TITLE 15

PROBATE, TRUSTS, AND FIDUCIARIES

FIDUCIARY

Art. 1. Fiduciary, 15-1-101 to 15-1-1518.

Art. 1.1. Uniform Prudent Investor Act, 15-1.1-101 to 15-1.1-115.

Art. 1.2. Uniform Fiduciary Income and Principal Act, 15-1.2-101 to 15-1.2-804.

Art. 1.5. Colorado Uniform Custodial Trust Act, 15-1.5-101 to 15-1.5-122.

POWERS OF APPOINTMENT

Art. 2. Powers of Appointment (Repealed).

Art. 2.5. Uniform Powers of Appointment Act, 15-2.5-101 to 15-2.5-603.

COLORADO UNIFORM TRUST CODE

Art. 5. Colorado Uniform Trust Code, 15-5-101 to 15-5-1404.

COLORADO PROBATE CODE

Art. 10. General Provisions, Definitions, Jurisdiction, 15-10-101 to 15-10-606.

Art. 11. Intestate Succession and Wills, 15-11-101 to 15-11-1311.

Art. 12. Probate of Wills and Administration, 15-12-101 to 15-12-1414.

Art. 13. Ancillary Administration, 15-13-101 to 15-13-401.

Art. 14. Persons Under Disability - Protection, 15-14-101 to 15-14-806.

Art. 14.5. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, 15-14.5-101 to 15-14.5-503.

Art. 15. Nonprobate Transfers on Death, 15-15-101 to 15-15-415.

Art. 16. Trust Administration, 15-16-801 to 15-16-931.

Art. 17. Effective Date - Transition, 15-17-101 to 15-17-103.

DECLARATIONS - FUTURE HEALTH CARE TREATMENT

Art. 18. Colorado Medical Treatment Decision Act, 15-18-101 to 15-18-113.

Art. 18.5. Proxy and Surrogate Decision-makers for Medical Treatment and Health-Care Benefit Decisions, 15-18.5-101 to 15-18.5-105.

Art. 18.6. Directive Relating to Cardiopulmonary Resuscitation, 15-18.6-101 to 15-18.6-108.

Art. 18.7. Directives Concerning Orders for Scope of Treatment, 15-18.7-101 to 15-18.7-207.

HUMAN BODIES AFTER DEATH

Art. 19. Treatment of Human Bodies After Death, 15-19-101 to 15-19-309.

COMMUNITY PROPERTY RIGHTS

Art. 20. Uniform Community Property Disposition at Death Act, 15-20-101 to 15-20-116.

DESIGNATED BENEFICIARY AGREEMENTS

Art. 22. Designated Beneficiary Agreements, 15-22-101 to 15-22-112.

ABANDONED ESTATE PLANNING DOCUMENTS

Art. 23. Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, 15-23-101 to 15-23-122.

NON-TESTAMENTARY ELECTRONIC ESTATE PLANNING DOCUMENTS

Art. 24. Uniform Non-Testamentary Electronic Estate Planning Documents Act, 15-24-101 to 15-24-403.

FIDUCIARY

ARTICLE 1

Fiduciary

PART 1
GENERAL PROVISIONS

15-1-101. Short title.

15-1-102. Legislative declaration.

15-1-103. Definitions.

15-1-104. Prior transactions.

15-1-105. Application of payments to fiduciary.

15-1-106. Transfer of negotiable instruments by fiduciary.

15-1-107. Check drawn by fiduciary payable to third person, effect.

15-1-108. Check drawn by and payable to fiduciary, effect.

15-1-109. Deposit in name of fiduciary.

15-1-110. Check drawn upon account of principal by fiduciary.

15-1-111. Deposits in personal account of fiduciary.

15-1-112. Deposits in name of two or more trustees.

15-1-112.5. Liability of a fiduciary for acts of predecessor fiduciary.

15-1-113. Cases not provided for in law.

PART 2
DISTRIBUTION BY FIDUCIARIES OF EXPRESS TRUSTS

15-1-201. When part 2 applicable.

15-1-201.5. Definitions.

15-1-202. Trustee not liable, when.

15-1-203. No liability if distribution under instrument.

15-1-204. Rights of appointees.

15-1-205. Rights of persons entitled.

15-1-206. Rights of bona fide purchasers.

PART 3
FIDUCIARY INVESTMENTS

15-1-301. Fiduciary defined.

15-1-302. Application.

15-1-303. Construction of part 3.

15-1-304. Standard for investments.

15-1-304.1. Standard for investments on and after July 1, 1995 - "Colorado Uniform Prudent Investor Act".

15-1-305. Terms of instrument govern.

15-1-306. Court not restricted.

15-1-307. Powers of investment in persons other than fiduciary. (Repealed)

15-1-308. Investments in United States government obligations.

PART 4
UNIFORM PRINCIPAL AND INCOME ACT

15-1-401 to

15-1-468. (Repealed)

PART 5
FIDUCIARY PROPERTY - DEPOSITORY NOMINEES

15-1-501. Fiduciary property kept separate.

15-1-502. Nominees.

15-1-503. Fiduciary property deposits.

15-1-504. Holding of securities by fiduciary or depository of fiduciary property.

15-1-505. Records.

15-1-506. Liability of issuer.

15-1-507. Custodian as fiduciary.

15-1-508. Individual and corporate fiduciaries.

15-1-509. Fiduciary duty.

15-1-510. Application.

PART 6
UNIFORM FIDUCIARY SECURITY TRANSFERS ACT

15-1-601 to

15-1-611. (Repealed)

PART 7
FIDUCIARY INTERESTS IN ENTITIES

15-1-701. Power to become partner.

15-1-702. Family business interests - maintenance of entity - formation of successor entity.

PART 8
POWERS

15-1-801. Short title.

15-1-802. Definitions.

15-1-803. Powers conferred on fiduciaries.

15-1-804. Powers available.

15-1-805. Powers of fiduciary conferred by court.

15-1-806. Third persons protected in dealing with fiduciary.

15-1-807. Applicability.

PART 9
DISCLAIMER OF SUCCESSION - NONTESTAMENTARY INSTRUMENTS

15-1-901 to

15-1-907. (Repealed)

PART 10
CHARITABLE, EDUCATIONAL, RELIGIOUS, AND BENEVOLENT TRUSTS

15-1-1001. Legislative declaration.

15-1-1002. Prohibition of certain acts - amendment of governing instrument.

15-1-1003. Requirement for distribution of certain amounts.

15-1-1004. Applicability of sections 15-1-1002 and 15-1-1003.

15-1-1005. Rights and powers of courts and attorney general not impaired.

15-1-1006. References to "Internal Revenue Code of 1954".

15-1-1007. Application of part 10.

PART 11
UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

15-1-1101. Short title.

15-1-1102. Definitions.

15-1-1103. Standard of conduct in managing and investing institutional fund.

15-1-1104. Appropriation for expenditure of accumulation of endowment fund - rules of construction.

15-1-1105. Delegation of management and investment functions.

15-1-1106. Release or modification of restrictions on management, investment, or purpose.

15-1-1107. Reviewing compliance.

15-1-1108. Application to existing institutional funds.

15-1-1109. Relation to "Electronic Signatures in Global and National Commerce Act".

15-1-1110. Uniformity of application and construction.

PART 12
LIFE ESTATE IN PROPERTY OF SURVIVING SPOUSE

15-1-1201. Life estate in property - rights of surviving spouse.

15-1-1202. Applicability of part.

PART 13
UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

15-1-1301 to

15-1-1321. (Repealed)

PART 14
RESTRICTIONS ON EXERCISE OF CERTAIN FIDUCIARY POWERS

15-1-1401. Restrictions on exercise of certain fiduciary powers.

PART 15
REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

15-1-1501. Short title.

15-1-1502. Definitions.

15-1-1503. Applicability.

15-1-1504. User direction for disclosure of digital assets.

15-1-1505. Terms-of-service agreement.

15-1-1506. Procedure for disclosing digital assets.

15-1-1507. Disclosure of content of electronic communications of deceased user.

15-1-1508. Disclosure of other digital assets of deceased user.

15-1-1509. Disclosure of content of electronic communications of principal.

15-1-1510. Disclosure of other digital assets of principal.

15-1-1511. Disclosure of digital assets held in trust when trustee is original user.

15-1-1512. Disclosure of contents of electronic communications held in trust when trustee not original user.

15-1-1513. Disclosure of other digital assets held in trust when trustee not original user.

15-1-1514. Disclosure of digital assets to conservator of protected person.

15-1-1515. Fiduciary duty and authority.

15-1-1516. Custodian compliance and immunity.

15-1-1517. Uniformity of application and construction.

15-1-1518. Relation to electronic signatures in global and national commerce act.

PART 1

GENERAL PROVISIONS

15-1-101. Short title.

This part 1 shall be known and may be cited as the "Uniform Fiduciaries Law".

Source: L. 23: p. 178, § 14. **CSA:** C. 67, § 14. **CRS 53:** § 57-1-14. **C.R.S. 1963:** § 57-1-13.

ANNOTATION

Law reviews. For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Some Problems Arising in the Representation of a Fiduciary", see 32 Colo. Law. 11 (June 2003).

The purpose of the Uniform Fiduciaries Act is that uniform and definite rules were found necessary to take the place of diverse and conflicting rules that had grown up concerning constructive notice of breach of fiduciary obligations in order that commerce might proceed with as little hindrance as possible. Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955); Commercial Sav. Bank v. Baum, 137 Colo. 538, 327 P.2d 743 (1958).

Applied in Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

15-1-102. Legislative declaration.

This part 1 shall be interpreted and construed so as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: L. 23: p. 178, § 13. **CSA:** C. 67, § 13. **CRS 53:** § 57-1-13. **C.R.S. 1963:** § 57-1-12.

15-1-103. Definitions.

As used in this part 1, unless the context otherwise requires:

(1) "Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

(2) "Fiduciary" includes a trustee under any trust, expressed, implied, resulting, or constructive, executor, administrator, personal representative, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate.

(3) "Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

(4) "Principal" includes any person to whom a fiduciary as such owes an obligation.

Source: L. 23: p. 173, § 1. **CSA:** C. 67, § 1. **CRS 53:** § 57-1-1. **C.R.S. 1963:** § 57-1-1. **L. 2002:** (2) amended, p. 650, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L.J. 609 (1980).

Officers and directors of a corporation are fiduciaries as to its stockholders and owe all stockholders the obligation of good faith, candor, forthrightness, and fairness. Herald Co. v. Bonfils, 315 F. Supp. 497 (D. Colo. 1970).

The existence of a fiduciary relationship between a customer and a stockbroker is a question of fact and is created if the relationship is accompanied by the customer's trust and confidence in the broker. Adams v. Paine, Webber, Jackson & Curtis, Inc., 686 P.2d 797 (Colo. App. 1983).

Applied in Clibon Drilling Co. v. Wyoming Mineral Corp., 42 Colo. App. 41, 589 P.2d 78 (1978).

15-1-104. Prior transactions.

The provisions of this part 1 shall not apply to transactions taking place prior to April 16, 1923.

Source: L. 23: p. 178, § 11. **CSA:** C. 67, § 11. **CRS 53:** § 57-1-11. **C.R.S. 1963:** § 57-1-10.

15-1-105. Application of payments to fiduciary.

A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

Source: L. 23: p. 174, § 2. **CSA:** C. 67, § 2. **CRS 53:** § 57-1-2. **C.R.S. 1963:** § 57-1-2.

ANNOTATION

Applied in Clibon Drilling Co. v. Wyoming Mineral Corp., 42 Colo. App. 41, 589 P.2d 78 (1978); Kaneco Oil & Gas v. Univ. Nat. Bank, 732 P.2d 247 (Colo. App. 1986).

15-1-106. Transfer of negotiable instruments by fiduciary.

If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

Source: L. 23: p. 174, § 4. **CSA:** C. 67, § 4. **CRS 53:** § 57-1-4. **C.R.S. 1963:** § 57-1-3.

15-1-107. Check drawn by fiduciary payable to third person, effect.

If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligations as fiduciary in drawing or delivering the instrument and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

Source: L. 23: p. 175, § 5. **CSA:** C. 67, § 5. **CRS 53:** § 57-1-5. **C.R.S. 1963:** § 57-1-4.

ANNOTATION

The Uniform Fiduciaries Act relaxes some of the harsher rules which require of a bank and of individuals the highest degree of vigilance in the detection of a fiduciary's wrongdoing. Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955).

Where an instrument is good on its face, there is no apparent reason for inquiry; it remains good until shown to have been taken in "bad faith" and the burden of proving that is on the plaintiff. Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955).

The loss for breach of a fiduciary obligation should fall on the party directly responsible for the faithless agent and not on one who was a mere conduit to transmit the fund. Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955); Commercial Sav. Bank v. Baum, 137 Colo. 538, 327 P.2d 743 (1958).

15-1-108. Check drawn by and payable to fiduciary, effect.

If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument and is not chargeable with

notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

Source: L. 23: p. 175, § 6. **CSA:** C. 67, § 6. **CRS 53:** § 57-1-6. **C.R.S. 1963:** § 57-1-5.

15-1-109. Deposit in name of fiduciary.

If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

Source: L. 23: p. 176, § 7. **CSA:** C. 67, § 7. **CRS 53:** § 57-1-7. **C.R.S. 1963:** § 57-1-6.

ANNOTATION

The mere failure of a bank to make inquiry, even though there are suspicious circumstances, does not constitute bad faith unless the facts and circumstances are so cogent and obvious that to remain passive would amount to deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. Richards v. Platte Valley Bank, 866 F.2d 1576 (10th Cir. 1989); In re M & L Business Machine Co., 84 F.3d 1330 (10th Cir. 1996).

In order for bank to be liable to real estate purchaser for bank's paying money to escrow agent who then converted money to his own use, bank was required to either have had actual knowledge that escrow agent was committing a breach of his obligation as fiduciary when he took the money or have acted in bad faith in paying escrow agent. Richards v. Platte Valley Bank, 866 F.2d 1576 (10th Cir. 1989).

Applied in Kaneco Oil & Gas v. Univ. Nat. Bank, 732 P.2d 247 (Colo. App. 1986).

15-1-110. Check drawn upon account of principal by fiduciary.

If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

Source: L. 23: p. 176, § 8. **CSA:** C. 67, § 8. **CRS 53:** § 57-1-8. **C.R.S. 1963:** § 57-1-7.

15-1-111. Deposits in personal account of fiduciary.

If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks on that account, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary by that action; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

Source: L. 23: p. 177, § 9. **CSA:** C. 67, § 9. **CRS 53:** § 57-1-9. **C.R.S. 1963:** § 57-1-8.

Cross references: For deposits by a fiduciary, see part 5 of this article.

ANNOTATION

Section inapplicable where funds not held as fiduciary. This section does not apply where a person depositing the funds to his personal account did not hold such funds as a fiduciary and was not empowered to endorse the checks. Arvada Hardwood Floor

Co. v. James, 638 P.2d 828 (Colo. App. 1981).

In order for bank to be liable to real estate purchaser for bank's paying money to escrow agent who then converted money to his own use, bank was required to either have had actual knowledge that escrow agent was committing a breach of his obligation as fiduciary when he took the money or have acted in bad faith in paying escrow agent. Richards v. Platte Valley Bank, 866 F.2d 1576 (10th Cir. 1989).

15-1-112. Deposits in name of two or more trustees.

When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee authorized by the other trustee to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee to draw checks upon the trust account and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

Source: L. 23: p. 177, § 10. **CSA:** C. 67, § 10. **CRS 53:** § 57-1-10. **C.R.S. 1963:** § 57-1-9.

Cross references: For deposits by a fiduciary, see part 5 of this article.

15-1-112.5. Liability of a fiduciary for acts of predecessor fiduciary.

In the absence of actual knowledge or information which would cause a reasonable fiduciary to inquire further, a fiduciary shall be under no duty to examine the accounts and records of or inquire into the acts or omissions of a predecessor fiduciary and shall not be liable for failure to seek redress for any act or omission of any predecessor fiduciary.

Source: L. 77: Entire section added, p. 829, § 1, effective July 1.

15-1-113. Cases not provided for in law.

In any case not provided for in this part 1, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments, and banking, shall continue to apply.

Source: L. 23: p. 178, § 12. **CSA:** C. 67, § 12. **CRS 53:** § 57-1-12. **C.R.S. 1963:** § 57-1-11.

PART 2

DISTRIBUTION BY FIDUCIARIES OF EXPRESS TRUSTS

15-1-201. When part 2 applicable.

This part 2 shall be applicable to all powers of appointment or disposition existing or created on or after April 1, 1953, the donees of which powers shall be living on such date.

Source: L. 53: p. 304, § 6. **CRS 53:** § 57-2-6. **C.R.S. 1963:** § 57-2-6.

15-1-201.5. Definitions.

As used in this part 2, "donee" has the same meaning as "powerholder" as set forth in section 15-2.5-102 (13).

Source: L. 2014: Entire section added, (HB 14-1353), ch. 209, p. 782, § 3, effective July 1, 2015.

15-1-202. Trustee not liable, when.

If a trustee of an express trust which includes property subject to a power of appointment or other power of disposition distributes such property to those persons who would take such property in default of appointment and such distribution is made not sooner than six months after the death of the donee of such power and without knowledge of the existence of an instrument exercising such power, he shall not be responsible to the appointee under the instrument exercising such power.

Source: L. 53: p. 303, § 1. **CRS 53:** § 57-2-1. **C.R.S. 1963:** § 57-2-1.

ANNOTATION

Law reviews. For article, "Trusts and Estates", see 30 Dicta 435 (1953).

15-1-203. No liability if distribution under instrument.

If a trustee of an express trust which includes property subject to a power of appointment or other power of disposition distributes such property pursuant to an instrument exercising such power and without knowledge of any infirmity in such instrument and thereafter such instrument shall be held wholly or partially invalid, such trustee shall not be responsible to those persons who would take in default of appointment.

Source: L. 53: p. 303, § 2. **CRS 53:** § 57-2-2. **C.R.S. 1963:** § 57-2-2.

15-1-204. Rights of appointees.

Nothing in this part 2 shall be deemed to affect the right of the appointee of such property to trace such property into the hands of the distributee or to affect the cause of action of such appointee against such distributee.

Source: L. 53: p. 303, § 3. **CRS 53:** § 57-2-3. **C.R.S. 1963:** § 57-2-3.

15-1-205. Rights of persons entitled.

Nothing in this part 2 shall be deemed to affect the right of the person entitled to such property in default of appointment to trace such property into the hands of the appointee or to affect the cause of action of such person against such distributee.

Source: L. 53: p. 303, § 4. **CRS 53:** § 57-2-4. **C.R.S. 1963:** § 57-2-4.

15-1-206. Rights of bona fide purchasers.

Nothing in this part 2 shall be construed to impair the title or lien of a purchaser or mortgagee in good faith and for value from the person to whom such property was first conveyed pursuant to, or in default of, appointment, as the case may be.

Source: L. 53: p. 304, § 5. **CRS 53:** § 57-2-5. **C.R.S. 1963:** § 57-2-5.

PART 3

FIDUCIARY INVESTMENTS

15-1-301. Fiduciary defined.

The word "fiduciary" as used in this part 3 means original or successor administrators, special administrators, administrators cum testamento annexo, executors, guardians, conservators, and trustees, whether of express or implied trusts.

Source: L. 51: p. 841, § 5. **CSA:** C. 176, § 126(9). **CRS 53:** § 57-3-5. **C.R.S. 1963:** § 57-3-5.

15-1-302. Application.

The provisions of this part 3 shall apply to and govern all fiduciaries appointed or lawfully acting.

Source: L. 51: p. 841, § 3. **CSA:** C. 176, § 126(7). **CRS 53:** § 57-3-3. **C.R.S. 1963:** § 57-3-4.

15-1-303. Construction of part 3.

Nothing in this part 3 shall be construed as modifying or repealing either section 28-5-214 or section 28-5-301, C.R.S., with respect to investment of surplus funds by appointed guardians and conservators of minor and incompetent beneficiaries of the veterans administration.

Source: L. 51: p. 841, § 6. **CSA:** C. 176, § 126(10). **CRS 53:** § 57-3-6. **C.R.S. 1963:** § 57-3-6.

15-1-304. Standard for investments.

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of others, fiduciaries shall be required to have in mind the responsibilities which are attached to such offices and the size, nature, and needs of the estates entrusted to their care and shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of the property of another, not

in regard to speculation but in regard to the permanent disposition of funds, considering the probable income as well as the probable safety of capital. Within the limitations of the foregoing standard, fiduciaries are authorized to acquire and retain every kind of property, real, personal, and mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, stocks, preferred or common, securities of any open-end or closed-end management type investment company or investment trust, and participations in common trust funds, which men of prudence, discretion, and intelligence would acquire or retain for the account of another.

Source: L. 51: p. 840, § 1. **CSA:** C. 176, § 126(5). **CRS 53:** § 57-3-1. **C.R.S. 1963:** § 57-3-1. **L. 75:** Entire section amended, p. 588, § 6, effective July 1.

Cross references: For investments by custodians under the "Colorado Uniform Transfers to Minors Act", see § 11-50-113; for legal investments, see part 6 of article 75 of title 24; for investments of police and fire pension funds, see § 31-31-302.

ANNOTATION

Law reviews. For article, "The 'Prudent Man Rule' Now Applies to Investments by Fiduciaries", see 28 Dicta 213 (1951). For article, "Problems in the Administration of Estates of Mental Incompetents", see 29 Dicta 286 (1952). For article, "On the Prudent Man Rule", see 30 Dicta 107 (1953). For article, "The Prudent Man: Charge and Surcharge", see 35 Dicta 69 (1958). For note, "Advice for Advisors - Trust Investments", see 37 Dicta 306 (1960). For comment on Rippey v. Denver United States Nat'l Bank, appearing below, see 45 Den. L.J. 483 (1968). For article, "Standards of Prudent Investment for Minors Act Custodians", see 19 Colo. Law. 39 (1990). For article, "The 'New' Prudent Investor Rule", see 20 Colo. Law. 713 (1991). For article, "The Prudent Investor Rule as it Affects Fiduciary Investments", see 21 Colo. Law. 1883 (1992).

Within the limits and scope of their fiduciary duty, directors and officers have the power, the duty, and the discretion to exercise their best judgment when making business decisions for corporate purposes, and such decisions are primarily matters for the judgment of such officers and directors, or the stockholders in exercise of their stockholder powers, and not the court. It is only under special circumstances that the court scrutinizes these decisions. Herald Co. v. Bonfils, 315 F. Supp. 497 (D. Colo. 1970).

The standard of care imposed by this section applies to all fiduciaries except custodians. Buder v. Sartore, 774 P.2d 1383 (Colo. 1989).

Ex-husband had fiduciary duty to ex-wife since he retained complete control over her share of stock. Despite having the power to sell the stock within his sole discretion, the husband still was required to operate within the bounds of prudent judgment, reasonableness, and equity. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

As a matter of law, the husband owed the wife a fiduciary duty to deal with her interest with the utmost good faith. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

The "reasonable prudence" standard applies to protecting and caring for the property and does not permit one to prudently speculate. The trustee may not subject his trust property to hazards which a man dealing with his own property might consider warranted if to do so would create danger to the trust estate. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

A trustee owes a duty to his beneficiaries to exercise such care and skill as a man of ordinary prudence would exercise in safeguarding and preserving his own property. This rule obtained at common law and has been codified in Colorado. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

The trustee should do his best to secure competitive bidding and to surround the sale with such other factors as will tend to cause the property to sell to the greatest advantage. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967); Murphy v. Cent. Bank & Trust Co., 699 P.2d 13 (Colo. App. 1985).

The trustee's duty of loyalty and of reasonable care dictate that he must seek to obtain the best price obtainable for the property which he is selling. The rule is that a trustee has a duty to determine the fair value of trust property before selling it, and any sale of it for an inadequate consideration measured against its fair value may be subject to being set aside as a constructive fraud upon proper complaint being made. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967); Murphy v. Cent. Bank & Trust Co., 699 P.2d 13 (Colo. App. 1985).

A trustee's duty of loyalty and of reasonable care dictates that he must seek to obtain the best price for trust property he is selling. If a trust has been damaged but there is uncertainty as to the extent of the damage, damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

Trustee owes a fiduciary duty to the beneficiaries of the trust and he may not allow personal motives to interfere with the discharge of those duties. Wright v. Wright, 182 Colo. 425, 514 P.2d 73 (1973); Vento v. Colo. Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995).

Court may not review with advantages of hindsight. When reviewing investments made by a trustee, a court may not use the advantages of hindsight. Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982).

Applied in Canaday v. Kauffman, 140 Colo. 165, 342 P.2d 1027 (1959); Kaitz v. Dist. Court, 650 P.2d 553 (Colo. 1982).

15-1-304.1. Standard for investments on and after July 1, 1995 - "Colorado Uniform Prudent Investor Act".

(1) On and after July 1, 1995, when investing and managing assets, fiduciaries shall be governed by the standard for trustees set forth in the "Colorado Uniform Prudent Investor Act", article 1.1 of this title.

(2) This section shall not apply to those persons, corporations, entities, or state agencies which were made subject to the provisions of section 15-1-304 by specific reference in another statute in existence prior to July 1, 1995.

Source: L. 95: Entire section added, p. 312, § 2, effective July 1.

15-1-305. Terms of instrument govern.

Nothing in this part 3 shall be construed as authorizing any departure from or variation of the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's duties and powers, but the terms "legal investment" or "authorized investment", or words of similar import as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of section 15-1-304.

Source: L. 51: p. 840, § 2. **CSA:** C. 176, § 126(6). **CRS 53:** § 57-3-2. **C.R.S. 1963:** § 57-3-2.

ANNOTATION

Law reviews. For article, "The Meaning of the Prudent Man Rule", see 24 Rocky Mt. L. Rev. 44 (1951). For comment on Rippey v. Denver United States Nat'l Bank, appearing below, see 45 Den. L.J. 483 (1968).

Despite will's provisions, trustee does not have absolute discretion. In the will the trustee is authorized to sell the trust property (1) in its sole judgment; (2) at private sale; (3) without advertisement or notice to anyone; (4) without the aid or necessity of any court order; (5) without consulting the beneficiaries and without regard to their opinions, desires, or judgment; (6) and at such price and upon such terms as to credit or otherwise as the trustee shall determine. The trustee is not therefore authorized to exercise unlimited or absolute discretion in

making a sale of trust property. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

In any event trustee cannot act recklessly. Even if the instrument had contained language granting absolute and uncontrolled discretion, it would not follow that the trustee could act recklessly or in willful abuse of discretion. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

When the bank acts despite a high probability that the beneficiaries would suffer loss, such conduct is in law reckless and is not protected by an exculpatory clause. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

Exculpatory clause does not apply to transaction conducted in unorthodox manner. An exculpatory clause in the will which provides that the trustee shall be free from liability for "depreciation or loss" of trust property "through error of judgment" does not apply to a loss which resulted from a sale which was not conducted in accordance with orthodox trust principles. Such a provision is usually held to add nothing. It does not limit the trustee liability for even negligence. If the exculpatory provision in express terms relieves the trustee from liability merely for errors of judgment, its effect does not go beyond what a court of equity would do in the absence of an exculpatory provision for a trustee is never held to the liability of an insurer. Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718 (D. Colo. 1967).

15-1-306. Court not restricted.

Nothing in this part 3 shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of estate or trust property.

Source: L. 51: p. 841, § 3. **CSA:** C. 176, § 126(7). **CRS 53:** § 57-3-3. **C.R.S. 1963:** § 57-3-3.

ANNOTATION

A court may not order trustee to deviate from terms of trust unless, because of a change of circumstances, compliance with its terms would defeat or substantially impair the accomplishment of its underlying purposes. Matter of Will of Killin, 703 P.2d 1323 (Colo. App. 1985).

Deviation from the expressed intent of a testator that trust property be retained during trust administration is not warranted solely because of potential increased income to the

income beneficiaries. Matter of Will of Killin, 703 P.2d 1323 (Colo. App. 1985).

15-1-307. Powers of investment in persons other than fiduciary. (Repealed)

Source: L. 77: Entire section added, p. 829, § 2, effective July 1. **L. 2014:** Entire section repealed, (HB 14-1322), ch. 296, p. 1239, § 11, effective August 6.

15-1-308. Investments in United States government obligations.

In the absence of an express provision to the contrary, any fiduciary is authorized, whenever a governing instrument or order requires or permits investment in United States government obligations which are backed by the full faith and credit of the United States government, to invest in such obligations, either directly or in the form of the securities of or other interests in any open-end or closed-end management type investment company or investment trust registered under the federal "Investment Company Act of 1940", 15 U.S.C. sec. 80(a)-1 et seq., if the portfolio of such investment company or investment trust is limited to United States government obligations which are backed by the full faith and credit of the United States government and to repurchase agreements fully collateralized by such obligations and if any such investment company or investment trust actually takes delivery of such collateral, either directly or through an authorized custodian.

Source: L. 88: Entire section added, p. 645, § 1, effective April 6.

PART 4

UNIFORM PRINCIPAL AND INCOME ACT

15-1-401 to 15-1-468. (Repealed)

Source: L. 2021: Entire part repealed, p. 841, § 2, effective January 1, 2022.

Editor's note: (1) This part 4 was numbered as article 4 of chapter 57, C.R.S. 1963. For amendments to this part 4 prior to its repeal in 2022, consult the 2021 Colorado Revised Statutes

and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

(2) Section 15-1-468 provided for the repeal of this part 4, effective January 1, 2022. (See L. 2021, p. 841.)

PART 5

FIDUCIARY PROPERTY - DEPOSITORY NOMINEES

Editor's note: This part 5 was numbered as article 5 of chapter 57, C.R.S. 1963. The substantive provisions of this part 5 were repealed and reenacted in 1977, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 5 prior to 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

Cross references: For deposits by a fiduciary, see §§ 15-1-111 and 15-1-112.

15-1-501. Fiduciary property kept separate.

Every fiduciary shall keep fiduciary property separate and distinct from such fiduciary's own property and shall not invest or deposit the same with any person, association, or corporation in such fiduciary's own name. Except as provided in this part 5, every fiduciary shall keep the property of each fiduciary account separate and distinct from the property of every other fiduciary account, and all transactions shall be conducted in such fiduciary's name as fiduciary.

Source: L. 77: Entire part R&RE, p. 826, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-501 as it existed prior to 1977.

ANNOTATION

Law reviews. For article, "The Care and Feeding of Individual Trustees", see 39 U. Colo. L. Rev. 205 (1966).

15-1-502. Nominees.

Any fiduciary may register or hold the title to fiduciary property in the name of a nominee.

Source: L. 77: Entire part R&RE, p. 826, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-501 as it existed prior to 1977.

15-1-503. Fiduciary property deposits.

Any fiduciary may deposit fiduciary property with a bank or trust company, including a federal reserve bank, or with a clearing corporation, as defined in section 4-8-102 (a)(5), C.R.S., as depository, and such fiduciary property so deposited may be registered in such depository's name as nominee for the fiduciary or may be registered in the name of a nominee of such depository.

Source: L. 77: Entire part R&RE, p. 826, § 1, effective July 1. **L. 96:** Entire section amended, p. 245, § 23, effective July 1.

Editor's note: This section is similar to former § 15-1-502 as it existed prior to 1977.

15-1-504. Holding of securities by fiduciary or depository of fiduciary property.

Any bank or trust company or clearing corporation acting as a fiduciary or depository of fiduciary property may merge and hold securities held as fiduciary property, without certification as to ownership attached, with other securities held as fiduciary property, in one or more certificates representing securities of the same class of the same issuer. Ownership of such securities may be transferred by bookkeeping entry on the books of the fiduciary or of the depository without physical delivery of certificates representing such securities.

Source: L. 77: Entire part R&RE, p. 826, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-503 as it existed prior to 1977.

15-1-505. Records.

The records of every fiduciary shall at all times show the ownership of any fiduciary property held by such fiduciary or in the name of its nominee or held in a depository.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-505 as it existed prior to 1977.

15-1-506. Liability of issuer.

No issuer of securities or agent thereof shall be liable for registering or causing to be registered on the books of such issuer any securities in the name of any nominee or, when the transfer is made on the authorization of the nominee, for transferring or causing to be transferred on the books of the issuer any securities theretofore registered by the issuer in the name of any nominee.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-506 as it existed prior to 1977.

15-1-507. Custodian as fiduciary.

For purposes of this part 5, a bank or trust company acting as custodian shall be deemed to be a fiduciary, and property held in custody by a bank or trust company shall be deemed to be fiduciary property.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

Editor's note: This section is similar to former § 15-1-507 as it existed prior to 1977.

ANNOTATION

Bank acknowledgment of restriction in letters of conservatorship made bank more than a mere custodian; bank became a fiduciary. Pledging collateral consisting of conservatorship funds breached fiduciary duty because bank failed to refrain from involvement in transactions antagonistic to the interests of the protected person. In re Conservatorship of Roth, 804 P.2d 265 (Colo. App. 1990).

15-1-508. Individual and corporate fiduciaries.

(1) For purposes of this part 5, a bank or trust company acting as a fiduciary, alone or jointly with any cofiduciary, may take any action authorized by this part 5 without regard to the language or provisions, or any limitations, in the will or trust instrument or other instrument establishing the fiduciary relationship.

(2) For purposes of this part 5, any fiduciary other than a bank or trust company may take any action authorized by this part 5, unless limited by the language or provisions in the will or trust instrument or other instrument establishing the fiduciary relationship expressing a clear intention that an action otherwise authorized by this part 5 shall be denied to such fiduciary.

(3) Nothing in subsection (2) of this section shall be construed to limit the authority of a bank or trust company serving as a cofiduciary with one or more other fiduciaries or serving as a depository to take any action authorized by this part 5 which it could take if serving as sole fiduciary.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

15-1-509. Fiduciary duty.

In the exercise of any of the powers granted in this part 5, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors and the estate or trust involved and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

15-1-510. Application.

This part 5 shall apply to every fiduciary, regardless of the date of the agreement, instrument, or court order by which the fiduciary is appointed.

Source: L. 77: Entire part R&RE, p. 827, § 1, effective July 1.

PART 6

UNIFORM FIDUCIARY SECURITY TRANSFERS ACT

15-1-601 to 15-1-611. (Repealed)

Source: L. 96: Entire part repealed, p. 246, § 25, effective July 1.

Editor's note: This part 6 was numbered as article 6 of chapter 57, C.R.S. 1963. For amendments to this part 6 prior to its repeal in 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

PART 7

FIDUCIARY INTERESTS IN ENTITIES

15-1-701. Power to become partner.

Subject to the terms of the partnership agreement, if permitted by the trust instrument or will under which the fiduciary serves or by order of a court having jurisdiction of the estate or trust, a fiduciary may enter into a partnership agreement and accept the assignment of or otherwise acquire, hold, and dispose of an interest in a partnership and in so doing may become either a general or a limited partner.

Source: L. 63: p. 496, § 1. **C.R.S. 1963:** § 57-7-1. **L. 2002:** Entire section amended, p. 650, § 2, effective July 1.

15-1-702. Family business interests - maintenance of entity - formation of successor entity.

(1) As used in this section, unless the context otherwise requires:

(a) "Family" means an individual, such individual's spouse, parents, the descendants of either of such parents or of such spouse, or the spouses of such descendants or any combination of such persons.

(b) "Family business" means a business enterprise with respect to which the aggregate interests of the family are substantial in relation to the total outstanding interests in the business enterprise.

(c) "Interest" and "interests" include beneficial interests as beneficiaries of any estate or trust and indirect interests through any other form of entity.

(d) "Successor entity" includes the entity holding the family business where such entity survives a consolidation, merger, acquisition, or other combination.

(2) Any fiduciary acting under a will or trust instrument that evidences an intent to retain an interest in a family business may maintain the interest in any form of entity or successor entity. Such a successor entity may be formed by consolidation, merger, acquisition, or other combination and shall be considered the same enterprise for purposes of maintaining the interest in the family business where the interests of the beneficiaries in the successor entity are substantial.

(3) Except as otherwise provided in the instrument under which the fiduciary is acting:

(a) A fiduciary may proceed as provided in this subsection (3) with the formation of such a successor entity where the fiduciary believes in good faith that the formation is on a favorable basis considering only the overall interests of the beneficiaries including the maintenance of a substantial interest on the part of the beneficiaries in the enterprise and the value of such interest in the long term.

(b) A fiduciary may vote and otherwise deal with respect to interests in the family business as the fiduciary believes in the good faith exercise of the fiduciary's business judgment, under the business judgment rule, to be necessary or appropriate to complete such formation on such a favorable basis.

(c) A fiduciary may, in the good faith exercise of such judgment, accept a reduced participation in equity, voting, and other rights and preferences including a reduction in voting rights that results in less than voting control of the successor entity.

(d) A fiduciary may proceed without notice to the beneficiaries where disclosure is forbidden by law or where the fiduciary believes in the good faith exercise of such judgment, that nondisclosure is necessary to complete such formation on such a favorable basis.

(4) This section shall apply to any interests held by an estate or trust in a family business on or after May 26, 2000, and to the formation of any entity or successor entity completed after May 26, 2000.

Source: L. 2000: Entire section added, p. 1171, § 1, effective May 26.

PART 8

POWERS

15-1-801. Short title.

This part 8 shall be known and may be cited as the "Colorado Fiduciaries' Powers Act".

Source: L. 67: p. 766, § 1. **C.R.S. 1963:** § 57-8-1.

15-1-802. Definitions.

As used in this part 8, unless the context otherwise requires:

(1) "Court" means the district or probate court having jurisdiction over the administration of the estate or trust.

(2) "Estate" means the estate of a decedent or a person under disability.

(3) (a) "Fiduciary" means the one or more persons designated in a will, trust instrument, or otherwise, whether corporate or natural persons and including successors and substitutes, who are acting in any of the following capacities:

(I) Personal representatives, including executors, administrators, administrators with the will annexed (cum testamento annexo), administrators in succession acting under a will (de bonis non), ancillary administrators acting under a will, and ancillary executors;

(II) Special administrators;

(III) Conservators; and

(IV) Trustees.

(b) "Fiduciary" does not include a guardian, special fiduciary, or public administrator, except when the public administrator has been appointed a fiduciary as defined in this subsection (3).

(4) "Trust" means any express trust created by a will, trust instrument, or other instrument, whereby there is imposed upon a trustee the duty to administer a trust asset, for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, or trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions, or profits, instruments wherein one or more persons are mere nominees for another, or trusts created in deposits in any banking institution or savings and loan institution.

(5) "Will" means a will of a decedent and includes a testament or codicil.

Source: L. 67: p. 766, § 1. **C.R.S. 1963:** § 57-8-2. **L. 73:** p. 1647, § 7. **L. 75:** (3) R&RE, p. 588, § 7, effective July 1.

ANNOTATION

Ex-husband had fiduciary duty to ex-wife since he retained complete control over her share of stock. Despite having the power to sell the stock within his sole discretion, the husband still was required to operate within the bounds of prudent judgment, reasonableness, and equity. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

As a matter of law, the husband owed the wife a fiduciary duty to deal with her interest with the utmost good faith. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

A trustee's duty of loyalty and of reasonable care dictates that he must seek to obtain the best price for trust property he is selling. If a trust has been damaged but there is uncertainty as to the extent of the damage, damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven. Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990).

15-1-803. Powers conferred on fiduciaries.

Fiduciaries have all powers conferred upon them by the provisions of this part 8, unless limited by the language or provisions in the will or trust instrument expressing a clear intention that powers conferred under this part 8 shall be denied to the fiduciary. They have, in addition to

the powers conferred in this part 8, such other or further powers as are set forth in the will or trust instrument or as are provided by other statutes or by court rule or order. If any power specifically conferred on a fiduciary by the will or trust instrument conflicts with any power conferred by this part 8, the fiduciary shall be deemed to have only the power specifically conferred by the will or trust instrument and not the conflicting power conferred by this part 8. Provisions in articles 10 to 20 of this title concerning the exercise of powers in the administration of an estate by an executor having powers under a will shall apply to executors having powers conferred under this part 8.

Source: L. 67: p. 767, § 1. **C.R.S. 1963:** § 57-8-3. **L. 73:** p. 1648, § 8.

ANNOTATION

Applied in Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

15-1-804. Powers available.

(1) During the period of administration of the estate or trust and until final distribution, a fiduciary has the power to perform, without court authorization, every act reasonably necessary to administer the estate or trust, including but not limited to the powers specified in subsection (2) of this section. In the exercise of any of his powers, whether derived from this part 8 or from any other source, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another.

(2) Subject to subsection (1) of this section, a fiduciary has the power:

(a) To receive, take possession of, recover, and preserve the assets of the estate or trust, both real and personal, coming to his attention or knowledge and the rents, issues, and profits arising therefrom;

(b) To retain the initial assets of the estate or trust without liability for loss, depreciation, or diminution in value resulting from such retention until, in the judgment of the fiduciary, disposition of such assets should be made;

(c) To accept additions to the estate or trust, not only from the estate of the decedent or the settlor of the trust, but also from other sources;

(d) To acquire an undivided interest in an estate or trust asset in which the fiduciary, in a fiduciary or individual capacity, also holds an undivided interest;

(e) To invest and reinvest assets of the estate or trust, as provided by law;

(f) To effect and keep in force fire, rent, title, liability, casualty, or other insurance to protect the assets of the estate or trust and the fiduciary against hazards usually insured against;

(g) With respect to real property or any interest in real property owned by the estate or trust, except where such real property, or interest in real property, is specifically devised:

(I) To grant options to sell and to sell and convey the same at public or private sale, for cash or on credit, upon fair, reasonable, and equitable terms;

(II) To lease the same, even for a term extending beyond the duration of the administration of the estate or trust, and, in any such case, to include or exclude the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements;

(III) To encumber the same;

(IV) To make repairs or alterations in buildings, or other structures; to improve or demolish any improvements; to raze existing party walls or buildings and erect new party walls or buildings together with owners of adjoining or adjacent property or to enter into agreements with respect thereto; to subdivide, develop, and dedicate to public use; to make or obtain the vacation of public plats; to adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving money or money's worth; and to dedicate and grant easements to public use without consideration;

(h) With respect to personal property or any interest in personal property, owned by the estate or trust, except where such personal property is specifically bequeathed:

(I) To grant options to sell and to sell the same at public or private sale, for cash or on credit, upon fair, reasonable, and equitable terms;

(II) To lease personal property, even for a term extending beyond the duration of the administration of the estate or trust;

(III) To encumber the same;

(IV) To make repairs to the personal property of the estate or trust;

(i) With respect to any indebtedness owed to the estate or trust, secured or unsecured:

(I) To continue the same upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary deems advisable;

(II) To foreclose any security for such indebtedness, to purchase any property securing such indebtedness, and to acquire any property by conveyance from the debtor in lieu of foreclosure;

(j) To perform, in the case of an estate, any and all valid and legally enforceable executory contracts to which at the time of his death the decedent was a party and which at the time of such death had not been fully performed by such decedent and to discharge all obligations of the estate arising under or by reason of such contracts if such obligations are legally enforceable against the estate;

(k) To enter into contracts which are reasonably incident to the administration of the estate or trust;

(l) To continue or to participate in the operation of any business activity or enterprise, including a sole proprietorship or partnership, existing at the inception of the estate or trust (in the case of an estate having due regard for those having claims against the estate) and to incorporate or otherwise change its form;

(m) To deposit funds of the estate or trust in one or more banks, including the banking department of a corporate fiduciary;

(n) To deposit fiduciary property with others, to the extent permitted by part 5 of this article, so long as the cost thereof does not constitute an additional charge against the estate or trust but is payable out of compensation otherwise properly payable to the fiduciary;

(o) To hold title to fiduciary property in the name of a nominee, without disclosure of the estate or trust, to the extent permitted by part 5 of this article;

(p) To borrow money from any source, including the commercial department of a corporate fiduciary, with any such indebtedness being repayable solely from assets of the estate or trust and to pledge or encumber estate or trust assets as security for such loans;

(q) To advance money for the protection of the estate, or the trust, or the assets thereof and for all expenses, losses, and liabilities incurred in or by the collection, care, administration, or protection of the estate, or trust, or the assets thereof. For all such advances, the fiduciary shall have a lien on the estate or trust assets and may reimburse himself with interest at a reasonable rate out of the estate or trust.

