVIDUAL THAT HIS OR HER ACTIONS BEFORE THE NOTARY PUBLIC ARE KNOWINGLY AND VOLUNTARILY MADE;

(3) IF THE REMOTELY LOCATED INDIVIDUAL FOR WHOM THE NOTARIAL ACT IS BEING PERFORMED IS IDENTIFIED BY PERSONAL KNOWLEDGE, AN EXPLANATION BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE REMOTELY LOCATED INDIVIDUAL AND FOR HOW LONG;

(4) IF THE REMOTELY LOCATED INDIVIDUAL IS IDENTIFIED BY A CREDIBLE WITNESS:

(A) A STATEMENT BY THE NOTARY PUBLIC AS TO HOW THE NOTARY PUBLIC KNOWS THE CREDIBLE WITNESS AND FOR HOW LONG THE NOTARY PUBLIC HAS KNOWN THE CREDIBLE WITNESS OR EVIDENCE OF IDENTITY USING GOVERNMENT-ISSUED IDENTIFICATION AS REQUIRED BY SECTION 24-21-507, C.R.S.; AND

(B) AN EXPLANATION BY THE CREDIBLE WITNESS AS TO HOW THE CREDIBLE WITNESS KNOWS THE REMOTELY LOCATED INDIVIDUAL;

(5) ANY OTHER STATEMENTS, ACTS, AND CONDUCT NECESSARY TO PERFORM THE REQUESTED NOTARIAL ACT.

(D) THE PROVISIONS OF SECTION 24-21-519, C.R.S., THAT RELATE TO THE SECURITY, INSPECTION, COPYING, RETENTION, AND DISPOSITION OF A NOTARY PUBLIC'S JOURNAL APPLY EQUALLY TO THE SECURITY, INSPECTION, COPYING, RETENTION, AND DISPOSITION OF AUDIO-VIDEO RECORDINGS REQUIRED BY THIS SECTION.

5.2.9 TRANSMITTAL OF RECORD TO BE NOTARIZED

(A) AFTER THE NOTARY PUBLIC PERFORMS THE NOTARIAL ACT, THE REMOTELY LOCATED INDIVIDUAL MUST TRANSMIT A LEGIBLE COPY OF THE RECORD BY FAX, EMAIL, OR OTHER ELECTRONIC MEANS DIRECTLY TO THE NOTARY ON THE SAME DATE THAT THE ACT TOOK PLACE; AND

(B) THE NOTARY PUBLIC MUST NOTARIZE THE TRANSMITTED COPY OF THE DOCUMENT AS SOON AS RECEIVED AND TRANSMIT THE SAME BACK TO THE PERSON.

(C) IF THE RECORD IS A WILL, AS DEFINED UNDER SECTION 15-10-201(59) C.R.S.:

(1) THE ORIGINAL SIGNED RECORD MUST BE PRESENTED TO THE NOTARY PUBLIC WITHIN 15 CALENDAR DAYS OF THE DATE OF THE REMOTE NOTARIZATION; AND

(2) WITHIN THREE CALENDAR DAYS OF RECEIVING THE SIGNED RECORD, THE NOTARY PUBLIC MUST CONFIRM THAT SUCH RECORD IS IDENTICAL TO THE RECORD REMOTELY NOTARIZED UNDER RULE 5.2, AND, IF SO, AFFIX THE NOTARY PUBLIC'S SIGNATURE AND SEAL ON TO THE ORIGINAL SIGNED RECORD, REFLECTING THE DATE OF THE REMOTE NOTARIZATION.

(3) A WILL OF A REMOTELY LOCATED TESTATOR IS NOT ACKNOWLEDGED IN ACCORDANCE WITH SECTION 15-11-502(1)(C)(II), C.R.S. UNLESS IT IS NOTARIZED PURSUANT TO ALL THE REQUIREMENTS OF 5.2.9(C).

5.3 A NOTARY PUBLIC MUST RECORD ALL REMOTE NOTARIZATIONS IN HIS OR HER NOTARY JOURNAL.

5.4 NOTARIES PERFORMING REMOTE NOTARIZATION, MAINSTREAM VIDEOCONFERENCING TECHNOLOGY COMPANIES AND REMOTE NOTARIZATION VENDORS MUST NOT USE, SELL, OR OFFER TO SELL TO ANOTHER PERSON OR TRANSFER TO ANOTHER PERSON ANY PERSONAL INFORMATION, INCLUDING RELATED TO THE INDIVIDUAL OR THE TRANSACTION, OBTAINED UNDER THIS RULE 5 THAT PERTAINS TO THE REMOTELY LOCATED INDIVIDUAL, A WITNESS TO A REMOTE NOTARIZATION, OR AN INDIVIDUAL NAMED IN A RECORD PRESENTED FOR REMOTE NOTARIZATION, EXCEPT:

5.4.1 AS NECESSARY TO FACILITATE PERFORMANCE OF A NOTARIAL ACT;

5.4.2 TO EFFECT, ADMINISTER, ENFORCE SERVICE, OR PROCESS A RECORD PROVIDED BY OR ON BEHALF OF THE INDIVIDUAL OR THE TRANSACTION OF WHICH THE RECORD IS A PART;

5.4.3 IN ACCORDANCE WITH THIS RULE 5 OR OTHER APPLICABLE FEDERAL, STATE OR LOCAL LAW;

5.4.4 TO COMPLY WITH A LAWFUL SUBPOENA OR COURT ORDER; OR

5.4.5 IN CONNECTION WITH A PROPOSED OR ACTUAL SALE, MERGER, TRANSFER, OR EXCHANGE OF ALL OR A PORTION OF A BUSINESS OR OPERATING UNIT OF THE PROVIDER IF THE PERSONAL INFORMATION CONCERNS ONLY CUSTOMERS OR THE BUSINESS OR UNIT AND THE TRANSFEREE AGREES TO COMPLY WITH THE RESTRICTIONS SET FORTH IN THIS RULE 5.4.

II. Basis, Purpose, and Specific Statutory Authority

A Statement of Basis, Purpose, and Specific Statutory Authority follows this notice and is incorporated by reference.

III. Statement of Justification and Reasons for Adoption of Temporary Rules

A statement of the Secretary of State's findings to justify the immediate adoption of this new rule on a temporary basis follows this notice and is incorporated by reference.[4]

IV. Effective Date of Adopted Rules

These rule amendments are effective immediately.

Dated this 15th day of October, 2020,

Ian Rayder
Deputy Secretary of State

For

Jena Griswold
Colorado Secretary of State

[4] Section 24-4-103(6), C.R.S. (2020).

STATE OF COLORADO
Department of State
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Statement of Basis, Purpose, and Specific Statutory Authority

Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

October 15, 2020

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- Readopting Rule 5 - Remote Notarization

On March 10, 2020, the Colorado Governor declared a disaster emergency due to the COVID-19 contagion. On March 28, 2020, the Colorado Governor issued Executive Order D 2020 019, suspending the requirement for personal appearance before a notary officer as set forth in Section 24-21-506, C.R.S. Executive Order D 2020 087, which extended Executive Orders D 2020 019, 030, and 047, expire on June 28, 2020. On June 26, 2020, the Colorado Governor signed Senate Bill 20-096 concerning an authorization for notaries public to perform notarial acts using audio-video communication. In accordance with new statutory authority, the Secretary readopted Rule 5 on a temporary basis as is necessary to authorize and establish minimum standards for remote notarizations. Today, October 15, 2020, the Secretary of State readopts the temporary rules to continue the rules until permanent rules are established. The Secretary of State simultaneously issued a notice of permanent rulemaking. (For reference: temporary Rule 5 was initially adopted on March 30, 2020, under CCR Tracking #2020-00167 and extended on June 26, 2020, under CCR Tracking #2020-00446.)

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Office of the Secretary of State
Notary Program Rules
8 CCR 1505-11

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Colorado Bar Association

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November 16, 2020

The Honorable Jena Griswold
State of Colorado, Department of State
1700 Broadway, Suite 200
Denver, Colorado 80290

Re: Colorado Bar Association Written Comments – 8 CCR 1505-11

Dear Secretary Griswold:

The Colorado Bar Association ("CBA") respectfully submits these written comments to the proposed Notary Program Rules, 8 CCR 1505-11 ("Rules"), published October 15, 2020. The CBA appreciates both the Department's ongoing work to implement Senate Bill 20-096 and the opportunity to provide comment.

1. **Sections 2.3.1 and 2.3.2 – Communication**:

    a. This provision requires direct communication and understanding between notary and signer and prohibits the use of a translator. This section may discriminate against individuals with disabilities and those who face language barriers. If translators are prohibited, it leaves these individuals without any options other than to locate a notary that can overcome any number of communications barriers directly.

    b. The foregoing provisions of the Rules also seem inconsistent with Senate Bill 20096, which provides at section 24-21-502(11.7): "REMOTE NOTARIZATION SYSTEM" MEANS AN ELECTRONIC DEVICE OR PROCESS THAT: (a) ALLOWS A NOTARY PUBLIC AND A REMOTELY LOCATED INDIVIDUAL TO COMMUNICATE WITH EACH OTHER SIMULTANEOUSLY BY SIGHT AND SOUND; AND (b) **WHEN NECESSARY AND CONSISTENT WITH OTHER APPLICABLE LAW, FACILITATES COMMUNICATION WITH A REMOTELY LOCATED INDIVIDUAL WHO HAS A VISION, HEARING, OR SPEECH IMPAIRMENT**. (Emphasis added).

2. **Section 5.1.1 – Definition of "Personal Information":** The second sentence should indicate that "The term **includes but** is not limited to data included in the electronic record..." (Emphasis added).

3. **Section 5.2.1 – Application:**

    a. 5.2.1(A) – If the required exam and the approved providers are not set by December 31, 2020, remote online notary ("RON") rules will not be practically implemented, and, for example, title companies, will be without a means to notarize documents remotely during that gap in time (during which we are likely to be experiencing a higher COVID incidence rate). This gap should be addressed through an extension of the temporary rule until the process for examination and approval of providers can be established.

    b. 5.2.1(E) – This section provides that in applying to become a remote notary, the individual must "SELECT AN APPROVED REMOTE NOTARIZATION SYSTEM PROVIDER." However, section 5.2.8 provides that the remote notary must notify the secretary of state "AFTER CHANGING A REMOTE NOTARIZATION SYSTEM PROVIDER OR REMOTE NOTARIZATION STORAGE PROVIDER." These sections should be clarified to provide whether a notary can utilize more than one remote notarization system provider. Notaries should be allowed to select more than one remote notarization system provider.

4. **Section 5.2.3 – Requirements for Remote Notary Public Seal:**

    a. Pursuant to section 5.2.3(B)(1)(A), "THE REMOTE NOTARY'S SEAL AND SIGNATURE MUST: (A) BE RETAINED UNDER THE REMOTE NOTARY PUBLIC'S SOLE CONTROL AND ACCESS THROUGH THE AUTHENTICATION REQUIRED BY RULE 5.3.3(A)(4)." A similar requirement is set forth in section 5.3.3(A)(4) for system providers. But 5.2.3(B)(3) requires, on the death or incompetency of a notary, that the personal representative or guardian delete the notary's seal and signature from the system. How will that requirement be implemented? The obligation should be limited to a "personal representative or guardian with knowledge of the existence of or knowingly in possession of the seal and signature."

    b. The prohibition in section 5.2.3(B)(2) on "A REMOTE NOTARY PUBLIC'S EMPLOYER, INCLUDING THE EMPLOYER'S EMPLOYEES AND AGENTS, MUST NOT USE OR PERMIT THE USE OF A REMOTE NOTARY'S SEAL OR SIGNATURE BY ANYONE EXCEPT THE REMOTE NOTARY PUBLIC," should be an outright prohibition on any other person's use of the remote notary's seal or signature, with the prohibition on the employer's use being an example or subset.

5. **Section 5.2.7 - Fee**. Does section 5.2.7 (and C.R.S. § 24-21-529(2)) prohibit the notary from charging (or passing through) a fee in excess of $10.00 to cover the Remote Notarization System Provider or Remote Notarization Service Provider?

6. **Section 5.2.9 – Expiration of the Secretary of State's Approval to Perform Remote Notarizations:** Section 5.2.9(B) requires a notary's authorized representative (or the notary) to delete the notary's seal and signature from the remote notary provider's system. This requirement seems inconsistent with section 5.2.3(B)(1)(A) that the remote notary public's seal be retained under the notary's "SOLE CONTROL AND ACCESS …." See also 5.3.3(A)(4) regarding related requirements for system providers.

7. **Section 5.3.5(A) – Notifications**: Section 5.3.5(A) provides: "IF A REMOTE NOTARIZATION SYSTEM PROVIDER OR STORAGE PROVIDER BECOMES AWARE OF A POSSIBLE SECURITY BREACH INVOLVING ITS DATA, THE PROVIDER MUST GIVE NOTICE TO BOTH THE SECRETARY OF STATE AND <u>EACH COLORADO REMOTE NOTARY PUBLIC USING ITS SERVICES</u> NO LATER THAN THIRTY DAYS AFTER THE DATE OF DETERMINATION THAT A SECURITY BREACH OCCURRED. THE PROVIDER MUST COMPLY WITH ANY OTHER NOTIFICATION REQUIREMENTS OF COLORADO'S DATA PRIVACY LAWS." The underlined language should be revised to clarify that notice should be given to each notary using the service provider prior to and at the time of the breach.

8. **Privacy of Personal Information**: With respect to privacy, Senate Bill 20-096 addresses what can and cannot be recorded and how personal information can be used.

    a. Regarding what can and cannot be used, the statute provides:

> 24-21-514.5(11)(c). PROVIDER OF A REMOTE NOTARIZATION SYSTEM OR STORAGE SYSTEM MUST: . . . NOT USE, SELL, OR OFFER TO SELL TO ANOTHER PERSON OR TRANSFER TO ANOTHER PERSON FOR USE OR SALE ANY PERSONAL INFORMATION OBTAINED UNDER THIS SECTION THAT IDENTIFIES A REMOTELY LOCATED INDIVIDUAL, A WITNESS TO A REMOTE NOTARIZATION, OR A PERSON NAMED IN A RECORD PRESENTED FOR REMOTE NOTARIZATION, EXCEPT . . .

The Rules goes on to define "Personal Information" as:

> 5.1.1 ANY INFORMATION OR DATA THAT IS COLLECTED OR USED IN ORDER TO COMPLETE THE TRANSACTION SUBJECT TO REMOTE NOTARIZATION OR IN THE REMOTE NOTARIZATION ITSELF. THE TERM IS NOT LIMITED TO DATA INCLUDED IN THE ELECTRONIC RECORD THAT IS BEING REMOTELY NOTARIZED.

It goes on to prohibit:

> 5.4 THE USE OF PERSONAL INFORMATION FOR THE PURPOSE OF GENERATING ADDITIONAL BUSINESS OR MARKETING OPPORTUNITIES BY OR FOR: (A) THE REMOTE NOTARY; (B) THE REMOTE NOTARY'S EMPLOYER OR ANY BUSINESS FOR WHOM THE REMOTE NOTARY 18 MAY BE PROVIDING CONTRACTED SERVICES; OR (C) THE PROVIDER OR ANY OF ITS AFFILIATES.

And that the service provider:

> 5.3.3(B)(6) PROVIDE REASONABLE SECURITY MEASURES TO PREVENT UNAUTHORIZED ACCESS TO: (A) THE LIVE TRANSMISSION OF THE AUDIO-VIDEO COMMUNICATION; (B) A RECORDING OF THE AUDIO-VIDEO COMMUNICATION; (C) THE VERIFICATION METHODS AND CREDENTIALS USED TO VERIFY THE IDENTITY OF THE PRINCIPAL; AND (D) THE ELECTRONIC RECORDS PRESENTED FOR REMOTE NOTARIZATION.

b. However, there remains a privacy-related issue on which further clarification in the Rules would be helpful. The statute provides:

> 24-21-514.5(9)(b). THE RECORDING MUST INCLUDE THE INFORMATION DESCRIBED IN THIS SUBSECTION (9)(b). A NOTARY PUBLIC SHALL MAKE A GOOD-FAITH EFFORT TO NOT INCLUDE ANY OTHER INFORMATION ON THE RECORDING.
>
> Subsection 9(b) references:
>
> (I) A RECITATION BY THE NOTARY PUBLIC OF INFORMATION SUFFICIENT TO IDENTIFY THE NOTARIAL ACT;
>
> (II) A DECLARATION BY THE REMOTELY LOCATED INDIVIDUAL THAT THE INDIVIDUAL'S SIGNATURE ON THE RECORD IS KNOWINGLY AND VOLUNTARILY MADE;
>
> . . .
>
> (V) THE STATEMENTS, ACTS, AND CONDUCT NECESSARY TO PERFORM THE REQUESTED NOTARIAL ACT OR SUPERVISION OF SIGNING OR WITNESSING OF THE SUBJECT RECORD.

At the same time, the statute requires the notary to:

> 24-21-514.5(4)(c). CONFIRM THAT ANY RECORD THAT IS SIGNED, ACKNOWLEDGED, OR OTHERWISE PRESENTED FOR NOTARIZATION BY THE REMOTELY LOCATED INDIVIDUAL IS THE SAME RECORD SIGNED BY THE NOTARY PUBLIC;

It seems likely that recording the information necessary to confirm that a record being signed is the same as that which the notary is notarizing would violate the requirement to use good faith efforts not to include in the recording information outside that which is required by 9(b) to be recorded, especially in circumstances where only slightly different documents are being revised and finalized up to closing. It also ultimately seems that such recording would not violate the prohibitions on what can be done with personal information. Does that mean a notary can record such information as long as it is kept private? The Rules should provide clarification in such circumstances.

9. **Venue for the signatory whose signature/acknowledgement is the subject of the notarial act**: Section 24-21-514.5(4)(e) of Senate Bill 20-096 requires a RON to:

> IDENTIFY THE VENUE FOR THE NOTARIAL ACT AS THE JURISDICTION WITHIN THE STATE OF COLORADO WHERE THE NOTARY PUBLIC IS PHYSICALLY LOCATED WHILE PERFORMING THE ACT.

It would be helpful to include (or at least be authorized to include) in the record and/or certificate, information on where the signatory is located both in case it becomes relevant to future disputes and to confirm compliance with section 24-21-514.5(2)(a).

10. **Electronic Notarization versus RON**: The Rules are unclear as to whether a remote notarization must comply with the requirements for an electronic notarization. It seems like documents notarized via RON must comply with RON requirements but not those for electronic notarizations since, for example, in electronic notarization there is no seal and a DAN (or a DAN plus a signature) is used in place of a signature whereas RON contemplates using an actual signature and seal.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker

Date: August 27, 2020

UEWA Section	Prefatory Note
Section Title	NA
UEWA Statutory Language	NA
Uniform Law Commission Comment	See below for UEWA Prefatory Note
Current Colorado Law	NA
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

UNIFORM ELECTRONIC WILLS ACT

Prefatory Note

Electronic Wills Under Existing Statutes. People increasingly turn to electronic tools to accomplish life's tasks, including legal tasks. They use computers, tablets, or smartphones to execute electronically a variety of estate planning documents, including pay-on-death and transfer-on-death beneficiary designations and powers of attorney. Some people assume that they will be able to execute all their estate planning documents electronically, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already arisen.

An early case involved a testator's signature typed in a word processing document, which was then printed in hard copy. In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. 2003), the testator typed his signature in a cursive font at the end of the electronic text of his will and then printed the will. Two witnesses watched him type the signature on the will, and then signed the printed copy of the will. The court had no trouble concluding that the typed signature qualified as the testator's signature. The statute defined signature to include a "symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . ." TENN. CODE ANN. § 1-3-105(27) (1999).

In *Taylor* the will was not attested or stored electronically, but the case illustrates a situation in which the substitution of electronic tools for traditional pen and paper can lead to litigation.

In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be "in writing." The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act ("the E-Wills Act") gives effect to such a will and clarifies that the will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the E-Wills Act, if a notary is present with the testator and witnesses, the will can be made self-proving. An alternative provided under the E-Wills Act allows a notary present electronically to prepare the self-proving affidavit.

An even more recent case illustrates what may be anticipated to be the most common electronic will scenario: that of a will prepared without witnesses and stored electronically. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled "Last Note" was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton's death, the probate and appeals court applied Michigan's harmless error statute and concluded that the note was a document that could be treated as executed in compliance with Michigan's requirements for execution of a will. *In re Estate of Horton*, 925 N.W.2d 207 (2018). Under the E-Wills Act, the note would be considered a will only if the state had adopted the harmless error provision of Section 6 and a court determined that the decedent intended the electronic writing to be the decedent's will and therefore excused the lack of witnesses.

Although existing statutes might validate wills like the ones in *Castro* and *Taylor*, litigation may be necessary to resolve the question of validity. Further, the results will be haphazard if no clear policy exists and given statutory variation across the states. States that have adopted the harmless error rule for will execution could use that rule to validate an electronic will, as the court did in *In re Horton*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially, as endorsed by RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.2 (1999), or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. *See, e.g.*, *In re Will of Ranney,* 589 A.2d 1339 (N.J. 1991) (adopting substantial compliance prior to New Jersey's adoption of a harmless error statute.) However, courts are reluctant to adopt exceptions to statutory execution formalities. *See, e.g.*, *Litevich v. Probate Court, Dist. Of West Haven,* 2013 WL 2945055 (Sup. Ct. Conn. 2013); *Davis v. Davis- Henriques*, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

Goals of the E-Wills Act. Estate planning lawyers, notaries, and software providers are among those interested in electronic wills. As of 2019, state legislatures in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia have considered bills authorizing electronic execution of wills. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statute.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency would follow if states modify their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if states law on this question is not uniform, that recognition will be a significant issue. The E-Wills Act seeks:

- To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act seeks to preserve the four functions served by will formalities, as described in John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form,* 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941), which identified the other functions). Those four functions are:

- Evidentiary – the will provides permanent reliable evidence of the testator's intent.
- Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
- Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
- Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

Electronic Execution of Estate Planning Documents. In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). As of 2019, all but three state have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. 7003(a)(1).

Many documents authorizing nonprobate transfers of property are already executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker

Date: August 27, 2020

UEWA Section	Section 1
Section Title	Short Title
UEWA Statutory Language	This [act] may be cited as the Uniform Electronic Wills Act
Uniform Law Commission Comment	None.
Colorado Subcommittee Comment	The Colorado enactment should call the act the "Colorado Uniform Electronic Wills Act".
Colorado Subcommittee Recommendation	Colorado should adopt this section with the addition of the word "Colorado" before "Uniform Electronic Wills Act."

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker

Date: August 20, 2020

UEWA Section	Section 2
Section Title	Definitions
UEWA Statutory Language	In this [act]: (1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. [(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.] (3) "Electronic will" means a will executed electronically in compliance with Section 5(a). (4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (5) "Sign" means, with present intent to authenticate or adopt a record: a. to execute or adopt a tangible symbol; or b. to affix to or logically associate with the record an electronic symbol or process. (6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin

	Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe. (7) "Will" includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.
Uniform Law Commission Comment	**Paragraph 2. Electronic Presence.** An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. *See* Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state's existing rules for presence will apply to determine physical presence. An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5. This definition provides for the meaning of electronic presence. Permitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." MERRIAM-WEBSTER DICTIONARY, https://www.merriamwebster.com/dictionary/real%20time (last visited Sept. 22, 2019). The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time," see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT.

	ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities). In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently-abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology. **Paragraph 5. Sign**. The term "logically associated" is used in the definition of sign, without further definition. Although Indiana has defined the term in its electronic wills statute, IND. CODE § 29-1-21-3(13) (defining logically associated as meaning that documents are "electronically connected, cross referenced, or linked in a reliable manner"), most statutes do not define the term. Most notably, the Uniform Electronic Transactions Act and the Revised Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to the concern that an attempt at definition would be over- or under-inclusive as technology develops. Although often used in connection with a signature, the term is used in RULONA and in the E-Wills Act to refer both to a document that may be logically associated with another document as well as to a signature logically associated with a document. *See also* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq*. **Paragraph 7. Will.** The E-Wills Act follows the Uniform Probate Code (UPC) in providing that the term "will" includes instruments that may not involve the disposition of property. The common law definition of "will" is well established, and a definition in the E-Wills Act might result in inadvertent changes to the common law understanding.
Current Colorado Law C.R.S. § 24-33.5-2102(h)	**15-10-201, C.R.S.** **(44.5)** "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. **(47.5)** "Sign" means, with present intent to authenticate or adopt a record other than a will: **(a)** To execute or adopt a tangible symbol; or **(b)** To attach to or logically associate with the record an electronic symbol, sound, or process.

	(49) "State" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, and any territory or insular possession subject to the jurisdiction of the United States. **(59)** "Will" includes any codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. "Will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title. 24-21-502, C.R.S. **(2)** "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. **(3)** "Electronic record" means a record containing information that is created, generated, sent, communicated, received, or stored by electronic means. **(4)** "Electronic signature" means an electronic symbol, sound, or process attached to or logically associated with an electronic record and executed or adopted by an individual with the intent to sign the electronic record. **(11)** "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. **(12)** "Sign" means, with present intent to authenticate or adopt a record: **(a)** To execute or adopt a tangible symbol; or **(b)** To attach to or logically associate with the record an electronic symbol, sound, or process. **(13)** "Signature" means a tangible symbol or an electronic signature that evidences the signing of a record.
Arizona A.R.S. § 14-2518	An electronic will must meet all of the following requirements: 1. Be created and maintained in an electronic record. 2. Contain the electronic signature of the testator or the testator's electronic signature made by some other individual in the testator's conscious presence and by the testator's direction. 3. Contain the electronic signatures of at least two persons, each of who meet both the following requirements: (a) Was physically present with the testator when the testator electronically signed the will, acknowledged the testator's signature or acknowledged the will.

	(b) Electronically signed the will within a reasonable time after the person witnessed the testator signing the will, acknowledging the testator's signature or acknowledging the will as described in subdivision (a) of this paragraph.
Florida Fla. Stat. § 732.521 Fla. Stat. § 117.201	"Audio-video communication technology" has the same meaning as provided in s. 117.201. "Audio-video communication technology" means technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another.
Indiana Ind. Code Ann. § 29-1-21-3	(1) "Actual presence means that: (A) a witness; or (B) another individual who observes the execution of the electronic will; Is physically present in the same physical location as the testator. The term does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means.
Nevada N.R.S. § 133.088(1)(a)	(a) A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) The same physical location; or (2) Different physical locations but can communicate with each other by means of audio-video communication.

Colorado Subcommittee Comment	Adopt all UEWA definitions with the following modifications: (1) Refer to definition of "Will" under 15-10-201, C.R.S. (2) Modify the definition of "Sign" to require an electronic image of a signature (i.e. "handwritten signature") rather than just a typed name, etc.
Colorado Subcommittee Recommendation	In this act: (1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. (2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location. (3) "Electronic will" means a will executed electronically in compliance with Section 5(a). (4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (5) "Sign" means, with present intent to authenticate or adopt a record: (A) Subject to subsection (B), to execute or adopt a tangible symbol; or to affix to or logically associate with the record an electronic symbol or process. (B) the electronic signature of a testator or

	witness must be an electronic image of the testator's or witness' signature affixed to the electronic will. (6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe. (7) "Will" has the meaning set forth in section 15-10-201(59), C.R.S.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By John R. Valentine and Michael R. Stiff

Date: October 2, 2019

UEWA Section	Section 3
Section Title	Law Applicable to Electronic Wills; Principles of Equity
UEWA Statutory Language	An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].
Uniform Law Commission Comment	The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes. In this Section "law" means both common law and statutory law. Law other than the E-Wills Act continues to supply rules and guidance related to wills, unless the E-Wills Act modifies a state's other law related to wills. The common law requires that a testator intend that the writing be the testator's will. The Restatement explains, "To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999). A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator. Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003).

	The statutory and common law requirements that apply to wills in general also apply to electronic wills. Laws related to qualifications to serve as a witness also apply to electronic wills. For some of those requirements *see*, *e.g.*, Uniform Probate Code § 2-505.
Current Colorado Law	None
Arizona A.R.S. § 14-2518. Electronic will; requirements; interpretation	B. Except as provided in this section and sections 14-2519, 14-2520, 14-2521, 14-2522 and 14-2523, any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to section 14-2502.
Indiana Indiana Code. Ann. § 29-1-21-1. Purpose	The purpose of this chapter is to provide rules for the valid execution, attestation, self-proving, and probate of wills that are prepared and signed electronically. This chapter shall be applied fairly and flexibly so that a testator whose identify can be verified, who has testamentary capacity, and who is acting free from duress and undue influence may execute a valid electronic will consistent with the testator's intent. If an electronic will is properly and electronically signed by the testator and by the witnesses and is maintained as an electronic record or as a complete converted copy in compliance with this chapter, all the normal presumptions that apply to a traditional paper will that is validly signed and executed apply to an electronic will. (a) Except as provided in subsection (b), electronic wills are exclusively governed by this chapter. (b) If this chapter does not provide an explicit definition, form, rule, or statute concerning the creation, execution, probate, interpretation, storage, or use of an electronic will, the applicable statute from this article shall apply to the electronic will.

Indiana Code. Ann. § 29-1-21-2. Electronic wills exclusively governed by chapter – Exception	
Nevada Nevada Revised Statutes § 133.085. Electronic will	3. Except as otherwise provided in NRS 133.085 to 133.088, inclusive, and 133.300 to 133.340, inclusive, all questions relating to the force, effect, validity and interpretation of an electronic will that complies with the provisions of NRS 133.085 to 133.088, inclusive, and 133.300 to 133.340, inclusive, must be determined in the same manner as a will executed in accordance with NRS 133.040.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt UEWA Section 3 as written.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Letitia M. Maxfield and Susan Boothby

Date: November 20, 2019

UEWA Section	**SECTION 4.**
Section Title	**CHOICE OF LAW REGARDING EXECUTION.**
UEWA Statutory Language	A will executed electronically but not in compliance with Section 5 is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where: (1) the testator is physically located when the will is signed; or (2) the testator is domiciled or resides when the will is signed or when the testator dies.
Uniform Law Commission Comment	Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. *See* RESTATEMENT (SECOND) OF PROPERTY: WILLS & DON. TRANS. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, Uniform Probate Code § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator's domicile when the testator dies to apply. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (e) (1999). Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. *See, e.g.,* NEV. REV. STAT. 133.088(1)(e) (2019) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Thus, a Connecticut domiciliary could go online and execute a Nevada will without leaving Connecticut. If that happened, Connecticut should not be required to accept the will as valid, because the testator had not physically been present in the state (Nevada) that authorized the electronic will when the Connecticut domiciliary executed the will.

	This Section reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. This rule is consistent with current law for non-electronic wills. Otherwise, someone living in a state that authorized electronic wills might execute a will there and then move to a state that did not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to do so. An electronic will executed in compliance with the law of the state where the testator was physically located should be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy. ***Example***: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis did so, with the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.
Current Colorado Law CRS Section 15-11-506	**Choice of Law as to execution.** A written will is valid if executed in compliance with section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national.
CRS Section 15-11-502	**Execution – witnessed or notarized wills-holographic wills.** (1) Except as otherwise provided in subsection (2) of this section and in sections 15-11-503 , 15-11-506 , and 15-11-513 , a will shall be: (a) In writing; (b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) Either: (I) Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will; or

CRS Section 15-11-503	(II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. (2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. (3) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting. (4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight. (5) For purposes of this part 5, "will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title. **Writings intended as wills.** (1) Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502 , the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or complete revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will. (2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse. (3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide. (4) Subsection (1) of this section shall not apply to a designated beneficiary agreement under article 22 of this title.
Florida	**Method and place of execution**.For purposes of the execution or filing of an electronic will, the acknowledgment of an electronic will

Fla. Stat. Section 732.522(4)	by the testator and the affidavits of witnesses under s. 732.503, or any other instrument under the Florida Probate Code: (1) Any requirement that an instrument be signed may be satisfied by an electronic signature. (2) Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology that meets the requirements of part II of chapter 117 and any rules adopted thereunder, if: (a) The individuals are supervised by a notary public in accordance with s. 117.285; (b) The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265; (c) The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and (d) The signing and witnessing of the instrument complies with the requirements of s. 117.285. (3) Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same manner as in the case of a will executed in accordance with s. 732.502. (4) An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state.
Nevada N. R. S. Section 133.088	**Performance of certain notarial acts by electronic means.** 1. For purposes of this title, including, without limitation, any declaration or affidavit made by an attesting witness as described in NRS 133.050, for all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will and for purposes of executing a power of attorney pursuant to NRS 162A.220, an advance directive or any document relating to an advance directive: (a) A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) The same physical location; or (2) Different physical locations but can communicate with each other by means of audio-video communication. *** (e) Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if:

	(1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State; (2) The document states that the validity and effect of its execution are governed by the laws of this State; (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution: (I) If a natural person, is domiciled in this State; or (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.
Indiana Ind.Code Ann 29-1-21-7	**Execution of electronic will** Sec. 7. An electronic will is legally executed if the manner of its execution complies with the law of: (1) this state; (2) the jurisdiction that the testator is actually present in at the time of execution; or (3) the domicile of the testator at the time of execution or at the time of the testator's death.
Arizona ARS Section 14-2506	**Execution; choice of law** A. A paper will is valid if it is executed in compliance with section 14-2502. An electronic will is valid if it is executed in compliance with section 14-2518. B. Notwithstanding subsection A of this section, a paper will or an electronic will is valid if its execution complies with the law at the time of execution of the place where the testator is physically present when the testator executes the will, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.
New Hampshire Revised Statutes Section 551:5	**Will Made Outside the State.** I. A will made out of this state, and valid according to the laws of the state or country where it was executed, may be proved and allowed in this state, and shall thereupon be as effective as it would have been if executed according to the laws of this state. II. A will made out of this state, and self-proved according to the

	laws of the state or country where it was executed, is self-proved in this state and shall be allowed as such by the probate court.
Colorado Subcommittee Comments	
Colorado Subcommittee Recommendation	Adopt UEWA Section 4 as written.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Herb Tucker, Esq.

Date: August 12, 2020

UEWA Section	Section 5
Section Title	Execution of Electronic Will
UEWA Statutory Language	(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) [either: (A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing: [(A)] [(i)] the signing of the will under paragraph (2); or [(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will [or;

	(B) acknowledged by the testator before and in the physical [or electronic] presence of a notary public or other individual authorized by law to notarize records electronically]. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence. *Legislative Note: A state should conform Section 5 to its will-execution statute.* *A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).* *A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).* *A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B). Other states may include that provision for an electronic will because an electronic notarization may provide more protection for a will than a paper notarization.*
Colorado Alternative	**SECTION 5. EXECUTION OF ELECTRONIC WILL** (a) Subject to Section 8(d) and except as provided in Section 6, an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) either:

	(A) signed in the physical or electronic presence of the testator by at least two individuals, each of whom is a resident of a state and physically located in a state at the time of signing and within a reasonable time after witnessing: (i) the signing of the will under paragraph (2); or (ii) the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will; or (B) acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual **who is located in Colorado at the time the notarial act is performed and who is** authorized **by laws of Colorado** to notarize records electronically. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.
Uniform Law Commission Comment	**Comments** The E-Wills Act does not duplicate all rules related to valid wills, and except as otherwise provided in the E-Wills Act, a state's existing requirements for valid wills will apply to electronic wills. Section 5 follows the formalities required in UPC § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations. Some states allow a will to be self-proved if the testator and witnesses sign an affidavit detailing the procedures followed in executing the will. The UPC treats the self-proving affidavit as creating a conclusive presumption that the signature requirements were met and a rebuttable presumption that other requirements for a valid will were met. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (r) (1999). Rather than create extra requirements to validate an electronic will, the E-Wills Act creates extra requirements to make an electronic will self-proving when the testator and witnesses are in different locations. *See* Section 8. **Requirement of a Writing.** Statutes that apply to non-electronic wills require that a will be "in writing." The RESTATEMENT

	(THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment i (1999), explains: *i. The writing requirement.* All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be. UPC § 2-502 requires that a will be "in writing" and the comment to that section says, "Any reasonably permanent record is sufficient." The E-Wills Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The E-Wills Act incorporates the requirement of writing by requiring that an electronic will be readable as text. One example of an electronic record readable as text is a will inscribed with a stylus on a tablet. *See In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. Under the E-Wills Act, the issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it. The Uniform Law Commission decided to retain the requirement that a will be in writing. Thus, the E-Wills Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will. The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text *before* the testator executes the will, the will meets that requirement that it be a record readable as text at the time of execution.

	Electronic Signature. In *Castro*, the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the E-Wills Act. The definition of "sign" includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will. **Requirement of Witnesses.** Wills law includes a witness requirement for several reasons: (1) evidentiary—to identify persons who can answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary—to signal to the testator that signing the document has serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence. Section 5 requires witnesses for a validly executed will. Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed without witnesses when the testator's intent was clear. In the electronic will context these cases have typically involved suicides that occurred shortly after the creation of the electronic document. *See, e.g., In re Estate of Horton*, 925 N.W. 2d 207, 325 Mich.App. 325 (2018). A state concerned that electronic wills will be invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the E-Wills Act, even if the state has not adopted a similar provision for judicially correcting harmless error in execution. **Remote Witnesses.** Because electronic wills may be executed via the internet, the question arises whether the witnesses to the testator's signature must be in the physical presence of the testator or whether electronic presence such as via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing

as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving.

The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

Reasonable Time. The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to UPC § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator's death is not "within a reasonable time." In *Matter of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator's death. *See, e.g.*, In re Estate of Miller, 149 P.3d 840 (Idaho 2006). For electronic wills, a state's rules applicable to non-electronic wills apply.

Notarized Wills. A small number of states permit a notary public to validate the execution of a will in lieu of witnesses. Paragraph (3)(b) follows UPC § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses. Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.

Definition of Electronic Presence

Section (2) Definitions: [(2) "Electronic presence" means the relationship of two or more individuals in different locations

	communicating in real time to the same extent as if the individuals were physically present in the same location.] **Comment** **Paragraph 2. Electronic Presence.** An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. *See* Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state's existing rules for presence will apply to determine physical presence. An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5. This definition provides for the meaning of electronic presence. Permitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time," see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities). In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.
Current Colorado Law C.R.S. § 15-11-502	**Execution - witnessed or notarized wills - holographic will** (1) Except as otherwise provided in subsection (2) of this section and in sections 15-11-503, 15-11-506, and 15-11-513, a will shall be:

	(a) In writing; (b) Signed by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) Either: (I) Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will; or (II) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. (2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. (3) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting. (4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight. (5) For purposes of this part 5, "will" does not include a designated beneficiary agreement that is executed pursuant to article 22 of this title.
C.R.S. 15-11-504	**Self-proved will** (1) A will that is executed with attesting witnesses may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the

	state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal.
Arizona A.R.S. § 14-2518	**Electronic will; requirements; interpretation** A. An electronic will must meet all of the following requirements: 1. Be created and maintained in an electronic record. 2. Contain the electronic signature of the testator or the testator's electronic signature made by some other individual in the testator's conscious presence and by the testator's direction. 3. Contain the electronic signatures of at least two persons, each of who meet both the following requirements: (c) Was physically present with the testator when the testator electronically signed the will, acknowledged the testator's signature or acknowledged the will. (d) Electronically signed the will within a reasonable time after the person witnessed the testator signing the will, acknowledging the testator's signature or acknowledging the will as described in subdivision (a) of this paragraph. 4. State the date that the testator and each of the witnesses electronically signed the will. 5. Contain a copy of a government-issued identification card of the testator that was current at the time of execution of the will. B. Except as provided in this section and sections 14-2519, 14-2520, 14-251, 14-2522 and 13-2523, any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to 14-2502.

	C. This section does not apply to a trust except a testamentary trust created in an electronic will.
Florida Fla. Sta. § 732.522	**Method and place of execution** For purposes of the execution or filing of an electronic will, the acknowledgment of an electronic will by the testator and the affidavits of witnesses under s. 732.503, or any other instrument under the Florida Probate Code: (1) Any requirement that an instrument be signed may be satisfied by an electronic signature. (2) Any requirement that individuals sign an instrument in the presence of one another may be satisfied by witnesses being present and electronically signing by means of audio-video communication technology that meets the requirements of part II of chapter 117 and any rules adopted thereunder, if: (a) The individuals are supervised by a notary public in accordance with s. 117.285; (b) The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265; (c) The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and (d) The signing and witnessing of the instrument complies with the requirements of s. 117.285. (3) Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same manner as in the case of a will executed in accordance with s. 732.502. (4) An instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that

	he or she is executing the instrument in, and pursuant to the laws of, this state. **SUMMARY OF FLORIDA E-WILLS STATUTE AND REMOTE NOTARIZATION PROVISIONS** - The Florida Statute generally offers online notarization and witnessing of wills, trusts, powers of attorney and marital agreements. Online notarization creates a record. - Also, there is record keeping provisions in the Florida Statute. It provides for online notarization in real time with two-way audio-visual recording creating an electronic record and video. - Only qualified entities can serve as a custodian and they must insure that they have tamper evidence protection which would detect any efforts to amend the recorded document stored with the qualified custodian. **Steps Necessary to Create an Electronic Record** Step One: Notary - Witnesses must be in the US and residents of the US. - The remote notary must comply with strict standards and training regarding identity proofing. In addition, they must be able to authenticate the identity of the testator, as well as witnesses as set forth below.

	Step Two: Verifying Identity of Testator and Screening the Testator - The Notary will ask five questions of which four out of the five questions must be answered correctly. The questions relate to personal information that would only be known by the testator through credit records. - The Notary then screens the testator as to whether or not they are vulnerable adults. Generally, the testator must be 18 years of age or older and must be able to attest to the fact that they can perform activities of daily living and they do not have any mental or physical disability that would interfere with their ability to meet activities of daily living. - The first set of questions to determine whether or not the testator is a vulnerable adult and, therefore, prohibited from remote notarization, are the following three questions: - Are they under any undue influence related to the execution of their will? - Do they have any physical or mental disability that impairs their activities of daily living? - Do they need assistance with their daily care? - If the Notary suspects that the testator is a vulnerable adult, then the witnesses must be in the physical presence of the testator and remote notarization is denied, as well as remote witnessing.

	Storage - Qualified Custodians can store the electronic will upon notice of death. - The Qualified Custodian must electronically transmit the electronic record to the appropriate court electronically. **Remote Witnesses** - The company providing electronic will services is going to provide online notary, as well as online witnesses. - The question is how are remote witnesses to an online will going to sign an attestation clause that they were in the physical presence of the testator and swear that the testator signed his or her will of their volition, free of undue influence. How do the witnesses know there isn't someone else in the room? **E-Notarization and Execution of E-Will** - E-notarization and execution of e-will – you can't have one without the other. - Currently Texas and Montana have e-notarization Bills pending. These states are not concerned about vulnerable testators.