(r) To pay, contest, or otherwise settle claims by or against the estate or trust, including taxes, assessments, and expenses, by compromise, arbitration, or otherwise;

(s) To determine all matters of estate and trust accounting as the fiduciary deems to be proper and equitable;

(t) In the case of a trust, to advance trust income to or for the use of a beneficiary, for which advance the fiduciary shall have a lien on the future benefits of such beneficiary from the trust;

(u) To make distributions in kind, in money, or partially in each, at fair market values on the effective date of distribution, as determined by the fiduciary, and without requiring pro rata distribution of specific assets;

(v) In the case of a trust, to abandon, charge off, or otherwise dispose of any property held by or on behalf of the trust which is of no value or of insufficient value to justify collection, care, administration, or protection;

(w) To execute and deliver all legal instruments which are necessary or appropriate for the administration of the estate or trust;

(x) (I) To employ attorneys or other advisors to advise or assist the fiduciary in the performance of his or her duties or, instead of acting personally, to employ one or more agents to do any ministerial act required to be done by the fiduciary in the performance of his or her duties;

(II) In accordance with section 15-1.1-109 of the "Colorado Uniform Prudent Investor Act", to delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances;

(y) In the case of the survivors of the holders of a power given to or imposed upon two or more fiduciaries, to exercise or perform such power, unless the exercise of such power would be contrary to any express provision of the will, trust instrument, or other instrument;

(z) As successor or substitute fiduciary, to succeed to all of the powers and duties of an original, successor, or prior substitute fiduciary, unless contrary to any express provision of the will, trust instrument, or other instrument;

(aa) To vote in person or by proxy shares of stock or other securities which are assets of the estate or trust;

(bb) To pay calls, assessments, and any other sums chargeable to or accruing against or on account of shares of stock or other securities which are assets of the estate or trust whenever such payments may be legally enforceable against the fiduciary or any property of the estate or trust or whenever the fiduciary deems payment expedient and for the best interests of the estate or trust;

(cc) To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers, or liquidations; to enter into voting trust agreements or other similar arrangements; and to consent to corporate sales, leases, and encumbrances. In the exercise of such powers, the fiduciary shall be authorized, whenever he deems such course expedient, to deposit stocks or other securities which are assets of the estate or trust with any protective or other similar committee or with voting trustees under such terms and conditions respecting the deposit thereof as the fiduciary may approve.

(dd) In the case of a trustee, to hold the assets of two or more trusts or parts of such trusts created by the same instrument or by two or more instruments if the trust provisions are substantially similar, as an undivided whole, without separation as between the assets of such trusts or parts of such trusts; but such separate trusts or parts of such trusts shall have undivided interests in such assets; and no such holding shall defer the vesting of any estate in possession or otherwise;

(ee) In the case of an estate, to join with the surviving spouse, his conservator, his guardian, the executor of his will, or the administrator of his estate, in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which he has not filed a return, a federal gift tax return on gifts made by the decedent's surviving spouse, or a Colorado gift tax return on gifts made before January 1, 1980, by the decedent's surviving spouse, and to consent to said gifts being made one-half by the decedent, for any period prior to a decedent's death, and to pay such taxes thereon as are chargeable to the decedent;

(ff) With respect to stock of a corporation held in an estate or trust where the powers of investment conferred upon the fiduciary by the governing instrument or by this part 8 include the power to retain assets initially contributed, or subsequently added from the estate of the decedent or by the settlor of the trust or from any other source, to retain such stock, to exchange or convert such stock for the stock or other securities of an affiliate of the corporation issuing such stock, and to retain such new stock and other securities. For the purposes of this paragraph (ff), "corporation" includes the corporate fiduciary as well as any other corporation, and "affiliate" of a corporation means any corporation controlling, controlled by, or under common control with such corporation, or any corporation formed as a result of or for the purpose of effectuating any merger, consolidation, or reorganization of such corporation. The powers conferred by this paragraph (ff) are hereby conferred upon the fiduciaries of all estates and trusts, unless otherwise limited by language or provisions in the will or trust agreement expressing a clear intention to the contrary.

(gg) In the case of a bank acting as a corporate fiduciary, to invest fiduciary funds awaiting investment or distribution in short-term investments, including, but not limited to, a collective investment fund. A bank acting as a corporate fiduciary may also deposit fiduciary funds awaiting investment or distribution in the commercial department of such bank or in an affiliate bank. For the purposes of this paragraph (gg), the term "bank" includes a state bank or bank and trust company which is chartered by this state or as a national bank.

(hh) To grant a conservation easement in gross, as defined in section 38-30.5-102, C.R.S., whether for consideration or gratuitously; except that, if such grant is for less than fair market value, the consent of interested persons, as defined in section 15-10-201 (27), shall be obtained in writing or an order of the court shall be obtained after notice to interested persons, unless a will or trust instrument directs, permits, or requires a donation of a conservation easement in gross, in which case no such consent or order shall be required;

(ii) Subject to the terms of the documents controlling the entity concerned, to retain or acquire interests in any entity in which the fiduciary does not have general liability, regardless of form, including but not limited to any partnership, corporation, limited liability company, and joint venture, and to become a shareholder, partner, member, or joint venturer.

Source: L. 67: p. 767, § 1. **C.R.S. 1963:** § 57-8-4. **L. 70:** p. 196, § 1. **L. 73:** p. 1648, § 9. **L. 77:** (2)(n) and (2)(o) amended, p. 827, § 2, effective July 1. **L. 79:** (2)(u) amended, p. 656, § 20, effective July 1. **L. 81:** (2)(ee) amended, p. 1885, § 6, effective May 27; (2)(g)(I) and (2)(g)(II) amended, p. 631, § 8, effective July 1. **L. 92:** (2)(gg) added, p. 1991, § 1, effective April 16. **L. 95:** (2)(x) amended, p. 312, § 3, effective July 1. **L. 99:** (2)(hh) added, p. 70, § 1, effective August 4. **L. 2002:** (2)(ii) added, p. 650, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

A revocable living trust is valid even though the settlor reserves an extensive power of control over administration of the corpus. Oken v. Hammer, 791 P.2d 9 (Colo. App. 1990).

Whether a deed of trust is intended to exercise the trustee's powers, rather than encumber a lesser interest in the property, is a question of the intent of the parties. Evidence is properly admissible to ascertain the intent of the parties. Oken v. Hammer, 791 P.2d 9 (Colo. App. 1990).

Indorsement on the note from the transferor to the holder was not required since, although trust instruments did not specifically include the power to indorse notes, the obligation to liquidate those assets included the implied power to perform the necessary acts required to carry out that undertaking. First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

A difference in voting rights of shares is a relevant factor that should be considered when determining fair market value. Providing no compensation to reflect the difference in voting rights rendered the in-kind distribution of shares among the children unequal. In re Estate of Beren, 2012 COA 203, 412 P.3d 487, aff'd in part, rev'd in part on other grounds, 2015 CO 29, 349 P.3d 233.

Section does not empower a personal representative to resolve a dispute after it has been raised in the probate court. Personal representative's discretion was limited to deciding whether the estate would accede or seek reformation of a conveyance for mistake. If the personal representation chose to seek reformation, the probate court was obligated to take evidence and make a ruling. In re Estate of Beren, 2012 COA 203, 412 P.3d 487, aff'd in part, rev'd in part on other grounds, 2015 CO 29, 349 P.3d 233.

Applied in Cavanaugh v. State Dept. of Rev. Inheritance & Gift Tax Div., 42 Colo. App. 453, 599 P.2d 965 (1979).

15-1-805. Powers of fiduciary conferred by court.

The court having jurisdiction of the estate or trust may authorize the fiduciary to exercise any power not otherwise held by the fiduciary which, in the judgment of the court, is necessary for the proper collection, care, administration, and protection of the estate or the trust.

Source: L. 67: p. 770, § 1. **C.R.S. 1963:** § 57-8-5.

15-1-806. Third persons protected in dealing with fiduciary.

With respect to a third person dealing with a fiduciary or assisting a fiduciary in the conduct of a transaction, proper exercise of his powers by the fiduciary is to be presumed, and such third person shall not be bound to inquire whether the fiduciary has power to act or is properly exercising such powers, nor shall such third person be bound to see to the proper application of estate or trust assets paid or delivered to the fiduciary.

Source: L. 67: p. 770, § 1. **C.R.S. 1963:** § 57-8-6.

15-1-807. Applicability.

This part 8 shall apply to all trusts existing on January 1, 1968, which are later amended to make applicable this part 8, and to all estates and trusts which may come into existence after January 1, 1968.

Source: L. 67: p. 771, § 1. **C.R.S. 1963:** § 57-8-7.

PART 9

DISCLAIMER OF SUCCESSION - NONTESTAMENTARY INSTRUMENTS

15-1-901 to 15-1-907. (Repealed)

Editor's note: (1) This part 9 was numbered as article 9 of chapter 57, C.R.S. 1963. For amendments to this part 9 prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 15-1-907 provided for the repeal of this part 9, effective July 1, 1995. (See L. 94, p. 1041.)

PART 10

CHARITABLE, EDUCATIONAL, RELIGIOUS, AND BENEVOLENT TRUSTS

Cross references: For testamentary additions to trusts, see § 15-11-511.

15-1-1001. Legislative declaration.

It is the purpose of this part 10 to preserve the intent of testators and grantors of testamentary and inter vivos trusts created prior to and after June 2, 1971, for charitable, educational, religious, and benevolent purposes, by minimizing the imposition of federal income and excise taxes, and federal estate and gift taxes, imposed upon the assets of such trusts, and thereby preserving the maximum amount of the trust assets for the charitable, educational, religious, and benevolent purposes for which they were intended. The attorney general of this state shall perform such acts as, in his or her opinion, will result in the effectuation of this declaration of purpose.

Source: L. 71: p. 589, § 1. **C.R.S. 1963:** § 57-10-1. **L. 73:** p. 638, § 1. **L. 2016:** Entire section amended, (HB 16-1094), ch. 94, p. 266, § 9, effective August 10.

ANNOTATION

An express trust was created by implication in fact, rather than theory of implied trust in case where loyal minority members of local church sought to recover possession of church's property from seceding majority members. Bishop and Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986).

15-1-1002. Prohibition of certain acts - amendment of governing instrument.

(1) In the administration of any trust which is a private foundation as defined in section 509 of the federal "Internal Revenue Code of 1986", a charitable trust as defined in section 4947 (a)(1) of the federal "Internal Revenue Code of 1986", or a split-interest trust as defined in section 4947 (a)(2) of the federal "Internal Revenue Code of 1986", notwithstanding any provisions to the contrary in the governing instrument or in any other law of this state, and except as otherwise provided by court decree entered on or after June 2, 1971, the following acts shall be prohibited:

(a) Engaging in any act of "self-dealing", as defined in section 4941 (d) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4941 (a) of the federal "Internal Revenue Code of 1986";

(b) Retaining any "excess business holdings", as defined in section 4943 (c) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4943 (a) of the federal "Internal Revenue Code of 1986";

(c) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the federal "Internal Revenue Code of 1986", so as to give rise to any liability for the tax imposed by section 4944 (a) of the federal "Internal Revenue Code of 1986"; and

(d) Making any "taxable expenditure", as defined in section 4945 (d) of the federal "Internal Revenue Code of 1986", which would give rise to any liability for the tax imposed by section 4945 (a) of the federal "Internal Revenue Code of 1986".

(2) The provisions of subsection (1) of this section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the federal "Internal Revenue Code of 1986".

(3) Notwithstanding any provisions to the contrary in the governing instrument or in any other law of this state, the trustee of any charitable trust as defined in section 4947 (a)(1) or 4947 (a)(2) of the federal "Internal Revenue Code of 1986", with the consent of all the beneficiaries under the governing instrument, may, without application to any court and either before or after the funding of such trust, amend the governing instrument to conform to the provisions of sections 508 (e), 664, 2055 (e), and 2522 (c) of the federal "Internal Revenue Code of 1986", to the extent applicable, by executing a written amendment to the trust for that purpose. Consent shall not be required as to individual beneficiaries not living at the time of amendment or as to charitable beneficiaries not named or not in existence at the time of amendment. The possibility of beneficial interests arising after the amendment of the governing instruments shall not defeat the ability to amend. In the case of an individual beneficiary not competent to give consent, the consent of such beneficiary's guardian or conservator, if any, or the consent of a guardian ad

litem appointed by a court of competent jurisdiction is treated as the consent of the beneficiary. A copy of the proposed amendment, executed by the trustee and consented to by all beneficiaries whose consent is required under this subsection (3), must be delivered in person or by registered mail to the attorney general. The attorney general may, within sixty days after such receipt, indicate by registered mail to the trustee his or her specific objections to such proposed amendment, in which event the provisions of subsection (4) of this section apply if he or she does not withdraw his or her objections. In the case of any amendment to a trust created by will or to a trust created by inter vivos instrument, unless otherwise provided, the amendment applies as of the date of death of the decedent or as of the date of gift.

(4) In the event that all such trustees and beneficiaries under the governing instrument do not consent to such amendment or in the event that there are no named beneficiaries, any court of competent jurisdiction shall have the power to amend the governing instrument in accordance with subsection (3) of this section upon petition of the trustee or any beneficiary and upon a subsequent finding by the court that the testator's or the grantor's intention would not be defeated by such amendment. A copy of such petition shall be delivered in person or by registered mail to the attorney general.

(5) Unless otherwise expressly provided in the governing instrument, any devise, bequest, or transfer in a testamentary or revocable inter vivos trust for religious, educational, charitable, or benevolent uses to be determined by the trustee or any other person shall be made only to organizations and for purposes within the meaning of section 2055 (a) of the federal "Internal Revenue Code of 1986".

Source: L. 71: p. 589, § 1. **C.R.S. 1963:** § 57-10-2. **L. 73:** p. 638, § 2. **L. 2000:** (1), (2), (3), and (5) amended, p. 1844, § 25, effective August 2. **L. 2016:** (3) amended, (HB 16-1094), ch. 94, p. 266, § 10, effective August 10.

15-1-1003. Requirement for distribution of certain amounts.

In the administration of any trust which is a private foundation, as defined in section 509 of the federal "Internal Revenue Code of 1986", or which is a charitable trust, as defined in section 4947 (a)(1) of the federal "Internal Revenue Code of 1986", there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the federal "Internal Revenue Code of 1986". No trustee of such a trust shall be required to reimburse the trust from his own property for the amount of any liability for such tax which is incurred by the trust if the trustee acted in a prudent manner and in good faith. No trustee of such a trust shall be required to reimburse the trust from his own property for any amount which he, acting prudently and in good faith, distributes from the trust, believing it to be required to be distributed in order to avoid the

liability for such tax, but which later is determined not to have been required to be distributed for that purpose.

Source: L. 71: p. 590, § 1. **C.R.S. 1963:** § 57-10-3. **L. 2000:** Entire section amended, p. 1845, § 26, effective August 2.

15-1-1004. Applicability of sections 15-1-1002 and 15-1-1003.

The provisions of sections 15-1-1002 and 15-1-1003 shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the terms of such instrument may not properly be changed to conform to such sections.

Source: L. 71: p. 590, § 1. **C.R.S. 1963:** § 57-10-4.

15-1-1005. Rights and powers of courts and attorney general not impaired.

Nothing in this part 10 shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

Source: L. 71: p. 590, § 1. **C.R.S. 1963:** § 57-10-5.

15-1-1006. References to "Internal Revenue Code of 1954".

All references to sections of the "Internal Revenue Code of 1954" refer to the "Internal Revenue Code of 1954" as it exists on June 2, 1971; except that all references to the "Internal Revenue Code of 1954" in section 15-1-1002 (3) and (5) refer to the "Internal Revenue Code of 1954" as it exists on April 19, 1973.

Source: L. 71: p. 590, § 1. **C.R.S. 1963:** § 57-10-6. **L. 73:** p. 639, § 3.

15-1-1007. Application of part 10.

This part 10 shall apply to all trusts established after December 31, 1969, with the exceptions contained in section 4947 (a)(2) of the federal "Internal Revenue Code of 1986". This part 10 shall also apply to all trusts established before January 1, 1970, with the exceptions contained in section 508 (e)(2) and section 4947 (a)(2) of the federal "Internal Revenue Code of 1986". Section 15-1-1002 (3) to (5) shall apply in the case of all decedents dying after December 31, 1969, and in the case of all irrevocable inter vivos trusts created after July 31, 1969.

Source: L. 71: p. 591, § 1. **C.R.S. 1963:** § 57-10-7. **L. 73:** p. 639, § 4. **L. 2000:** Entire section amended, p. 1846, § 27, effective August 2.

PART 11

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Editor's note: This part 11 was numbered as article 26 of chapter 31, C.R.S. 1963, and was not amended prior to 2008. The substantive provisions of this part 11 were repealed and reenacted in 2008, resulting in the addition, relocation, and elimination of sections as well as subject matter. For the text of this part 11 prior to 2008, consult the 2007 Colorado Revised Statutes. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this part 11, see the comparative tables located in the back of the index.

PREFATORY NOTE

Reasons for Revision. The Uniform Prudent Management of Institutional Funds Act (UPMIFA) replaces the Uniform Management of Institutional Funds Act (UMIFA). The National Conference of Commissioners on Uniform State Laws approved UMIFA in 1972, and 47 jurisdictions have enacted the act. UMIFA provided guidance and authority to charitable organizations within its scope concerning the management and investment of funds held by those organizations, UMIFA provided endowment spending rules that did not depend on trust accounting principles of income and principal, and UMIFA permitted the release of restrictions on the use or management of funds under certain circumstances. The changes UMIFA made to the law permitted charitable organizations to use modern investment techniques such as total-return investing and to determine endowment fund spending based on spending rates rather than on determinations of "income" and "principal."

UMIFA was drafted almost 35 years ago, and portions of it are now out of date. The prudence standards in UMIFA have provided useful guidance, but prudence norms evolve over time. The new Act provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), an Act promulgated in 1994 and already enacted in 43 jurisdictions, served as a model for many of the revisions. UPIA updates rules on investment decision making for trusts, including charitable trusts, and imposes additional duties on trustees for the protection of beneficiaries. UPMIFA applies these rules and duties to charities organized as nonprofit corporations. UPMIFA does not apply to trusts managed by corporate and other fiduciaries that are not charities, because UPIA provides management and investment standards for those trusts.

In applying principles based on UPIA to charities organized as nonprofit corporations, UPMIFA combines the approaches taken by UPIA and by the Revised Model Nonprofit Corporation Act (RMNCA). UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity. See Bevis Longstreth, Modern Investment Management and the Prudent Man Rule 7 (1986) (stating "[t]he modern paradigm of prudence applies to all fiduciaries who are subject to some version of the prudent man rule, whether under ERISA, the private foundation provisions of the Code, UMIFA, other state statutes, or the common law."); Harvey P. Dale, Nonprofit Directors and Officers - Duties and Liabilities for Investment Decisions, 1994 N.Y.U. Conf. Tax Plan. 501(c)(3) Org's. Ch. 4.

UPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and UPMIFA imposes additional duties on those who manage and invest charitable funds. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely.

UPMIFA modernizes the rules governing expenditures from endowment funds, both to provide stricter guidelines on spending from endowment funds and to give institutions the ability to cope more easily with fluctuations in the value of the endowment.

Finally, UPMIFA updates the provisions governing the release and modification of restrictions on charitable funds to permit more efficient management of these funds. These provisions derive from the approach taken in the Uniform Trust Code (UTC) for modifying charitable trusts. Like the UTC provisions, UPMIFA's modification rules preserve the historic position of the attorneys general in most states as the overseers of charities.

As under UMIFA, the new Act applies to charities organized as charitable trusts, as nonprofit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities.

Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

Prudent Management and Investment. UMIFA applied the 1972 prudence standard to investment decision making. In contrast, UPMIFA will give charities updated and more useful guidance by incorporating language from UPIA, modified to fit the special needs of charities. The revised Act spells out more of the factors a charity should consider in making investment decisions, thereby imposing a modern, well accepted, prudence standard based on UPIA.

Among the expressly enumerated prudence factors in UPMIFA is "the preservation of the endowment fund," a standard not articulated in UMIFA.

In addition to identifying factors that a charity must consider in making management and investment decisions, UPMIFA requires a charity and those who manage and invest its funds to:

1. Give primary consideration to donor intent as expressed in a gift instrument,

2. Act in good faith, with the care an ordinarily prudent person would exercise,

3. Incur only reasonable costs in investing and managing charitable funds,

4. Make a reasonable effort to verify relevant facts,

5. Make decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy,

6. Diversify investments unless due to special circumstances, the purposes of the fund are better served without diversification,

7. Dispose of unsuitable assets, and

8. In general, develop an investment strategy appropriate for the fund and the charity.

UMIFA did not articulate these requirements.

Thus, UPMIFA strengthens the rules governing management and investment decision making by charities and provides more guidance for those who manage and invest the funds.

Donor Intent with Respect to Endowments. UPMIFA improves the protection of donor intent with respect to expenditures from endowments. When a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions. When a donor's intent is not so expressed, UPMIFA directs the charity to spend an amount that is prudent, consistent with the purposes of the fund, relevant economic factors, and the donor's intent that the fund continue in perpetuity. This approach allows the charity to give effect to donor intent, protect its endowment, assure generational equity, and use the endowment to support the purposes for which the endowment was created.

Retroactivity. Like UMIFA, UPIA, the Uniform Principal and Income Act of 1961, and the Uniform Principal and Income Act of 1997, UPMIFA applies retroactively to

institutional funds created before and prospectively to institutional funds created after enactment of the statute. Regarding the considerations motivating this treatment of the issues, see the comment to Section 4.

Endowment Spending. UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value and providing better guidance regarding the operation of the prudence standard. Under UMIFA a charity can spend amounts above historic dollar value that the charity determines to be prudent. The Act directs the charity to focus on the purposes and needs of the charity rather than on the purposes and perpetual nature of the fund. Amounts below historic dollar value cannot be spent. The Drafting Committee concluded that this endowment spending rule created numerous problems and that restructuring the rule would benefit charities, their donors, and the public. The problems include:

1. Historic dollar value fixes valuation at a moment in time, and that moment is arbitrary. If a donor provides for a gift in the donor's will, the date of valuation for the gift will likely be the donor's date of death. (UMIFA left uncertain what the appropriate date for valuing a testamentary gift was.) The determination of historic dollar value can vary significantly depending upon when in the market cycle the donor dies. In addition, the fund may be below historic dollar value at the time the charity receives the gift if the value of the asset declines between the date of the donor's death and the date the asset is actually distributed to the charity from the estate.

2. After a fund has been in existence for a number of years, historic dollar value may become meaningless. Assuming reasonable long term investment success, the value of the typical fund will be well above historic dollar value, and historic dollar value will no longer represent the purchasing power of the original gift. Without better guidance on spending the increase in value of the fund, historic dollar value does not provide adequate protection for the fund. If a charity views the restriction on spending simply as a direction to preserve historic dollar value, the charity may spend more than it should.

3. The Act does not provide clear answers to questions a charity faces when the value of an endowment fund drops below historic dollar value. A fund that is so encumbered is commonly called an "underwater" fund. Conflicting advice regarding whether an organization could spend from an underwater fund has led to difficulties for those managing charities. If a charity concluded that it could continue to spend trust accounting income until a fund regained its historic dollar value, the charity might invest for income rather than on a total-return basis. Thus, the historic dollar value rule can cause inappropriate distortions in investment policy and can ultimately lead to a decline in a fund's real value. If, instead, a charity with an underwater fund continues to invest for growth, the charity may be unable to spend anything from an underwater endowment fund for several years. The inability of a charity to spend anything from an endowment is likely to be contrary to donor intent, which is to provide current benefits to the charity.

The Drafting Committee concluded that providing clearly articulated guidance on the prudence rule for spending from an endowment fund, with emphasis on the permanent nature of the fund, would provide the best protection of the purchasing power of endowment funds.

Presumption of Imprudence. UPMIFA includes as an optional provision a presumption of imprudence if a charity spends more than seven percent of an endowment fund in any one year. The presumption is meant to protect against spending an endowment too quickly. Although the Drafting Committee believes that the prudence standard of UPMIFA provides appropriate and adequate protection for endowments, the Committee provided the option for states that want to include a mechanical guideline in the statute. A major drawback to any statutory percentage is that it is unresponsive to changes in the rate of inflation or deflation.

Modification of Restrictions on Charitable Funds. UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful. UMIFA permitted release of restrictions but left the application of cy pres uncertain. Under UPMIFA, as under trust law, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding. The one addition to existing law is that UPMIFA gives a charity the authority to modify a restriction on a fund that is both old and small. For these funds, the expense of a trip to court will often be prohibitive. By permitting a charity to make an appropriate modification, money is saved for the charitable purposes of the charity. Even with respect to small, old funds, however, the charity must notify the attorney general of the charity's intended action. Of course, if the attorney general has concerns, he or she can seek the agreement of the charity to change or abandon the modification, and if that fails, can commence a court action to enjoin it. Thus, in all types of modification the attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds.

Other Organizational Law. For matters not governed by UPMIFA, a charitable organization will continue to be governed by rules applicable to charitable trusts, if it is organized as a trust, or rules applicable to nonprofit corporations, if it is organized as a nonprofit corporation.

Relation to Trust Law. Although UPMIFA applies a number of rules from trust law to institutions organized as nonprofit corporations, in two respects UPMIFA creates rules that do not exist under the common law applicable to trusts. The endowment spending rule of Section 4 and the provision for modifying a small, old fund in subsection (d) of Section 6 have no counterparts in the common law or the UTC. The Drafting Committee believes that these rules could be useful to charities organized

as trusts, and the Committee recommends conforming amendments to the UTC and the Principal and Income Act to incorporate these changes into trust law.

15-1-1101. Short title.

This part 11 shall be known and may be cited as the "Uniform Prudent Management of Institutional Funds Act".

Source: L. 2008: Entire part R&RE, p. 559, § 1, effective September 1.

Editor's note: This section is similar to former § 15-1-1101 as it existed prior to 2008.

ANNOTATION

Law reviews. For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Modern Tomb Raiders: Nonprofit Organizations' Impermissible Use of Restricted Funds", see 31 Colo. Law. 57 (Sept. 2002).

Only the attorney general or a person with a special interest in a charitable trust has standing to sue for mismanagement of a charitable trust that is subject to this act. Herbst v. Univ. of Colo. Found., 2022 COA 38, 513 P.3d 388.

15-1-1102. Definitions.

As used in this part 11, unless the context otherwise requires:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, or any other charitable or eleemosynary purpose.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) A person, other than an individual, organized and operated exclusively for charitable purposes;

(B) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include funds held by the public employees' retirement association created by article 51 of title 24, C.R.S., or:

(A) Program-related assets;

(B) A fund held for an institution by a trustee that is not an institution; or

(C) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "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.

Source: L. 2008: Entire part R&RE, p. 559, § 1, effective September 1. **L. 2009:** IP(5) amended, (SB 09-282), ch. 288, p. 1398, § 61, effective January 1, 2010.

Editor's note: This section is similar to former § 15-1-1103 as it existed prior to 2008.

OFFICIAL COMMENT

Subsection (1). Charitable Purpose. The definition of charitable purpose follows that of UTC § 405 and Restatement (Third) of Trusts § 28 (2003). This long-familiar standard derives from the English Statute of Charitable Uses, enacted in 1601.

Some 17 states have created statutory definitions of charitable purpose for various purposes. See, e.g., 10 Pa. Cons. Stat. § 162.3 (2005) (defining charitable purpose within the Solicitation of Funds for Charitable Purposes Act to include "humane," "patriotic," "social welfare and advocacy," and "civic" purposes). The

definition in subsection (1) applies for purposes of this Act and does not affect other definitions of charitable purpose.

Subsection (2). Endowment Fund. An endowment fund is an institutional fund or a part of an institutional fund that is not wholly expendable by the institution on a current basis. A restriction that makes a fund an endowment fund arises from the terms of a gift instrument. If an institution has more than one endowment fund, under Section 3 the institution can manage and invest some or all endowment funds together. Section 4 and Section 6 must be applied to individual funds and cannot be applied to a group of funds that may be managed collectively for investment purposes.

Board-designated funds are institutional funds but not endowment funds. The rules on expenditures and modification of restrictions in this Act do not apply to restrictions that an institution places on an otherwise unrestricted fund that the institution holds for its own benefit. The institution may be able to change these restrictions itself, subject to internal rules and to the fiduciary duties that apply to those that manage the institution.

If an institution transfers assets to another institution, subject to the restriction that the other institution hold the assets as an endowment, then the second institution will hold the assets as an endowment fund.

Subsection (3). Gift Instrument. The term gift instrument refers to the records that establish the terms of a gift and may consist of more than one document. The definition clarifies that the only legally binding restrictions on a gift are the terms set forth in writing.

As used in this definition, "record" is an expansive concept and means a writing in any form, including electronic. The term includes a will, deed, grant, conveyance, agreement, or memorandum, and also includes writings that do not have a donative purpose. For example, under some circumstances the bylaws of the institution, minutes of the board of directors, or canceled checks could be a gift instrument or be one of several records constituting a gift instrument. Although the term can include any of these records, a record will only become a gift instrument if both the donor and the institution were or should have been aware of its terms when the donor made the gift. For example, if a donor sends a contribution to an institution for its general purposes, then the articles of incorporation may be used to clarify those purposes. If, in contrast, the donor sends a letter explaining that the institution should use the contribution for its "educational projects concerning teenage depression," then any funds received in response must be used for that purpose and not for broader purposes otherwise permissible under the articles of incorporation.

Solicitation materials may constitute a gift instrument. For example, a solicitation that suggests in writing that any gifts received pursuant to the solicitation will be held as an endowment may be integrated with other writings and may be considered part of the gift instrument. Whether the terms of the solicitation become part of the gift instrument will depend upon the

circumstances, including whether a subsequent writing superseded the terms of the solicitation. Each gift received in response to a solicitation will be subject to any restrictions indicated in the gift instrument pertaining to that gift. For example, if an initial gift establishes an endowment fund, and the charity then solicits additional gifts "to be held as part of the Charity X Endowment Fund," those additional gifts will each be subject to the restriction that the gifts be held as part of that endowment fund.

The term gift instrument includes matching funds provided by an employer or some other person. Whether matching funds are treated as part of the endowment fund or otherwise will depend on the terms of the matching gift.

The term gift instrument also includes an appropriation by a legislature or other public or governmental body for the benefit of an institution.

Subsection (4). Institution. The Act applies generally to institutions organized and operated exclusively for charitable purposes. The term includes charitable organizations created as nonprofit corporations, unincorporated associations, governmental subdivisions or agencies, or any form of entity, however organized, that is organized and operated exclusively for charitable purposes. The term includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee. This approach leaves unchanged the coverage of UMIFA. The exclusion of "individual" from the definition of institution is not intended to exclude a corporation sole.

Although UPMIFA does not apply to all charitable trusts, many of UPMIFA's provisions derive from trust law. Prudent investor standards apply to trustees of charitable trusts in states that have adopted UPIA. Trustees of charitable trusts can use the doctrines of cy pres and deviation to modify trust provisions, and the UTC includes a number of modification provisions. The Uniform Principal and Income Act permits allocation between principal and income to facilitate total-return investing. Charitable trusts not included in UPMIFA, primarily those managed by corporate trustees and individuals, will lose the benefits of UPMIFA's endowment spending rule and the provision permitting a charity to apply cy pres, without court supervision, for modifications to a small, old fund. Enacting jurisdictions may choose to incorporate these rules into existing trust statutes to provide the benefits to charitable funds managed by corporate trustees.

The definition of institution includes governmental organizations that hold funds exclusively for the purposes listed in the definition. A governmental entity created by state law may fall outside the definition on account of the form of organization under which the state created it. Because state arrangements are so varied, creating a definition that encompasses all charitable entities created by states is not feasible. States should consider applying the core principles of UPMIFA to such governmental institutions. For example, the control over a state university may be held by a State

Board of Regents. In that situation, the state may have created a governing structure by statute or in the state constitution so that the university is, in effect, privately chartered. The Drafting Committee does not intend to exclude these universities from the definition of institution, but additional state legislation may be necessary to address particular situations.

Subsection (5). Institutional Fund. The term institutional fund includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee that is not an institution.

Some institutions combine assets from multiple funds for investment purposes, and some institutions invest funds from different institutions in a common fund. Typically each fund is assigned units representing the share value of the individual fund. The assets are invested collectively, permitting more efficient investment and improved diversification of the overall portfolio. The collective fund makes annual distributions to the individual funds based on the units held by each fund. For purposes of Section 3 [and Section 5], the collective fund is considered one institutional fund. Section 4 and Section 6 apply to each fund individually and not to the collective fund.

Assets held by an institution primarily for program-related purposes rather than exclusively for investment are not subject to UPMIFA. For example, a university may purchase land adjacent to its campus for future development. The purchase might not meet prudent investor standards for commercial real estate, but the purchase may be appropriate because the university needs to build a new dormitory. The classroom buildings, administration buildings, and dormitories held by the university all have value as property, but the university does not hold those buildings as financial assets for investment purposes. The Act excludes from the prudent investor norms those assets that a charity uses to conduct its charitable activities, but does not exclude assets that have a tangential tie to the charitable purpose of the institution but are held primarily for investment purposes.

A fund held by an institution is not an institutional fund if any beneficiary of the fund is not an institution. For example, a charitable remainder trust held by a charity as trustee for the benefit of the donor during the donor's lifetime, with the remainder interest held by the charity, is not an institutional fund. However, this subsection treats as an institution a charitable remainder trust that continues to operate for charitable purposes after the termination of the noncharitable interests. The Act will have only a limited effect on a charitable remainder trust that terminates after the noncharitable interest ends. During the period required to complete the distribution of the trust's property, the prudence norm will apply to the actions of the trustee, but the short timeframe will affect investment decision making.

Subsection (6). Person. The Act uses as the definition of person the definition approved by the National Conference of Commissioners on Uniform State Laws. The definition of institution uses the term person,

but to be an institution a person must be organized and operated exclusively for charitable purposes. A person with a commercial purpose cannot be an institution. Thus, although the definition of person includes "business trust" and "any other . . . commercial entity," the Act does not apply to an entity organized for business purposes and not exclusively for charitable purposes. Further, the definition of person includes trusts, but only trusts managed by charities can be institutional funds. UPMIFA does not apply to trusts managed by corporate trustees or by individual trustees.

If a governing instrument provides that a fund will revert to the donor if, and only if, the institution ceases to exist or the purposes of the fund fail, then the fund will be considered an institutional fund until such contingency occurs.

Subsection (7). Program-Related Asset. Although UPMIFA does not apply to program-related assets, if program-related assets serve, in part, as investments for an institution, then the institution should identify categories for reporting those investments and should establish investment criteria for the investments that are reasonably related to achieving the institution's charitable purposes. For example, a program providing below-market loans to inner-city businesses may be "primarily to accomplish a charitable purpose of the institution" but also can be considered, in part, an investment. The institution should create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid.

Subsection (8). Record. This definition was added to clarify that the definition of instrument includes electronic records as defined in Section 2(8) of the Uniform Electronic Transactions Act (1999).

15-1-1103. Standard of conduct in managing and investing institutional fund.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this part 11, each person responsible for managing and investing an institutional fund shall manage and invest the institutional fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) Shall make a reasonable effort to verify facts relevant to the management and investment of the institutional fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) General economic conditions;

(B) The possible effect of inflation or deflation;

(C) The expected tax consequences, if any, of investment decisions or strategies;

(D) The role that each investment or course of action plays within the overall investment portfolio of the institutional fund;

(E) The expected total return from income and the appreciation of investments;

(F) Other resources of the institution;

(G) The needs of the institution and the institutional fund to make distributions and to preserve capital; and

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the institutional fund and to the institution.

(3) Except as otherwise provided by law other than this part 11, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the institutional fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this part 11.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

Source: L. 2008: Entire part R&RE, p. 560, § 1, effective September 1.

Editor's note: This section is similar to former §§ 15-1-1106 and 15-1-1108 as they existed prior to 2008.

OFFICIAL COMMENT

Purpose and Scope of Revisions. This section adopts the prudence standard for investment decision making. The section directs directors or others responsible for managing and investing the funds of an institution to act as a prudent investor would, using a portfolio approach in making investments and considering the risk and return objectives of the fund. The section lists the factors that commonly bear on decisions in fiduciary investing and incorporates the duty to diversify investments absent a conclusion that special circumstances make a decision not to diversify reasonable. Thus, the section follows modern portfolio theory for investment decision making. Section 3 applies to all funds held by an institution, regardless of whether the institution obtained the funds by gift or otherwise and regardless of whether the funds are restricted.

The Drafting Committee discussed extensively the standard that should govern nonprofit managers. UMIFA states the standard as "ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision." Since the decision in Stern v. Lucy Webb Hayes National Training School for Deaconesses, 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard nominally similar to the corporate standard but with the recognition that the facts and circumstances considered include the fact that the entity is a charity and not a business corporation.

The language of the prudence standard adopted in UPMIFA is derived from the RMNCA and from the prudent investor rule of UPIA. The standard is consistent with the business judgment standard under corporate law, as applied to charitable institutions. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule. The standard for prudent investment set forth in Section 3 first states the duty of care as articulated in the RMNCA, but provides more specific guidance for those managing and investing institutional funds by incorporating language from UPIA. The criteria derived from UPIA are consistent with good practice under current law applicable to nonprofit corporations.

Trust law norms already inform managers of nonprofit corporations. The Preamble to

UPIA explains: "Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations." See also, Restatement (Third) of Trusts: Prudent Investor Rule § 379, Comment b, at 190 (1992) (stating that "absent a contrary statute or other provision, the prudent investor rule applies to investment of funds held for charitable corporations."). Trust precedents have routinely been found to be helpful but not binding authority in corporate cases.

The Drafting Committee decided that by adopting language from both the RMNCA and UPIA, UPMIFA could clarify that common standards of prudent investing apply to all charitable institutions. Although the principal trust authorities, UPIA § (2)(a), Restatement (Third) of Trusts §337, UTC § 804, and Restatement (Second) of Trusts § 174 (prudent administration) use the phrase "care, skill and caution," the Drafting Committee decided to use the more familiar corporate formulation as found in RMNCA. The standard also appears in Sections 3, 4 and 5 of UPMIFA. The Drafting Committee does not intend any substantive change to the UPIA standard and believes that "reasonable care, skill, and caution" are implicit in the term "care" as used in the RMNCA. The Drafting Committee included the detailed provisions from UPIA, because the Committee believed that the greater precision of the prudence norms of the Restatement and UPIA, as compared with UMIFA, could helpfully inform managers of charitable institutions. For an explanation of the Prudent Investor Act, see John H. Langbein, The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641 (1996), and for a discussion of the effect UPIA has had on investment decision making, see Max M. Schanzenbach & Robert H. Sitkoff, Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?, 50 J. L. & Econ. (forthcoming 2007).

Section 3 has incorporated the provisions of UPIA with only a few exceptions. UPIA applies to private trusts and is entirely default law. The settlor of a private trust has complete control over virtually all trust provisions. See UTC § 105. Because UPMIFA applies to charitable organizations, UPMIFA makes the duty of care, the duty to minimize costs, and the duty to investigate mandatory. The duty of loyalty is mandatory under applicable organization law, corporate or trust. Other than these duties, the provisions of Section 3 are default rules. A gift instrument or the governing instruments of an institution can modify these duties, but the charitable purpose doctrine limits the extent to which an institution or a donor can restrict these duties. In addition, subsection (a) of Section 3 reminds the decision maker that the intent of a donor expressed in a gift instrument will control decision making. Further, the decision maker must consider the charitable purposes of the institution and the purposes of the institutional fund for which decisions are being made. These factors are specific to charitable organizations; UPIA § 2(a) states the duty to consider similar factors in the private trust context.

UPMIFA does not include the duty of impartiality, stated in UPIA § 6, because nonprofit corporations do not confront the multiple beneficiaries problem to which the duty is addressed. Under UPIA, a trustee must treat the current beneficiaries and the remainder beneficiaries with due regard to their respective interests, subject to alternative direction from the trust document. A nonprofit corporation typically creates one charity. The institution may serve multiple beneficiaries, but those beneficiaries do not have enforceable rights in the institution in the same way that beneficiaries of a private trust do. Of course, if a charitable trust is created to benefit more than one charity, rather than being created to carry out a charitable purpose, then UPIA will apply the duty of impartiality to that trust.

In other respects, the Drafting Committee made changes to language from UPIA only where necessary to adapt the language for charitable institutions. No material differences are intended. Subsection (e)(1)(D) of Section 3 of UPMIFA does not include a clause that appears at the end of UPIA § 2(c)(4) ("which may include financial assets, interest in closely held enterprises, tangible and intangible personal property, and real property."). The Drafting Committee deemed this clause unnecessary for charitable institutions. The language of subsection (e)(1)(G) reflects a modification of the language of UPIA § (2)(c)(7). Other minor modifications to the UPIA provisions make the language more appropriate for charitable institutions.

The duties imposed by this section apply to those who govern an institution, including directors and trustees, and to those to whom the directors or managers delegate responsibility for investment and management of institutional funds. The standard applies to officers and employees of an institution and to agents who invest and manage institutional funds. Volunteers who work with an institution will be subject to the duties imposed here, but state and federal statutes may provide reduced liability for persons who act without compensation. UPMIFA does not affect the application of those shield statutes.

Subsection (a). Donor Intent and Charitable Purposes. Subsection (a) states the overarching duty to comply with donor intent as expressed in the terms of the gift instrument. The emphasis in the Act on giving effect to donor intent does not mean that the donor can or should control the management of the institution. The other fundamental duty is the duty to consider the charitable purposes of the institution and of the institutional fund in making management and investment decisions. UPIA § 2(a) states a similar duty to consider the purposes of a trust in investing and managing assets of a trust.

Subsection (b). Duty of Loyalty. Subsection (b) reminds those managing and investing institutional funds that the duty of loyalty will apply to their actions, but Section 3 does not state the loyalty standard that applies. The Drafting Committee was concerned, at least nominally, that different standards of loyalty may apply to directors of nonprofit corporations and to trustees of

charitable trusts. The RMNCA provides that under the duty of loyalty a director of a nonprofit corporation should act "in a manner the director reasonably believes to be in the best interests of the corporation." RMNCA § 8.30. The trust law articulation of the loyalty standard uses "sole interests" rather than "best interests." As the Restatement of Trusts explains, "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts § 170 (1). Although the standards for loyalty, like the standard of care, are merging, see Evelyn Brody, Charitable Governance: What's Trust Law Got to do With It? Chi.-Kent L. Rev. (2005); John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest, 114 Yale L.J. 929 (2005), the Drafting Committee concluded that formulating a duty of loyalty provision for UPMIFA was unnecessary. Thus the duty of loyalty under nonprofit corporation law will apply to charities organized as nonprofit corporations, and the duty of loyalty under trust law will apply to charitable trusts.

Subsection (b). Duty of Care. Subsection (b) also applies the duty of care to performance of investment duties. The language derives from § 8.30 of the RMNCA. This subsection states the duty to act in good faith, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Although the language in the RMNCA and in UPMIFA is similar to that of § 8.30 of the Model Business Corporation Act (3d ed. 2002), the standard as applied to persons making decisions for charities is informed by the fact that the institution is a charity and not a business corporation. Thus, in UPMIFA the references to "like position" and "similar circumstances" mean that the charitable nature of the institution affects the decision making of a prudent person acting under the standard set forth in subsection (b). The duty of care involves considering the factors set forth in subsection (e)(1).

Subsection (c)(1). Duty to Minimize Costs. Subsection (c)(1) tracks the language of UPIA § 7 and requires an institution to minimize costs. An institution may prudently incur costs by hiring an investment advisor, but the costs incurred should be appropriate under the circumstances. See UPIA § 7 cmt; Restatement (Third) of Trusts: Prudent Investor Rule § 227, cmt. M, at 58 (1992); Restatement (Second) of Trusts § 188 (1959). The duty is consistent with the duty to act prudently under § 8.30 of the RMNCA.

Subsection (c)(2). Duty to Investigate. This subsection incorporates the traditional fiduciary duty to investigate, using language from UPIA § 2(d). The subsection requires persons who make investment and management decisions to investigate the accuracy of the information used in making decisions.

Subsection (d). Pooling Funds. An institution holding more than one institutional fund may find that pooling its funds for investment and management purposes will be economically beneficial. The Act permits pooling for these purposes. The prohibition against commingling no longer prevents pooling funds for

investment and management purposes. See UPIA § 3, cmt. (duty to diversify aided by pooling); UPIA § 7, cmt. (pooling to minimize costs); Restatement (Third) of Trusts: Duty to Segregate and Identify Trust Property § 84 (T.D. No. 4 2005). Funds will be considered individually for other purposes of the Act, including for the spending rule for endowment funds of Section 4 and the modification rules of Section 6.

Subsection (e)(1). Prudent Decision Making. Subsection (e)(1) takes much of its language from UPIA § 2(c). In making decisions about whether to acquire or retain an asset, the institution should consider the institution's mission, its current programs, and the desire to cultivate additional donations from a donor, in addition to factors related more directly to the asset's potential as an investment.

Subsection (e)(1)(C) reflects the fact that some organizations will invest in taxable investments that may generate unrelated business taxable income for income tax purposes.

Assets held primarily for program-related purposes are not subject to UPMIFA. The management of those assets will continue to be governed by other laws applicable to the institution. Other assets may not be held primarily for program-related purposes but may have both investment purposes and program-related purposes. Subsections (a) and (e)(1)(H) indicate that a prudent decision maker can take into consideration the relationship between an investment and the purposes of the institution and of the institutional fund in making an investment that may have a program-related purpose but not be primarily program-related. The degree to which an institution uses an asset to accomplish a charitable purpose will affect the weight given that factor in a decision to acquire or retain the asset.

Subsection (e)(2). Portfolio Approach. This subsection reflects the use of portfolio theory in modern investment practice. The language comes from UPIA § 2(b), which follows the articulation of the prudent investor standard in Restatement (Third) of Trusts: Prudent Investor Rule § 227(a) (1992).

Subsection (e)(3). Broad Investment Authority. Consistent with the portfolio theory of investment, this subsection permits a broad range of investments. The language derives from UPIA § 2(e).

Section 4 of UMIFA indicated that an institution could invest "without restriction to investments a fiduciary may make." The committee removed this language from subsection (e)(3) as unnecessary, because states no longer have legal lists restricting fiduciary investing to the specific types of investments identified in statutory lists.

Subsection (e)(3) also provides that other law may limit the authority under this subsection. In addition, all of subsection (e) is subject to contrary provisions in a gift instrument, and a gift instrument may restrict the ability to invest in particular assets. For example, the gift instrument for a particular institutional fund might preclude the institution from investing the assets of the fund in companies that produce tobacco products.

In her book, Governing Nonprofit Organizations: Federal and State Law and Regulation 434 (Harv. Univ. Press 2004), Marion R. Fremont-Smith reports that some large charities pledge their endowment funds as security for loans. Subsection (e)(3) permits this sort of debt financing, subject to the guidelines of subsection (e)(1).

Subsection (e)(4). Duty to Diversify. This subsection assumes that prudence requires diversification but permits an institution to determine that nondiversification is appropriate under exceptional circumstances. A decision not to diversify must be based on the needs of the charity and not solely for the benefit of a donor. A decision to retain property in the hope of obtaining additional contributions from the same donor may be considered made for the benefit of the charity, but the appropriateness of that decision will depend on the circumstances. This subsection derives its language from UPIA § 3. See UPIA § 3 cmt. (discussing the rationale for diversification); Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

Subsection (e)(5). Disposing of Unsuitable Assets. This subsection imposes a duty on an institution to review the suitability of retaining property contributed to the institution within a reasonable period of time after the institution receives the property. Subsection (e)(5) requires the institution to make a decision but does not require a particular outcome. The institution may consider a variety of factors in making its decision, and a decision to retain the property either for a period of time or indefinitely may be a prudent decision.

Section 4(2) of UMIFA specifically authorized an institution to retain property contributed by a donor. The comment explained that an institution might retain property in the hope of obtaining additional contributions from the donor. Under UPMIFA the potential for developing additional contributions by retaining property contributed to the institution would be among the "other circumstances" that the institution might consider in deciding whether to retain or dispose of the property. The institution must weigh the potential for obtaining additional contributions with all other factors that affect the suitability of retaining the property in the investment portfolio.

The language of subsection (e)(5) comes from UPIA § 4, which restates Restatement (Third) of Trusts: Prudent Investor Rule § 229 (1992), which adopted language from Restatement (Second) of Trusts § 231 (1959). See UPIA § 4 cmt.

Subsection (e)(6). Special Skills or Expertise. Subsection (e)(6) states the rule provided in UPIA § 2(f) requiring a trustee to use the trustee's own skills and expertise in carrying out the trustee's fiduciary duties. The comment to RMNCA § 8.30 describes the existence of a similar rule under the law of nonprofit corporations. Section 8.30(a)(2) provides that in discharging duties a director must act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances. . . ." The comment explains that"[t]he concept of under similar circumstances' relates not only to the circumstances of the corporation but to the special background, qualifications,

and management experience of the individual director and the role the director plays in the corporation." After describing directors chosen for their ability to raise money, the comment notes that "[n]o special skill or expertise should be expected from such directors unless their background or knowledge evidences some special ability."

The intent of subsection (e)(6) is that a person managing or investing institutional funds must use the person's own judgment and experience, including any particular skills or expertise, in carrying out the management or investment duties. For example, if a charity names a person as a director in part because the person is a lawyer, the lawyer's background may allow the lawyer to recognize legal issues in connection with funds held by the charity. The lawyer should identify the issues for the board, but the lawyer is not expected to provide legal advice. A lawyer is not expected to be able to recognize every legal issue, particularly issues outside the lawyer's area of expertise, simply because the board member is lawyer. See ALI Principles of the Law of Nonprofit Organizations, Preliminary Draft No. 3 (May 12, 2005) § 315 (Duty of Care), cmt. c.

UMIFA contained two provisions that authorized investments in pooled or common investment funds. UMIFA §§ 4(3), 4(4). The Drafting Committee concluded that Section 3(e)(3) of UPMIFA authorizes these investments. The decision not to include the two provisions in UPMIFA implies no disapproval of such investments.

15-1-1104. Appropriation for expenditure of accumulation of endowment fund - rules of construction.

(a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) The duration and preservation of the endowment fund;

(2) The purposes of the institution and the endowment fund;

(3) General economic conditions;

(4) The possible effect of inflation or deflation;

(5) The expected total return from income and the appreciation of investments;

(6) Other resources of the institution; and

(7) The investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a) of this section, a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(1) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the endowment fund; and

(2) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a) of this section.

Source: L. 2008: Entire part R&RE, p. 562, § 1, effective September 1.

Editor's note: This section is similar to former §§ 15-1-1104 and 15-1-1105 as they existed prior to 2008.

OFFICIAL COMMENT

Purpose and Scope of Revisions. This section revises the provision in UMIFA that permitted the expenditure of appreciation of an endowment fund to the extent the fund had appreciated in value above the fund's historic dollar value. UMIFA defined historic dollar value to mean all contributions to the fund, valued at the time of contribution. Instead of using historic dollar value as a limitation, UPMIFA applies a more carefully articulated prudence standard to the process of making decisions about expenditures from an endowment fund. The expenditure rule of Section 4 applies only to the extent that a donor and an institution have not reached some other agreement about spending from an endowment. If a gift instrument sets forth specific requirements for spending, then the charity must comply with those requirements. However, if the gift instrument uses more general language, for example directing the charity to "hold the fund as an endowment" or "retain principal and spend income," then Section 4 provides a rule of construction to guide the charity.

Prior to the promulgation of UMIFA, "income" for trust accounting purposes meant interest and dividends but not capital gains, whether or not realized. Many institutions assumed that trust accounting principles applied to charities organized as nonprofit corporations, and the rules limited the institutions' ability to invest their endowment funds effectively. UMIFA

addressed this problem by construing "income" in gift instruments to include a prudent amount of capital gains, both realized and unrealized. Under UMIFA an institution could spend appreciation in addition to spending income determined under trust accounting rules. This rule of construction likely carried out the intent of the donor better than a rule limiting spending to trust accounting income, while permitting the charity to invest in a manner that could generate better returns for the fund.

UPMIFA also applies a rule of construction to terms like "income" or "endowment." The assumption in the Act is that a donor who uses one of these terms intends to create a fund that will generate sufficient gains to be able to make ongoing distributions from the fund while at the same time preserving the purchasing power of the fund. Because historic dollar value under UMIFA was a number fixed in time, the use of that approach may not have adequately captured the intent of a donor who wanted the endowment fund to continue to maintain its value in current dollars. UPMIFA takes a different approach, directing the institution to determine spending based on the total assets of the endowment fund rather than determining spending by adding a prudent amount of appreciation to trust accounting income.

UPMIFA requires the persons making spending decisions for an endowment fund to focus on the purposes of the endowment fund as opposed to the purposes of the institution more generally, as was the case under UMIFA. When the institution considers the purposes and duration of the fund, the institution will give priority to the donor's general intent that the fund be maintained permanently. Although the Act does not require that a specific amount be set aside as "principal," the Act assumes that the charity will act to preserve "principal" (i.e., to maintain the purchasing power of the amounts contributed to the fund) while spending "income" (i.e. making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions). Thus, an institution should monitor principal in an accounting sense, identifying the original value of the fund (the historic dollar value) and the increases in value necessary to maintain the purchasing power of the fund.

Subsection (a). Expenditure of Endowment Funds. Subsection (a) uses the RMNCA articulation of the standard of care for decision making under Section 4. The change in language does not reflect a substantive change. The comment to Section 3 more fully describes that standard of care.

Section 4 permits expenditures from an endowment fund to the extent the institution determines that the expenditures are prudent after considering the factors listed in subsection (a). These factors emphasize the importance of the intent of the donor, as expressed in a gift instrument. Section 4 looks to written documents as evidence of donor's intent and does not require an institution to rely on oral expressions of intent. By requiring written evidence of intent, the Act protects reliance by the donor and the institution on the written terms of a

donative agreement. Informal conversations may be misremembered and may be subject to multiple interpretations. Of course, oral expressions of intent may guide an institution in further carrying out a donor's wishes and in understanding a donor's intent.

The factors in subsection (a) require attention to the purposes of the institution and the endowment fund, economic conditions, and present and reasonably anticipated resources of the institution. As under UMIFA, determinations under Section 4 do not depend on the characterization of assets as income or principal and are not limited to the amount of income and unrealized appreciation. The authority in Section 4 is permissive, however, and an institution organized as a trust may continue to make spending decisions under trust accounting principles so long as doing so is prudent.

Institutions have operated effectively under UMIFA and have operated more conservatively than the historic dollar value rule would have permitted. Institutions have little incentive to maximize allowable spending. Good practice has been to provide for modest expenditures while maintaining the purchasing power of a fund. Institutions have followed this practice even though UMIFA (1) does not require an institution to maintain a fund's purchasing power and (2) does allow an institution to spend any amounts in a fund above historic dollar value, subject to the prudence standard. The Drafting Committee concluded that eliminating historic dollar value and providing institutions with more discretion would not lead to depletion of endowment funds. Instead, UPMIFA should encourage institutions to establish a spending policy that will be responsive to short-term fluctuations in the value of the fund. Section 4 allows an institution to maintain appropriate levels of expenditures in times of economic downturn or economic strength. In some years, accumulation rather than spending will be prudent, and in other years an institution may appropriately make expenditures even if a fund has not generated investment return that year.

Several levels of safeguard exist to prevent an institution from depleting an endowment fund or diverting assets from the purposes for which the fund was created. In comparison with UMIFA, UPMIFA provides greater direction to the institution with respect to making a prudent determination about spending from an endowment. UMIFA told the decision maker to consider "long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions." UPMIFA clarifies that in making spending decisions the institution should attempt to ensure that the value of the fund endures while still providing that some amounts be spent for the purposes of the endowment fund. In UPMIFA prudent decision making emphasizes the endowment aspect of the fund, rather than the overall purposes or needs of the institution.

In addition to the guidance provided by Section 4, other safeguards exist. Donors

can restrict gifts and can provide specific instructions to donee institutions regarding appropriate uses for assets contributed. Within institutions, fiduciary duties govern the persons making decisions on expenditures. Those persons must operate both with the best interests of the institution in mind and in keeping with the intent of donors. If an institution diverts an institutional fund from the charitable purposes of the institution, the state attorney general can enforce the charitable interests of the public. By relying on these safeguards while providing institutions with adequate discretion to make appropriate expenditures, the Act creates a standard that takes into consideration the diversity of the charitable sector. The committee expects that accumulated experience with such spending formulas will continue to inform institutional practice under the Act.

Distinguishing Legal and Accounting Standards. Deleting historic dollar value does not transform any portion of an endowment fund into unrestricted assets from a legal standpoint. An endowment fund is restricted because of the donor's intent that the fund be restricted by the prudent spending rule, that the fund not be spent in the current year, and that the fund continue to maintain its value for a long time. Regardless of the treatment of endowment fund from an accounting standpoint, legally an endowment fund should not be considered unrestricted. Subsection (a) states that endowment funds will be legally restricted until the institution appropriates funds for expenditure. The UMIFA statutes in Utah and Maine contain similar language. 13 Me. Rev. Stat. Ann. tit. 13 § 4106 (West 2005); Utah Code Ann. 1953 § 13-29-3 (2005). See, also, advisory published by Mass. Attorney General, "The Attorney General's Position on FASB Statement of Financial Accounting Standards No. 117, paragraph 22 and Related G.L.C. 180A Issues" (January 2004) http://www.ago.state.ma.us/filelibrary/fasb.pdf (last visited May 22, 2006) (concerning the treatment of endowments as legally restricted assets).

The term "endowment fund" includes funds that may last in perpetuity but also funds that are created to last for a fixed term of years or until the institution achieves a specified objective. Section 4 requires the institution to consider the intended duration of the fund in making determinations about spending. For example, if a donor directs that a fund be spent over 20 years, Section 4 will guide the institution in making distribution decisions. The institution would amortize the fund over 20 years rather than try to maintain the fund in perpetuity. For an endowment fund of limited duration, spending at a rate higher than rates typically used for endowment spending will be both necessary and prudent.

Subsection (c). Rule of Construction. Donor's intent must be respected in the process of making decisions to expend endowment funds. Section 4 does not allow an institution to convert an endowment fund into a non-endowment fund nor does the section allow the institution to ignore a donor's intent that a fund be maintained as an endowment. Rather, subsection (c) provides rules of construction to assist institutions in interpreting donor's intent.

Subsection (c) assumes that if a donor wants an institution to spend "only the income" from a fund, the donor intends that the fund both support current expenditures and be preserved permanently. The donor is unlikely to be concerned about designation of particular returns as "income" or "principal" under accounting principles. Rather the donor is more likely to assume that the institution will use modern total-return investing techniques to generate enough funds to distribute while maintaining the long-term viability of the fund. Subsection (c) is an intent effectuating provision that provides default rules to construe donor's intent.

As subsection (b) explains, a donor who wants to specify particular spending guidelines can do so. For example, a donor might require that a charity spend between three and five percent of an endowed gift each year, regardless of investment performance or other factors. Because the charity agrees to the restriction in accepting the gift, the restriction will govern spending decisions by the charity. Another donor might want to limit expenditures to trust accounting income and not want the institution to be able to expend appreciation. An instruction to "pay only the income" will not be specific enough, but an instruction to "pay only interest and dividend income earned by the fund and not to make other distributions of the kind authorized by Section 4 of UPMIFA" should be sufficient. If a donor indicates that the rules on investing or expenditures under Section 4 do not apply to a particular fund, then as a practical matter the institution will probably invest the fund separately. Thus, a decision by a donor to require fund specific expenditure rules will likely also have consequences in the way the institution invests the fund.

Retroactive Application of the Rule of Construction. A constructional rule resolves an ambiguity, in this case, because donors use words like endowment or income without specific directions regarding the intended meaning. Changing a statutory constructional rule does not change the underlying intent, and instead changes the way an ambiguity is resolved, in an attempt to increase the likelihood of giving effect to the intent of most donors.

If a donor has stated in a gift instrument specific directions as to spending, then the institution must respect those wishes, but many donors do not give precise instructions about how to spend endowment funds. In Section 4 UPMIFA provides guidance for giving effect to a donor's intent when the donor has not been specific. Like Section 3 of UMIFA, Section 4 of UPMIFA is a rule of construction, so it does not violate either donor intent or the Constitution.

The issue of whether to apply a rule of construction retroactively was considered in connection with UMIFA. When the New Hampshire legislature considered UMIFA, the Senate asked the New Hampshire Supreme Court for an opinion regarding whether UMIFA, if adopted, would violate a provision of the state constitution prohibiting retrospective laws, and also whether the statute would encroach on the functions of the judicial branch. The opinion answered no to both questions. Opinion of

the Justices, Request of the Senate No. 6667, 113 N.H. 287, 306 A.2d 55 (1973).

More recently the Colorado Supreme Court considered the retroactive application of another constructional statute, one that deems the designation of a spouse as the beneficiary of a life insurance policy to be revoked in a case in which the marriage was dissolved after the naming of the spouse as beneficiary. In re Estate of DeWitt, 54 P. 3d 849 (Colo. 2002). In holding that retroactive application of the statute did not violate the Contracts Clause, the court cited approvingly from a statement prepared by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB). JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to PreExisting Documents, 17 Am. Coll. Tr. & Est. Couns. Notes 184 app. II (1991).

The JEB Statement explains that the purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law. By definition, however, rules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction. See also In re Gardner's Trust, 266 Minn. 127, 132, 123 N.W. 2d 69, 73 (1963) ("[I]t is doubtful whether the testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends go where the law required them to go at the time they were received by the trustee.") (Uniform Principal and Income Act).

Non-retroactivity would produce serious practical problems: If the Act were not retroactive, a charity would need to keep two sets of books for each endowment fund created before the enactment of UPMIFA, if new funds were added after the enactment. The burden that such a rule would impose is out of proportion to the benefit sought.

Subsection (d). Rebuttable Presumption of Imprudence. The Drafting Committee debated at length whether to include a presumption of imprudence for spending above a fixed percentage of the value of the fund. The Drafting Committee decided to include a presumption in the Act in brackets, as an option for states to consider, and to include in these Comments a discussion of the advantages and disadvantages of including a presumption in the Act. (Colorado did not adopt the provisions contained in subsection (d).)

Some who commented on the Act viewed the presumption as linked to the retroactive application of the rule of construction of subsection (c). A donor who contributed to an endowment fund under UMIFA may have assumed that the historic dollar value of the gift would be subject to a no-spending rule under the statute. Because UPMIFA removes the concept of historic dollar value, the bracketed presumption of imprudence would assure the donor that spending from an endowment fund will be so limited.

Those in favor of the presumption of imprudence argued that the presumption would curb the temptation that a charity might have to spend endowment assets too rapidly. Although the presumption would be rebuttable, and spending above the identified

percentage might, in some years and for some charities, be prudent, institutions would likely be reluctant to authorize spending above seven percent. In addition, the presumption would give the attorney general a benchmark of sorts.

A variety of considerations cut against including a presumption of imprudence in the statute. A fixed percentage in the statute might be perceived as a safe harbor that could lead institutions to spend more than is prudent. Although the provision should not be read to imply that spending below seven percent will be considered prudent, some charities might interpret the statute in that way. Decision makers might be pressured to spend up to the percentage, and in doing so spend more than is prudent, without adequate review of the prudence factors as required under the Act.

Perhaps the biggest problem with including a presumption in the statute is the difficulty of picking a number that will be appropriate in view of the range of institutions and charitable purposes and the fact that economic conditions will change over time. Under recent economic conditions, a spending rate of seven percent is too high for most funds, but in a period of high inflation, seven percent might be too low. In making a prudent decision regarding how much to spend from an endowment fund, each institution must consider a variety of factors, including the particular purposes of the fund, the wishes of the donors, changing economic factors, and whether the fund will receive future donations.

Whether or not a statute includes the presumption, institutions must remember that prudence controls decision making. Each institution must make decisions on expenditures based on the circumstances of the particular charity.

Application of Presumption. For a state wishing to adopt a presumption of imprudence, subsection (d) provides language. Under subsection (d), a rebuttable presumption of imprudence will arise if expenditures in one year exceed seven percent of the assets of an endowment fund. The subsection applies a rolling average of three or more years in determining the value of the fund for purposes of calculating the seven-percent amount. An institution can rebut the presumption of imprudence if circumstances in a particular year make expenditures above that amount prudent. The concept and the language for the presumption of imprudence comes from Mass. Gen. L. ch. 180A, § 2 (2004). Massachusetts enacted this rule in 1975 as part of its UMIFA statute. New Mexico adopted the same presumption in 1978. N.M.S.A. § 46-9-2 (C) (2004). New Hampshire has a similar provision. N.H. Rev. Stat. § 292-B:6.

The period that a charity uses to calculate the presumption (three or more years) and the frequency of valuation (at least quarterly) will be binding in any determination of whether the presumption applies. For example, if a charity values an endowment fund on a quarterly basis and averages the quarterly values over three years to determine the fair market value of the fund for purposes calculating seven

percent of the fund, the charity's choices of three years as a smoothing period and quarterly as a valuation period cannot be challenged. If the charity makes an appropriation that is less than seven percent of this value, then the presumption of imprudence does not arise even if the appropriation would exceed seven percent of the value of the fund calculated based on monthly valuations averaged over five years.

If sufficient evidence establishes, by the preponderance of the evidence, the facts necessary to raise the presumption of imprudence, then the institution will have to carry the burden of production of (i.e., the burden of going forward with) other evidence that would tend to demonstrate that its decision was prudent. The existence of the presumption does not shift the burden of persuasion to the charity.

Expenditures from an endowment fund may include distributions for charitable purposes and amounts used for the management and administration of the fund, including annual charges for fundraising. The value of a fund, as calculated for purposes of determining the seven percent amount, will reflect increases due to contributions and investment gains and decreases due to distributions and investment losses. The seven percent figure includes charges for fundraising and administrative expenses other than investment management expenses. All costs or fees associated with an endowment fund are factors that prudent decision makers consider. High costs or fees of investment management could be considered imprudent regardless of whether spending exceeds seven percent of the fund's value.

The presumption of imprudence does not create an automatic safe harbor. Expenditures at six percent might well be imprudently high. See James P. Garland, The Fecundity of Endowments and Long-Duration Trusts, The Journal of Portfolio Management (2005). Evidence reviewed by the Drafting Committee suggests that at present few funds can sustain spending at a rate above five percent. See Roger G. Ibbotson & Rex A. Sinquefield, Stocks, Bonds, Bills, and Inflation: Historical Returns (1926-1987) (Research Foundation of the Institute of Chartered Financial Analysts, 1989). Indeed, under current conditions five percent can be too high. See Joel C. Dobris, Why Five? The Strange, Magnetic, and Mesmerizing Effect of the Five Percent Unitrust and Spending Rate on Settlors, Their Advisers, and Retirees, 40 Real Prop. Prob. & Tr. J. 39 (2005). Further, spending at a lower rate, particularly in the early years of an endowment, may result in greater distributions over time. See DeMarche Associates, Inc, Spending Policies and Investment Planning for Foundations: A Structure for Determining a Foundation's Asset Mix (Council on Foundations: 3d ed. 1999). A presumption of imprudence can serve as a reminder that spending at too high a rate will jeopardize the long-term nature of an endowment fund. If an endowment fund is intended to continue permanently, the institution should take special care to limit annual spending to a level that protects the purchasing power of the fund.

Subsection (d) provides that the terms of the gift instrument can provide additional spending authority. For example, if a gift instrument directs that an institution expend a fund over a ten-year period, exhausting the fund after ten years, spending at a rate higher than seven percent will be necessary.

Subsection (d) does not require an institution to spend a minimum amount each year. The prudence standard and the needs of the institution will supply sufficient guidance regarding whether to accumulate rather than to spend in a particular year.

Spending above seven percent in any one year will not necessarily be imprudent. For some endowment funds fluctuating spending rates may be appropriate. Although the Act does not apply the percentage for the presumption on a rolling basis (e.g., 21 percent over three years), some endowment funds may prudently spend little or nothing in some years and more than seven percent in other years. For example, a charity planning a construction project might decide to spend nothing from an endowment for three years and then in the fourth year might spend 20 percent of the value of the fund for construction costs. The decision to accumulate in years one through three and then to spend 20 percent in the fourth year might be prudent for the charity, depending on the other factors. The charity should maintain adequate records during the accumulation period and should document the decision-making process in the fourth year to be able to meet the burden of production associated with the presumption. Another charity might prudently spend 20 percent in year one and nothing for the following three years. That charity would also need to document the decision-making process through which the decision to spend occurred and maintain records explaining why the decision was prudent under the circumstances.

A charity might establish a "capital replacement fund" designed to provide funds to the institution for repair or replacement of major items of equipment. Disbursements from such a fund will likely fluctuate, with limited expenditures in some years and big expenditures in others. The fund would not exhibit a uniform spending rate. Indeed, an advantage of a capital replacement fund is the ability to absorb a significant capital expenditure in a single year without a negative impact on the operating budget of the institution. Disbursements might average five percent per year but would vary, with spending in some years more and in some years less. Even if this fund is an endowment fund subject to Section 4, spending above seven percent in a particular year could well be prudent. Subsection (d) does not preclude spending above seven percent.

A charity creating a capital replacement fund or a building fund might chose to adopt spending rules for the fund that would not be subject to UPMIFA. Specific donor intent can supersede the rules of UPMIFA. If the charity creates a gift instrument that establishes appropriate rules on spending for the fund, and if donors agree to those restrictions, then the UPMIFA rules on spending, including the bracketed presumption, will not apply.

Institutions with Limited Investment and Spending Experience. Several attorneys general and other charity officials raised concerns about whether small institutions would be able to adjust to a spending rule based solely on prudence, without the bright-line guidance of historic dollar value. Some charity regulators who spoke with the Drafting Committee noted that large institutions have sophisticated investment strategies, access to good investment advisors, and experience with spending rules that maintain purchasing power for endowment funds. For these institutions, the rules of UPMIFA should work well. For smaller institutions, however, the state regulators thought that additional guidance could be helpful. After discussing strategies to address this concern, the Drafting Committee decided to include in these comments an additional optional provision that a state could choose to include in its UPMIFA statute.

The optional provision focuses on institutions with endowment funds valued, in the aggregate, at less than $2,000,000. The number is in brackets to indicate that it could be set higher or lower. The number was chosen to address the concern of the state regulators that some small charities might be more likely to spend imprudently than large charities. The Drafting Committee selected $2,000,000 as the value that might include most unsophisticated institutions but would not be overinclusive.

The optional provision creates a notification requirement for an institution with a small endowment that plans to spend below historic dollar value. If an institution subject to the provision decides to appropriate an amount that would cause the value of its endowment funds to drop below the aggregate historic dollar value for all of its endowment funds, then the institution will have to notify the attorney general before proceeding with the expenditure. The provision does not require that the institution obtain the approval of the attorney general before making the distribution. Rather, the notification requirement gives the attorney general the opportunity to take a closer look at the institution and its spending decision, to educate the institution on prudent decision making for endowment funds, and to intervene if the attorney general determines that the spending would be imprudent for the institution. Although the Drafting Committee thinks that the prudence standard in UPMIFA provides adequate guidance to all institutions within the scope of the Act, if a state chooses to adopt a notification provision for institutions with small endowments, the Drafting Committee recommends the following language:

(-) If an institution has endowment funds with an aggregate value of less than [$2,000,000], the institution shall notify the [Attorney General] at least [60 days] prior to an appropriation for expenditure of an amount that would cause the value of the institution's endowment funds to fall below the aggregate historic dollar value of the institution's endowment funds, unless the expenditure is permitted or required under law other than this [act] or in the gift instrument. For purposes of this subsection, "historic dollar value" means the aggregate value in dollars of (i) each endowment fund at the time it became an endowment fund,

(ii) each subsequent donation to the fund at the time the donation is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The institution's determination of historic dollar value made in good faith is conclusive.

15-1-1105. Delegation of management and investment functions.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this part 11, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) of this section is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this part 11.

Source: L. 2008: Entire part R&RE, p. 563, § 1, effective September 1.

Editor's note: This section is similar to former § 15-1-1107 as it existed prior to 2008.

OFFICIAL COMMENT

The prudent investor standard in Section 4 presupposes the power to delegate. For some types of investment, prudence requires diversification, and diversification may best be accomplished through the use of pooled investment vehicles that entail delegation. The Drafting Committee decided to put Section 5 in brackets because many states already provide sufficient authority to delegate authority through other statutes. If such authority exists, then an enacting state should enact UPMIFA without Section 5. Enacting delegation rules that duplicate existing rules could be confusing and might create conflicts. For charitable trusts, UPIA provides the same delegation rules as those in Section 5. For nonprofit corporations, nonprofit corporation statutes often provide comparable rules. A state enacting UPMIFA must be certain that its laws authorize delegation, either through other statutes or by enacting Section 5.

Section 5 incorporates the delegation rule found in UPIA § 9, updating the delegation rules in UMIFA § 5. Section 5 permits the decision makers in an institution to delegate management and investment functions to external agents if the decision makers exercise reasonable skill, care, and caution in selecting the agent, defining the scope of the delegation and reviewing the performance of the agent. In some circumstances, the scope of the delegation may include redelegation. For example, an institution may select an investment manager to assist with investment decisions. The delegation may include the authority to redelegate to investment managers with expertise in particular investment areas. All decisions to delegate require the exercise of reasonable care, skill, and caution in selecting, instructing, and monitoring agents. Further, decision makers cannot delegate the authority to make decisions concerning expenditures and can only delegate management and investment functions. Subsection (c) protects decision makers who comply with the requirement for proper delegation from liability for actions or decisions of the agents. In making decisions concerning delegation, the institution must be mindful of Section 3(c)(1) of UPMIFA, the provision that directs the institution to incur only reasonable costs in managing and investing an institutional fund.

Section 5 does not address issues of internal delegation and potential liability for internal delegation, and subsection (c) does not affect laws that govern personal liability of directors or trustees for matters outside the scope of Section 5. Directors will look to nonprofit corporation laws for these rules, while trustees will look to trust law. See, e.g., RMNCA, § 8.30(b) (permitting directors to rely on information prepared by an officer or employee of the institution if the director reasonably believes the officer or employee to be reliable and competent in the matters presented).

The language of subsection (c) is similar to that of UPIA § 9(c) and RMNCA § 8.30(d). The decision not to include the terms "beneficiaries" or "members" in subsection (c) does not indicate a decision that this section does not create immunity from claims brought by beneficiaries or members. Instead, a decision maker who complies with section 5 will be protected

from any liability resulting from actions or decisions made by an external agent.

Subsection (d) creates personal jurisdiction over the agent. This subsection is not a choice of law rule.

Subsection (e) notes that law other than this Act governs internal delegation. Section 5 of UMIFA included internal delegation as well as external delegation, due to a concern at that time that trust law concepts might govern internal delegation in nonprofit corporations. With the widespread adoption of nonprofit corporation statutes, that concern no longer exists. The decision not to address internal delegation in UPMIFA does not suggest that a governing board of a nonprofit corporation cannot delegate to committees, officers, or employees. Rather, a nonprofit corporation must look to other law, typically a nonprofit corporation statute, for the rules governing internal delegation.

15-1-1106. Release or modification of restrictions on management, investment, or purpose.

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow an institutional fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the institutional fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the institutional fund. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the institutional fund or the restriction on the use of the institutional fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, sixty days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(1) The institutional fund, subject to the restriction, has a total value of less than one hundred thousand dollars; except that the dollar limit established in this paragraph (1) shall be adjusted for inflation in accordance with the annual percentage change in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Aurora-Lakewood for all items and all urban consumers, or its applicable predecessor or successor index. On or before January 1, 2010, and each even-numbered year thereafter, the attorney general shall calculate the adjusted dollar amount for the next two-year cycle using inflation for the prior two calendar years as of the date of the calculation. The adjusted exemption shall be rounded upward to the nearest one-hundred-dollar increment. The attorney general shall certify the amount of the adjustment for the next two-year cycle and shall publish the amount on the attorney general's website.

(2) More than twenty years have elapsed since the institutional fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

Source: L. 2008: Entire part R&RE, p. 563, § 1, effective September 1. **L. 2018:** (d)(1) amended, (HB 18-1375), ch. 274, p. 1697, § 11, effective May 29.

Editor's note: This section is similar to former § 15-1-1109 as it existed prior to 2008.

OFFICIAL COMMENT

Section 6 expands the rules on releasing or modifying restrictions that are found in Section 7 of UMIFA. Subsection (a) restates the rule from UMIFA allowing the release of a restriction with donor consent. Subsections (b) and (c) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under appropriate circumstances. Subsection (d), a new provision, permits an institution to apply cy pres on its own for small funds that have existed for a substantial period of time, after giving notice to the state attorney general.

Although UMIFA stated that it did not "limit the application of the doctrine of cy pres", UMIFA § 7(d), what that statement meant under the Act was unclear. UMIFA itself appeared to permit only a release of a restriction and not a modification. That all-or-nothing approach did not adequately protect donor intent. See Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993). By expressly including deviation and cy pres, UPMIFA requires an institution to seek modifications that are "in accordance with the donor's probable intention" for deviation and "in a manner consistent with the charitable purposes expressed in the gift instrument" for cy pres.

Individual Funds. The rules on modification require that the institution, or a court applying a court-ordered doctrine, review each institutional fund separately. Although an institution may manage institutional funds collectively, for purposes of this Section each fund must be considered individually.

Subsection (a). Donor Release. Subsection (a) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a restriction, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect the property to another use by the charity. The donor has no retained interest in the fund.

Subsection (b). Equitable Deviation. Subsection (b) applies the rule of equitable deviation, adapting the language of UTC § 412 to this section. See also Restatement (Third) of Trusts § 66 (2003). Under the deviation doctrine, a court may modify restrictions on the way an institution manages or administers a fund in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor commonly has a predominating purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. Deviation does not alter the purpose but rather modifies the means in order to carry out the purpose.

Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations the restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner. A court applying deviation should attempt to follow the donor's probable intention in deciding how to modify the restriction. Consistent with the doctrine of equitable deviation in trust law, subsection (b) does not require an institution to notify donors of the proposed modification. Good practice dictates notifying any donors who are alive and can be located with a reasonable expenditure of time and money. Consistent with the doctrine of deviation under trust law, the institution must notify the attorney general who may choose to participate in the court proceeding. The attorney general protects donor intent as well as the public's interest in charitable assets. Attorney general is in brackets in the Act because in some states another official enforces the law of charities.

Subsection (c). Cy Pres. Subsection (c) applies the rule of cy pres from trust law, authorizing the court to modify the purpose of an institutional fund. The term "modify" encompasses the release of a restriction as well as an alteration of a restriction and also permits a court to order that the fund be paid to another institution. A court can apply the doctrine of cy pres only if the restriction in question has become unlawful, impracticable, impossible to achieve, or wasteful. This standard, which comes from UTC § 413, updates the circumstances under which cy pres may be applied by adding

"wasteful" to the usual common law articulation of the doctrine. Any change must be made in a manner consistent with the charitable purposes expressed in the gift instrument. See also Restatement (Third) of Trusts § 67 (2003). Consistent with the doctrine of cy pres, subsection (c) does not require an institution seeking cy pres to notify donors. Good practice will be to notify donors whenever possible. As with deviation, the institution must notify the attorney general who must have the opportunity to be heard in the proceeding.

Subsection (d). Modification of Small, Old Funds. Subsection (d) permits an institution to release or modify a restriction according to cy pres principles but without court approval if the amount of the institutional fund involved is small and if the institutional fund has been in existence for more than 20 years. The rationale is that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. The Drafting Committee discussed at length the parameters for allowing an institution to apply cy pres without court supervision. The Committee drafted subsection (d) to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent. The Committee concluded that an institutional fund with a value of $25,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion to its protective purpose. The Committee included a requirement that the institutional fund be in existence at least 20 years, as a further safeguard for fidelity to donor intent. The 20-year period begins to run from the date of inception of the fund and not from the date of each gift to the fund. The amount and the number of years have been placed in brackets to signal to an enacting jurisdiction that it may wish to designate a higher or lower figure. Because the amount should reflect the cost of a judicial proceeding to obtain a modification, the number may be higher in some states and lower in others.

As under judicial cy pres, an institution acting under subsection (d) must change the restriction in a manner that is in keeping with the intent of the donor and the purpose of the fund. For example, if the value of a fund is too small to justify the cost of administration of the fund as a separate fund, the term "wasteful" would allow the institution to combine the fund with another fund with similar purposes. If a fund has been created for nursing scholarships and the institution closes its nursing school, the institution might appropriately decide to use the fund for other scholarships at the institution. In using the authority granted under subsection (d), the institution must determine which alternative use for the fund reasonably approximates the original intent of the donor. The institution cannot divert the fund to an entirely different use. For example, the fund for nursing scholarships could not be used to build a football stadium.

An institution seeking to modify a provision under subsection (d) must notify the attorney general of the planned modification. The institution must wait 60 days before proceeding; the attorney general

may take action if the proposed modification appears inappropriate.

Notice to Donors. The Drafting Committee decided not to require notification of donors under subsections (b), (c), and (d). The trust law rules of equitable deviation and cy pres do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public's interest in charitable assets.

With regard to subsection (d), the Drafting Committee concluded that an institution should not be required to give notice to donors. Subsection (d) can only be used for an old and small fund. Locating a donor who contributed to the fund more than 20 years earlier may be difficult and expensive. If multiple donors each gave a small amount to create a fund 20 years earlier, the task of locating all of those donors would be harder still. The Drafting Committee concluded that an institution's concern for donor relations would serve as a sufficient incentive for notifying donors when donors can be located.

15-1-1107. Reviewing compliance.

Compliance with this part 11 is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

Source: L. 2008: Entire part R&RE, p. 564, § 1, effective September 1.

15-1-1108. Application to existing institutional funds.

This part 11 applies to institutional funds existing on or established after September 1, 2008. As applied to institutional funds existing on September 1, 2008, this part 11 governs only decisions made or actions taken on or after said date.

Source: L. 2008: Entire part R&RE, p. 565, § 1, effective September 1.

15-1-1109. Relation to "Electronic Signatures in Global and National Commerce Act".

This part 11 modifies, limits, and supersedes the "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (a) of that act, 15 U.S.C. sec. 7001 (a), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2008: Entire part R&RE, p. 565, § 1, effective September 1.

15-1-1110. Uniformity of application and construction.

In applying and construing this part 11, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2008: Entire part R&RE, p. 565, § 1, effective September 1.

Editor's note: This section is similar to former § 15-1-1102 as it existed prior to 2008.

PART 12

LIFE ESTATE IN PROPERTY OF SURVIVING SPOUSE

15-1-1201. Life estate in property - rights of surviving spouse.

(1) Unless the instrument provides otherwise, any devise of a life estate in property to a surviving spouse by a decedent spouse shall entitle the surviving spouse to:

(a) All income for life from the entire interest in or specific portion of the property, payable annually or at more frequent intervals;

(b) Exclusive beneficial enjoyment of the property during his life, including such income or use of the property as is consistent with the value of the property and its preservation; except that, during the surviving spouse's lifetime, no person other than the surviving spouse may receive any distribution of the property or its income; and

(c) Make the property productive or convert it into productive property within a reasonable time after the devise; except that, the exercise of such power shall be subject to the degree of judgment and care which a prudent person would use if he were the owner of the property. The proceeds of any such conversion shall be reinvested by the surviving spouse in a form subject to the life estate and remainder rights created by the decedent.

(2) The provisions of this part 12 shall be interpreted consistently with the requirements of section 2056 (b)(7) of the federal "Internal Revenue Code of 1986", as amended, if the personal representative of the estate of the decedent spouse elects to treat such life estate as qualified terminable interest property under said Internal Revenue Code section.

Source: L. 88: Entire part added, p. 647, § 1, effective May 17. **L. 2000:** (2) amended, p. 1846, § 28, effective August 2.

15-1-1202. Applicability of part.

This part 12 shall apply to the estate of any person whose death occurred after December 31, 1981.

Source: L. 88: Entire part added, p. 648, § 1, effective May 17.

PART 13

UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

15-1-1301 to 15-1-1321. (Repealed)

Editor's note: (1) This part 13 was added in 1992. For amendments to this part 13 prior to its repeal in 2010, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 15-1-1321 provided for the repeal of this part 13, effective January 1, 2010. (See L. 2009, p. 427.)

PART 14

RESTRICTIONS ON EXERCISE OF CERTAIN FIDUCIARY POWERS

15-1-1401. Restrictions on exercise of certain fiduciary powers.