Nevada N.R.S. § 133.088	1. For purposes of this title, including, without limitation, any declaration or affidavit made by an attesting witness as described in NRS 133.050, for all purposes relating to the execution and filing of any document with the court in any proceeding relating to an electronic will and for purposes of executing a power of attorney pursuant to NRS 162A.220, an advance directive or any document relating to an advance directive: (a) A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) The same physical location; or (2) Different physical locations but can communicate with each other by means of audio-video communication. (b) An electronic notary public may electronically notarize electronic documents, including, without limitation, documents constituting or relating to an electronic will, in accordance with NRS 240.181 to 240.206, inclusive. (c) Any requirement that a document be signed may be satisfied by an electronic signature. (d) If a provision of law requires a written record, an electronic record satisfies such a provision. (e) Except as otherwise provided in subparagraph (3), regardless of the physical location of the person executing a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be

	governed by the laws of this State and subject to the jurisdiction of the courts of this State if: (1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State; (2) The document states that the validity and effect of its execution are governed by the laws of this State; (3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or (4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution: (I) If a natural person, is domiciled in this State; or (II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State. 2. Notwithstanding the provisions of subsection 1, the validity of a notarial act performed by an electronic notary public must be determined by applying the laws of the jurisdiction in which the electronic notary public is commissioned or appointed. 3. As used in this section:

	(a) "Advance directive" has the meaning ascribed to it in NRS 449A.703. (b) "Audio-video communication" means communication by which a person is able to see, hear and communicate with another person in real time using electronic means.
Indiana Ind. Code Ann. § 29-1-21-4	**Attestation; electronic signature; self proving clause** (a) To be valid as a will under this article, an electronic will **must** be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner: (1) The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties. (2) The testator and attesting witnesses must comply with: (A) the prompts, if any, issued by the software being used to perform the electronic signing; or (B) the instructions by the person, if any, responsible for supervising the execution of the electronic will. (3) The testator must state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will.

	(4) The testator must: (A) electronically sign the electronic will in the actual presence of the attesting witnesses; or (B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the attesting witnesses. (5) The attesting witnesses must electronically sign the electronic will in the actual presence of: (A) the testator; and (B) one another; after the testator has electronically signed the electronic will. (6) The: (A) testator; or (B) other adult individual who is: (i) not an attesting witness; and (ii) acting on behalf of the testator;

	must command the software application or user interface to finalize the electronically signed electronic will as an electronic record. The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will. (b) An electronic will may be self-proved: (1) at the time that it is electronically signed; and (2) before it is electronically finalized; by incorporating into the electronic record of the electronic will a self-proving clause described under subsection (c) An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will. (c) A self-proving clause under subsection (b) must **substantially** be in the following form: "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare: (1) That the testator executed the instrument as the testator's will. (2) That, in the actual and direct physical presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' actual and direct physical presence; (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it; (4) That each of the witnesses, in the actual and direct physical presence of the testator and each other, signed the will as a witness;

	(5) That the testator was of sound mind when the will was executed; (6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies. That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies. _____ (insert date) (insert signature of testator) _____ (insert date)(insert signature of witness) _____ (insert date) (insert signature of witness)". A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause. (d) An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of the following attributes: (1) An attestation clause. (2) Additional signatures. (3) A self-proving clause that differs in form from the exemplar provided in subsection (c). (4) Any additional language that refers to the circumstances or manner in which the electronic will was executed.

	(e) **This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.**
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	**SECTION 5. EXECUTION OF ELECTRONIC WILL** (a) Subject to Section 8(d) and except as provided in Section 6, an electronic will must be: (1) a record that is readable as text at the time of signing under paragraph (2); (2) signed by: (A) the testator; or (B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and (3) either: (A) signed in the physical or electronic presence of the testator by at least two individuals, each of whom is a resident of a state and physically located in a state at the time of signing and within a reasonable time after witnessing: (i) the signing of the will under paragraph (2); or (ii) the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will; or (B) acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual who is authorized by Colorado law to notarize records, and who is located in Colorado at the time the notarial act is performed. (b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By: Stanley C. Kent

Date: February 5, 2020

UEWA Section	Section 6
Section Title	Harmless Error
UEWA Statutory Language	**Alternative A** A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be: (1) the decedent's will; (2) a partial or complete revocation of the decedent's will; (3) an addition to or modification of the decedent's will; or (4) a partial or complete revival of the decedent's formerly revoked will or part of the will. **Alternative B**

	[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically. **End of Alternatives]** ***Legislative Note:*** *A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not* *enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.*
Uniform Law Commission Comment	**Comment** The harmless error doctrine was added to the UPC in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-503 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. See, also, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion 38 ADEL. L. REV. 1 (2017); John H. Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 COLUM. L. REV. 1 (1987). The focus of the harmless error doctrine is the testator's intent. A court can excuse a defect in the execution formalities if the

	proponent of the defective will can establish by clear and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent. The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse. A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. See In re Estate of Horton, 925 N.W. 2d 207 (Mich. 2018) (involving an electronic document titled "Last Note"); In re Yu, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, "This is the Last Will and Testament…"). Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.
Current Colorado Law	**§ 15-11-503. Writings intended as wills**

	(1) Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or complete revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will. (2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse. (3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide. (4) Subsection (1) of this section shall not apply to a designated beneficiary agreement under article 22 of this title. **§ 15-2.5-304. Substantial compliance with donor-imposed formal requirement** (1) A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if: (a) The powerholder knows of and intends to exercise the power; and

	(b) The powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.
Current Law in other States	Electronic Will statutes enacted in other states have not codified the Harmless Error Doctrine. If Nevada, Florida and Arizona were to enact the Harmless Error Doctrine for paper wills, then presumably the Doctrine would also apply to electronic wills because of these provisions: **Nevada: § 133.085 (3) provides:** Except as otherwise provided in NRS …, inclusive, and …, inclusive, all questions relating to the force, effect, validity and interpretation of an electronic will that complies with the provision of NRS …, inclusive, and …, inclusive, must be determined in the same manner as a will executed in accordance with NRS .... [citations omitted] **Florida: § 732.522 (3) provides:** Except as otherwise provided in this part, all questions as to the force, effect, validity, and interpretation of an electronic will which comply with this section must be determined in the same manner as in the case of a will executed in accordance with section ... [citations omitted] **Arizona: § 14-2517 (B) provides:** Except as provided in this section and sections ..., any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to section ... [citations omitted]

	Indiana: The Indiana codification of its electronic will statute is interesting. For an electronic will to be valid in Indiana, arguably there must be strict compliance with statutory requirements for a valid electronic will. However, for an Indiana electronic will to be self-proving, only substantial compliance is required per section 29-1-21-4 which provides: **§ 29-1-21-4. Attestation; electronic signature; self proving clause** (a) To be valid as a will under this article, an electronic will **must** be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner: (1) The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties. (2) The testator and attesting witnesses must comply with: (A) the prompts, if any, issued by the software being used to perform the electronic signing; or (B) the instructions by the person, if any, responsible for supervising the execution of the electronic will. (3) The testator must state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will. (4) The testator must:

	(A) electronically sign the electronic will in the actual presence of the attesting witnesses; or (B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the attesting witnesses. (5) The attesting witnesses must electronically sign the electronic will in the actual presence of: (A) the testator; and (B) one another; after the testator has electronically signed the electronic will. (6) The: (A) testator; or (B) other adult individual who is: (i) not an attesting witness; and (ii) acting on behalf of the testator;

	must command the software application or user interface to finalize the electronically signed electronic will as an electronic record. The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will. (b) An electronic will may be self-proved: (1) at the time that it is electronically signed; and (2) before it is electronically finalized; by incorporating into the electronic record of the electronic will a self-proving clause described under subsection (c). An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will. (c) A self-proving clause under subsection (b) must **substantially** be in the following form: "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare: (1) That the testator executed the instrument as the testator's will.

	(2) That, in the actual and direct physical presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' actual and direct physical presence; (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it; (4) That each of the witnesses, in the actual and direct physical presence of the testator and each other, signed the will as a witness; (5) That the testator was of sound mind when the will was executed; and (6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies. _____ (insert date) (insert signature of testator) _____ (insert date) (insert signature of witness) _____ (insert date) (insert signature of witness)".

	A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause. (d) An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of the following attributes: (1) An attestation clause. (2) Additional signatures. (3) A self-proving clause that differs in form from the exemplar provided in subsection (c). (4) Any additional language that refers to the circumstances or manner in which the electronic will was executed. (e) **<u>This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.</u>** Note, too, that notwithstanding the apparent codification a rule requiring strict compliance with statutory will execution formalities, subsection (e) seems to codify the rule that underpins the Harmless Error Doctrine. In other words, the entire wills statute must be construed in a manner that gives effect to the testators intent to execute a valid will.

Colorado Subcommittee Comment	**I. History of § 15-11-503** The Uniform Law Commission promulgated the Harmless Error doctrine at *UPC*-503 as follows: > **§ 2-503. Harmless Error.** Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: > (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will. Colorado enacted the Harmless Error doctrine in 1994, effective 1995, at § 15-11-503, Colorado Revised Statutes. However, the Colorado enactment was narrower in scope than the Uniform Law because it applied only to wills. Colorado enactment provided: > **15-11-503. Writings intended as wills.** Although a will was not executed in compliance with section 15-11-502, the will is treated as if it had been executed in compliance with that section if the proponent of the will establishes by clear and convincing evidence that the decedent intended the will to constitute the decedent's will. Colorado amended 15-11-503 completely in 2001. The 2001 statute contained four subsections: Subsection (1) adopted *UPC*-503 such that the Harmless Error doctrine as of June 1, 2001, applied uniformly and broadly to not only wills but also to revocations, alterations and revivals of formerly revoked will.

	Subsection (2), which is not uniform, was added to restrict application of Harmless Error in two ways: • the doctrine only applies if the document in question is: (i) signed by the decedent; or (ii) acknowledged by the decedent as his or her will; or • it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse. Subsection (3), also not uniform, was added to confirm that application of the Harmless Error doctrine is a question of law to be decided by a court in formal proceedings and not a question of fact to be decided by a jury. Subsection (4) was added in 2010 after Colorado enacted the "Designated Beneficiary Agreement Statute." **II. Comparison of Harmless Error and Substantial Compliance.** Both doctrines are intent serving. Harmless Error allows a court to excuse, or to dispense with, defective compliance with the statutory formalities to create a valid will. Moving away from the traditional requirement of strict compliance with the formalities, the Harmless Error doctrine allows a court to excuse a defect in compliance if the court finds by clear and convincing evidence that decedent adopted the document as the decedent's will. *Restatement (Third) Property – Wills and other Donative Transfers,* section 3.3, cmt. b, explains: > The trend toward excusing Harmless Errors is based on the growing acceptance of the broader principal that mistake, whether in execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment. The substantial compliance doctrine is similarly intent serving but in a narrower sense. The purpose is to excuse imperfect compliance with a formal requirement for execution of a power of appointment imposed by the donor on the power holder.

	However, the doctrine does not excuse compliance with formal requirements imposed by law. Further, the doctrine excuses compliance with formal requirements imposed by the donor only if application of the doctrine does not defeat a material purpose of the donor in imposing the formal requirement. *Restatement (Third) Property – Wills and other Donative Transfers,* section 19.10, cmts. a and c. Interestingly, application of Harmless Error is often described as "the rule of substantial compliance." *Restatement (Third) Property – Wills and other Donative Transfers,* section 3.3, Rptrs. notes on cmt. b. **III. Issue** Should this committee recommend enactment of the Harmless Error doctrine in the context of electronic wills and if so, should the committee recommend enactment of alternative A which is the uniform statute quoted above, or alternative B, which would to provide: Section 15-11-503, C.R.S. applies to a will executed electronically.
Colorado Subcommittee Recommendation	1. Adopt alternative "B" which will provide: **Section 15-11-503, C.R.S., applies to a will executed electronically.** 2. The Committee will revisit Section 2 (5) of the Act (definition of "sign") in light of the adoption of Section 15-11-503 (2) (the requirement that a document be either "signed" or "acknowledged" by the decedent as his or her will in connection with an electronic will.) For example, should a testator's valid "signing" of an electronic will be restricted to a "digitized signature", meaning a graphic image of the testator's signature? See Nevada Electronic Will Execution. Section 133.085

Colorado T&E Section Statutory Revisions Committee Subcommittee on the Colorado Uniform Electronic Wills Act

By: Hillary Hammond and Sarah Brooks

Date: July 21, 2020

UEWA Section	Seven
Section Title	Revocation
UEWA Statutory Language	SECTION 7. REVOCATION. (a) An electronic will may revoke all or part of a previous will. (b) All or part of an electronic will is revoked by: (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or (2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.
Uniform Law Commission Comment	Revocation by physical act is permitted for non-electronic wills. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. Although a subsequent will may revoke an electronic will, a testator may assume that a will may be deleted by using a delete or trash function on a computer, as well as by other physical means. Guided by the goal of giving effect to the intent of most testators, the E-Wills Act permits revocation by physical act. Although a will may be revoked by physical act, revocation by subsequent will under subsection (a)(1) is the preferred, and more reliable, method of revocation. The lack of a certain outcome when revocation by physical act is used makes this form of revocation problematic. **Physical Act Revocation.** The E-Wills Act does not define physical act, which could include deleting a file with the click of a mouse or smashing a flash drive with a hammer. If an electronic will is stored with a third party that provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act. If a testator prints a copy of an electronic will, writing "revoked" on the copy would be a physical act. Typing "revoked" on an electronic copy would also constitute a physical act, if the electronic will had not been notarized in a manner that locked the document.

	Sending an email that says, "I revoke my will," is not a physical act performed on the will itself because the email is separate from the will. The email could revoke the will under subsection (a)(1) as a subsequent will, if the email met the formalities required under Section 5(a) or met the burden of proof under Section 6. Of course, if there were a separate physical act, such as deleting an electronic will on an electronic device, such an email could be useful evidence in interpreting the testator's intent. If a testator uses a physical act to revoke an electronic will, the party arguing that the testator intended to revoke the will must prove the testator's intent. **Multiple Originals**. Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. Traditional law applicable to duplicate originals supports this rule. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment f, ¶ 2 (1999) is illustrative: If the testator executed more than one copy of the same will, each duplicate is considered to be the testator's will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates. **Intent to Revoke.** Revocation by physical act requires that the testator intend to revoke the will. The E-Wills Act uses a preponderance of the evidence standard, which may be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it, and a higher evidentiary standard could give effect to wills that testators intended to revoke. The standard may increase the risk of a false positive but should decrease the risk of a false negative. The preponderance of the evidence standard is consistent with the law for nonelectronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999). *Example:* Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information

	indicating that he had revoked the will, following the company's protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will, and under the E-Wills Act Alejandro's compliance with the company's protocol would qualify as a physical act revocation. His sister will be unsuccessful in her attempt to probate the copy she has. *Example:* Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette's intent was the niece, the court might conclude that the niece's self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette's computer. **Lost Wills.** A testator's accidental deletion of an electronic will should not be considered revocation of the will. However, the common law "lost will" presumption may apply. Under the common law, if a will last known to be in the possession of the testator cannot be found at the testator's death, a presumption of revocation may apply. The soft presumption is that the testator destroyed the will with the intent to revoke it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the will's disappearance. A house fire might have destroyed the testator's files. A testator may have misplaced or inadvertently discarded files; age or poor health may make such inadvertence more likely. A person with motive to revoke and access to the testator's files might have destroyed the will. The presumption does not apply if the will was in the possession of someone other than the testator. If the document cannot be found and the presumption of revocation is overcome or does not apply, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

	Physical Act by Someone Other than Testator. A testator may direct someone else to perform a physical act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the act, not merely in the person's electronic presence. The use of "physical presence" is intended to mean that the state's rules on presence in connection with wills apply—either line of sight or conscious presence. UPC § 2-507(a)(2) relies on conscious presence.
Nevada Statute	**NRS133.120 Other means of revocation.** 1. A written will other than an electronic will may only be revoked by: (a) Burning, tearing, cancelling or obliterating the will, with the intention of revoking it, by the testator, or by some person in the presence and at the direction of the testator; (b) Another will or codicil in writing, executed as prescribed in this chapter; or (c) An electronic will, executed as prescribed in this chapter. 2. An electronic will may only be revoked by: (a) Another will, codicil, electronic will or other writing, executed as prescribed in this chapter; or (b) Cancelling, rendering unreadable or obliterating the will with the intention of revoking it, by: (1) The testator or a person in the presence and at the direction of the testator; or (2) If the will is in the custody of a qualified custodian, the qualified custodian at the direction of a testator in an electronic will. 3. This section does not prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. [8:61:1862; B § 819; BH § 3007; C § 3078; RL § 6209; NCL § 9912] — (NRS A 1999, 2257; 2017, 3442)
Indiana Statute	**IN Code § 29-1-21-8 (2018)** IC 29-1-21-8 Revocation of electronic will Sec. 8.

	(a) This section describes the exclusive methods for revoking an electronic will. Before a testator completes or directs the revocation of an electronic will, the testator shall: (1) comply with; or (2) direct a third party custodian to comply, as applicable, with subsection (e). (b) A testator may revoke and supersede a previously executed electronic will by executing a new electronic will or traditional paper will that explicitly revokes and supersedes all prior wills. However, if the revoked or superseded electronic will is held in the custody or control of more than one (1) custodian, the testator shall use the testator's best efforts to contact each custodian and to instruct each custodian to permanently delete and render nonretrievable each revoked or superseded electronic will in the manner described in subsection (d). (c) If a testator is not using the services of a custodian to store the electronic record for an electronic will, the testator may revoke the electronic will by permanently deleting each copy of the electronic record associated with the electronic will in the testator's possession or control or by rendering the electronic record for the associated electronic will unreadable and nonretrievable. (d) The testator may revoke the testator's electronic will by executing a revocation document that: (1) is signed by the testator and two (2) attesting witnesses in a manner that complies with IC 29-1-5-3(b) or with section 4 of this chapter; (2) refers to the date on which the electronic will that is being revoked was signed; and (3) states that the testator is revoking the electronic will described in subdivision (2). A revocation document under this subsection may be signed and witnessed with the electronic signature of the testator and two (2) attesting witnesses, or signed and witnessed with signatures on paper as described in IC 29-1-5-6. (e) If a testator is using the services of an attorney or a custodian to store the electronic record associated with the testator's electronic will, the testator may revoke the electronic will by instructing the custodian or attorney to permanently delete or make unreadable and nonretrievable the electronic record associated with the electronic will. An instruction issued under this subsection must be made in writing to the custodian or attorney as applicable. A custodian or attorney who receives a written instruction described in this subsection shall: (1) sign an affidavit of regularity under section 13 of this chapter with respect to the electronic will to be revoked by the testator;

	(2) create a complete converted copy (as defined in section 3(3) of this chapter) of the electronic will being revoked; (3) make the signed affidavit of regularity a permanent attachment to or part of the complete converted copy; (4) follow the testator's written instruction by: (A) permanently deleting the electronic record for the revoked electronic will; or (B) rendering the electronic record associated with the revoked electronic will unreadable and nonretrievable; and (5) transmit or issue the complete converted copy of the revoked electronic will to the testator. (f) If the electronic record for a particular electronic will or a complete converted copy of the electronic will cannot be found after the testator's death, the presumption that applied to a lost or missing traditional paper will shall be applied to the lost or missing electronic will.
Florida Statute	**§ 732.506. Revocation by act.** A will or codicil, other than an electronic will, is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by burning, tearing, canceling, defacing, obliterating, or destroying it with the intent, and for the purpose, of revocation. An electronic will or codicil is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by deleting, canceling, rendering unreadable, or obliterating the electronic will or codicil, with the intent, and for the purpose, of revocation, as proved by clear and convincing evidence.
Arizona Statute	**14-2518. Electronic will; requirements; interpretation** ...B. Except as provided in this section and sections 14-2519, 14-2520, 14-2521, 14-2522 and 14-2523, any question raised about the force, effect, validity and interpretation of an electronic will shall be determined in the same manner as a question regarding a paper will executed pursuant to section 14-2502. **14-2507. Revocation of will; requirements** A. A testator may revoke a will in whole or in part: 1. By executing a subsequent will that revokes the previous will or part expressly or by inconsistency. 2. By performing a revocatory act on the will if the testator performs the act with this intent or if another person performs the act in the testator's conscious presence and by the testator's direction. For the purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, rendering unreadable or destroying the will or any part of it. A burning, tearing or canceling is a revocatory act on the will whether or not the burn, tear or cancellation touched any of the words on the will.

	B. If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will. C. The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked and only the subsequent will is operative on the testator's death. D. The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will and each will is fully operative on the testator's death to the extent the wills are not inconsistent.
Current Colorado Law	**15-11-507. Revocation by writing or by act** **(1)** A will or any part thereof is revoked: **(a)** By executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or **(b)** By performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part of it or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph (b), "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will", whether or not the burn, tear, or cancellation touched any of the words on the will. **(2)** If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will. **(3)** The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

	(4) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.
Colorado Subcommittee Comment	A higher burden of proof should be required to overcome the presumption of revocation.
Colorado Subcommittee Recommendation	SECTION 7. REVOCATION. (a) An electronic will may revoke all or part of a previous will. (b) All or part of an electronic will is revoked by: (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or (2) a physical act, if it is established by clear and convincing evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the Colorado Uniform Electronic Wills Act
By: Gordon J. Williams & Michael A. Kirtland
Date: July 21, 2020

UEWA Section	Section 8
Section Title	SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION
UEWA Statutory Language	(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses. (b) The acknowledgment and affidavits under subsection (a) must be: (1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and (2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will. (c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form: I, _____, the testator, and, being sworn, declare to the (name) undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence. _____ Testator We, _____, and _____, witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator willingly signed it

	or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence. _____ Witness _____ Witness Certificate of officer: State of _____ [County] of _____ Subscribed, sworn to, and acknowledged before me by _____ , the testator, and subscribed and sworn to before me by _____ and _____ , witnesses, this _____ day of _____, _____. (Seal) _____ (Signed) _____ (Capacity of officer)

	(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).
Uniform Law Commission Comment	***Legislative Note:*** *A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.* *A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).* *A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).* **Comment** If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of RULONA or a comparable statute, the notary need not be physically present. However, if the state has not adopted a statute allowing remote online notarization, the notary must be physically present in order to administer the oath under the law of that state. **Remote Online Notarization.** Section 14A of RULONA provides additional protection through a notarization process referred to as "remote online notarization." In remote online notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer's identity. The E-Wills Act requires additional steps to make an electronic will with remote attestation self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use remote online notarization. However, if anyone

	necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if remote online notarization is used. **Signatures on Affidavit Used to Execute Will.** Subsection [(d)] addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. UPC § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred. **Time of Affidavit.** Under the UPC a will may be made self-proving at a time later than execution. The E-Wills Act does not permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the self-proving affidavit may be uncertain. If a testator fails to make an electronic will self-proving simultaneously with the will's execution, the testator can later re-execute the electronic will. The additional burden on the testator is justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.
Current Colorado Law C.R.S. § 15-11-504	**Self-Proved Will** **(1)** A will that is executed with attesting witnesses may be simultaneously executed, attested, and made self-proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form: I, _____, the testator, sign my name to this instrument this ____ day of ____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____

Testator

We, _____ and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that [he] [she] executes it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of us, in the conscious presence of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____ _____

Witness Witness

THE STATE OF _____

COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, _____.

(SEAL)(SIGNED) _____

Official capacity of officer)

(2) A will that is executed with attesting witnesses may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

THE STATE OF _____

	COUNTY OF _____ We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the conscious presence of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence. _____ Testator _____ _____ Witness Witness Subscribed, sworn to, and acknowledged before me by, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, _____. (SEAL)(SIGNED) _____ Official capacity of officer) **(3)** A signature affixed to a self-proving affidavit attached to a (3) will is considered a signature affixed to the will if necessary to prove the will's due execution.
Colorado Comment	**COMMENT** A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and 3-406 without the testimony of any attesting witness, but otherwise it is treated no differently from a will not self proved. Thus, a self-proved will may be contested (except in regard to questions of proper execution), revoked, or amended by a codicil in exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will is limited to formal testacy

	proceedings because Section 3-303, which deals with informal probate, dispenses with the necessity of testimony of witnesses even though the instrument is not self proved under this section. Subsection (c) was added in 1990 to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit was held not to constitute a signature on the will, resulting in invalidity of the will in cases in which the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash.Ct.App. 1989). **2008 Revision.** Section 2-502(a) was amended in 2008 to add an optional method of execution by having a will notarized rather than witnessed by two attesting witnesses. The amendment to Section 2-502 necessitated amending this section so that it only applies to a will that is executed with attesting witnesses. **Historical Note.** This Comment was revised in 2008.
Arizona Statutes	**A.R.S § 14-2519. Self-proved electronic will** In addition to the requirements of section 14-2504, to be self-proved, an electronic will must meet all of the following requirements: 1. Contain the electronic signature and electronic seal of a notary public placed on the will in accordance with applicable law. 2. Designate a qualified custodian to maintain custody of the electronic will. 3. Before being offered for probate or being reduced to a certified paper original, be under the exclusive control of a qualified custodian at all times **A.R.S §14-2504. Self-proved wills; sample form; signature requirements** A. A will may be simultaneously executed, attested and made self-proved by its acknowledgment by the testator and by affidavits of the witnesses if the acknowledgment and affidavits are made before an officer authorized to administer oaths under the laws of the state in which execution occurs and are evidenced by the officer's certificate, under official seal, in substantially the following form:

	I, _____, the testator, sign my name to this instrument this _____ day of _____, and being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in that document and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence. _____ Testator We, _____, _____, the witnesses, sign our names to this instrument being first duly sworn and do declare to the undersigned authority that the testator signs and executes this instrument as his/her will and that he/she signs it willingly, or willingly directs another to sign for him/her, and that each of us, in the presence and hearing of the testator, signs this will as witness to the testator's signing and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence. _____ Witness _____ Witness The State of _____ County of _____ Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____. (Seal) (Signed)_____

	_____ (Official capacity of officer) B. An attested will may be made self-proved at any time after its execution by its acknowledgment by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form: The State of _____ County of _____ We, _____, _____ and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument being first duly sworn do declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he/she signed willingly, or willingly directed another to sign for him/her, and that he/she executed it as his/her free and voluntary act for the purposes expressed in that document, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his/her knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence. _____ Testator _____ Witness _____ Witness

	Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____. (Seal) (Signed)_____ _____ (Official capacity of officer) C. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.
Florida	**732.523 Self-proof of electronic will.** —An electronic will is self-proved if: (1) The acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503 and are part of the electronic record containing the electronic will, or are attached to, or are logically associated with, the electronic will; (2) The electronic will designates a qualified custodian; (3) The electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate; and (4) The qualified custodian who has custody of the electronic will at the time of the testator's death certifies under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian in compliance with s. 732.524 and that the electronic will has not been altered in any way since the date of its execution.

732.503 Self-proof of will.—

(1) A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will, in substantially the following form:

STATE OF FLORIDA

COUNTY OF

I, , declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

Testator

We, and , have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator's will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

Witness

Witness

Acknowledged and subscribed before me by the testator, (type or print testator's name), who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, (type or print name of first witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification and (type or print name of second witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on (date).

	(Signature of Officer) (Print, type, or stamp commissioned name and affix official seal) (2) A will or codicil made self-proved under former law, or executed in another state and made self-proved under the laws of that state, shall be considered as self-proved under this section.
Indiana (Note: The provision regarding the self-proving affidavit is at IC29-1-21-4((b) & (c))	**IC 29-1-21-4 Attestation; electronic signature; self proving clause** Sec. 4. (a) To be valid as a will under this article, an electronic will must be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner: (1) The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties. (2) The testator and attesting witnesses must comply with: (A) the prompts, if any, issued by the software being used to perform the electronic signing; or (B) the instructions by the person, if any, responsible for supervising the execution of the electronic will. (3) The testator must state, in the actual presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will. (4) The testator must: (A) electronically sign the electronic will in the actual presence of the attesting witnesses; or (B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the actual presence of the testator and the attesting witnesses. (5) The attesting witnesses must electronically sign the electronic will in the actual presence of: (A) the testator; and (B) one another; after the testator has electronically signed the electronic will. (6) The: (A) testator; or (B) other adult individual who is: (i) not an attesting witness; and (ii) acting on behalf of the testator; must command the software application or user interface to finalize the electronically signed electronic will as an electronic record.

	The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will. (b) An electronic will may be self-proved: (1) at the time that it is electronically signed; and (2) before it is electronically finalized; by incorporating into the electronic record of the electronic will a self-proving clause described under subsection (c). An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will. (c) A self-proving clause under subsection (b) must substantially be in the following form: "We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare: (1) That the testator executed the instrument as the testator's will. (2) That, in the actual and direct physical presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' actual and direct physical presence; (3) That the testator executed the will as a free and voluntary act for the purposes expressed in it; (4) That each of the witnesses, in the actual and direct physical presence of the testator and each other, signed the will as a witness; (5) That the testator was of sound mind when the will was executed; and (6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.
Nevada	**NRS 133.086 Requirements for self-proving electronic will; acceptance of declaration or affidavit.** 1. An electronic will is self-proving if: (a) The declarations or affidavits of the attesting witnesses are incorporated as part of, attached to or logically associated with the electronic will, as described in NRS 133.050; (b) The electronic will designates a qualified custodian to maintain custody of the electronic record of the electronic will; and (c) Before being offered for probate or being reduced to a certified paper original that is offered for probate, the electronic will was at all times under the custody of a qualified custodian. 2. A declaration or affidavit of an attesting witness made pursuant to NRS 133.050 and an affidavit of a person made pursuant to NRS 133.340 must be accepted by a court as if made before the court.

NRS 133.050 Attesting witnesses may sign self-proving declarations or affidavits to be attached to or associated with will.

1. Any attesting witness to a will, including, without limitation, an electronic will, may sign a declaration under penalty of perjury or an affidavit before any person authorized to administer oaths in or out of the State, stating such facts as the witness would be required to testify to in court to prove the will. The declaration or affidavit must be written on the will or, if that is impracticable, on some paper attached thereto. If the will is an electronic will, the declaration or affidavit must be in a record incorporated as part of, attached to or logically associated with the electronic will. The sworn statement of any witness so taken must be accepted by the court as if it had been taken before the court.

2. The affidavit described in subsection 1 may be in substantially the following form:

State of Nevada }

}ss.

County of..... }

(Date).....

Then and there personally appeared ..... and ....., who, being duly sworn, depose and say: That they witnessed the execution of the foregoing will of the testator, ...; that the testator subscribed the will and declared it to be his or her last will and testament in their presence; that they thereafter subscribed the will as witnesses in the presence of the testator and in the presence of each other and at the request of the testator; and that the testator at the time of the execution of the will appeared to them to be of full age and of sound mind and memory.

.....

Affiant

.....

Affiant

Subscribed and sworn to before me

this ..... day of the month of ..... of the year .....

.....

Notary Public

3. The declaration described in subsection 1 may be in substantially the following form:

Under penalty of perjury pursuant to the law of the State of Nevada, the undersigned, ... and ....., declare that the following is true of their own knowledge: That they witnessed the execution of the foregoing will of the testator, ...; that the testator subscribed the will and declared it to be his or her last will and testament in their presence; that they thereafter subscribed the will as witnesses in the presence of the testator and in the presence of each other and at the request of the testator; and that the testator at the time of the execution of the will appeared to them to be of full age and of sound mind and memory.

Dated this ..... day of ....., ...

..... Declarant

..... Declarant

4. If a testator or a witness signing an affidavit or declaration described in subsection 1 appears by means of audio-video communication, the form for the affidavit or declaration, as set forth in subsections 2 and 3, respectively, must be modified to indicate that fact.

5. As used in this section, "audio-video communication" has the meaning ascribed to it in NRS 133.088.

	NRS 133.055 Signature affixed to self-proving affidavit or declaration that is attached to will considered signature affixed to will. A signature affixed to a self-proving affidavit or a self-proving declaration that is attached to a will and executed at the same time as the will is considered a signature affixed to the will if necessary to prove the execution of the will.
Colorado Subcommittee Comment	Note that a self-proving affidavit is permitted only at the time of signing the electronic will. Should this be clarified with the word "only" or some other limiting language? Or should a testator be allowed to self-prove an electronic will after the fact if the affidavit identifies the metadata or contains other information that proves that it refers to the correct electronic will? Also, Arizona, Florida, and Nevada buck uniformity and require custodians to maintain custody of the will in order for a self-proving affidavit to be valid. There is wisdom in this. See A.R.S. §§ 14-2520, et seq. (definition and duties if qualified custodian); F.R.S. §§ 732.524-525 (definition, bonding, liability, and receivership of qualified custodian); N.R.S. §§ 133.286 ("'Qualified custodian' means a person who meets the requirements of NRS 133.320."); 133.300, et seq. (qualifications, duties, and cessation of qualified custodian). Indiana does not require a custodian, but it defines a custodian and authorizes a custodian to maintain an electronic will for evidentiary purposes. I.R.S. §§ 29-1-21-3(4)-(6) (definitions), 29-1-21-10 (maintenance, receipt, and transfer of electronic will), 29-1-21-13 (affidavit of regularity signed by a custodian). Given that three of the four states require a custodian in order for a self-providing affidavit to be valid, and the fourth state (Indiana) permits it, the Uniform law is lacking in this regard. However, the subcommittee recommends that the CBA reserve proposing a final version of Sections 8 and Section 9 and engage in conversations with members of the Colorado legislature and Colorado's Commission on Uniform Laws. The subcommittee will continue to review and revise language that proposes qualified custodians or a similar concept via the state court administrator's office prior to the legislative session. The inclusion of a requirement for qualified custodians and/or use of the state court administrator's office for this purpose is likely to have fiscal impacts and be of interest to other stakeholders during the legislative process. The subcommittee supports adopting the language below subject to further review and comment during the legislative session.

Colorado Subcommittee Recommendation	(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses. (b) The acknowledgment and affidavits under subsection (a) must be: (1) made in the physical presence officer authorized to administer oaths under law of the state in which the testator signs pursuant to section 5(a)(2) or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under pursuant to section 5(a)(2), in the physical or electronic presence of a notary public or other individual who is authorized by Colorado law to notarize records, and who is located in Colorado at the time the notarial act is performed; and (2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will. (c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form: I, _____, the testator, and, being sworn, declare to the (name) undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence. _____ Testator We, _____, and _____, witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence. _____

	Witness _____ Witness Certificate of officer: State of _____ [County] of _____ Subscribed, sworn to, and acknowledged before me by _____ , the testator, and subscribed and sworn to before me by _____ and _____ , witnesses, this _____ day of _____, _____. (Seal) _____ (Signed) _____ (Capacity of officer) (d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this act is deemed a signature of the electronic will under Section 5(a).

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Peter W. Bullard

Date: August 7, 2020

UEWA Section	Section 9
Section Title	Certification of Paper Copy
UEWA Statutory Language	An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will was made self-proving, the certified paper copy of the will must include the self-proving affidavit. ***Legislative Note:*** *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.* *Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.*
Uniform Law Commission Comment	None.
Current Colorado Law	None
Arizona A.R.S. § 14-2519. Self-proved electronic will.	In addition to the requirements of section 14-2504, to be self-proved, an electronic will must meet all of the following requirements: 1. Contain the electronic signature and electronic seal of a notary public placed on the will in accordance with applicable law. 2. designate a qualified custodian to maintain custody of the electronic will. 3. Before being offered for probate or being reduced to a certified paper original, be under the exclusive control of a qualified custodian at all times.
A.R.S. § 14-2523 Certified paper original of electronic will; affidavits.	A. On the creation of a certified paper original of an electronic will, if the electronic will has always been in the custody of a qualified custodian, the qualified custodian shall state in an affidavit all of the following: 1. That the qualified custodian is eligible to act as a qualified custodian in this state and is the qualified custodian designated by the testator in the electronic will or was designated to act in that capacity by another qualified custodian pursuant to section 14-2521, subsection C, paragraph 2. 2. That an electronic record was created at the time the testator executed the electronic will. 3. That the electronic record has been under the exclusive control

	of one or more qualified custodians since the execution of the electronic will and has not been altered since the time it was created. 4. The identity of all qualified custodians who have had custody of the electronic record since the execution of the electronic will. 5. That the certified paper original is a true, correct and complete tangible manifestation of the electronic will. 6. That the records described in section 14-2520, paragraph 4 are under the exclusive control of the qualified custodian. B. On the creation of a certified paper original of an electronic will, if the electronic will has not always been under the exclusive control of a qualified custodian, the person who discovered the electronic will and the person who reduced the electronic will to the certified paper original shall each state in an affidavit all of the following to the best of each person's knowledge: 1. When the electronic will was created, if not indicated in the electronic will. 2. When, how and by whom the electronic will was discovered. 3. The identity of each person who has had access to the electronic will. 4. The method in which the electronic will was stored and the safeguards in place to prevent alterations to the electronic will. 5. Whether the electronic will has been altered since its execution. 6. That the certified paper original is a true, correct and complete tangible manifestation of the electronic will. C. For the purposes of making the affidavit prescribed by subsection A of this section, the qualified custodian may rely conclusively on any affidavits provided by a predecessor qualified custodian.
Florida Fla. Sta. § 732.524(11) Qualified custodians.	Upon receiving information that the testator is dead, a qualified custodian must deposit the electronic will with the court in accordance with s. 732.901. A qualified custodian may not charge a fee for depositing the electronic will with the clerk, provided the affidavit is made in accordance with s. 732.503, or furnishing in writing any information requested by a court under paragraph (2)(b).

Indiana Indiana Code. Ann. § 29-1-21-3(3) and (6). Definitions. Completed converted copy and Document integrity evidence.	IC 29-1-21-3 Definitions Sec. 3. The following terms are defined for this chapter: . . . . (3) "Complete converted copy" means a document in any format that: (A) can be visually perceived in its entirety on a monitor or other display device; (B) can be printed; and (C) contains: (i) the text of the electronic will; (ii) the electronic signatures of the testator and the witnesses; (iii) a readable copy of any associated document integrity evidence that may be a part of or attached to the electronic will; and (iv) a self-proving clause concerning the electronic will, if the electronic will is self-proved. . . . . (6) "Document integrity evidence" means the part of the electronic record for the electronic will that: (A) is created and maintained electronically; (B) includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing; (C) is logically associated with the electronic will in a tamper evident manner so that any change made to the text of the electronic will after its execution is visibly perceptible when the electronic record is displayed or printed; (D) displays any changes made to the text of the electronic will after its execution; and (E) displays the following information: (i) The city, state, date, and time the electronic will was executed by the testator and the attesting witnesses. (ii) The text of the self-proving clause, if the electronic will is electronically self-proved through use of a self-proving clause executed under section 4(c) of this chapter. (iii) The name of the testator and attesting witnesses. (iv) The name and address of the person responsible for marking the testator's signature on the electronic will at the testator's direction and in the actual presence of the testator and attesting witnesses. (v) Copies of or links to the electronic signatures of the testator and the attesting witnesses on the electronic will. (vi) A general description of the type of identity verification evidence used to verify the testator's identity. (vii) The text of the advisory instruction, if any, that is provided to the testator under section 6 of this chapter at the time of the execution of the electronic will. (viii) The content of the cryptographic hash or unique code used by the testator to sign the electronic will in the event that public key infrastructure or similar secure technology was used to sign or authenticate the electronic will. Document integrity evidence may, but is not required to, contain other information about the electronic will such as a unique document number, client number, or other identifier that an attorney or custodian assigns to the electronic will or a link to a secure Internet web site where a complete copy of the electronic will is accessible. The title, heading, or label, if any, that is assigned to the document integrity evidence (such as "certificate of completion", "audit trail", or "audit log" is immaterial).

Nevada Nevada Revised Statutes § 133.0865. Requirements for self-proving electronic will; acceptance of declaration or affidavit.	1. An electronic will is self-proving if: (a) The declarations or affidavits of the attesting witnesses are incorporated as part of, attached to or logically associated with the electronic will, as described in NRS 133.050; (b) The electronic will designates a qualified custodian to maintain custody of the electronic record of the electronic will; and (c) Before being offered for probate or being reduced to a certified paper original that is offered for probate, the electronic will was at all times under the custody of a qualified custodian.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopt UEWA Section as written.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker

Date: August 27, 2020

UEWA Section	Section 10
Section Title	Uniformity of Application and Construction
UEWA Statutory Language	In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.
Uniform Law Commission Comment	None.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	Adopted UEWA Section 10 as written.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker and John R. Valentine

Date: August 27, 2020

UEWA Section	Section 11
Section Title	Transitional Provision
UEWA Statutory Language	This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].
Uniform Law Commission Comment	An electronic will may be valid even if executed before the effective date of the E-Wills Act, if it meets the E-Wills Act's requirements and the testator dies on or after the effective date.
Current Colorado Law	Colorado law provides that, except as provided in certain named sections of the Colorado probate code: • Amendments to the Colorado probate code apply "to governing instruments executed by decedent's dying" after the effective date of the amendment (C.R.S. § 15-17-101(2)(a)); and • Amendments to the Colorado probate code apply to proceedings pending on the effective date of the amendment, regardless of when the decedent dies, unless the court determines that "in the interest of justice or because of infeasibility of application" the amendment should not apply (C.R.S. § 15-17-101(2)(b)). Subsection (2)(a) is more specific than Subsection (2)(b); therefore Subsection (2)(a) trumps Subsection (2)(b) if there is an inconsistency between them. *In re Estate of Ramstetter*, 411 P.3d 1043, 1048-1049 (Colo. Ct. App. 2016).
Colorado Subcommittee Comment	Section 11 of the E-Wills Act would not follow the rules of either Subsection 2(a) or Subsection 2(b) of C.R.S. § 15-17-101: • Subsection 2(a) would apply an amendment only to governing instruments executed after the effective date of the amendment, while Section 11 would apply to governing instruments executed before the effective date of the E-Wills Act if the decedent died after the effective date of the E-Wills Act.

	• Subsection 2(b) would apply an amendment to any proceeding pending on the effective date of the amendment, regardless of when the decedent dies, while Section 11 would not apply to probate proceedings pending on the effective date of the E-Wills Act. Therefore, if the E-Wills Act is adopted, Section 11 should be listed as an exception to the general application of C.R.S. § 15-17-101(2).
Colorado Subcommittee Recommendation	Adopt UEWA Section 11 as written.