(1) (a) Due to the inherent conflict of interest that exists between a trustee who is a beneficiary of a trust and other beneficiaries of the trust, any of the following powers conferred upon a trustee shall not be exercised by such trustee:

(I) To make or cause to be made discretionary distributions of either principal or income to or for the direct or indirect benefit of such trustee; except that such a power may be exercised by such trustee to the extent that it may be exercised to provide for that trustee's health, education,

maintenance, or support as described under sections 2041 and 2514 of the federal "Internal Revenue Code of 1986", as amended;

(II) To make discretionary distributions of either principal or income to satisfy any legal obligations of such trustee; or

(III) To make or cause to be made discretionary distributions of either principal or income to or for the direct or indirect benefit of any person who has the right to remove or replace such trustee; except that such a power may be exercised by such trustee to the extent that it may be exercised to provide for such person's health, education, maintenance, or support as described under sections 2041 and 2514 of the federal "Internal Revenue Code of 1986", as amended.

(b) Any of the powers prescribed in paragraph (a) of this subsection (1) that are conferred upon two or more trustees may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise such powers, any party in interest, as described in subsection (3) of this section, may apply to a court of competent jurisdiction to appoint an independent trustee, and such powers may be exercised by the independent trustee appointed by the court. Subparagraph (I) of paragraph (a) of this subsection (1) shall not prohibit a trustee from making payments, including reimbursement of and compensation of such trustee, for the protection of the trust, or the assets thereof, and for all expenses, losses, and liabilities incurred in or by the collection, care, administration, or protection of the trust or the assets thereof.

(2) This section applies to every trust unless the terms of the trust as it may be amended in accordance with its terms provide expressly to the contrary and either specifically refer to this section or otherwise clearly demonstrate the intent that this rule not apply or unless, if the trust is irrevocable, all parties in interest, as described in subsection (3) of this section, elect affirmatively, in the manner prescribed in subsection (4) of this section, not to be subject to the application of this section. Such election shall be made on or before July 1, 1999, or three years after the date on which the trust becomes irrevocable, whichever occurs later.

(3) For the purpose of subsection (1) or subsection (2) of this section:

(a) If the trust is revocable or amendable and the settlor is not incapacitated, the party in interest is the settlor.

(b) If the trust is revocable or amendable and the settlor is incapacitated, the party in interest is the settlor's legal representative under applicable law or the settlor's agent under a durable power of attorney that is sufficient to grant such authority.

(c) If the trust is not revocable or amendable, the parties in interest are:

(I) Each trustee then serving;

(II) Each income beneficiary then in existence or, if any such beneficiary has not attained majority or is otherwise incapacitated, the beneficiary's legal representative under applicable law

or the beneficiary's agent under a durable power of attorney that is sufficient to grant such authority; and

(III) Each remainder beneficiary then in existence or, if any such remainder beneficiary has not attained majority or is otherwise incapacitated, the beneficiary's legal representative under applicable law or the beneficiary's agent under a durable power of attorney that is sufficient to grant such authority.

(4) The affirmative election required under subsection (2) of this section shall be made:

(a) If the settlor is not incapacitated and the trust is revocable or amendable, through a revocation of or an amendment to the trust;

(b) If the settlor is incapacitated and the trust is revocable or amendable, through a written declaration executed in the manner prescribed for the acknowledgment of deeds in this state and delivered to the trustee; or

(c) If the trust is not revocable or amendable, through a written declaration executed in the manner prescribed for the acknowledgment of deeds in this state and delivered to the trustee.

(5) A person who has the right to remove or to replace a trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers proscribed in subparagraphs (I), (II), and (III) of paragraph (a) of subsection (1) of this section of the trustee that is subject to removal or to replacement.

(6) (a) Subparagraphs (I) and (II) of paragraph (a) of subsection (1) of this section shall not apply to a trustee with respect to trust property and the income from such property where such property would, upon the death of such trustee, be included in the gross estate of such trustee for federal estate tax purposes for any reason other than the powers proscribed by subparagraphs (I) and (II) of paragraph (a) of subsection (1) of this section.

(b) Subparagraph (I) of paragraph (a) of subsection (1) of this section shall not apply to a trustee that may be appointed or removed by a person for whose benefit the proscribed powers may be exercised to distribute trust property or the income from such property where such property would, upon the death of such person, be included in the gross estate of such person for federal estate tax purposes for any reason other than such powers to appoint or remove such trustee.

(7) The provisions of this section neither create a new cause of action nor impair any existing cause of action that, in either case, relates to any power proscribed by subsection (1) of this section that was exercised before July 1, 1996.

Source: L. 96: Entire part added, p. 654, § 4, effective July 1.

PART 15

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Law reviews: For article, "Colorado's New Uniform Electronic Wills Act", see 51 Colo. Law. 46 (Feb. 2022).

PREFATORY NOTE

The purpose of the Revised Fiduciary Access to Digital Assets Act (Revised UFADAA) is twofold. First, it gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible. Second, it gives custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications. The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user. It adheres to the traditional approach of trusts and estates law, which respects the intent of an account holder and promotes the fiduciary's ability to administer the account holder's property in accord with legally-binding fiduciary duties. The act removes barriers to a fiduciary's access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law. Existing law prohibits any fiduciary from violating fiduciary responsibilities by divulging or publicizing any information the fiduciary obtains while carrying out his or her fiduciary duties.

Revised UFADAA addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees. It distinguishes the authority of fiduciaries, which exercise authority subject to this act only on behalf of the user, from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

Digital assets are electronic records in which individuals have a right or interest. As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. These assets, ranging from online gaming items to photos, to digital music, to client lists, can have real economic or sentimental value. Yet few laws exist on the rights of fiduciaries over digital assets. Holders of digital assets may not consider the fate of their online presences once they are no longer able to manage their

assets, and may not expressly provide for the disposition of their digital assets or electronic communications in the event of their death or incapacity. Even when they do, their instructions may come into conflict with custodians' terms-of-service agreements. Some Internet service providers have explicit policies on what will happen when an individual dies, while others do not, and even where these policies are included in the terms-of- service agreement, consumers may not be fully aware of the implications of these provisions in the event of death or incapacity or how courts might resolve a conflict between such policies and a will, trust instrument, or power of attorney.

The situation regarding fiduciaries' access to digital assets is less than clear, and is subject to federal and state privacy and computer "hacking" laws as well as state probate law. A minority of states has enacted legislation on fiduciary access to digital assets, and numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered. A uniform approach among states will provide certainty and predictability for courts, users of Internet services, fiduciaries, and Internet service providers. Revised UFADAA gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent, protected person, principal, or a trust.

With regard to the general scope of the act, the act's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records in which an individual has a property right or interest, which do not include the underlying asset or liability unless it is itself an electronic record.

The act is divided into 21 sections. [Colorado adopted 18 sections.] Section 1502 contains definitions of terms used throughout the act.

Section 1503 governs applicability, clarifying the scope of the act and the fiduciaries who have access to digital assets under Revised UFADAA, and carves out an exception for digital assets of an employer used by an employee during the ordinary course of business.

Section 1504 provides ways for users to direct the disposition or deletion of their digital assets at their death or incapacity, and establishes a priority system in case of conflicting instructions.

Section 1505 establishes that the terms-of-service governing an online account apply to fiduciaries as well as to users, and clarify that a fiduciary cannot take any action that the user could not have legally taken.

Section 1506 gives the custodians of digital assets a choice for disclosing those assets to fiduciaries. A custodian may, but need not, comply with a request for access by allowing the fiduciary to reset the password and access the user's account. In many cases that will be the simplest method of compliance. However, a custodian may

also comply without giving access to a user's account by simply giving a copy of all the user's digital assets to the fiduciary. That method may be preferred for a social media account when a fiduciary has no need for full access and control.

Sections 1507-1514 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications protected under federal privacy laws and for other types of digital assets. Generally, a fiduciary will have access to a catalogue of the user's communications, but not the content, unless the user consented to the disclosure of the content.

Section 1515 contains general provisions relating to the rights and responsibilities of the fiduciary. Section 1516 addresses compliance by custodians and grants immunity for any acts taken in order to comply with a fiduciary's request under this act. Sections 1517 and 1518 address miscellaneous topics.

15-1-1501. Short title.

This part 15 may be cited as the "Revised Uniform Fiduciary Access to Digital Assets Act".

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 179, § 1, effective August 10.

15-1-1502. Definitions.

In this part 15:

(1) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(2) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) "Carries" means engages in the transmission of an electronic communication.

(4) "Catalog of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Conservator" means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator.

(6) "Content of an electronic communication" means information concerning the substance or meaning of a communication that:

(a) Has been sent or received by a user;

(b) Is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(c) Is not readily accessible to the public.

(7) "Court" means the district court, except in the city and county of Denver where it is the probate court.

(8) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(9) "Designated recipient" means a person chosen by a user using an on-line tool to administer digital assets of the user.

(10) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

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

(12) "Electronic communication" has the meaning set forth in 18 U.S.C. sec. 2510(12), as amended.

(13) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(14) "Fiduciary" means an original, additional, or successor personal representative, conservator, agent, or trustee.

(15) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) "On-line tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

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

(18) "Personal representative" means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this part 15.

(19) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(20) "Principal" means an individual who grants authority to an agent in a power of attorney.

(21) "Protected person" means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending.

(22) "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.

(23) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. sec. 2510(14), as amended.

(24) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(25) "Trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

(26) "User" means a person that has an account with a custodian.

(27) "Will" includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 179, § 1, effective August 10.

OFFICIAL COMMENT

Many of the definitions are based on those in the Uniform Probate Code: agent (UPC Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), person (UPC Section 5B-101(6)), personal representative (UPC Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC Section 5B-102(9)), protected person (UPC Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1- 201(57)). The definition of "information" is based on that in the Uniform Electronic Transactions Act, Section 2, subsection (11). Many of the

other definitions are either drawn from federal law, as discussed below, or are new for this act.

The definition of "account" is broadly worded to encompass any contractual arrangement subject to a terms-of-service agreement, but limited for the purpose of this act by the requirement that the custodian carry, maintain, process, receive, or store a digital asset of the user.

The definition of "digital asset" expressly excludes underlying assets such as funds held in an online bank account. Because records may exist in both electronic and non- electronic formats, this definition clarifies the scope of the act and the limitation on the type of records to which it applies. The term includes types of electronic records currently in existence and yet to be invented. It includes any type of electronically-stored information, such as: 1) information stored on a user's computer and other digital devices; 2) content uploaded onto websites; and 3) rights in digital property. It also includes records that are either the catalogue or the content of an electronic communication. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 388 (2014) (available at: http://goo.gl/T9jX1d).

The term "catalogue of electronic communications" is designed to cover log-type information about an electronic communication such as the email addresses of the sender and the recipient, and the date and time the communication was sent.

The term "content of an electronic communication" is adapted from 18 U.S.C. Section 2510(8), which provides that content: "when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." The definition is designed to cover only content subject to the coverage of Section 2702 of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 et seq.; it does not include content not subject to ECPA. Consequently, the "content of an electronic communication", as used later throughout Revised UFADAA, refers *only* to information in the body of an electronic message that is not readily accessible to the public; if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under ECPA. See S. Rep. No. 99-541, at 36 (1986). Example: X uses a Twitter account to send a message. If the tweet is sent only to other people who have been granted access to X's tweets, then it meets Revised UFADAA's definition of "content of an electronic communication." But, if the tweet is completely public with no access restrictions, then it does not meet the act's definition of "content of an electronic communication." ECPA does not apply to private e-mail service providers, such as employers and educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State*

Laws Prevent Fiduciaries from Managing Digital Property, 68 U. Miami L. Rev. 385, 404 (2014) (available at: http://goo.gl/T9jX1d).

A "user" is a person that has an account with a custodian, and includes a deceased individual that entered into the agreement while alive. A fiduciary can be a user when the fiduciary opens the account.

The definition of "carries" is drawn from federal law, 47 U.S.C. Section 1001(8).

A "custodian" includes any entity that provides or stores electronic data for a user.

The fiduciary's access to a record defined as a "digital asset" does not mean the fiduciary *owns* the asset or may engage in transactions with the asset. Consider, for example, a fiduciary's legal rights with respect to funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar presence. This act affects electronic records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other transactions might occur electronically. Revised UFADAA only deals with the right of the fiduciary to access all relevant electronic communications and digital assets accessible through the online account. An entity may not refuse to provide access to online records any more than the entity can refuse to provide the fiduciary with access to hard copy records.

An "electronic communication" is a particular type of digital asset subject to the privacy protections of the Electronic Communications Privacy Act. It includes email, text messages, instant messages, and any other electronic communication between private parties. The definition of "electronic communication" is that set out in 18 U.S.C. Section 2510(12): "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

The definition of "electronic-communication service" is drawn from 18 U.S.C. Section 2510(15): "any service which provides to users thereof the ability to send or receive wire or electronic communications." The definition of "remote-computing service" is adapted from 18 U.S.C. Section 2711(2): "the provision to the public of computer storage or processing services by means of an electronic communications system." The definition refers to 18 U.S.C. Section 2510(14), which

defines an electronic communications system as: "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications."

A "fiduciary" under this act occupies a status recognized by state law, and a fiduciary's powers under this act are subject to the relevant limits established by other state laws.

An "online tool" is a mechanism by which a user names an individual to manage the user's digital assets after the occurrence of a future event, such as the user's death or incapacity. The named individual is referred to as the "designated recipient" in the act to differentiate the person from a fiduciary. A designated recipient may perform many of the same tasks as a fiduciary, but is not held to the same legal standard of conduct.

The term "record" includes information available on both tangible and electronic media. Revised UFADAA applies only to electronic records.

The "terms-of-service agreement" definition relies on the definition of "agreement" found in UCC Section 1-201(b)(3) ("the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade"). It refers to any agreement that controls the relationship between a user and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through license, or a similar term. State and federal law determine capacity to enter into a binding terms-of-service agreement.

15-1-1503. Applicability.

(1) This part 15 applies to:

(a) A fiduciary acting under a will or power of attorney executed before, on, or after August 10, 2016;

(b) A personal representative acting for a decedent who died before, on, or after August 10, 2016;

(c) A conservatorship proceeding commenced before, on, or after August 10, 2016; and

(d) A trustee acting under a trust created before, on, or after August 10, 2016.

(2) This part 15 applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) (a) This part 15 does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

(b) This part 15 does not apply to a digital asset of an entity used by a manager, owner, or other person in the course of the conduct of the internal affairs of the entity. The terms "entity", "manager", and "owner" in this paragraph (b) have the same meaning as defined in section 7-90-102, C.R.S.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 181, § 1, effective August 10.

OFFICIAL COMMENT

This act does not change the substantive rules of other laws, such as agency, banking, conservatorship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law except to vest fiduciaries with authority, according to the provisions of this act, to access or copy digital assets of a decedent, protected person, principal, settlor, or trustee.

Subsection (1)(b) covers the situations in which a decedent dies intestate, so it falls outside of subsection (1)(a), as well as the situations in which a state's procedures for small estates are used.

Subsection (2) states that custodians are subject to the act if the custodian's user was a resident of the enacting state. This includes out-of-state custodians, who must respond to requests for access in the same way that out-of-state banks or credit card companies must respond to requests from a fiduciary requesting access to a customer's account.

Subsection (3) clarifies that the act does not apply to a fiduciary's access to an employer's internal email system.

Example 1—Fiduciary access to an employee e-mail account. D dies, employed by Company Y. Company Y has an internal e-mail communication system, available only to Y's employees, and used by them in the ordinary course of Y's business. D's personal representative, R, believes that D used Company Y's e-mail system to effectuate some financial transactions that R cannot find through other means. R requests access from Company Y to the e-mails.

Company Y is not a custodian subject to the act. Under Section 1502(8), a custodian must carry, maintain or store a user's digital assets. A user, under Section 1502(26) must have an account, and an account, in turn, is defined under Section 1502(1) as a contractual arrangement subject to a terms-of-service agreement. Company Y, like most employers, did not enter into a terms-of-service agreement with D, so Y is not a custodian.

Example 2—Employee of electronic-communication service provider. D dies, employed by Company Y. Company Y is an electronic-communication service provider. Company Y has an internal e-mail communication system, available only to Y's employees and used by them in the ordinary course of Y's business. D used the internal Company Y system. When not at work, D

also used an electronic-communication service system that Company Y provides to the public. D's personal representative, R, believes that D used Company Y's internal e-mail system as well as Company Y's electronic- communication system available to the public to effectuate some financial transactions. R seeks access to both communication systems.

As is true in Example 1, Company Y is not a custodian subject to the act for purposes of the internal email system. The situation is different with respect to R's access to Company Y's system that is available to the public. Assuming that Company Y can disclose the communications under federal law and R meets the other requirements of this act, Company Y must disclose them to R.

15-1-1504. User direction for disclosure of digital assets.

(1) A user may use an on-line tool to direct the custodian to disclose to a designated recipient or to not disclose some or all of the user's digital assets, including the content of electronic communications. If the on-line tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an on-line tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(2) If a user has not used an on-line tool to give direction under subsection (1) of this section or if the custodian has not provided an on-line tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(3) A user's direction under subsection (1) or (2) of this section overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 182, § 1, effective August 10.

OFFICIAL COMMENT

This section addresses the relationship of online tools, other records documenting the user's intent, and terms-of-service agreements. In some instances, there may be a conflict between the directions provided by a user in an online tool that limits access by other parties to the user's digital assets, and the user's estate planning or other personal documents that purport to authorize access for specified persons in identified situations. The act attempts to balance these interests by establishing a three-tier priority system for determining the user's intent with respect to any digital asset.

Subsection (1) gives top priority to a user's wishes as expressed using an online tool. If a custodian of digital assets allows the user to provide directions for handling those digital assets in case of the user's death or incapacity, and the user does so, that provides the clearest possible indication of the user's intent and is specifically limited to those particular digital assets.

If the user does not give direction using an online tool, but makes provisions in an estate plan for the disposition of digital assets, subsection (2) gives legal effect to the user's directions. The fiduciary charged with managing the user's digital assets must provide a copy of the relevant document to the custodian when requesting access. See Sections 1507 through 1514.

If the user provides no other direction, the terms-of-service governing the account will apply. If the terms-of-service do not address fiduciary access to digital assets, the default rules provided in this act will apply.

15-1-1505. Terms-of-service agreement.

(1) This part 15 does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(2) This part 15 does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(3) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 15-1-1504.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 182, § 1, effective August 10.

OFFICIAL COMMENT

This section clarifies that, to the extent that a custodian gives a fiduciary access to an account pursuant to Section 1506, the account's terms-of-service agreement applies equally to the original user and to a fiduciary acting for the original user. A fiduciary is subject to the same terms and conditions of the user's agreement with the custodian. This section does not require a custodian to permit a fiduciary to assume a user's terms-of-service agreement if the custodian can otherwise comply with Section 1506.

15-1-1506. Procedure for disclosing digital assets.

(1) When disclosing digital assets of a user under this part 15, the custodian may at its sole discretion:

(a) Grant a fiduciary or designated recipient full access to the user's account;

(b) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this part 15.

(3) A custodian need not disclose under this part 15 a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a custodian to disclose under this part 15 some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(a) A subset limited by date of the user's digital assets;

(b) All of the user's digital assets to the fiduciary or designated recipient;

(c) None of the user's digital assets; or

(d) All of the user's digital assets to the court for review in camera.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 183, § 1, effective August 10.

OFFICIAL COMMENT

This section governs a custodian's response to a request for disclosure of a user's digital assets.

Subsection (1) gives the custodian of digital assets a choice of methods for disclosing digital assets to an authorized fiduciary. Each custodian has a different business model and may prefer one method over another.

Subsection (2) allows a custodian to assess a reasonable administrative charge for the cost of disclosure. This is intended to be analogous to the charge any business may assess for administrative tasks outside the

ordinary course of its business to comply with a court order.

Subsection (3) states that any digital asset deleted by the user need not be disclosed, even if recoverable by the custodian. Deletion is assumed to be a good indication that the user did not intend for a fiduciary to have access.

Subsection (4) addresses requests that are unduly burdensome because they require segregation of digital assets. For example, a fiduciary's request for disclosure of "any email pertaining to financial matters" would require a custodian to sort through the full list of emails and cull any irrelevant messages before disclosure. If a custodian receives an unduly burdensome request of this sort, it may decline to disclose the digital assets, and either the fiduciary or custodian may seek guidance from a court.

15-1-1507. Disclosure of content of electronic communications of deceased user.

(1) If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the death certificate of the user;

(c) A certified copy of the letter of appointment of the representative or a small-estate affidavit or court order;

(d) Unless the user provided direction using an on-line tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(e) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(II) Evidence linking the account to the user; or

(III) A finding by the court that:

(A) The user had a specific account with the custodian, identifiable by the information specified in subparagraph (I) of this paragraph (e);

(B) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. sec. 2701, et seq., as amended; 47 U.S.C. sec. 222, as amended; or other applicable law;

(C) Unless the user provided direction using an on-line tool, the user consented to disclosure of the content of electronic communications; or

(D) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 183, § 1, effective August 10.

OFFICIAL COMMENT

The Electronic Communications Privacy Act (ECPA) distinguishes between the permissible disclosure of the "content" of an electronic communication, covered in 18 U.S.C. Section 2702(b), and of "a record or other information pertaining to a" subscriber or customer, covered in 18 U.S.C. Section 2702(c); *see* Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105 (2009). Section 1507 concerns disclosure of content; Section 1508 covers disclosure of non-content and other digital assets of the user.

Content-based material can, in turn, be divided into two types of communications: those received by the user and those sent. Federal law, 18 U.S.C. Section 2702(b) permits a custodian to divulge the contents of a communication "(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."

Consequently, when the user is the "addressee or intended recipient," material can be disclosed either to that individual or to an agent for that person, 18 U.S.C. Section 2702(b)(1), and it can also be disclosed to third parties with the "lawful consent" of the addressee or intended recipient. 18 U.S.C. Section 2702(b)(3). Material for which the user is the "originator" (or the "subscriber" to a remote computing service) can be disclosed to third parties only with the user's "lawful consent." 18 U.S.C. Section 2702(b)(3). (Note that, when the user is the addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the user is the originator, lawful consent is required under (b)(3).) See the Comments concerning the definition of "content" after Section 1502. By contrast to content-based material, non-content material can be disclosed either with the lawful consent of the user or to any person (other than a governmental entity) even without lawful consent. This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, which this act defines as the "catalogue of electronic communications." (Further discussion of this issue and examples are set out in the Comments to Section 1515, *infra*.)

Therefore, Section 1507 gives the personal representative access to digital assets if the user consented to disclosure or if a court orders disclosure. To obtain access, the personal representative must provide the documentation specified by Section 1507. First, the personal representative must give the custodian a written request for disclosure, a copy of the death certificate, a document establishing the authority of the personal representative, and, in the absence of an online tool, a record evidencing the user's consent to disclosure. When requesting disclosure, the fiduciary must write or email the custodian. The form of the request is limited, and does not, for example, include video, Tweet, instant message or other forms of communication.

Second, if the custodian requests, then the personal representative can be required to establish that the requested information is necessary for estate administration and the account is attributable to the decedent. Different custodians may have different procedures. Thus a custodian may request that the personal representative obtain a court order, and such an order must include findings that: 1) the user had a specific account with the custodian, 2) that disclosure of the content of electronic communications of the user would not violate the SCA or other law, 3) unless the user provided direction using an online tool, that the user consented to disclosure of the content of electronic communications, or 4) that disclosure of the content of electronic communications of a user is reasonably necessary for administration of the estate.

15-1-1508. Disclosure of other digital assets of deceased user.

(1) Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the death certificate of the user;

(c) A certified copy of the letter of appointment of the representative or a small-estate affidavit or court order; and

(d) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(II) Evidence linking the account to the user;

(III) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(IV) A finding by the court that:

(A) The user had a specific account with the custodian, identifiable by the information specified in subparagraph (I) of this paragraph (d); or

(B) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 184, § 1, effective August 10.

OFFICIAL COMMENT

As in Section 1507, when requesting disclosure of non-content, the fiduciary must write or email the custodian.

Section 1508 requires disclosure of all other digital assets, unless prohibited by the decedent or directed by the court, once the personal representative provides a written request, a death certificate and a certified copy of the letter of appointment. In addition, the custodian may request a court order, and such an order must include findings that the decedent had a specific account with the custodian and that disclosure of the decedent's digital assets is reasonably necessary for administration of the estate. Thus, Section 1508 was intended to give personal representatives default access to the "catalogue" of electronic communications and other digital assets not protected by federal privacy law.

15-1-1509. Disclosure of content of electronic communications of principal.

(1) To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(II) Evidence linking the account to the principal.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 185, § 1, effective August 10.

OFFICIAL COMMENT

An agent has access to the content of electronic communications only when the power of attorney explicitly grants access. Section 1510 concerns disclosure of other digital assets of the principal.

When a power of attorney contains the consent of the principal, ECPA does not prevent the agent from exercising authority over the content of an electronic communication. See the Comments to Section 1507. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the user to access digital assets and provides "lawful consent" to allow disclosure of the content of an electronic communication from an electronic-communication service or a remote-computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with intentional access without authorization and 18 U.S.C. Section 2702 allows a service provider to disclose with lawful consent. Federal courts have not yet interpreted how ECPA affects a fiduciary's efforts to access the content of an electronic communication. *E.g., In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

When requesting access, the agent must write or email the custodian (see the comments in Section 1507). The agent must also give the custodian an original or copy of the power of attorney expressly granting the agent authority over the contents of electronic communications of the principal to the agent and a certification by the agent, under penalty of perjury, that the power of attorney is in effect. In addition, if requested by the custodian, the agent must provide a unique subscriber or account identifier assigned by the custodian to identify the principal's account or other evidence linking the account to the principal.

15-1-1510. Disclosure of other digital assets of principal.

(1) Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalog of electronic communications sent or

received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(II) Evidence linking the account to the principal.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 185, § 1, effective August 10.

OFFICIAL COMMENT

This section establishes that the agent has default authority over all of the principal's digital assets, other than the content of the principal's electronic communications. When requesting access, the agent must write or email the custodian (see the comments in Section 1507).

The agent must also give the custodian an original or copy of the power of attorney and a certification by the agent, under penalty of perjury, that the power of attorney is in effect. Also, if requested by the custodian, the agent must provide a unique subscriber or account identifier assigned by the custodian to identify the principal's account, or some evidence linking the account to the principal.

15-1-1511. Disclosure of digital assets held in trust when trustee is original user.

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalog of electronic communications of the trustee and the content of electronic communications.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 186, § 1, effective August 10.

OFFICIAL COMMENT

Section 1511 provides that trustees who are original users can access all digital assets held in the trust. There should be no question that a trustee who is the original user will have full access to all digital assets. This includes the content of electronic communications, as access to content is presumed with respect to assets for which the trustee is the initial user. A trustee may have title to digital assets when the trustee opens an account as trustee; under those circumstances, the trustee can access the content of each digital asset that is in an account for which the trustee is the original user, not necessarily each digital asset held in the trust.

15-1-1512. Disclosure of contents of electronic communications held in trust when trustee not original user.

(1) Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the trust instrument or a registration of the trust under part 2 of article 5 of this title 15 that includes consent to disclosure of the content of electronic communications to the trustee;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(II) Evidence linking the account to the trust.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 186, § 1, effective August 10. **L. 2018:** (1)(b) amended, (SB 18-180), ch. 169, p. 1192, § 6, effective January 1, 2019.

OFFICIAL COMMENT

For accounts that are transferred into a trust by the settlor or in another manner, a trustee is not the original user of the account, and the trustee's authority is qualified. Thus, Section 1512, governing disclosure of content of electronic communications from those accounts, requires consent.

Section 1512 addresses situations involving an inter vivos transfer of a digital asset into a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other governing instrument of a digital asset into a trust. In those situations, a trustee becomes a successor user when the settlor transfers a digital asset into the trust. There should be no question that the trustee with legal title to the digital asset was authorized by the settlor to access the digital assets so transferred, including both the catalogue and content of an electronic communication, and this provides "lawful consent" to allow disclosure of the content of an electronic communication from an electronic-communication service or a remote-computing service pursuant to applicable law. See the Comments concerning the definitions of the "content of an electronic communication" after Section 1502. Nonetheless, Sections 1512 and 1513 distinguish between the catalogue and content of an electronic communication in case there are any questions about whether the form in which property transferred into a trust is held constitutes lawful consent. Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with intentional access without authorization and because 18 U.S.C. Section 2702 allows a service provider to disclose with lawful consent.

The underlying trust documents and default trust law will supply the allocation of responsibilities between and among trustees. When requesting access, the trustee must write or email the custodian (see comments to Section 1507). The trustee must also give the custodian an original or copy of the trust that includes consent to disclosure of the content of electronic communications to the trustee and a certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust. Also, if requested by the custodian, the trustee must provide a unique subscriber or account identifier assigned by the custodian to identify the trust's account, or some evidence linking the account to the trust.

15-1-1513. Disclosure of other digital assets held in trust when trustee not original user.

(1) Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalog of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the trust instrument or a registration of the trust under part 2 of article 5 of this title 15;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(II) Evidence linking the account to the trust.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 186, § 1, effective August 10. **L. 2018:** (1)(b) amended, (SB 18-180), ch. 169, p. 1192, § 7, effective January 1, 2019.

OFFICIAL COMMENT

Section 1513 governs digital assets other than the contents of electronic communications, so it does not require the settlor's consent.

When requesting access, the trustee must write or email the custodian (see Comments to Section 1507).

The trustee must also give the custodian an original or copy of the trust, and a certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust. Also, if requested by the custodian, the trustee must provide a unique subscriber or account identifier assigned by the custodian to identify the trust's account, or some evidence linking the account to the trust.

15-1-1514. Disclosure of digital assets to conservator of protected person.

(1) After an opportunity for a hearing under article 14 of this title, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalog of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

(c) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or

(II) Evidence linking the account to the protected person.

(3) A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 187, § 1, effective August 10.

OFFICIAL COMMENT

When a conservator is appointed to represent a protected person's interests, the protected person may still retain some right to privacy in their personal communications. Therefore, Section 1514 does not permit conservators to request disclosure of a protected person's electronic communications on the basis of the conservatorship order alone. To access a protected person's digital assets and a catalogue of electronic communications, a conservator must be specifically authorized by the court to do so. This requirement for express judicial authority over digital assets does not limit the fiduciary's authority over the underlying assets, such as funds held in a bank account. The meaning of the term "hearing" will vary from state to state according to state law and procedures.

State law will establish the criteria for when a court will grant power to the conservator. For example, UPC Section 5-411(c) requires the court to consider the decision the protected person would have made as well as a list of other factors. Existing state law may also set out the requisite standards for a conservator's actions. The conservator must exercise authority in the interests of the protected person. When requesting access to digital assets in which the protected person has a right or interest, the conservator must write or email the custodian (see comments to Section 1507).

The conservator must also give the custodian a certified copy of the court order that gives the conservator authority over the protected person's digital assets. Also, if requested by the custodian, the conservator

must provide a unique subscriber or account identifier assigned by the custodian to identify the protected person's account, or some evidence linking the account to the protected person. The custodian is required to disclose the digital assets so requested.

Under subsection (3), a conservator with general authority to manage the assets of the protected person may request suspension or termination of the protected person's account, for good cause.

15-1-1515. Fiduciary duty and authority.

(1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

(2) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(a) Except as otherwise provided in section 15-1-1504, is subject to the applicable terms of service;

(b) Is subject to other applicable law, including copyright law;

(c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(d) May not be used to impersonate the user.

(3) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital asset in which the decedent, protected person, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including article 5.5 of title 18, C.R.S.

(5) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal, or settlor:

(a) Has the right to access the property and any digital asset stored in it; and

(b) Is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including article 5.5 of title 18, C.R.S.

(6) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letter of appointment of the representative or a small-estate affidavit or court order, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

(I) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(II) Evidence linking the account to the user; or

(III) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (I) of this paragraph (c).

(8) A domiciliary foreign personal representative is not required to comply with the provisions of section 15-13-204, or with any other provision of article 13 of this title, as a condition to obtaining disclosure of a digital asset pursuant to this part 15.

(9) A foreign conservator is not required to comply with the provisions of section 15-14-433 as a condition to obtaining disclosure of a digital asset pursuant to this part 15.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 187, § 1, effective August 10.

OFFICIAL COMMENT

The original version of UFADAA incorporated fiduciary duties by reference to "other law." This proved to be confusing and led to enactment difficulty. Section 1515 specifies the nature, extent and limitation of the fiduciary's authority over digital assets. Subsection (1) expressly imposes all fiduciary duties to the management of digital assets, including the duties of care, loyalty and confidentiality. Subsection (2) specifies that a fiduciary's authority over digital assets is subject to the terms-of-service agreement, except to the extent the terms-of- service agreement provision is overridden by an action taken pursuant to Section 1504, and it reinforces the applicability of copyright and fiduciary duties. Finally, subsection (2) prohibits a fiduciary's authority being used to impersonate a user. Subsection (3) permits the fiduciary to access all digital

assets not in an account or subject to a terms-of- service agreement. Subsection (4) further specifies that the fiduciary is an authorized user under any applicable law on unauthorized computer access.

Subsection (7) gives the fiduciary the option of requesting that an account be terminated, if termination would not violate a fiduciary duty.

This issue concerning the parameters of the fiduciary's authority potentially arises in two situations: 1) the fiduciary obtains access to a password or the like directly from the user, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords in a written or electronic list and those passwords are then transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.

This section clarifies that the fiduciary has the same authority as the user if the user were the one exercising the authority (note that, where the user has died, this means that the fiduciary has the same access as the user had immediately before death). This means that the fiduciary's authority to access the digital asset is the same as the user except where, pursuant to Section 1504, the user has explicitly opted out of fiduciary access. In exercising its responsibilities, the fiduciary is subject to the duties and obligations established pursuant to state fiduciary law, and is liable for breach of those duties. Note that even if the digital asset were illegally obtained by the user, the fiduciary would still need access in order to handle that asset appropriately. There may, for example, be tax consequences that the fiduciary would be obligated to report.

However, this section does not require a custodian to permit a fiduciary to assume a user's terms-of-service agreement if the custodian can otherwise comply with Section 1506.

In exercising its responsibilities, the fiduciary is subject to the same limitations as the user more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the user could challenge provisions in a terms-of-service agreement, then the fiduciary is also able to do so. *See Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

Subsection (2) is designed to establish that the fiduciary is authorized to obtain or access digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004). The subsection clarifies that state law treats the fiduciary as "authorized" under state laws criminalizing unauthorized access.

State laws vary in their coverage but typically prohibit unauthorized computer access. By defining the fiduciary as an authorized user in subsection (4), the fiduciary has authorization under applicable law to access the digital assets under state computer trespass laws.

Federal courts may look to these provisions to guide their interpretations of ECPA and the federal Computer Fraud and Abuse Act, but fiduciaries should understand that federal courts may not view such provisions as dispositive in determining whether access to a user's account violated federal criminal law.

Subsection (5) clarifies that the fiduciary is authorized to access digital assets stored on tangible personal property of the decedent, protected person, principal, or settlor, such as laptops, computers, smartphones or storage media, exempting fiduciaries from application for purposes of state or federal laws on unauthorized computer access. For criminal law purposes, this clarifies that the fiduciary is authorized to access all of the user's digital assets, whether held locally or remotely.

Example 1—Access to digital assets by personal representative. D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account with a company that provides electronic- communication services to the public. The personal representative of D's estate needs access to the electronic bank account statements, the photo account, and e-mails.

The personal representative of D's estate has the authority to access D's electronic banking statements and D's photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to the personal representative, then the bank and the photo account service must give access to the personal representative when the request is made in accordance with Section 1508. If the terms-of-service agreement permits D to transfer the accounts electronically, then the personal representative of D's estate can use that procedure for transfer as well.

The personal representative of D's estate is also able to request that the e-mail account service provider grant access to e-mails sent or received by D; ECPA permits the service provider to release the catalogue to the personal representative. The service provider also must provide the personal representative access to the content of an electronic communication sent or received by D if the user has consented and the fiduciary submitted the information required under Section 1507. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 2—Access to digital assets by agent. X creates a power of attorney designating A as X's agent. The power of attorney expressly grants A authority over X's digital assets, including the content of an electronic communication. X has a bank account for which X receives only electronic statements, X has stored photos in a cloud-based Internet account, and X has a game character and in-game property associated with an online game. X also has an e-mail account with a company that provides electronic-communication services to the public.

A has the authority to access X's electronic bank statements, the photo account, the game character and in-game property associated with the online game, all of which fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to A as X's agent, then the bank, the photo account service provider, and the online game service provider must give access to A when the request is made in accordance with Section 1510. If the terms-of-service agreement permits X to transfer the accounts electronically, then A as X's agent can use that procedure for transfer as well.

As X's agent, A is also able to request that the e-mail account service provider grant access to e-mails sent or received by X; ECPA permits the service provider to release the catalogue. The service provider also must provide A access to the content of an electronic communication sent or received by X if the fiduciary provides the information required under Section 1509. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 3—Access to digital assets by trustee. T is the trustee of a trust established by S. As trustee of the trust, T opens a bank account for which T receives only electronic statements. S transfers into the trust to T as trustee (in compliance with a terms-of-service agreement) a game character and in-game property associated with an online game and a cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in compliance with the terms-of-service agreement) an e-mail account with a company that provides electronic-communication services to the public.

T is an original user with respect to the bank account that T opened, and T has the ability to access the electronic banking statements under Section 1511. T, as successor user to S, may under Section 1513 access the game character and in-game property associated with the online game and the photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the photo account service provider, and the online game service provider must give access to T when the request is made in accordance with the act. If the terms-of-service agreement permits the user to transfer the accounts electronically, then T as trustee can use that procedure for transfer as well.

T as successor user of the e-mail account for which S was previously the user is also able to request that the e-mail account service provider grant access to e-mails sent or received by S; and ECPA permits the service provider to release the catalogue. The service provider also must provide T access to the content of an electronic communication sent or received by S if the fiduciary provides the information required under Section 1512. The bank may release the catalogue of electronic communications or content of an electronic communication

for which it is the originator or the addressee because the bank is not subject to the ECPA.

15-1-1516. Custodian compliance and immunity.

(1) Not later than sixty days after receipt of the information required under sections 15-1-1507 to 15-1-1515, a custodian shall comply with a request under this part 15 from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(2) An order under subsection (1) of this section directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. sec. 2702, as amended.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under this part 15.

(4) A custodian may deny a request under this part 15 from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) This part 15 does not limit a custodian's ability to obtain, or to require a fiduciary or designated recipient requesting disclosure or termination under this part 15 to obtain, a court order that:

(a) Specifies that an account belongs to the protected person or principal;

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(c) Contains a finding required by law other than this part 15.

(6) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this part 15.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 189, § 1, effective August 10.

OFFICIAL COMMENT

This section establishes that custodians are protected from liability when they act in accordance with the procedures of this act and in good faith. The types of actions covered include disclosure as well as transfer of copies. The critical issue in conferring immunity is the source of the liability. Direct liability is not subject to

immunity; indirect liability is subject to immunity.

Direct liability could only arise from noncompliance with a judicial order issued under sections 1507 to 1515. Upon determination of a right of access under those sections, a court may issue an order to grant access under section 1516. Section 1516(2) requires that an order directing compliance contain a finding that compliance is not in violation of 18 U.S.C. Section 2702. Noncompliance with that order would give rise to liability for contempt. There is no immunity from this liability.

Indirect liability could arise from granting a right of access under this act. Access to a digital asset might invade the privacy or the harm the reputation of the decedent, protected person, principal, or settlor, it might harm the family or business of the decedent, protected person, principal, or settlor, and it might harm other persons. The grantor of access to the digital asset is immune from liability arising out of any of these circumstances if the grantor acted in good faith to comply with this act. If there is a judicial order under section 1516, compliance with the order establishes good faith. Absent a judicial order under section 1516, good faith must be established by the grantor's assessment of the requirements of this act. Further, Section 1516(5) allows the custodian to verify that the account belongs to the person represented by the fiduciary.

15-1-1517. 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.

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 190, § 1, effective August 10.

15-1-1518. Relation to electronic signatures in global and national commerce act.

This part 15 modifies, limits, or supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. sec. 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. sec. 7003(b).

Source: L. 2016: Entire part added, (SB 16-088), ch. 71, p. 190, § 1, effective August 10.

ARTICLE 1.1

Uniform Prudent Investor Act

15-1.1-101. Prudent investor rule.

15-1.1-102. Standard of care - portfolio strategy - risk and return objectives.

15-1.1-103. Diversification.

15-1.1-104. Duties at inception of trusteeship.

15-1.1-105. Loyalty.

15-1.1-106. Impartiality.

15-1.1-107. Investment costs.

15-1.1-108. Reviewing compliance.

15-1.1-109. Delegation of investment and management functions.

15-1.1-110. Language invoking standard of article.

15-1.1-111. Application to existing trusts.

15-1.1-112. Uniformity of application and construction.

15-1.1-113. Short title.

15-1.1-114. Severability.

15-1.1-115. Colorado changes to uniform act - specific statutes control - use of term "trustee".

PREFATORY NOTE

Over the quarter century from the late 1960's the investment practices of fiduciaries experienced significant change. The Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as "modern portfolio theory."

This Act draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992) [hereafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement].

Objectives of the Act.

UPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term "portfolio" embraces all the trust's assets. UPIA § 2(b).

(2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. UPIA § 2(b).

(3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. UPIA § 2(e).

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. UPIA § 3.

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9.

Literature.

These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter's notes by Edward C. Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule (1992); see also Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 27 Real Property, Probate & Trust J. 407 (1992); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev. 52 (1987); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, the Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, An Introduction to Modern Financial Theory (1991) (American College of Trust &Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983).

Legislation.

Most states have legislation governing trust-investment law. This Act promotes uniformity of state law on the basis of the new consensus reflected in the Restatement of Trusts 3d: Prudent Investor Rule. Some states have already acted. California, Delaware, Georgia, Minnesota, Tennessee, and Washington revised their prudent investor legislation to emphasize the total-portfolio standard of care in advance of the 1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter's note, at 60-66 (1992).

Drafters in Illinois in 1991 worked from the April 1990 "Proposed Final Draft" of the Restatement of Trusts 3d: Prudent Investor Rule and enacted legislation that is closely modeled on the new Restatement. 760 ILCS § 5/5 (prudent investing); and § 5/5.1 (delegation) (1992). As the Comments to this Uniform Prudent Investor Act reflect, the Act draws upon the Illinois statute in several sections. Virginia revised its prudent investor act in a similar vein in 1992. Virginia Code § 26-45.1 (prudent investing) (1992). Florida revised its statute in 1993. Florida Laws, ch. 93-257, amending Florida

Statutes § 518.11 (prudent investing) and creating § 518.112 (delegation). New York legislation drawing on the new Restatement and on a preliminary version of this Uniform Prudent Investor Act was enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994), adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor Act).

Remedies.

This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement].

Implications for charitable and pension trusts.

This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. "In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust." Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (footnote omitted).

Other fiduciary relationships.

The Uniform Prudent Investor Act regulates the investment responsibilities of trustees. Other fiduciaries — such as executors, conservators, and guardians of the property — sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust-investment law to the special circumstances of the state schemes for administering decedents' estates or conducting the affairs of protected persons.

Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, "the duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust." Restatement of Trusts 3d: Prudent

Investor Rule § 379, Comment b, at 190 (1992). See also id. § 389, Comment b, at 190-91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

15-1.1-101. Prudent investor rule.

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Source: L. 95: Entire article added, p. 309, § 1, effective July 1.

OFFICIAL COMMENT

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830). Trustees should "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Id. at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the Amory case. See Mayo A. Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see id. at 508-09. Another prominent codification of the Amory standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . . ."

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a fiduciary shall discharge his duties

with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . ."

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the Amory case: "In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived . . . ." Restatement of Trusts 2d § 227 (1959).

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the "reasonable person" rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 2 through 9 of this Act identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

ANNOTATION

The Colorado Uniform Prudent Investor Act provides a legal standard of care, not an independent cause of action. The general assembly considered the issue of remedies and chose not to include an independent right of action in the act. Micale v. Bank One, N.A., 382 F. Supp. 2d 1207 (D. Colo. 2005).

15-1.1-102. Standard of care - portfolio strategy - risk and return objectives.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;

(6) Other resources of the beneficiaries;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Source: L. 95: Entire article added, p. 309, § 1, effective July 1.

OFFICIAL COMMENT

Section 2 is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (f) is derived from Uniform Probate Code § 7-302 (1969).

Objective standard. Subsection (a) of this Act carries forward the relational and objective standard made familiar in the Amory case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other

circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio standard. Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

Risk and return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

Factors affecting investment. Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, Is Your Alpha Big Enough to Cover Its Taxes?, Journal of Portfolio Management 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).

Duty to monitor. Subsections (a) through (d) apply both to investing and managing trust assets. "Managing" embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments.

Duty to investigate. Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment — for example, audit reports or records of title. E.g., Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating categoric restrictions. Subsection 2(e) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called "legal lists" of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility — in this case, inflation risk — that had not been anticipated. Accordingly, section 2(e) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: "Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment f, at 24 (1992). The premise of subsection 2(e) is that trust beneficiaries are better protected by the Act's emphasis on close attention to risk/return objectives as prescribed in subsection 2(b) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding "speculative" or "risky" investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee's task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee's conventional duty of loyalty, which is reiterated for the purposes of this Act in Section 5. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee's breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

Professional fiduciaries. The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments h, m, at 28, 51; reporter's note to Comment g, id. at 83.

Matters of proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

ANNOTATION

Law reviews. For article, "Class Action Liability for Trustees after Banks v. Northern Trust", see 50 Colo. Law. 38 (Dec. 2021).

Trustee's purchases on margin and failure to diversify investments do not per se constitute breach of duty and are not categorically imprudent. The default rule is

that what is considered prudent can be altered or eliminated by the terms of the trust instrument. Van Gundy v. Van Gundy, 2012 COA 194, 292 P.3d 1201.

15-1.1-103. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Source: L. 95: Entire article added, p. 310, § 1, effective July 1.

OFFICIAL COMMENT

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., Duty of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for diversification. "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, An Introduction to Modern Financial Theory 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk — the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently — to include investments in different industries. This is uncompensated risk — nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, An Introduction to Risk and Return from Common Stocks 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries . . . . Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments e-h, at 77 (1992). See also Macey, supra, at 23-24; Brealey, supra, at 111-13.

Diversifying by pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: "The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble." 7 Uniform Laws Ann. 402 (1985).

Fiduciary investing in mutual funds. Trusts can also achieve diversification by

investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment m, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities "issued by an investment company registered under the Investment Company Act of 1940 . . . ."

15-1.1-104. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.

Source: L. 95: Entire article added, p. 310, § 1, effective July 1.

OFFICIAL COMMENT

Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that "[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year." Restatement of Trusts 2d § 230, comment b (1959). The 1992 Restatement retreated from this rule of thumb, saying, "No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities." Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b (1992).

The criteria and circumstances identified in Section 2 of this Act as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

15-1.1-105. Loyalty.

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee's own interest or that of third parties. The language of Section 4 of this Act derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the Comment to Section 1 of this Act, effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would benefit personally from the trust. "The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefitting the third person rather than the trust." Restatement of Trusts 2d § 170, comment q, at 371 (1959).

No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries — for example, by accepting below-market returns — in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, Social Investing and the Law of Trusts, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that

pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

15-1.1-106. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962) (which is presently under study by the Uniform Law Commission with a view toward further revision).

15-1.1-107. Investment costs.

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.

The language of Section 7 derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment m, at 58 (1992).

ANNOTATION

Law reviews. For article, "Class Action Liability for Trustees after Banks v. Northern Trust", see 50 Colo. Law. 38 (Dec. 2021).

15-1.1-108. Reviewing compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment b, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post.

15-1.1-109. Delegation of investment and management functions.

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

This section of the Act reverses the much-criticized rule that forbad trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed infra, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

Former law. The former nondelegation rule survived into the 1959 Restatement: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that "There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate." Instead, the comment directed attention to a list of factors that "may be of importance: (1) the

amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment d (1959). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment h (1959).

For discussion and criticism of the former rule see William L. Cary & Craig B. Bright, The Delegation of Investment Responsibility for Endowment Funds, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, Market Funds and Trust-Investment Law, 1976 American Bar Foundation Research J. 1, 18-24.

The modern trend to favor delegation. The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. See John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Missouri L. Rev. 105 (1994).

The delegation rule of the Uniform Trustee Powers Act. The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees "to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary . . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann. 743 (1985). The Act has been enacted in 16 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

UMIFA's delegation rule. The Uniform Management of Institutional Funds Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 705 (1985). UMIFA has been enacted in 38 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

ERISA's delegation rule. The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that "authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers . . . . " ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA's encouragement of delegation:

> ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans—computing and honoring benefit entitlements across decades of employment and retirement—is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 496 (1990).

The delegation rule of the 1992 Restatement. The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted supra, and replaces it with substitute text that reads:

> § 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that "the trustee must . . . deciding whether and how to delegate to others . . . ." Restatement of Trusts 3d: Prudent Investor Rule § 227(c) (1992).

Protecting the beneficiary against unreasonable delegation. There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees' powers, such as those found in most lawyer-drafted instruments and exemplified

in the Uniform Trustees' Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic accounting and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent's specialized investment skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

Section 9 of the Uniform Prudent Investor Act is designed to strike the appropriate balance between the advantages and the hazards of delegation. Section 9 authorizes delegation under the limitations of subsections (a) and (b). Section 9(a) imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent's compliance.

The trustee's duties of care, skill, and caution in framing the terms of the delegation should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement. Leaving one's beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses, e.g., ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney 1967).

Although subsection (c) of the Act exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection 9(a), subsection 9(b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.

Costs. The duty to minimize costs that is articulated in Section 7 of this Act applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

15-1.1-110. Language invoking standard of article.

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this article: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

Source: L. 95: Entire article added, p. 311, § 1, effective July 1.

OFFICIAL COMMENT

This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

15-1.1-111. Application to existing trusts.

This article applies to trusts existing on and created after July 1, 1995; except that, as applied to trusts existing on July 1, 1995, this article governs only decisions or actions occurring after said date.

Source: L. 95: Entire article added, p. 312, § 1, effective July 1.

15-1.1-112. Uniformity of application and construction.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.

Source: L. 95: Entire article added, p. 312, § 1, effective July 1.

15-1.1-113. Short title.

This article shall be known and may be cited as the "Colorado Uniform Prudent Investor Act".

Source: L. 95: Entire article added, p. 312, § 1, effective July 1.

15-1.1-114. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Source: L. 95: Entire article added, p. 312, § 1, effective July 1.

15-1.1-115. Colorado changes to uniform act - specific statutes control - use of term "trustee".

(1) (a) The general assembly recognizes that persons, corporations, entities, or state agencies who have responsibility for investing funds may be subject to a standard that is specifically set forth in other statutes. Under such circumstances, such persons, corporations, entities, or state agencies shall comply with the standard of investment set forth in the other statute, and this article shall not modify or repeal that standard.

(b) In addition, as provided for in section 15-1-304.1, this article shall not apply to those persons, corporations, entities, or state agencies which were made subject to the provisions of section 15-1-304 by specific reference in another statute in existence prior to July 1, 1995.

(2) As used in this article, "trustee" includes original or successor administrators, special administrators, administrators cum testamento annexo, executors, guardians, conservators, and trustees, whether of express or implied trusts.

Source: L. 95: Entire article added, p. 312, § 1, effective July 1.

ARTICLE 1.2

Uniform Fiduciary Income and Principal Act

PART 1
GENERAL PROVISIONS

15-1.2-101. Short title.

15-1.2-102. Definitions.

15-1.2-103. Scope.

15-1.2-104. Governing law.

PART 2
FIDUCIARY DUTIES AND JUDICIAL REVIEW

15-1.2-201. Fiduciary duties - general principles.

15-1.2-202. Judicial review of exercise of discretionary power - definition.

15-1.2-203. Fiduciary's power to adjust.

15-1.2-204. Notice of action - definitions.

PART 3
UNITRUST

15-1.2-301. Definitions.

15-1.2-302. Application - duties and remedies.

15-1.2-303. Authority of fiduciary.

15-1.2-304. Notice.

15-1.2-305. Unitrust policy.

15-1.2-306. Unitrust rate.

15-1.2-307. Applicable value.

15-1.2-308. Period.

15-1.2-309. Special tax benefits - rules.

PART 4
ALLOCATION OF RECEIPTS

15-1.2-401. Character of receipts from entity - definitions.

15-1.2-402. Distribution from trust or estate.

15-1.2-403. Business of other activity conducted by fiduciary.

15-1.2-404. Principal receipts.

15-1.2-405. Rental property.

15-1.2-406. Receipt on obligation to be paid in money.

15-1.2-407. Insurance policy or contract.

15-1.2-408. Insubstantial allocation not required.

15-1.2-409. Deferred compensation, annuity, or similar payment - definitions.

15-1.2-410. Liquidating asset - definition.

15-1.2-411. Minerals, water, and other natural resources.

15-1.2-412. Timber.

15-1.2-413. Marital deduction property not productive of income.

15-1.2-414. Derivative or option - definition.

15-1.2-415. Asset-backed security.

15-1.2-416. Other financial instrument or arrangement.

PART 5
ALLOCATION OF DISBURSEMENTS

15-1.2-501. Disbursement from income.

15-1.2-502. Disbursement from principal.

15-1.2-503. Transfer from income to principal for depreciation - definition.

15-1.2-504. Reimbursement of income from principal.

15-1.2-505. Reimbursement of principal from income.

15-1.2-506. Income taxes.

15-1.2-507. Adjustment between income and principal because of taxes.

PART 6
DEATH OF INDIVIDUAL OR TERMINATION OF INCOME INTEREST

15-1.2-601. Determination and distribution of net income.

15-1.2-602. Distribution to successor beneficiary.

PART 7
APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

15-1.2-701. When right to income begins and ends.

15-1.2-702. Apportionment of receipts and disbursements when decedent dies or income interest begins.

15-1.2-703. Apportionment when income interest ends - definition.

PART 8
MISCELLANEOUS PROVISIONS

15-1.2-801. Uniformity of application and construction.

15-1.2-802. Relation to electronic signatures in global and national commerce act.

15-1.2-803. Application to trust or estate.

15-1.2-804. Severability.

PART 1

GENERAL PROVISIONS

15-1.2-101. Short title.

This article 1.2 may be cited as the "Uniform Fiduciary Income and Principal Act".

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 799, § 1, effective January 1, 2022.

15-1.2-102. Definitions.

In this article 1.2:

(1) "Accounting period" means a calendar year, unless a fiduciary selects another period of twelve calendar months or approximately twelve calendar months. The term includes a part of a calendar year or another period of twelve calendar months or approximately twelve calendar months that begin 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 15-1.2-401, 15-1.2-409, or 15-1.2-414 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.

(c) Reserved.

(4) "Court" means the court in this state having jurisdiction relating to a trust or estate.

(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, personal representative, 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 part 4 of this article 1.2.

(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 section 15-5-103 (16) of the "Colorado Uniform Trust Code";

(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 subsection (11)(a) or (11)(b) of this section;

(d) A corporation, partnership, limited liability company, or other entity in which persons described in subsections (11)(a) through (11)(c) of this section, in the aggregate, have voting control; or

(e) An employee of a person described in subsections (11)(a) through (11)(d) of this section.

(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 article 1.2 minus the disbursements during the period, other than distributions, allocated to income under the terms of the trust and this article 1.2. To the extent the trust is a unitrust under part 3 of this article 1.2, the term means the unitrust amount determined under part 3 of this article 1.2. The term includes an adjustment from principal to income under section 15-1.2-203. The term does not include an adjustment from income to principal under section 15-1.2-203.

(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", 26 U.S.C. sec. 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, as described in section 1361 (d)(3) of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 1361 (d)(3), as amended, at a time the trust holds stock of an S corporation, as described in section 1361 (a)(1) of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 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", 26 U.S.C. sec. 2056 or 26 U.S.C. sec. 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", 26 U.S.C. sec. 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", 26 U.S.C. sec. 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", 26 U.S.C. sec. 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", 26 U.S.C. sec. 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", 26 U.S.C. sec. 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", 26 U.S.C. sec. 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 subsection (22)(b) of this section, 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;

(II) A court order;

(III) A nonjudicial settlement agreement under section 15-5-111; or

(IV) By alternative dispute resolution under section 15-5-113; or

(c) For an estate, a will.

(d) Reserved.

(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.

(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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 799, § 1, effective January 1, 2022.

15-1.2-103. Scope.

(1) Except as otherwise provided in the terms of a trust, a will, or this article 1.2, this article 1.2 applies to:

(a) A trust or estate.

(b) Reserved.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 804, § 1, effective January 1, 2022.

15-1.2-104. Governing law.

Except as otherwise provided in the terms of a trust or this article 1.2, this article 1.2 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 of a trust to this state, the trustee submits to the application of this article 1.2 to any matter within the scope of this article 1.2 involving the trust.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 804, § 1, effective January 1, 2022.

PART 2

FIDUCIARY DUTIES AND JUDICIAL REVIEW

15-1.2-201. Fiduciary duties - general principles.

(1) In making an allocation or determination or exercising discretion under this article 1.2, a fiduciary shall:

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

(b) 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;

(c) Administer the trust or estate in accordance with the terms of the trust, even if there is a different provision in this article 1.2; and

(d) Administer the trust or estate in accordance with this article 1.2, except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.

(2) A fiduciary's allocation, determination, or exercise of discretion under this article 1.2 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 article 1.2 does not create an inference that the fiduciary abused the fiduciary's discretion.

(3) A fiduciary shall:

(a) Add a receipt to principal, to the extent neither the terms of the trust nor this article 1.2 allocates the receipt between income and principal; and

(b) Charge a disbursement to principal, to the extent neither the terms of the trust nor this article 1.2 allocates the disbursement between income and principal.

(4) A fiduciary may exercise the power to adjust under section 15-1.2-203, convert an income trust to a unitrust under section 15-1.2-303 (1)(a), change the percentage or method used to calculate a unitrust amount under section 15-1.2-303 (1)(b), or convert a unitrust to an income trust under section 15-1.2-303 (1)(c), if the fiduciary determines the exercise of the power will assist the fiduciary to administer the trust or estate impartially.

(5) Factors the fiduciary must consider in making the determination under subsection (4) of this section include:

(a) The terms of the trust;

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

(c) The effect of the allocation rules, including specific adjustments between income and principal, under parts 4 through 7 of this article 1.2;

(d) The desirability of liquidity and regularity of income;

(e) The desirability of the preservation and appreciation of principal;

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

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

(h) 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;

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

(j) The effect of current and reasonably expected economic conditions; and

(k) The reasonably expected tax consequences of the exercise of the power.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 804, § 1, effective January 1, 2022.

15-1.2-202. Judicial review of exercise of discretionary power - definition.

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

(a) 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 article 1.2;

(b) The fiduciary's exercise or nonexercise of a discretionary power regarding income and principal granted by the terms of the trust or this article 1.2, including the power to adjust under section 15-1.2-203, convert an income trust to a unitrust under section 15-1.2-303 (1)(a), change the percentage or method used to calculate a unitrust amount under section 15-1.2-303 (1)(b), or convert a unitrust to an income trust under section 15-1.2-303 (1)(c); or

(c) The fiduciary's implementation of a decision described in subsection (1)(a) or (1)(b) of this section.

(2) 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.

(3) 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 section 15-5-1001 of the "Colorado Uniform Trust Code" and part 5 of article 10 of this title 15. 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:

(a) The fiduciary to exercise or refrain from exercising the power to adjust under section 15-1.2-203;

(b) The fiduciary to exercise or refrain from exercising the power to convert an income trust to a unitrust under section 15-1.2-303 (1)(a), change the percentage or method used to calculate a unitrust amount under section 15-1.2-303 (1)(b), or convert a unitrust to an income trust under section 15-1.2-303 (1)(c);

(c) The fiduciary to distribute an amount to a beneficiary;

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

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

(4) Reserved.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 806, § 1, effective January 1, 2022. **L. 2022:** (3) introductory portion amended, (SB 22-212), ch. 421, p. 2968, § 24, effective August 10.

15-1.2-203. Fiduciary's power to adjust.

(1) 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.

(2) This section does not create a duty to exercise or consider the power to adjust under subsection (1) of this section or to inform a beneficiary about the applicability of this section.

(3) A fiduciary that in good faith exercises or fails to exercise the power to adjust under subsection (1) of this section is not liable to a person affected by the exercise or failure to exercise.

(4) In deciding whether and to what extent to exercise the power to adjust under subsection (1) of this section, a fiduciary shall consider all factors the fiduciary considers relevant, including relevant factors in section 15-1.2-201 (5) and the application of sections 15-1.2-401 (9), 15-1.2-408, and 15-1.2-413.

(5) A fiduciary may not exercise the power under subsection (1) of this section to make an adjustment or, under section 15-1.2-408, to make a determination that an allocation is insubstantial if:

(a) 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;

(b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) Possessing or exercising the power would cause an individual to be treated as making a gift for federal gift tax purposes;

(g) The fiduciary is not an independent person;

(h) 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

(i) The trust is a unitrust under part 3 of this article 1.2.

(6) If subsection (5)(d), (5)(e), (5)(f), or (5)(g) of this section applies to a fiduciary:

(a) A co-fiduciary to which subsections (5)(d) through (5)(g) of this section do 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 article 1.2; or

(b) If there is no co-fiduciary to which subsections (5)(d) through (5)(g) of this section do not apply, the fiduciary may appoint a co-fiduciary to which subsections (5)(d) through (5)(g) of this section do not apply, which may be a special fiduciary with limited powers, and the

appointed co-fiduciary may exercise the power to adjust under subsection (1) of this section, 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 article 1.2.

(7) A fiduciary may release or delegate to a co-fiduciary the power to adjust under subsection (1) of this section if the fiduciary determines that the fiduciary's possession or exercise of the power will or may:

(a) Cause a result described in subsections (5)(a) through (5)(f) of this section or subsection (5)(h) of this section; or

(b) Deprive the trust of a tax benefit or impose a tax burden not described in subsections (5)(a) through (5)(f) of this section.

(8) A fiduciary's release or delegation to a co-fiduciary under subsection (7) of this section of the power to adjust under subsection (1) of this section:

(a) Must be in a record;

(b) Applies to the entire power, unless the release or delegation provides a limitation, which may be a limitation to the power to adjust:

(I) From income to principal;

(II) From principal to income;

(III) For specified property; or

(IV) In specified circumstances;

(c) For a delegation, may be modified by a re-delegation under this subsection by the co-fiduciary to which the delegation is made; and

(d) Subject to subsection (8)(c) of this section, 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.

(9) 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 (1) of this section.

(10) The exercise of the power to adjust under subsection (1) of this section in any accounting period may apply to the current period, the immediately preceding period, and one or more subsequent periods.

(11) A description of the exercise of the power to adjust under subsection (1) of this section must be:

(a) Included in a report, if any, sent to beneficiaries under section 15-5-813 (3) of the "Colorado Uniform Trust Code"; or

(b) Communicated at least annually to the qualified beneficiaries determined under section 15-5-103 (16) of the "Colorado Uniform Trust Code", including the attorney general when applicable.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 807, § 1, effective January 1, 2022.

15-1.2-204. Notice of action - definitions.

(1) In this section, the following definitions apply:

(a) "Objection period" means the period of time prior to the date by which an objection must be received as described in section 15-1.2-304 (4)(e).

(b) "Qualified beneficiary" has the same meaning as set forth in section 15-5-103 (16).

(2) A fiduciary may give a notice of proposed action regarding a matter governed by this article 1.2 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 part 3 of article 5 of this title 15.

(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 15-1.2-304 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 2 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 provision that it should be performed.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 809, § 1, effective January 1, 2022.

PART 3

UNITRUST

15-1.2-301. Definitions.

In this part 3:

(1) "Applicable value" means the amount of the net fair market value of a trust taken into account under section 15-1.2-307.

(2) "Express unitrust" means a trust for which, under the terms of the trust without regard to this part 3, 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 15-1.2-305 through 15-1.2-309 and adopted under section 15-1.2-303.

(8) "Unitrust rate" means the rate used to compute the unitrust amount under subsection (6) of this section for a unitrust administered under a unitrust policy.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 810, § 1, effective January 1, 2022.

15-1.2-302. Application - duties and remedies.

(1) Except as otherwise provided in subsection (2) of this section, this part 3 applies to:

(a) An income trust, unless the terms of the trust expressly prohibit use of this part 3 by a specific reference to this part 3 or an explicit expression of intent that net income not be calculated as a unitrust amount; and

(b) An express unitrust, except to the extent the terms of the trust explicitly:

(I) Prohibit use of this part 3 by a specific reference to this part 3;

(II) Prohibit conversion to an income trust; or

(III) Limit changes to the method of calculating the unitrust amount.

(2) This part 3 does not apply to a trust described in section 170 (f)(2)(B), 642 (c)(5), 664 (d), or 2702 of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 170 (f)(2)(B), 642 (c)(5), 664 (d), or 2702, as amended.

(3) An income trust to which this part 3 applies under subsection (1)(a) of this section may be converted to a unitrust under this part 3 regardless of the terms of the trust concerning distributions. Conversion to a unitrust under this part 3 does not affect other terms of the trust concerning distributions of income or principal.

(4) This part 3 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 part 3.

(5) This part 3 does not create a duty to take or consider action under this part 3 or to inform a beneficiary about the applicability of this part 3.

(6) A fiduciary that in good faith takes or fails to take an action under this part 3 is not liable to a person affected by the action or inaction.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 811, § 1, effective January 1, 2022.

15-1.2-303. Authority of fiduciary.

(1) A fiduciary, without court approval, by complying with subsections (2) and (6) of this section, may:

(a) Convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:

(I) 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 part 3; and

(II) The percentage and method used to calculate the unitrust amount;

(b) 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

(c) 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 part 3 rather than a unitrust amount.

(2) A fiduciary may take an action under subsection (1) of this section if:

(a) The fiduciary determines that the action will assist the fiduciary to administer a trust impartially;

(b) The fiduciary sends a notice in a record, in the manner required by section 15-1.2-304, describing and proposing to take the action;

(c) The fiduciary sends a copy of the notice under subsection (2)(b) of this section to each settlor of the trust which is:

(I) If an individual, living; or

(II) If not an individual, in existence;

(d) At least one member of each class of the qualified beneficiaries determined under section 15-5-103 (16) of the "Colorado Uniform Trust Code", other than the attorney general, receiving the notice under subsection (2)(b) of this section is:

(I) If an individual, legally competent;

(II) If not an individual, in existence; or

(III) Represented in the manner provided in section 15-1.2-304 (2); and

(e) The fiduciary does not receive, by the date specified in the notice under section 15-1.2-304 (4)(e), an objection in a record to the action proposed under subsection (2)(b) of this section from a person to which the notice under subsection (2)(b) of this section is sent.

(3) If a fiduciary receives, not later than the date stated in the notice under section 15-1.2-304, an objection in a record described in section 15-1.2-304 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 15-1.2-304 (1) may oppose the proposed action in the proceeding under this subsection (3), whether or not the person:

(a) Consented under section 15-1.2-304; or

(b) Objected under section 15-1.2-304.

(4) If, after sending a notice under subsection (2)(b) of this section, a fiduciary decides not to take the action proposed in the notice, the fiduciary shall notify in a record each person described in section 15-1.2-304 (1) of the decision not to take the action and the reasons for the decision.

(5) If a beneficiary requests in a record that a fiduciary take an action described in subsection (1) of this section and the fiduciary declines to act or does not act within ninety days after receiving the request, the beneficiary may request the court to direct the fiduciary to take the action requested.

(6) In deciding whether and how to take an action authorized by subsection (1) of this section, or whether and how to respond to a request by a beneficiary under subsection (5) of this section, a fiduciary shall consider all factors relevant to the trust and the beneficiaries, including relevant factors in section 15-1.2-201 (5).

(7) A fiduciary may release or delegate the power to convert an income trust to a unitrust under subsection (1)(a) of this section, change the percentage or method used to calculate a unitrust amount under subsection (1)(b) of this section, or convert a unitrust to an income trust under subsection (1)(c) of this section, for a reason described in section 15-1.2-203 (7) and in the manner described in section 15-1.2-203 (8).

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 812, § 1, effective January 1, 2022.

15-1.2-304. Notice.

(1) A notice required by section 15-1.2-303 (2)(b) must be sent in a manner authorized under section 15-5-109 to:

(a) The qualified beneficiaries determined under section 15-5-103 (16), other than the attorney general; and

(b) Each person acting as trust director of the trust under the "Colorado Uniform Directed Trust Act", part 8 of article 16 of this title 15; and

(c) Each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in subsection (1)(b) of this section, to the extent that power is exercisable when the person is not then serving as a trustee or person described in subsection (1)(b) of this section.

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

(3) A person may consent in a record at any time to action proposed under section 15-1.2-303 (2)(b). A notice required by section 15-1.2-303 (2)(b) need not be sent to a person that consents under this subsection (3).

(4) A notice required by section 15-1.2-303 (2)(b) must include:

(a) The action proposed under section 15-1.2-303 (2)(b);

(b) For a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under section 15-1.2-303 (1)(a);

(c) 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 15-1.2-303 (1)(b);

(d) 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;

(e) The date by which an objection under subsection (4)(d) of this section must be received by the fiduciary, which must be at least thirty days after the date the notice is sent;

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

(g) The name and contact information of the fiduciary; and

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

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 814, § 1, effective January 1, 2022.

15-1.2-305. Unitrust policy.

(1) In administering a unitrust under this part 3, a fiduciary shall follow a unitrust policy adopted under section 15-1.2-303 (1)(a) or (1)(b) or amended or replaced under section 15-1.2-303 (1)(b).

(2) A unitrust policy must provide:

(a) The unitrust rate or the method for determining the unitrust rate under section 15-1.2-306;

(b) The method for determining the applicable value under section 15-1.2-306; and

(c) The rules described in sections 15-1.2-306 through 15-1.2-309 which apply in the administration of the unitrust, whether the rules are:

(I) Mandatory, as provided in sections 15-1.2-307 (1) and 15-1.2-416; or

(II) Optional, as provided in sections 15-1.2-306, 15-1.2-307 (2), 15-1.2-308 (2), and 15-1.2-309 (1), to the extent the fiduciary elects to adopt those rules.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 815, § 1, effective January 1, 2022.

15-1.2-306. Unitrust rate.

(1) Except as otherwise provided in section 15-1.2-309 (2)(a), a unitrust rate may be:

(a) A fixed unitrust rate; or

(b) A unitrust rate that is determined for each period using:

(I) A market index or other published data; or

(II) A mathematical blend of market indices or other published data over a stated number of preceding periods.

(2) Except as otherwise provided in section 15-1.2-309 (2)(a), a unitrust policy may provide:

(a) A limit on how high the unitrust rate determined under subsection (1)(b) of this section may rise;

(b) A limit on how low the unitrust rate determined under subsection (1)(b) of this section may fall;

(c) A limit on how much the unitrust rate determined under subsection (1)(b) of this section may increase over the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods;

(d) A limit on how much the unitrust rate determined under subsection (1)(b) of this section 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

(e) A mathematical blend of any of the unitrust rates determined under subsection (1)(b) of this section and subsections (2)(a) through (2)(d) of this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 815, § 1, effective January 1, 2022.

15-1.2-307. Applicable value.

(1) 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:

(a) The frequency of valuing the asset, which need not require a valuation in every period; and

(b) The date for valuing the asset in each period in which the asset is valued.

(2) Except as otherwise provided in section 15-1.2-309 (2)(b), 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:

(a) Obtaining an appraisal of an asset for which fair market value is not readily available;

(b) Exclusion of specific assets or groups or types of assets;

(c) Other exceptions or modifications of the treatment of specific assets or groups or types of assets;

(d) Identification and treatment of cash or property held for distribution;

(e) Use of:

(I) An average of fair market values over a stated number of preceding periods; or

(II) Another mathematical blend of fair market values over a stated number of preceding periods;

(f) A limit on how much the applicable value of all assets, groups of assets, or individual assets may increase over:

(I) The corresponding applicable value for the preceding period; or

(II) A mathematical blend of applicable values over a stated number of preceding periods;

(g) A limit on how much the applicable value of all assets, groups of assets, or individual assets may decrease below:

(I) The corresponding applicable value for the preceding period; or

(II) A mathematical blend of applicable values over a stated number of preceding periods;

(h) The treatment of accrued income and other features of an asset which affect value; and

(i) Determining the liabilities of the trust, including treatment of liabilities to conform with the treatment of assets under subsections (2)(a) through (2)(h) of this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 816, § 1, effective January 1, 2022.

15-1.2-308. Period.

(1) A unitrust policy must provide the period used under sections 15-1.2-306 and 15-1.2-307. Except as otherwise provided in section 15-1.2-309 (2)(c), the period may be:

(a) A calendar year;

(b) A twelve-month period other than a calendar year;

(c) A calendar quarter;

(d) A three-month period other than a calendar quarter; or

(e) Another period.

(2) Except as otherwise provided in section 15-1.2-309 (2), a unitrust policy may provide standards for:

(a) Using fewer preceding periods under section 15-1.2-306 (1)(b)(II), (2)(c), or (2)(d) if:

(I) The trust was not in existence in a preceding period; or

(II) Market indices or other published data are not available for a preceding period;

(b) Using fewer preceding periods under section 15-1.2-307 (2)(e)(I), (2)(e)(II), (2)(f)(II), or (2)(g)(II) if:

(I) The trust was not in existence in a preceding period; or

(II) Fair market values are not available for a preceding period; and

(c) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 817, § 1, effective January 1, 2022.

15-1.2-309. Special tax benefits - rules.

(1) A unitrust policy may:

(a) Provide methods and standards for:

(I) Determining the timing of distributions;

(II) Making distributions in cash or in kind or partly in cash and partly in kind; or

(III) Correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;

(b) 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

(c) Provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.

(2) If a trust qualifies for a special tax benefit or a fiduciary is not an independent person:

(a) The unitrust rate established under section 15-1.2-306 may not be less than three percent or more than five percent;

(b) The only provisions of section 15-1.2-307 which apply are section 15-1.2-307 (1), (2)(a), (2)(d), (2)(e)(I), and (2)(i);

(c) The only period that may be used under section 15-1.2-308 is a calendar year under section 15-1.2-308 (1)(a); and

(d) The only other provisions of section 15-1.2-308 which apply are section 15-1.2-308 (2)(b)(I) and (2)(c).

(3) 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:

(a) Net income determined as if the trust was not a unitrust;

(b) Other ordinary income as determined for federal income tax purposes;

(c) Net realized short-term capital gains as determined for federal income tax purposes;

(d) Net realized long-term capital gains as determined for federal income tax purposes;

(e) Trust principal comprising assets for which there is a readily available market value; and

(f) Other trust principal.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 817, § 1, effective January 1, 2022.

PART 4

ALLOCATION OF RECEIPTS

15-1.2-401. Character of receipts from entity - definitions.

(1) In this section:

(a) "Capital distribution" means an entity distribution of money which is a:

(I) Return of capital; or

(II) Distribution in total or partial liquidation of the entity.

(b) "Entity":

(I) 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

(II) Does not include:

(A) A trust or estate to which section 15-1.2-402 applies;

(B) A business or other activity to which section 15-1.2-403 applies which is not conducted by an entity described in subsection (1)(b)(I) of this section;

(C) An asset-backed security; or

(D) An instrument or arrangement to which section 15-1.2-416 applies.

(c) "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.

(2) 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.

(3) Except as otherwise provided in subsections (4)(b) through (4)(d) of this section, a fiduciary shall allocate to income:

(a) Money received in an entity distribution; and

(b) Tangible personal property of nominal value received from the entity.

(4) A fiduciary shall allocate to principal:

(a) Property received in an entity distribution which is not:

(I) Money; or

(II) Tangible personal property of nominal value;

(b) 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;

(c) Money received in an entity distribution that the fiduciary determines or estimates is a capital distribution; and

(d) Money received in an entity distribution from an entity that is:

(I) A regulated investment company or real estate investment trust if the money received is a capital gain dividend for federal income tax purposes; or

(II) Treated for federal income tax purposes comparably to the treatment described in subsection (4)(d)(I) of this section.

(5) A fiduciary may determine or estimate that money received in an entity distribution is a capital distribution:

(a) By relying without inquiry or investigation on a characterization of the entity distribution provided by or on behalf of the entity, unless the fiduciary:

(I) Determines, on the basis of information known to the fiduciary, that the characterization is or may be incorrect; or

(II) Owns or holds more than fifty percent of the voting interest in the entity;

(b) 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 twenty percent of the fair market value of the fiduciary's interest in the entity; or

(c) If neither subsection (5)(a) nor (5)(b) of this section applies, by considering the factors in subsection (6) of this section and the information known to the fiduciary or provided to the fiduciary by or on behalf of the entity.

(6) In making a determination or estimate under subsection (5)(c) of this section, a fiduciary may consider:

(a) A characterization of an entity distribution provided by or on behalf of the entity;

(b) The amount of money or property received in:

(I) The entity distribution; or

(II) What the fiduciary determines is or will be a series of related entity distributions;

(c) The amount described in subsection (6)(b) of this section compared to the amount the fiduciary determines or estimates is, during the current or preceding accounting periods:

(I) The entity's operating income;

(II) The proceeds of the entity's sale or other disposition of:

(A) All or part of the business or other activity conducted by the entity;

(B) 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

(C) 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;

(III) 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;

(IV) The entity's regular, periodic entity distributions;

(V) The amount of money the entity has accumulated;

(VI) The amount of money the entity has borrowed;

(VII) The amount of money the entity has received from the sources described in sections 15-1.2-407, 15-1.2-410, 15-1.2-411, and 15-1.2-412; and

(VIII) The amount of money the entity has received from a source not otherwise described in this subsection (6)(c); and

(d) Any other factor the fiduciary determines is relevant.

(7) If, after applying subsections (3) through (6) of this section, 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.

(8) 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.

(9) 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 15-1.2-203.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 819, § 1, effective January 1, 2022.

15-1.2-402. Distribution from trust or estate.

A fiduciary shall allocate to income an amount received as a distribution of income, including a unitrust distribution under part 3 of this article 1.2, 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 15-1.2-401, 15-1.2-415, or 15-1.2-416 apply to a receipt from the trust.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 822, § 1, effective January 1, 2022.

15-1.2-403. Business of other activity conducted by fiduciary.

(1) 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:

(a) Accounting for the business or other activity as part of the fiduciary's general accounting records; or

(b) Conducting the business or other activity through an entity described in section 15-1.2-401 (1)(b)(I).

(2) 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.

(3) A fiduciary that accounts separately under this section for a business or other activity:

(a) May determine:

(I) The extent to which the net cash receipts of the business or other activity must be retained for:

(A) Working capital;

(B) The acquisition or replacement of fixed assets; and

(C) Other reasonably foreseeable needs of the business or other activity; and

(II) 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;

(b) May make a determination under subsection (3)(a) of this section separately and differently from the fiduciary's decisions concerning distributions of income or principal; and

(c) 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.

(4) Activities for which a fiduciary may account separately under this section include:

(a) Retail, manufacturing, service, and other traditional business activities;

(b) Farming;

(c) Raising and selling livestock and other animals;

(d) Managing rental properties;

(e) Extracting minerals, water, and other natural resources;

(f) Growing and cutting timber;

(g) An activity to which section 15-1.2-414, 15-1.2-415, or 15-1.2-416 applies; and

(h) Any other business conducted by the fiduciary.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 822, § 1, effective January 1, 2022.

15-1.2-404. Principal receipts.

(1) A fiduciary shall allocate to principal:

(a) To the extent not allocated to income under this article 1.2, an asset received from:

(I) An individual during the individual's lifetime;

(II) An estate;

(III) A trust on termination of an income interest; or

(IV) A payor under a contract naming the fiduciary as beneficiary;

(b) Except as otherwise provided in this part 4, money or other property received from the sale, exchange, liquidation, or change in form of a principal asset;

(c) An amount recovered from a third party to reimburse the fiduciary because of a disbursement described in section 15-1.2-502 (1) or for another reason to the extent not based on loss of income;

(d) 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;

(e) Net income received in an accounting period during which there is no beneficiary to which a fiduciary may or must distribute income; and

(f) Other receipts as provided in sections 15-1.2-408 through 15-1.2-416.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 823, § 1, effective January 1, 2022.

15-1.2-405. Rental property.

(1) To the extent a fiduciary does not account for the management of rental property as a business under section 15-1.2-403, 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:

(a) Must be added to principal and held subject to the terms of the lease, except as otherwise provided by law other than this article 1.2; and

(b) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 824, § 1, effective January 1, 2022.

15-1.2-406. Receipt on obligation to be paid in money.

(1) This section does not apply to an obligation to which section 15-1.2-409, 15-1.2-410, 15-1.2-411, 15-1.2-412, 15-1.2-414, 15-1.2-415, or 15-1.2-416 applies.

(2) 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.

(3) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 824, § 1, effective January 1, 2022.

15-1.2-407. Insurance policy or contract.

(1) This section does not apply to a contract to which section 15-1.2-409 applies.

(2) Except as otherwise provided in subsection (3) of this section, 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.

(3) A fiduciary shall allocate to income proceeds of a contract that insures the fiduciary against loss of:

(a) Occupancy or other use by a current income beneficiary;

(b) Income; or

(c) Subject to section 15-1.2-403, profits from a business.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 825, § 1, effective January 1, 2022.

15-1.2-408. Insubstantial allocation not required.

(1) If a fiduciary determines that an allocation between income and principal required by section 15-1.2-409, 15-1.2-410, 15-1.2-411, 15-1.2-412, or 15-1.2-415 is insubstantial, the fiduciary may allocate the entire amount to principal, unless section 15-1.2-203 (5) applies to the allocation.

(2) A fiduciary may presume an allocation is insubstantial under subsection (1) of this section if:

(a) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; and

(b) The asset producing the receipt to be allocated has a fair market value less than ten percent of the total fair market value of the assets owned or held by the fiduciary at the beginning of the accounting period.

(3) The power to make a determination under subsection (1) of this section may be:

(a) Exercised by a co-fiduciary in the manner described in section 15-1.2-203 (6); or

(b) Released or delegated for a reason described in section 15-1.2-203 (7) and in the manner described in section 15-1.2-203 (8).

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 825, § 1, effective January 1, 2022.

15-1.2-409. Deferred compensation, annuity, or similar payment - definitions.

(1) In this section:

(a) "Internal income of a separate fund" means the amount determined under subsection (2) of this section.

(b) "Marital trust" means a trust:

(I) 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

(II) That qualifies for a marital deduction with respect to the settlor's estate under section 2056 of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056, as amended, because:

(A) An election to qualify for a marital deduction under section 2056 (b)(7) of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056 (b)(7), as amended, has been made; or

(B) The trust qualifies for a marital deduction under section 2056 (b)(5) of the "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056 (b)(5), as amended.

(c) "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.

(d) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(2) For each accounting period, the following rules apply to a separate fund:

(a) The fiduciary shall determine the internal income of the separate fund as if the separate fund were a trust subject to this article 1.2;

(b) If the fiduciary cannot determine the internal income of the separate fund under subsection (2)(a) of this section, the internal income of the separate fund is deemed to equal four percent of the value of the separate fund, according to the most recent statement of value preceding the beginning of the accounting period; and

(c) If the fiduciary cannot determine the value of the separate fund under subsection (2)(b) of this section, 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", 26

U.S.C. sec. 7520, as amended, for the month preceding the beginning of the accounting period for which the computation is made.

(3) 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.

(4) The fiduciary of a marital trust shall:

(a) 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;

(b) 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 subsection (4)(a) of this section; and

(c) Distribute to the current income beneficiary as income:

(I) The amount of the internal income of the separate fund received or withdrawn during the period; and

(II) The amount transferred from principal to income under subsection (4)(b) of this section.

(5) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 826, § 1, effective January 1, 2022.

15-1.2-410. Liquidating asset - definition.

(1) 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.

(2) This section does not apply to a receipt subject to section 15-1.2-401, 15-1.2-409, 15-1.2-411, 15-1.2-412, 15-1.2-414, 15-1.2-415, 15-1.2-416, or 15-1.2-503.

(3) A fiduciary shall allocate:

(a) To income:

(I) A receipt produced by a liquidating asset, to the extent the receipt does not exceed four percent of the value of the asset; or

(II) If the fiduciary cannot determine the value of the asset, ten percent of the receipt; and

(b) To principal, the balance of the receipt.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 827, § 1, effective January 1, 2022.

15-1.2-411. Minerals, water, and other natural resources.

(1) 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 15-1.2-403, the fiduciary shall allocate the receipt:

(a) To income, to the extent received:

(I) As delay rental or annual rent on a lease;

(II) As a factor for interest or the equivalent of interest under an agreement creating a production payment; or

(III) On account of an interest in renewable water;

(b) To principal, if received from a production payment, to the extent subsection (1)(a)(II) of this section does not apply; or

(c) Between income and principal equitably, to the extent received:

(I) On account of an interest in non-renewable water;

(II) As a royalty, shut-in-well payment, take-or-pay payment, or bonus; or

(III) From a working interest or any other interest not provided for in subsection (1)(a), (1)(b), (1)(c)(I), or (1)(c)(II) of this section.

(2) 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.

(3) An allocation of a receipt under subsection (1)(c) of this section is presumed to be equitable if the amount allocated to principal is equal to the amount allowed by sections 611 through 614 of the "Internal Revenue Code of 1986", 26 U.S.C. secs. 611 through 614, as amended, as a deduction for depletion of the interest.