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Colorado Uniform Electronic Wills Act

By Herb E. Tucker and John R. Valentine

Date: August 27, 2020

UEWA Section	Section 12
Section Title	Effective Date
UEWA Statutory Language	This [act] takes effect ….
Uniform Law Commission Comment	None.
Current Colorado Law	This act takes effect on its effective date, except that if a referendum against this act or an item, section or part of this act is ordered by a petition of the registered electors or by the general assembly in accordance with Colorado Constitution Article V, Section 1(3), this act or such item, section or part of this act shall not become effective until approved by a majority of the vote cast at a biennial regular general election. *See* Colorado Constitution Article V, Section 1(4). A petition of the registered electors for a referendum must be filed with the Colorado Secretary of State within ninety days after final adjournment of the session of the general assembly in which this act has been adopted. *See* Colorado Constitution Article V, Section 1(3). The act or portion thereof approved by a referendum will take effect on the date of the governor's official declaration of the vote on the referendum but "not later than thirty days after the vote has been canvassed." Colorado Constitution Article V, Section 1(4)(a).
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	TBT during legislative process

UNIFORM ELECTRONIC WILLS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12-18, 2019

WITH PREFATORY NOTE AND COMMENTS

November 20, 2019

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UNIFORM ELECTRONIC WILLS ACT

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UNIFORM ELECTRONIC WILLS ACT

Prefatory Note

Electronic Wills Under Existing Statutes. People increasingly turn to electronic tools to accomplish life's tasks, including legal tasks. They use computers, tablets, or smartphones to execute electronically a variety of estate planning documents, including pay-on-death and transfer-on-death beneficiary designations and powers of attorney. Some people assume that they will be able to execute all their estate planning documents electronically, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already arisen.

An early case involved a testator's signature typed in a word processing document, which was then printed in hard copy. In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. 2003), the testator typed his signature in a cursive font at the end of the electronic text of his will and then printed the will. Two witnesses watched him type the signature on the will, and then they signed the printed copy of the will. The court had no trouble concluding that the typed signature qualified as the testator's signature. The statute defined signature to include a "symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . ." TENN. CODE ANN. § 1-3-105(27) (1999). In *Taylor* the will was not attested or stored electronically, but the case illustrates a situation in which the substitution of electronic tools for traditional pen and paper can lead to litigation.

In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be "in writing." The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act ("the E-Wills Act") gives effect to such a will and clarifies that the will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the E-Wills Act, if a notary is present with the testator and witnesses, the will can be made self-proving. An alternative provided under the E-Wills Act allows a notary present electronically to prepare the self-proving affidavit.

An even more recent case illustrates what may be anticipated to be the most common electronic will scenario: that of a will prepared without witnesses and stored electronically. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled "Last Note" was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton's death, the probate and appeals court applied Michigan's harmless error statute and concluded that the note was a document that could be treated as executed in compliance with Michigan's requirements for execution of a will.

In re Estate of Horton, 925 N.W. 2d 207 (Mich. 2018). Under the E-Wills Act, the note would be considered a will only if the state had adopted the harmless error provision of Section 6 and a court determined that the decedent intended the electronic writing to be the decedent's will and therefore excused the lack of witnesses.

Although existing statutes might validate wills like the ones in *Castro* and *Taylor*, litigation may be necessary to resolve the question of validity. Further, the results will be haphazard if no clear policy exists and given statutory variation across the states. States that have adopted the harmless error rule for will execution could use that rule to validate an electronic will, as the court did in *In re Horton*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially, as endorsed by RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.2 (1999), or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. *See, e.g.*, *In re Will of Ranney,* 589 A.2d 1339 (N.J. 1991) (adopting substantial compliance prior to New Jersey's adoption of a harmless error statute). However, courts are reluctant to adopt exceptions to statutory execution formalities. *See, e.g.*, *Litevich v. Probate Court, Dist. Of West Haven,* 2013 WL 2945055 (Sup. Ct. Conn. 2013); *Davis v. Davis-Henriques*, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

Goals of the E-Wills Act. Estate planning lawyers, notaries, and software providers are among those interested in electronic wills. As of 2019, state legislatures in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia have considered bills authorizing electronic execution of wills. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statute.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency would follow if states modified their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if state law on this question is not uniform, that recognition will be a significant issue. The E-Wills Act seeks:

- To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act seeks to preserve the four functions served by will formalities, as described in John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form,* 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941), which

identified the other functions). Those four functions are:

- Evidentiary – the will provides permanent and reliable evidence of the testator's intent.
- Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
- Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
- Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

Electronic Execution of Estate Planning Documents. In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. 7003(a)(1).

Many documents authorizing nonprobate transfers of property are already executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted.

UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

(3) "Electronic will" means a will executed electronically in compliance with Section 5(a).

(4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) "Will" includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate

succession.

Legislative Note: *A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.*

Comment

Paragraph 2. Electronic Presence. An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. *See* Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state's existing rules for presence will apply to determine physical presence.

An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5. This definition provides for the meaning of electronic presence. Permitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/real%20time (last visited Sept. 22, 2019). The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time," see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities).

In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently-abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.

Paragraph 5. Sign. The term "logically associated" is used in the definition of sign, without further definition. Although Indiana has defined the term in its electronic wills statute, IND. CODE § 29-1-21-3(13) (defining logically associated as meaning that documents are "electronically connected, cross referenced, or linked in a reliable manner"), most statutes do not define the term. Most notably, the Uniform Electronic Transactions Act and the Revised Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to the concern that an attempt at definition would be over- or under-inclusive as technology develops. Although often used in connection with a signature, the term is used in RULONA and in the E-Wills Act to refer both to a document that may be logically associated with another document as well as to a signature logically associated with a document. *See also* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq*.

Paragraph 7. Will. The E-Wills Act follows the Uniform Probate Code (UPC) in providing that the term "will" includes instruments that may not involve the disposition of property. The common law definition of "will" is well established, and a definition in the E-Wills Act might result in inadvertent changes to the common law understanding.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

Comment

The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes.

In this Section "law" means both common law and statutory law. Law other than the E-Wills Act continues to supply rules related to wills, unless the E-Wills Act modifies a state's other law related to wills.

The common law requires that a testator intend that the writing be the testator's will. The Restatement explains, "To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999).

A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator. Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003). The statutory and common law requirements that apply to wills in general also apply to electronic wills.

Laws related to qualifications to serve as a witness also apply to electronic wills. For some of those requirements *see, e.g.*, UPC § 2-505.

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

(1) physically located when the will is signed; or

(2) domiciled or resides when the will is signed or when the testator dies.

Comment

Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. *See* RESTATEMENT (SECOND) OF PROPERTY: WILLS & DON. TRANS. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, UPC § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator's domicile when the testator dies to apply. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (e) (1999).

Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. *See, e.g.,* NEV. REV. STAT. 133.088(1)(e) (2019) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Thus, someone domiciled and living outside Nevada could execute a Nevada will without leaving home. The Uniform Law Commission concluded that a state should not be required to accept an electronic will as valid if the state's domiciliary executed the will without being physically present in the state authorizing electronic wills.

Section 4 reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. The E-Wills Act does not require a state to give effect to a will executed by a testator using the law of another state unless the testator resides, is domiciled, or is physically present in the other state when the testator executes the will.

Example: Gina lived in Connecticut and was domiciled there. During a trip to Nevada Gina executes an electronic will, following the requirements of Nevada law. The will is valid in Nevada and also in Connecticut, because Gina was physically present in a state that authorizes electronic wills when she executed her will. Now assume that Gina never leaves the state of Connecticut. While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act.

This rule is consistent with current law for non-electronic wills. The rule is necessary, because otherwise someone living in a state that authorizes electronic wills might execute a will there and then move to a state that does not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to execute another will. An electronic will executed in compliance with the law of the state where the testator was physically located should

be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy.

Example: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis executed the will in compliance with Nevada law in force at the time of execution, using the lawyer's electronic platform and providing the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and

(3) [either:

(A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing:

[(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or

(B) acknowledged by the testator before and in the physical [or electronic]

presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

Legislative Note: *A state should conform Section 5 to its will-execution statute.*

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).

A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).

Comment

The E-Wills Act does not duplicate all rules related to valid wills, and except as otherwise provided in the E-Wills Act, a state's existing requirements for valid wills will apply to electronic wills. Section 5 follows the formalities required in UPC § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations.

Some states allow a will to be self-proved if the testator and witnesses sign an affidavit detailing the procedures followed in executing the will. The UPC treats the self-proving affidavit as creating a conclusive presumption that the signature requirements were met and a rebuttable presumption that other requirements for a valid will were met. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (r) (1999). Rather than create extra requirements to validate an electronic will, the E-Wills Act creates extra requirements to make an electronic will self-proving when the testator and witnesses are in different locations. *See* Section 8.

Requirement of a Writing. Statutes that apply to non-electronic wills require that a will be "in writing." The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment i (1999), explains:

> *i. The writing requirement.* All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the

paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be.

UPC § 2-502 requires that a will be "in writing" and the comment to that section says, "Any reasonably permanent record is sufficient." The E-Wills Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The E-Wills Act incorporates the requirement of writing by requiring that an electronic will be readable as text.

One example of an electronic record readable as text is a will inscribed with a stylus on a tablet. *See In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. Under the E-Wills Act, the issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it.

The Uniform Law Commission decided to retain the requirement that a will be in writing. Thus, the E-Wills Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will.

The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text *before* the testator executes the will, the will meets that requirement that it be a record readable as text at the time of execution.

Electronic Signature. In *Castro*, the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the E-Wills Act. The definition of "sign" includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will.

Requirement of Witnesses. Wills law includes a witness requirement for several reasons: (1) evidentiary—to identify persons who can answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary—to signal to the testator that signing the document has serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence. Section 5 requires witnesses for a validly executed will.

Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed without witnesses when the testator's intent was clear. In the electronic will context these cases have typically involved suicides that occurred shortly after the creation of the electronic document. *See, e.g., In re Estate of Horton*, 925 N.W. 2d 207, 325 Mich.App. 325 (2018). A state concerned that electronic wills will be invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the E-Wills Act, even if the state has not adopted a similar provision for judicially correcting harmless error in execution.

Remote Witnesses. Because electronic wills may be executed via the internet, the question arises whether the witnesses to the testator's signature must be in the physical presence of the testator or whether electronic presence such as via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving.

The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

Reasonable Time. The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to UPC § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator's death is not "within a reasonable time." In *Matter of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator's death. *See, e.g*., In re Estate of Miller, 149 P.3d 840 (Idaho 2006). For electronic wills, a state's rules applicable to non-electronic wills apply.

Notarized Wills. A small number of states permit a notary public to validate the execution of a will in lieu of witnesses. Paragraph (3)(b) follows UPC § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses. Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.

[SECTION 6. HARMLESS ERROR.

Alternative A

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be:

(1) the decedent's will;

(2) a partial or complete revocation of the decedent's will;

(3) an addition to or modification of the decedent's will; or

(4) a partial or complete revival of the decedent's formerly revoked will or part of the will.

Alternative B

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

End of Alternatives]

Legislative Note: *A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.*

Comment

The harmless error doctrine was added to the UPC in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-503 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. *See, also*, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion* 38 ADEL. L. REV. 1 (2017); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

The focus of the harmless error doctrine is the testator's intent. A court can excuse a defect in the execution formalities if the proponent of the defective will can establish by clear

and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent.

The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse.

A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. *See In re Estate of Horton*, 925 N.W. 2d 207 (Mich. 2018) (involving an electronic document titled "Last Note"); *In re Yu*, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, "This is the Last Will and Testament…").

Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.

SECTION 7. REVOCATION.

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

Comment

Revocation by physical act is permitted for non-electronic wills. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. Although a subsequent will may revoke an electronic will, a testator may assume that a will may be deleted by using a delete or trash function on a computer, as well as by other physical means. Guided by the goal of giving effect to the intent of most testators, the E-Wills Act permits revocation by physical act.

Although a will may be revoked by physical act, revocation by subsequent will under subsection (a)(1) is the preferred, and more reliable, method of revocation. The lack of a certain outcome when revocation by physical act is used makes this form of revocation problematic.

Physical Act Revocation. The E-Wills Act does not define physical act, which could include deleting a file with the click of a mouse or smashing a flash drive with a hammer. If an electronic will is stored with a third party that provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act. If a testator prints a copy of an electronic will, writing "revoked" on the copy would be a physical act. Typing "revoked" on an electronic copy would also constitute a physical act, if the electronic will had not been notarized in a manner that locked the document.

Sending an email that says, "I revoke my will," is not a physical act performed on the will itself because the email is separate from the will. The email could revoke the will under subsection (a)(1) as a subsequent will, if the email met the formalities required under Section 5(a) or met the burden of proof under Section 6. Of course, if there were a separate physical act, such as deleting an electronic will on an electronic device, such an email could be useful evidence in interpreting the testator's intent.

If a testator uses a physical act to revoke an electronic will, the party arguing that the testator intended to revoke the will must prove the testator's intent.

Multiple Originals. Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. Traditional law applicable to duplicate originals supports this rule. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment f, ¶ 2 (1999) is illustrative:

> If the testator executed more than one copy of the same will, each duplicate is considered to be the testator's will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates.

Intent to Revoke. Revocation by physical act requires that the testator intend to revoke the will. The E-Wills Act uses a preponderance of the evidence standard, which may be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it, and a higher evidentiary standard could give effect to wills that testators intended to revoke. The standard may increase the risk of a false positive but should decrease the risk of a false negative. The preponderance of the evidence standard is consistent with the law for non-electronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999).

Example: Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his

will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information indicating that he had revoked the will, following the company's protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will, and under the E-Wills Act Alejandro's compliance with the company's protocol would qualify as a physical act revocation. His sister will be unsuccessful in her attempt to probate the copy she has.

Example: Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette's intent was the niece, the court might conclude that the niece's self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette's computer.

Lost Wills. A testator's accidental deletion of an electronic will should not be considered revocation of the will. However, the common law "lost will" presumption may apply. Under the common law, if a will last known to be in the possession of the testator cannot be found at the testator's death, a presumption of revocation may apply. The soft presumption is that the testator destroyed the will with the intent to revoke it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the will's disappearance. A house fire might have destroyed the testator's files. A testator may have misplaced or inadvertently discarded files; age or poor health may make such inadvertence more likely. A person with motive to revoke and access to the testator's files might have destroyed the will. The presumption does not apply if the will was in the possession of someone other than the testator.

If the document cannot be found and the presumption of revocation is overcome or does not apply, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

Physical Act by Someone Other than Testator. A testator may direct someone else to perform a physical act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the act, not merely in the person's electronic presence. The use of "physical presence" is intended to mean that the state's rules on presence in connection with wills apply—either line of sight or conscious presence. UPC § 2-507(a)(2) relies on conscious presence.

SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, and, being sworn, declare to the
(name)

undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____ and _____,
(name) (name)

witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument

as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

Certificate of officer:

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ___.
(name)

(Seal)

_____
(Signed)

_____
(Capacity of officer)

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).

Legislative Note: *A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.*

A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).

A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).

Comment

If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of RULONA or a comparable statute, the notary need not be physically present. However, if the state has not adopted a statute allowing remote online notarization, the notary must be physically present in order to administer the oath under the law of that state.

Remote Online Notarization. Section 14A of RULONA provides additional protection through a notarization process referred to as "remote online notarization." In remote online notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer's identity.

The E-Wills Act requires additional steps to make an electronic will with remote attestation self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if remote online notarization is used.

Signatures on Affidavit Used to Execute Will. Subsection [(d)] addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. UPC § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred.

Time of Affidavit. Under the UPC a will may be made self-proving at a time later than execution. The E-Wills Act does not permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the

self-proving affidavit may be uncertain. If a testator fails to make an electronic will self-proving simultaneously with the will's execution, the testator can later re-execute the electronic will. The additional burden on the testator is justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits.

Legislative Note: *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.*

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. TRANSITIONAL PROVISION. This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].

Comment

An electronic will may be valid even if executed before the effective date of the E-Wills Act, if it meets the E-Wills Act's requirements and the testator dies on or after the effective date.

SECTION 12. EFFECTIVE DATE. This [act] takes effect . . . .

Memorandum

TO:	**Colorado Bar Association Legislative Policy Committee**
FROM:	**Trust and Estate Section of the Colorado Bar Association**
SUBJECT:	**Uniform Fiduciary Income and Principal Act**
DATE:	***November 10, 2020***

Bill: The proposed bill is to enact the Uniform Fiduciary Income and Principal Act ("UFIPA") promulgated by the Uniform Law Commission.

TES Position: The Trust and Estate Section Council voted to support this bill.

Background. UFIPA is a uniform act which clarifies, complements and improves upon Colorado's existing Uniform Principal and Income Act ("UPIA"), C.R.S. §§ 15-1-401, *et seq.* UFIPA introduces a more comprehensive set of default rules for trust accounting based on the equitable allocation of total return than currently exists in Colorado under UPIA. UFIPA also provides more guidance than Colorado's current UPIA as to how a fiduciary should account for returns for a variety of asset classes, such as business assets and natural resources. UFIPA assists fiduciaries in logically and consistently accounting for receipts, while maintaining equity in making distributions to beneficiaries.

Overall, the drafting subcommittee was favorably impressed by the wording and organization of the UFIPA text. The subcommittee consisted of a broad range of practitioners from individual planners and advisors to corporate trustees. Some attorneys concentrated on specific types of trust assets, such as mineral interests, that are prevalent in Colorado trusts; whereas other attorneys contributed their perspectives from decades of trust administration.

The subcommittee benefited greatly from the history provided by Gene Zuspann and Stan Kent of Colorado's earlier adoptions of the Uniform Principal and Income Acts. The subcommittee recommended a few changes to the Uniform Law Commission's final version of UFIPA to preserve existing aspects of current law and thus avoid adversely affecting trust instruments which may be based on the current or prior versions of UPIA. The majority of the text is uniform law.

Status. A representative of the Trust and Estate Section testified on UFIPA at the September 18, 2020 meeting of the Colorado Commission on Uniform State Laws. The commissioners expressed support for the bill, and a member of that group is prepared to sponsor the bill as a uniform law in the 2021 legislative session.

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
1. General Provisions	101. Short Title	5/17/18	5/17/18		The ULC promulgated the *Principal and Income Act* in 1931 [*1931 UPIA*.] Colorado enacted the *1931 UPIA* in 1955 [*1955 Act*.] The ULC promulgated a revised *Uniform and Principal Income Act* in 1962. Colorado did not adopt the *1962 UPIA*. The ULC revised and reorganized (into six parts) the 1931 and 1962 *Acts* in 1997 [*1997 UPIA*.] Colorado enacted the *1997 UPIA* in 2000 [*2000 Act*.] At the same time, Colorado repealed the 1955 *Act* (*The 1931 UPIA.)* In 2009, Colorado reenacted the 1955 *Act* as Part 7 of the *2000 Act*.	
	102. Definitions	**UPIA** = Uniform Principal & Income Act; **CPC** = CO Probate Code; **CUTDA** = CO Uniform Trust Decanting Act; **CUTC** = CO Uniform Trust Code; **RUFADAA** = Revised Uniform Fiduciary Access to Digital Assets Act; **UDPIA** = Uniform Disclaimer of Property Interests Act; **UPOAA** = Uniform Powers of Appointment Act				
	1. Accounting Period	5/17/18	5/17/18		§ 15-1-402(1)	UPIA
	2. Asset-backed Securities	10/18/18: Wait to Discuss and to Vote 3/4/20: Approved			§ 15-1-425(1)	UPIA
	3. Beneficiary	5/17/18: Wait to Vote. Committee favors retaining "legatee" because other states may use the term. UFIPA applies to more than Wills and Trusts (life estates). 4/1/20: Approved 8/5/20: 102(3)(B) changed to "for an estate, an heir, legatee, and devisee." 102(3)(C) changed to "Reserved"			§ 15-1-402(2) § 15-10-201(5) § 15-16-902(4) § 15-5-103(4)	UPIA, CPC, CUTDA, CUTC
	4. Court	5/17/18: Wait to Vote. We need a definition of "court" in UFIPA because UFIPA will not be in the CPC. 3/4/20: Approved 8/5/20: changed to ""Court" means the court in this state having jurisdiction relating to a trust, OR estate."			§ 15-10-201(10) § 15-16-902(8) § 15-1-502(7)	CPC, CUTDA, RUFADAA
	5. Current Income Beneficiary	5/17/18: Wait to Vote. CO's definition in CUTC was drawn from UPIA. 4/1/20: Approved			§ 15-1-402 § 15-16-902(9)	UPIA, CUTDA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	6. Distribution	5/17/18: Wait to Vote. "Distribution" is not defined in the UTC, and its definition in the CPC refers to testamentary trusts. 4/1/20: Approved			§ 15-10-201(15)	CPC
	7. Estate	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-10-201(17)	CPC
	8. Fiduciary	5/17/18: Wait to Vote. Discussion re: whether a life tenant is traditionally a fiduciary? • Possibly, because intent of UFIPA is broad application to be able to allocate between income and principal. • Perhaps cabin the definition of "fiduciary" to UFIPA? • Appears to be consistent with C.R.S. 15-10-501 judicial toolbox to determine standing for fiduciary oversight. • Possible definitions too in C.R.S. 15-10-601, C.R.S. 15-1-103(2). • Possible relationship with UFIPA Section 102, para. 2, (D). 4/1/20: Approved 8/14/20: Approved without life tenant, holder of term interest			§ 15-1-103(2) § 15-10-201(19) § 15-1-402(3) § 15-10-501(3) § 15-10-601(2) § 15-16-902(3) § 15-1-1502(14) § 15-11-1202(4)	CPC, UPIA, CUTDA, RUFADAA, UDPIA
	9. Income	5/17/18: Wait to Vote. "Current return" includes proceeds from sale of something; may include mineral rights. 4/1/20: Approved			§ 15-1-402(4) § 15-1-453(1)(b)	UPIA & UPIA of 1955
	10. Income Interest	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-1-402	UPIA
	11. Independent Person	5/17/18: Wait to Vote. No issues with (A) or (B). Need to see what independent person can do under other UFIPA sections. 4/1/20: Approved			--	This section seems to track IRC §672 (c) and Treas. Regs.
	12. Mandatory Income Interest	5/17/18: Wait to Vote. 4/1/20: Approved			§ 15-1-402(7)	UPIA
	13. Net Income	5/17/18: Wait to vote until after Articles 2 and 3. There appears to be no adjustment from income to principal. 4/1/20: Approved			§ 15-1-402(8) § 15-1-453(1)(c)	UPIA & UPIA of 1955
	14. Person	5/17/18 8/16/18	8/16/18		§ 15-10-201(38) § 15-1-402(9) § 15-2.5-102(9) § 15-16-902(16) § 15-1-1502(17) § 15-5-103(13)	CPC, UPIA, UPOAA, CUTDA, RUFADAA, CUTC

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	15. Personal Representative	8/16/18	8/16/18		§ 15-10-201 § 15-1-1502	CPC, RUFADAA
	16. Principal	8/16/18	8/16/18		§ 15-1-402(10)	UPIA
	17. Record	8/16/18	8/16/18		§ 15-10-201(44.5) § 15-2.5-102(16) § 15-16-902(22) § 15-1-1502(22)	CPC, UPOAA, CUTDA, RUFADAA
	18. Settlor	8/16/18: Wait to vote, but reserving approval. Wait to see how "part" is used in UFIPA, and revisit use of "portion." 4/1/20: Approved			§ 15-16-501(1) § 15-16-902(25) § 15-1-103(18)	Insurable Interest of Trustee, CUTDA, CUTC
	19. Special Tax Benefit	10/18/18: Wait to discuss and vote. 4/1/20: Approved			§ 15-16-919(1)	CUTDA
	20. Successive Interest	10/18/18	10/18/18		§ 15-1-408(3)	UPIA
	21. Successor Beneficiary	8/16/18: Wait to vote, but reserving approval because UFIPA uses the word "entitled" rather than the term "eligible." The issue is whether "eligible" would be a better word. 4/1/20: Approved			§ 15-1-402(11) § 15-1-453(1)(e)	UPIA & UPIA of 1955
	22. Terms of Trust	9/20/18	9/20/18 & 10/18/18 8/5/20	102(22)(B)(iii) adds "**section 15-5-111 CRS**;" 102(22)(B)(iv) adds "**by alternative dispute resolution under section 15-5-113**;" 102(22)(C) changed to "for an estate, or a will." 102(22)(D) "Reserved"	§ 15-1-402(12) § 15-2.5-102(19) § 15-16-902(28) § 15-5-103(21)	UPIA, UPOAA, CUTDA, CUTC
	23. Trust	9/20/18	9/20/18		§ 15-10-201(56)	CPC
	24. Trustee	9/20/18	9/20/18		§ 15-10-201(57) § 15-1-402(13) § 15-1-453(1)(g) § 15-16-902(3) § 15-1-1502(25) § 15-5-103(23)	CPC, UPIA, UPIA of 1955, RUFADAA, CUTC
	25. Will	9/20/18	9/20/18		§ 15-10-201(59) § 15-1-1502(27)	CPC, RUFADAA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	103. Scope	9/20/18	9/20/18 & 10/18/18 8/5/20	Except as otherwise provided in the terms of a trust, A WILL or this [act], this [act] applies to: (1) a trust or estate; and (2) RESERVED.	§ 15-1-434 § 15-1-454 § 15-1-455 § 15-16-903	1997 UPIA
	104. Governing law	9/20/18	9/20/18 & 8/5/20	Except as otherwise provided in the terms of a trust or this [act], this [act] applies when this state is the principal place of administration of a trust or estate. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits to the application of this [act] to any matter within the scope of this [act] involving the trust.	§ 15-16-905	CUTDA, Tentative Directed Trust Act
2. Fiduciary Duties and Judicial Review	201. Fiduciary Duties; General Principles	9/20/18 10/18/18	10/18/18		§ 15-1-403 § 15-1-402(12) § 15-5-105(2)(b) § 15-5-801 § 15-5-103(21)	See Santa Fe for Colorado Subcommittee Comments
	202. Judicial Review of Exercise of Discretionary Power[; Request for Instruction]	10/18/18 11/15/18	11/15/18: to add to 202(c) 12/20/18: Final	202(c) adds "including Uniform Trust Code **Section 1001 and Part 5 of Article 10 of Title 15, C.R.S.**"	§ 15-1-403 § 15-1-404(7) § 15-1-404.5(7) § 15-5-201 § 15-5-814 § 15-5-1001	No counterpart of "fiduciary decision" in the current UPIA.
	203. Fiduciary's Power to Adjust	11/15/18 12/20/18 2/6/19 4/3/19	2/6/19: 203(k)(1) & (2)	**203(i)** UFIPA wording **203(k)(1)** changes "UTC Section 813(c)" to "**CUTC 813(1)**" **203(k)(2)** changed to: "Communicated at least annually	§ 15-1-404	UPIA; See Santa Fe and minutes for discussion of "forbid," "prohibit," and

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
			4/3/19 & 5/1/19: 203(i)	to the qualified beneficiaries determined under CUTC Section 103(16), **including** the Attorney General **when applicable**."		return to UFIPA wording for 203(i)
New	204. Notice of Action	5/6/20 8/5/20	8/14/20	See discussion of 602 & below	§ 15-1-405	
3. Unitrust	301. Definitions	2/6/19 3/6/19	3/6/19		§ 15-1-404.5(10) § 15-1-404.5(4.5) § 15-1-402(10.5)	
	302. Application; Duties and Remedies	3/6/19 4/3/19	3/6/19: Passed, subject to issue of consistency between 203(i) & 302(d) 4/3/19: Approved with consistency of 302(d) with CUTC language & 203(i)		§ 15-1-404.5(1) § 15-1-404.5(13)(b) § 15-1-404.5(9) § 15-1-404.5(14) § 15-1-404.5(3)(d)(ii) § 15-1-404.5(11) § 15-1-404.5(12)	
	303. Authority of Fiduciary	3/6/19 4/3/19	4/3/19		§ 15-1-404.5(1) § 15-1-404.5(2) § 15-1-404.5(3) § 15-1-404.5(5) § 15-1-404.5(10) § 15-1-404.5(6)	
	304. Notice	4/3/19 5/1/19 11/6/19	4/3/19	See p. 9 below for Section 304 as approved without brackets for optional text.	§ 15-1-404.5(1)	
	305. Unitrust Policy	4/3/19	Read 305 – 309 together. 5/1/19: Approved Article 3 subject to ordering rule		§ 15-1-404.5(5)	
	306. Unitrust Rate	4/3/19 5/1/19			§ 15-1-404.5(2) § 15-1-404.5(4)	
	307. Applicable Value	4/3/19 5/1/19			§ 15-1-404.5(5)	
	308. Period	4/3/19 5/1/19			§ 15-1-404.5(4.5)(b) § 15-1-404.5(5)	
	309. Special Tax Benefits; Other Rules	4/3/19 5/1/19 8/7/19		309 adds new (c):	§ 15.1.404.5(g)(iii)(B) § 15-1-404.5(5)	

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
			11/6/19: Approved 309 with ordering rule in 309(c)	"**(c) Unless otherwise provided by the terms of unitrust policy or the terms of the trust, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:** **(1) Net income determined as if the trust was not a unitrust;** **(2) Other ordinary income as determined for federal income tax purposes;** **(3) Net realized short-term capital gains as determined for federal income tax purposes;** **(4) Net realized long-term capital gains as determined for federal income tax purposes;** **(5) Trust principal comprising assets for which there is a readily available market value; and** **(6) Other trust principal.**"		
4. Allocation of Receipts: Part 1. Receipts from Entity	401. Character of Receipts from Entity	2/6/19 5/1/19	5/1/19		§ 15-1-411 § 15-1-456(2) § 15-1-458(3) & (6)	UPIA & UPIA of 1955 lack some UFIPA definitions
	402. Distribution from Trust or Estate	8/7/19	8/7/19		§ 15-1-412 § 15-1-467(4) § 15-1-453	UPIA & UPIA of 1955
	403. Business or Other Activity Conducted by Fiduciary	8/7/19	8/7/19		§ 15-1-413(2) § 15-1-460	UPIA & UPIA of 1955

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
4. Allocation of Receipts: Part 2. Receipts Not Normally Apportioned	404. Principal Receipts	8/7/19	8/7/19		§ 15-1-414 § 15-1-456 § 15-1-457	UPIA & UPIA of 1955
	405. Rental Property	8/7/19	8/7/19		§ 15-1-415 § 15-1-456	UPIA & UPIA of 1955
	406. Receipt on Obligation to be Paid in Money	8/7/19	8/7/19		§ 15-1-416 § 15-1-456	UPIA & UPIA of 1955
	407. Insurance Policy or Contract	8/7/19	8/7/19		§ 15-1-417 § 15-1-456	UPIA & UPIA of 1955
4. Allocation of Receipts: Part 3. Receipts Normally Apportioned	408. Insubstantial Allocation Not Required	9/4/19	9/4/19		§ 15-1-418	UPIA
	409. Deferred Compensation, Annuity, or Similar Payment	9/4/19	9/4/19	use "**26 U.S.C. Section 7520 as amended**" throughout, and 409(b)(2) set at **4 percent**	§ 15-1-419	UPIA
	410. Liquidating Asset	9/4/19	9/4/19		§ 15-1-420	UPIA
	411. Minerals, Water, and Other Natural Resources	10/2/19 11/6/19	10/2/19: Tentative approval 11/6/19: Final approval		§ 15-1-420 § 15-1-421.5	UPIA
	412. Timber	9/4/19	9/4/19		§ 15-1-422	UPIA
	413. Marital Deduction Property Not Productive of Income	10/2/19	10/2/19		§ 15-1-423	UPIA
	414. Derivative or Option	11/6/19	11/6/19		§ 15-1-424	UPIA
	415. Asset-backed Security	11/6/19	11/6/19		§ 15-1-425	UPIA
	416. Other Financial Instrument or Arrangement	11/6/19	11/6/19		--	
5. Allocation of Disbursements	501. Disbursement from Income	11/6/19	11/6/19		§ 15-1-426	UPIA
	502. Disbursement from Principal	12/4/19	12/4/19		§ 15-1-427	UPIA
	503. Transfer from Income to Principal for Depreciation	12/4/19	12/4/19		§ 15-1-428	UPIA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	504. Reimbursement of Income from Principal	12/4/19	12/4/19		--	
	505. Reimbursement of Principal from Income	12/4/19	12/4/19		§ 15-1-429	UPIA
	506. Income Taxes	12/4/19	12/4/19	506(c)(1): Latest UFIPA wording of 1/25/19 approved	§ 15-1-430	UPIA
	507. Adjustment Between Income and Principal Because of Taxes	12/4/19	12/4/19	507(a)(2): Latest UFIPA wording of 1/25/19 approved	§ 15-1-431	UPIA
6. Death of Individual or Termination of Income Interest	601. Determination and Distribution of Net Income	12/4/19 2/5/20 3/4/20 4/1/20 5/6/20	5/6/20	601(e) changed to "Reserved"	§ 15-12-904 § 15-1-406	CPC, UPIA
	602. Distribution to Successor Beneficiary	2/5/20 3/4/20 4/1/20 5/6/20	5/6/20	Add 204 Notice of Fiduciary Action	§ 15-1-407	UPIA
7. Apportionment at Beginning and End of Income Interest	701. When right to Income Begins and Ends	3/4/20	3/4/20			
	702. Apportionment of Receipts and Disbursement When Decedent Dies or Income Interest Begins	3/4/20	3/4/20			
	703. Apportionment When Income Interest Ends	3/4/20	3/4/20			
8. Miscellaneous Provisions	801. Uniformity of Application and Construction	2/5/20	2/5/20		§ 15-1-432 § 15-5-1401	UPIA, CUTC
	802. Relation to Electronic Signatures in Global and National Commerce Act	2/5/20	2/5/20		§ 15-5-1402 § 15-2.5-602	UPIA, CUTC, UPOAA

[Article]	Section	Discussed	Approved	Changes to, or Selection of, UFIPA Language of 1/25/19	References to Colorado Law	Notes
	803. Application to Trust or Estate	2/5/20 4/1/20 5/6/20	8/14/20	See below	§ 15-1-435 § 15-1-436 § 15-5-1404	UPIA, CUTC
	[804. Severability]	2/5/20			§ 15-1-433 § 15-5-1403	UPIA, CUTC
	805. Repeals; Conforming Amendments	2/5/20 4/1/20	8/14/20	(a) This [act] repeals §§ 15-1-401 through 15-1-467, C.R.S.	--	
	806. Effective Date	2/5/20 4/1/20	8/14/20	This [act] takes effect July 1, 2021.	§ 15-1-434	UPIA

New 204 – NOTICE OF ACTION

(1) IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

(A) "QUALIFIED BENEFICIARY" HAS THE MEANING SET FORTH IN SUBSECTION 15-5-103(16).

(B) "OBJECTION PERIOD" HAS THE MEANING SET FORTH IN SECTION 304(D)(5).

(2) A FIDUCIARY MAY GIVE A NOTICE OF PROPOSED ACTION REGARDING A MATTER GOVERNED BY SUBPARTS 1 THROUGH 8 OF THIS PART [4] AS PROVIDED IN THIS SECTION. FOR THE PURPOSE OF THIS SECTION, A PROPOSED ACTION INCLUDES A COURSE OF ACTION AND A DECISION NOT TO TAKE ACTION.

(3) THE FIDUCIARY SHALL MAIL NOTICE OF THE PROPOSED ACTION TO ALL QUALIFIED BENEFICIARIES AND THE FIDUCIARY MAY GIVE NOTICE TO OTHER BENEFICIARIES. A BENEFICIARY SHALL BE BOUND UNDER THIS SECTION WITH RESPECT TO SUCH PROPOSED ACTION IF THE BENEFICIARY RECEIVES ACTUAL NOTICE OR IF THE BENEFICIARY WOULD BE BOUND UNDER THE PROVISIONS OF TITLE 15, ARTICLE 5, PART 3.

(4) NOTICE OF PROPOSED ACTION NEED NOT BE GIVEN TO ANY BENEFICIARY WHO CONSENTS IN WRITING TO THE PROPOSED ACTION. THE CONSENT MAY BE EXECUTED AT ANY TIME BEFORE OR AFTER THE PROPOSED ACTION IS TAKEN.

(5) THE NOTICE OF PROPOSED ACTION SHALL STATE THAT IT IS GIVEN PURSUANT TO THIS SECTION AND SHALL FOLLOW THE PROCEDURES SET OUT IN SECTION 304 REGARDING NOTICE.

(6) A BENEFICIARY MAY OBJECT TO THE PROPOSED ACTION BY MAILING A WRITTEN OBJECTION TO THE FIDUCIARY AT THE ADDRESS STATED IN THE NOTICE OF PROPOSED ACTION WITHIN THE OBJECTION PERIOD.

(7) A FIDUCIARY IS NOT LIABLE TO A BENEFICIARY TO WHOM NOTICE IS GIVEN FOR AN ACTION REGARDING A MATTER GOVERNED BY THIS PART IF THE FIDUCIARY DOES NOT RECEIVE A WRITTEN OBJECTION TO THE PROPOSED ACTION FROM THE BENEFICIARY WITHIN THE OBJECTION PERIOD AND THE OTHER REQUIREMENTS OF THIS SECTION ARE SATISFIED. IF NO BENEFICIARY WHO RECEIVES NOTICE OBJECTS UNDER THIS SECTION, THE FIDUCIARY IS NOT LIABLE TO THE BENEFICIARIES RECEIVING NOTICE WITH RESPECT TO THE PROPOSED ACTION.

(8) IF THE FIDUCIARY RECEIVES A WRITTEN OBJECTION WITHIN THE OBJECTION PERIOD, EITHER THE FIDUCIARY OR A BENEFICIARY MAY PETITION THE COURT TO HAVE THE PROPOSED ACTION PERFORMED AS PROPOSED, PERFORMED WITH MODIFICATIONS, OR DENIED. IN THE PROCEEDING, A BENEFICIARY OBJECTING TO THE PROPOSED ACTION HAS THE BURDEN OF PROVING THAT THE FIDUCIARY'S PROPOSED ACTION SHOULD NOT BE PERFORMED. A BENEFICIARY WHO HAS NOT OBJECTED IS NOT ESTOPPED FROM OPPOSING THE PROPOSED ACTION IN THE PROCEEDING. IF THE FIDUCIARY DECIDES NOT TO IMPLEMENT THE PROPOSED ACTION, THE FIDUCIARY SHALL NOTIFY THE BENEFICIARIES OF THE DECISION NOT TO TAKE THE ACTION AND THE REASONS FOR THE DECISION, AND THE FIDUCIARY'S DECISION NOT TO IMPLEMENT THE PROPOSED ACTION DOES NOT ITSELF GIVE RISE TO LIABILITY TO ANY BENEFICIARY. A BENEFICIARY MAY PETITION THE COURT TO HAVE THE ACTION PERFORMED, AND HAS THE BURDEN OF PROVING THAT IT SHOULD BE PERFORMED.

SECTION 304. NOTICE.

(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under CRS 15-5-1-109 to:

(1) the qualified beneficiaries determined under CRS 15-5-103(16) other than the Attorney General; and

(2) each person acting as trust director of the trust under the Colorado Uniform Directed Trust Act; and

(3) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2).

(b) The representation provisions of 15-5-301 through 15-5-305 apply to notice under this section.

(c) A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.

(d) A notice required by Section 303(b)(2) must include:

(1) the action proposed under Section 303(b)(2);

(2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);

(3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or replacement of the unitrust policy adopted under Section 303(a)(2);

(4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;

(5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;

(6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;

(7) the name and contact information of the fiduciary; and

(8) the name and contact information of a person that may be contacted for additional information.

Legislative Note:

A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (a)(2)(B)(iii). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.

803, Application to Trust or Estate

EXCEPT AS PROVIDED IN THE TERMS OF THE TRUST AND THIS SECTION 803, THIS ACT SHALL TAKE EFFECT ON THE EFFECTIVE DATE.

(1) THIS [ACT] SHALL NOT APPLY TO A TRUST ESTABLISHED UNDER A WILL OR TRUST AGREEMENT EXISTING AND IRREVOCABLE ON JULY 1, 2001, IF A TRUSTEE OF THE TRUST HAS ELECTED TO APPLY THE "UNIFORM PRINCIPAL AND INCOME ACT" OF THIS STATE IN EFFECT ON JUNE 30, 2001.

(2) THIS [ACT] SHALL NOT APPLY TO A TRUST EXISTING ON JULY 1, 2001, IN WHICH NO TRUSTEE HAD THE AUTHORITY TO ACT UNDER SECTION 15-1-404 OF THE UNIFORM PRINCIPAL AND INCOME ACT EFFECTIVE JULY 1, 2001, UNLESS A TRUSTEE OF THE TRUST ELECTED TO APPLY THE UNIFORM PRINCIPAL AND INCOME ACT AS IT EXISTED AFTER JULY 1, 2001, AS AMENDED.

(3) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (1) OF THIS SECTION, THIS [ACT] SUBPARTS 1 THROUGH 6 OF THIS PART 4 SHALL NOT APPLY TO ANY TRUST OR DECEDENT'S ESTATE EXISTING ON THE EFFECTIVE DATE, IN WHICH NO FIDUCIARY HAS THE AUTHORITY TO ACT UNDER SECTION 203 SECTION 15-1-404 UNLESS A FIDUCIARY ELECTS TO APPLY SUBPARTS 1 THROUGH 7 OF THIS PART 4. THE LAW IN EFFECT IN COLORADO AS OF JUNE 30, 2001 WILL APPLY TO THIS THE TRUST OR ESTATE UNLESS A FIDUCIARY MAKES SUCH ELECTION. THE FIDUCIARY MAY MAKE THIS ELECTION AT ANY TIME.

(4) ONCE AN ELECTION IS MADE PURSUANT TO THIS SECTION, THE ELECTION SHALL BE IRREVOCABLE. THE FIDUCIARY SHALL GIVE NOTICE OF SUCH AN ELECTION TO THE BENEFICIARIES OF THE TRUST IN ACCORDANCE WITH SECTION 204. IF SUCH NOTICE COMPLIES WITH SECTION 204, THE PROVISIONS OF SAID SECTION SHALL APPLY TO SUCH ELECTION.

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SEVENTH YEAR
LOUISVILLE, KENTUCKY
JULY 20 - JULY 26, 2018

WITH PREFATORY NOTE AND COMMENTS

January 25, 2019

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DRAFTING COMMITTEE ON UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

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UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

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UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

PREFATORY NOTE

The Uniform Fiduciary Income and Principal Act (2018) is an update of the Revised Uniform Principal and Income Act (1997). Like the 1997 Act, it adapts to changes in the design and use of trusts. Highlights include an expansion of the use of the power to adjust between income and principal in Section 203, the addition of provisions for unitrusts in Article 3, and a simplifying change in governing law for purposes of distinguishing income and principal in Section 104.

Changes in the Design and Use of Trusts

The 2018 Uniform Fiduciary Income and Principal Act, like previous revisions of the Uniform Principal and Income Act, is intended to reflect and address changes in the design and use of modern trusts. Very long-term trusts are more common, as are totally discretionary trusts – that is, trusts in which income, as well as principal, is distributable to beneficiaries during the term of the trust not as a matter of right but solely in the discretion of the trustee. Even where income distributions are mandatory, including occasions where income distributions are mandated by requirements of tax law (such as the estate tax marital deduction), discretion in the trustee to supplement income distributions by invasions of principal is common.

One result of these developments in the design, use, and role of trusts is to make historical distinctions between income and principal less important as a technical matter in some cases. Discretionary accumulation of income has the effect of treating income as principal to the extent of the accumulation. And discretionary invasion of principal has the effect of treating principal as income to the extent of the invasion. Even so, the difference between income and principal is important to impartial trustees and beneficiaries alike. The 2018 Act retains the historical distinctions, including the historical technical rules that have evolved through changing legal and practical environments, while still allowing skilled and dedicated trustees to respond to legal and practical environments that inevitably will continue to change.

The basic premise of the current revision is that a trustee that is aware of the current practical environment of trust administration and sensitive to the evolving demands of impartiality should be able to determine standards for adjusting between income and principal that are reasonable in the circumstances, and to update those standards from time to time. Authority to make adjustments between income and principal from year to year, introduced as Section 104 in the 1997 Act, is retained, and indeed significantly expanded, as Section 203 in the 2018 Act. The most important way in which the authority to adjust is expanded is by eliminating the precondition that trust distributions are constricted by the concept of "income" in a way that economic results from year to year could arbitrarily affect. In other words, while the trustee of a more modern trust with greater, if not total, flexibility to make distributions from income and/or principal would actually have been *denied* the flexibility intended by former Section 104, new Section 203 ensures that designing a trust for greater flexibility will not ironically sacrifice the flexibility of adjustments.

That means that the technical structure of the 2018 Act exhibits a certain amount of apparent redundancy. A trustee that could cope with the constraints of income and principal rules by merely accumulating income or invading principal now is given the alternative of making an adjustment under Section 203 instead, either from year to year, as under former Section 104, or for more than one year, under these expanded rules.

The 2018 Act respects, and permits a trustee to respect, the simple notion of "income." Under Section 203, a trustee of a discretionary trust can make adjustments, taking into account a nonexclusive list of factors provided in Section 201(e), and still achieve the comfortable outcome of "distributing income." And if the interests of beneficiaries under the terms of the trust are still not appropriately served within the framework of "distributing income" – that is, when no reasonable adjustment would serve those interests, or when non-pro rata distributions are justified – then invasions of principal are still appropriate to the extent consistent with the terms of the trust.

The more traditional rules for allocating income and principal are retained, with updates, in Articles 4 through 7. The general substantive rules are in Articles 4 and 5, and the special temporal rules relating to the beginning and end of interests are moved from Articles 2 and 3 in the 1997 Act to Articles 6 and 7 in the 2018 Act, thus placing the substantive rules that are applicable on an ongoing basis ahead of the temporal rules that are applicable only at certain times. One useful result of these changes is that the former rules of Sections 401 through 415 and 501 through 503, with which many fiduciaries no doubt have considerable experience, are retained in the 2018 Act with the same section numbers.

Article 3 adds the authority for a trustee to convert to or from a unitrust or change a unitrust. But the tax-sensitive limitations typically included in unitrust statutes, such as the limitation of the unitrust rate to a rate from 3 to 5 percent, are now provided only for trusts that are intended to qualify for tax benefits for the protection of which those limitations are needed. The new unitrust rules are discussed further in the Comments in Article 3.

Expansion Beyond Trusts and Estates

Previous Uniform Principal and Income Acts explicitly addressed only trusts and estates, even though they reflected principles that would apply in other contexts where the benefits of property are shared by successive legal or beneficial ownership interests. While those contexts do not necessarily present allocation issues that require the application of specific statutory rules on a regular basis, Section 103(2) of the 2018 Act fills a potential gap by making the act explicitly applicable to "a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons."

Governing Law

New Section 104 clarifies that the income and principal rules of the state that is the principal place of administration of the trust from time to time will be the governing law.

A "rule of construction" is typically governed by the law of the place where the trust was created or deemed created. A "rule of administration" is typically governed by the law of the situs of the trust from time to time, often with appropriate savings provisions for tax benefits, etc.

if the situs is changed. Authorities seem to be divided, however, on which historical category includes an income and principal act. See Restatement (Second) of Conflict of Laws § 268, comment *h* (1971):

> The question of the allocation of receipts and expenditures to principal or income presents a different problem. See Restatement (Second) of Trusts, §§ 232-241 (1959). If a testator creates a trust to be administered in a state other than that of his domicil, the question is whether the allocation, as for instance of extraordinary dividends, is to be determined by the local law of his domicil or the local law of the place of administration. This could conceivably be treated as a question of administration and governed by the local law of the place of administration. On the other hand, it can be treated as a question of the distribution of the trust property and governed by the local law of the testator's domicil. For the purposes of the choice of the applicable law, it is generally held that it is a question of construction and that the local law of the testator's domicil is applicable.

Despite the fact that income and principal allocations often do determine who gets what and therefore are rules of construction, treating those allocations as governed by the place of current administration seems to be the most workable approach and seems to be contemplated, for example, by the change-of-situs examples in the 2003 amendments to the GST tax regulations (Treasury Reg. §26.2601-1(b)(4)(i)(E), Examples 11 & 12). Perhaps the biggest burden of a rule of construction is determining the governing law not only *where* the trust was originally created but also *when* the trust was originally created, a burden that gets greater as longer-term trusts become more common and existing trusts therefore become older. Previous Uniform Principal and Income Acts did not include a governing law provision. New Section 104 of the 2018 Act specifies that the Uniform Fiduciary Income and Principal Act, like a rule of administration, is governed by the law of the situs, or principal place of administration, of the trust, which is not necessarily the place where all or most or any of the trust assets are located.

Section 104 is consistent with Sections 107 and 108 of the Uniform Trust Code and Section 3 of the Uniform Directed Trust Act. Like those acts, the rule of Section 104 may be superseded by a provision in the terms of the trust.

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Income and Principal Act.

Comment

Name. The change in the name of this Uniform Act has three purposes and effects.

First, this name will distinguish the 2018 Act from its 1931, 1962, and 1997 predecessors and support an acronym that will not be confused with the Uniform Prudent Investor Act, which was closely associated with the 1997 Revised Uniform Principal and Income Act.

Second, by using the word "Fiduciary," the name emphasizes that the distinctions between income and principal are most likely to be relevant in the context of trusts and decedents' estates, especially trusts that continue for a long time, perpetually in the case of some modern trusts. Such trusts present a greater possibility of competing interests between those entitled to income currently and those who may be entitled to income and/or principal – that is, entitled to "what's left" – after the current interests terminate by death or otherwise. The act also applies to term relationships other than just trusts and decedents' estates, such as legal life estates, which may share the long-term character and need for balancing of successive interests that is most commonly associated with trusts. But the primary applications of the act will generally be in contexts marked by the role of a fiduciary.

Third, placing income first in the name emphasizes the fact that principal may be "what's left" after income is paid out. After income is paid out it is gone and normally cannot be retrieved (although prior over-distributions can sometimes be taken into account in determining the amount of future distributions). This continues the practice of previous acts of favoring principal where there is uncertainty.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Accounting period" means a calendar year, unless a fiduciary selects another period of 12 calendar months or approximately 12 calendar months. The term includes a part of a calendar year or another period of 12 calendar months or approximately 12 calendar months which begins when an income interest begins or ends when an income interest ends.

(2) "Asset-backed security" means a security that is serviced primarily by the cash flows

of a discrete pool of fixed or revolving receivables or other financial assets that by their terms convert into cash within a finite time. The term includes rights or other assets that ensure the servicing or timely distribution of proceeds to the holder of the asset-backed security. The term does not include an asset to which Section 401, 409, or 414 applies.

(3) "Beneficiary" includes:

(A) for a trust:

(i) a current beneficiary, including a current income beneficiary and a beneficiary that may receive only principal;

(ii) a remainder beneficiary; and

(iii) any other successor beneficiary;

(B) for an estate, an heir[, legatee,] and devisee; and

(C) for a life estate or term interest, a person that holds a life estate, term interest, or remainder or other interest following a life estate or term interest.

(4) "Court" means [the court in this state having jurisdiction relating to a trust, estate, or life estate or other term interest described in Section 103(2)].

(5) "Current income beneficiary" means a beneficiary to which a fiduciary may distribute net income, whether or not the fiduciary also may distribute principal to the beneficiary.

(6) "Distribution" means a payment or transfer by a fiduciary to a beneficiary in the beneficiary's capacity as a beneficiary, made under the terms of the trust, without consideration other than the beneficiary's right to receive the payment or transfer under the terms of the trust. "Distribute", "distributed", and "distributee" have corresponding meanings.

(7) "Estate" means a decedent's estate. The term includes the property of the decedent as the estate is originally constituted and the property of the estate as it exists at any time during

administration.

(8) "Fiduciary" includes a trustee,[trust director determined under [Section 2(9) of the Uniform Directed Trust Act,]] personal representative, life tenant, holder of a term interest, and person acting under a delegation from a fiduciary. The term includes a person that holds property for a successor beneficiary whose interest may be affected by an allocation of receipts and expenditures between income and principal. If there are two or more co-fiduciaries, the term includes all co-fiduciaries acting under the terms of the trust and applicable law.

(9) "Income" means money or other property a fiduciary receives as current return from principal. The term includes a part of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [Article] 4.

(10) "Income interest" means the right of a current income beneficiary to receive all or part of net income, whether the terms of the trust require the net income to be distributed or authorize the net income to be distributed in the fiduciary's discretion. The term includes the right of a current beneficiary to use property held by a fiduciary.

(11) "Independent person" means a person that is not:

(A) for a trust:

(i) [a qualified beneficiary determined under [Uniform Trust Code Section 103(13)]][a beneficiary that 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 either the trust or the interests of the distributees or permissible distributees of trust income or principal were terminated, assuming no power of appointment is exercised];

(ii) a settlor of the trust; or

(iii) an individual whose legal obligation to support a beneficiary may be

satisfied by a distribution from the trust;

(B) for an estate, a beneficiary;

(C) a spouse, parent, brother, sister, or issue of an individual described in subparagraph (A) or (B);

(D) a corporation, partnership, limited liability company, or other entity in which persons described in subparagraphs (A) through (C), in the aggregate, have voting control; or

(E) an employee of a person described in subparagraph (A), (B), (C), or (D).

(12) "Mandatory income interest" means the right of a current income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(13) "Net income" means the total allocations during an accounting period to income under the terms of a trust and this [act] minus the disbursements during the period, other than distributions, allocated to income under the terms of the trust and this [act]. To the extent the trust is a unitrust under [Article] 3, the term means the unitrust amount determined under [Article] 3. The term includes an adjustment from principal to income under Section 203. The term does not include an adjustment from income to principal under Section 203.

(14) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(15) "Personal representative" means an executor, administrator, successor personal representative, special administrator, or person that performs substantially the same function with respect to an estate under the law governing the person's status.

(16) "Principal" means property held in trust for distribution to, production of income for, or use by a current or successor beneficiary.

(17) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(18) “Settlor” means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, the term includes each person, to the extent of the trust property attributable to that person’s contribution, except to the extent another person has the power to revoke or withdraw that portion.

(19) “Special tax benefit” means:

(A) exclusion of a transfer to a trust from gifts described in Section 2503(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2503(b)[, as amended,] because of the qualification of an income interest in the trust as a present interest in property;

(B) status as a qualified subchapter S trust described in Section 1361(d)(3) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(d)(3)[, as amended,] at a time the trust holds stock of an S corporation described in Section 1361(a)(1) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 1361(a)(1)[, as amended];

(C) an estate or gift tax marital deduction for a transfer to a trust under Section 2056 or 2523 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056 or 2523[, as amended,] which depends or depended in whole or in part on the right of the settlor’s spouse to receive the net income of the trust;

(D) exemption in whole or in part of a trust from the federal generation-skipping transfer tax imposed by Section 2601 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2601[, as amended,] because the trust was irrevocable on September 25, 1985, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal

Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended], could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended], could occur with respect to the trust; or

(E) an inclusion ratio, as defined in Section 2642(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2642(a)[, as amended], of the trust which is less than one, if there is any possibility that:

(i) a taxable distribution, as defined in Section 2612(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(b)[, as amended], could be made from the trust; or

(ii) a taxable termination, as defined in Section 2612(a) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2612(a)[, as amended], could occur with respect to the trust.

(20) "Successive interest" means the interest of a successor beneficiary.

(21) "Successor beneficiary" means a person entitled to receive income or principal or to use property when an income interest or other current interest ends.

(22) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding;

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law; [or]

(ii) court order[; or

(iii) a nonjudicial settlement agreement under [Uniform Trust Code Section 111]];

(C) for an estate, a will; or

(D) for a life estate or term interest, the corresponding manifestation of the rights of the beneficiaries.

(23) "Trust":

(A) includes:

(i) an express trust, private or charitable, with additions to the trust, wherever and however created; and

(ii) a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust; and

(B) does not include:

(i) a constructive trust;

(ii) a resulting trust, conservatorship, guardianship, multi-party account, custodial arrangement for a minor, business trust, voting trust, security arrangement, liquidation trust, or trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, retirement benefits, or employee benefits of any kind; or

(iii) an arrangement under which a person is a nominee, escrowee, or agent for another.

(24) "Trustee" means a person, other than a personal representative, that owns or holds

property for the benefit of a beneficiary. The term includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(25) "Will" means any testamentary instrument recognized by applicable law which makes a legally effective disposition of an individual's property, effective at the individual's death. The term includes a codicil or other amendment to a testamentary instrument.

Legislative Note: *Revise paragraph (4) as necessary to refer to the appropriate court having jurisdiction over the matters listed.*

In paragraph (8), refer to Uniform Directed Trust Act Section 2(9), or modify paragraph (8) appropriately if the state has not enacted the Uniform Directed Trust Act.

In paragraph (11)(A)(i), refer to Uniform Trust Code Section 103(13), or modify paragraph (11)(A)(i) appropriately if the state has not enacted the Uniform Trust Code.

A state that has enacted Uniform Trust Code Section 103(15) and (20) may replace paragraphs (18) and (24) with cross-references to those provisions.

A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in paragraph (19). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted from paragraph (19).

A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 103(18), defining "terms of a trust", or the Uniform Trust Decanting Act (2015) Section 2(28), defining "terms of the trust", should update those definitions to conform to paragraph (22)(A) and (B). A state that has not enacted Uniform Trust Code Section 111 should replace the bracketed language of paragraph (22)(B)(iii) with a cross reference to the state's statute governing nonjudicial settlement or should omit paragraph (22)(B)(iii) if the state does not have such a statute.

Comment

"Accounting period." The 2018 Act adds the option of using an accounting period of "approximately 12 calendar months." This clarifies that a 52-53-week fiscal year contemplated, for example, by section 441(f) of the Internal Revenue Code of 1986, or any other reasonable fiscal year, is not precluded.

"Beneficiary." The 2018 Act expands the definition to include life estate-remainder relationships, as provided in the broader scope of the act set forth in Section 103. The definition is adapted to the context of income and principal allocations.

"Court." The 2018 Act defines "court," to simplify references throughout the act. The definition is drawn from Section 2(8) of the Uniform Trust Decanting Act and conformed to the broader scope in Section 103 of this act.

"Current income beneficiary," "income interest," and "mandatory income interest." The 2018 Act adds these definitions because of their relevance to the temporal distinctions between income and principal. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the act.

"Distribution," "distribute," "distributed," and "distributee." The 2018 Act adds this definition, which clarifies that these words are used in the limited sense of a payment or transfer to a beneficiary only in the beneficiary's capacity as beneficiary with respect to that beneficiary's interest in the trust. For example, these words do not include compensation paid to a beneficiary who is also a fiduciary or employee, rent paid to a beneficiary who leases property to a trust, or interest paid to a beneficiary who has made a loan or installment sale to a trust.

"Fiduciary." The 2018 Act expands this definition to conform to the broader scope in Section 103. The definition makes it clear that the singular "fiduciary" will be used throughout the act even when two or more fiduciaries are serving together at the same time. To refer to one or more but not all of the fiduciaries serving at the same time that are authorized to exercise the power to adjust under Section 203 or disregard insubstantial allocations under Section 408 when one or more of the other then-serving fiduciaries are not authorized to do so, Sections 203 and 408 use the variations "co-fiduciary" and "co-fiduciaries". The term "fiduciary" does not refer to successor fiduciaries or potential successor fiduciaries that are not then serving.

"Independent person." The 2018 Act adds a definition of an "independent person," which is used is Sections 203(e)(7), 309(b), and 501(2) with reference to fiduciaries to limit certain fiduciary discretionary powers to independent fiduciaries. Because an important reason for these limitations is to protect against unwelcome tax consequences, the definition in large part reflects, in the negative, the definition of a "related or subordinate party" in section 672(c) of the Internal Revenue Code of 1986, which is incorporated by some tax rules, some safe harbors acknowledged by the IRS, and some conventions of document drafting. A limited liability company is added to subparagraph (D). Otherwise, subparagraphs (B) through (E) track section 672(c) as closely as feasible. For example, subparagraph (D) refers simply to "voting control" rather than the more subjective "significant from the viewpoint of voting control" used in section 672(c)(2), and subparagraph (E) refers simply to "an employee" rather than the more subjective "subordinate employee" used in reference to a corporation in section 672(c)(2). Subparagraph (C) refers to a "spouse," as does section 672(c)(1); in view of the evolution of the law in this area, no reference has been included to "domestic partners" or similar terms. Although this definition largely tracks the definition of a "related or subordinate party" in section 672(c) of the Internal Revenue Code of 1986, its purposes in the act are broader than the protection of tax benefits, and it therefore is broader than section 672(c) in some respects.

"Net income." "Net income" continues to be the term generally used in the 2018 Act to refer to what a current beneficiary must or may receive. This use is flexible enough to cover, for example, even a trust, or a special circumstance related to a trust, that requires or permits distributions of gross income, because "net income" *is* gross income (expressed as "the total

allocations during an accounting period to income under the terms of a trust and this [act]") "minus the disbursements during the period, other than distributions, allocated to income under the terms of the trust and this [act]." To the extent the terms of a trust require or permit the distribution of gross income, there will necessarily be no "disbursements … allocated to income" – all such disbursement will necessarily be allocated to principal – and thus the definition will work even in that unusual case. In addition, the 2018 Act expands this definition to explicitly provide that in a unitrust, now provided for in new Article 3, "net income" *is* the unitrust amount, without deduction for any disbursements.

"Record." This addition in the 2018 Act is copied from Section 2(22) of the Uniform Trust Decanting Act.

"Settlor." The 2018 Act adds a definition of "settlor" adapted from Section 103(15) of the Uniform Trust Code and Section 2(6) of the recent Uniform Directed Trust Act. It includes a "testator." Because of this definition, there is generally no reason to add words like "testator," "donor," or "transferor" throughout this act.

"Special tax benefit." In exercising various forms of fiduciary discretion under the 2018 Act, there are certain federal tax benefits that it is important to preserve and certain adverse federal tax consequences that it is important to avoid. (Section 104(c) of the 1997 Act served that purpose with respect to the power to adjust between income and principal.) There are four kinds of "special tax benefit" that it is important to preserve under the 2018 Act that are defined in Section 102(19). One is the qualification of an income interest in a trust for the annual exclusion from taxable gifts because the income interest is a "present interest" in property under Treasury Reg. §25.2503-3(b) and therefore is not a "future interest in property" referred to in section 2503(b)(1) of the Internal Revenue Code of 1986 (subparagraph (A) of this act). Another is the eligibility of a trust to hold stock of an S corporation under section 1361 as a "qualified subchapter S trust" (QSST) under section 1361(d) of the Code if all of the income is distributed to one citizen or resident of the United States under section 1361(d)(3)(B) of the Code (subparagraph (B)). Another is the eligibility of a transfer to a trust for an estate or gift tax marital deduction because the settlor's spouse is entitled to all the net income of the trust under section 2056(b)(5) or (7)(B)(i)(II) or 2523(e) or (f)(2)(B) of the Code (subparagraph (C)). Finally, there is the total or partial exemption of a trust from generation-skipping transfer tax (GST tax) either under section 1433(b)(2)(A) of the Tax Reform Act of 1986 (Public Law 99-514) because the trust was irrevocable on September 25, 1985 (subparagraph (D)) or under section 2642(a)(2)(A) of the Code because GST exemption was allocated to the trust (subparagraph (E)). This definition of a "special tax benefit" is used to determine limits on the power to adjust between income and principal under Section 203(e)(1) and the new power to convert to or from a unitrust or change a unitrust under Section 309(b).

"Successor beneficiary." This term is used in the 2018 Act rather than "remainder beneficiary," the term in the 1997 Act, in recognition of the fact that modern trusts often last longer than the life of a single income beneficiary, and therefore the beneficiaries whose future interests are most often in need of balance and protection are beneficiaries who continue as income beneficiaries, not who succeed to the "remainder" interest as if the trust terminates. The term "successor beneficiary" includes remainder beneficiaries.

"Terms of a trust." The definition of "terms of a trust" in the 2018 Act is conformed to Section 2(8) of the Uniform Directed Trust Act, which is similar to Section 2(28) of the Uniform Trust Decanting Act and Section 103(18) of the Uniform Trust Code. This replaces Section 102(12) of the 1997 Act, which reads: "'Terms of a trust' means the manifestation of the intent of a settlor or decedent with respect to a trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct." Subparagraphs (C) and (D) are added to conform to the broader scope in Section 103. The expressions "terms of *a* trust" and "terms of *the* trust" are used interchangeably in the act, depending on whether there has been a reference to a trust, either explicitly or indirectly, previously in the subsection (or self-contained paragraph).

SECTION 103. SCOPE. Except as otherwise provided in the terms of a trust or this [act], this [act] applies to:

(1) a trust or estate; and

(2) a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons.

SECTION 104. GOVERNING LAW. Except as otherwise provided in the terms of a trust or this [act], this [act] applies when this state is the principal place of administration of a trust or estate or the situs of property that is not held in a trust or estate and is subject to a life estate or other term interest described in Section 103(2). By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration of a trust to this state, the trustee submits to the application of this [act] to any matter within the scope of this [act] involving the trust.

Comment

As explained in the Prefatory Note, new Section 104 of the 2018 Act specifies that the Uniform Fiduciary Income and Principal Act is governed by the law of the situs, or principal place of administration, of the trust. This is consistent with Sections 107 and 108 of the Uniform Trust Code and Section 3 of the Uniform Directed Trust Act. Like those acts, the rule of Section 104 may be superseded by a provision in the terms of the trust.

[ARTICLE] 2

FIDUCIARY DUTIES AND JUDICIAL REVIEW

SECTION 201. FIDUCIARY DUTIES; GENERAL PRINCIPLES.

(a) In making an allocation or determination or exercising discretion under this [act], a fiduciary shall:

(1) act in good faith, based on what is fair and reasonable to all beneficiaries;

(2) administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries;

(3) administer the trust or estate in accordance with the terms of the trust, even if there is a different provision in this [act]; and

(4) administer the trust or estate in accordance with this [act], except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.

(b) A fiduciary's allocation, determination, or exercise of discretion under this [act] is presumed to be fair and reasonable to all beneficiaries. A fiduciary may exercise a discretionary power of administration given to the fiduciary by the terms of the trust, and an exercise of the power which produces a result different from a result required or permitted by this [act] does not create an inference that the fiduciary abused the fiduciary's discretion.

(c) A fiduciary shall:

(1) add a receipt to principal, to the extent neither the terms of the trust nor this [act] allocates the receipt between income and principal; and

(2) charge a disbursement to principal, to the extent neither the terms of the trust nor this [act] allocates the disbursement between income and principal.

(d) A fiduciary may exercise the power to adjust under Section 203, convert an income

trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3), if the fiduciary determines the exercise of the power will assist the fiduciary to administer the trust or estate impartially.

(e) Factors the fiduciary must consider in making the determination under subsection (d) include:

(1) the terms of the trust;

(2) the nature, distribution standards, and expected duration of the trust;

(3) the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7;

(4) the desirability of liquidity and regularity of income;

(5) the desirability of the preservation and appreciation of principal;

(6) the extent to which an asset is used or may be used by a beneficiary;

(7) the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;

(8) whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;

(9) the extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;

(10) the effect of current and reasonably expected economic conditions; and

(11) the reasonably expected tax consequences of the exercise of the power.

Comment

Subsections (a) through (c) of Section 201 of the 2018 Act are an update of Section 103 of the 1997 Act.

The standard of what is fair and reasonable to all beneficiaries in subsection (a)(1) is derived from Section 103(b) of the 1997 Act; it is an objective standard, not dependent on what *seems* to any beneficiary to be fair and reasonable. A requirement to act "in good faith" is added, complementing and supporting the exoneration for a fiduciary's action or inaction in good faith in Sections 203(c) (relating to the power to adjust between income and principal) and 302(f) (relating to the new power to convert to or from a unitrust or change a unitrust) of the 2018 Act.

The requirement to administer a trust or estate impartially in subsection (a)(2) is also derived from Section 103(b) of the 1997 Act, as is the accompanying exception to the extent the terms of the trust manifest an intent to favor one or more beneficiaries.

The terms of the trust may alter the degree or nature of impartiality without abandoning the duty of impartiality. For example, the terms of the trust may permit or require a current beneficiary to be preferred to meet needs for support in accordance with an accustomed standard of living and for medical care, but in making determinations regarding that standard the trustee owes a duty of impartiality to the current beneficiary and the successor beneficiaries. If such a preference for support and health is expressed, the 2018 Act preserves the duty of impartiality in making discretionary distributions when that standard is satisfied.

The fact that an income beneficiary or a remainder beneficiary is also the fiduciary is not by itself an indication of partiality for that beneficiary.

Like previous acts, the 2018 Act contains only default rules. The general supremacy of the terms of the trust is affirmed in subsection (a)(3), as in Section 103(a)(1) of the 1997 Act. Conversely, the applicability of the act where not overridden by the terms of the trust is affirmed in subsection (a)(4), but in a simpler and clearer way than Section 103(a)(3) of the 1997 Act, which stated that "a fiduciary … shall administer a trust or estate in accordance with this [Act] *if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration*." The 2018 Act states simply "except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise."

The presumption of fairness and reasonableness of a fiduciary's determination in the first sentence of subsection (b) is adapted from the last sentence of Section 103(b) of the 1997 Act. The reassurance in the following sentence of subsection (b) that a result of a fiduciary's exercise of discretion under the terms of the trust that is different from a result under the act does not create a negative inference is adapted from Section 103(a)(2) of the 1997 Act.

The default of adding a receipt, or charging a disbursement, to principal in subsection (c) is derived from Section 103(a)(4) of the 1997 Act.

Factors. The factors in subsection (e) that a fiduciary must consider are adapted from Section 104(b) of the 1997 Act, which was written in the context of the power to adjust between income and principal now found in Section 203. Unlike Section 104(b) of the 1997 Act, subsection (e) does not limit such consideration to those factors "to the extent they are relevant," because determining that a factor is not relevant would itself require a degree of consideration. Under subsection (d), those factors are now also applicable to the new power to convert to or from a unitrust or change a unitrust granted by Section 303.

"The terms of the trust" are added as an obvious factor and, indeed, placed first, in paragraph (1). Correspondingly, in paragraph (2) the "purpose" of the trust is deleted as a factor, as is "the intent of the settlor" in Section 104(b)(2) of the 1997 Act. Divining or guessing subjective elements like "purpose" and "intent" are not a reasonable burden to place on a fiduciary, whereas "terms of the trust" is defined in Section 102(22)(A) to be "the *manifestation* of the settlor's intent" in an objective medium.

Paragraph (3) adds "the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7," an elaboration of the reference to "the other sections of this [Act]" in Section 104(b)(6) of the 1997 Act. This wording affirms that a main function of the power to adjust or to convert to a unitrust is to fix or compensate for the results otherwise obtained under those default rules. And because the filter of the default rules in Articles 4 through 7 is the meaningful way to view the assets of the trust, the enumeration of a few characteristics of those assets in Section 104(b)(5) of the 1997 Act is omitted, except for the use of an asset by a beneficiary, which is retained in paragraph (6).

In paragraphs (4) and (5), "the needs for liquidity, regularity of income, and preservation and appreciation of capital" (as expressed in Section 104(b)(4) of the 1997 Act) is retained, except that "needs for" is changed to "desirability of" and "capital" is changed to "principal."

Paragraph (7) retains "the increase or decrease in the value of principal assets" from Section 104(b)(6) of the 1997 Act. The volatility of value, as well as the unpredictability of income, can be an occasion for the "smoothing" the powers to adjust between income and principal and to convert to or from a unitrust or change a unitrust are designed to provide.

Finally, "the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation" in Section 104(b)(8) of the 1997 Act is simplified to "the effect of current and reasonably expected economic conditions" in paragraph (10), and "anticipated tax consequences" in Section 104(b)(9) of the 1997 Act is changed to "reasonably expected tax consequences" in paragraph (11).

SECTION 202. JUDICIAL REVIEW OF EXERCISE OF DISCRETIONARY POWER[; REQUEST FOR INSTRUCTION].

(a) In this section, "fiduciary decision" means:

(1) a fiduciary's allocation between income and principal or other determination

regarding income and principal required or authorized by the terms of the trust or this [act];

(2) the fiduciary's exercise or nonexercise of a discretionary power regarding income and principal granted by the terms of the trust or this [act], including the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3); or

(3) the fiduciary's implementation of a decision described in paragraph (1) or (2).

(b) The court may not order a fiduciary to change a fiduciary decision unless the court determines that the fiduciary decision was an abuse of the fiduciary's discretion.

(c) If the court determines that a fiduciary decision was an abuse of the fiduciary's discretion, the court may order a remedy authorized by law[, including Uniform Trust Code Section 1001]. To place the beneficiaries in the positions the beneficiaries would have occupied if there had not been an abuse of the fiduciary's discretion, the court may order:

(1) the fiduciary to exercise or refrain from exercising the power to adjust under Section 203;

(2) the fiduciary to exercise or refrain from exercising the power to convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3);

(3) the fiduciary to distribute an amount to a beneficiary;

(4) a beneficiary to return some or all of a distribution; or

(5) the fiduciary to withhold an amount from one or more future distributions to a beneficiary.

[(d) On [petition] by a fiduciary for instruction, the court may determine whether a proposed fiduciary decision will result in an abuse of the fiduciary's discretion. If the [petition] describes the proposed decision, contains sufficient information to inform the beneficiary of the reasons for making the proposed decision and the facts on which the fiduciary relies, and explains how the beneficiary will be affected by the proposed decision, a beneficiary that opposes the proposed decision has the burden to establish that it will result in an abuse of the fiduciary's discretion.]

Legislative Note: *In subsection (c), refer to Uniform Trust Code Section 1001, or modify subsection (c) appropriately or refer to the corresponding provision of the state's trust law if the state has not enacted the Uniform Trust Code.*

Modify subsection (d) if the manner for bringing the matter to a court under the state law is not a "petition", or delete subsection (d) and modify the title to the section if the state law does not permit a court to give instruction to a fiduciary in these circumstances.

Comment

Section 202 of the 2018 Act is adapted from Section 105 of the 1997 Act. Subsection (a) expands the scope of Section 105(b) of the 1997 Act from the power to adjust to include not only the powers under the new unitrust provisions (subsection (a)(2)) but also any allocation or other determination regarding income and principal (subsection (a)(1)) and the implementation of any such allocations, determinations, or actions (subsection (a)(3)). Collectively these decisions are called "fiduciary decisions."

Subsection (b) retains the general rule of Section 105(a) of the 1997 Act that a court will intervene only if it determines that the fiduciary decision was an abuse of the fiduciary's discretion. The statement that "A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power," although obviously true, is deleted as unnecessary. *See* Restatement (Third) of Trusts § 50, comment *b* (2003) ("A court will not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.").

Subsection (c) focuses the enumeration of available remedies on remedies that place the beneficiaries overtly – and the trust implicitly – "in the positions [they] would have occupied if there had not been an abuse of the fiduciary's discretion," while acknowledging that the choice of remedy is of course the court's decision to make. Paragraphs (1) and (2) add that the court may simply order that the fiduciary exercise or refrain from exercising the power to adjust or the power to convert to or from a unitrust or change a unitrust. Those remedies are placed first

because they may often be the first choices (but, again, without purporting to limit the court's authority). Paragraphs (3), (4), and (5) contain the remedies of ordering a distribution or withholding from future distributions by a fiduciary or even ordering a refund by a beneficiary.

The remedy in Section 105(c)(3) of the 1997 Act of ordering the fiduciary to use the fiduciary's own funds to make a beneficiary whole is deleted – not denied to a court, but deleted as beyond the scope of a statute dealing primarily with allocations of income and principal. But the fiduciary's option of obtaining advance directions from the court (in Section 105(d) of the 1997 Act) is retained in subsection (d), if consistent with general state law. The reference in Section 105 of the 1997 Act to "the court having jurisdiction of a trust or estate" is shortened to just "the court," which is defined in Section 102(4).

SECTION 203. FIDUCIARY'S POWER TO ADJUST.

(a) Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.

(b) This section does not create a duty to exercise or consider the power to adjust under subsection (a) or to inform a beneficiary about the applicability of this section.

(c) A fiduciary that in good faith exercises or fails to exercise the power to adjust under subsection (a) is not liable to a person affected by the exercise or failure to exercise.

(d) In deciding whether and to what extent to exercise the power to adjust under subsection (a), a fiduciary shall consider all factors the fiduciary considers relevant, including relevant factors in Section 201(e) and the application of Sections 401(i), 408, and 413.

(e) A fiduciary may not exercise the power under subsection (a) to make an adjustment or under Section 408 to make a determination that an allocation is insubstantial if:

(1) the adjustment or determination would reduce the amount payable to a current income beneficiary from a trust that qualifies for a special tax benefit, except to the extent the adjustment is made to provide for a reasonable apportionment of the total return of the trust between the current income beneficiary and successor beneficiaries;

(2) the adjustment or determination would change the amount payable to a beneficiary, as a fixed annuity or a fixed fraction of the value of the trust assets, under the terms of the trust;

(3) the adjustment or determination would reduce an amount that is permanently set aside for a charitable purpose under the terms of the trust, unless both income and principal are set aside for the charitable purpose;

(4) possessing or exercising the power would cause a person to be treated as the owner of all or part of the trust for federal income tax purposes;

(5) possessing or exercising the power would cause all or part of the value of the trust assets to be included in the gross estate of an individual for federal estate tax purposes;

(6) possessing or exercising the power would cause an individual to be treated as making a gift for federal gift tax purposes;

(7) the fiduciary is not an independent person;

(8) the trust is irrevocable and provides for income to be paid to the settlor and possessing or exercising the power would cause the adjusted principal or income to be considered an available resource or available income under a public-benefit program; or

(9) the trust is a unitrust under [Article] 3.

(f) If subsection (e)(4), (5), (6), or (7) applies to a fiduciary:

(1) a co-fiduciary to which subsection (e)(4) through (7) does not apply may exercise the power to adjust, unless the exercise of the power by the remaining co-fiduciary or co-fiduciaries is not permitted by the terms of the trust or law other than this [act]; or

(2) if there is no co-fiduciary to which subsection (e)(4) through (7) does not apply, the fiduciary may appoint a co-fiduciary to which subsection (e)(4) through (7) does not

apply, which may be a special fiduciary with limited powers, and the appointed co-fiduciary may exercise the power to adjust under subsection (a), unless the appointment of a co-fiduciary or the exercise of the power by a co-fiduciary is not permitted by the terms of the trust or law other than this [act].

(g) A fiduciary may release or delegate to a co-fiduciary the power to adjust under subsection (a) if the fiduciary determines that the fiduciary's possession or exercise of the power will or may:

(1) cause a result described in subsection (e)(1) through (6) or (8); or

(2) deprive the trust of a tax benefit or impose a tax burden not described in subsection (e)(1) through (6).

(h) A fiduciary's release or delegation to a co-fiduciary under subsection (g) of the power to adjust under subsection (a):

(1) must be in a record;

(2) applies to the entire power, unless the release or delegation provides a limitation, which may be a limitation to the power to adjust:

(A) from income to principal;

(B) from principal to income;

(C) for specified property; or

(D) in specified circumstances;

(3) for a delegation, may be modified by a re-delegation under this subsection by the co-fiduciary to which the delegation is made; and

(4) subject to paragraph (3), is permanent, unless the release or delegation provides a specified period, including a period measured by the life of an individual or the lives

of more than one individual.

(i) Terms of a trust which deny or limit the power to adjust between income and principal do not affect the application of this section, unless the terms of the trust expressly deny or limit the power to adjust under subsection (a).

(j) The exercise of the power to adjust under subsection (a) in any accounting period may apply to the current period, the immediately preceding period, and one or more subsequent periods.

(k) A description of the exercise of the power to adjust under subsection (a) must be:

(1) included in a report, if any, sent to beneficiaries under [Uniform Trust Code Section 813(c)]; or

(2) communicated at least annually to [the qualified beneficiaries determined under [Uniform Trust Code Section 103(13)], other than [the Attorney General]][all beneficiaries that receive or are entitled to receive income from the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the notice is sent, assuming no power of appointment is exercised].

Legislative Note: *Delete or modify subsection (f) if the state law requires fiduciaries to act unanimously.*

In subsection (k), refer to Uniform Trust Code Sections 813(c) and 103(13), or modify subsection (k) appropriately or refer to the corresponding provision of the state's trust law if the state has not enacted the Uniform Trust Code.

Comment

Origin, purpose, and scope of the power to adjust. The power to adjust between income and principal was added to the 1997 Act as Section 104 (the predecessor of Section 203 of the 2018 Act) to complement the Uniform Prudent Investor Act that had been approved by the Uniform Law Commission in 1994. For a discussion of the prudent investor rule, including the investment considerations involving specific investments and techniques under the rule, *see* Restatement (Third) of Trusts § 90 (2007), comments *k* through *p* (originally published as Restatement (Third) of Trusts: Prudent Investor Rule § 227, comments *i* and *k* through *p* (1992)).

The purpose of the power to adjust between income and principal was to enable a fiduciary to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 104 authorized a fiduciary to make adjustments between income and principal if three conditions were met: (1) the fiduciary must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the fiduciary must be unable to comply with the duty to administer the trust impartially, based on what is fair and reasonable to all the beneficiaries, without making an adjustment. In deciding whether and to what extent to exercise the power to adjust, the fiduciary was required to consider the factors described in what is now, with refinements, Section 201(e), but the fiduciary could not make an adjustment in circumstances described in what is now, with refinements, Section 203(e).

As stated in the Prefatory Note, new Section 203 is significantly expanded over former Section 104, especially by eliminating the three aforementioned preconditions. For the power to adjust to be available, trust distributions need not be constricted by the concept of "income" in a way that economic results from year to year could arbitrarily affect. In other words, while the trustee of a more modern trust with greater, if not total, flexibility to make distributions from income and/or principal would actually have been *denied* the flexibility intended by former Section 104, new Section 203 ensures that designing a trust for greater flexibility will not ironically sacrifice the flexibility of adjustments.

Section 203 does not empower a fiduciary to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the fiduciary to make adjustments between income and principal that may be necessary or helpful if the income component of a portfolio's total return is too small or too large because of investment decisions made by the fiduciary under the prudent investor rule. The paramount considerations in applying Section 203(a), which replace the three preconditions of former Section 104, are the requirement in Section 201(a)(1) and (2) that "a fiduciary shall …act in good faith, based on what is fair and reasonable to all beneficiaries [and] administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries," and the precondition in Section 203(a) that "the fiduciary [determine] the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially."

In other words, the power to adjust between income and principal under former Section 104(a) was available only when, without the power, the fiduciary would have been "unable" to administer the trust impartially because prudent investment for *total* return was not producing an appropriate level of traditional trust *income* return to impartially balance the interests of the beneficiaries. Under new Section 203(a), that standard is relaxed when "the fiduciary determines the exercise of the power to adjust will *assist* the fiduciary to administer the trust or estate impartially." The former standard of impossibility is replaced by a standard of assistance.

As further stated in the Prefatory Note, a trustee of a flexible trust that could have coped with the constraints of income and principal rules by merely accumulating income or invading principal now is given the alternative of making an adjustment under Section 203 instead. Under

Section 203, a trustee of a discretionary trust can make adjustments, taking into account the nonexclusive list of factors provided in Section 201(e), and still achieve the comfortable outcome of "distributing income." The 2018 Act contemplates that not only would some fiduciaries prefer the opportunity to continue to respect the formality of "distributing income to income beneficiaries," but such a practice would also reassure beneficiaries and reduce some tendencies toward suspicion and conflict among beneficiaries. And when the interests of beneficiaries under the terms of the trust are still not appropriately served within the framework of "distributing income" – that is, when no reasonable adjustment would serve those interests, or when non-pro rata distributions are justified – then invasions of principal, if authorized by the terms of the trust, may still be necessary.

Factors to consider in exercising the power to adjust. The factors the fiduciary must consider in determining whether to exercise the power to adjust between income and principal, formerly found in Section 104(b) regarding the power to adjust, are now revised and set forth in Section 201(e), applicable to both the power to adjust between income and principal and the power to convert to or from a unitrust or change a unitrust. Section 203(d) refers to Section 201(e) in reference to the power to adjust. The differences between the factors in former Section 104(b) and those in new Section 201(e) are discussed in the Comment to Section 201.

Section 203(d) also requires that a fiduciary considering an exercise of the power to adjust consider the potential presence and effect of certain specific circumstances, namely the clarification of the character of a distribution from an entity under Section 401(i) after the fiduciary has made a distribution to trust beneficiaries on the basis of incorrect or incomplete information, the forgoing of specific small allocations between income and principal as insubstantial under Section 408, and the need under Section 413 to compensate a settlor's spouse when the property in a marital trust is underproductive.

Duration of an exercise of the power to adjust. Section 104 of the 1997 Act did not state the trust accounting periods to which a fiduciary's exercise of the power to adjust between income and principal would apply, suggesting that the power would be exercised year-by-year, although presumably a retrospective exercise in the first part of the following year would work. Section 203(j) of the 2018 Act explicitly provides that an exercise of the power in 2019, for example, may apply to 2018, 2019, and any subsequent years. Such an exercise, again as an example, would permit a fiduciary to take note that a particular long-term investment was likely to produce little or no accounting income but significant capital appreciation, and to provide accordingly for ongoing adjustments to occur as long as those conditions prevailed. While it still may be prudent to review such circumstances regularly, an announced commitment to a long-term strategy of adjustments might provide reassuring predictability and enhance the "regularity of income" cited as a factor for consideration in Section 201(e)(4).