(4) If a fiduciary owns or holds an interest in minerals, water, or other natural resources before January 1, 2022, the fiduciary may allocate receipts from the interest as provided in this section or in the manner used by the fiduciary before January 1, 2022. If the fiduciary acquires an interest in minerals, water, or other natural resources on or after January 1, 2022, the fiduciary shall allocate receipts from the interest as provided in this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 828, § 1, effective January 1, 2022.

15-1.2-412. Timber.

(1) To the extent a fiduciary does not account for receipts from the sale of timber and related products as a business under section 15-1.2-403, the fiduciary shall allocate the net receipts:

(a) To income, to the extent the amount of timber cut from the land does not exceed the rate of growth of the timber;

(b) 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;

(c) 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 subsections (1)(a) and (1)(b) of this section; or

(d) To principal, to the extent advance payments, bonuses, and other payments are not allocated under subsection (1)(a), (1)(b), or (1)(c) of this section.

(2) In determining net receipts to be allocated under subsection (1) of this section, a fiduciary shall deduct and transfer to principal a reasonable amount for depletion.

(3) 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.

(4) If a fiduciary owns or holds an interest in land used for growing and cutting timber before January 1, 2022, 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 January 1, 2022. If the fiduciary acquires an interest in land used for growing and cutting timber on or after January 1, 2022, the fiduciary shall allocate net receipts from the sale of timber and related products as provided in this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 829, § 1, effective January 1, 2022.

15-1.2-413. Marital deduction property not productive of income.

(1) 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:

(a) Make property productive of income;

(b) Convert property to property productive of income within a reasonable time; or

(c) Exercise the power to adjust under section 15-1.2-203.

(2) The trustee may decide which action or combination of actions in subsection (1) of this section to take.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 829, § 1, effective January 1, 2022.

15-1.2-414. Derivative or option - definition.

(1) 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.

(2) To the extent a fiduciary does not account for a transaction in derivatives as a business under section 15-1.2-403, the fiduciary shall allocate ten percent of receipts from the transaction

and ten percent of disbursements made in connection with the transaction to income and the balance to principal.

(3) Subsection (4) of this section applies if:

(a) A fiduciary:

(I) Grants an option to buy property from a trust, whether or not the trust owns the property when the option is granted;

(II) Grants an option that permits another person to sell property to the trust; or

(III) Acquires an option to buy property for the trust or an option to sell an asset owned by the trust; and

(b) The fiduciary or other owner of the asset is required to deliver the asset if the option is exercised.

(4) If this subsection (4) applies, the fiduciary shall allocate ten percent to income and the balance to principal of the following amounts:

(a) An amount received for granting the option;

(b) An amount paid to acquire the option; and

(c) Gain or loss realized on the exercise, exchange, settlement, offset, closing, or expiration of the option.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 830, § 1, effective January 1, 2022.

15-1.2-415. Asset-backed security.

(1) Except as otherwise provided in subsection (2) of this section, 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.

(2) 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 ten percent of receipts from the transaction and ten percent of disbursements made in connection with the transaction, and to principal the balance of the receipts and disbursements.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 831, § 1, effective January 1, 2022.

15-1.2-416. Other financial instrument or arrangement.

A fiduciary shall allocate receipts from or related to a financial instrument or arrangement not otherwise addressed by this article 1.2. The allocation must be consistent with sections 15-1.2-414 and 15-1.2-415.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 831, § 1, effective January 1, 2022.

PART 5

ALLOCATION OF DISBURSEMENTS

15-1.2-501. Disbursement from income.

(1) Subject to section 15-1.2-504, and except as otherwise provided in section 15-1.2-601 (3)(b) or (3)(c), a fiduciary shall disburse from income:

(a) One-half of:

(I) 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

(II) 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;

(b) The balance of the disbursements described in subsection (1)(a) of this section, 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;

(c) 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

(d) A premium on insurance covering loss of a principal asset or income from or use of the asset.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 831, § 1, effective January 1, 2022.

15-1.2-502. Disbursement from principal.

(1) Subject to section 15-1.2-505, and except as otherwise provided in section 15-1.2-601 (3)(b), a fiduciary shall disburse from principal:

(a) The balance of the disbursements described in section 15-1.2-501 (1)(a) and (1)(c), after application of section 15-1.2-501 (1)(b);

(b) The fiduciary's compensation calculated on principal as a fee for acceptance, distribution, or termination;

(c) A payment of an expense to prepare for or execute a sale or other disposition of property;

(d) A payment on the principal of a trust debt;

(e) 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;

(f) A payment of a premium for insurance, including title insurance, not described in section 15-1.2-501 (1)(d), of which the fiduciary is the owner and beneficiary;

(g) 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

(h) A payment:

(I) Related to environmental matters, including:

(A) Reclamation;

(B) Assessing environmental conditions;

(C) Remedying and removing environmental contamination;

(D) Monitoring remedial activities and the release of substances;

(E) Preventing future releases of substances;

(F) Collecting amounts from persons liable or potentially liable for the costs of activities described in subsections (1)(h)(I)(A) through (1)(h)(I)(E) of this section;

(G) Penalties imposed under environmental laws or regulations;

(H) Other actions to comply with environmental laws or regulations;

(I) Statutory or common law claims by third parties; and

(J) Defending claims based on environmental matters; and

(II) For a premium for insurance for matters described in subsection (1)(h)(I) of this section.

(2) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 832, § 1, effective January 1, 2022.

15-1.2-503. Transfer from income to principal for depreciation - definition.

(1) 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.

(2) 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:

(a) Of the part of real property used or available for use by a beneficiary as a residence;

(b) Of tangible personal property held or made available for the personal use or enjoyment of a beneficiary; or

(c) Under this section, to the extent the fiduciary accounts:

(I) Under section 15-1.2-410 for the asset; or

(II) Under section 15-1.2-403 for the business or other activity in which the asset is used.

(3) An amount transferred to principal under this section need not be separately held.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 833, § 1, effective January 1, 2022.

15-1.2-504. Reimbursement of income from principal.

(1) If a fiduciary makes or expects to make an income disbursement described in subsection (2) of this section, the fiduciary may transfer an appropriate amount from principal to income in one or more accounting periods to reimburse income.

(2) To the extent the fiduciary has not been and does not expect to be reimbursed by a third party, income disbursements to which subsection (1) of this section applies include:

(a) An amount chargeable to principal but paid from income because principal is illiquid;

(b) A disbursement made to prepare property for sale, including improvements and commissions; and

(c) A disbursement described in section 15-1.2-502 (1).

(3) 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 (1) of this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 833, § 1, effective January 1, 2022.

15-1.2-505. Reimbursement of principal from income.

(1) If a fiduciary makes or expects to make a principal disbursement described in subsection (2) of this section, 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.

(2) To the extent a fiduciary has not been and does not expect to be reimbursed by a third party, principal disbursements to which subsection (1) of this section applies include:

(a) An amount chargeable to income but paid from principal because income is not sufficient;

(b) 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;

(c) A disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and commissions;

(d) 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

(e) A disbursement described in section 15-1.2-502 (1).

(3) 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 (1) of this section.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 834, § 1, effective January 1, 2022.

15-1.2-506. Income taxes.

(1) A tax required to be paid by a fiduciary which is based on receipts allocated to income must be paid from income.

(2) 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.

(3) Subject to subsection (4) of this section and sections 15-1.2-504, 15-1.2-505, and 15-1.2-507, 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:

(a) Income and principal proportionately to the allocation between income and principal of receipts from the entity in the period; and

(b) Principal to the extent the tax exceeds the receipts from the entity in the period.

(4) After applying subsections (1) through (3) of this section, 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 834, § 1, effective January 1, 2022.

15-1.2-507. Adjustment between income and principal because of taxes.

(1) 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:

(a) An election or decision the fiduciary makes regarding a tax matter, other than a decision to claim an income tax deduction to which subsection (2) of this section applies;

(b) 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

(c) 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.

(2) 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.

(3) A fiduciary that charges a beneficiary under subsection (2) of this section 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 835, § 1, effective January 1, 2022.

PART 6

DEATH OF INDIVIDUAL OR TERMINATION OF INCOME INTEREST

15-1.2-601. Determination and distribution of net income.

(1) This section applies when:

(a) The death of an individual results in the creation of an estate or trust; or

(b) An income interest in a trust terminates, whether the trust continues or is distributed.

(2) A fiduciary of an estate or trust with an income interest that terminates shall determine, under subsection (7) of this section and parts 4, 5, and 7 of this article 1.2, 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.

(3) 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 (2) of this section, under parts 4, 5, and 7 of this article 1.2 and by:

(a) Including in net income all income from property used or sold to discharge liabilities;

(b) 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:

(I) The payment of the expenses from income will not cause the reduction or loss of the deduction; or

(II) The fiduciary makes an adjustment under section 15-1.2-507 (2); and

(c) 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:

(I) 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

(II) 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.

(4) 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 (3) of this section or from principal to the extent net income is insufficient.

(5) Reserved.

(6) A fiduciary shall distribute net income remaining after payments required by subsection (4) of this section in the manner described in section 15-1.2-602 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.

(7) A fiduciary may not reduce principal or income receipts from property described in subsection (2) of this section because of a payment described in section 15-1.2-501 or 15-1.2-502, 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 836, § 1, effective January 1, 2022.

15-1.2-602. Distribution to successor beneficiary.

(1) Except to the extent part 3 of this article 1.2 applies for a beneficiary that is a trust, each beneficiary described in section 15-1.2-601 (6) 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.

(2) In determining a beneficiary's share of net income under subsection (1) of this section, the following rules apply:

(a) 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;

(b) The beneficiary's fractional interest under subsection (2)(a) of this section must be calculated:

(I) On the aggregate value of the assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(II) Without regard to:

(A) Property specifically given to a beneficiary under the decedent's will or the terms of the trust; and

(B) Property required to pay pecuniary amounts not in trust; and

(c) The distribution date under subsection (2)(a) of this section 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.

(3) 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.

(4) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 837, § 1, effective January 1, 2022.

PART 7

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

15-1.2-701. When right to income begins and ends.

(1) 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:

(a) The trust for the current income beneficiary; or

(b) A successive interest for a successor beneficiary.

(2) An asset becomes subject to a trust under subsection (1)(a) of this section:

(a) For an asset that is transferred to the trust during the settlor's life, on the date the asset is transferred;

(b) 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

(c) 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.

(3) An asset becomes subject to a successive interest under subsection (1)(b) of this section on the day after the preceding income interest ends, as determined under subsection (4) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(4) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 838, § 1, effective January 1, 2022.

15-1.2-702. Apportionment of receipts and disbursements when decedent dies or income interest begins.

(1) A fiduciary shall allocate an income receipt or disbursement, other than a receipt to which section 15-1.2-601 (2) applies, to principal if its due date occurs before the date on which:

(a) For an estate, the decedent died; or

(b) For a trust or successive interest, an income interest begins.

(2) 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.

(3) 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.

(4) A receipt or disbursement is periodic under subsections (2) and (3) of this section if:

(a) The receipt or disbursement must be paid at regular intervals under an obligation to make payments; or

(b) The payor customarily makes payments at regular intervals.

(5) 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.

(6) Distributions to shareholders or other owners from an entity to which section 15-1.2-401 applies are due:

(a) On the date fixed by or on behalf of the entity for determining the persons entitled to receive the distribution;

(b) If no date is fixed, on the date of the decision by or on behalf of the entity to make the distribution; or

(c) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 839, § 1, effective January 1, 2022.

15-1.2-703. Apportionment when income interest ends - definition.

(1) 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.

(2) Except as otherwise provided in subsection (3) of this section, 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.

(3) 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:

(a) The fiduciary shall allocate to principal the undistributed income from the portion of the trust which may be withdrawn; and

(b) Subsection (2) of this section applies only to the balance of the undistributed income.

(4) 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 840, § 1, effective January 1, 2022.

PART 8

MISCELLANEOUS PROVISIONS

15-1.2-801. 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.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 840, § 1, effective January 1, 2022.

15-1.2-802. Relation to electronic signatures in global and national commerce act.

This article 1.2 modifies, limits, or supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 840, § 1, effective January 1, 2022.

15-1.2-803. Application to trust or estate.

(1) Except as provided in the terms of the trust and subsection (2) of this section, this article 1.2 shall take effect on January 1, 2022.

(2) (a) This article 1.2 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 that was in effect on June 30, 2001.

(b) This article 1.2 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", subparts 1 to 6 of part 4 of article 1 of this title 15, as it existed on or after July 1, 2001, unless a trustee of the trust elected to apply the "Uniform Principal and Income Act" as it existed on or after July 1, 2001.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 840, § 1, effective January 1, 2022.

15-1.2-804. Severability.

If any provision of this article 1.2 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article 1.2 which can be given effect without the invalid provision or application, and to this end the provisions of this article 1.2 are severable.

Source: L. 2021: Entire article added, (SB 21-171), ch. 143, p. 841, § 1, effective January 1, 2022.

ARTICLE 1.5

Colorado Uniform Custodial Trust Act

15-1.5-101. Definitions.

15-1.5-102. Custodial trust - general.

15-1.5-103. Custodial trustee for future payment or transfer.

15-1.5-104. Form and effect of receipt and acceptance by custodial trustee - jurisdiction.

15-1.5-105. Transfer to custodial trustee by fiduciary or obligor - facility of payment.

15-1.5-106. Multiple beneficiaries - separate custodial trusts - survivorship.

15-1.5-107. General duties of custodial trustee.

15-1.5-108. General powers of custodial trustee.

15-1.5-109. Use of custodial trust property.

15-1.5-110. Determination of incapacity - effect.

15-1.5-111. Exemption of third persons from liability.

15-1.5-112. Liability to third persons.

15-1.5-113. Declination, resignation, incapacity, death, or removal of custodial trustee - designation of successor custodial trustee.

15-1.5-114. Expenses, compensation, and bond of custodial trustee.

15-1.5-115. Reporting and accounting by custodial trustee -

determination of liability of custodial trustee.

15-1.5-116. Limitations of action against custodial trustee.

15-1.5-117. Distribution on termination.

15-1.5-118. Methods and forms for creating custodial trusts.

15-1.5-119. Applicable law.

15-1.5-120. Uniformity of application and construction.

15-1.5-121. Short title.

15-1.5-122. Severability.

PREFATORY NOTE

This Uniform Act provides for the creation of a statutory custodial trust for adults to be governed by the provisions of the Act whenever property is delivered to another "as custodial trustee under the (Enacting state) Uniform Custodial Trust Act." The provisions of this Act are based on trust analogies to concepts developed and used in establishing custodianships for minors under the Uniform Transfers to Minors Act (UTMA). The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity. The statute will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed. Since this Act allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in the beneficiary and not in the custodial trustee, its potential for use is extensive. Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

This Act follows the approach taken by the Uniform Transfers to Minors Act and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. However, the most typical transaction envisioned would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with

retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination. The potential for tax problems is minimized by permitting the beneficiary in most instances to retain control while the beneficiary has capacity to manage the assets effectively. The statute contains an asset specific transfer provision that it is believed will be simple to use and will gain the acceptance of the securities and financial industry. A simple transfer document, examples of which are set forth in the Act, and a receipt from the custodian, also in the Act, would provide for identification of beneficiaries or distributees upon death of the beneficiary. Protection is extended to third parties dealing with the custodian. Although the Act is patterned on the Uniform Transfers to Minors Act and meshes into the Uniform Probate Code, it is appropriate for enactment as well in states which have not adopted either UTMA or the UPC.

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (section 15-1.5-102 (5)); (2) receive so much of the income or custodial property as he or she may request from time to time (section 15-1.5-109 (1)); and (3) give the custodial trustee binding instructions for investment or management (section 15-1.5-107 (2)). In the absence of direction by the beneficiary, who is not incapacitated, the custodial trustee manages the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries. (section 15-1.5-107).

A principal feature of the Custodial Trust under this Act is designed to protect the beneficiary and his or her dependents against the perils of the beneficiary's possible future incapacity without the necessity of a conservatorship. Under section 15-1.5-110, the incapacity of the beneficiary does not terminate (1) the custodial trust, (2) the designation of a successor custodial trustee, (3) any power or authority of the custodial trustee, or (4) the immunities of third persons relying on actions of the custodial trustee. The custodial trustee continues to manage the property as a discretionary trust under the prudent person standard for the benefit of the incapacitated beneficiary.

Means of monitoring and enforcing the custodial trust include provisions requiring the custodial trustee to keep the beneficiary informed, requiring accounting by the custodial trustee (section 15-1.5-115), providing for removal of the custodial trustee (section 15-1.5- 113), and the distribution of the assets on termination of the custodial trust (section 15-1.5- 117). The custodial trustee is protected in section 15-1.5-116 by the statutes of limitation on proceedings against the custodial trustee.

Transactions with the custodial trustee should be executed readily and quickly by third parties because their rights and protections are determined by the Act and a third party acting in good faith has no need to determine the custodial trustee's authority

to bind the beneficiary with respect to property and investment matters. (section 15-1.5-111). The Act generally limits the claims of third parties to recourse against the custodial property, with the beneficiary insulated against personal liability unless he or she is personally at fault and the custodial trustee is similarly insulated unless the custodial trustee is personally at fault or failed to disclose the custodial capacity when entering into a contract (section 15-1.5-112).

As a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act, uniformity of the laws governing custodial trusts is highly desirable, and the Act is designed to avoid conflict of laws problems. A custodial trust created under this Act remains subject to this Act despite a subsequent change in the residence of the transferor, the beneficiary, or the custodial trustee or the removal of the custodial trust property from the state of original location. (section 15-1.5-119).

15-1.5-101. Definitions.

As used in this article 1.5:

(1) "Adult" means an individual who is at least eighteen years of age.

(2) "Beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under this article.

(3) "Conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions.

(4) "Court" means the district courts of this state, except in the city and county of Denver, where it means the probate court.

(5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this article and the income from and proceeds of that interest.

(6) "Custodial trustee" means a person designated as trustee of a custodial trust under this article or a substitute or successor to the person designated.

(7) "Guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of a behavioral or mental health disorder, an intellectual and developmental disability, a physical illness or disability, a substance use disorder, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.

(9) "Legal representative" means a personal representative or conservator.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether related by whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity authorized to exercise general trust powers.

Source: L. 99: Entire article added, p. 1211, § 1, effective August 4. **L. 2017:** IP and (8) amended, (HB 17-1046), ch. 50, p. 157, § 7, effective March 16; (8) amended, (SB 17-242), ch. 263, p. 1295, § 115, effective May 25.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

OFFICIAL COMMENT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) "Conservator" is defined broadly to permit identification of a person functioning as a conservator.

(4) "Court" means the district courts of this state, except in the city and county of Denver, where it means the probate court. Here the likelihood is that most states would utilize the same court, e.g., the probate court, that deals with conservators and estates.

(5 and 6) The terms, "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act. The statutory trust concept is used throughout the Act.

(7) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) A definition of incapacitated has been included, for the purpose of this Act, because incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that section 15-1.5-110(1)(b) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 15-1.5-110 deals specifically with the determination of incapacity.

(10) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (sections 15-1.5-113 and 15-1.5-115).

(11) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

(12) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

ANNOTATION

Law reviews. For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (Aug. 2005).

15-1.5-102. Custodial trust - general.

(1) A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the "Colorado Uniform Custodial Trust Act".

(2) A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner,

describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the "Colorado Uniform Custodial Trust Act". A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under the "Colorado Uniform Custodial Trust Act".

(3) Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

(4) Except as provided in subsection (5) of this section, a transferor may not terminate a custodial trust.

(5) The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(6) Any person may augment existing custodial trust property by the addition of other property pursuant to this article.

(7) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(8) This article does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this article may be enforceable according to its terms under other law.

Source: L. 99: Entire article added, p. 1212, § 1, effective August 4.

OFFICIAL COMMENT

Section 15-1.5-102 is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act. Section 15-1.5-102 sets forth the general effect of such a transfer. Section 15-1.5-118 provides forms which satisfy the requirements of this section and identifies customary methods of transferring assets to create a custodial trust.

Section 15-1.5-102(1) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declaration of trust by the owner of property to hold it for the benefit of another as is provided in section 15-1.5-102(2). A declaration in trust by the owner of property for the sole benefit of the owner is not contemplated by this Act because such

an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act for the benefit of the transferor and one or more other beneficiaries. See section 15-1.5-106.

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets remaining at the beneficiary's death directly to a named distributee.

This Act does not preclude the creation of trusts under other existing law, statutory or nonstatutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act. The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 15-1.5-102 (3) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and authority to act with regard to the property only as is authorized by the statute. The custodial trustee's powers are enumerated in section 15-1.5-108.

Section 15-1.5-102 (5) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under section 15-1.5-110, in which event the beneficiary does not have the power to terminate. However, the designation of incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to section 15-1.5-110. The Act precludes termination by exercise of a durable power of attorney if the beneficiary is incompetent (section 15-1.5-107(6)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under section 15-1.5-110, an individually drafted trust outside the scope of this Act would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in section 15-1.5-117.

A transfer under this Act is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act and enforceable under general law pursuant to subsection 15-1.5-102 (8).

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act.

15-1.5-103. Custodial trustee for future payment or transfer.

(1) A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"".

(2) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

(3) A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right.

Source: L. 99: Entire article added, p. 1213, § 1, effective August 4.

OFFICIAL COMMENT

This section permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the

transaction or transfer. Any person designated as a future custodial trustee may decline to serve before the transfer occurs or may resign under section 15-1.5-113 after the transfer.

The source of this section is Section 3 of UTMA. The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

15-1.5-104. Form and effect of receipt and acceptance by custodial trustee - jurisdiction.

(1) Obligations of a custodial trustee, including the obligation to follow upon directions of the beneficiary, arise under this article upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

(2) The custodial trustee's acceptance may be evidenced by a writing stating in substance:

CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, _____ (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for _____ (name of beneficiary) under the "Colorado Uniform Custodial Trust Act". I undertake to administer and distribute the custodial trust property pursuant to the "Colorado Uniform Custodial Trust Act". My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of _____.

Dated: _____

_____

(Signature of Custodial Trustee)

(3) Upon accepting custodial trust property, a person designated as custodial trustee under this article is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust.

Source: L. 99: Entire article added, p. 1214, § 1, effective August 4.

OFFICIAL COMMENT

Although a custodial trust is created by a transfer that satisfies section 15-1.5-102 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be expressed or implied, but it is recommended that the written acceptance provided for in section 15-1.5-104 (2) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

15-1.5-105. Transfer to custodial trustee by fiduciary or obligor - facility of payment.

(1) Unless otherwise directed by an instrument designating a custodial trustee pursuant to section 15-1.5-103, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds thirty thousand dollars, the transfer is not effective unless authorized by the court.

(2) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

Source: L. 99: Entire article added, p. 1214, § 1, effective August 4.

OFFICIAL COMMENT

This section is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act. The section does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid or delivered. It is based primarily on Sections 6 and 7 of UTMA and

includes the protections of Section 8 of UTMA as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see section 15-1.5-111, which protects transferors and other third parties dealing with the custodial trustee.

15-1.5-106. Multiple beneficiaries - separate custodial trusts - survivorship.

(1) Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship.

(2) Custodial trust property held under this article by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

(3) A custodial trustee of custodial trust property held for more than one beneficiary shall separately account to each beneficiary pursuant to sections 15-1.5-107 and 15-1.5-115 for the administration of the custodial trust.

Source: L. 99: Entire article added, p. 1214, § 1, effective August 4.

OFFICIAL COMMENT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (3) to account separately to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (2) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

15-1.5-107. General duties of custodial trustee.

(1) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(2) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, or if the beneficiary is incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and shall comply with the provisions of the "Colorado Uniform Prudent Investor Act". However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor.

(3) Subject to subsection (2) of this section, a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(4) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for (name of beneficiary) under the "Colorado Uniform Custodial Trust Act"".

(5) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(6) The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.

Source: L. 99: Entire article added, p. 1215, § 1, effective August 4.

Editor's note: Colorado modified the model act by directing that the custodial trustee shall also comply with the provisions of the "Colorado Uniform Prudent Investor Act".

OFFICIAL COMMENT

Subsection (2) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the

beneficiary has not directed him. Under sections 15-1.5-109 and 15-1.5-110, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section 7-302 of the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional specific duties identified in other sections such as Section 15-1.5-109.

15-1.5-108. General powers of custodial trustee.

(1) A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(2) This section does not relieve a custodial trustee from liability for a violation of section 15-1.5-107.

Source: L. 99: Entire article added, p. 1216, § 1, effective August 4.

OFFICIAL COMMENT

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (1) that might be taken by an enacting state is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

15-1.5-109. Use of custodial trust property.

(1) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the

beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(3) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary.

Source: L. 99: Entire article added, p. 1216, § 1, effective August 4.

OFFICIAL COMMENT

This section provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA. In addition, however, subsection (2) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use-and-benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (3) allows a custodial trustee to maintain a bank account, of an amount reasonable under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a

conservator under the Uniform Probate Code.]

15-1.5-110. Determination of incapacity - effect.

(1) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if:

(a) The custodial trust was created under section 15-1.5-105;

(b) The transferor has so directed in the instrument creating the custodial trust; or

(c) The custodial trustee has determined that the beneficiary is incapacitated.

(2) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon:

(a) Previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney;

(b) The certificate of the beneficiary's physician; or

(c) Other persuasive evidence.

(3) If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

(4) On petition of the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

(5) Absent determination of incapacity of the beneficiary under subsection (2) or (4) of this section, a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of this article applicable to an incapacitated beneficiary.

(6) Incapacity of a beneficiary does not terminate:

(a) The custodial trust;

(b) Any designation of a successor custodial trustee;

(c) Rights or powers of the custodial trustee; or

(d) Any immunities of third persons acting on instructions of the custodial trustee.

Source: L. 99: Entire article added, p. 1216, § 1, effective August 4.

OFFICIAL COMMENT

This is one of the more important sections of the Act under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (2) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (4) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important to the custodial trustee, as his duties and responsibilities change on the event of the beneficiary's incapacity.

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under section 15-1.5-102. Rather, section 15-1.5-110 relates to a management matter in a validly established custodial trust.

Subsection (6) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act relating to managing custodial trusts for incapacitated individuals.

15-1.5-111. Exemption of third persons from liability.

(1) A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the

capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

(a) The validity of the purported custodial trustee's designation;

(b) The propriety of, or the authority under this article for, any action of the purported custodial trustee;

(c) The validity or propriety of an instrument executed or instruction given pursuant to this article either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or

(d) The propriety of the application of property vested in the purported custodial trustee.

Source: L. 99: Entire article added, p. 1217, § 1, effective August 4.

OFFICIAL COMMENT

This section is based upon Section 16 of the UTMA and protects third persons who deal in good faith with the custodial trustee.

15-1.5-112. Liability to third persons.

(1) A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property, or a tort committed in the course of administering the custodial trust may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(2) A custodial trustee is not personally liable to a third person:

(a) On a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(b) For an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

(3) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of

administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(4) Subsections (2) and (3) of this section do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance.

Source: L. 99: Entire article added, p. 1218, § 1 effective August 4.

OFFICIAL COMMENT

This section is patterned after Section 17 of the UTMA and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d Sections 265 and 277. The effect of this section is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent personal fault on their part. This section does not alter the obligations between the custodial trustee and the beneficiary arising out of the administration of the estate and the accounting for that administration.

There may be cases in which a custodial trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such a case, the beneficiary should be permitted as a party defendant under subsection (4) but only to the extent of the protection of the liability insurance.

15-1.5-113. Declination, resignation, incapacity, death, or removal of custodial trustee - designation of successor custodial trustee.

(1) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under section 15-1.5-103 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to section 15-1.5-103. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

(2) A custodial trustee who has accepted the custodial trust property may resign by:

(a) Delivering written notice to a successor custodial trustee, if any, the beneficiary, and, if the beneficiary is incapacitated, to the beneficiary's conservator, if any; and

(b) Transferring or registering, or recording an appropriate instrument relating to, the custodial trust property, in the name of, and delivering the records to, the successor custodial trustee identified under subsection (3) of this section.

(3) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated under section 15-1.5-102 (7) or section 15-1.5-103 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within ninety days after the ineligibility, resignation, death, or incapacity of the custodial trustee, the beneficiary's conservator becomes successor custodial trustee. If the beneficiary does not have a conservator or the conservator fails to act, the resigning custodial trustee may designate a successor custodial trustee.

(4) If a successor custodial trustee is not designated pursuant to subsection (3) of this section, the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court to designate a successor custodial trustee.

(5) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

(6) A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief.

Source: L. 99: Entire article added, p. 1218, § 1, effective August 4.

OFFICIAL COMMENT

This section follows many of the provisions of Section 18 of UTMA with some substantive changes. It is designed to accommodate in a single section the

circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (2), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (3), a beneficiary who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in UTMA except that the nonincapacitated beneficiary has 90 days to act and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (6), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section, unlike Section 18 of UTMA, does not give the custodial trustee the general power to designate a successor custodial trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

15-1.5-114. Expenses, compensation, and bond of custodial trustee.

(1) Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

(a) Is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(b) Has a noncumulative election, to be made no later than six months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

(c) Need not furnish a bond or other security for the faithful performance of fiduciary duties.

Source: L. 99: Entire article added, p. 1219, § 1, effective August 4.

OFFICIAL COMMENT

This section follows the pattern of Section 15 of the UTMA except it does subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA, the provisions with regard to compensation are designed to avoid

imputed compensation to the custodian who waives compensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust. Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA, it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

15-1.5-115. Reporting and accounting by custodial trustee - determination of liability of custodial trustee.

(1) (a) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property:

(I) Once each year;

(II) Upon request at reasonable times by the beneficiary or the beneficiary's legal representative;

(III) Upon resignation or removal of the custodial trustee; and

(IV) Upon termination of the custodial trust.

(b) The statements must be provided to the beneficiary or to the beneficiary's legal representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trust property is to be delivered.

(2) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(3) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

(4) In an action or proceeding under this article or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

(5) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(6) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or

review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others.

Source: L. 99: Entire article added, p. 1220, § 1, effective August 4.

OFFICIAL COMMENT

This section requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between the custodial trustee and beneficiary would be expected, e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section assumes the usual minimum components of an account, i.e., assets and values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period.

Subsection (1) identifies the necessary reports and accountings for the parties, and subsection (2) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust. Subsection (6) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

15-1.5-116. Limitations of action against custodial trustee.

(1) Except as provided in subsection (3) of this section, unless previously barred by adjudication, consent, or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(a) Who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two years after receipt of the final account or statement; or

(b) Who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three years after the termination of the custodial trust.

(2) Except as provided in subsection (3) of this section, a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust is barred unless an action or proceeding to assert the claim is commenced within five years after the termination of the custodial trust.

(3) A claim for relief is not barred by this section if the claimant:

(a) Is a minor, until the earlier of two years after the claimant becomes an adult or dies;

(b) Is an incapacitated adult, until the earliest of two years after the appointment of a conservator, the removal of the incapacity, or the death of the claimant; or

(c) Was an adult, now deceased, who was not incapacitated, until two years after the claimant's death.

Source: L. 99: Entire article added, p. 1221, § 1, effective August 4.

OFFICIAL COMMENT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations provided in this section are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under section 15-1.5-113 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year limitation of subsection (1)(a) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (1)(b) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (2) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (3) could postpone the time bar until two years after removal of the disability or death.

15-1.5-117. Distribution on termination.

(1) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

(a) To the beneficiary, if not incapacitated or deceased;

(b) To the conservator or other recipient designated by the court for an incapacitated beneficiary; or

(c) Upon the beneficiary's death, in the following order:

(I) As last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;

(II) To the survivor of multiple beneficiaries if survivorship is provided for pursuant to section 15-1.5-106;

(III) As designated in the instrument creating the custodial trust; or

(IV) To the estate of the deceased beneficiary.

(2) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

(3) Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

Source: L. 99: Entire article added, p. 1221, § effective August 4.

OFFICIAL COMMENT

This section controls distribution of the custodial trust property when the custodial trust is terminated under section 15-1.5-102(5). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (1)(c) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see sections 15-1.5-102, 15-1.5-106, and 15-1.5-118) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate.

The direction to the custodial trustee by the beneficiary, who is not incapacitated, for

distribution on termination of the custodial trust may be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:

I, ____ (name of beneficiary) hereby direct ____ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to ____ as distributee on the termination of the trust at my death. In the event of the prior death of ____ above named as distributee, I designate ____ as distributee of the custodial trust property.

Signed (signature) _____ Beneficiary

Date _____

Receipt Acknowledged (signature) _____

Custodial Trustee

Date _____

15-1.5-118. Methods and forms for creating custodial trusts.

(1) If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of section 15-1.5-102 are satisfied by:

(a) The execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

TRANSFER UNDER THE

"COLORADO UNIFORM CUSTODIAL TRUST ACT"

I, _____ (name of transferor or name and representative capacity if a fiduciary), transfer to _____ (name of trustee other than transferor), as custodial trustee for _____ (name of beneficiary) as beneficiary and as distributee on termination of the trust in absence of direction by the beneficiary under the "Colorado Uniform Custodial Trust Act", the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: _____ _____

(Signature); or

(b) The execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

DECLARATION OF TRUST UNDER THE

"COLORADO UNIFORM CUSTODIAL TRUST ACT"

I, _____ (name of owner of property), declare that henceforth I hold as custodial trustee for _____ (name of beneficiary other than transferor) as beneficiary and as distributee on termination of the trust in absence of direction by the beneficiary under the "Colorado Uniform Custodial Trust Act", the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: _____ _____

(Signature).

(2) Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:

(a) Registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(b) Delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in paragraph (a) of subsection (1) of this section;

(c) Payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(d) Registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(e) Delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(f) Irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(g) Delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(h) Execution, delivery, and recordation of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'";

(i) Issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property:

(I) Issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'"; or

(II) Delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'"; or

(j) Execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: "as custodial trustee for (name of beneficiary) under the 'Colorado Uniform Custodial Trust Act'".

Source: L. 99: Entire article added, p. 1222, § 1, effective August 4.

OFFICIAL COMMENT

This section largely follows Section 9 of UTMA. It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute.

Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the requirements of section 15-1.5-102 are met. The method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

15-1.5-119. Applicable law.

(1) This article applies to a transfer or declaration creating a custodial trust that refers to this article if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this state or custodial trust property is located in this state. The custodial trust remains subject to this article despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this state.

(2) A transfer made pursuant to an act of another state substantially similar to this article is governed by the law of that state and may be enforced in this state.

Source: L. 99: Entire article added, p. 1224, § 1, effective August 4.

OFFICIAL COMMENT

This section is designed to avoid confusion in the event a party or assets are removed from the state.

15-1.5-120. Uniformity of application and construction.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

Source: L. 99: Entire article added, p. 1225, § 1, effective August 4.

15-1.5-121. Short title.

This article may be cited as the "Colorado Uniform Custodial Trust Act".

Source: L. 99: Entire article added, p. 1225, § 1, effective August 4.

15-1.5-122. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Source: L. 99: Entire article added, p. 1225, § 1, effective August 4.

POWERS OF APPOINTMENT

ARTICLE 2

Powers of Appointment

15-2-101 to 15-2-304. (Repealed)

Editor's note: (1) This article was numbered as articles 1 to 3 of chapter 107, C.R.S. 1963. For amendments to this article prior to its repeal in 2015, consult the 2014 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

(2) Section 15-2-304 provided for the repeal of this article, effective July 1, 2015. (See L. 2014, pp. 782, 783.)

ARTICLE 2.5

Uniform Powers of Appointment Act

PART 1
GENERAL PROVISIONS

15-2.5-101. Short title.

15-2.5-102. Definitions.

15-2.5-103. Governing law.

15-2.5-104. Supplementation by common law and principles of equity.

PART 2
CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

15-2.5-201. Creation of power of appointment.

15-2.5-202. Nontransferability.

15-2.5-203. Presumption of unlimited authority.

15-2.5-204. Exception to presumption of unlimited authority.

15-2.5-205. Rules of classification - definitions.

15-2.5-206. Power of the donor to revoke or amend.

PART 3
EXERCISE OF POWER OF APPOINTMENT

15-2.5-301. Requisites for exercise of power of appointment.

15-2.5-302. Intent to exercise - determining intent from residuary clause.

15-2.5-303. Intent to exercise - after-acquired power.

15-2.5-304. Substantial compliance with donor-imposed formal requirement.

15-2.5-305. Permissible appointment.

15-2.5-306. Appointment to deceased appointee or permissible appointee's descendant.

15-2.5-307. Impermissible appointment.

15-2.5-308. Selective allocation doctrine.

15-2.5-309. Capture doctrine - disposition of ineffectively appointed property under general power.

15-2.5-310. Disposition of unappointed property under released or unexercised general power.

15-2.5-311. Disposition of unappointed property under released or unexercised nongeneral power.

15-2.5-312. Disposition of unappointed property if partial appointment to taker in default.

15-2.5-313. Appointment to taker in default.

15-2.5-314. Powerholder's authority to revoke or amend exercise.

PART 4
DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT

15-2.5-401. Disclaimer.

15-2.5-402. Authority to release.

15-2.5-403. Method of release.

15-2.5-404. Revocation or amendment of release.

15-2.5-405. Power to contract - presently exercisable power of appointment.

15-2.5-406. Power to contract - power of appointment not presently exercisable.

PART 5
(Reserved)

PART 6
MISCELLANEOUS PROVISIONS

15-2.5-601. Uniformity of application and construction.

15-2.5-602. Relation to electronic signatures in global and national commerce act.

15-2.5-603. Application to existing relationships.

PREFATORY NOTE

Professor W. Barton Leach described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." 24 A.B.A. J. 807 (1938). Powers of appointment are routinely included in trusts to add flexibility to the arrangement.

A power of appointment is the authority, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property. An owner, of course, has this authority with respect to the owner's property. By creating a power of appointment, the owner typically confers this authority on someone else.

The power of appointment is a staple of modern estate-planning practice. However, many jurisdictions within the United States have very little statutory or case law on powers of appointment.

A comprehensive restatement of the law of powers of appointment was approved in 2010 and published in 2011 by the American Law Institute. See chapters 17-23 of the Restatement Third of Property: Wills and Other Donative Transfers.

This act draws heavily on that Restatement. The aim of this act is to codify the law of powers of appointment, or at least the portions of the law that are most amenable to codification.

The act is divided into six parts. Part 1 contains general provisions. Part 2 contains provisions concerning the creation, revocation, and amendment of a power of appointment. Part 3 addresses the exercise of a power of appointment. Part 4 contains provisions on the disclaimer or release of a power of appointment and on contracts to appoint or not to appoint. Part 5 concerns the rights of the powerholder's creditors in appointive property. Part 6 contains miscellaneous provisions.

After each section, there is a detailed Comment. The Comments explain, and

should be read in conjunction with, the statutory text. The Comments also provide information and guidance about best practices in creating and exercising powers of appointment.

PART 1

GENERAL PROVISIONS

15-2.5-101. Short title.

This article may be cited as the "Colorado Uniform Powers of Appointment Act".

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 772, § 1, effective July 1, 2015.

15-2.5-102. Definitions.

In this article:

(1) "Appointee" means a person to whom a powerholder makes an appointment of appointive property.

(2) "Appointive property" means property or property interest subject to a power of appointment.

(3) "Blanket-exercise clause" means a clause in an instrument, which clause exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:

(a) Expressly uses the words "any power" in exercising any power of appointment the powerholder has;

(b) Expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or

(c) Disposes of all property subject to disposition by the powerholder.

(4) "Donor" means a person who creates a power of appointment.

(5) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees.

(6) "General power of appointment" means a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(7) "Gift-in-default clause" means a clause identifying a taker in default of appointment.

(8) "Impermissible appointee" means a person who is not a permissible appointee.

(9) "Instrument" means a record.

(10) "Nongeneral power of appointment" means a power of appointment that is not a general power of appointment.

(11) "Permissible appointee" means a person in whose favor a powerholder may exercise a power of appointment.

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

(13) "Powerholder" means a person in whom a donor creates a power of appointment.

(14) "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.

(15) "Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. The term:

(a) Includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(I) The occurrence of the specified event;

(II) The satisfaction of the ascertainable standard; or

(III) The passage of the specified time; and

(b) Does not include a power exercisable only at the powerholder's death.

(16) "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.

(17) "Specific-exercise clause" means a clause in an instrument, which clause specifically refers to and exercises a particular power of appointment.

(18) "Taker in default of appointment" means a person who takes all or part of the appointive property to the extent the powerholder does not effectively exercise the power of appointment.

(19) "Terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 772, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Subsection (1) defines an appointee as the person to which a powerholder makes an appointment of appointive property. For the definition of the related term, "permissible appointee," see subsection 11.

Subsection (2) defines appointive property as the property or property interest subject to a power of appointment. The effective creation of a power of appointment requires that there be appointive property. See Section 201.

Subsections (3) and (17) introduce the distinction between blanket-exercise and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the particular power of appointment in question, using language such as the following: "I exercise the power of appointment conferred upon me by my father's will as follows: I appoint [fill in details of appointment]." In contrast, a blanket-exercise clause exercises "any" power of appointment the powerholder may have, appoints "any" property over which the powerholder may have a power of appointment, or disposes of all property subject to disposition by the powerholder. The use of specific-exercise clauses is encouraged; the use of blanket-exercise clauses is discouraged. See Section 301 and the accompanying Comment.

Subsections (4) and (13) define the donor and the powerholder. The donor is the person who created the power of appointment. The powerholder is the person in whom the power of appointment was conferred or in whom the power was reserved. The traditional, but potentially confusing, term for powerholder is "donee." See Restatement of Property § 319 (1940); Restatement Second of Property: Donative Transfers § 11.2 (1986); Restatement Third of Property: Wills and Other Donative Transfers § 17.2 (2011). In the case of a reserved power, the same person is both the donor and the powerholder.

Subsection (5) introduces the distinction between exclusionary and nonexclusionary powers of appointment. An exclusionary power is one in which the donor has authorized the powerholder to appoint to any one or more of the permissible appointees to the exclusion of the other permissible appointees. For example, a power to appoint "to such of my descendants as the powerholder may select" is exclusionary, because the powerholder may appoint to any one or more of the donor's descendants to

the exclusion of the other descendants. In contrast, a nonexclusionary power is one in which the powerholder cannot make an appointment that excludes any permissible appointee, or one or more designated permissible appointees, from a share of the appointive property. An example of a nonexclusionary power is a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." Here, the powerholder is not under a duty to exercise the power; but, if the powerholder does exercise the power, the appointment must abide by the power's nonexclusionary nature. See Sections 301 and 305. An instrument creating a power of appointment is construed as creating an exclusionary power unless the terms of the instrument manifest a contrary intent. See Section 203. The typical power of appointment is exclusionary. And in fact, only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 205 and the accompanying Comment.

Subsections (6) and (10) explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the powerholder to exercise the power in favor of one or more of the following: the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate, regardless of whether the power is also exercisable in favor of others. A nongeneral power of appointment—sometimes called a "special" power of appointment—cannot be exercised in favor of the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate. Estate planners often classify nongeneral powers as being either "broad" or "limited," depending on the range of permissible appointees. A power to appoint to anyone in the world except the powerholder, the powerholder's estate, and the creditors of either would be an example of a broad nongeneral power. In contrast, a power in the donor's spouse to appoint among the donor's descendants would be an example of a limited nongeneral power.