Accountability to beneficiaries and review by the court. Section 203(k) clarifies that a description of a fiduciary's exercise of the power to adjust must be communicated to beneficiaries, either in the annual report contemplated by Section 813(c) of the Uniform Trust Code or by less formal communication at least annually.

The exercise or nonexercise of the power to adjust is subject to review by the court under an abuse-of-discretion standard pursuant to Section 202. Certain remedies available to the court

are addressed in Section 202(c) and discussed in the Comment to Section 202.

Limitations on the power to adjust. Section 203(e) prohibits a trustee from exercising the power to adjust where the exercise or even possession of the power might produce unwelcome federal tax results. Many of the tax results new Section 203(e) seeks to avoid are carryovers from the former Section 104(c): loss of marital deduction (new Sections 203(e)(1) & 102(19)(C), former Section 104(c)(1)), loss of annual gift tax exclusion (203(e)(1) & 102(19)(A), 104(c)(2)), loss of annuity trust or unitrust treatment (203(e)(2), 104(c)(3)), charitable deduction (203(e)(3), 104(c)(4)), grantor trust treatment (203(e)(4), 104(c)(5)), and exposure to estate tax (203(e)(5), 104(c)(6)). Adverse results that the 2018 Act adds are disqualification of a trust to hold S corporation stock as a qualified subchapter S trust (QSST) under Section 102(19)(B), loss of grandfathered or exempt status for generation-skipping transfer tax (GST tax) purposes under Section 102(19)(D) and (E), and a taxable gift by a beneficiary or fiduciary (Section 203(e)(6)), as well as jeopardy of exemption for public benefit purposes (Section 203(e)(8)).

With respect to the "special tax benefits" defined in Section 102(19), however, the limitation of Section 203(e)(1) does not apply "to the extent the adjustment is made to provide for a reasonable apportionment of the total return of the trust between the current income beneficiary and successor beneficiaries." This is patterned after a safe harbor in Treasury Reg. §1.643(b)-1, discussed in the Comments to Sections 301 and 309.

In Section 104(c)(5) and (6) of the 1997 Act, the limitations to avoid grantor trust status and estate tax exposure were expressed as "if possessing or exercising the power to make an adjustment causes [the adverse result], and [the adverse result] would not [occur] if the trustee did not possess the power to make the adjustment." The second clause is omitted in Section 203(e)(5) and (6) because if the possessing or exercising the power "causes" the adverse result it necessarily follows that the adverse result would not occur but for the power.

In addition, the estate tax protection is extended to all individuals under Section 203(e)(5) of the 2018 Act, whereas it was limited to individuals with the power to remove or appoint a trustee under Section 104(c)(6) of the 1997 Act. But the limitation applies only to the exposure of "trust assets" to estate tax, not assets held outside the trust, including assets that have been distributed from the trust. Therefore, for example, the limitation is not implicated merely because the exercise of the power to adjust from principal to income might increase a distribution to an income beneficiary and thereby add to that beneficiary's estate held outside the trust.

Section 104(c)(7) and (8) of the 1997 Act prohibited exercise of the power to adjust "if the trustee is a beneficiary of the trust or … the adjustment would benefit the trustee directly or indirectly." Section 203(e)(7) of the 2018 Act simply requires the fiduciary to be "an independent person," as defined in new Section 102(11). Like Section 104(d) of the 1997 Act, if some but not all co-fiduciaries are restricted from exercising the power, Section 203(f)(1) of the 2018 Act permits a qualified co-fiduciary to exercise the power, if permitted by the terms of the trust and applicable law. Section 203(f)(2) of the 2018 Act goes on to permit the appointment of a co-fiduciary for that purpose, even limited to that purpose.

Even in a case where Section 203(e) does not prohibit a trustee from adjusting between

income and principal because certain tax advantages might be jeopardized, the trustee's adjustment between income and principal does not necessarily determine or affect the amount of income that will be subject to federal income tax. Income for federal tax purposes is different from income for purposes of trust administration. As Treasury Reg. §1.643(b)-1 warns, "[t]rust provisions that depart fundamentally from traditional principles of income and principal will generally not be recognized" for income tax purposes.

Section 203(e)(9) provides that the power to adjust is not available for a unitrust under Article 3.

Release or delegation of the power to adjust. Like Section 104(e) of the 1997 Act, Section 203(g) of the 2018 Act permits a fiduciary to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a benefit or impose a burden or risk. In addition, Section 203 allows delegation of the power in such a case. Section 203(h) provides that a release or delegation may be limited to income, to principal, or in other ways, or may apply only for a limited time, which may be measured by a life or lives. If not limited, the default under Section 203(h) is that the release or delegation is complete and permanent.

Trust terms that limit a power to adjust. Like Section 104(f) of the 1997 Act, Section 203(i) of the 2018 Act acknowledges that the terms of a trust may limit the power to adjust, but only if the limitation expressly applies to "the power to adjust under subsection (a)."

[ARTICLE] 3

UNITRUST

SECTION 301. DEFINITIONS. In this [article]:

(1) "Applicable value" means the amount of the net fair market value of a trust taken into account under Section 307.

(2) "Express unitrust" means a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount.

(3) "Income trust" means a trust that is not a unitrust.

(4) "Net fair market value of a trust" means the fair market value of the assets of the trust, less the noncontingent liabilities of the trust.

(5) "Unitrust" means a trust for which net income is a unitrust amount. The term includes an express unitrust.

(6) "Unitrust amount" means an amount computed by multiplying a determined value of a trust by a determined percentage. For a unitrust administered under a unitrust policy, the term means the applicable value, multiplied by the unitrust rate.

(7) "Unitrust policy" means a policy described in Sections 305 through 309 and adopted under Section 303.

(8) "Unitrust rate" means the rate used to compute the unitrust amount under paragraph (6) for a unitrust administered under a unitrust policy.

Comment

Background. The word "unitrust" can be traced at least to the literature of the mid-1960s. Lovell, "The Unitrust: A New Concept to Meet an Old Problem," 105 Trusts & Estates 215 (1966); Del Cotto & Joyce, "Taxation of the Trust Annuity: The Unitrust Under the Constitution and the Internal Revenue Code," 23 Tax L. Rev. 257 (1968). For many estate planners and charitable giving planners, the first introduction to the word may be in the term "charitable remainder unitrust" introduced by Congress in section 664, added to the Internal Revenue Code by the Tax Reform Act of 1969. The word was reprised following the enactment of section 2702 in Treasury Reg. § 25.2702-3(c), governing "qualified unitrust interests" in grantor retained unitrusts ("GRUTs") (which are hardly ever used, if they are used at all).

While the precise origin or intent of the word is not totally clear, it appears derived from the notion that the trust consists of a *unified* fund—"a single fund [in which] there would be no distinction between income and principal," only between "receipts" and "payouts." Lovell, *supra*. The "unitrust" can be thought of as a trust in which there is a "unity" of interest between the current income beneficiary and the successor beneficiary, because both benefit from a higher value of the trust assets.

Thus, in current legal usage, a "unitrust" is simply a trust in which the periodic payout to the current income beneficiary is determined with reference to a percentage of the net value of the trust assets, determined from time to time, regardless of how much income is produced by the trust assets or the growth of the trust assets. As the value of the trust assets increases, the unitrust amount increases. As the value decreases, the unitrust amount decreases.

The "unity" of interest between the current income beneficiaries and the remainder or successor beneficiaries will enable the trustee to invest the assets for long-term growth to the benefit of all beneficiaries. This will permit the mission of the trustee and investment team to be more focused. Investment decisions can be based on the needs and risk tolerances of the beneficiaries, and there is less likelihood of dissension between the current and future beneficiaries over investment policy. In addition, to the extent that a unitrust approach obviates discretionary invasions of principal, the trustee is protected against challenges by the remainder beneficiaries that any discretionary principal distributions were excessive. Similarly, a unitrust

approach eliminates the need to make adjustments between income and principal under Section 203 and thus avoids or minimizes controversy over whether such adjustments are proper.

By the end of 2016, 36 states (Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming) had enacted statutes, some as part of their Principal and Income Acts and some separately, permitting a trustee to convert a trust to a unitrust. Some of those statutes refer to unitrusts as "total return unitrusts" (a term not used in Article 3).

Response by the Internal Revenue Service. In February 2001, the Internal Revenue Service published proposed regulations it described in part as follows: "This document contains proposed regulations revising the definition of income under section 643(b) of the Internal Revenue Code to take into account changes in the definition of trust accounting income under state laws." The preamble to the proposed regulations noted:

> These [then current] statutory and regulatory provisions [under section 643] date back to a time when, under state statutes, dividends and interest were considered income and were allocated to the income beneficiaries while capital gains were allocated to the principal of the trust. Changes in the types of available investments and in investment philosophies have caused states to revise, or to consider revising, these traditional concepts of income and principal….
>
> To ensure that the income beneficiaries are not penalized if a trustee adopts a total return investment strategy, many states have made, or are considering making, revisions to the definitions of income and principal. Some state statutes permit the trustee to make an equitable adjustment between income and principal if necessary to ensure that both the income beneficiaries and the remainder beneficiaries are treated impartially, based on what is fair and reasonable to all the beneficiaries. Thus, a receipt of capital gains that previously would have been allocated to principal may be allocated by the trustee to income if necessary to treat both parties impartially. Conversely, a receipt of dividends or interest that previously would have been allocated to income may be allocated by the trustee to principal if necessary to treat both parties impartially.
>
> Other states are proposing legislation that would allow the trustee to pay a unitrust amount to an income beneficiary in satisfaction of that beneficiary's right to the income from the trust. This unitrust amount will be a fixed percentage, sometimes required to be within a range set by state statute, of the fair market value of the trust assets determined annually.
>
> Questions have arisen concerning how these state statutory changes affect the definition of income provided in section 643(b) and the other Code provisions that rely on the section 643(b) definition of income. This definition of income affects trusts including, but not limited to, ordinary trusts, charitable remainder trusts, pooled income funds, and qualified subchapter S trusts.

In short, revision of the regulations was proposed to respond to changes in circumstances, including changes in the pressures on a trustee faced with an obligation to invest for total return under the prudent investor rule and faced with the remedies of principal-income adjustments under the 1997 Revised Uniform Principal and Income Act and of conversion to a total return unitrust.

The final regulations were released on December 30, 2003. Treasury Reg. §1.643(b)-1 states, in part:

> [A]n allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, a state statute providing that income is a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust.

Article 3. The typical state unitrust statute limits unitrust conversions to the parameters in the Treasury Regulations – "a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis." Article 3 borrows heavily from that existing state legislation, but it is broader and more flexible than the laws of most states. The 2018 Act does not limit state law by these specialized federal regulations and includes in Article 3 many more features and refinements than only a 3-to-5-percent range and the potential for annual averaging, to permit a unitrust to even better serve the objective of achieving more stability and predictability for beneficiaries.

One such refinement is to provide that the trust distribute a percentage of its market value determined on the basis of a rolling average of values for periods other than years. Twelve quarters is an example. This can reduce potential fluctuations in distributions caused by short-swing movements in the stock market. Although the rate of increase in the unitrust distribution to the current income beneficiary will lag the performance of the portfolio, the current income beneficiary will benefit in down years. Another similar refinement designed to reduce risk to all the beneficiaries is to place a ceiling and/or a floor on the unitrust payout amount, or on the size of fluctuation of the unitrust amount from year to year or period to period. More fundamental refinements include a variable unitrust rate itself, perhaps drawn from specified market data, and different treatment for different types of assets, including the total exclusion of certain assets and the income therefrom. Sections 305-309(a) allow all variations of that kind. To afford a trustee the benefit of the safe harbor in the Treasury regulations in situations where it applies, Section 309(b) limits the parameters in those situations to the parameters specified in that safe harbor. The situations where Section 309(b) applies, described as situations in which the trust offers a "special tax benefit," which is defined in Section 102(19), are built around situations addressed in the 2003 Treasury Regulations.

Because of the broad flexibility Article 3 allows, it is not necessary to provide specific statutory fixes for specific identified challenges, including computational challenges like the treatment of accrued but unpaid income and the treatment of property that is personally used and not invested.

In addition to the requirements in Sections 303(b)(2) and 304 for sending notice of a proposed conversion to or from a unitrust or change to a unitrust, some state statutes also require the trustee to send a copy of the state unitrust statute. If the other, somewhat more detailed, requirements of this Article 3 are followed, that seems unnecessary, although any state that chooses may still add it.

Like some state unitrust statutes, Article 3 applies to "express unitrusts," defined in Section 301(2) to be "a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount." This scope of Article 3 is confirmed in Section 301(5), which includes an express unitrust in the general definition of a "unitrust," in Section 301(6), in which the definition of a "unitrust amount" "includes" the unitrust amount determined under Article 3 but also covers any "amount computed by multiplying a determined value of a trust by a determined percentage" (as in an express unitrust), and in Section 302(a)(2), which includes an express unitrust in the application of Article 3. This definition and scope are carried out in Section 303(a)(2) and (3), which provides that any unitrust (which includes an express unitrust under Section 301(5)) may be changed (Section 303(a)(2)) or converted (not just "converted *back*") to an income trust (Section 303(a)(3)). Thus the Comments to this act refer to "the power to convert to or from a unitrust or change a unitrust," although the act itself (in Sections 201(d) and 202(a)(2) and (c)(2)) is more formal.

As in the case of the power to adjust between income and principal provided in Section 203 and discussed in the Comment to Section 203, Section 302(c) provides that a trust may be converted to a unitrust regardless of the terms of the trust governing distributions – that is, even though distributions are not defined or limited by the amount of net income of the trust. This is a departure from current state laws, but it reflects the overall commitment to flexibility in the 2018 Act that is discussed in the Comment to Section 302. Like the power to adjust, Section 303(b)(1) makes the power to convert to or from a unitrust or change a unitrust available when "the fiduciary determines that the action will *assist* the fiduciary to administer a trust impartially."

SECTION 302. APPLICATION; DUTIES AND REMEDIES.

(a) Except as otherwise provided in subsection (b), this [article] applies to:

(1) an income trust, unless the terms of the trust expressly prohibit use of this [article] by a specific reference to this [article] or an explicit expression of intent that net income not be calculated as a unitrust amount; and

(2) an express unitrust, except to the extent the terms of the trust explicitly:

(A) prohibit use of this [article] by a specific reference to this [article];

(B) prohibit conversion to an income trust; or

(C) limit changes to the method of calculating the unitrust amount.

(b) This [article] does not apply to a trust described in Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b)[, as amended].

(c) An income trust to which this [article] applies under subsection (a)(1) may be converted to a unitrust under this [article] regardless of the terms of the trust concerning distributions. Conversion to a unitrust under this [article] does not affect other terms of the trust concerning distributions of income or principal.

(d) This [article] applies to an estate only to the extent a trust is a beneficiary of the estate. To the extent of the trust's interest in the estate, the estate may be administered as a unitrust, the administration of the estate as a unitrust may be discontinued, or the percentage or method used to calculate the unitrust amount may be changed, in the same manner as for a trust under this [article].

(e) This [article] does not create a duty to take or consider action under this [article] or to inform a beneficiary about the applicability of this [article].

(f) A fiduciary that in good faith takes or fails to take an action under this [article] is not liable to a person affected by the action or inaction.

Legislative Note: *A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (b). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.*

Comment

Section 302(a)(2) includes "express unitrusts" within the scope of Article 3. Section 302(b) excludes charitable lead annuity trusts and unitrusts (CLATs and CLUTs), pooled income funds (PIFs), charitable remainder annuity trusts and unitrusts (CRATs and CRUTs), personal residence trusts and qualified personal residence trusts (PRTs and QPRTs), and grantor retained

annuity trusts and unitrusts (GRATs and GRUTs).

Section 302(c) confirms that conversion of an income trust to a unitrust does not depend on the terms of the trust concerning distributions. In other words, a unitrust conversion is available even for a trust in which a trustee may accumulate income or invade principal. This works both ways under Section 302(c). Discretion over distributions does not disqualify an income trust from converting to a unitrust, and neither does conversion to a unitrust change the trustee's discretion to accumulate income (even the unitrust amount, although that may be unusual) or invade principal above the unitrust amount. This carries out the objective of the 2018 Act, explained in the Prefatory Note and in the Comment to Section 203, to allow a fiduciary to respect the simple, predictable, and reassuring notion of "income" (in this case a unitrust amount) without necessarily relying on accumulations of income or invasions of principal as a first resort.

Section 302(d) provides that Article 3 applies to a decedent's estate only to the extent a trust is a beneficiary of the estate. To that extent, the estate, or part of the estate, is treated for all purposes the same as a trust under Article 3. Thus, there are no other references to estates in Article 3.

Section 302(e) rejects any creation of an affirmative duty to act under Article 3 or to inform beneficiaries of the actions available under Article 3. And Section 302(f) exonerates a fiduciary that in good faith acts or fails to act under Article 3.

SECTION 303. AUTHORITY OF FIDUCIARY.

(a) A fiduciary, without court approval, by complying with subsections (b) and (f), may:

(1) convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:

(A) that in administering the trust the net income of the trust will be a unitrust amount rather than net income determined without regard to this [article]; and

(B) the percentage and method used to calculate the unitrust amount;

(2) change the percentage or method used to calculate a unitrust amount for a unitrust if the fiduciary adopts in a record a unitrust policy or an amendment or replacement of a unitrust policy providing changes in the percentage or method used to calculate the unitrust amount; or

(3) convert a unitrust to an income trust if the fiduciary adopts in a record a

determination that, in administering the trust, the net income of the trust will be net income determined without regard to this [article] rather than a unitrust amount.

(b) A fiduciary may take an action under subsection (a) if:

(1) the fiduciary determines that the action will assist the fiduciary to administer a trust impartially;

(2) the fiduciary sends a notice in a record, in the manner required by Section 304, describing and proposing to take the action;

(3) the fiduciary sends a copy of the notice under paragraph (2) to each settlor of the trust which is:

(A) if an individual, living; or

(B) if not an individual, in existence;

(4) at least one member of each class[of the qualified beneficiaries determined under [Uniform Trust Code Section 103(13)], other than [the Attorney General],] receiving the notice under paragraph (2) is:

(A) if an individual, legally competent; [or]

(B) if not an individual, in existence; [or

(C) represented in the manner provided in Section 304(b);] and

(5) the fiduciary does not receive, by the date specified in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record to the action proposed under paragraph (2) from a person to which the notice under paragraph (2) is sent.

(c) If a fiduciary receives, not later than the date stated in the notice under Section 304[(d)(5)][(c)(5)], an objection in a record described in Section 304[(d)(4)][(c)(4)] to a proposed action, the fiduciary or a beneficiary may request the court to have the proposed action

taken as proposed, taken with modifications, or prevented. A person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection, whether or not the person:

(1) consented under Section 304[(c)][(b)]; or

(2) objected under Section 304[(d)(4)][(c)(4)].

(d) If, after sending a notice under subsection (b)(2), a fiduciary decides not to take the action proposed in the notice, the fiduciary shall notify in a record each person described in Section 304(a) of the decision not to take the action and the reasons for the decision.

(e) If a beneficiary requests in a record that a fiduciary take an action described in subsection (a) and the fiduciary declines to act or does not act within 90 days after receiving the request, the beneficiary may request the court to direct the fiduciary to take the action requested.

(f) In deciding whether and how to take an action authorized by subsection (a), or whether and how to respond to a request by a beneficiary under subsection (e), a fiduciary shall consider all factors relevant to the trust and the beneficiaries, including relevant factors in Section 201(e).

(g) A fiduciary may release or delegate the power to convert an income trust to a unitrust under subsection (a)(1), change the percentage or method used to calculate a unitrust amount under subsection (a)(2), or convert a unitrust to an income trust under subsection (a)(3), for a reason described in Section 203(g) and in the manner described in Section 203(h).

Legislative Note: *In subsection (b)(4), refer to Uniform Trust Code Section 103(13), or modify subsection (b)(4) appropriately or refer to the corresponding provision of the state's trust law if the state has not enacted the Uniform Trust Code.*

In subsections (b)(5) and (c), use the reference in the first set of brackets if Alternative A of Section 304 is used and use the reference in the second set of brackets if Alternative B of Section 304 is used.

Comment

Section 303 sets forth, in effect, the road map for action under Article 3: the options under Section 303(a), a determination that impartiality will be assisted under Section 303(b)(1), notice to beneficiaries under Section 303(b)(2) with a copy to the settlor or settlors under Section 303(b)(3), existence of a competent potential party under Section 303(b)(4), a wait for a prescribed time before acting under Section 303(b)(5), and an opportunity to ask for court approval under Section 303(c) if there is a timely objection. There is also an opportunity under Section 303(e) for a beneficiary to seek the help of the court if the beneficiary asks the fiduciary to act under Article 3 and the fiduciary refuses or fails to act.

Although the recipients of the required notice are set forth in detail in Section 304, settlors are included only here in Section 303(b)(3) and are said to receive only "a copy of the notice." This is done to avoid unintentionally making the settlor of an irrevocable trust over which he or she has relinquished all power a party to a proceeding with a voice in the matter that could be construed as retained control of the trust. See Section 303(c), which provides that "[a] person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection," and Section 304[(d)][(c)](4), which requires the notice to state that everyone who receives the notice "may object to the proposed action." This is a departure from the Uniform Trust Decanting Act (UTDA), for example, which includes the requirement for notice to the settlor in the same list, indeed at the head of the list (Section 7(c)(1)), of all persons entitled to notice. But there may be reasons unique to decanting to give formal notice to the settlor. Section 19(b)(10) of UTDA, for example, allows a settlor to block a fiduciary's decanting proposal if the decanting would reduce the settlor's power to avoid or terminate grantor trust status, which typically would not be implicated by a unitrust conversion.

Section 303(a)(1)(A) states that in a unitrust "the net income of the trust will be a unitrust amount rather than net income determined without regard to this [article]." Thus, for example, because "net income" already reflects the disbursements made from income, there will be no deductions from the unitrust amount for expenses unless the unitrust policy expressly allows it.

Like the power to adjust, the power to convert to or from a unitrust or change a unitrust is governed by consideration of the same factors under Sections 303(f) and 201(e), and a fiduciary may release or delegate the power under Section 303(g).

SECTION 304. NOTICE.

Alternative A

(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under [Uniform Trust Code Section 109] to:

(1) the qualified beneficiaries determined under [Uniform Trust Code Section 103(13)], other than [the Attorney General]; [and]

(2) [each person acting as trust director of the trust under the Uniform Directed Trust Act][each person that is granted a power over the trust by the terms of the trust, to the extent the power is exercisable when the person is not then serving as a trustee:

(A) including a:

(i) power over the investment, management, or distribution of trust property or other matters of trust administration; and

(ii) power to appoint or remove a trustee or person described in this paragraph; and

(B) excluding a:

(i) power of appointment;

(ii) power of a beneficiary over the trust, to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by the beneficiary under [Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power; and

(iii) power over the trust if the terms of the trust provide that the power is held in a nonfiduciary capacity and the power must be held in a nonfiduciary capacity to achieve a tax objective under the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended]][; and

(3) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2)].

(b) The representation provisions of [Uniform Trust Code Sections 301 through 305]

apply to notice under this section.

Alternative B

(a) A notice required by Section 303(b)(2) must be sent to:

(1) all beneficiaries that receive or are entitled to receive income from the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the notice is sent, assuming no power of appointment is exercised; [and]

(2) [each person acting as trust director of the trust under the Uniform Directed Trust Act][each person that is granted a power over the trust by the terms of the trust, to the extent the power is exercisable when the person is not then serving as a trustee:

(A) including a:

(i) power over the investment, management, or distribution of trust property or other matters of trust administration; and

(ii) power to appoint or remove a trustee or person described in this paragraph; and

(B) excluding a:

(i) power of appointment;

(ii) power of a beneficiary over the trust, to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary; and

(iii) power over the trust if the terms of the trust provide that the power is held in a nonfiduciary capacity and the power must be held in a nonfiduciary capacity to achieve a tax objective under the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended]][; and

(3) each person that is granted a power by the terms of the trust to appoint or

remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2)].

End of Alternatives

[(c)][(b)] A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.

[(d)][(c)] A notice required by Section 303(b)(2) must include:

(1) the action proposed under Section 303(b)(2);

(2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);

(3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or replacement of the unitrust policy adopted under Section 303(a)(2);

(4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;

(5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;

(6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;

(7) the name and contact information of the fiduciary; and

(8) the name and contact information of a person that may be contacted for

additional information.

Legislative Note: *Use Alternative A and the designations in the first set of brackets if the state has enacted the Uniform Trust Code. Use Alternative B and the subsection designations in the second set of brackets if the state has not enacted the Uniform Trust Code.*

A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (a)(2)(B)(iii). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.

In Alternative A or B, modify subsection (a)(2) to refer to the Uniform Directed Trust Act and include subsection (a)(3) if the state has enacted the Uniform Directed Trust Act, or modify subsection (a)(2) appropriately and omit subsection (a)(3) if the state has not enacted the Uniform Directed Trust Act.

Comment

Section 304 provides details of the fiduciary's notice to beneficiaries. Subsection (a) is offered in two Alternatives, Alternative A for a state that has enacted the Uniform Trust Code and Alternative B for a state that hasn't. Alternative A also includes a subsection (b) that affirms the application of the UTC representation rules. Generally, a detailed notice goes to "qualified beneficiaries" in the UTC sense, as both current and successor beneficiaries are affected by the administration of a trust as a unitrust. Subsection (d) (in the UTC case) or (c) (in the non-UTC case) requires, in paragraphs (7) and (8), the name and contact information of the fiduciary and of a person that may be contacted for additional information. "Contact information" is left open-ended, to accommodate any reasonably accessible technology or medium.

SECTION 305. UNITRUST POLICY.

(a) In administering a unitrust under this [article], a fiduciary shall follow a unitrust policy adopted under Section 303(a)(1) or (2) or amended or replaced under Section 303(a)(2).

(b) A unitrust policy must provide:

(1) the unitrust rate or the method for determining the unitrust rate under Section 306;

(2) the method for determining the applicable value under Section 307; and

(3) the rules described in Sections 306 through 309 which apply in the administration of the unitrust, whether the rules are:

(A) mandatory, as provided in Sections 307(a) and 308(a); or

(B) optional, as provided in Sections 306, 307(b), 308(b), and 309(a), to

the extent the fiduciary elects to adopt those rules.

Comment

Section 305 provides for a "unitrust policy," which will include a few mandatory details spelled out in Sections 306 through 308 and may include many more optional details mentioned in those sections. It is in those sections where broad flexibility is encountered, including a unitrust rate under Section 306 that may be less than 3 percent or more than 5 percent and a period under Section 308 that may be something other than a calendar year. For exceptions to that flexibility in certain cases, see Section 309 and the Comment thereto.

SECTION 306. UNITRUST RATE.

(a) Except as otherwise provided in Section 309(b)(1), a unitrust rate may be:

(1) a fixed unitrust rate; or

(2) a unitrust rate that is determined for each period using:

(A) a market index or other published data; or

(B) a mathematical blend of market indices or other published data over a

stated number of preceding periods.

(b) Except as otherwise provided in Section 309(b)(1), a unitrust policy may provide:

(1) a limit on how high the unitrust rate determined under subsection (a)(2) may

rise;

(2) a limit on how low the unitrust rate determined under subsection (a)(2) may

fall;

(3) a limit on how much the unitrust rate determined under subsection (a)(2) may

increase over the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods;

(4) a limit on how much the unitrust rate determined under subsection (a)(2) may

decrease below the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods; or

(5) a mathematical blend of any of the unitrust rates determined under subsection (a)(2) and paragraphs (1) through (4).

SECTION 307. APPLICABLE VALUE.

(a) A unitrust policy must provide the method for determining the fair market value of an asset for the purpose of determining the unitrust amount, including:

(1) the frequency of valuing the asset, which need not require a valuation in every period; and

(2) the date for valuing the asset in each period in which the asset is valued.

(b) Except as otherwise provided in Section 309(b)(2), a unitrust policy may provide methods for determining the amount of the net fair market value of the trust to take into account in determining the applicable value, including:

(1) obtaining an appraisal of an asset for which fair market value is not readily available;

(2) exclusion of specific assets or groups or types of assets;

(3) other exceptions or modifications of the treatment of specific assets or groups or types of assets;

(4) identification and treatment of cash or property held for distribution;

(5) use of:

(A) an average of fair market values over a stated number of preceding periods; or

(B) another mathematical blend of fair market values over a stated number

of preceding periods;

(6) a limit on how much the applicable value of all assets, groups of assets, or individual assets may increase over:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(7) a limit on how much the applicable value of all assets, groups of assets, or individual assets may decrease below:

(A) the corresponding applicable value for the preceding period; or

(B) a mathematical blend of applicable values over a stated number of preceding periods;

(8) the treatment of accrued income and other features of an asset which affect value; and

(9) determining the liabilities of the trust, including treatment of liabilities to conform with the treatment of assets under paragraphs (1) through (8).

Comment

In determining the amount to which the unitrust rate is applied to determine the unitrust amount, a fiduciary first determines the fair market value of *each* asset that is not excluded under Section 307(b)(2). Fair market value is just that, fair market value in the usual sense. Next, the fiduciary adds the fair market values of *all* those assets together and subtracts the noncontingent liabilities of the trust to determine "net fair market value of the trust," as defined in Section 301(4). Finally, the fiduciary applies the actions described in Section 307(b)(3) through (9), to the extent provided by the unitrust policy (as well as other actions provided by the unitrust policy under Section 309(a)(3)), to determine the "applicable value." It is the applicable value that is multiplied by the unitrust rate to determine the unitrust amount, which is deemed to be the net income of the trust under Section 303(a)(1)(A) or (2). Thus, unlike fair market value, the "applicable value" may be affected by the actions taken under Section 307(b)(3) through (9). Those actions may be somewhat artificial, in that they are not produced by the market as is "fair market value." In fact, most of those actions are intended to counterbalance the effects of the market to provide a smoother and more predictable unitrust amount from year to year.

Like the "terms of *a* trust" and "terms of *the* trust" discussed in the Comment to Section 102, "net fair market value of *a* trust" (in Section 301(1) and (4)) and "net fair market value of *the* trust" in Section 307(b) are used interchangeably, depending on whether there has been a reference to a trust, either explicitly or indirectly, previously in the subsection or paragraph. In Section 307(b), that previous reference to a trust is imbedded in the term "unitrust policy."

SECTION 308. PERIOD.

(a) A unitrust policy must provide the period used under Sections 306 and 307. Except as otherwise provided in Section 309(b)(3), the period may be:

(1) a calendar year;

(2) a 12-month period other than a calendar year;

(3) a calendar quarter;

(4) a three-month period other than a calendar quarter; or

(5) another period.

(b) Except as otherwise provided in Section 309(b), a unitrust policy may provide standards for:

(1) using fewer preceding periods under Section 306(a)(2)(B) or (b)(3) or (4) if:

(A) the trust was not in existence in a preceding period; or

(B) market indices or other published data are not available for a preceding period;

(2) using fewer preceding periods under Section 307(b)(5)(A) or (B), (6)(B), or (7)(B) if:

(A) the trust was not in existence in a preceding period; or

(B) fair market values are not available for a preceding period; and

(3) prorating the unitrust amount on a daily basis for a part of a period in which the trust or the administration of the trust as a unitrust or the interest of any beneficiary commences or terminates.

SECTION 309. SPECIAL TAX BENEFITS; OTHER RULES.

(a) A unitrust policy may:

(1) provide methods and standards for:

(A) determining the timing of distributions;

(B) making distributions in cash or in kind or partly in cash and partly in kind; or

(C) correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;

(2) specify sources and the order of sources, including categories of income for federal income tax purposes, from which distributions of a unitrust amount are paid; or

(3) provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.

(b) If a trust qualifies for a special tax benefit or a fiduciary is not an independent person:

(1) the unitrust rate established under Section 306 may not be less than three percent or more than five percent;

(2) the only provisions of Section 307 which apply are Section 307(a) and (b)(1), (4), (5)(A), and (9);

(3) the only period that may be used under Section 308 is a calendar year under Section 308(a)(1); and

(4) the only other provisions of Section 308 which apply are Section 308(b)(2)(A) and (3).

Comment

Section 309(a) provides that a unitrust policy may include details beyond even the broad scope of Sections 306 through 308. One specific example, in paragraph (2), is to "specify sources and the order of sources, including categories of income for federal income tax purposes, from

which distributions of a unitrust amount are paid." Approximately two-thirds of the state unitrust statutes include a default "ordering rule," although five of those default rules are limited to net accounting income or ordinary income and leave the ordering of short- and long-term capital gains, for example, to the fiduciary's discretion. Although the 2018 Act does not include such an ordering rule, Section 309(a)(2) makes it clear that the fiduciary may include an ordering rule in a proposed unitrust policy.

Importantly, Section 309(b) addresses trusts that qualify for a "special tax benefit" defined in Section 102(19) – the annual gift tax exclusion, eligibility of a qualified subchapter S trust (QSST), an estate or gift tax marital deduction, or exemption from generation-skipping transfer tax (GST tax) – and trusts with a fiduciary that is not an "independent person" defined in Section 102(11). For those trusts, much of the expanded flexibility of Article 3 is denied, and, specifically, the unitrust rate is limited to 3-5 percent and the period used for calculation is limited to a calendar year. This protects the trust under the following safe harbor in Treasury Reg. §1.643(b)-1 (Dec. 30, 2003) (emphasis added):

> [A]n allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, *a state statute* providing that income is a unitrust amount of *no less than 3% and no more than 5%* of the fair market value of the trust assets, whether determined *annually or averaged on a multiple year basis*, is a reasonable apportionment of the total return of the trust.

Although two of the "special tax benefits" – the gift tax exclusion and the marital deduction – are short-term, and there are often alternatives to QSSTs and non-independent trustees, GST tax exemption is anything but short-term, is unavoidable, and is often crucial in the type of large long-term or even perpetual trust that is perhaps the most typical candidate for a unitrust conversion. And although "no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis" is explicitly offered in the Treasury regulation only as an "example," it is expressly incorporated into the regulations for GST-grandfathered trusts (Treasury Reg. §26.2601-1(b)(4)(i)(D)(*2*) & (E), *Example 11*), and the GST tax stakes are typically so high that few fiduciaries or beneficiaries would want to assume the risk. The focus of the regulation is on what the "state statute provid[es]." Therefore, Section 309(b) respects this safe harbor for such trusts.

[ARTICLE] 4

ALLOCATION OF RECEIPTS

[PART] 1

RECEIPTS FROM ENTITY

SECTION 401. CHARACTER OF RECEIPTS FROM ENTITY.

(a) In this section:

(1) “Capital distribution” means an entity distribution of money which is a:

(A) return of capital; or

(B) distribution in total or partial liquidation of the entity.

(2) “Entity”:

(A) means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization or arrangement in which a fiduciary owns or holds an interest, whether or not the entity is a taxpayer for federal income tax purposes; and

(B) does not include:

(i) a trust or estate to which Section 402 applies;

(ii) a business or other activity to which Section 403 applies which is not conducted by an entity described in subparagraph (A);

(iii) an asset-backed security; or

(iv) an instrument or arrangement to which Section 416 applies.

(3) “Entity distribution” means a payment or transfer by an entity made to a person in the person’s capacity as an owner or holder of an interest in the entity.

(b) In this section, an attribute or action of an entity includes an attribute or action of any other entity in which the entity owns or holds an interest, including an interest owned or held indirectly through another entity.

(c) Except as otherwise provided in subsection (d)(2) through (4), a fiduciary shall allocate to income:

(1) money received in an entity distribution; and

(2) tangible personal property of nominal value received from the entity.

(d) A fiduciary shall allocate to principal:

(1) property received in an entity distribution which is not:

(A) money; or

(B) tangible personal property of nominal value;

(2) money received in an entity distribution in an exchange for part or all of the fiduciary's interest in the entity, to the extent the entity distribution reduces the fiduciary's interest in the entity relative to the interests of other persons that own or hold interests in the entity;

(3) money received in an entity distribution that the fiduciary determines or estimates is a capital distribution; and

(4) money received in an entity distribution from an entity that is:

(A) a regulated investment company or real estate investment trust if the money received is a capital gain dividend for federal income tax purposes; or

(B) treated for federal income tax purposes comparably to the treatment described in subparagraph (A).

(e) A fiduciary may determine or estimate that money received in an entity distribution is a capital distribution:

(1) by relying without inquiry or investigation on a characterization of the entity distribution provided by or on behalf of the entity, unless the fiduciary:

(A) determines, on the basis of information known to the fiduciary, that the characterization is or may be incorrect; or

(B) owns or holds more than 50 percent of the voting interest in the entity;

(2) by determining or estimating, on the basis of information known to the

fiduciary or provided to the fiduciary by or on behalf of the entity, that the total amount of money and property received by the fiduciary in the entity distribution or a series of related entity distributions is or will be greater than 20 percent of the fair market value of the fiduciary's interest in the entity; or

(3) if neither paragraph (1) nor (2) applies, by considering the factors in subsection (f) and the information known to the fiduciary or provided to the fiduciary by or on behalf of the entity.

(f) In making a determination or estimate under subsection (e)(3), a fiduciary may consider:

(1) a characterization of an entity distribution provided by or on behalf of the entity;

(2) the amount of money or property received in:

(A) the entity distribution; or

(B) what the fiduciary determines is or will be a series of related entity distributions;

(3) the amount described in paragraph (2) compared to the amount the fiduciary determines or estimates is, during the current or preceding accounting periods:

(A) the entity's operating income;

(B) the proceeds of the entity's sale or other disposition of:

(i) all or part of the business or other activity conducted by the entity;

(ii) one or more business assets that are not sold to customers in the ordinary course of the business or other activity conducted by the entity; or

(iii) one or more assets other than business assets, unless the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets;

(C) if the entity's primary activity is to invest in assets to realize gain on the disposition of all or some of the assets, the gain realized on the disposition;

(D) the entity's regular, periodic entity distributions;

(E) the amount of money the entity has accumulated;

(F) the amount of money the entity has borrowed;

(G) the amount of money the entity has received from the sources described in Sections 407, 410, 411, and 412; and

(H) the amount of money the entity has received from a source not otherwise described in this paragraph; and

(4) any other factor the fiduciary determines is relevant.

(g) If, after applying subsections (c) through (f), a fiduciary determines that a part of an entity distribution is a capital distribution but is in doubt about the amount of the entity distribution which is a capital distribution, the fiduciary shall allocate to principal the amount of the entity distribution which is in doubt.

(h) If a fiduciary receives additional information about the application of this section to an entity distribution before the fiduciary has paid part of the entity distribution to a beneficiary, the fiduciary may consider the additional information before making the payment to the beneficiary and may change a decision to make the payment to the beneficiary.

(i) If a fiduciary receives additional information about the application of this section to an entity distribution after the fiduciary has paid part of the entity distribution to a beneficiary, the

fiduciary is not required to change or recover the payment to the beneficiary but may consider that information in determining whether to exercise the power to adjust under Section 203.

Comment

Entities to which Section 401 applies. Section 401 covers distributions from all types of entities. For example, the reference to partnerships in Section 401(a)(2)(A) includes all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from state to state. And subsection (b) provides that the same is true of a chain or chains of entities, whether the entities are the same or different and no matter how many tiers the entities represent. This section does not apply, however, to receipts from an interest in property that a fiduciary owns as a tenant-in-common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the interest is regarded as that of a tenant-in-common.

Section 401(a)(2)(A) of the 2018 Act clarifies that Section 401 applies to an entity that meets these tests whether or not the entity is respected for federal income tax purposes. In Section 401(a)(2)(B) the 2018 Act retains the exceptions from the application of Section 401 in Section 401(a) of the 1997 Act, except that it clarifies that it does not exclude a business that might appear to be described in Section 403 if it is conducted in an entity that is subject to Section 401 under Section 401(a)(2)(A). This clarification and a similar clarification to Section 403(a)(2) prevent what might otherwise seem to be a circularity between Sections 401 and 403, with each of those sections excluding an entity described in the other section.

Terms. The 2018 Act introduces the term "entity distribution" to refer to distributions from entities to which Section 401 applies and the term "capital distribution" to refer to distributions of money, rather than other property, which nevertheless are treated as principal. "Capital distribution" replaces the former term "total or partial liquidation" and includes a "return of capital."

Reinvested dividends. If a fiduciary elects (or continues an election made by a predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to making an adjustment from income to principal under Section 203. If the fiduciary makes or continues the election for a reason other than to comply with the standards of Section 203, such as making an investment without incurring brokerage commissions, the fiduciary has the option of considering a corresponding transfer of cash from principal to income.

Distribution of property. The 1962 Act described a number of types of property that would be principal if distributed by a corporation. This became unwieldy in a section (former Section 401) that applied to both corporations and all other entities. By stating that the distribution of any property other than money is generally allocated to principal, subsection (d)(1) embraces all of the items enumerated in Section 6 of the 1962 Act as well as any other form of nonmonetary distribution not specifically mentioned in that act. The new exception in subsections (c)(2) and (d)(1)(B) for "tangible personal property of nominal value" would cover,

for example, an item of food sent to owners (and perhaps others such as customers, suppliers, and employees) at a holiday time. It is not necessarily given in proportion to ownership interests, and as a practical matter it often needs to be allocated to income, in effect, so it can be conveniently distributed and enjoyed.

With respect to large distributions of cash, the 2018 Act is sensitive to the fact that the fiduciary might not have enough information to properly categorize the distribution. Subsection (d)(2) addresses the relatively easy case of a likely non-pro-rata distribution that reduces the fiduciary's proportionate interest in the entity – in effect, a redemption. Subsection (d)(4) retains the special rule for capital gain dividends from a regulated investment company (RIC) or real estate investment trust (REIT) that was added in 1997, and adds a reference to other distributions that federal income tax law treats comparably.

Subsection (d)(2) retains the rule that a distribution in exchange for part of all of the fiduciary's interest in the entity is principal, but clarifies that this rule applies only to the extent the transaction reduces the fiduciary's proportional interest in the entity relative to other owners. It does not necessarily apply, for example, to a corporate reorganization in which shareholders exchange their stock for other stock. If all owners receive proportionate distributions, the distribution to the fiduciary is tested as described in the next paragraph.

With regard to receipts of money that could be what the act refers to as a "capital distribution" – a return of capital or a distribution in partial liquidation of the entity – subsections (d)(3), (e), and (f) provide some help with what the act acknowledges might be only an "estimate" by the fiduciary. For this purpose, subsection (e) provides that the fiduciary may first rely on how the entity describes the distribution, unless the fiduciary possesses information that casts doubt on that description or the fiduciary is a majority voting owner, in which case the fiduciary may have a duty to inquire or investigate further. Next, the fiduciary may be satisfied with treating the distribution as a capital distribution if information the entity provides, together with other information the fiduciary knows, indicates that the distribution exceeds 20 percent of the fair market value of the fiduciary's interest. This 20 percent test is retained from the 1997 Act, except that (i) it is a permissive safe harbor and not a presumption and (ii) the 1997 Act applied the 20 percent test to "the entity's gross assets" and the 2018 Act applies it to "the fair market value of the fiduciary's interest in the entity," thus focusing the inquiry on the distribution to that fiduciary rather than all distributions made by the entity. For this purpose, what the available information indicates is or will be a series of distributions is aggregated. Finally, under subsection (e)(3), the fiduciary may make a determination or estimate based on factors in subsection (f), including but not limited to the entity's characterization of the distribution, that may help point the fiduciary to a distribution that is extraordinary enough under the circumstances to be treated as a capital distribution. But it is not possible to describe a "capital distribution" with reference to objective characteristics alone, and fiduciaries will have to exercise some judgment in making the necessary determinations and estimates.

Because estimates may be necessary and are expressly contemplated by the act, subsections (h) and (i) help the fiduciary know how to make distributions on the basis of incomplete information and, as a last resort, cite the power to adjust between income and principal in Section 203.

SECTION 402. DISTRIBUTION FROM TRUST OR ESTATE. A fiduciary shall allocate to income an amount received as a distribution of income, including a unitrust distribution under [Article] 3, from a trust or estate in which the fiduciary has an interest, other than an interest the fiduciary purchased in a trust that is an investment entity, and shall allocate to principal an amount received as a distribution of principal from the trust or estate. If a fiduciary purchases, or receives from a settlor, an interest in a trust that is an investment entity, Section 401, 415, or 416 applies to a receipt from the trust.

Comment to 1997 Act

Terms of the distributing trust or estate. Under this section, a fiduciary is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this act. In determining whether a distribution from another trust or an estate is income or principal, however, the fiduciary should also determine what the terms of the distributing trust or estate say about the distribution – for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

Investment trusts. An investment entity to which the second sentence of this section applies includes a mutual fund, a common trust fund, a business trust, or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements or similar arrangements to which Section 415 or 416 applies. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

SECTION 403. BUSINESS OR OTHER ACTIVITY CONDUCTED BY FIDUCIARY.

(a) This section applies to a business or other activity conducted by a fiduciary if the fiduciary determines that it is in the interests of the beneficiaries to account separately for the business or other activity instead of:

(1) accounting for the business or other activity as part of the fiduciary's general accounting records; or

(2) conducting the business or other activity through an entity described in Section 401(a)(2)(A).

(b) A fiduciary may account separately under this section for the transactions of a business or other activity, whether or not assets of the business or other activity are segregated from other assets held by the fiduciary.

(c) A fiduciary that accounts separately under this section for a business or other activity:

(1) may determine:

(A) the extent to which the net cash receipts of the business or other activity must be retained for:

(i) working capital;

(ii) the acquisition or replacement of fixed assets; and

(iii) other reasonably foreseeable needs of the business or other activity; and

(B) the extent to which the remaining net cash receipts are accounted for as principal or income in the fiduciary's general accounting records for the trust;

(2) may make a determination under paragraph (1) separately and differently from the fiduciary's decisions concerning distributions of income or principal; and

(3) shall account for the net amount received from the sale of an asset of the business or other activity, other than a sale in the ordinary course of the business or other activity, as principal in the fiduciary's general accounting records for the trust, to the extent the fiduciary determines that the net amount received is no longer required in the conduct of the business or other activity.

(d) Activities for which a fiduciary may account separately under this section include:

(1) retail, manufacturing, service, and other traditional business activities;

(2) farming;

(3) raising and selling livestock and other animals;

(4) managing rental properties;

(5) extracting minerals, water, and other natural resources;

(6) growing and cutting timber;

(7) an activity to which Section 414, 415, or 416 applies; and

(8) any other business conducted by the fiduciary.

Comment

Purpose and scope. Section 403 gives flexibility to a fiduciary who operates a business or other activity in proprietorship form rather than, for example, in a wholly-owned corporation or a single-member limited liability company, and enables the fiduciary to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a fiduciary to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, activities in derivatives and options, and other business activities as though they were held and conducted by a separate entity. Some of the wording of the descriptions of those business activities is changed to conform to the wording in subsequent sections that address those activities specifically, including Sections 405, 411, and 412. Section 403, however, does not permit a fiduciary to account separately for a traditional securities portfolio to avoid the provisions of this act that apply to such securities.

Section 403 permits the fiduciary to account separately for each business or activity for which the fiduciary determines separate accounting is appropriate. A fiduciary may account for these activities in a "subtrust" or may, for example, continue to use the business and record-keeping methods employed by a decedent or settlor who had conducted the business. This section gives the fiduciary broad authority to select business record-keeping methods that best suit the activity in which the fiduciary is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 403 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up period, none of the proceeds would be income for purposes of Section 601.

Separate accounts. A fiduciary may or may not maintain separate bank accounts for business activities that are accounted for under Section 403. A fiduciary, especially a fiduciary that is continuing a decedent's or settlor's business practices, may continue the same banking

arrangements that were used during the decedent's lifetime. In either case, the fiduciary is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

Separate accounting. The 2018 Act adds subsection (c)(2) to the wording that was used in the 1997 Act to accommodate the concept of "separate accounting" in a trust the only activity of which (other than making distributions to beneficiaries) is the conduct of a business. It may not be reasonable to assume that receipts not distributed to beneficiaries have been "retained" for use in the business, if that permits discretionary distributions to beneficiaries, in effect, to define trust income. That might be especially awkward if discretionary distributions of either income or principal or both to multiple beneficiaries are not made pro rata. In such a case, the fiduciary is permitted to designate which distributions in effect define trust income, and which distributions are discretionary distributions under the terms of the trust not intended to be a standard or precedent for defining income.

[PART] 2

RECEIPTS NOT NORMALLY APPORTIONED

SECTION 404. PRINCIPAL RECEIPTS. A fiduciary shall allocate to principal:

(1) to the extent not allocated to income under this [act], an asset received from:

(A) an individual during the individual's lifetime;

(B) an estate;

(C) a trust on termination of an income interest; or

(D) a payor under a contract naming the fiduciary as beneficiary;

(2) except as otherwise provided in this [article], money or other property received from the sale, exchange, liquidation, or change in form of a principal asset;

(3) an amount recovered from a third party to reimburse the fiduciary because of a disbursement described in Section 502(a) or for another reason to the extent not based on loss of income;

(4) proceeds of property taken by eminent domain, except that proceeds awarded for loss of income in an accounting period are income if a current income beneficiary had a mandatory income interest during the period;

(5) net income received in an accounting period during which there is no beneficiary to which a fiduciary may or must distribute income; and

(6) other receipts as provided in [Part] 3.

Comment

Apportionment. Part 2, Receipts Not Normally Apportioned, generally addresses receipts that are either income or income, while Part 3, Receipts Normally Apportioned, generally addresses receipts that are "apportioned" part to income and part to principal. The act generally uses the term "allocate" to refer to both.

Reimbursements. The 1997 Act limited the application of paragraph (3) to reimbursements related to environmental matters described in Section 502(a)(8)(A), perhaps because those are the disbursements listed in Section 502(a) that are most likely to be reimbursable. But they are not necessarily the only disbursements in Section 502(a) that could be reimbursed, and the 2018 Act cites only Section 502(a).

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on a lease, if that amount is not separately stated the entire award is principal. This rule is the same in the 1931, 1962, and 1997 Acts.

SECTION 405. RENTAL PROPERTY. To the extent a fiduciary does not account for the management of rental property as a business under Section 403, the fiduciary shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods:

(1) must be added to principal and held subject to the terms of the lease, except as otherwise provided by law other than this [act]; and

(2) is not allocated to income or available for distribution to a beneficiary until the fiduciary's contractual obligations have been satisfied with respect to that amount.

Comment

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 405, a transfer from income to reimburse principal may be appropriate under Section 505 to the extent that some of the "rent" is

really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 203 in deciding whether and to what extent to make an adjustment between principal and income under Section 203.

Available for distribution. The term "available for distribution to a beneficiary" in paragraph (2), which the 2018 Act carries over from the 1997 Act, does not mean "allocated to income." That would be inconsistent with the requirement earlier in the sentence, also carried over from the 1997 Act, that the receipt "must be added to principal." To make that clear, the words "allocated to income or" are added in the 2018 Act before "available for distribution." The concept is that deposits are held in the trust corpus, but will be allocated to income if and when the tenant has the right to ask, and does ask, for those funds to be applied to future rent. In any event, the applicable precondition – whether for application of the deposit to rent payments, return of the deposit to the tenant, or allocation to income upon the tenant's forfeiture – *is* the satisfaction of the fiduciary's contractual obligations with respect to that deposit, namely to hold it until an objectively determined event or time.

SECTION 406. RECEIPT ON OBLIGATION TO BE PAID IN MONEY.

(a) This section does not apply to an obligation to which Section 409, 410, 411, 412, 414, 415, or 416 applies.

(b) A fiduciary shall allocate to income, without provision for amortization of premium, an amount received as interest on an obligation to pay money to the fiduciary, including an amount received as consideration for prepaying principal.

(c) A fiduciary shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the fiduciary. A fiduciary shall allocate to income the increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable or redeemable, at maturity or another future time, in an amount that exceeds the amount in consideration of which it was issued.

Comment

Section 406 in the 2018 Act is largely similar to Section 406 in the 1997 Act, except that Section 406(c) is reworded to follow New York's statute (EPTL §11-A-4.6).

SECTION 407. INSURANCE POLICY OR CONTRACT.

(a) This section does not apply to a contract to which Section 409 applies.

(b) Except as otherwise provided in subsection (c), a fiduciary shall allocate to principal the proceeds of a life insurance policy or other contract received by the fiduciary as beneficiary, including a contract that insures against damage to, destruction of, or loss of title to an asset. The fiduciary shall allocate dividends on an insurance policy to income to the extent premiums on the policy are paid from income and to principal to the extent premiums on the policy are paid from principal.

(c) A fiduciary shall allocate to income proceeds of a contract that insures the fiduciary against loss of:

(1) occupancy or other use by a current income beneficiary;

(2) income; or

(3) subject to Section 403, profits from a business.

[PART] 3

RECEIPTS NORMALLY APPORTIONED

SECTION 408. INSUBSTANTIAL ALLOCATION NOT REQUIRED.

(a) If a fiduciary determines that an allocation between income and principal required by Section 409, 410, 411, 412, or 415 is insubstantial, the fiduciary may allocate the entire amount to principal, unless Section 203(e) applies to the allocation.

(b) A fiduciary may presume an allocation is insubstantial under subsection (a) if:

(1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; and

(2) the asset producing the receipt to be allocated has a fair market value less than 10 percent of the total fair market value of the assets owned or held by the fiduciary at the beginning of the accounting period.

(c) The power to make a determination under subsection (a) may be:

(1) exercised by a co-fiduciary in the manner described in Section 203(f); or

(2) released or delegated for a reason described in Section 203(g) and in the manner described in Section 203(h).

Comment

The 2018 Act retains Section 408 from the 1997 Act, excusing a fiduciary from the burden of determining the portion of a receipt that should be allocated to income if the allocation would be "insubstantial." A fiduciary might determine that an allocation would be "insubstantial," for example, if the cost of determining the amount of the allocation would be greater than the economic effect of the allocation, or if such an allocation each year would create a variability or unpredictability of the income stream that would offset any apparent precision that the allocation might achieve.

Section 408(b) creates a safe harbor, within which a fiduciary may presume an allocation to be insubstantial. In the 1997 Act, paragraphs (1) and (2) of subsection (b) were joined by the conjunction "or." The 2018 Act tightens up the resulting test, making it somewhat less generous by changing the conjunction to "and." As a practical matter, a fiduciary will have to estimate such things and in a close case is not likely to know with certainty the parameters of subsection (b) until after the end of the accounting period. But if the upper limits escape precision, or are not even viewed as very important because most allocations viewed as insubstantial are well within the limits, a fiduciary that simply does not bother with a small amount here and there is protected.

The reference to Section 203(e) in Section 408(a) and the reference to Section 408 in Section 203(e) mean that allocations cannot be overlooked under Section 408 if to do so would create a tax issue or achieve another result listed in Section 203(e) or if the fiduciary is not an independent person defined in Section 102(11).

Subsection (c) is drawn from the 1997 Act, except that delegation is added to release as an option under paragraph (2).

SECTION 409. DEFERRED COMPENSATION, ANNUITY, OR SIMILAR PAYMENT.

(a) In this section:

(1) "Internal income of a separate fund" means the amount determined under subsection (b).

(2) "Marital trust" means a trust:

(A) of which the settlor's surviving spouse is the only current income beneficiary and is entitled to a distribution of all the current net income of the trust; and

(B) that qualifies for a marital deduction with respect to the settlor's estate under Section 2056 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056[, as amended,] because:

(i) an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056(b)(7)[, as amended,] has been made; or

(ii) the trust qualifies for a marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 2056(b)(5)[, as amended].

(3) "Payment" means an amount a fiduciary may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future amounts the fiduciary may receive. The term includes an amount received in money or property from the payor's general assets or from a separate fund created by the payor.

(4) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) For each accounting period, the following rules apply to a separate fund:

(1) The fiduciary shall determine the internal income of the separate fund as if the separate fund were a trust subject to this [act].

(2) If the fiduciary cannot determine the internal income of the separate fund under paragraph (1), the internal income of the separate fund is deemed to equal [insert a number

at least three and not more than five] percent of the value of the separate fund, according to the most recent statement of value preceding the beginning of the accounting period.

(3) If the fiduciary cannot determine the value of the separate fund under paragraph (2), the value of the separate fund is deemed to equal the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986[, as amended,] 26 U.S.C. Section 7520[, as amended], for the month preceding the beginning of the accounting period for which the computation is made.

(c) A fiduciary shall allocate a payment received from a separate fund during an accounting period to income, to the extent of the internal income of the separate fund during the period, and the balance to principal.

(d) The fiduciary of a marital trust shall:

(1) withdraw from a separate fund the amount the current income beneficiary of the trust requests the fiduciary to withdraw, not greater than the amount by which the internal income of the separate fund during the accounting period exceeds the amount the fiduciary otherwise receives from the separate fund during the period;

(2) transfer from principal to income the amount the current income beneficiary requests the fiduciary to transfer, not greater than the amount by which the internal income of the separate fund during the period exceeds the amount the fiduciary receives from the separate fund during the period after the application of paragraph (1); and

(3) distribute to the current income beneficiary as income:

(A) the amount of the internal income of the separate fund received or withdrawn during the period; and

(B) the amount transferred from principal to income under paragraph (2).

(e) For a trust, other than a marital trust, of which one or more current income beneficiaries are entitled to a distribution of all the current net income, the fiduciary shall transfer from principal to income the amount by which the internal income of a separate fund during the accounting period exceeds the amount the fiduciary receives from the separate fund during the period.

Legislative Note: *A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsections (a)(2)(B) and (b)(3). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.*

The bracketed words in subsection (b)(2) should be replaced with a percentage that fiduciaries may rely on as a "safe harbor". The 2008 revision to the Uniform Principal and Income Act used the range of three to five percent because the Internal Revenue Service approved the use of that range in the context of unitrusts. See Treasury Reg. Section 1.643(b)-1.

Comment

Section 409 of the 1997 Act was substantially amended in 2008 in response to concerns expressed by the Internal Revenue Service about the eligibility of a transfer of an individual retirement account (IRA) or other qualified retirement benefit to a marital trust intended to qualify for an estate tax marital deduction. See Revenue Ruling 2006-26, 2006-22 Internal Revenue Bulletin 939.

The 2018 Act further revises and simplifies Section 409. Former general subsections (b) and (c) are omitted, leaving marital trusts as the focus. The 2018 Act treats marital trusts and other trusts the same, except as provided in subsection (e).

Current subsection (b)(1) is similar to the first sentence of former subsection (f) relating to the determination of the internal income of what is called in both acts a "separate fund" (such as an IRA), and current subsection (b)(2) and (3) is similar to former subsection (g) relating to the determination of data to use if the fiduciary cannot determine the internal income or the value of the separate fund.

Former subsection (f) provided in full:

> (f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this [act]. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and

distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

Subsection (d) of the 2018 Act reaches the same result to satisfy the concerns of Revenue Ruling 2006-26, but clarifies the ordering and interrelationships of the respective provisions. Subsection (d) prescribes what the fiduciary is required to do if the settlor's surviving spouse requests. It does not limit the fiduciary's discretion to make withdrawals from the separate fund in excess of what the spouse requests or in excess of the internal income of the fund.

For a trust that is not a marital trust but is required to distribute current income, subsection (e) requires the fiduciary to transfer principal to income to make up for the amount of the internal income of an IRA or similar fund that is not withdrawn. But it is silent on whether the fiduciary should withdraw greater amounts from the fund, leaving that to the fiduciary's discretion guided by general fiduciary standards such as the standards set forth in Section 201(a).

SECTION 410. LIQUIDATING ASSET.

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a limited time. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance.

(b) This section does not apply to a receipt subject to Section 401, 409, 411, 412, 414, 415, 416, or 503.

(c) A fiduciary shall allocate:

(1) to income:

(A) a receipt produced by a liquidating asset, to the extent the receipt does not exceed [insert a number at least three and not more than five] percent of the value of the asset; or

(B) if the fiduciary cannot determine the value of the asset, 10 percent of the receipt; and

(2) to principal, the balance of the receipt.

Legislative Note: *The bracketed words in subsection (c)(1)(A) should be replaced with a percentage that fiduciaries may rely on as a "safe harbor". The 2008 revision to the Uniform Principal and Income Act used the range of three to five percent because the Internal Revenue Service approved the use of that range in the context of unitrusts. See Treasury Reg. Section 1.643(b)-1.*

Comment

Previous Acts. As stated in a Comment to the 1997 Act, Section 11 of the 1962 Act allocated receipts from "property subject to depletion" to income in an amount "not in excess of 5%" of the asset's inventory value. The 1931 Act had a similar 5-percent rule that applied when the trustee was under a duty to change the form of the investment. The 5-percent rule imposed on a fiduciary the obligation to pay a fixed annuity to the current income beneficiary until the asset was exhausted. Under both the 1931 and 1962 Acts, the balance of each year's receipts was added to principal.

A fixed payment can produce results that appear unfair. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 410 of the 1997 Act abandoned the annuity approach of the 5-percent rule, but required that 10 percent of the receipts from a "liquidating asset" be allocated to income and the balance to principal. The 2018 Act restores a variation of the annuity approach, with a range of 3 to 5 percent of the value of the asset consistent with other provisions in the act, and retains the 10-percent-of-the-receipt rule for cases where the fiduciary cannot determine the value of the asset.

SECTION 411. MINERALS, WATER, AND OTHER NATURAL RESOURCES.

(a) To the extent a fiduciary does not account for a receipt from an interest in minerals, water, or other natural resources as a business under Section 403, the fiduciary shall allocate the receipt:

(1) to income, to the extent received:

(A) as delay rental or annual rent on a lease;

(B) as a factor for interest or the equivalent of interest under an agreement creating a production payment; or

(C) on account of an interest in renewable water;

(2) to principal, if received from a production payment, to the extent paragraph (1)(B) does not apply; or

(3) between income and principal equitably, to the extent received:

(A) on account of an interest in non-renewable water;

(B) as a royalty, shut-in-well payment, take-or-pay payment, or bonus; or

(C) from a working interest or any other interest not provided for in paragraph (1) or (2) or subparagraph (A) or (B).

(b) This section applies to an interest owned or held by a fiduciary whether or not a settlor was extracting minerals, water, or other natural resources before the fiduciary owned or held the interest.

(c) An allocation of a receipt under subsection (a)(3) is presumed to be equitable if the amount allocated to principal is equal to the amount allowed by the Internal Revenue Code of 1986[, as amended,] 26 U.S.C.[, as amended,] as a deduction for depletion of the interest.

(d) If a fiduciary owns or holds an interest in minerals, water, or other natural resources before [the effective date of this [act]], the fiduciary may allocate receipts from the interest as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in minerals, water, or other natural resources on or after [the effective date of this [act]], the fiduciary shall allocate receipts from the interest as provided in this section.

Legislative Note: *A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (c). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be omitted.*

Comment

The 2018 Act adapts Section 411 from the Texas statute (Texas Trust Code Sec. 116.174). It is similar to Section 411 of the 1997 Act, except that it does not provide for a default 10-percent allocation to income, but provides that the allocation should be made "equitably," and then provides, in subsection (c), that an allocation to principal of the amount allowed by the Internal Revenue Code as a depletion deduction is presumed to be equitable. For oil and gas percentage depletion, that percentage has most recently been set at 15 percent. Cost depletion for federal income tax purposes is also available as a safe harbor. Subsection (d) will protect a fiduciary that is currently relying on the 10-percent rule.

In contrast to the 1997 Act, the 2018 Act changes the reference to "on the effective date of this act" at the beginning of the first sentence of Section 411(d) to "before the effective date of this act" to conform to that reference in the last part of that sentence. Similarly, the 2018 Act changes the reference to "after the effective date of this act" in the second sentence of Section 411(d) to "on or after the effective date of this act" to make the two sentences complementary.

SECTION 412. TIMBER.

(a) To the extent a fiduciary does not account for receipts from the sale of timber and related products as a business under Section 403, the fiduciary shall allocate the net receipts:

(1) to income, to the extent the amount of timber cut from the land does not exceed the rate of growth of the timber;

(2) to principal, to the extent the amount of timber cut from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) between income and principal if the net receipts are from the lease of land used for growing and cutting timber or from a contract to cut timber from land, by determining the amount of timber cut from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) to principal, to the extent advance payments, bonuses, and other payments are not allocated under paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated under subsection (a), a fiduciary shall deduct and transfer to principal a reasonable amount for depletion.

(c) This section applies to land owned or held by a fiduciary whether or not a settlor was cutting timber from the land before the fiduciary owned or held the property.

(d) If a fiduciary owns or holds an interest in land used for growing and cutting timber before [the effective date of this [act]], the fiduciary may allocate net receipts from the sale of timber and related products as provided in this section or in the manner used by the fiduciary before [the effective date of this [act]]. If the fiduciary acquires an interest in land used for growing and cutting timber on or after [the effective date of this [act]], the fiduciary shall allocate net receipts from the sale of timber and related products as provided in this section.

Comment

Section 412 is substantially the same in the 2018 Act as in the 1997 Act, except for changes in wording to conform to wording used through the act. In addition, in contrast to the 1997 Act, as in Section 411(d), the 2018 Act changes the reference to "on the effective date of this act" at the beginning of the first sentence of Section 412(d) to "before the effective date of this act" to conform to that reference in the last part of that sentence, and changes the reference to "after the effective date of this act" in the second sentence of Section 412(d) to "on or after the effective date of this act" to make the two sentences complementary.

Although the previous acts do not have sections addressing every context where things are grown – for example, agriculture, orchards, and cattle and poultry raising – in the way they address timber, a fiduciary may be able to adapt the principles applicable to timber to those other contexts, including the contexts of activities accounted for separately as businesses, as specified in Section 403(d)(2) and (3).

Comment to 1997 Act

Scope of section. The rules in Section 412 apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (a) applies to net receipts from property owned by the trustee and property leased by the trustee. The act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (a), the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on

methods customarily used for the kind of timber involved.

SECTION 413. MARITAL DEDUCTION PROPERTY NOT PRODUCTIVE OF INCOME.

(a) If a trust received property for which a gift or estate tax marital deduction was allowed and the settlor's spouse holds a mandatory income interest in the trust, the spouse may require the trustee, to the extent the trust assets otherwise do not provide the spouse with sufficient income from or use of the trust assets to qualify for the deduction, to:

(1) make property productive of income;

(2) convert property to property productive of income within a reasonable time; or

(3) exercise the power to adjust under Section 203.

(b) The trustee may decide which action or combination of actions in subsection (a) to take.

Comment

In Section 413 the 2018 Act makes little substantive change from the 1997 Act. It omits Section 413(b) of the 1997 Act, which had provided:

> In a case not governed by subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

Section 404(2) of the 2018 Act provides that proceeds from a sale or exchange of a principal asset remain principal, which renders former Section 413(b) duplicative.

SECTION 414. DERIVATIVE OR OPTION.

(a) In this section, "derivative" means a contract, instrument, other arrangement, or combination of contracts, instruments, or other arrangements, the value, rights, and obligations of which are, in whole or in part, dependent on or derived from an underlying tangible or intangible asset, group of tangible or intangible assets, index, or occurrence of an event. The term includes stocks, fixed income securities, and financial instruments and arrangements based on

indices, commodities, interest rates, weather-related events, and credit-default events.

(b) To the extent a fiduciary does not account for a transaction in derivatives as a business under Section 403, the fiduciary shall allocate 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction to income and the balance to principal.

(c) Subsection (d) applies if:

(1) a fiduciary:

(A) grants an option to buy property from a trust, whether or not the trust owns the property when the option is granted;

(B) grants an option that permits another person to sell property to the trust; or

(C) acquires an option to buy property for the trust or an option to sell an asset owned by the trust; and

(2) the fiduciary or other owner of the asset is required to deliver the asset if the option is exercised.

(d) If this subsection applies, the fiduciary shall allocate 10 percent to income and the balance to principal of the following amounts:

(1) an amount received for granting the option;

(2) an amount paid to acquire the option; and

(3) gain or loss realized on the exercise, exchange, settlement, offset, closing, or expiration of the option.

Comment

Section 414 in the 1997 Act provided that all receipts and disbursements from a derivative and option must be allocated to principal.

In the 2018 Act, the definition of "derivative" includes some of the most common current derivatives, including: (1) options, which provide one party the right but not the obligation to buy or sell the underlying asset at a set price, (2) forwards and futures contracts, which obligate one party to buy or sell the underlying asset at a set price in the future, and (3) swaps (sometimes referred to as "notional principal contracts"), which obligate both parties to the arrangement to make payments to the other party based on the change in value of an underlying asset or the occurrence of an event. The definition is broad enough to include less common derivatives like exchange-traded notes (financial instruments traded on an exchange, the values of which are linked to the returns of hypothetical investments in specified market indices or strategies), structured or principal-protected notes (financial instruments typically issued by a financial organization that provide the holder some principal protection along with a return based on the return of an underlying asset like a stock index), and derivatives that could be created in the future. The definition does not make a distinction between derivatives that are privately negotiated between a party and counterparty and those that are traded on an exchange or in the over-the-counter market. Although options technically fall within the definition of derivative, as in the 1997 Act a specific subsection makes clear that any amounts paid to or received by the fiduciary in the granting of an option and any gain or loss upon any realization or expiration event will be allocated to income and principal in the same manner.

The 2018 Act does not include a suggested provision that would have asked the fiduciary, in allocating receipts or disbursements under a derivative contract to income or principal, to consider how they would be allocated if the fiduciary had invested directly in the underlying asset that is the subject of the derivative. For example, if a fiduciary entered into a total return equity swap on shares of ABC stock, pursuant to which the fiduciary would receive payments from the counterparty due to any dividends and appreciation on ABC stock, then the fiduciary would have been asked to allocate to income that portion of the return that is due to dividends and to principal that portion of the return that is due to appreciation of ABC stock. That sort of determination, however, would work only for the simplest of derivative arrangements. Derivatives allow parties to take positions in assets that would not be possible under an established market and to make highly leveraged investments in assets that would not be permitted under current margin regulations. Furthermore, derivatives are sometimes combined in such a way that looking through to the underlying asset is difficult or impossible. For example, a "swaption" is an option that provides the owner the right to enter into a swap. Because of these complications, the 2018 Act provides a default rule that provides that all receipts and disbursements in relation to a derivative transaction should be allocated 10 percent to income and 90 percent to principal. No distinction is made if the fiduciary establishes a long position (generally seeking to profit from an increase in value of the underlying asset) or short position (seeking to profit from a decrease in value of the underlying asset) with the derivative.

This default allocation for derivatives can be adjusted pursuant to the fiduciary's power to adjust between income and principal under Section 203. In making that determination, the fiduciary can consider whether the default rule would not be fair and reasonable, especially in light of the fact that derivatives can be used to create the equivalent return as another investment, whose allocation under the act might be different from the default rule. For example, in a traditional total return equity swap, one party (Party S, for Short) agrees to make annual payments over the next 5 years in an amount equal to the sum of the total appreciation in value of 100 shares of XYZ stock during the year, and dividends paid on 100 shares of XYZ stock

during the year. The counterparty (Party L, for Long) agrees to make five annual payments (at the same time) in an amount equal to the total depreciation in value of 100 shares of XYZ stock during the year, and a fixed rate of interest multiplied by the value of 100 shares of XYZ stock at the beginning of each year. The amounts are netted against each other. From an economic standpoint, Party L is in the same situation it would have been in if Party L had borrowed funds from Party S and used those proceeds to buy 100 shares of XYZ shares from Party S, with an agreement to sell the shares back to Party S at the end of the 5 year period (100-percent-leveraged investment in 100 shares of XYZ shares).

Furthermore, the fiduciary should consider whether the derivative is being used as a way to hedge or manage risk on another investment, and, as such, any receipts or disbursements on the derivative should be combined with the hedged investment. For example, an investor may have an investment (ABC stock) and use a derivative to hedge against a decrease in the investment's value (buy a put option on ABC stock). The fiduciary should consider whether the cost or return on the put option is properly combined with the cost or return on ABC stock in applying the default rule or making any adjustments to income or principal as to ABC stock.

As another example, the most common swap arrangement is an interest rate swap, pursuant to which parties help manage the impact of changes in interest rates on investments in the portfolio and liabilities associated with loans. In a common interest rate swap (floating-to-fixed rate), one party agrees to make payments based on a fixed interest rate (for example, 5 percent) applied to a notional amount (for example, $1 million) at regular intervals (for example, quarterly for two years). The counterparty agrees to make interest payments based on a floating or variable rate of interest (for example, 3 percent above the London Interbank Offered Rate [LIBOR]) applied to the same notional amount. An interest rate swap like this can reflect one party's expectation that the payments of a floating interest rate will exceed a specified fixed interest rate (or vice versa). Importantly, to the extent such party has a loan or other liability tied to a floating interest rate, the party might be seeking to hedge against the risk of an interest rate increase by essentially converting the liability to a fixed rate liability. In deciding whether to use the default rule or exercise the power to adjust, the fiduciary may decide, if appropriate, based on the facts and circumstances, to apply the default rule as to the interest rate swap in isolation or as part of a larger transaction where the swap should be considered in conjunction with a larger transaction, liability, or investment.

SECTION 415. ASSET-BACKED SECURITY.

(a) Except as otherwise provided in subsection (b), a fiduciary shall allocate to income a receipt from or related to an asset-backed security, to the extent the payor identifies the payment as being from interest or other current return, and to principal the balance of the receipt.

(b) If a fiduciary receives one or more payments in exchange for part or all of the fiduciary's interest in an asset-backed security, including a liquidation or redemption of the

fiduciary's interest in the security, the fiduciary shall allocate to income 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction, and to principal the balance of the receipts and disbursements.

Comment

The primary changes to Section 415 in the 2018 Act include a more inclusive definition of an asset-backed security that is in line with the definition used by the Securities and Exchange Commission. The allocation retains the distinction between payments of interest and principal, for example on a mortgage. Subsection (b) is simply a blanket rule of a 10-percent allocation for any sales of a portion or all of the interest in the asset-backed security (consistently with Section 414). This rule applies to sales of the asset-backed security on an exchange or a redemption/liquidation of the interest.

SECTION 416. OTHER FINANCIAL INSTRUMENT OR ARRANGEMENT. A fiduciary shall allocate receipts from or related to a financial instrument or arrangement not otherwise addressed by this [act]. The allocation must be consistent with Sections 414 and 415.

Comment

The 2018 Act adds Section 416 to provide guidance for financial instruments and arrangements designed in the future, which could not be anticipated in advance. References to Section 416, as appropriate, are added throughout the 2018 Act where there are references to Sections 414 and 415.

[ARTICLE] 5

ALLOCATION OF DISBURSEMENTS

SECTION 501. DISBURSEMENT FROM INCOME. Subject to Section 504, and except as otherwise provided in Section 601(c)(2) or (3), a fiduciary shall disburse from income:

(1) one-half of:

(A) the regular compensation of the fiduciary and any person providing investment advisory, custodial, or other services to the fiduciary, to the extent income is sufficient; and

(B) an expense for an accounting, judicial or nonjudicial proceeding, or other matter that involves both income and successive interests, to the extent income is sufficient;

(2) the balance of the disbursements described in paragraph (1), to the extent a fiduciary that is an independent person determines that making those disbursements from income would be in the interests of the beneficiaries;

(3) another ordinary expense incurred in connection with administration, management, or preservation of property and distribution of income, including interest, an ordinary repair, regularly recurring tax assessed against principal, and an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily an income interest, to the extent income is sufficient; and

(4) a premium on insurance covering loss of a principal asset or income from or use of the asset.

Comment

Although the 2018 Act updates the choice of words and word order to match more recent usage, there are few substantive changes in Article 5.

The phrase "to the extent income is sufficient" is added at the end of Section 501(1)(A) and (B) and (3) to acknowledge and accommodate illiquid, low-income-producing trusts. And, as that phrase protects income, paragraph (2) protects principal by allowing more than one-half of the disbursements described in this section to be paid from income. One reason, for example, would be that principal is illiquid. Reimbursements under Sections 504 and 505 may be available.

SECTION 502. DISBURSEMENT FROM PRINCIPAL.

(a) Subject to Section 505, and except as otherwise provided in Section 601(c)(2), a fiduciary shall disburse from principal:

(1) the balance of the disbursements described in Section 501(1) and (3), after application of Section 501(2);

(2) the fiduciary's compensation calculated on principal as a fee for acceptance, distribution, or termination;

(3) a payment of an expense to prepare for or execute a sale or other disposition of

property;

(4) a payment on the principal of a trust debt;

(5) a payment of an expense of an accounting, judicial or nonjudicial proceeding, or other matter that involves primarily principal, including a proceeding to construe the terms of the trust or protect property;

(6) a payment of a premium for insurance, including title insurance, not described in Section 501(4), of which the fiduciary is the owner and beneficiary;

(7) a payment of an estate or inheritance tax or other tax imposed because of the death of a decedent, including penalties, apportioned to the trust; and

(8) a payment:

(A) related to environmental matters, including:

(i) reclamation;

(ii) assessing environmental conditions;

(iii) remedying and removing environmental contamination;

(iv) monitoring remedial activities and the release of substances;

(v) preventing future releases of substances;

(vi) collecting amounts from persons liable or potentially liable for the costs of activities described in clauses (i) through (v);

(vii) penalties imposed under environmental laws or regulations;

(viii) other actions to comply with environmental laws or regulations;

(ix) statutory or common law claims by third parties; and

(x) defending claims based on environmental matters; and

(B) for a premium for insurance for matters described in subparagraph (A).

(b) If a principal asset is encumbered with an obligation that requires income from the asset to be paid directly to a creditor, the fiduciary shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

Comment

The 2018 Act replaces "the remaining one-half" at the beginning of Section 502(a)(1) in the 1997 Act with "the balance." This conforms to the changes to Section 501 that make it more likely that traditional 50-50 splits will not necessarily be followed. Reimbursements under Sections 504 and 505 may be available. A reference to title insurance is added to Section 502(a)(6).

The 1997 Act added the detailed provisions regarding environmental remediation in what is now Section 502(a)(8)(A). The 2018 Act adds to those provisions a reference in subparagraph (B) to insurance premiums.

SECTION 503. TRANSFER FROM INCOME TO PRINCIPAL FOR DEPRECIATION.

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a tangible asset having a useful life of more than one year.

(b) A fiduciary may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of the part of real property used or available for use by a beneficiary as a residence;

(2) of tangible personal property held or made available for the personal use or enjoyment of a beneficiary; or

(3) under this section, to the extent the fiduciary accounts:

(A) under Section 410 for the asset; or

(B) under Section 403 for the business or other activity in which the asset is used.

(c) An amount transferred to principal under this section need not be separately held.

Comment

The 2018 Act changes "fixed" to "tangible" in the definition of depreciation in Section 503(a). The references to "a residence" and "tangible personal property" in Section 503(b)(1) are broken up into paragraphs (1) and (2), for ease of reading, and to avoid implying that the two topics are linked so that, for example, the tangible personal property described must be household furnishings. The 2018 Act also adds Section 503(b)(3)(A) to expand the exception from the depreciation rule to assets accounted for separately as liquidating assets under Section 410, as well in a business under Section 403.

SECTION 504. REIMBURSEMENT OF INCOME FROM PRINCIPAL.

(a) If a fiduciary makes or expects to make an income disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from principal to income in one or more accounting periods to reimburse income.

(b) To the extent the fiduciary has not been and does not expect to be reimbursed by a third party, income disbursements to which subsection (a) applies include:

(1) an amount chargeable to principal but paid from income because principal is illiquid;

(2) a disbursement made to prepare property for sale, including improvements and commissions; and

(3) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to an income disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

Comment

Section 504, Transfers from Income to Reimburse Principal, in the 1997 Act is redesignated Section 505, Reimbursement of Principal from Income, in the 2018 Act. New Section 504, Reimbursement of Income from Principal, is the mirror image of Section 505, with the result that reimbursements in both directions are now covered in the same way. Cross-references to these sections are added at the beginning of Sections 501 and 502. The order of Sections 504 and 505 was selected with reference to the corresponding Sections 501 and 502. Section 501 is "Subject to Section 504," and Section 502 is "Subject to Section 505."

The term "successive income interest" in Section 504(c) of the 1997 Act is changed to simply "successive interest" in Sections 504(c) and 505(c) of the 2018 Act, because that is now the defined term in Section 102(20). Even though a "successive interest" includes the interest of a person entitled to receive principal – that is, a remainder beneficiary – when an income interest ends, that does not mean that Section 504 or 505 would continue to apply after a trust terminates, because the terms of the trust providing for termination would control under Section 201(a)(3).

SECTION 505. REIMBURSEMENT OF PRINCIPAL FROM INCOME.

(a) If a fiduciary makes or expects to make a principal disbursement described in subsection (b), the fiduciary may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or provide a reserve for future principal disbursements.

(b) To the extent a fiduciary has not been and does not expect to be reimbursed by a third party, principal disbursements to which subsection (a) applies include:

(1) an amount chargeable to income but paid from principal because income is not sufficient;

(2) the cost of an improvement to principal, whether a change to an existing asset or the construction of a new asset, including a special assessment;

(3) a disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and commissions;

(4) a periodic payment on an obligation secured by a principal asset, to the extent the amount transferred from income to principal for depreciation is less than the periodic

payment; and

(5) a disbursement described in Section 502(a).

(c) If an asset whose ownership gives rise to a principal disbursement becomes subject to a successive interest after an income interest ends, the fiduciary may continue to make transfers under subsection (a).

SECTION 506. INCOME TAXES.

(a) A tax required to be paid by a fiduciary which is based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a fiduciary which is based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) Subject to subsection (d) and Sections 504, 505, and 507, a tax required to be paid by a fiduciary on a share of an entity's taxable income in an accounting period must be paid from:

(1) income and principal proportionately to the allocation between income and principal of receipts from the entity in the period; and

(2) principal to the extent the tax exceeds the receipts from the entity in the period.

(d) After applying subsections (a) through (c), a fiduciary shall adjust income or principal receipts, to the extent the taxes the fiduciary pays are reduced because of a deduction for a payment made to a beneficiary.

Comment

Marital deduction issues. Any payment of income tax from income could raise issues of the estate or gift tax marital deduction, especially if the income on which that income tax is paid is not fully distributed, as in the case of income retained in an entity owned in whole or in part by the trust. These issues are similar to the issues raised by Revenue Ruling 2006-26 in the context of defined contribution qualified retirement plans and individual retirement accounts (IRAs). See

Section 409 and the Comment thereto. The 2018 Act makes no change to Section 506 because the power in the spouse to cause the trust assets to be made reasonably productive of income addresses any marital deduction issue. See Section 413.

Comment to 2008 Amendments of 1997 Act

Taxes on Undistributed Entity Taxable Income. When a nongrantor trust owns an interest in a pass-through entity, such as a partnership or S corporation, it must report its share of the entity's taxable income regardless of how much the entity distributes to the trust. Whether the entity distributes more or less than the trust's tax on its share of the entity's taxable income, the trust must pay the taxes and allocate them between income and principal.

Subsection (c) requires the trust to pay the taxes on its share of an entity's taxable income from income or principal receipts to the extent that receipts from the entity are allocable to each. This assures the trust a source of cash to pay some or all of the taxes on its share of the entity's taxable income. Subsection (d) recognizes that, except in the case of an Electing Small Business Trust (ESBT), a trust normally receives a deduction for amounts distributed to a beneficiary. Accordingly, subsection (d) requires the trust to increase receipts payable to a beneficiary as determined under subsection (c) to the extent the trust's taxes are reduced by distributing those receipts to the beneficiary.

Because the trust's taxes and amounts distributed to a beneficiary are interrelated, the trust may be required to apply a formula to determine the correct amount payable to a beneficiary. This formula should take into account that each time a distribution is made to a beneficiary, the trust taxes are reduced and amounts distributable to a beneficiary are increased. The formula assures that after deducting distributions to a beneficiary, the trust has enough to satisfy its taxes on its share of the entity's taxable income as reduced by distributions to beneficiaries.

Example (1) – Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of $1 million. Partnership P distributes $100,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T's tax on $1 million of taxable income is $350,000. Under Subsection (c) T's tax must be paid from income receipts because receipts from the entity are allocated only to income. Therefore, T must apply the entire $100,000 of income receipts to pay its tax. In this case, Beneficiary B receives nothing.

Example (2) – Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of $1 million. Partnership P distributes $500,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T's tax on $1 million of taxable income is $350,000. Under Subsection (c), T's tax must be paid from income receipts because receipts from P are allocated only to income. Therefore, T uses $350,000 of the $500,000 to pay its taxes and distributes the remaining $150,000 to B. The $150,000 payment to B reduces T's taxes by $52,500, which it must pay to B. But the $52,500 further reduces T's taxes by $18,375, which it also must pay to B. In fact, each time T makes a distribution to B, its taxes are further reduced, causing another payment to be due B.

Alternatively, T can apply the following algebraic formula to determine the amount payable to B:

D = (C-R×K)/(1-R)
D = Distribution to income beneficiary
C = Cash paid by the entity to the trust
R = tax rate on income
K = entity's K-1 taxable income

Applying the formula to Example (2) above, Trust T must pay $230,769 to B so that after deducting the payment, T has exactly enough to pay its tax on the remaining taxable income from P.