An instrument creating a power of appointment is construed as creating a general power unless the terms of the instrument manifest a contrary intent. See Section 203. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the powerholder, the powerholder's estate, or the creditors of either. If the settlor of a trust empowers a trustee or another person to change a power of appointment from a general power into a nongeneral power, or vice versa, the power is either general or nongeneral depending on the scope of the power at any particular time.

Subsection (7) defines the gift-in-default clause. In an instrument creating a power of appointment, the clause that identifies the taker in default is called the gift-in-default clause. A gift-in-default clause is not mandatory but is included in a well-drafted instrument.

Subsections (8) and (11) explain the distinction between impermissible and

permissible appointees. The permissible appointees—known at common law as the "objects" —of a power of appointment may be narrowly defined (for example, "to such of the powerholder's descendants as the powerholder may select"), broadly defined (for example, "to such persons as the powerholder may select, except the powerholder, the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate"), or unlimited (for example, "to such persons as the powerholder may select"). A permissible appointee of a power of appointment does not, in that capacity, have a property interest that can be transferred to another. Otherwise, a permissible appointee could transform an impermissible appointee into a permissible appointee, exceeding the intended scope of the power and thereby violating the donor's intent. An appointment cannot benefit an impermissible appointee. See Section 307.

Subsection (9) defines the term "instrument" as either a writing or a record, depending on the choice made by the enacting jurisdiction. The drafting committee had no clear preference between the two options. Interestingly, there is no pre-existing Uniform Law definition of "instrument" outside the commercial context. See Uniform Commercial Code §§ 3-104(b), 9-102(a)(47). The term is used without definition in, for example, the Uniform Probate Code, the Uniform Trust Code, and the Uniform Power of Attorney Act.

Subsections (12) and (16) contain the definitions of "person" and "record". With one exception, these are standard definitions approved by the Uniform Law Commission. The exception is that the word "trust" has been added to the definition of "person". Trust law in the United States is moving in the direction of viewing the trust as an entity, see Restatement Third of Trusts Introductory Note to Chapter 21, but does not yet do so.

Subsection (14) defines a power of appointment. A power of appointment is a power enabling the powerholder, acting in a nonfiduciary capacity, to designate recipients of ownership interests in or powers of appointment over the appointive property. (Powers held in a fiduciary capacity, such a trustee's power to "decant" property from one trust to another, are the subject of other uniform legislation.)

A power to revoke or amend a trust or a power to withdraw income or principal from a trust is a power of appointment, whether the power is reserved by the transferor or conferred on another. See Restatement Third of Trusts § 56, Comment b. A power to withdraw income or principal subject to an ascertainable standard is a postponed power, exercisable upon the satisfaction of the ascertainable standard. See the Comment to subsection (15), below.

A power to direct a trustee to distribute income or principal to another is a power of appointment.

In this act, a fiduciary distributive power is not a power of appointment. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for some other individual, or to pay income or principal to a

designated beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee.

A power over the management of property, sometimes called an administrative power, is not a power of appointment. For example, a power of sale coupled with a power to invest the proceeds of the sale, as commonly held by a trustee of a trust, is not a power of appointment but is an administrative power. A power of sale merely authorizes the person to substitute money for the property sold but does not authorize the person to alter the beneficial interests in the substituted property.

A power to designate or replace a trustee or other fiduciary is not a power of appointment. A power to designate or replace a trustee or other fiduciary involves property management and is a power to designate only the nonbeneficial holder of property.

A power of attorney is not a power of appointment. See Restatement of Property § 318, Comment h: "A power of attorney, in the commonest sense of that term, creates the relationship of principal and agent and is terminated by the death of the [principal]. In both of these characteristics such a power differs from a power of appointment. The latter does not create an agency relationship and, except in the case of a power reserved in the donor, it is usually expected that it will be exercised after the donor's death." The distinction is carried forward in Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment j. See also Uniform Power of Attorney Act §§ 102(7) (defining the holder of a power of attorney as an agent), 110(a)(1) (providing that the principal's death terminates a power of attorney).

A power to create or amend a beneficiary designation, for example with respect to the proceeds of a life insurance policy or of a pension plan, is not a power of appointment. An instrument creating a power of appointment must, among other things, transfer the appointive property. See Section 201; Restatement Third of Property: Wills and Other Donative Transfers § 18.1.

On the authority of a powerholder to exercise the power of appointment by creating a new power of appointment, see Section 305. If a powerholder exercises a power by creating another power, the powerholder of the first power is the donor of the second power, and the powerholder of the second power is the appointee of the first power.

Subsection (15) introduces the distinctions among powers of appointment based upon when the power can be exercised. (A power is exercised when the instrument of exercise is effective. Thus, a power exercised by deed is exercised when the deed is effective. The law of deeds

typically requires, among other things, intent, delivery, and acceptance. A power exercised by will is exercised when the will is effective—at the testator's death, not when the will is executed.)

There are three categories here: a power of appointment is presently exercisable, postponed, or testamentary.

A power of appointment is presently exercisable if it is exercisable at the time in question. Typically, a presently exercisable power of appointment is exercisable at the time in question during the powerholder's life and also at the powerholder's death, e.g., by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power. To take another example, a power of appointment exercisable by the powerholder's last unrevoked instrument in writing is a presently exercisable power, because the powerholder can make a present exercise irrevocable by explicitly so providing in the instrument exercising the power. See Restatement Third of Property: Wills and Other Donative Transfers § 17.4, Comment a.

A power of appointment is presently exercisable even though, at the time in question, the powerholder can only appoint an *interest* that is revocable or subject to a condition. For example, suppose that a trust directs the trustee to pay the income to the powerholder for life, then to distribute the principal by representation to the powerholder's surviving descendants. The trust further provides that, if the powerholder leaves no surviving descendants, the principal is to be distributed "to such individuals as the powerholder shall appoint." The powerholder has a presently exercisable power of appointment, but the appointive property is a remainder interest that is conditioned on the powerholder leaving no surviving descendants.

A power is a postponed power—sometimes known as a deferred power—if it is not yet exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified time. The second sentence in subsection (15) is modeled on Uniform Power of Attorney Act § 102(8).

A power is testamentary if it is not exercisable during the powerholder's life but only in the powerholder's will or in a nontestamentary instrument that is functionally similar to the powerholder's will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. On the ability of a powerholder to exercise a testamentary power of appointment in such a revocable trust, see Section 304 and the accompanying Comment. See also Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b.

Subsection (18) defines a taker in default of appointment. A taker in default of appointment often called the "taker in default" —has a property interest that can be transferred to another. If a taker in default

transfers the interest to another, the transferee becomes a taker in default.

Subsection (19) defines the "terms of the instrument" as the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding. The maker of an instrument creating a power of appointment is the donor. The maker of an instrument exercising a power of appointment is the powerholder. This definition is a slightly modified version of the definition of "terms of a trust" in Uniform Trust Code § 103(18).

The definitions in this section are substantially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.1 to 17.5 and the accompanying Commentary.

15-2.5-103. Governing law.

(1) Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

(a) The creation, revocation, or amendment of the power is governed by the law of the donor's domicile at the relevant time; and

(b) The exercise, release, or disclaimer of the power, or the revocation or amendment of the exercise, release, or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 774, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section provides default rules for determining the law governing the creation and exercise of, and related matters concerning, a power of appointment.

Unless the terms of the instrument creating the power provide otherwise, the actions of the donor—the creation, revocation, or amendment of the power—are governed by the law of the donor's domicile; and the actions of the powerholder—the exercise, release, or disclaimer, or the revocation or amendment thereof—are governed by the law of the powerholder's domicile.

In each case, the domicile is determined *at the relevant time*. For example, a donor's creation of a power is governed by the law of the donor's domicile at the time of the

power's creation; and a donor's amendment of a power is governed by the law of the donor's domicile at the time of the amendment. Similarly, a powerholder's exercise of a power is governed by the law of the powerholder's domicile at the time of the exercise.

The standard "public policy" rules of choice of law naturally continue to apply. See, for example, Restatement Second of Conflict of Laws § 187.

Subsection (1)(b) is a departure from older law. The older position was that the law of the donor's domicile governs acts both of the donor (such as the creation of the power) and of the powerholder (such as the exercise of the power). *See, e.g., Beals v. State Street Bank & Trust Co.*, 326 N.E.2d 896 (Mass. 1975); *Bank of New York v. Black*, 139 A.2d 393 (N.J. 1958).

Subsection (1)(b) adopts the modern view that acts of the powerholder should be governed by the law of the powerholder's domicile, because that is the law the powerholder (or the powerholder's lawyer) is likely to know. This approach is supported by Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c. It is also supported by *Estate of McMullin*, 417 A.2d 152 (Pa. 1980); *White v. United States*, 680 F.2d 1156 (7th Cir. 1982).

See generally, Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c.

15-2.5-104. Supplementation by common law and principles of equity.

Unless displaced by the particular provisions of this article, the principles of law and equity supplement its provisions.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 774, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This act codifies those portions of the law of powers of appointment that are most amenable to codification. The act is supplemented by the common law and principles of equity. To determine the common law and principles of equity in a particular state, a court might look first to prior case law in the state and to more general sources, such as the Restatement Third of Property: Wills and Other Donative Transfers. The common law is not static but includes the contemporary and evolving

rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the act in no way restricts.

The statutory text of the act is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Stern Oil Co. v. Brown*, 817 N.W.2d 395 (S.D. 2012) (interpreting Uniform Commercial Code); *Isbell v. Commercial Investment Associates, Inc.*, 644 S.E.2d 72 (Va. 2007) (interpreting Uniform Residential Landlord Tenant Act); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); *GMAC v. Anaya*, 703 P.2d 169, 172 (N.M. 1985) (interpreting Uniform Commercial Code and describing the Comments as "persuasive" though "not binding"); Jack Davies, Legislative Law and Process in a Nutshell § 59-4 (3d ed. 2007).

The text of and Comment to this section are based on Uniform Trust Code § 106 and its accompanying Comment.

PART 2

CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

15-2.5-201. Creation of power of appointment.

(1) A power of appointment is created only if:

(a) The instrument creating the power:

(I) Is valid under applicable law; and

(II) Except as otherwise provided in subsection (2) of this section, transfers the appointive property; and

(b) The terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

(2) Subparagraph (II) of paragraph (a) of subsection (1) of this section does not apply to the creation of a power of appointment by the exercise of a power of appointment.

(3) A power of appointment may not be created in a deceased individual.

(4) Subject to an applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained powerholder.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 774, § 1, effective July 1, 2015. **L. 2015:** (1)(a)(II) amended, (SB 15-264), ch. 259, p. 951, § 37, effective August 5.

OFFICIAL COMMENT

An instrument can only create a power of appointment if, under applicable law, the instrument itself is valid (or partially valid, see the next paragraph). Thus, for example, a *will* creating a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to wills. An *inter vivos trust* creating a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to inter vivos trusts. In part, this requirement of validity means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to create a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The instrument need not be entirely valid. A partially valid instrument creates a power of appointment if the provisions creating the power are valid.

In addition to being valid in the relevant provisions, an instrument creating a power of appointment must transfer the appointive property. The creation of a power of appointment unlike the creation of a power of attorney—requires a transfer. See Restatement Third of Property: Wills and Other Donative Transfers § 18.1 ("A power of appointment is created by a transfer that manifests an intent to create a power of appointment."). The term "transfer" includes a declaration by an owner of property that the owner holds the property as trustee. Such a declaration necessarily entails a transfer of legal title from the owner-as-owner to the owner-as-trustee; it also entails a transfer of all or some of the equitable interests in the property from the owner to the trust's beneficiaries. See Restatement Third of Property: Wills and Other Donative Transfers § 7.1, Comment a.

The requirement of a transfer presupposes that the donor has the right to transfer the property. An ordinary individual cannot create a power of appointment over the Brooklyn Bridge. Less fancifully, a donor cannot create a power of appointment if doing so would circumvent a valid restriction on the transfer of the property. For example, interests in unincorporated business organizations may have transfer restrictions arising from statute, contract, or

both. A donor cannot use the creation of a power of appointment to circumvent a valid restriction on transfer.

The one exception to the requirement of a transfer is stated in subsection (2): by necessity, the requirement of a transfer does not apply to the creation of a power of appointment by the exercise of a power of appointment. On the ability of a powerholder to exercise the power by creating a new power of appointment, see Section 305.

In addition to the aforementioned requirements, an instrument creating a power of appointment must manifest the donor's intent to create in one or more powerholders a power of appointment over appointive property. This manifestation of intent does not require the use of particular words or phrases (such as "power of appointment"), but careful drafting should leave no doubt about the transferor's intent.

Sometimes the instrument is poorly drafted, raising the question whether the donor intended to create a power of appointment. In such a case, determining the donor's intent is a process of construction. On construction generally, see Chapters 10, 11, and 12 of the Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically, Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g, containing many illustrations of language ambiguous about whether a power of appointment was intended and, for each illustration, offering guidance about how to construe the language.

The creation of a power of appointment requires that there be a donor, a powerholder (who may be the same as the donor), and appointive property. There must also be one or more permissible appointees, though these need not be restricted; a powerholder can be authorized to appoint to anyone. A donor is not required to designate a taker in default of appointment, although a well-drafted instrument will specify one or more takers in default.

Subsection (3) states the well-accepted rule that a power of appointment cannot be created in an individual who is deceased. If the powerholder dies before the effective date of an instrument purporting to confer a power of appointment, the power is not created, and an attempted exercise of the power is ineffective. (The effective date of a power of appointment created in a donor's will is the donor's death, not when the donor executes the will. The effective date of a power of appointment created in a donor's inter vivos trust is the date the trust is established, even if the trust is revocable. See Restatement Third of Property: Wills and Other Donative Transfers § 19.11, Comments b and c.)

Nor is a power of appointment created if all the possible permissible appointees of the power are deceased when the transfer that is intended to create the power becomes legally operative. If all the possible permissible appointees of a power die after the power is created and before the powerholder exercises the power, the power terminates.

A power of appointment is not created if the permissible appointees are so indefinite

that it is impossible to identify any person to whom the powerholder can appoint. If the description of the permissible appointees is such that one or more persons are identifiable, but it is not possible to determine whether other persons are within the description, the power is validly created, but an appointment can only be made to persons who can be identified as within the description of the permissible appointees.

Subsection (4) explains that a power of appointment can be conferred on an unborn or unascertained powerholder, subject to any applicable rule against perpetuities. This is a postponed power. The power arises on the powerholder's birth or ascertainment. The language creating the power as well as other factors such as the powerholder's capacity under applicable law determine whether the power is then presently exercisable, postponed, or testamentary.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying Commentary.

15-2.5-202. Nontransferability.

A powerholder may not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 775, § 1, effective July 1, 2015.

OFFICIAL COMMENT

A power of appointment is nontransferable. The powerholder may not transfer the power to another person. (On the ability of the powerholder to exercise the power by conferring on a permissible appointee a new power of appointment over the appointive property, see Section 305.) If the powerholder dies without exercising or releasing the power, the power lapses. (If a power is held by multiple powerholders, which is rare, on the death of one powerholder that individual's power lapses but the power continues to be held by the surviving powerholders.) If the powerholder partially releases the power and dies without exercising the remaining part, the unexercised part of the power lapses. The power does not pass through the powerholder's estate to the powerholder's successors in interest.

The ability of an agent or guardian to create, revoke, exercise, or revoke the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, the Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.

15-2.5-203. Presumption of unlimited authority.

(1) Subject to section 15-2.5-205, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

(a) Presently exercisable;

(b) Exclusionary; and

(c) Except as otherwise provided in section 15-2.5-204, general.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 775, § 1, effective July 1, 2015.

OFFICIAL COMMENT

In determining which type of power of appointment is created, the general principle of construction, articulated in this section, is that a power falls into the category giving the powerholder the maximum discretionary authority except to the extent the terms of the instrument creating the power restrict the powerholder's authority. Maximum discretion confers on the powerholder the flexibility to alter the donor's disposition in response to changing conditions.

In accordance with this presumption of unlimited authority, a power is general unless the terms of the creating instrument specify that the powerholder cannot exercise the power in favor of the powerholder, the powerholder's estate, or the creditors of either. A power is presently exercisable unless the terms of the creating instrument specify that the power can only be exercised at some later time or in some document such as a will that only takes effect at some later time. A power is exclusionary unless the terms of the creating instrument specify that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

This general principle of construction applies, unless the terms of the instrument creating the power of appointment provide otherwise. A well-drafted instrument intended to create a nongeneral or testamentary or nonexclusionary power will use clear language to achieve the desired objective. Not all instruments are well-drafted, however. A court may have to construe the terms of the instrument to discern the donor's intent. For principles of construction applicable to the creation of a power of appointment, see Restatement

Third of Property: Wills and Other Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing many examples.

15-2.5-204. Exception to presumption of unlimited authority.

(1) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

(a) The power is exercisable only at the powerholder's death; and

(b) The permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 775, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section is designed to remedy a recurring drafting mistake. A testamentary power of appointment created in a defined and limited class that happens to include the powerholder is usually intended to be a nongeneral power. For example, a testamentary power created in one of the donor's descendants (such as the donor's child or grandchild) to appoint among the donor's "descendants" or "issue" is typically intended to be a nongeneral power. See, for example, PLR 201229005 (stating the ruling of the Internal Revenue Service that a testamentary power of appointment in the donor's son, exercisable in favor of the donor's "issue," is a nongeneral power for purposes of 26 U.S.C. § 2041). Accordingly, the presumption of this Section is that such a power is nongeneral.

On the meaning of the well-accepted term of art "defined and limited," see the Comment to Section 205. See also Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c.

15-2.5-205. Rules of classification - definitions.

(1) In this section, "adverse party" means a person with a substantial beneficial interest in property, which interest would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(2) If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

(3) If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 775, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Subsection (2) states a well-accepted and mandatory exception to the presumption of unlimited authority articulated in Section 203. If a power of appointment can be exercised only with the consent or joinder of an adverse party, the power is not a general power. An adverse party is an individual who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or the creditors of either. In this context, the word "substantial" is not subject to precise definition but must be determined in light of all the facts and circumstances. Consider the following examples.

Example 1. D transferred property in trust, directing the trustee "to pay the income to D's son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall appoint; in default of appointment, remainder to X." S's power is not a general power because X meets the definition of an adverse party.

Example 2. Same facts as Example 1, except that S's power is exercisable with the joinder of Y rather than with the joinder of X. Y has no property interest that could be adversely affected by the exercise of the power. Because Y is not an adverse party, S's power is general.

Whether the party whose consent or joinder is required is adverse or not is determined at the time in question. Consider the following example.

Example 3. Same facts as Example 2, except that, one month after D's creation of the trust, X transfers the remainder interest to Y. Before the transfer, Y is not an adverse party and S's power is general. After the transfer, Y is an adverse party and S's power is nongeneral.

Subsection (3) also states a longstanding mandatory rule. Only a power of appointment whose permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible appointees are "defined and limited" if they are defined and

limited to a reasonable number. Typically, permissible appointees who are defined and limited are described in class-gift terms: a single- generation class such as "children," "grandchildren," "brothers and sisters," or "nieces and nephews," or a multiple-generation class such as "issue" or "descendants" or "heirs." Permissible appointees need not be described in class-gift terms to be defined and limited, however. The permissible appointees are also defined and limited if one or more permissible appointees are designated by name or otherwise individually identified.

If the permissible appointees are not defined and limited, the power is exclusionary irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or persons other than the powerholder, the powerholder's estate, the creditors of the powerholder, and the creditors of the powerholder's estate" is an exclusionary power. An attempt by the donor to require the powerholder to appoint at least $X to each permissible appointee of the power is ineffective, because the permissible appointees of the power are so numerous that it would be administratively impossible to carry out the donor's expressed intent. The donor's expressed restriction is disregarded, and the powerholder may exclude any one or more of the permissible appointees in exercising the power.

In contrast, a power to appoint only to the powerholder's creditors or to the creditors of the powerholder's estate is a power in favor of a defined and limited class. Such a power could be nonexclusionary if, for example, the terms of the instrument creating the power provide that the power is a power to appoint "to such of the powerholder's estate creditors as the powerholder shall by will appoint, but if the powerholder exercises the power, the powerholder must appoint $X to a designated estate creditor or must appoint in full satisfaction of the powerholder's debt to a designated estate creditor."

If a power is determined to be nonexclusionary, it is to be inferred that the donor intends to require an appointment to confer a reasonable benefit upon each mandatory appointee. An appointment under which a mandatory appointee receives nothing, or only a nominal sum, violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment j.

The terms of the instrument creating a power of appointment sometimes provide that no appointee shall receive any share in default of appointment unless the appointee consents to allow the amount of the appointment to be taken into account in calculating the fund to be distributed in default of appointment. This "hotchpot" language is used to minimize unintended inequalities of distribution among permissible appointees. Such a clause does not make the power nonexclusionary, because the terms do not prevent the powerholder from making an appointment that excludes a permissible appointee. See Restatement Third of Property: Wills and

Other Donative Transfers § 17.5, Comment k.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.3 to 17.5 and the accompanying Introductory Note and Commentary.

15-2.5-206. Power of the donor to revoke or amend.

(1) A donor may revoke or amend a power of appointment only to the extent that:

(a) The instrument creating the power is revocable by the donor; or

(b) The donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 776, § 1, effective July 1, 2015.

OFFICIAL COMMENT

The donor of a power of appointment has the authority to revoke or amend the power only to the extent the instrument creating the power is revocable by the donor or the donor reserves a power of revocation or amendment in the instrument creating the power.

For example, the donor's power to revoke or amend a revocable inter vivos trust carries with it the authority to revoke or amend any power of appointment created in the trust. However, to the extent an exercise of the power removes appointive property from the trust, the donor's authority to revoke or amend the power is eliminated, unless the donor expressly reserved authority to revoke or amend any transfer from the trust after the transfer is completed.

If an irrevocable inter vivos trust confers a presently exercisable power on someone who is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority to revoke or amend the power, except to the extent the donor reserved the authority to do so. If the donor did reserve the authority to revoke or amend the power, that authority is only effective until the powerholder irrevocably exercises the power.

If the same individual is both the donor and the powerholder, the donor in his or her capacity as powerholder can indirectly revoke or amend the power by a partial or total release of the power. See Section 402. After the power has been irrevocably exercised, however, the donor as donor is in no different position in regard to revoking or amending the exercise of the power than the

donor would be if the donor and powerholder were different individuals.

The ability of an agent or guardian to revoke or amend a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying Commentary.

PART 3

EXERCISE OF POWER OF APPOINTMENT

15-2.5-301. Requisites for exercise of power of appointment.

(1) A power of appointment may be exercised only:

(a) If the instrument exercising the power is valid under applicable law;

(b) If the terms of the instrument exercising the power:

(I) Manifest the powerholder's intent to exercise the power; and

(II) Subject to section 15-2.5-304, satisfy the requirements of exercise, if any, imposed by the donor; and

(c) To the extent the appointment is a permissible exercise of the power.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 776, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Subsection (1)(a) states the fundamental principle that an instrument can only exercise a power of appointment if the instrument, under applicable law, is valid (or partially valid, see the next paragraph). Thus, for example, a *will* exercising a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to wills. An *inter vivos trust* exercising a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable

to inter vivos trusts. In part, this means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to exercise a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The instrument need not be entirely valid. A partially valid instrument can exercise a power of appointment if the provisions exercising the power are valid.

Subsection (1)(b) requires the terms of the instrument exercising the power of appointment to manifest the powerholder's intent to exercise the power of appointment. Whether a powerholder has manifested an intent to exercise a power of appointment is a question of construction. See generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For example, a powerholder's disposition of appointive property may manifest an intent to exercise the power even though the powerholder does not refer to the power. See Restatement Third of Property: Wills and Other Donative Transfers § 19.3. Subsection (1)(b) also requires that the terms of the instrument exercising the power must, subject to Section 304, satisfy the requirements of exercise, if any, imposed by the donor.

Language expressing an intent to exercise a power is clearest if it makes a specific reference to the creating instrument and exercises the power in unequivocal terms and with careful attention to the requirements of exercise, if any, imposed by the donor.

The recommended method for exercising a power of appointment is by a specific-exercise clause, using language such as the following: "I exercise the power of appointment conferred upon me by [my father's will] as follows: I appoint [fill in details of appointment]."

Not recommended is a blanket-exercise clause, which purports to exercise "any" power of appointment the powerholder may have, using language such as the following: "I exercise any power of appointment I may have as follows: I appoint [fill in details of appointment]." Although a blanket-exercise clause does manifest an intent to exercise any power of appointment the powerholder may have, such a clause raises the often-litigated question of whether it satisfies the requirement of specific reference imposed by the donor in the instrument creating the power.

A blending clause purports to blend the appointive property with the powerholder's own property in a common disposition. The exercise portion of a blending clause can take the form of a specific exercise or, more

commonly, a blanket exercise. For example, a clause providing "All the residue of my estate, including the property over which I have a power of appointment under my mother's will, I devise as follows" is a blending clause with a specific exercise. A clause providing "All the residue of my estate, including any property over which I may have a power of appointment, I devise as follows" is a blending clause with a blanket exercise.

This act aims to eliminate any significance attached to the use of a blending clause. A blending clause has traditionally been regarded as significant in the application of the doctrines of "selective allocation" and "capture." This act eliminates the significance of such a clause under those doctrines. See Sections 308 (selective allocation) and 309 (capture). The use of a blending clause is more likely to be the product of the forms used by the powerholder's lawyer than a deliberate decision by the powerholder to facilitate the application of the doctrines of selective allocation or capture.

If the powerholder decides not to exercise a specific power or any power that the powerholder might have, it is important to consider whether to depend on mere silence to produce a nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the form of a release during life (see Section 402) or a nonexercise clause in the powerholder's will or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise clause (for example, "I do not exercise the power of appointment conferred on me by my father's trust") or the form of a blanket-nonexercise clause (for example, "I do not exercise any power of appointment I may have").

In certain circumstances, different consequences depend on the powerholder's choice. Under Section 302, a residuary clause in the powerholder's will is treated as manifesting an intent to exercise a general power in certain limited circumstances if the powerholder silently failed to exercise the power, but not if the powerholder released the power or refrained in a record from exercising it. Under Section 310, unappointed property passes to the powerholder's estate in certain limited circumstances if the powerholder silently failed to exercise a general power, but passes to the donor or to the donor's successors in interest if the powerholder released the power.

Subsection (1)(c) provides that the exercise is valid only to the extent the exercise is permissible. On permissible and impermissible exercise, see Sections 305 to 307.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.1, 19.8, and 19.9 and the accompanying Commentary.

15-2.5-302. Intent to exercise - determining intent from residuary clause.

(1) In this section:

(a) "Residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause.

(b) "Will" includes a codicil and a testamentary instrument that revises another will.

(2) A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

(a) The terms of the instrument containing the residuary clause do not manifest a contrary intent;

(b) The power is a general power exercisable in favor of the powerholder's estate;

(c) There is no gift-in-default clause or the clause is ineffective; and

(d) The powerholder did not release the power.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 776, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section addresses a question arising under Section 301(1)(b)(I)—namely, whether the powerholder's intent to exercise a power of appointment is manifested by a garden- variety residuary clause such as "All the residue of my estate, I devise to ..." or "All of my estate, I devise to ...." (The section also applies to a comparable provision in the powerholder's revocable trust, such as a provision providing for the distribution of the trust corpus.) This section does not address the effect of a residuary clause that contains a blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and specific-exercise clauses, see the Comment to Section 301.

The rule of this section is that *in most circumstances* a garden-variety residuary clause does *not* manifest an intent to exercise a power of appointment.

Such a clause manifests an intent to exercise a power of appointment only in the rare circumstance when (1) the terms of the instrument containing the residuary clause do not manifest a contrary intent, (2) the power in question is a general power exercisable in favor of the powerholder's estate, (3) there is no gift-in-default clause or it is ineffective, and (4) the powerholder did not release the power.

In a well-planned estate, a power of appointment, whether general or nongeneral,

is accompanied by a gift in default. In a less carefully planned estate, on the other hand, there may be no gift-in-default clause. Or, if there is such a clause, the clause may be wholly or partly ineffective. To the extent the donor did not provide for takers in default or the gift-in-default clause is ineffective, it is more efficient to attribute to the powerholder the intent to exercise a general power in favor of the powerholder's residuary devisees. The principal benefit of attributing to the powerholder the intent to exercise a general power is that it allows the property to pass under the powerholder's will instead of as part of the donor's estate. Because the donor's death would normally have occurred before the powerholder died, some of the donor's successors might themselves have predeceased the powerholder. It is more efficient to avoid tracing the interest through multiple estates to determine who are the present successors. Moreover, to the extent the donor did not provide for takers in default, it is also more in accord with the donor's probable intent for the powerholder's residuary clause to be treated as exercising the power.

A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons. The clause might cover only part of the appointive property. The clause might be invalid because it violates a rule against perpetuities or some other rule, or it might be ineffective because it conditioned the interest of the takers in default on an uncertain event that did not happen, the most common of which is an unsatisfied condition of survival.

Under no circumstance does a residuary clause manifest an intent to exercise a *non*general power. A residuary clause disposes of the powerholder's own property, and a nongeneral power is not an ownership-equivalent power. Similarly, a residuary clause does not manifest an intent to exercise a general power which is general only because it is exercisable in favor of the creditors of the powerholder or the creditors of the powerholder's estate.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying Commentary.

15-2.5-303. Intent to exercise - after-acquired power.

(1) Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

(a) Except as otherwise provided in paragraph (b) of this subsection (1), a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and

(b) If the powerholder is also the donor of the power, the clause does not extend to the power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 776, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Nothing in the law prevents a powerholder from exercising an after-acquired power—in other words, from exercising a power in an instrument executed before acquiring the power. The only question is one of construction: whether the powerholder *intended* by the earlier instrument to exercise the after-acquired power. (The term "after-acquired power" in this section refers only to an after-acquired power acquired before the powerholder's death. A power of appointment cannot be conferred on a deceased powerholder. See Section 201.)

If the instrument of exercise specifically identifies the power to be exercised, then the question of construction is readily answered: the specific-exercise clause expresses an intent to exercise the power, whether the power is after-acquired or not. However, if the instrument of exercise uses only a *blanket*-exercise clause, the question of whether the powerholder intended to exercise an after-acquired power is often harder to answer. The presumptions in this section provide default rules of construction on the powerholder's likely intent.

Subsection (1)(a) states the general rule of this section. Unless the terms of the instrument indicate that the powerholder had a different intent, a blanket-exercise clause extends to a power of appointment acquired after the powerholder executed the instrument containing the blanket-exercise clause. General references to then-present circumstances, such as "all the powers I have" or similar expressions, are not a sufficient indication of an intent to exclude an after-acquired power. In contrast, more precise language, such as "all powers I have at the date of execution of this will," does indicate an intent to exclude an after-acquired power.

It is important to remember that even if the terms of the instrument manifest an intent to exercise an after-acquired power, the intent may be ineffective, for example if the terms of the *donor's* instrument creating the power manifest an intent to preclude such an exercise. In the absence of an indication to the contrary, however, it is inferred that the time of the execution of the powerholder's exercising instrument is immaterial to the donor. Even if the donor declares that the property shall pass to such persons as the powerholder "shall" or "may" appoint, these terms do not suffice to indicate an intent to exclude exercise by an instrument previously executed, because these words may be construed to refer to the time when the exercising document becomes effective.

Subsection (1)(b) states an exception to the general rule of subsection (1)(a). If the

powerholder is also the donor, a blanket-exercise clause in a preexisting instrument is rebuttably presumed *not* to manifest an intent to exercise a power later reserved in another donative transfer, unless the donor/powerholder did not provide for a taker in default of appointment or the gift-in-default clause is ineffective.

The black-letter of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying Commentary.

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.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 777, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section adopts a substantial-compliance rule for donor-imposed formal requirements. This section only applies to formal requirements imposed *by the donor*. It does not apply to formal requirements imposed by law, such as the requirement that a will must be signed and attested. The section also does not apply to *substantive* requirements imposed by the donor, for example a requirement that the powerholder attain a certain age before the power is exercisable.

Whenever the donor imposes formal requirements with respect to the instrument of appointment that exceed the requirements imposed by law, the donor's purpose in imposing the additional requirements is relevant to whether the powerholder's attempted exercise satisfies the rule of this section. To the extent the powerholder's failure to comply with the additional requirements will not impair the accomplishment of a material purpose of the donor, the powerholder's attempted appointment in a manner that substantially complies with a donor-imposed requirement does not fail for lack of perfect compliance with that requirement.

For example, a donor's formal requirement that the power of appointment is exercisable "by will" may be satisfied by the powerholder's attempted exercise in a nontestamentary instrument that is functionally similar to a will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. See Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b ("Because a revocable trust operates in substance as a will, a power of appointment exercisable "by will" can be exercised in a revocable-trust document, as long as the revocable trust remained revocable at the [powerholder]'s death.").

A formal requirement commonly imposed by the donor is that, in order to be effective, the powerholder's attempted exercise must make specific reference to the power. Specific-reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a general power. The federal estate tax law then provided that the value of property subject to a general power was included in the powerholder's gross estate if the general power was exercised. The idea of requiring specific reference was designed to thwart unintended exercise and, hence, estate taxation.

The federal estate tax law has changed. For a general power created after October 21, 1942, estate tax consequences do not depend on whether the power is exercised.

Nevertheless, donors continue to impose specific-reference requirements. Because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power, it seems reasonable to presume that that this is still the donor's purpose in doing so. Consequently, a specific-reference requirement still overrides any applicable state law that presumes that an ordinary residuary clause was intended to exercise a general power. Put differently: An ordinary residuary clause may manifest the powerholder's *intent to exercise* (under Section 301(1)(b)(I)) but does not satisfy the *requirements of exercise* if the donor imposed a specific-reference requirement (this section and Section 301(1)(b)(II)).

A more difficult question is whether a *blanket-exercise clause* satisfies a specific-reference requirement. If it could be shown that the powerholder had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise of the power but instead that the donor had a material purpose in insisting on the specific-reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the powerholder's attempted appointment to insert the required specific reference should be explored.

This rule of this section is consistent with, but an elaboration of, Uniform Probate Code § 2-704: "If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intent, in requiring that the [powerholder] exercise the power by making

reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power."

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying Commentary.

15-2.5-305. Permissible appointment.

(1) A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

(2) A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

(3) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

(a) Make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;

(b) Create a general or nongeneral power in a permissible appointee; or

(c) Create a nongeneral power in an impermissible appointee to appoint to one or more of the permissible appointees of the original nongeneral power.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 777, § 1, effective July 1, 2015.

OFFICIAL COMMENT

When a donor creates a general power under which an appointment can be made outright to the powerholder or the powerholder's estate, the necessary implication is that the powerholder may accomplish by an appointment to others whatever the powerholder could accomplish by first appointing to himself and then disposing of the property, including a disposition in trust or in the creation of a further power of appointment.

A general power to appoint only to the powerholder (even though it says "and to no one else") does not prevent the powerholder from exercising the power in favor of others. There is no reason to require the powerholder to transform the appointive

assets into owned property and then, in a second step, to dispose of the owned property. Likewise, a general power to appoint only to the powerholder's estate (even though it says "and to no one else") does not prevent an exercise of the power by will in favor of others. There is no reason to require the powerholder to transform the appointive assets into estate property and then, in a second step, to dispose of the estate property by will.

Similarly, a general power to appoint to the powerholder may purport to allow only one exercise of the power, but such a restriction is ineffective and does not prevent multiple partial exercises of the power. To take another example, a general power to appoint to the powerholder or to the powerholder's estate may purport to restrict appointment to outright interests not in trust, but such a restriction is ineffective and does not prevent an appointment in trust.

An additional example will drive home the point. A general power to appoint to the powerholder or to the powerholder's estate may purport to forbid the powerholder from imposing conditions on the enjoyment of the property by the appointee. Such a restriction is ineffective and does not prevent an appointment subject to such conditions.

As stated in subsection (2), however, a general power to appoint only to the powerholder's creditors or the creditors of the powerholder's estate permits an appointment only to those creditors.

Except to the extent the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the same breadth of discretion in appointment to permissible appointees that the powerholder has in the disposition of the powerholder's owned property to permissible appointees of the power.

Thus, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by an appointment in trust. In order to manifest a contrary intent, the terms of the instrument creating the power must specifically prohibit an appointment in trust. So, for example, a power to appoint "to" the powerholder's descendants includes the authority to appoint in trust for the benefit of one or more of those descendants.

Similarly, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by creating a general power in a permissible appointee. The rationale for this rule is a straightforward application of the maxim that the greater includes the lesser. A powerholder of a nongeneral power may appoint outright to a permissible appointee, so the powerholder may instead create in a permissible appointee a general power.

And finally, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power may exercise the power by creating a new nongeneral power in *any* person, whether or not a permissible appointee, to appoint to some or all of the

permissible appointees of the original nongeneral power. In order to manifest a contrary intent, the terms of the instrument creating the power must prohibit the creation of such powers. Language merely conferring the power of appointment on the powerholder does not suffice.

The rules of subsection (3) are default rules. The terms of the instrument creating the power may manifest a contrary intent. For example, a donor may choose to loosen the restriction in subsection (3)(c) by authorizing the powerholder of a nongeneral power to create a new nongeneral power with broader permissible appointees. Consider the following examples.

Example 1. D creates a nongeneral power in D's child, P1, to appoint among D's descendants. Under the default rule of subsection (3)(c), P1 may exercise this power to create a new nongeneral power in D's child, P2. Unless the terms of D's instrument manifest a contrary intent, however, the permissible appointees of P2's nongeneral power cannot be broader than the permissible appointees of P1's nongeneral power.

Example 2. Same facts as in Example 1, except that D's instrument states: "The nongeneral power of appointment granted to P1 may be exercised to create in one or more of my descendants a new nongeneral power. This new nongeneral power may have permissible appointees as broad as P1 sees fit." On these facts, the default rule of subsection (3)(c) is overridden by the terms of D's instrument. The permissible appointees of P2's nongeneral power may be broader than the permissible appointees of P1's nongeneral power.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and the accompanying Commentary.

15-2.5-306. Appointment to deceased appointee or permissible appointee's descendant.

(1) An appointment to a deceased appointee is ineffective.

(2) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or create a new power of appointment in, a descendant of a deceased permissible appointee, which deceased appointee is a descendant of one or more of the grandparents of the donor, regardless of whether the descendant is described by the donor as a permissible appointee.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 777, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Just as property cannot be transferred to an individual who is deceased (see Restatement Third of Property: Wills and Other Donative Transfers § 1.2), a power of appointment cannot be effectively exercised in favor of a deceased appointee.

However, an antilapse statute may apply to trigger the substitution of the deceased appointee's descendants (or other substitute takers), unless the terms of the instrument creating or exercising the power of appointment manifest a contrary intent. Antilapse statutes typically provide, as a default rule of construction, that devises to certain relatives who predecease the testator pass instead to specified substitute takers, usually the descendants of the predeceased devisee who survive the testator. See generally Restatement Third of Property: Wills and Other Donative Transfers § 5.5.

When an antilapse statute does not expressly address whether it applies to the exercise of a power of appointment, a court should construe it to apply to such an exercise. See Restatement Third of Property: Wills and Other Donative Transfers § 5.5, Comment *l*. The rationale underlying antilapse statutes, that of presumptively attributing to the testator the intent to substitute the descendants of a predeceased devisee, applies equally to the exercise of a power of appointment.

The substitute takers provided by an antilapse statute (typically the descendants of the deceased appointee) are treated as permissible appointees even if the description of permissible appointees provided by the donor does not expressly cover them. This rule corresponds to the rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of deceased class members, even if the class member's descendants are not members of the class. See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment e.

The donor of a power, general or nongeneral, can prohibit the application of an antilapse statute to the powerholder's appointment and, in the case of a nongeneral power, can prohibit an appointment to the descendants of a deceased permissible appointee, but must manifest an intent to do so in the terms of the instrument creating the power of appointment. A traditional gift-in-default clause does not manifest a contrary intent in either case, unless the clause provides that it is to take effect instead of the descendants of a deceased permissible appointee.

Subsection (2) provides that the descendants of a deceased permissible appointee are treated as permissible appointees of a nongeneral power of appointment. This rule is a logical extension of the application of antilapse statutes to appointments. If an antilapse statute can substitute the descendants of a deceased appointee, the powerholder should be allowed to appoint in favor of, or to create a new power of appointment in, a descendant (meaning, one or more descendants; the Uniform Law Commission uses the singular to include the plural) of a deceased permissible appointee.

Who qualifies as a "descendant" is defined by state law. See, for example,

Uniform Probate Code §§ 1-201(9), 2-103, 2-115 to 2-122, 2-705.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying Commentary.

15-2.5-307. Impermissible appointment.

(1) Except as otherwise provided in section 15-2.5-306, an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

(2) An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 778, § 1, effective July 1, 2015.

OFFICIAL COMMENT

The rules of this section apply to the extent the powerholder attempts to confer a beneficial interest in the appointive property on an impermissible appointee. For example, a nongeneral power may not be exercised in favor of the powerholder. And a nongeneral power in favor of the donor's descendants may not be exercised in favor of the donor's spouse (assuming the usual scenario wherein the spouse is not also a descendant).

To the extent an appointment is ineffective, it is invalid. But it bears emphasizing that an appointment that is partially valid remains partially valid. Partial invalidity does not doom the entire appointment.

The rules of this section do not apply to an appointment of a *non*beneficial interest—for example, the appointment of legal title to a trustee if the beneficial interest is held by permissible appointees.

Nor do the rules of this section prohibit beneficial appointment to an impermissible appointee if the intent to benefit the impermissible appointee is not the powerholder's but rather is the intent of a permissible appointee in whose favor the powerholder has decided to exercise the power. In other words, if the powerholder makes a decision to exercise the power in favor of a permissible appointee, the permissible appointee may request the powerholder to transfer the appointive assets directly to an impermissible appointee. The appointment directly to the impermissible appointee in this situation is effective, being treated for all purposes as an appointment first to the permissible appointee followed

by a transfer by the permissible appointee to the impermissible appointee.

The donor of a power of appointment sets the range of permissible appointees by designating the permissible appointees of the power. The rules of this section are concerned with attempts by the powerholder to exceed that authority. Such an attempt is called a fraud on the power and is ineffective. The term "fraud on the power" is a well- accepted term of art. See Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

Among the most common devices employed to commit a fraud on the power are: an appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an appointment subject to a charge in favor of an impermissible appointee; an appointment upon a trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit to an impermissible appointee; and an appointment primarily for the benefit of the permissible appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is impermissible and ineffective.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the accompanying Commentary.

15-2.5-308. Selective allocation doctrine.

If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 778, § 1, effective July 1, 2015.