Taxable Income per K-1	$1,000,000
Payment to beneficiary	230,769
Trust Taxable Income	$ 769,231
35 percent tax	269,231
Partnership Distribution	$ 500,000
Fiduciary's Tax Liability	(269,231)
Payable to the Beneficiary	$ 230,769

The "payment to beneficiary" is calculated as (C-R×K)/(1-R) = (500,000-0.35×1,000,000)/(1-0.35) = (500,000-350,000)/(1-0.35) = 150,000/0.65 = $230,769 (where C is the cash distributed by the entity, R is the trust ordinary tax rate (35%), and K is the entity's K-1 taxable income).

In addition, B will report $230,769 on his or her own personal income tax return, paying taxes of $80,769. Because Trust T withheld $269,231 to pay its taxes and B paid $80,769 taxes of its own, B bore the entire $350,000 tax burden on the $1 million of entity taxable income, including the $500,000 that the entity retained that presumably increased the value of the trust's investment entity.

If a trustee determines that it is appropriate to so, it should consider exercising the discretion granted in RUPIA section 506 [now 507] to adjust between income and principal. Alternatively, the trustee may exercise the power to adjust under RUPIA section 104 [now 203] to the extent it is available and appropriate under the circumstances, including whether a future distribution from the entity that would be allocated to principal should be reallocated to income because the income beneficiary already bore the burden of taxes on the reinvested income. In exercising the power, the trust should consider the impact that future distributions will have on any current adjustments.

SECTION 507. ADJUSTMENT BETWEEN INCOME AND PRINCIPAL BECAUSE OF TAXES.

(a) A fiduciary may make an adjustment between income and principal to offset the shifting of economic interests or tax benefits between current income beneficiaries and successor

beneficiaries which arises from:

(1) an election or decision the fiduciary makes regarding a tax matter, other than a decision to claim an income tax deduction to which subsection (b) applies;

(2) an income tax or other tax imposed on the fiduciary or a beneficiary as a result of a transaction involving the fiduciary or a distribution by the fiduciary; or

(3) ownership by the fiduciary of an interest in an entity a part of whose taxable income, whether or not distributed, is includable in the taxable income of the fiduciary or a beneficiary.

(b) If the amount of an estate tax marital or charitable deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes and, as a result, estate taxes paid from principal are increased and income taxes paid by the fiduciary or a beneficiary are decreased, the fiduciary shall charge each beneficiary that benefits from the decrease in income tax to reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax, to the extent the principal used to pay the increase would have qualified for a marital or charitable deduction but for the payment. The share of the reimbursement for each fiduciary or beneficiary whose income taxes are reduced must be the same as its share of the total decrease in income tax.

(c) A fiduciary that charges a beneficiary under subsection (b) may offset the charge by obtaining payment from the beneficiary, withholding an amount from future distributions to the beneficiary, or adopting another method or combination of methods.

Comment

Mandatory adjustments. The adjustments addressed by Section 507 are derived from the history of "equitable adjustments" largely associated with New York case law. For example, *Matter of Warms*, 140 N.Y.S.2d 169 (1955), involved estate administration expenses chargeable

to principal that are allowed as either estate tax deductions or income tax deductions. If the items are claimed as income tax deductions and benefit income, *Warms* requires income to reimburse principal for any increased estate taxes. The *Warms* adjustment has been codified in some states, including New York in EPTL §11-2.1(a).

Subsection (b), which requires reimbursement of principal from income, is derived from New York's EPTL §11-2.1(a). Unlike the New York statute, however, it limits the mandatory reimbursement to cases in which a marital or charitable deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C. 711 (1966), in which the United States Tax Court held that a reimbursement required by the predecessor of EPTL §11-2.1(a) preserved for the estate the same charitable deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will typically elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries still receive the additional benefit of the difference in the benefit of the two deductions. For example, if the income tax benefit from the deduction is $30,000 and the estate tax benefit would have been $20,000, principal will be reimbursed by $20,000 and the net benefit to the income beneficiaries will be $10,000.

Other adjustments. A second occasion for adjustment is a "trapping distribution" – a distribution of principal that carries out income for income tax purposes. *Matter of Holloway*, 68 Misc.2d 361, 327 N.Y.S.2d 865 (1972), held that a trust that made a trapping distribution must reimburse principal for the income taxes resulting from the distribution.

A third adjustment context arises when a trust's deductible expenses chargeable to principal reduce distributable net income and the taxable income of an income beneficiary, and the trust has taxable gains. Must income reimburse principal for the capital gains taxes that would have been saved if the expenses were used to reduce the gains? A Pennsylvania case, *Rice Estate*, 8 Pa. D&C2d 379 (1956), required an adjustment, but a New York case, *Matter of Dick*, 29 Misc.2d 648, 218 N.Y.S.2d 182 (1961), and a Massachusetts case, *New England Merchants Nat'l Bank v. Converse*, 373 Mass. 639, 369 N.E.2d 982 (1972), rejected an adjustment. A similar New York case, *Matter of Pross*, 90 Misc.2d 895, 396 N.Y.S.2d 309 (1978), required an adjustment from income to principal when a capital gain on a sale of real property resulted from a depreciation deduction that had benefitted the income beneficiary of the trust by reducing distributable net income.

Subsection (a) allows adjustments in cases like these, in the fiduciary's discretion (recognizing that local case law and statutory law, other than this Act, may require the exercise of that discretion under this Act).

Changes in the 2018 Act. Section 506(b) of the 1997 Act required that "each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid." The 2018 Act changes this, in Section 507(b), to "the fiduciary shall charge each beneficiary that benefits from the decrease in income tax to

reimburse the principal from which the increase in estate tax is paid" and adds subsection (c) to provide the fiduciary with options for accomplishing the "reimbursement" objective. One option in subsection (c) remains "obtaining payment from the beneficiary," but the possibly more practical option of withholding amounts from future distributions is also included.

[ARTICLE] 6

DEATH OF INDIVIDUAL OR TERMINATION OF INCOME INTEREST

SECTION 601. DETERMINATION AND DISTRIBUTION OF NET INCOME.

(a) This section applies when:

(1) the death of an individual results in the creation of an estate or trust; or

(2) an income interest in a trust terminates, whether the trust continues or is distributed.

(b) A fiduciary of an estate or trust with an income interest that terminates shall determine, under subsection [(g)][(e)] and [Articles] 4, 5, and 7, the amount of net income and net principal receipts received from property specifically given to a beneficiary. The fiduciary shall distribute the net income and net principal receipts to the beneficiary that is to receive the specific property.

(c) A fiduciary shall determine the income and net income of an estate or income interest in a trust which terminates, other than the amount of net income determined under subsection (b), under [Articles] 4, 5, and 7 and by:

(1) including in net income all income from property used or sold to discharge liabilities;

(2) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on estate and inheritance taxes and other taxes imposed because of the decedent's death, but the fiduciary may pay the expenses from income of property passing to a trust for which the

fiduciary claims a federal estate tax marital or charitable deduction only to the extent:

(A) the payment of the expenses from income will not cause the reduction or loss of the deduction; or

(B) the fiduciary makes an adjustment under Section 507(b); and

(3) paying from principal other disbursements made or incurred in connection with the settlement of the estate or the winding up of an income interest that terminates, including:

(A) to the extent authorized by the decedent's will, the terms of the trust, or applicable law, debts, funeral expenses, disposition of remains, family allowances, estate and inheritance taxes, and other taxes imposed because of the decedent's death; and

(B) related penalties that are apportioned, by the decedent's will, the terms of the trust, or applicable law, to the estate or income interest that terminates.

[(d) If a decedent's will, the terms of a trust, or applicable law provides for the payment of interest or the equivalent of interest to a beneficiary that receives a pecuniary amount outright, the fiduciary shall make the payment from net income determined under subsection (c) or from principal to the extent net income is insufficient.

(e) If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends because of an income beneficiary's death, and no payment of interest or the equivalent of interest is provided for by the terms of the trust or applicable law, the fiduciary shall pay the interest or the equivalent of interest to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.]

[(f)][(d)] A fiduciary shall distribute net income[remaining after payments required by subsections (d) and (e)] in the manner described in Section 602 to all other beneficiaries,

including a beneficiary that receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

[(g)][(e)] A fiduciary may not reduce principal or income receipts from property described in subsection (b) because of a payment described in Section 501 or 502, to the extent the decedent's will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property must be determined by including the amount the fiduciary receives or pays regarding the property, whether the amount accrued or became due before, on, or after the date of the decedent's death or an income interest's terminating event, and making a reasonable provision for an amount the estate or income interest may become obligated to pay after the property is distributed.

Legislative Note: *If state law already provides for interest on payments from a trust on the death of an income beneficiary, delete or modify subsections (d) and (e). If subsections (d) and (e) are not deleted, use the subsection reference in the first set of brackets in subsections (b), (f), and (g). If subsections (d) and (e) are deleted, use the subsection reference in the second set of brackets in subsection (b) and redesignated subsections (d) and (e), and delete the words in brackets in redesignated subsection (d).*

Comment

Article 6 of the 2018 Act, Death of Decedent or Termination of Income Interest, is not greatly changed from Article 2 of the 1997 Act, Decedent's Estate or Terminating Income Interest. Paragraph (3) of Section 201 of the 1997 Act, addressing the payment of interest on pecuniary bequests or pecuniary amounts payable by a trust (explained below in the paragraph captioned "Interest on pecuniary amounts"), is divided into two optional subsections (d) and (e) of Section 601 in the 2018 Act. As explained in the Legislative Note, a state may use these subsections if it has no other provision for payment of interest on pecuniary amounts received from a trust. In that case, subsection (e) will provide that interest is payable on pecuniary amounts received from a trust in the same manner as state law otherwise provides in the case of pecuniary bequests under a will, and subsection (d) will provide that all such interest payments are made from income to the extent income is sufficient. If state law already provides for the payment of interest on pecuniary amounts received from a trust, subsections (d) and (e) may be

modified or omitted.

The Treasury Regulations contemplated by the Comment to the 1997 Act to respond to the Supreme Court's decision in *Commissioner v. Estate of Hubert*, 520 U.S. 93 (1997), were added in 1999 as Treasury Regs. §§20.2056(b)-4(d), 20.2055-3(b), and 20.2013-4(b)(3).

Comment to 1997 Act

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts § 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

Gift of a pecuniary amount. Section 201(3) and (4) [now 601(d) through (f)] provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 5(b)(2) of the 1962 Act.

Interest on pecuniary amounts. Section 201(3) [now 601(d) and (e)] provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos

instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions, App. B (4th ed. 1997).

Administration expenses and interest on death taxes. Under Section 201(2)(B) [now 601(c)(2)] a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

The United States Supreme Court has considered the question of whether an estate tax marital deduction or charitable deduction should be reduced when administration expenses are paid from income produced by property passing in trust for a surviving spouse or for charity and deducted for income tax purposes. The Court rejected the IRS position that administration expenses properly paid from income under the terms of the trust or state law must reduce the amount of a marital or charitable transfer, and held that the value of the transferred property is not reduced for estate tax purposes unless the administration expenses are material in light of the income the trust corpus could have been expected to generate. *Commissioner v. Estate of Otis C. Hubert*, 117 S. Ct. 1124 (1997). The provision in Section 201(2)(B) [now 601(c)(2)] permits a fiduciary to pay and deduct administration expenses from income only to the extent that it will not cause the reduction or loss of an estate tax marital or charitable deduction, which means that the limit on the amount payable from income will be established eventually by Treasury Regulations.

SECTION 602. DISTRIBUTION TO SUCCESSOR BENEFICIARY.

(a) Except to the extent [Article] 3 applies for a beneficiary that is a trust, each beneficiary described in Section [601(f)][601(d)] is entitled to receive a share of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to which this section applies, each beneficiary, including a beneficiary that does not receive part of the distribution, is entitled, as of each distribution date, to a share of the net income the fiduciary received after the decedent's death, an income interest's other terminating event, or the preceding distribution by the fiduciary.

(b) In determining a beneficiary's share of net income under subsection (a), the following

rules apply:

(1) The beneficiary is entitled to receive a share of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date.

(2) The beneficiary's fractional interest under paragraph (1) must be calculated:

(A) on the aggregate value of the assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(B) without regard to:

(i) property specifically given to a beneficiary under the decedent's will or the terms of the trust; and

(ii) property required to pay pecuniary amounts not in trust.

(3) The distribution date under paragraph (1) may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which the assets are distributed.

(c) To the extent a fiduciary does not distribute under this section all the collected but undistributed net income to each beneficiary as of a distribution date, the fiduciary shall maintain records showing the interest of each beneficiary in the net income.

(d) If this section applies to income from an asset, a fiduciary may apply the rules in this section to net gain or loss realized from the disposition of the asset after the decedent's death, an income interest's terminating event, or the preceding distribution by the fiduciary.

Legislative Note: *If subsections (d) and (e) of Section 601 are deleted, use the subsection reference in the second set of brackets in subsection (a).*

Comment

Section 202(a) of the 1997 Act ended with a reference to "the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not

distributed as of the current distribution date." The 2018 Act changes this, in Section 602(a), to "a share of the net income the fiduciary received after the decedent's death, an income interest's other terminating event, or the preceding distribution by the fiduciary." "The preceding distribution by the fiduciary" will prevent the possible misunderstanding that "earlier distribution date," in context, refers to a distribution date earlier than "the date of death or terminating event." So-called "stub income" between the last distribution date and the date of death is addressed in Section 703(b). The former words "but has not distributed as of the current distribution date" are not needed because Section 602(c) makes it clear that the fiduciary must account for all undistributed income.

Section 602(b)(2)(B) excludes specific bequests in kind and pecuniary bequests (and comparable distributions from a trust) from the calculation of a beneficiary's fractional interest of undistributed principal assets for purposes of allocating income to that beneficiary. If the beneficiary is entitled to statutory interest on any such bequest, that interest is not income subject to allocation under this section, and that bequest does not share in the income earned by the other assets.

Section 602(a) includes an exception for the portion of an estate or trust that is treated as a unitrust under new Article 3.

Comment to 1997 Act

Relationship to prior Acts. Section 202 [now 602] retains the concept in Section 5(b)(2) of the 1962 Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration.

[ARTICLE] 7

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

SECTION 701. WHEN RIGHT TO INCOME BEGINS AND ENDS.

(a) An income beneficiary is entitled to net income in accordance with the terms of the trust from the date an income interest begins. The income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to:

(1) the trust for the current income beneficiary; or

(2) a successive interest for a successor beneficiary.

(b) An asset becomes subject to a trust under subsection (a)(1):

(1) for an asset that is transferred to the trust during the settlor's life, on the date the asset is transferred;

(2) for an asset that becomes subject to the trust because of a decedent's death, on the date of the decedent's death, even if there is an intervening period of administration of the decedent's estate; or

(3) for an asset that is transferred to a fiduciary by a third party because of a decedent's death, on the date of the decedent's death.

(c) An asset becomes subject to a successive interest under subsection (a)(2) on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to which a fiduciary may or must distribute income.

Comment

Article 7 of the 2018 Act, Apportionment at Beginning and End of Income Interest, corresponds to Article 3 of the 1997 Act, with the same title. There is no substantive change in Section 701 (previously Section 301).

Comment to 1997 Act

Period during which there is no beneficiary. The purpose of the second part of subsection (d) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 302 and 303 [now 702 and 703] apply accordingly if the terms of the trust do not contain different provisions.

SECTION 702. APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN DECEDENT DIES OR INCOME INTEREST BEGINS.

(a) A fiduciary shall allocate an income receipt or disbursement, other than a receipt to which Section 601(b) applies, to principal if its due date occurs before the date on which:

(1) for an estate, the decedent died; or

(2) for a trust or successive interest, an income interest begins.

(b) If the due date of a periodic income receipt or disbursement occurs on or after the date on which a decedent died or an income interest begins, a fiduciary shall allocate the receipt or disbursement to income.

(c) If an income receipt or disbursement is not periodic or has no due date, a fiduciary shall treat the receipt or disbursement under this section as accruing from day to day. The fiduciary shall allocate to principal the portion of the receipt or disbursement accruing before the date on which a decedent died or an income interest begins, and to income the balance.

(d) A receipt or disbursement is periodic under subsections (b) and (c) if:

(1) the receipt or disbursement must be paid at regular intervals under an obligation to make payments; or

(2) the payor customarily makes payments at regular intervals.

(e) An item of income or obligation is due under this section on the date the payor is required to make a payment. If a payment date is not stated, there is no due date.

(f) Distributions to shareholders or other owners from an entity to which Section 401 applies are due:

(1) on the date fixed by or on behalf of the entity for determining the persons entitled to receive the distribution;

(2) if no date is fixed, on the date of the decision by or on behalf of the entity to make the distribution; or

(3) if no date is fixed and the fiduciary does not know the date of the decision by or on behalf of the entity to make the distribution, on the date the fiduciary learns of the decision.

Comment

In Section 702(a) of the 2018 Act, the change from "before a decedent dies" and "before an income interest begins" in Section 302(a) of the 1997 Act to "before the date on which … the decedent died" and "before the date on which … an income interest begins" makes this provision consistent with the reference to "the date of a testator's death" in Section 701(b)(2) and consistent with the reference to "on or after the date on which a decedent died" in Section 702(b). It means that the time of day at which the moment of death occurs is less relevant and therefore less important to determine. In effect, the decedent's income interest ends with the day before the date of death, and the estate's income interest begins with the date of death. This rule in a uniform act does not purport to address related income tax uncertainties.

Section 302(b) of the 1997 Act used the term "periodic due date." Section 702(b) of the 2018 Act changes the use of "periodic" to modify receipts or disbursements rather than due dates. Section 702(d) explains when a receipt or disbursement is "periodic."

With respect to distributions from an entity, Section 302(c) of the 1997 Act uses the term "declaration date for the distribution," consistent with the action of a board of directors in a corporate context. In the 2018 Act, Section 702(f)(2) uses the more generic description "date of the decision by or on behalf of the entity to make the distribution." The 2018 Act adds Section 702(f)(3) to authorize the fiduciary to use the date the fiduciary learns of the decision if the fiduciary doesn't know the date the decision was made. If a date is fixed by or on behalf of the entity for determining who is to receive a distribution, that date continues to govern, under Section 702(f)(1).

SECTION 703. APPORTIONMENT WHEN INCOME INTEREST ENDS.

(a) In this section, "undistributed income" means net income received on or before the date on which an income interest ends. The term does not include an item of income or expense which is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) Except as otherwise provided in subsection (c), when a mandatory income interest of a beneficiary ends, the fiduciary shall pay the beneficiary's share of the undistributed income that

is not disposed of under the terms of the trust to the beneficiary or, if the beneficiary does not survive the date the interest ends, to the beneficiary's estate.

(c) If a beneficiary has an unqualified power to withdraw more than five percent of the value of a trust immediately before an income interest ends:

(1) the fiduciary shall allocate to principal the undistributed income from the portion of the trust which may be withdrawn; and

(2) subsection (b) applies only to the balance of the undistributed income.

(d) When a fiduciary's obligation to pay a fixed annuity or a fixed fraction of the value of assets ends, the fiduciary shall prorate the final payment as required to preserve an income tax, gift tax, estate tax, or other tax benefit.

Comment

In Section 703(a) of the 2018 Act, a change from "before the date on which an income interest ends" in Section 303(a) of the 1997 Act to "on or before the date on which an income interest ends" makes this provision consistent with the corresponding references in Sections 701 and 702 (former Sections 301 and 302). Applying the rules of Section 701, that means that income received precisely on the date of a decedent's death is allocated to the estate, estate beneficiaries, or successive beneficiaries of a trust, not to the decedent. As with Section 702, this rule in a uniform act does not purport to address related income tax uncertainties.

There are no other substantive changes from the 1997 Act in Section 703. In subsection (c), a beneficiary's right to "revoke" is changed to the right to "withdraw." In subsection (d), the subjective "accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements" is changed to the more objective "preserve an income tax, gift tax, estate tax, or other tax benefit."

In Section 703(b), it remains the general rule that the income accrued between the last payment date and the date of a mandatory income beneficiary's death (often called "stub income") is payable to that income beneficiary's estate. As with other provisions of this act, under Section 201(a)(3) the terms of the trust may provide a different disposition of stub income.

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT . This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 803. APPLICATION TO TRUST OR ESTATE. This [act] applies to a trust or estate existing or created on or after [the effective date of this [act]], except as otherwise expressly provided in the terms of the trust or this [act].

[SECTION 804. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

SECTION 805. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

Legislative Note: *A state that has enacted a previous version of the Uniform Principal and Income Act or another statute addressing principal and income should consider repealing that statute or amending that statute to make it effective only before the effective date of this act. A state that has enacted a separate statute permitting conversion of trusts to unitrusts or otherwise addressing unitrusts as in Article 3 of this act, or has enacted other statutes addressing the issues addressed by this act, should consider repealing those statutes or amending those statutes to make them effective only before the effective date of this act.*

SECTION 806. EFFECTIVE DATE. This [act] takes effect . . . .

15-5-501. Rights of Beneficiary's Creditor or Assignee.

EXCEPT AS PROVIDED IN SECTION 15-5-504, TO THE EXTENT A BENEFICIARY'S INTEREST IS NOT SUBJECT TO A SPENDTHRIFT PROVISION, THE COURT MAY AUTHORIZE A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO ATTACH PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES. NOTHING IN THIS PART 5 MODIFIES OTHER COLORADO LAW GOVERNING (A) LIMITATIONS ON THE AMOUNTS THAT MAY BE APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR (B) THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.

Comparison of Proposed 501 and 501 as drafted in the UTC.

15-5-501. Rights of Beneficiary's Creditor or Assignee.

Except as provided in Section 15-5-504, to the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. NOTHING IN THIS PART 5 MODIFIES OTHER COLORADO LAW GOVERNING (A) LIMITATIONS ON THE AMOUNTS THAT MAY BE APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR (B) THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.

Uniform Law Comments.

General Comment
to Article 5

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. Section 501 applies if the trust does not contain a spendthrift provision or the spendthrift provision, if any, does not apply to the beneficiary's interest. Section 502 states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of exception creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Comment Amended in 2004

ULC
Comment to
Section 501

This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503.

Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. *See* (Third) of Trusts §56 (2003); Restatement (Second) of Trusts §§147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. *See, e.g.*, Cal. Prob. Code Section 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances.
In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

2005 Amendment. A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to

negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in Section 503. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.

Colorado Committee Report

1) It bears repeating that §501 applies to situations where there is no spendthrift protection afforded by the terms of the trusts. Spendthrift trusts have been recognized in Colorado as a matter of common law since at least 1938 but the protection depends on the stated intent of the settlor as determined from the trust terms. Snyder v. O'Connor, 102 Colo. 567, 81 P.2d 773 (1938); Newell v. Tubbs, 103 Colo. 224, 84 P.2d 820 (1938).

2) See the discussion under proposed §502(2) as to the fact that no expansive language will need to be included in the trust and a simple statement the interest is subject to a spendthrift trust will be sufficient. The effect of such a statement is in the definitions of the current Colorado Uniform Trust Code (CUTC) enacted by the General Assembly in 2018. Spendthrift provisions are defined in CUTC §15-5-103(19) as a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

3) The addition of the last sentence to the proposed section that other Colorado law must be considered as a limitation on amounts available for satisfaction of creditor claims was added by the Committee to codify a position that is set forth in the national Uniform Law Comments. The consensus was that any ambiguity on this question should be resolved by expressly providing that other creditor laws of the state should apply to limit any award that a judge may determine appropriate.

4) Although unrelated to §501 it should be pointed out that a section regarding spendthrift trusts is found in the modification provisions of Part. 4 of the CUTC as adopted in 2018. C.R.S. §15-5-411(3) provides that a spendthrift provision is not "presumed" to be a material purpose of the trust for purposes of modification under §411(1).

15-5-502. SPENDTHRIFT PROVISION.

(1) A SPENDTHRIFT PROVISION IS VALID ONLY IF IT RESTRAINS BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF A BENEFICIARY'S INTEREST.

(2) A TERM OF A TRUST PROVIDING THAT THE INTEREST OF A BENEFICIARY IS HELD SUBJECT TO A "SPENDTHRIFT TRUST," OR WORDS OF SIMILAR IMPORT, IS SUFFICIENT TO RESTRAIN BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF THE BENEFICIARY'S INTEREST.

(3) A BENEFICIARY MAY NOT TRANSFER AN INTEREST IN A TRUST IN VIOLATION OF A VALID SPENDTHRIFT PROVISION AND, EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH THE INTEREST OR A DISTRIBUTION BY THE TRUSTEE BEFORE ITS RECEIPT BY THE BENEFICIARY.

(4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY'S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY'S BENEFIT, AND NO TRUSTEE IS LIABLE TO ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

(5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY'S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE'S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

Comparison of Proposed Colorado 502 and 502 as drafted in the UTC:

15-5-502. Spendthrift Provision.

(1) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(2) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY'S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY'S BENEFIT, AND NO TRUSTEE IS LIABLE TO ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

(5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY'S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE'S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

Uniform Law Comments.

Comment to Section 502

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift provision, see Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under

this Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2).

Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.,* Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts §58(2), (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at any time. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).

Colorado Committee Report:

1) No Colorado case has addressed whether a spendthrift clause must prohibit both a voluntary and involuntary transfer of the beneficial interest. However, without setting out a formal definition the Colorado Supreme Court in Newell V. Tubbs, *103 Colo. 224, 84 P.2d 820, (Colo. 1938)* stated that: "A spendthrift trust is 'a trust created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his improvidence or incapacity." This language was cited most recently in In Re Cohen, 8 *P.3d 429 (Colo. 1999)*.
2) Some other states have provided that a spendthrift clause can allow for the voluntary transfer of an interest and only prohibit involuntary transfers. Examples of states that have opted to allow such a result: Wyoming has adopted §502 without subsection (1) (note: the uniform law formats subsections with letters rather than numerals which are used by legislative drafting in Colorado). Florida adopted subsection (1) but exempted trusts adopted prior to the enactment. Kansas amended subsection (1) to only provide that a spendthrift trust is valid. It added another subsection that a beneficiary could not transfer an interest in violation of a spendthrift clause. Wisconsin amended its definition

of spendthrift to provide that a spendthrift provision means a term of a trust that restrains either or both of a voluntary or involuntary transfer of a beneficiary's interest. The Committee elected to adopt the position taken by the UTC.

3) Subsections (4) and (5) were added to §502 based upon additions considered and adopted by various other states concerning trust administration issues encountered by Trustees. There is concern that Trustees face uncertainty and liability regarding distributions for the benefit of a beneficiary rather than directly to a beneficiary and in regard to real property and tangible personal property owned by the trust but used by the beneficiary. These provisions also have applicability to situations where the beneficiary is incapacitated and in regard to Supplemental Needs Trusts. These provisions were generally modeled after Ohio and Tennessee revisions to the UTC.

4) A Conforming Amendment was made to C.R.S. § 15-5-816 at the time that the Committee adopted proposed §502. The committee approved the following suggested language:

15-5-816. Specific powers of trustee

(1) Without limiting the authority conferred by section 15-5-815, and in addition to the powers conferred pursuant to the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15, a trustee may:

(u) Pay an amount distributable to a beneficiary <u>BY PAYING IT DIRECTLY TO THE BENEFICIARY OR BY APPLYING IT FOR THE BENEFICIARY'S BENEFIT AND, IN THE CASE OF A BENEFICIARY</u> who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit or by:

(I) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(II) Paying it to the beneficiary's custodian pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, or custodial trustee pursuant to the "Colorado Uniform Custodial Trust Act", article 1.5 of this title 15, and for that purpose, creating a custodianship of [sic] custodial trust;

(III) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(IV) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

15-5-503. Exceptions to spendthrift provision.

(a) DEFINITIONS.

(1) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(2) CHILD SUPPORT ORDER MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

(b) A SPENDTHRIFT PROVISION IS UNENFORCEABLE AGAINST:

(1) A CHILD WHO IS AN OBLIGEE PURSUANT TO A CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR; AND

(2) A JUDGMENT CREDITOR WHO HAS PROVIDED ESSENTIAL SERVICES FOR THE PROTECTION OF A BENEFICIARY'S INTEREST IN THE TRUST.

THIS SUBSECTION (b) DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

(c) THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO OBTAIN FROM A COURT AN ORDER ATTACHING PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES.

Comparison of Proposed 503 and 503 as drafted in the UTC:

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) DEFINITIONS.

(1) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(2) CHILD SUPPORT ORDER MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

~~(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.~~

(b) A spendthrift provision is unenforceable against:

(1) a beneficiary's child, ~~spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance~~WHO IS AN OBLIGEE PURSUANT TO A CURRENT CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR;

(2) a judgment creditor who has provided ESSENTIAL services for the protection of a beneficiary's interest in the trust; and

~~(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.~~

THIS SUBSECTION (b) DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

(c) ~~A claimant against which a spendthrift provision cannot be enforced may~~THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

Uniform Law Comments.

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction and specifies the remedies such exemption creditors may take to satisfy their claims.

The exception in subsection (b)(1) for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion.

Subsection (b)(1), unlike 85 Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution. Subsection (b)(1) refers both to "support" and "maintenance" in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of "child" in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State. For the definition of "state," which includes Puerto Rico and other American possessions, see Section 103(17).

The definition of "child" in subsection (a) is not exclusive. The definition clarifies that a "child" includes an individual awarded child support in any state. The definition does not expressly include but neither does it exclude persons awarded child support in some other country or political subdivision, such as a Canadian province.

The exception in subsection (b)(2) for a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust is in accord with Restatement (Third) of Trusts Section 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. See Restatement (Third) of Trusts Section 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (b)(3), which is similar to Restatement (Third) of Trusts Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift

restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 157-157.5 (4th ed. 1987).

Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions of present or future distributions. Depending on other creditor law of the state, additional remedies may be available should a beneficiary's interest not be subject to a spendthrift provision. Section 501, which applies in such situations, provides that the creditor may reach the beneficiary's interest under that section by attachment or "other means." Subsection (c), similar to Section 501, clarifies that the court has the authority to limit the creditor's relief as appropriate under the circumstances.

Colorado Committee Report:

(1) Colorado law does not currently contemplate exception creditors to a spendthrift clause. *In re Estate of Beren*, 321 P.3d 615 (Colo. App. 2013) "Spendthrift trusts are valid and enforceable in Colorado. *In re Cohen*, 8 P.3d 429, 430 n. 1 (Colo.1999); *see In re Portner*, 109 B.R. 977, 987 (Bkrtcy.D.Colo.1989) (In Colorado, "spendthrift trusts are determined exclusively by common law because there are no statutory provisions regulating their existence."). Such trusts "provide a fund for the maintenance of the beneficiary, and at the same time ... secure it against his improvidence or incapacity." *Portner*, 109 B.R. at 987. Funds under the discretionary control of a trustee subject to a spendthrift provision cannot be garnished. *Brasser v. Hutchison*, 37 Colo.App. 528, 531, 549 P.2d 801, 803 (1976). But once such funds have been distributed, they

are within the reach of creditors. *See generally* Restatement (Third) of Trusts § 58 cmt. d(2) (2003) ("After the income or principal of a spendthrift trust has been distributed to a beneficiary ... it can be reached by creditors.")." Thus, because the spendthrift provision, even assuming its validity, no longer protected those trust funds that had become subject to mandatory distribution, the trial court properly allowed garnishment of those funds."

As mentioned in the Comments to the UTC, both the Restatement (Second) of Trusts, §157 (Restatement (Third) of Trusts §59 do provide for certain exception creditors. Under the Restatement (Second) of Trusts, the following claimants could reach a beneficiary's interest in the trust to satisfy a valid claim, despite a spendthrift clause: spousal and child support claimants, claimants who provided necessary services to a beneficiary, claimants who provided services and materials to preserve a beneficiary's interest in the trust, and the US or a State. Under the Restatement (Third) of Trusts, only child and spousal support creditors, as well as creditors providing services necessary for the protection of the beneficiary's interest in the trust, are named as exception creditors. Comment (a) to §59 of the Restatement (Third) Trusts, does provide, however, that governmental claims are, implicitly, exempted from enforcement of a spendthrift provision.

(2) The Committee, early in its discussions, reviewed the law in other states who have enacted the UTC. Of the approximately thirty-three jurisdictions reviewed, there were 12 states that did not allow for exception creditors, who had reserved Section 503 for possible enactment at a later date, or who did not include either children or spouses as exception creditors. Of those states that had enacted a version of the UTC, 8 states allowed for child support claimants as exception creditors, but not spousal creditors. Approximately 13 of the states either adopted the UTC verbatim or allowed for spousal creditors in some modified way.

No Exception Creditors: KY, ME, MN, CT, NJ

Reserved: AK, KS, MA, MS, MO, MT

Neither children nor spousal creditors: TN

Children exception creditors, but not spouses: AZ, DC, NC, SC, VT, VA, WV, UT

Allows spousal creditors in some way: FL, MD, MI, ND, OH, WI, WY, PA

Verbatim UTC language: AL, NH, NM, OR, IL

(3) After discussion, the committee determined that although Colorado does not currently have caselaw that supports allowing any exception creditors, the majority of states that have adopted the UTC have included child support claimants as exception creditors, and accordingly the committee drafted Section 503 with this intent. The language allowing child support claimants as exception creditors was drafted in close consultation with Kim Willoughby, as a liaison from the Family Law Section.

(4) After additional discussion, the committee also decided to include claimants who provided services to a beneficiary to assist that person in protecting their interest in the trust. The committee determined that without such a term, a beneficiary of limited means may be prevented from securing legal or other counsel to preserve their beneficial interest. This is consistent with, although perhaps broader than, the Cost and Compensation Act, §15-10-602, which allows counsel for a nonfiduciary to recover compensation when those services result in an order beneficiary to the trust, respondent, ward, or protected person. The Committee added "essential" as a modifier to the type of services, as suggested by the UTC Comments ("This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust."), as a mechanism for limiting abuse.

(5) The committee chose, like several other states, to adopt language that made clear that the few exception creditors permitted under §503, should not impact special needs trusts. The language addressing special needs trusts was reviewed and approved by members of the Elder Law Committee.

(6) Although Government Claimants are not expressly included as exception creditors in this statute, such creditors may nonetheless be able to reach trust assets to satisfy their claims. *See* UTC Comments to §503; Reporter's Note, Restatement (Third) Trusts, §59 (citing caselaw that federal taxing authorities would be able to reach the assets of a spendthrift trust, but that state taxing authorities' ability to do so is less clear). The committee decided not to include government claimants as express exception creditors in order to preserve any opportunity a beneficiary may have to prevent governmental claims from bypassing a spendthrift clause.

Proposed CUTC 504

15-5-504. Discretionary Trusts; Effect of Standard.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) the court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

This subsection does not apply to a special needs trust, supplemental needs trust, or similar trust established for a person if its application could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if its application has the effect or potential effect of rendering such person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

Comparison of Proposed CUTC 504 and UTC Section 504

15-5-504. Discretionary Trusts; Effect of Standard.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child~~, spouse or former spouse~~; and

(2) the court shall direct the trustee to pay to the child~~, spouse or former spouse~~ such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

This subsection does not apply to a special needs trust, supplemental needs trust, or similar trust established for a person if its application could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if its application has the effect or potential effect of rendering such person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

NCCUSL Comments

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the

distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The effect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. See Section 814 cmt.

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

2004 Amendment. Section 504(e)

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's discretion to make distributions for the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee.

In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b). Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.

The Code does not specifically address the extent to which a creditor of a trustee-beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard.

For the definition of "ascertainable standard," see Section 103(2).

Colorado Committee Report (including 2005 Committee Comments)

(1) While trusts with valid spendthrift provisions directly prevent beneficiaries from assigning their interests and creditors of such beneficiaries from attaching their interests, the very nature of beneficial interests in discretionary trusts and trusts subject to a standard indirectly bar the reach of creditors of a beneficiary. A creditor who has attached a discretionary interest (because of the absence of a spendthrift provision or because a spendthrift exception applies)

cannot, as a general rule, force exercise of discretion. Thus, there is indirect protection against creditor claims.

(2) Colorado courts have tended to follow the Restatements with respect to trust administrative law. The Restatement (Second) of Trusts provided as follows:

> ***§154. Trusts for Support***
>
> *Except as stated in §§156 and 157, if by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.*
>
> ***§155. Discretionary Trusts***
>
> *(1) Except as stated in § 156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.*
>
> *(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.*

(3) Colorado courts have followed the Restatement (Second) position with respect to discretionary trusts in determining whether a discretionary interest is "property" for purposes of division of property in divorce. Absent an abuse of discretion, a beneficiary cannot compel exercise of discretion and therefore, the discretionary interest is not "property" for this purpose. See for example *In Re Marriage of Rosenblum*, 602 P.2d 892 (Colo. App. 1979); *In Re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); and *In Re McCart*, 847 P.2d 184 (Colo. App. 1992.)

These decisions do not address whether and under what circumstances a beneficiary's creditor can force an exercise of discretion.

(4) The Restatement (Third) provides as follows:

> ***§60. Transfer or Attachment of Discretionary Interests***
>
> *Subject to the rules stated in sections 58 and 59 (on spendthrift trusts), if the terms of a trust provide for a beneficiary to receive distributions in the trustee 's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The*

amounts a creditor can reach may be limited to provide for the beneficiary's needs (Comment c), or the amounts may be increased where the beneficiary is either the settlor (Comment f) or holds the discretionary power to determine his or her own distributions (Comment g).

Restatement (Third) of Trusts reiterates the common law right of a beneficiary's creditor to attach the beneficiary's discretionary interest unless a valid spendthrift provision applies to the interest. Restatement (Third) of Trusts Section 60 cmt. a. And under Restatement (Third), self-settled discretionary interests are not protected against creditor claims whether or not there is a spendthrift provision. Restatement (Third) of Trusts Section 60 cmt. f. However, the Restatement (Third) of Trusts, departs from Restatement (Second) as follows:

(a) The Restatement (Third) applies this principle to discretionary interests whether expressed in the form of a standard or not. Restatement (Third) of Trusts Section 60 cmt. a and Rptr's Notes on cmt. a.

(b) The Restatement (Third) points out that it is rare that a beneficiary is so powerless taking into account the beneficiary's circumstances, the terms of the discretionary power and the purposes of the trust. Thus, the exercise or non-exercise of discretion is always subject to judicial review to prevent abuse. Restatement (Third) of Trusts Section 60 cmt. e.

(c) Under the Restatement (Third), where a discretionary beneficiary is also trustee, his or her creditors are able to reach the maximum amount that the trustee/beneficiary can properly take. Restatement (Third) of Trusts Section 60 cmt. g.

(5) Compared with either Restatement's position, the rule codified in the UTC and proposed for the CUTC is much more protective of discretionary interests with respect to creditor claims. Section 504 makes it clear that, whether or not there is a spendthrift provision in the terms of the trust, no creditor of a beneficiary can compel a distribution that is subject to the trustee's discretion whether such discretion is expressed in the form of a standard or not, even if the trustee has abused discretion or failed to comply with the standard. Thus, under the UTC, even a creditor who has provided support to the beneficiary of a support trust is unable to force exercise of discretion.

Further, Subsection 504(e) eliminates the problematic position taken in Restatement (Third) Section 60 cmt g, protecting estate plans that employ a traditional family trust arrangement of which a surviving spouse serves as trustee, provided the trustee's power to make discretionary distributions to her/himself is limited by an ascertainable standard.

(6) Section 504(c) of the UTC makes a public policy exception with respect to a discretionary beneficiary's child, spouse or former spouse who has a judgment for support. Such a creditor can force exercise of discretion but only if the trustee has abused discretion or failed to comply with the standard. However, this provision only authorizes the court to force exercise of discretion in satisfaction of the judgment. It does not require it. If a court does act, the UTC requires

the court to direct the trustee to distribute to the creditor only an amount that is equitable taking into account the discretionary beneficiary's circumstances.

In keeping with Section 503, and for the reasons expressed in the report for that , Section, proposed Section 504 makes only a child – not a spouse or former spouse – an exception creditor. Among those states that have adopted the UTC, the following positions have been taken with respect to exception creditors:

Alabama – adopted 504 verbatim

Arizona – excepts child only (does not apply exceptions to special needs trusts)

Arkansas – omitted 504(c)

District of Columbia – reserved

Florida – creditors, including exception creditors under 504(2) (child, spouse, former spouse), may not compel a distribution or attach or otherwise reach the interest a beneficiary might have as a result of the trustee's discretion to make distributions to or for the benefit of the beneficiary

Kansas – omitted 504

Kentucky – excepts child and spouse

Maine – omitted 504(c)

Maryland – excepts (a) trust property subject to withdrawal power, and (b) contributions to trust by beneficiary

Mass. – reserved 504

Michigan – no exceptions to discretionary trust provision; trust property not subject to enforcement of a judgment until income or principal is distributed directly to trust beneficiary.

Minn. – no exception creditors

Mississippi – reserved all of Part 5

Missouri – creditor cannot attach, force judicial sale, or compel distributions or reach by any other means present or future discretionary distributions

Montana – no exception creditors

Nebraska – adopted 504 verbatim

New Hampshire – court may compel discretionary distribution to child, spouse, or former spouse in such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused discretion; and, with respect to alimony, only for

and to the extent that the judgment or court order expressly specifies the alimony amount attributable to the most basic food, shelter and medical needs of the former spouse.

New Mexico – enacted 504 verbatim

North Carolina – excepts child only

North Dakota – adopted 504 verbatim

Ohio – unless the settlor has explicitly provided in the trust that the beneficiary's child or spouse or both are excluded from benefiting from the trust, if there is a failure to apply standard or an abuse of discretion, then the court may order a distribution only if it is available for the beneficiary's support – but not for the satisfaction of a judgment for the support of a former spouse.

Oregon – omitted 504

Pennsylvania – adopted 504 verbatim

South Carolina – excepts child only (but does not

apply to special needs trusts)

Tennessee – no exception creditors

Utah – adopted 504 verbatim

Vermont – adopted 504 verbatim

Virginia – excepts child only

West Virginia – excepts child only

Wisconsin – substantial reworking of text: no exception creditors; specifically provides that interest in discretionary trust is not "property"; general principles do not apply if beneficiary can make purely discretionary distributions to self or without consent of adverse party

Wyoming – no exception creditors; and may not compel a distribution or reach or attach the interest of a beneficiary until a distribution is received by the beneficiary, even if the trustee makes distributions directly to third parties for the benefit of the beneficiary.

(7) For the reasons discussed in the report for Section 503, the Committee proposes, like several other states, to ensure that special needs trusts are not adversely affected by the limited exception creditor provisions of Section 504(b).

15-5-505. CREDITOR'S CLAIM AGAINST SETTLOR.

(A) WHETHER OR NOT THE TERMS OF A TRUST CONTAIN A SPENDTHRIFT PROVISION, THE FOLLOWING RULES APPLY:

(1) DURING THE LIFETIME OF THE SETTLOR, THE PROPERTY OF A REVOCABLE TRUST IS SUBJECT TO CLAIMS OF THE SETTLOR'S CREDITORS.

(2) WITH RESPECT TO AN IRREVOCABLE TRUST, A CREDITOR OR ASSIGNEE OF THE SETTLOR MAY REACH THE MAXIMUM AMOUNT THAT CAN BE DISTRIBUTED TO OR FOR THE SETTLOR'S BENEFIT. IF A TRUST HAS MORE THAN ONE SETTLOR, THE AMOUNT THE CREDITOR OR ASSIGNEE OF A PARTICULAR SETTLOR MAY REACH MAY NOT EXCEED THE SETTLOR'S INTEREST IN THE PORTION OF THE TRUST ATTRIBUTABLE TO THAT SETTLOR'S CONTRIBUTION.

(I) NONE OF THE FOLLOWING SHALL BE CONSIDERED AN AMOUNT THAT CAN BE DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR:

(A) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR ONLY AS A RESULT OF THE EXERCISE OF A POWER OF APPOINTMENT HELD IN A NONFIDUCIARY CAPACITY BY ANY PERSON OTHER THAN THE SETTLOR;

(B) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR OF A TRUST PURSUANT TO THE POWER OF THE TRUSTEE TO MAKE DISTRIBUTIONS OR PURSUANT TO THE POWER OF ANOTHER IN A FIDUCIARY CAPACITY TO DIRECT DISTRIBUTIONS, IF AND TO THE EXTENT THAT THE DISTRIBUTIONS COULD BE MADE FROM TRUST PROPERTY THE VALUE OF WHICH WAS INCLUDED IN THE GROSS ESTATE OF THE SETTLOR'S SPOUSE FOR FEDERAL ESTATE TAX PURPOSES

UNDER SECTION 2041 OR 2044 OF THE INTERNAL REVENUE CODE OR THAT WAS TREATED AS A TRANSFER BY THE SETTLOR'S SPOUSE UNDER SECTION 2514 OR 2519 OF THE INTERNAL REVENUE CODE;

(C) TRUST PROPERTY THAT, PURSUANT TO THE EXERCISE OF A DISCRETIONARY POWER BY A PERSON OTHER THAN THE SETTLOR, COULD BE PAID TO A TAXING AUTHORITY OR TO REIMBURSE THE SETTLOR FOR ANY INCOME TAX ON TRUST INCOME OR PRINCIPAL THAT IS PAYABLE BY THE SETTLOR UNDER THE LAW IMPOSING THE TAX.

(II) THIS SUBDIVISION SHALL NOT APPLY TO AN IRREVOCABLE "SPECIAL NEEDS TRUST" ESTABLISHED FOR A DISABLED PERSON AS DESCRIBED IN 42 U.S.C. SECTION 1396P(D)(4) OR SIMILAR FEDERAL LAW GOVERNING THE TRANSFER TO SUCH A TRUST.

(3) AFTER THE DEATH OF A SETTLOR, THE PROPERTY OF A TRUST THAT WAS REVOCABLE AT THE SETTLOR'S DEATH IS SUBJECT TO CLAIMS AND ALLOWANCES AS PROVIDED IN § 15-15-103, C.R.S.

(B) RESERVED.

<u>Comparison of Proposed 505 and 505 as drafted in the UTC</u>:

15-5-505. Creditor's claim against settlor.

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(I) NONE OF THE FOLLOWING SHALL BE CONSIDERED AN AMOUNT THAT CAN BE DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR:

(A) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR ONLY AS A RESULT OF THE EXERCISE OF A POWER OF APPOINTMENT HELD IN A NONFIDUCIARY CAPACITY BY ANY PERSON OTHER THAN THE SETTLOR;

(B) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR OF A TRUST PURSUANT TO THE POWER OF THE TRUSTEE TO MAKE DISTRIBUTIONS OR PURSUANT TO THE POWER OF ANOTHER IN A FIDUCIARY CAPACITY TO DIRECT DISTRIBUTIONS, IF AND TO THE EXTENT THAT THE DISTRIBUTIONS COULD BE MADE FROM TRUST PROPERTY THE VALUE OF WHICH WAS INCLUDED IN THE GROSS ESTATE OF THE SETTLOR'S SPOUSE FOR FEDERAL ESTATE TAX PURPOSES UNDER SECTION 2041 OR 2044 OF THE INTERNAL REVENUE CODE OR THAT WAS TREATED AS A TRANSFER BY THE SETTLOR'S SPOUSE UNDER SECTION 2514 OR 2519 OF THE INTERNAL REVENUE CODE;

(C) TRUST PROPERTY THAT, PURSUANT TO THE EXERCISE OF A DISCRETIONARY POWER BY A PERSON OTHER THAN THE SETTLOR, COULD BE PAID TO A TAXING AUTHORITY OR TO REIMBURSE THE SETTLOR FOR ANY INCOME TAX ON TRUST INCOME OR PRINCIPAL THAT IS PAYABLE BY THE SETTLOR UNDER THE LAW IMPOSING THE TAX.

(II) THIS SUBDIVISION SHALL NOT APPLY TO AN IRREVOCABLE "SPECIAL NEEDS TRUST" ESTABLISHED FOR A DISABLED PERSON AS DESCRIBED IN 42 U.S.C. SECTION 1396P(D)(4) OR SIMILAR FEDERAL LAW GOVERNING THE TRANSFER TO SUCH A TRUST.

(3) After the death of a settlor, ~~and subject to the settlor's right to direct the source from which liabilities will be paid,~~ the property of a trust that was revocable at the settlor's death is subject to claims AND ALLOWANCES AS PROVIDED IN § 15-15-103, C.R.S. ~~of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].~~

(b) RESERVED. ~~For purposes of this section:~~

~~(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and~~

~~(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].~~

Uniform Law Comments.

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts Section 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103(15).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable

trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a $10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the $10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes Section 14-7705(g) and Texas Property Code Section 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC Sections 2041(b)(2) or 2514(e) [greater of 5% or $5,000], or IRC Section 2503(b) [$10,000 in 2001].

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1-13.7 (1986).

Colorado Committee Report:

(1) Regarding UTC Subsection (a)(1): Consistent with the Uniform Law Commission ("ULC") comments, and the 2005 committee's comments, the Committee found no reason to challenge the diminishing significance of the common law view that a revocable trust is subject to the settlor's creditors only if the settlor reserved the power to revoke [*Restatement (Second) of* Trusts §330, comment o (1959)]. Thus, the Committee recommended no changes to the UTC's proposed language that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living.

(2) Regarding UTC Subsection (a)(2): Consistent with the ULC comments and the 2005 committee's comments, the Committee agreed that a creditor of a settlor, who is also a beneficiary of a trust, may reach only the interest attributable to that settlor/beneficiary. The Committee then examined the definition of "settlor," and how to define the interest attributable to a settlor under various scenarios such as where:

a. a joint trust, qualified terminable interest property ("QTIP"), spousal lifetime access trust ("SLAT"), special needs trust ("SNT") exists;

b. property is titled in one spouse's name but is intended to be marital property;

c. a schedule of property denotes respective interests in the property (versus the presumption of a 50/50 equitable interest); and

d. distinctions between "contribution," "gift," and "interest."

The Committee considered Pandy v. Independent Bank, 372 P.3d 1047 (Colo. 2016) (judgment creditor allowed to seek to enforce its judgment against entire trust estate of a revocable trust co-settled by debtor), which case was decided prior to enactment of the Colorado Uniform Trust Code (CUTC).

The Committee also noted that other states had taken a variety of approaches to their respective enactments of CUTC §505 and concluded that the addition of Subsections (a)(2)(i)&(ii) were warranted to provide clarity regarding the interest of a settlor who is also a beneficiary of an irrevocable trust.

(3) Regarding proposed Subsection (a)(2)(i): The Committee specifically sought to address the issue of: What if the settlor is a beneficiary as a result of the exercise of a power of appointment, or the choice of someone else? That is, what if there is an intervening action between settling the trust and the settlor becoming a beneficiary of that trust? The proposed language is taken from the Ohio statute, which the Committee decided most clearly addressed the concerns regarding a beneficial interest received by the settlor through the exercise of a power of appointment by a third party.

(4) Regarding proposed Subsection (a)(2)(ii): The Committee considered whether an exception should be recommended for special needs trusts (SNTs). The proposed language is taken from Vermont statute, which expressly addressed SNTs, and includes a reference to the federal statute regarding self-settled SNTs.

(5) Regarding UTC Subsection (a)(3): The Committee decided that adding a reference to the allowances in § 15-15-103, C.R.S. (addressing liability of nonprobate assets for debts of the decedent), and deleting the stricken text, provided the most succinct and straightforward means of addressing the allowances to which revocable property in a trust may be subject upon the death of the settlor.

(6) Regarding UTC Subsection (b): The Committee chose to follow the 2005 committee's recommendation not to overrule the ruling in University National Bank v. Rhoadarmer, 827 P.2d 561 (Colo. App. 1991), and reserved the subsection for a future decision by the legislature regarding this policy matter.

15-5-506. Overdue Distribution.

(a) IN THIS SECTION, "MANDATORY DISTRIBUTION" MEANS A DISTRIBUTION OF INCOME OR PRINCIPAL WHICH THE TRUSTEE IS REQUIRED TO MAKE TO A BENEFICIARY UNDER THE TERMS OF THE TRUST, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST. THE TERM DOES NOT INCLUDE A DISTRIBUTION SUBJECT TO THE EXERCISE OF THE TRUSTEE'S DISCRETION EVEN IF (1) THE DISCRETION IS EXPRESSED IN THE FORM OF A STANDARD OF DISTRIBUTION, OR (2) THE TERMS OF THE TRUST AUTHORIZING A DISTRIBUTION COUPLE LANGUAGE OF DISCRETION WITH LANGUAGE OF DIRECTION.

(b) WHETHER OR NOT A TRUST CONTAINS A SPENDTHRIFT PROVISION, A CREDITOR OR ASSIGNEE OF A BENEFICIARY MAY REACH A MANDATORY DISTRIBUTION OF INCOME OR PRINCIPAL, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST, IF THE TRUSTEE HAS NOT MADE THE DISTRIBUTION TO THE BENEFICIARY WITHIN A REASONABLE TIME AFTER THE DESIGNATED DISTRIBUTION DATE.

Comparison of Proposed 506 and 506 as drafted in the UTC:

The sections are identical, except for this change in the first sentence of 506(a):

(a) IN THIS SECTION, "MANDATORY DISTRIBUTION" MEANS A DISTRIBUTION OF INCOME OR PRINCIPAL ~~THAT~~ WHICH THE TRUSTEE IS REQUIRED TO MAKE TO A BENEFICIARY UNDER THE TERMS OF THE TRUST, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST.

Uniform Law Comments.

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed 101 to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, "designated distribution date" was substituted for "required distribution date" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2005 Amendment. The amendment adds a clarifying definition of "mandatory distribution" in subsection (a), which is based on an Ohio proposal. The amendment:

· tracks the traditional understanding that a mandatory distribution includes a provision requiring that a beneficiary be paid the income of a trust or receive principal upon termination;

· correlates the definition of "mandatory distribution" in this section to the broad definition of discretionary trust used in Section 504. Under both Sections 504 and 506, a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary's support;

· addresses the situation where the terms of the trust couple language of discretion with language of direction. An example of such a provision is "my trustees shall, in their absolute discretion, distribute such amounts as are necessary for the beneficiary's support." Despite the presence of the imperative "shall," the provision is discretionary, not mandatory. For a more elaborate example of such a discretionary "shall" provision, see Marsman v. Nasca, 573 N.E. 2d 1025 (Mass. Ct. App. 1991).

· is clarifying. No change of substance is intended by this amendment. This amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as a provision requiring that the beneficiary receive an income or receive principal upon termination of the trust.

Colorado Committee Report (from 2005):

If a trustee fails to make a distribution to a beneficiary within a "reasonable time" after the express terms of the trust require the distribution to be made, the trustee has become an agent for the beneficiary and the creditors of such beneficiary may attach the distribution held back by the trustee. Such a distribution has already become an asset of the beneficiary.

It had been argued that some discretionary trust terms might be construed as creating "mandatory" interests (e.g. "trustee shall distribute principal and income for the beneficiary's support") and that 506 "creates" a right in the beneficiary to compel them. Therefore, it had been argued, a creditor could "stand in the shoes" of the beneficiary and compel the distribution. The drafters did not intend this result. A mandatory distribution is one that the trustee does not have discretion to withhold. Moreover, the intent of article 5 is to treat all discretionary trusts, whether expressed in the form of a standard or not, as discretionary for purposes of defining creditor's rights. New subsection (a) is being added to make the intent of 506 clear.

In some contexts, the word "shall" has been construed to mean "may" and vice versa. For discussion of the misuse of the word "shall" in legal documents see Brian A. Garner, A Dictionary of Modern Legal Usage, p. 939-942 (2nd, ed., Oxford University Press).

Restatement (Third) of Trusts Section 58 cmt. d:

Overdue or delayed distributions. The statement in the Comment concerning what might be called "overdue" or "delayed" distributions involves a little-developed area. Restatement Second, Trusts § 153(2), and Comment *c* thereto, would seem to support the position of this Comment with respect to rights in *principal* (if the beneficiary "is entitled to have the principal paid or conveyed to him immediately" a restraint is not valid), but id. § 152, Comment *h*, is not supportive with respect to *income*. On the latter, compare Travelers Bank & Trust Co. v. Birge, 136 Conn. 21, 68 A.2d 138 (1949), with Jarcho Bros., Inc. v. Leverich, 240 App.Div. 783, 265 N.Y. Supp. 919 (1933), and Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688 (1955), and also Bogert & Bogert, *The Law of Trusts and Trustees*, supra at § 227 (pp. 514-515), which, after properly recognizing that "[i]f the trust income is accumulated pending payment upon a regular payment date, most courts agree that the protection of the spendthrift provisions remains applicable," goes on to acknowledge the Restatement Second of Trusts position (above) where the trustee may have failed to pay the accumulated income on a quarterly or other payment date, before continuing: "However the beneficiary may attempt to avoid receipt of an income payment by requesting that the trustee hold the accumulated income on his demand, … or by agreement with the trustee to alter the payment dates. In any such case it would seem that the accumulated income has become absolutely due and owing the beneficiary and should be subject to the claims of his creditors. Two theories may be advanced for this conclusion. The first is that as to the accumulated income the trust has become a dry or passive trust and becomes fully executed. The second theory is that by this conduct the beneficiary has unilaterally altered the terms of the trust and has therefore made himself the settlor of the accumulated income under his own revocable trust."

See MacDonald v. Joslyn, 17 Ill.App.3d 52, 307 N.E.2d 601 (1974) (regular quarterly income payment to life beneficiary not made when beneficiary could not be located; judgment creditors allowed to reach the income despite state's statutory restraint on involuntary alienation). More importantly for present purposes, unduly delayed distributions of *either* income or principal seem properly subject to the presently exercisable general power of appointment or withdrawal (or "equivalent to ownership") rule of Comment *b* of this Section, for which in all other contexts the authorities seem solidly supportive.

Notes of Decisions on UTC 506

Under Kansas law, the court and creditors are not powerless to compel a trustee's distribution under a trust. In re Hilgers, Bkrtcy.D.Kan.2006, 352 B.R. 298, affirmed 371 B.R. 465, affirmed 279 Fed.Appx. 662, 2008 WL 2127657.

Under Arkansas law, if trustee fails to make a timely distribution from spendthrift trust, the distribution, even while under control of trustee, can be reached by creditors of beneficiary. In re Reagan, W.D.Ark.2010, 433 B.R. 263, affirmed 649 F.3d 831.

Under Kansas law, trustees of three revocable trusts had duty to expeditiously wind up estates and make distributions to remainder beneficiaries when trusts terminated upon death of last life beneficiary, and trustees' unjustified failure to do so within reasonable time entitled creditors of one remainder beneficiary to reach distributions that were then due to such beneficiary. In re Hilgers, 10th Cir.BAP (Kan.) 2007, 371 B.R. 465, affirmed 279 Fed.Appx. 662, 2008 WL 2127657.

Spendthrift provision in instrument creating revocable trust, stating that "[t]he interest of any beneficiary in the income and/or principal of any trust created under this Agreement shall not be subject to alienation [or] anticipation," did not protect the specific bequests that successor trustee was directed to make upon death of the settlor, the original trustee of trust, or prevent bequests to which debtor was entitled upon settlor's death, prior to commencement of debtor's bankruptcy case, from entering bankruptcy estate; spendthrift provision protected only the residuary estate that was held in trust for benefit of named beneficiaries. In re Caubble, Bkrtcy.E.D.Ark.2014, 505 B.R. 857.

Spendthrift provisions of revocable trusts for which Chapter 7 debtor was remainder beneficiary ceased to be effective prior to debtor's bankruptcy filing under Kansas law, due to termination of trusts upon death of last life beneficiary and provision of Kansas Uniform Trust Code (KUTC) entitling creditors of trust beneficiaries to reach mandatory distributions when not made by trustee within reasonable time after mandated distribution date, and therefore debtor's interests in trusts became property of his bankruptcy estate and were subject to turnover to Chapter 7 trustee. In re Hilgers, 10th Cir.BAP (Kan.) 2007, 371 B.R. 465, affirmed 279 Fed.Appx. 662, 2008 WL 2127657.

15-5-507. Personal Obligations of Trustee

TRUST PROPERTY IS NOT SUBJECT TO PERSONAL OBLIGATIONS OF THE TRUSTEE, EVEN IF THE TRUSTEE BECOMES INSOLVENT OR BANKRUPT.

No changes from the UTC are recommended for the proposed Colorado statute.

Uniform Law Comments.

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).

Colorado Committee Report.

UTC Section 507 was created and added during the UTC drafting process. Colorado attorney James R. Walker served as an Observer on the UTC Drafting Committee. During an informal discussion with Professor John Langbein, Mr. Walker mentioned the recent *Lagae v. Lackner* Colorado Supreme Court decision, 996 P.2d 1281 (Colo. 2000), holding that a trustee's personal creditor could not attach a beneficiary's equitable interest in trust property. Mr. Walker also noted that the concept of trust property immunity for trustee personal obligations was not set forth in the black letter provisions of the Restatements. Instead, Mr. Walker expressed, you have to "dig" the concept out of the Restatement comments. *See, e.g.*, Restatement (Second) Trusts § 12 cmt. (a).

Following this discussion, the next version of the UTC contained Section 507. Most likely, it was Professor Langbein who added the Drafting Committee narrative regarding Anglo-American Trust and the Hague convention.

Lagae's program stemmed from the real estate "curative" statute passed in the 1930s. This curative statute created a remedy for "as trustee" deeds by allowing the deed to carry both legal and equitable title. The problem and the *Lagae* holding are explained in a July 2000 CBA *Trust & Estate Section Council Notes* article.

First Regular Session
Seventy-third General Assembly
STATE OF COLORADO

DRAFT
10.20.20

DRAFT

LLS NO. 21-0201.01 Conrad Imel x2313 **COMMITTEE BILL**

Colorado Commission on Uniform State Laws

BILL TOPIC: "Colorado Uniform Trust Code Part 5"

A BILL FOR AN ACT

CONCERNING SPENDTHRIFT PROVISIONS IN TRUSTS PURSUANT TO THE "COLORADO UNIFORM TRUST CODE".

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Colorado Commission on Uniform State Laws. In 2018, the general assembly enacted portions of the Uniform Trust Code (UTC) as the Colorado Uniform Trust Code. Part 5 of the UTC, which relates to spendthrift provisions in trusts, was not included in the 2018 act. A spendthrift provision in a trust prevents both voluntary and involuntary transfer of a trust beneficiary's interest.

The bill enacts part 5 of the UTC, including a number of Colorado-specific amendments. The bill addresses the validity of spendthrift provisions and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. The bill provides certain exceptions that allow children for whom an order or judgment for child support has been entered to reach a trust in order to satisfy the child support order or judgment.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** part 5 to article 5 of title 15 as follows:

PART 5

CREDITOR'S CLAIMS;

SPENDTHRIFT AND DISCRETIONARY TRUSTS

15-5-501. Rights of beneficiary's creditor or assignee. EXCEPT AS PROVIDED IN SECTION 15-5-504, TO THE EXTENT A BENEFICIARY'S INTEREST IS NOT SUBJECT TO A SPENDTHRIFT PROVISION, THE COURT MAY AUTHORIZE A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO ATTACH PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES. NOTHING IN THIS PART 5 MODIFIES OTHER COLORADO LAW GOVERNING LIMITATIONS ON THE AMOUNTS THAT MAY BE APPLIED TO THE SATISFACTION OF A CREDITOR'S CLAIM, OR THE PROCEDURES BY WHICH A CREDITOR MAY ATTEMPT TO SATISFY A CLAIM.

15-5-502. Spendthrift provision. (1) A SPENDTHRIFT PROVISION IS VALID ONLY IF IT RESTRAINS BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF A BENEFICIARY'S INTEREST.

(2) A TERM OF A TRUST PROVIDING THAT THE INTEREST OF A BENEFICIARY IS HELD SUBJECT TO A "SPENDTHRIFT TRUST", OR WORDS OF

SIMILAR IMPORT, IS SUFFICIENT TO RESTRAIN BOTH VOLUNTARY AND INVOLUNTARY TRANSFER OF THE BENEFICIARY'S INTEREST.

(3) A BENEFICIARY MAY NOT TRANSFER AN INTEREST IN A TRUST IN VIOLATION OF A VALID SPENDTHRIFT PROVISION AND, EXCEPT AS OTHERWISE PROVIDED IN THIS PART 5, A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH THE INTEREST OR A DISTRIBUTION BY THE TRUSTEE BEFORE ITS RECEIPT BY THE BENEFICIARY.

(4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY'S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY'S BENEFIT, AND NO TRUSTEE IS LIABLE TO ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

(5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY'S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE'S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

15-5-503. Exceptions to spendthrift provision - definitions. (1) IN THIS SECTION:

(a) "CHILD" INCLUDES ANY PERSON OR ENTITY WHO CAN ENFORCE A CHILD SUPPORT ORDER IN THIS OR ANOTHER STATE.

(b) "CHILD SUPPORT ORDER" MEANS ANY ADMINISTRATIVE OR COURT ORDER REQUIRING THE PAYMENT OF CHILD SUPPORT, CHILD

SUPPORT ARREARS, CHILD SUPPORT DEBT, RETROACTIVE SUPPORT, OR MEDICAL SUPPORT. IF A CHILD SUPPORT ORDER IS COMBINED WITH AN ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT, THE TERM "CHILD SUPPORT ORDER" SHALL NOT INCLUDE ANY PORTION OF THE ORDER FOR SPOUSAL MAINTENANCE OR SUPPORT.

(2) A SPENDTHRIFT PROVISION IS UNENFORCEABLE AGAINST:

(a) A CHILD WHO IS AN OBLIGEE PURSUANT TO A CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGOR; AND

(b) A JUDGMENT CREDITOR WHO HAS PROVIDED ESSENTIAL SERVICES FOR THE PROTECTION OF A BENEFICIARY'S INTEREST IN THE TRUST.

(2.5) SUBSECTION (2) OF THIS SECTION DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING THE PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SUPPLEMENTAL SECURITY INCOME.

(3) THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO OBTAIN FROM A COURT AN ORDER ATTACHING PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES.

15-5-504. Discretionary trusts - effect of standard - definition.

(1) IN THIS SECTION, "CHILD" INCLUDES ANY PERSON FOR WHOM AN ORDER OR JUDGMENT FOR CHILD SUPPORT HAS BEEN ENTERED IN THIS OR

ANOTHER STATE.

(2) EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (3) OF THIS SECTION, WHETHER OR NOT A TRUST CONTAINS A SPENDTHRIFT PROVISION, A CREDITOR OF A BENEFICIARY MAY NOT COMPEL A DISTRIBUTION THAT IS SUBJECT TO THE TRUSTEE'S DISCRETION, EVEN IF:

(a) THE DISCRETION IS EXPRESSED IN THE FORM OF A STANDARD OF DISTRIBUTION; OR

(b) THE TRUSTEE HAS ABUSED THE DISCRETION.

(3) TO THE EXTENT A TRUSTEE HAS NOT COMPLIED WITH A STANDARD OF DISTRIBUTION OR HAS ABUSED A DISCRETION:

(a) A DISTRIBUTION MAY BE ORDERED BY THE COURT TO SATISFY A JUDGMENT OR COURT ORDER AGAINST THE BENEFICIARY FOR SUPPORT OR MAINTENANCE OF THE BENEFICIARY'S CHILD; AND

(b) THE COURT SHALL DIRECT THE TRUSTEE TO PAY TO THE CHILD SUCH AMOUNT AS IS EQUITABLE UNDER THE CIRCUMSTANCES BUT NOT MORE THAN THE AMOUNT THE TRUSTEE WOULD HAVE BEEN REQUIRED TO DISTRIBUTE TO OR FOR THE BENEFIT OF THE BENEFICIARY HAD THE TRUSTEE COMPLIED WITH THE STANDARD OR NOT ABUSED THE DISCRETION.

(3.5) SUBSECTION (3) OF THIS SECTION DOES NOT APPLY TO A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A PERSON IF ITS APPLICATION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME PURPOSES OR IF ITS APPLICATION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING SUCH PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SUPPLEMENTAL SECURITY INCOME.

(4) THIS SECTION DOES NOT LIMIT THE RIGHT OF A BENEFICIARY TO MAINTAIN A JUDICIAL PROCEEDING AGAINST A TRUSTEE FOR AN ABUSE OF DISCRETION OR FAILURE TO COMPLY WITH A STANDARD FOR DISTRIBUTION.

(5) IF THE TRUSTEE'S OR COTRUSTEE'S DISCRETION TO MAKE DISTRIBUTIONS FOR THE TRUSTEE'S OR COTRUSTEE'S OWN BENEFIT IS LIMITED BY AN ASCERTAINABLE STANDARD, A CREDITOR MAY NOT REACH OR COMPEL DISTRIBUTION OF THE BENEFICIAL INTEREST EXCEPT TO THE EXTENT THE INTEREST WOULD BE SUBJECT TO THE CREDITOR'S CLAIM WERE THE BENEFICIARY NOT ACTING AS TRUSTEE OR COTRUSTEE.

15-5-505. Creditor's claim against a settlor. (1) WHETHER OR NOT THE TERMS OF A TRUST CONTAIN A SPENDTHRIFT PROVISION, THE FOLLOWING RULES APPLY:

(a) DURING THE LIFETIME OF THE SETTLOR, THE PROPERTY OF A REVOCABLE TRUST IS SUBJECT TO CLAIMS OF THE SETTLOR'S CREDITORS.

(b) WITH RESPECT TO AN IRREVOCABLE TRUST, A CREDITOR OR ASSIGNEE OF THE SETTLOR MAY REACH THE MAXIMUM AMOUNT THAT CAN BE DISTRIBUTED TO OR FOR THE SETTLOR'S BENEFIT. IF A TRUST HAS MORE THAN ONE SETTLOR, THE AMOUNT THE CREDITOR OR ASSIGNEE OF A PARTICULAR SETTLOR MAY REACH MAY NOT EXCEED THE SETTLOR'S INTEREST IN THE PORTION OF THE TRUST ATTRIBUTABLE TO THAT SETTLOR'S CONTRIBUTION.

(c) AFTER THE DEATH OF A SETTLOR, THE PROPERTY OF A TRUST THAT WAS REVOCABLE AT THE SETTLOR'S DEATH IS SUBJECT TO CLAIMS AND ALLOWANCES AS PROVIDED IN SECTION 15-15-103.

(1.5) (a) FOR THE PURPOSES OF SUBSECTION (1)(b) OF THIS SECTION, NONE OF THE FOLLOWING SHALL BE CONSIDERED AN AMOUNT THAT CAN BE DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR:

(I) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR ONLY AS A RESULT OF THE EXERCISE OF A POWER OF APPOINTMENT HELD IN A NONFIDUCIARY CAPACITY BY ANY PERSON OTHER THAN THE SETTLOR;

(II) TRUST PROPERTY THAT COULD BE, BUT HAS NOT YET BEEN, DISTRIBUTED TO OR FOR THE BENEFIT OF THE SETTLOR OF A TRUST PURSUANT TO THE POWER OF THE TRUSTEE TO MAKE DISTRIBUTIONS OR PURSUANT TO THE POWER OF ANOTHER IN A FIDUCIARY CAPACITY TO DIRECT DISTRIBUTIONS, IF AND TO THE EXTENT THAT THE DISTRIBUTIONS COULD BE MADE FROM TRUST PROPERTY THE VALUE OF WHICH WAS INCLUDED IN THE GROSS ESTATE OF THE SETTLOR'S SPOUSE FOR FEDERAL ESTATE TAX PURPOSES UNDER SECTION 2041 OR SECTION 2044 OF THE "INTERNAL REVENUE CODE OF 1986", AS AMENDED, OR THAT WAS TREATED AS A TRANSFER BY THE SETTLOR'S SPOUSE UNDER SECTION 2514 OR SECTION 2519 OF THE "INTERNAL REVENUE CODE OF 1986", AS AMENDED; AND

(III) TRUST PROPERTY THAT, PURSUANT TO THE EXERCISE OF A DISCRETIONARY POWER BY A PERSON OTHER THAN THE SETTLOR, COULD BE PAID TO A TAXING AUTHORITY OR TO REIMBURSE THE SETTLOR FOR ANY INCOME TAX ON TRUST INCOME OR PRINCIPAL THAT IS PAYABLE BY THE SETTLOR UNDER THE LAW IMPOSING THE TAX.

(b) SUBSECTION (1)(b) OF THIS SECTION SHALL NOT APPLY TO AN IRREVOCABLE SPECIAL NEEDS TRUST ESTABLISHED FOR A DISABLED PERSON AS DESCRIBED IN 42 U.S.C. SEC. 1396p (d)(4) OR SIMILAR FEDERAL LAW GOVERNING THE TRANSFER TO SUCH A TRUST.

(2) RESERVED.

15-5-506. Overdue distribution - definition. (1) IN THIS

SECTION, "MANDATORY DISTRIBUTION" MEANS A DISTRIBUTION OF INCOME OR PRINCIPAL WHICH THE TRUSTEE IS REQUIRED TO MAKE TO A BENEFICIARY UNDER THE TERMS OF THE TRUST, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST. THE TERM DOES NOT INCLUDE A DISTRIBUTION SUBJECT TO THE EXERCISE OF THE TRUSTEE'S DISCRETION, EVEN IF THE DISCRETION IS EXPRESSED IN THE FORM OF A STANDARD OF DISTRIBUTION, OR THE TERMS OF THE TRUST AUTHORIZING A DISTRIBUTION COUPLE LANGUAGE OF DISCRETION WITH LANGUAGE OF DIRECTION.

(2) WHETHER OR NOT A TRUST CONTAINS A SPENDTHRIFT PROVISION, A CREDITOR OR ASSIGNEE OF A BENEFICIARY MAY REACH A MANDATORY DISTRIBUTION OF INCOME OR PRINCIPAL, INCLUDING A DISTRIBUTION UPON TERMINATION OF THE TRUST, IF THE TRUSTEE HAS NOT MADE THE DISTRIBUTION TO THE BENEFICIARY WITHIN A REASONABLE TIME AFTER THE DESIGNATED DISTRIBUTION DATE.

15-5-507. Personal obligations of trustee. TRUST PROPERTY IS NOT SUBJECT TO PERSONAL OBLIGATIONS OF THE TRUSTEE, EVEN IF THE TRUSTEE BECOMES INSOLVENT OR BANKRUPT.

15-5-508. Application of part. (1) THIS PART 5 APPLIES TO ALL TRUSTS CREATED BEFORE, ON, OR AFTER JANUARY 1, 2022.

(2) THIS PART 5 APPLIES TO ALL JUDICIAL PROCEEDINGS CONCERNING TRUSTS COMMENCED ON OR AFTER JANUARY 1, 2022.

(3) THIS PART 5 APPLIES TO JUDICIAL PROCEEDINGS CONCERNING TRUSTS COMMENCED BEFORE JANUARY 1, 2022, UNLESS THE COURT FINDS THAT APPLICATION OF A PARTICULAR PROVISION OF THIS PART 5 WOULD SUBSTANTIALLY INTERFERE WITH THE EFFECTIVE CONDUCT OF THE JUDICIAL PROCEEDINGS OR PREJUDICE THE RIGHTS OF THE PARTIES, IN

WHICH CASE THE PARTICULAR PROVISION OF THIS PART 5 DOES NOT APPLY AND THE SUPERSEDED LAW APPLIES.

(4) ANY RULE OF CONSTRUCTION OR PRESUMPTION PROVIDED IN THIS PART 5 APPLIES TO TRUST INSTRUMENTS EXECUTED BEFORE JANUARY 1, 2022, UNLESS THERE IS A CLEAR INDICATION OF A CONTRARY INTENT IN THE TERMS OF THE TRUST.

(5) AN ACT DONE BEFORE JANUARY 1, 2022, IS NOT AFFECTED BY THIS PART 5.

(6) IF A RIGHT AFFECTED BY THIS PART 5 IS ACQUIRED, EXTINGUISHED, OR BARRED UPON THE EXPIRATION OF A PRESCRIBED PERIOD THAT HAS COMMENCED TO RUN PURSUANT TO ANY OTHER STATUTE BEFORE JANUARY 1, 2022, THEN THE PERIOD PRESCRIBED BY THAT STATUTE CONTINUES TO APPLY TO THE RIGHT.

SECTION 2. In Colorado Revised Statutes, 15-5-105, **add** (2)(e) as follows:

15-5-105. Default and mandatory rules. (2) Subject to sections 15-16-809, 15-16-810, and 15-16-811, the terms of a trust prevail over any provision of this code except:

(e) THE EFFECT OF A SPENDTHRIFT PROVISION AND THE RIGHTS OF CERTAIN CREDITORS AND ASSIGNEES TO REACH A TRUST AS PROVIDED IN PART 5 OF THIS ARTICLE 5;

SECTION 3. In Colorado Revised Statutes, 15-5-816, **amend** (1)(u) introductory portion as follows:

15-5-816. Specific powers of trustee. (1) Without limiting the authority conferred by section 15-5-815, and in addition to the powers conferred pursuant to the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15, a trustee may:

(u) Pay an amount distributable to a beneficiary BY PAYING IT DIRECTLY TO THE BENEFICIARY OR APPLYING IT FOR THE BENEFICIARY'S BENEFIT AND, IN THE CASE OF A BENEFICIARY who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit or by:

SECTION 4. In Colorado Revised Statutes, 15-5-1404, **amend** (1) introductory portion as follows:

15-5-1404. Application to existing relationships. (1) Except as otherwise provided in this article 5, INCLUDING SECTION 15-5-508, on January 1, 2019:

SECTION 5. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

RULE CHANGE 2020(16)
COLORADO RULES OF PROBATE PROCEDURE

PART 9. REMOTE WITNESSING OF DOCUMENTS

Rule 91. Remote Witnessing of Certain Non-Testamentary Instruments

(a) Any of the following documents is signed in the presence of a witness if the witness observes the signing through real-time audio-video communication in accordance with this rule:

(1) Declaration as to medical treatment, as provided under §15-18-104, C.R.S.;

(2) Behavior health order for scope of treatment, as provided under § 15-18.7-202, C.R.S.; and

(3) Anatomical gift, as provided under § 15-19-205, C.R.S., including an anatomical gift contained within a declaration as to surgical treatment described in subsection (a)(1) or within a medical durable power of attorney, as provided under § 15-14-506, C.R.S.

(b) The use of real-time audio-video communication to witness the signing of a document described in subsection (a) is subject to the following requirements with respect to each remotely located witness:

(1) "Real-time audio-video communication" means an electronic system of communication by which remotely located individuals are able to see, hear, and communicate with one another, substantially simultaneously and without interruption or disconnection. Delays of a few seconds that are inherent in the method of communication do not prevent the interaction from being considered to have occurred in real time.

(2) At the time of the document's signing:

A. Each signer and witness must be a domiciliary of and located within the State of Colorado; and

B. Each witness must be otherwise qualified to sign the document under any applicable statute.

(3) During real-time audio-video communication:

A. Prior to the document's signing, the signer of the document must:

(i) Make available for remote examination by the witness a complete copy of the unsigned document and, if the signer is not personally known to the witness, the signer's government-issued photo identification; and

(ii) Orally state to the witness the signer's name; the name, purpose, and number of pages of the document to be signed; and the signer's current location and State of domicile.

B. Prior to the document's signing, each witness must:

(i) Confirm the identity of the signer either by personal knowledge or by examining the signer's government-issued photo identification; and

(ii) Confirm that the name, purpose, and number of pages of the document to be signed as described by the signer match the copy of the unsigned document examined by the witness.

C. The signer must sign the document; and the witness must observe the signer's signing of the document.

(4) The signer must transmit a copy of the signed document by fax, email, or other means to the witness within a reasonable period after signing the document.

(5) Within 14 days after receiving a copy of the signed document, each remotely located witness must:

A. Certify his or her witnessing of the document's signing in a form substantially similar to the following:

I certify that on _____, 20__, I witnessed, through the use of real-time audio-visual communication, _____ (the "signer") sign the _____ (the "document"); and during the audio-visual communication I (a) confirmed the identity of the signer, (b) observed the signer's signing of the document, and (c) confirmed that the signed document had the same name, purpose, and number of pages as represented to me by the signer prior to his or her signing.

B. Transmit a copy of the signed document with the completed witness certification to the signer by fax, email, or other means.

(c) Except as otherwise provided by statute, a non-testamentary instrument executed pursuant to subsection (b) of this rule is effective as of the date the signer signed the instrument.

(d) This rule shall be effective during any period in which the Governor of Colorado, by executive order, has formally declared the existence of a public health crisis that, by the terms of such order, requires social or physical distancing throughout Colorado.

Comment

2020

This rule was promulgated by the Colorado Supreme Court's Probate Rules Committee during the COVID-19 pandemic to address issues arising from the Governor's Order D 2020 017, dated March 25, 2020, concerning social and physical distancing.

Rule 92. Remote Witnessing of Certain Testamentary Instruments

(a) A will, as defined under § 15-10-201(59), C.R.S., that is signed by a testator and attested by two qualified witnesses through the use of real-time audio-video communication, or by one witness in the testator's physical presence and the second qualified witness through the use of real-time audio-video communication, as defined in Rule 91(b)(1), shall constitute a valid attested will under C.R.S. § 15-11-502(1)(c)(I) if each of the following conditions is satisfied:

(1) Each of the witnesses must be either (a) a licensed Colorado attorney of whom the testator is a current client within the meaning of the Colorado Rules of Professional Conduct, or (b) if that attorney is a participant in the document's execution, any other lawyer or nonlawyer assistant whose professional activities are regularly performed under the authority of the attorney or the attorney's law firm.

(2) The requirements set forth in subsection (b) of Rule 91 must be satisfied and certified with respect to each witness's attestation of the will, subject to the following modifications:

A. The certification of a remotely located witness, in the form required by subsection (b)(5)A of Rule 91, must be contained in the will. A separate document of certification by a remotely located witness cannot be used to attest a will under this rule.

B. If more than one remotely located witness attests the will, the will must contain multiple certifications.

(3) After the will has been signed and attested:

A. Within a reasonable time after the will's signing, the original, signed will must be presented to an attorney who has witnessed the will's signing, or who is affiliated with or supervising other witnesses, as provided under subsection (a)(1) of this rule;

B. Within a reasonable time after receiving the original, signed will, the attorney must confirm that the document is identical to the will remotely witnessed under subsection (a)(2) of this rule; and

C. Within a reasonable period after confirming the will's status under subsection (a)(3)B of this rule:

i. The original, signed will must be presented to each witness who remotely attested the will's signing under subsection (a)(2) of this rule; and

ii. Each such witness must sign a witness certification in the original will in the same manner as that witness's certification was completed and signed for purposes of subsection (a)(2) of this rule.

(b) A will signed and attested in accordance with subsection (a) of this rule is executed as of the date the testator signed the will.

(c) If any portion of a will is executed pursuant to this rule, the will must be presented to the court in a formal testacy proceeding pursuant to C.R.S. 15-12-401 et seq.

(d) This rule shall be effective during any period in which the Governor of Colorado, by executive order, has formally declared the existence of a public health crisis that, by the terms of such order, requires social or physical distancing throughout Colorado.

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A. Prior to the document's signing, the signer of the document must:

(i) Make available for remote examination by the witness a complete copy of the unsigned document and, if the signer is not personally known to the witness, the signer's government-issued photo identification; and

(ii) Orally state to the witness the signer's name; the name, purpose, and number of pages of the document to be signed; and the signer's current location and State of domicile.

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(i) Confirm the identity of the signer either by personal knowledge or by examining the signer's government-issued photo identification; and

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B. Transmit a copy of the signed document with the completed witness certification to the signer by fax, email, or other means.

(c) Except as otherwise provided by statute, a non-testamentary instrument executed pursuant to subsection (b) of this rule is effective as of the date the signer signed the instrument.

(d) This rule shall be effective during any period in which the Governor of Colorado, by executive order, has formally declared the existence of a public health crisis that, by the terms of such order, requires social or physical distancing throughout Colorado.

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(1) Each of the witnesses must be either (a) a licensed Colorado attorney of whom the testator is a current client within the meaning of the Colorado Rules of Professional Conduct, or (b) if that attorney is a participant in the document's execution, any other lawyer or nonlawyer assistant whose professional activities are regularly performed under the authority of the attorney or the attorney's law firm.

(2) The requirements set forth in subsection (b) of Rule 91 must be satisfied and certified with respect to each witness's attestation of the will, subject to the following modifications:

A. The certification of a remotely located witness, in the form required by subsection (b)(5)A of Rule 91, must be contained in the will. A separate document of certification by a remotely located witness cannot be used to attest a will under this rule.

B. If more than one remotely located witness attests the will, the will must contain multiple certifications.

(3) After the will has been signed and attested:

A. Within a reasonable time after the will's signing, the original, signed will must be presented to an attorney who has witnessed the will's signing, or who is affiliated with or supervising other witnesses, as provided under subsection (a)(1) of this rule;

B. Within a reasonable time after receiving the original, signed will, the attorney must confirm that the document is identical to the will remotely witnessed under subsection (a)(2) of this rule; and

C. Within a reasonable period after confirming the will's status under subsection (a)(3)B of this rule:

i. The original, signed will must be presented to each witness who remotely attested the will's signing under subsection (a)(2) of this rule; and

ii. Each such witness must sign a witness certification in the original will in the same manner as that witness's certification was completed and signed for purposes of subsection (a)(2) of this rule.

(b) A will signed and attested in accordance with subsection (a) of this rule is executed as of the date the testator signed the will.

(c) If any portion of a will is executed pursuant to this rule, the will must be presented to the court in a formal testacy proceeding pursuant to C.R.S. 15-12-401 et seq.

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Amended and Adopted by the Court, En Banc, April 24, 2020, effective immediately.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court