OFFICIAL COMMENT

The rule of this section is commonly known as the doctrine of selective allocation. This doctrine applies if the powerholder uses the same instrument to exercise a power of appointment and to dispose of property that the powerholder owns. For purposes of this section, the powerholder's will, any codicils to the powerholder's will, and any revocable trust created by the powerholder that did not become irrevocable before the powerholder's death are treated as the same instrument.

The doctrine of selective allocation provides that the owned property and the appointive property shall be allocated in the

permissible manner that best carries out the powerholder's intent.

One situation that often calls for selective allocation is when the powerholder disposes of property to permissible and impermissible appointees. By allocating owned assets to the dispositions favoring impermissible appointees and allocating appointive assets to permissible appointees, the appointment is rendered effective. Consider the following example, drawn from the Restatement Third of Property: Wills and Other Donative Transfers.

Example. D died, leaving a will that devised property worth $100,000 to T in trust. T is directed to pay the net income to S (Donor's son) for life and then "to pay the principal to S's descendants as S shall by will appoint, and in default of appointment to pay the principal by representation to S's descendants then living, and if no descendant of S is then living, to pay the principal to X-Charity." S dies. The property over which S has the nongeneral power is worth $200,000 at his death. S's owned property at his death is worth $800,000. S's will provides as follows: "All property I own or over which I have any power of appointment shall be used first to pay my debts, expenses of administration, and death taxes, and the balance I give outright to my daughters." S's debts plus the death taxes payable on S's death plus the expenses of administering S's estate total $200,000. If S's owned property is allocated ratably to the payment of such $200,000, one-fifth of the $200,000 would be an ineffective appointment, because it would be to impermissible appointees. That one-fifth of $200,000 ($40,000 of the appointive assets) would pass in default of appointment, and the owned property would have to pick up the full payment of the debts, taxes, and expenses of administration. A selective allocation in the first instance of owned assets to the payment of debts, taxes, and expenses of administration leaves the appointive assets appointed only to permissible appointees of the nongeneral power and nothing passes in default of appointment.

The result of applying selective allocation is always one that the powerholder could have provided for in specific language, and one that the powerholder most probably would have provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By the rule of selective allocation, courts undertake to prevent the dispositive plan from being frustrated by the ineptness of the powerholder or the powerholder's lawyer. For an early case adopting selective allocation, see Roe v. Tranmer, 2 Wils. 75, 95 Eng. Rep. 694 (C.P. 1757).

For further discussion of selective allocation, and illustrations of its application to various fact-patterns, see Restatement Third of Property: Wills and Other Donative Transfers § 19.19 and the accompanying Commentary. This rule of this Section is consistent with, and this Comment draws on, that Restatement.

On the distinction between selective allocation (a rule of construction based on the assumed intent of the powerholder) and the process sometimes known as "marshaling" (an outgrowth of general

equitable principles), see the Restatement Second of Property: Donative Transfers, especially the Introductory Note to Chapter 22.

15-2.5-309. Capture doctrine - disposition of ineffectively appointed property under general power.

(1) To the extent a powerholder of a general power of appointment, other than a power to withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

(a) The gift-in-default clause controls the disposition of the ineffectively appointed property; or

(b) If there is no gift-in-default clause, or to the extent the clause is ineffective, the ineffectively appointed property:

(I) Passes to:

(A) The powerholder if the powerholder is a permissible appointee and living; or

(B) If the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(II) If there is no taker under subparagraph (I) of this paragraph (b), passes under a reversionary interest to the donor or to the donor's transferee or successor in interest.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 778, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section applies when the powerholder of a general power makes an ineffective appointment. This section does not apply when the powerholder of a general power fails to exercise or releases the power. (On such fact-patterns, see instead Section 310.)

Nor does this section apply to an ineffective exercise of a power of revocation, amendment, or withdrawal—in each case, a power pertaining to a trust. To the extent a powerholder of one of these types of powers makes an ineffective appointment, the ineffectively appointed property remains in the trust.

The central rule of this section—in subsection (1)(a) and subsection (1)(b)(I)—is a modern variation of the so-called "capture doctrine" adopted by a small body of case law and followed in Restatement Second of Property: Donative Transfers § 23.2. Under that doctrine, the ineffectively

appointed property passed to the powerholder or the powerholder's estate, but only if the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" and not merely for the limited purpose of giving effect to the attempted appointment. If the ineffective appointment manifested such an intent, the ineffective appointment was treated as an implied alternative appointment to the powerholder or the powerholder's estate, and thus took effect even if the donor provided for takers in default and one or more of the takers in default were otherwise entitled to take.

The capture doctrine was developed at a time when the donor's gift-in-default clause was considered an afterthought, inserted just in case the powerholder failed to exercise the power. Today, the donor's gift-in-default clause is typically carefully drafted and intended to take effect, unless circumstances change that would cause the powerholder to exercise the power. Consequently, if the powerholder exercises the power effectively, the exercise divests the interest of the takers in default. But if the powerholder makes an ineffective appointment, the powerholder's intent regarding the disposition of the ineffectively appointed property is problematic.

Whether or not the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" often depended on nothing more than whether the ineffective appointment was contained in a blending clause. The use of a blending clause rather than a direct-exercise clause, however, is typically the product of the drafting lawyer's forms rather than a deliberate choice of the powerholder.

This section alters the traditional capture doctrine in two ways: (1) the gift-in-default clause takes precedence over any implied alternative appointment to the powerholder or the powerholder's estate deduced from the use of a blending clause or otherwise; and (2) the ineffectively appointed property passes to the powerholder or the powerholder's estate only if there is no gift-in-default clause or to the extent the gift-in-default clause is ineffective. Nothing turns on whether the powerholder used a blending clause or somehow otherwise manifested an intent to assume control of the appointive property "for all purposes."

Subsection (1)(b)(II) addresses the special case of a power of appointment that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation-skipping transfer tax planning. However, this type of general power should not trigger the capture doctrine, because the powerholder and the powerholder's estate are impermissible appointees. Instead, ineffectively appointed property should pass under the gift-in-default clause (subsection (1)(a)) or, if there is no gift-in-default clause or it is ineffective, under a reversionary interest to the donor or the donor's transferee or successor in interest (subsection (1)(b)(II)).

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and

Other Donative Transfers § 19.21 and the accompanying Commentary.

15-2.5-310. Disposition of unappointed property under released or unexercised general power.

(1) To the extent a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke, or amend a trust:

(a) The gift-in-default clause controls the disposition of the unappointed property; or

(b) If there is no gift-in-default clause or to the extent the clause is ineffective:

(I) Except as otherwise provided in subparagraph (II) of this paragraph (b), the unappointed property passes to:

(A) The powerholder if the powerholder is a permissible appointee and living; or

(B) If the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(II) To the extent the powerholder released the power, or if there is no taker under subparagraph (I) of this paragraph (b), the unappointed property passes under a reversionary interest to the donor or to the donor's transferee or successor in interest.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 778, § 1, effective July 1, 2015.

OFFICIAL COMMENT

The rules of this section apply to unappointed property under a general power of appointment. The rules do *not* apply to unappointed property under a power of revocation, amendment, or withdrawal powers pertaining to a trust. If the powerholder releases or dies without exercising a power of revocation or amendment, the power to revoke expires and, unless someone else continues to have a power of revocation or amendment, the trust becomes irrevocable and unamendable. If the powerholder releases or dies without exercising a power to withdraw principal of a trust, the principal that the powerholder could have withdrawn, but did not, remains part of the trust.

The rationale for the rules of this section runs as follows. The gift-in-default clause controls the disposition of unappointed property to the extent the clause is effective. To the extent the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed property depends on

whether the powerholder merely failed to exercise the power or whether the powerholder released the power. If the powerholder merely *failed to exercise* the power, the unappointed property passes to the powerholder or to the powerholder's estate (if these are permissible appointees). The rationale is the same as when the powerholder makes an ineffective appointment. If, however, the powerholder *released* the power, the powerholder has affirmatively chosen to reject the opportunity to gain ownership of the property, hence the unappointed property passes under a reversionary interest to the donor or to the donor's transferee or successor in interest.

These rules are illustrated by the following examples.

Example 1. D transfers property to T in trust, directing T to pay the income to S (D's son) for life, with a general testamentary power in S to appoint the principal of the trust, and in default of appointment the principal is to be distributed "to S's descendants who survive S, by representation, and if none, to X-Charity." S dies leaving a will that does not exercise the power. The principal passes under the gift-in- default clause to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that D's gift-in-default clause covered only half of the principal, and S died intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to S's estate for distribution to S's intestate heirs.

Example 3. Same facts as Example 2, except that S released the power before dying intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to D or to D's transferee or successor in interest.

In addition to governing a released general power, subsection (1)(b)(II) also applies to the special case of an unexercised general power that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation- skipping transfer tax planning. In such a case, unappointed property passes under the gift-in-default clause (subsection (1)(a)) or, if there is no gift-in-default clause or to the extent it is ineffective, under a reversionary interest to the donor or the donor's transferee or successor in interest (subsection (1)(b)(II)).

The rules of this section are essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying Commentary.

15-2.5-311. Disposition of unappointed property under released or unexercised nongeneral power.

(1) To the extent a powerholder releases, ineffectively exercises, or fails to exercise a nongeneral power of appointment:

(a) The gift-in-default clause controls the disposition of the unappointed property; or

(b) If there is no gift-in-default clause, or to the extent the clause is ineffective, the unappointed property:

(I) Passes to the permissible appointees if:

(A) The permissible appointees are defined and limited; and

(B) The terms of the instrument creating the power do not manifest a contrary intent; or

(II) If there is no taker under subparagraph (I) of this paragraph (b), passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 779, § 1, effective July 1, 2015.

OFFICIAL COMMENT

To the extent the powerholder of a nongeneral power releases, ineffectively exercises, or fails to exercise the power, thus causing the power to lapse, the gift-in-default clause controls the disposition of the unappointed property to the extent the gift-in-default clause is effective.

To the extent the gift-in-default clause is nonexistent or ineffective, the unappointed property passes to the permissible appointees of the power—including those who are substituted for permissible appointees under an antilapse statute (see Section 306)—if the permissible appointees are "defined and limited" (on the meaning of this term of art, see the Comment to Section 205) and the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the powerholder elects to appoint it to them. This rule of construction is based on the assumption that the donor intends the permissible appointees of the power to have the benefit of the property. The donor focused on transmitting the appointive property to the permissible appointees through an appointment, but if the powerholder fails to carry out this particular method of transfer, the donor's underlying intent to pass the appointive property to the defined and limited class of permissible appointees should be carried out. Subsection (1)(b)(I) effectuates the donor's underlying intent by implying a gift in default of appointment to the defined and limited class of permissible appointees.

If the defined and limited class of permissible appointees is a multigenerational class, such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they take by representation. See Restatement Third of Property: Wills and Other Donative Transfers § 14.3, Comment

b. If the defined and limited class is a single-generation class, the default rule of construction is that the eligible class members take equally. See Restatement Third of Property: Wills and Other Donative Transfers § 14.2.

No implied gift in default of appointment to the permissible appointees arises if the permissible appointees are identified in such broad and inclusive terms that they are not defined and limited. In such an event, the donor has no underlying intent to pass the appointive property to such permissible appointees. Similarly, if the donor manifests an intent that the defined and limited class of permissible appointees is to receive the appointive property only by appointment, the donor's manifestation of intent eliminates any implied gift in default to the permissible appointees. Subsection (1)(b)(II) responds to these possibilities by providing for a reversionary interest to the donor or the donor's transferee or successor in interest.

The rules are illustrated by the following examples.

Example 1. D died, leaving a will devising property to T in trust. T is directed to pay the income to S (D's son) for life, and then to pay the principal "to such of S's descendants who survive S as S may appoint by will." D's will contains no gift-in- default clause. S dies without exercising the nongeneral power. The permissible appointees of the power constitute a defined and limited class. Accordingly, the principal of the trust passes at S's death to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that the permissible appointees of S's power of appointment are "such one or more persons, other than S, S's estate, S's creditors, or creditors of S's estate." The permissible appointees do not constitute a defined and limited class. Accordingly, the principal of the trust passes, at S's death, under a reversionary interest to D or D's transferee or successor in interest.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying Commentary.

15-2.5-312. Disposition of unappointed property if partial appointment to taker in default.

Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 779, § 1, effective July 1, 2015.

OFFICIAL COMMENT

If a powerholder makes a valid partial appointment to a taker in default, leaving some property unappointed, there is a question about whether that taker in default may also fully share in the unappointed property. In the first instance, the intent of the *donor* controls. In the absence of any indication of the donor's intent, it is assumed that the donor intends that the taker can take in both capacities. This rule presupposes that the donor contemplated that the taker in default who is an appointee could receive more of the appointive assets than a taker in default who is not an appointee. The donor can defeat this rule by manifesting a contrary intent in the instrument creating the power of appointment, thereby restricting the powerholder's freedom to benefit an appointee who is also a taker in default in both capacities. If the donor has not so manifested a contrary intent, the *powerholder* is free to exercise the power in favor of a taker in default who is a permissible appointee. Unless the powerholder manifests a contrary intent in the terms of the instrument exercising the power, it is assumed that the powerholder does not intend to affect in any way the disposition of any unappointed property.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.24 and the accompanying Commentary.

15-2.5-313. Appointment to taker in default.

If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes the property under the clause.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 779, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section articulates the rule that, to the extent an appointee would have taken appointed property as a taker in default, the appointee takes under the gift-in-default clause rather than under the appointment.

Takers in default have future interests that may be defeated by an exercise of the power of appointment. To whatever extent the powerholder purports to appoint an interest already held in default of appointment, the

powerholder does not exercise the power to alter the donor's disposition but merely declares an intent not to alter it. To the extent, however, that the appointed property *is different from* (e.g., is a lesser estate) or *exceeds the total of* the property the appointee would receive as a taker in default, the property passes under the appointment.

Usually it makes no difference whether the appointee takes as appointee or as taker in default. The principal difference arises in jurisdictions that follow the rule that the estate creditors of the powerholder of a general testamentary power that was conferred on the powerholder by another have no claim on the appointive property unless the powerholder has exercised the power. Although this act does not follow that rule regarding creditors' rights (see Section 502), some jurisdictions do.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.25 and the accompanying Commentary.

15-2.5-314. Powerholder's authority to revoke or amend exercise.

(1) A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

(a) The powerholder reserves a power of revocation or amendment in the instrument exercising the power of appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

(b) The terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 779, § 1, effective July 1, 2015.

OFFICIAL COMMENT

This section recognizes that a powerholder lacks the authority to revoke or amend an exercise of the power of appointment, except to the extent (1) the powerholder reserved a power of revocation or amendment in the instrument exercising the power of appointment and the terms of the instrument creating the power of appointment do not effectively prohibit the reservation, or (2) the donor provided that the exercise is revocable or amendable.

A powerholder who exercises a power of appointment is like any other transferor of property in regard to authority to revoke or amend the transfer. Hence, unless the

powerholder (or the donor) in some appropriate manner manifests an intent that an appointment is revocable or amendable, the appointment is irrevocable.

The ability of an agent or guardian to revoke or amend the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.7 and the accompanying Commentary.

PART 4

DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT

15-2.5-401. Disclaimer.

(1) Subject to the "Uniform Disclaimer of Property Interests Act", part 12 of article 11 of this title:

(a) A powerholder may disclaim all or part of a power of appointment; and

(b) A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 780, § 1, effective July 1, 2015.

OFFICIAL COMMENT

A prospective powerholder cannot be compelled to accept the power of appointment, just as the prospective donee of a gift cannot be compelled to accept the gift.

A disclaimer is to be contrasted with a release. A release occurs after the powerholder accepts the power. A disclaimer prevents acquisition of the power, and consequently a powerholder who has accepted a power can no longer disclaim.

Disclaimer statutes frequently specify the time within which a disclaimer must be made. The Uniform Disclaimer of Property

Interests Act (1999) (UDPIA) does not specify a time limit, but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).

Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12 provides that the statutory methods must be followed. In the absence of such a requirement, statutory formalities for making a disclaimer of a power are not construed as exclusive, and any manifestation of the powerholder's intent not to accept the power may also suffice.

A partial disclaimer of a power of appointment leaves the powerholder possessed of the part of the power not disclaimed.

Just as an individual who would otherwise be a powerholder can avoid acquiring the power by disclaiming it, a person who otherwise would be a permissible appointee, appointee, or taker in default of appointment can avoid acquiring that status by disclaiming it.

The ability of an agent or guardian to disclaim on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.4 and the accompanying Commentary.

15-2.5-402. Authority to release.

A powerholder may release a power of appointment, in whole or in part, except to the extent the terms of the instrument creating the power prevent the release.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 780, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Whether a power of appointment is general or nongeneral, presently exercisable or testamentary, the powerholder has the authority to release the power in whole or in part, in the absence of an effective restriction on release imposed by the donor. A partial release is a release that narrows the freedom of choice otherwise available to the powerholder but does not eliminate the power. A partial release may relate either to the manner of exercising the power or to the persons in whose favor the power may be exercised.

If the powerholder did not create the power, so that the powerholder and donor are different individuals, the donor can effectively impose a restraint on release, but

the donor must manifest an intent in the terms of the creating instrument to impose such a restraint.

If the powerholder created the power, so that the powerholder is also the donor, the donor/powerholder cannot effectively impose a restraint on release. A self-imposed restraint on release resembles a self-imposed restraint on alienation, which is ineffective. See, for example, Restatement Third of Trusts § 58.

If the exercise of a power of appointment requires the action of two or more individuals, each powerholder has a power of appointment. If one but not the other joint powerholder releases the power, the power survives in the hands of the nonreleasing powerholder, unless the continuation of the power is inconsistent with the donor's purpose in creating the joint power. See Restatement Third of Property: Wills and Other Donative Transfers § 20.1, Comment f.

The ability of an agent or guardian to release a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

15-2.5-403. Method of release.

(1) A powerholder of a releasable power of appointment may release the power in whole or in part:

(a) By substantial compliance with a method provided in the terms of the instrument creating the power; or

(b) If the terms of the instrument creating the power do not provide a method, or the method provided in the terms of the instrument is not expressly made exclusive, by:

(I) Delivering a writing declaring the extent to which the power is released to a person who could be adversely affected by an exercise of the power;

(II) Joining with some or all of the takers in default in making an otherwise-effective transfer of an interest in the property that is subject to the power, in which case the power is released to the extent that a subsequent exercise of the power would defeat the interest transferred;

(III) Contracting with a person who could be adversely affected by an exercise of the power not to exercise the power, in which case the power is released to the extent that a subsequent exercise of the power would violate the terms of the contract; or

(IV) Communicating in any other appropriate manner an intent to release the power, in which case the power is released to the extent that a subsequent exercise of the power would be contrary to manifested intent.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 780, § 1, effective July 1, 2015.

OFFICIAL COMMENT

A powerholder may release the power of appointment by substantial compliance with the method specified in the terms of the instrument creating the power or any other method manifesting clear and convincing evidence of the powerholder's intent. Only if the method specified in the terms of the creating instrument is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the creating instrument is otherwise substantial.

Examples of methods manifesting clear and convincing evidence of the powerholder's intent to release include: (1) delivering (by the same method of delivery that would make an instrument of transfer effective, see Restatement Third of Property: Wills and Other Donative Transfers § 20.3, Comment b) an instrument declaring the extent to which the power is released to an individual who could be adversely affected by an exercise of the power; (2) joining with some or all of the takers in default in making an otherwise effective transfer of an interest in the appointive property, in which case the power is released to the extent a subsequent exercise of the power would defeat the interest transferred; (3) contracting with an individual who could be adversely affected by an exercise of the power not to exercise the power, in which case the power is released to the extent a subsequent exercise of the power would violate the terms of the contract; and (4) communicating in a record an intent to release the power, in which case the power is released to the extent a subsequent exercise of the power would be contrary to manifested intent.

The black-letter of this section is based on Uniform Trust Code § 602(c). The rule of this section is fundamentally consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

15-2.5-404. Revocation or amendment of release.

(1) A powerholder may revoke or amend a release of a power of appointment only to the extent that:

(a) The instrument of release is revocable by the powerholder; or

(b) The powerholder reserves a power of revocation or amendment in the instrument of release.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 781, § 1, effective July 1, 2015.

OFFICIAL COMMENT

A release is typically irrevocable. If a powerholder wishes to retain the power to revoke or amend the release, the powerholder should so indicate in the instrument executing the release.

The ability of an agent or guardian to revoke or amend the release of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

15-2.5-405. Power to contract - presently exercisable power of appointment.

(1) A powerholder of a presently exercisable power of appointment may contract:

(a) Not to exercise the power if the contract, when made, does not confer a benefit on a person other than a taker in default or a permissible appointee; or

(b) To exercise the power if the contract, when made, does not confer a benefit on an impermissible appointee.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 781, § 1, effective July 1, 2015.

OFFICIAL COMMENT

A powerholder of a presently exercisable power may contract to make, or not to make, an appointment if the contract does not confer a benefit on an impermissible appointee. The rationale is that the power is presently exercisable, so the powerholder can presently enter into a contract concerning the appointment.

The contract may not confer a benefit on an impermissible appointee. Recall that a general power presently exercisable in favor of the powerholder or the powerholder's estate has no impermissible appointees. See Section 305(1). In contrast, a presently exercisable nongeneral power, or a general power presently exercisable only in favor of one or more of the creditors of the powerholder or the powerholder's estate, does have impermissible appointees. See Section 305(2)-(3).

A contract *not* to appoint assures that the appointive property will pass to the taker in default. A contract to appoint to a taker in default, if enforceable, has the same effect as a contract not to appoint.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.1 and the accompanying Commentary.

15-2.5-406. Power to contract - power of appointment not presently exercisable.

(1) A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

(a) Is also the donor of the power; and

(b) Has reserved the power in the instrument creating the power.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 781, § 1, effective July 1, 2015.

OFFICIAL COMMENT

Except in the case of a power reserved by the donor in a revocable inter vivos trust, a contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is unenforceable, because the powerholder does not have the authority to make a current appointment. If the powerholder was also the donor of the power and created the power in a revocable inter vivos trust, however, a contract to

appoint is enforceable, because the donor-powerholder could have revoked the trust and recaptured ownership of the trust assets or could have amended the trust to change the power onto one that is presently exercisable.

In all other cases, the donor of a power not presently exercisable has manifested an intent that the selection of the appointees and the determination of the interests they are to receive are to be made in the light of the circumstances that exist on the date that the power becomes exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.2 and the accompanying Commentary.

PART 5

(Reserved)

PART 6

MISCELLANEOUS PROVISIONS

15-2.5-601. Uniformity of application and construction.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 781, § 1, effective July 1, 2015.

15-2.5-602. Relation to electronic signatures in global and national commerce act.

This article modifies, limits, or supersedes the federal "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).

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 781, § 1, effective July 1, 2015.

15-2.5-603. Application to existing relationships.

(1) Except as otherwise provided in this article, on July 1, 2015, or on the effective date of any amendment to this article:

(a) This article or any amendment to this article applies to a power of appointment created before, on, or after July 1, 2015, or any amendment to this article;

(b) This article or any amendment to this article applies to any proceedings in court then pending or thereafter commenced concerning a power of appointment, except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this article or any amendment to this article, in which case the particular provision of this article does not apply and the superseded law applies;

(c) A rule of construction or presumption provided in this article or any amendment to this article applies to an instrument executed before July 1, 2015, unless there is a clear indication of a contrary intent in the terms of the instrument;

(d) Except as otherwise provided in paragraphs (a) to (c) of this subsection (1), an action done before July 1, 2015, is not affected by this article or any amendment to this article; and

(e) No provision of this article or of any amendment to this article shall apply retroactively if the court determines that such application would cause the provision to be retrospective in its operation in violation of section 11 of article II of the state constitution.

(2) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced under law of this state other than this article or any amendment to this article before July 1, 2015, the law continues to apply to the right.

Source: L. 2014: Entire article added, (HB 14-1353), ch. 209, p. 782, § 1, effective July 1, 2015. **L. 2016:** IP(1) amended, (SB 16-189), ch. 210, p. 758, § 24, effective June 6.

OFFICIAL COMMENT

This act is intended to have the widest possible effect within constitutional limitations. Specifically, the act applies to all powers of appointment whenever created, to judicial proceedings concerning powers of appointment commenced on or after its

effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the act apply to preexisting instruments unless there is a clear indication of a contrary intent in the instruments's terms. By applying the act to preexisting instruments, the need to know two bodies of law will quickly lessen.

This legislation cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights that became irrevocable prior to the effective date. Also, rights already barred under former law are not revived by a possibly more liberal rule under this act. Nor, except as otherwise provided in paragraphs (a) through (c) of subsection (1), is an action done before the effective date of the act affected by the act's enactment.

For comparable Uniform Law provisions, see Uniform Trust Code § 1106 and Uniform Probate Code § 8-101.

COLORADO UNIFORM TRUST CODE

ARTICLE 5

Colorado Uniform Trust Code

PART 1
GENERAL PROVISIONS AND DEFINITIONS

15-5-101. Short title.

15-5-102. Scope.

15-5-103. Definitions.

15-5-104. Knowledge.

15-5-105. Default and mandatory rules.

15-5-106. Common law of trusts - principles of equity - other statutes.

15-5-107. Governing law.

15-5-108. Principal place of administration.

15-5-109. Methods and waiver of notice in matters other than judicial proceedings.

15-5-110. Others treated as qualified beneficiaries.

15-5-111. Nonjudicial settlement agreements.

15-5-112. Rules of construction.

15-5-113. Alternate dispute resolution.

15-5-114. Insurable interest of trustee - definition.

PART 2
JUDICIAL PROCEEDINGS

15-5-201. Role of court in administration of trust.

15-5-202. Jurisdiction over trustee and beneficiary.

15-5-203. Subject matter jurisdiction.

15-5-204. Venue.

15-5-205. Registration of trusts.

15-5-206. Registration procedures and content of statement.

15-5-207. Effect of failure to register.

15-5-208. Registration - qualification of a foreign trustee.

15-5-209. Release of trust registration statement.

15-5-210. Judicially approved settlements.

PART 3
REPRESENTATION

15-5-301. Representation - basic effect.

15-5-301.5. Scope of representative's authority and duty of certain representatives - definitions.

15-5-302. Representation by a holder of general testamentary power of appointment.

15-5-303. Representation by fiduciaries and parents.

15-5-304. Representation by person having substantially identical interest.

15-5-305. Appointment of representative.

PART 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

15-5-401. Methods of creating trust.

15-5-402. Requirements for creation.

15-5-403. Trusts created in other jurisdictions.

15-5-404. Trust purposes.

15-5-405. Charitable purposes - enforcement.

15-5-406. Creation of trust induced by fraud, duress, or undue influence.

15-5-407. Evidence of oral trust.

15-5-408. Trust for care of an animal.

15-5-409. Noncharitable trust without ascertainable beneficiary.

15-5-409.5. Additional provisions applicable to noncharitable trusts without ascertainable beneficiary and trusts for care of animal.

15-5-410. Modification or termination of trust - proceedings for approval or disapproval.

15-5-411. Modification or termination of noncharitable irrevocable trust by consent.

15-5-412. Modification or termination because of unanticipated circumstances or inability

to administer trust effectively.

15-5-413. Cy pres.

15-5-414. Modification or termination of uneconomic trust.

15-5-415. Reformation to correct mistakes.

15-5-416. Modification to achieve settlor's tax objectives.

15-5-417. Combination and division of trusts.

PART 5
CREDITOR'S CLAIMS - SPENDTHRIFT AND DISCRETIONARY TRUSTS

15-5-501. Rights of beneficiary's creditor or assignee.

15-5-502. Spendthrift provision.

15-5-503. Exceptions to spendthrift provision - definitions.

15-5-504. Discretionary trusts - effect of standard - definitions.

15-5-505. Creditor's claim against a settlor.

15-5-506. Overdue distribution - definition.

15-5-507. Personal obligations of trustee.

15-5-508. Application of part.

PART 6
REVOCABLE TRUSTS

15-5-601. (Reserved)

15-5-602. Revocation or amendment of revocable trust.

15-5-603. Settlor's powers.

15-5-604. Limitation on action contesting validity of revocable trust.

PART 7
OFFICE OF TRUSTEE

15-5-701. Accepting or declining trusteeship.

15-5-702. Trustee's bond.

15-5-703. Cotrustees.

15-5-704. Vacancy in trusteeship - appointment of successor.

15-5-705. Resignation of trustee.

15-5-706. Removal of trustee.

15-5-707. Delivery of property by former trustee.

15-5-708. Compensation of trustee.

15-5-709. Reimbursement of expenses.

PART 8
DUTIES AND POWERS OF TRUSTEE

15-5-801. Duty to administer trust.

15-5-802. Duty of loyalty.

15-5-803. Impartiality.

15-5-804. Prudent administration.

15-5-805. Costs of administration.

15-5-806. Trustee's skills.

15-5-807. Delegation by trustee.

15-5-808. Powers to direct. (Reserved)

15-5-809. Control and protection of trust property.

15-5-810. Record keeping and identification of trust property.

15-5-811. Enforcement and defense of claims.

15-5-812. Collecting trust property.

15-5-813. Duty to inform and report.

15-5-814. Discretionary powers - tax savings.

15-5-815. General powers of trustee.

15-5-816. Specific powers of trustee.

15-5-817. Distribution on termination.

15-5-818. Reimbursement for taxes - definitions.

PART 9
(Reserved)

PART 10
LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

15-5-1001. Remedies for breach of trust.

15-5-1002. Damages for breach of trust.

15-5-1003. Damages in absence of breach.

15-5-1004. Compensation and costs.

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

15-5-1006. Reliance on trust instrument.

15-5-1007. Event affecting administration or distribution.

15-5-1008. Exculpation of trustee.

15-5-1009. Beneficiary's consent, release, or ratification.

15-5-1010. Limitation on personal liability of trustee.

15-5-1011. Interest as a general partner.

15-5-1012. Protection of person dealing with trustee.

15-5-1013. Certification of trust.

PART 11
(Reserved)

PART 12
(Reserved)

PART 13
LIFE INSURANCE POLICY OWNED BY A TRUSTEE

15-5-1301. Life insurance policy owned by a trustee - definition.

PART 14
MISCELLANEOUS PROVISIONS

15-5-1401. Uniformity of application and construction.

15-5-1402. Electronic records and signatures.

15-5-1403. Severability clause.

15-5-1404. Application to existing relationships.

PART 1

GENERAL PROVISIONS AND DEFINITIONS

15-5-101. Short title.

This article 5 is known and may be cited as the "Colorado Uniform Trust Code" and is referred to in this article 5 as "this code" or "code".

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1144, § 1, effective January 1, 2019.

15-5-102. Scope.

This code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. This code does not apply to a business trust, a security arrangement, a trust created by a deposit arrangement in a financial institution, or any arrangement under which a person is a nominee or escrowee for another.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1144, § 1, effective January 1, 2019.

15-5-103. Definitions.

As used in this article 5, unless the context otherwise requires:

(1) "Action", with respect to an act of a trustee, includes a failure to act.

(2) "Alternative dispute resolution" means a method of nonjudicial dispute resolution as set forth in the trust instrument, which may include but is not limited to a method prescribed pursuant to the uniform arbitration act, part 2 of article 22 of title 13.

(3) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041 (b)(1)(A) or 2514 (c)(1) of the federal "Internal Revenue Code of 1986", as amended.

(4) (a) "Beneficiary" means a person who:

(I) Has a present or future beneficial interest in a trust, vested or contingent; or

(II) In a capacity other than that of trustee, holds a power of appointment over trust property.

(b) "Beneficiary" does not include an appointee under a power of appointment unless and until the power is exercised and the trustee has knowledge of the exercise and the identity of the appointee.

(5) "Business trust" has the same meaning as set forth in section 15-10-201 (6.5).

(6) "Charitable trust" means a trust, or a portion of a trust, created for a charitable purpose described in section 15-5-405 (1).

(7) "Conservator" means a person appointed by a court to administer the estate of a minor or adult individual.

(8) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(9) "Guardian" means a person appointed by a court to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

(10) "Interested person" means a qualified beneficiary or other person having a property right in or claim against a trust estate, which right or claim may reasonably and materially be affected by a judicial proceeding pursuant to this code. The term also includes fiduciaries and other persons having authority to act under the terms of the trust.

(11) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(12) "Jurisdiction", with respect to a geographical area, includes a state or country.

(13) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(14) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

(a) Exercisable by a trustee and limited by an ascertainable standard; or

(b) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(15) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(16) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subsection (16)(a) of this section terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(17) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(18) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or has a power of withdrawal over that portion.

(19) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(20) "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 an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(21) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions, as expressed in the trust instrument, or as may be established by other evidence in a judicial proceeding, or in a nonjudicial settlement agreement pursuant to section 15-5-111 or by alternative dispute resolution pursuant to section 15-5-113.

(22) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(23) "Trustee" includes an original, an additional, and a successor trustee or a cotrustee.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1144, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Measuring the Value of Trust Interests in Dissolution of Marriage Proceedings", see 51 Colo. Law. 38 (Mar. 2022).

15-5-104. Knowledge.

(1) Subject to subsection (2) of this section, a person has knowledge of a fact if the person:

(a) Has actual knowledge of it;

(b) Has received a notice or notification of it; or

(c) From all the facts and circumstances known to the person at the time in question, and acting in a reasonably prudent manner given the person's experience and expertise, has reason to know it.

(2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows that a matter involving the trust would be materially affected by the information.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1147, § 1, effective January 1, 2019.

15-5-105. Default and mandatory rules.

(1) Except as otherwise provided in the terms of the trust, this code governs the duties, rights, and powers of a trustee; relations among trustees; the rights, powers, and interests of a beneficiary; the relationship between the trustees and the beneficiaries; the purpose of the trust; and other matters with respect to the trust or the property subject to the trust.

(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:

(a) The minimum requirements for creating the trust;

(b) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(c) The requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(d) The power of the court to modify or terminate a trust pursuant to sections 15-5-410 to 15-5-416;

(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;

(f) The power of the court pursuant to section 15-5-702 to require, dispense with, modify, or terminate a bond;

(g) The power of the court pursuant to section 15-5-708 (2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;

(h) The duty pursuant to section 15-5-813 (2)(b) and (2)(c) to provide notice of the existence of an irrevocable trust, of the identity of the trustee, and of the right to request trustee's reports to current distributees or permissible distributees of such trust at any age, or to other qualified beneficiaries of such trust who have attained twenty-five years of age;

(i) The duty pursuant to section 15-5-813 (1) to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;

(j) The effect of an exculpatory term pursuant to section 15-5-1008;

(k) The rights pursuant to sections 15-5-1010 to 15-5-1013 of a person other than a trustee or beneficiary;

(l) The periods of limitation for commencing a judicial proceeding;

(m) Consistent with the terms of the trust and the provisions of this code, the power of the court to take such action and exercise such jurisdiction not inconsistent with a settlor's intent as may be necessary in the interests of justice; and

(n) The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 15-5-203 and 15-5-204, unless the trust instrument requires alternative dispute resolution.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1147, § 1, effective January 1, 2019. **L. 2019:** IP(2) amended, (SB 19-105), ch. 51, p. 173, § 2, effective August 2. **L. 2021:** (2)(e) added, (SB 21-162), ch. 170, p. 944, § 2, effective September 7.

15-5-106. Common law of trusts - principles of equity - other statutes.

Unless displaced by the particular provisions of this code, the common law of trusts and principles of law and equity, and other statutes of this state, supplement its provisions.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1148, § 1, effective January 1, 2019.

15-5-107. Governing law.

(1) The meaning and effect of the terms of a trust are determined by:

(a) The law of the jurisdiction designated in the terms of the trust unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(b) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1148, § 1, effective January 1, 2019.

15-5-108. Principal place of administration.

(1) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(b) All or part of the administration occurs in the designated jurisdiction.

(2) In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is the usual place of business of the corporate trustee if there is but one corporate cotrustee, or the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee, and otherwise the usual place of business or residence of any of the cotrustees as agreed upon by them.

(3) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(4) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (3) of this section, may transfer the

trust's principal place of administration to another state or to a jurisdiction outside the United States.

(5) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer. The notice of a proposed transfer must include:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred;

(b) The address, e-mail address, and telephone number at the new location at which the trustee can be contacted;

(c) An explanation of the reasons for the proposed transfer;

(d) The date on which the proposed transfer is anticipated to occur; and

(e) The date, not less than sixty days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(6) If a qualified beneficiary notifies the trustee of an objection to a proposed transfer of the trust's principal place of administration, the authority of a trustee pursuant to this section to transfer a trust's principal place of administration is suspended, pending resolution of the objection.

(7) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 15-5-704.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1149, § 1, effective January 1, 2019. **L. 2022:** (4) amended, (SB 22-212), ch. 421, p. 2968, § 25, effective August 10.

ANNOTATION

Law reviews. For article, "Selecting a Trust Situs: What Should a Trustee Consider?", see 50 Colo. Law. 38 (Oct. 2021).

15-5-109. Methods and waiver of notice in matters other than judicial proceedings.

(1) Notice to a person pursuant to this code or the sending of a document to a person pursuant to this code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of

notice or for sending a document include first-class mail, personal delivery, delivery to the person's last-known place of residence or place of business, or a properly directed electronic message.

(2) A trustee need not provide a notice or document otherwise required pursuant to this code to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee. The trustee shall maintain documentation of the trustee's reasonable efforts to ascertain the identity or location of such a person.

(3) Notice pursuant to this code or the sending of a document pursuant to this code may be waived by the person who is to be notified or sent the document.

(4) Notice of a judicial proceeding must be given as provided in the Colorado rules of probate procedure, the "Colorado Probate Code", and, if applicable, the Colorado rules of civil procedure.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1150, § 1, effective January 1, 2019.

15-5-110. Others treated as qualified beneficiaries.

(1) Whenever notice to qualified beneficiaries of a trust is required pursuant to this code, the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice.

(2) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary pursuant to this code if the charitable organization, on the date the charitable organization's qualification is being determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(3) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 15-5-408 or 15-5-409 has the rights of a qualified beneficiary pursuant to this code.

(4) The attorney general has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1150, § 1, effective January 1, 2019.

15-5-111. Nonjudicial settlement agreements.

(1) Except as otherwise provided in subsection (3) of this section, any person may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust, regardless of whether the settlement agreement is supported by consideration.

(2) The required parties to a nonjudicial settlement agreement are those persons whose interests in the trust would be materially affected by its provisions were the settlement agreement to be approved by the court at the time it was entered into by the parties.

(3) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court pursuant to this code or other applicable law.

(4) Matters that may be resolved by a nonjudicial settlement agreement include but are not limited to:

(a) The interpretation or construction of the terms of the trust;

(b) The approval of a trustee's report or accounting;

(c) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(d) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(e) Transfer of a trust's principal place of administration; and

(f) Liability of a trustee for an action relating to the trust.

(5) Any person whose interest in the trust may be affected by a nonjudicial settlement agreement may request the court to approve or disapprove the nonjudicial settlement agreement, to determine whether the representation as provided in part 3 of this code was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1151, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Settlement Agreements Under the CUTC -- What Are the Limits?", 36 Colo. Law. 42 (May 2020).

15-5-112. Rules of construction.

Unless the terms of the trust instrument contain contrary rules of construction, the rules of construction that apply in this state to the interpretations of and disposition of property by a will or other governing instrument, as that term is defined in the "Colorado Probate Code", articles 10 to 17 of this title 15, also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1152, § 1, effective January 1, 2019.

15-5-113. Alternate dispute resolution.

(1) A settlor may designate in the trust instrument a method of nonjudicial alternate dispute resolution that is valid, enforceable, and irrevocable, except on a ground that exists at law or in equity for the invalidation of a trust. Such methods of nonjudicial dispute resolution may include rules of notice and procedure. The settlor may bind beneficiaries and assigns to the methods of dispute resolution.

(2) A method of nonjudicial dispute resolution provided by the settlor in the trust instrument does not preclude the court's authority to enter an order of alternate dispute resolution, which does not eliminate or negate the method of nonjudicial dispute resolution provided by the settlor except on a ground that exists at law or in equity for the invalidation of a trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1152, § 1, effective January 1, 2019.

15-5-114. Insurable interest of trustee - definition.

(1) In this section, "settlor" means a person who executes a trust instrument. The term includes a person for which a fiduciary or agent is acting.

(2) A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy issued:

(a) The insured is:

(I) A settlor of the trust; or

(II) An individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(b) The life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:

(I) An insurable interest in the life of the insured; or

(II) A substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included pursuant to subsection (2)(b)(I) of this section, who are:

(A) Related within the fifth degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured;

(B) Stepchildren of the insured or their descendants; or

(C) Individuals who are designated as beneficiaries of insurance policies for life insurance coverage on the life of the insured under a designated beneficiary agreement executed pursuant to article 22 of this title 15.

(3) This section does not limit or abridge any insurable interest or right to insure under the common law or any other statute.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1152, § 1, effective January 1, 2019.

PART 2

JUDICIAL PROCEEDINGS

15-5-201. Role of court in administration of trust.

(1) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(2) A trust is not subject to continuing judicial supervision unless ordered by the court.

(3) A judicial proceeding involving a trust may relate to any matter involving the trust's administration. Such matters may include, but are not limited to, proceedings involving:

(a) The appointment or removal of a trustee or trust director;

(b) Review of a trustee's fees or trust director's fees and review and settling of interim or final accountings;

(c) Requests for instruction;

(d) Declarations of rights;

(e) Determinations as to the creation, existence, and validity of all or part of a trust;

(f) The ascertainment of beneficiaries, and determinations of any other questions arising in the administration of distribution of any trust, including questions of construction in trust instruments, and the existence or nonexistence of any immunity, power, privilege, duty, or right;

(g) The registration or release of registration of a trust;

(h) A direction to compel or refrain from performing a particular act;

(i) The amendment, modification, revocation, or termination of a trust;

(j) The combination or division of trusts; or

(k) Equitable doctrines of cy pres, equitable deviation, and other principles of equity pertaining to charitable and other trusts.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1153, § 1, effective January 1, 2019. **L. 2019:** (3)(a) and (3)(b) amended, (SB 19-105), ch. 51, p. 173, § 3, effective August 2.

15-5-202. Jurisdiction over trustee and beneficiary.

(1) 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 personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(2) With respect to their interests in the trust, the beneficiaries of a trust that has its principal place of administration in this state or that is properly registered in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(3) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1154, § 1, effective January 1, 2019.

15-5-203. Subject matter jurisdiction.

(1) The district court or, in the city and county of Denver, the probate court, has exclusive jurisdiction of proceedings in this state brought by a trustee, trust director, or beneficiary concerning the administration of a trust.

(2) The district court or, in the city and county of Denver, the probate court, has concurrent jurisdiction with other district courts of this state of other proceedings involving trusts and third parties, such as proceedings by or against creditors or debtors of trusts.

(3) This section does not preclude judicial or nonjudicial alternative dispute resolution.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1154, § 1, effective January 1, 2019. **L. 2019:** (1) amended, (SB 19-105), ch. 51, p. 174, § 4, effective August 2.

15-5-204. Venue.

(1) A judicial proceeding concerning the internal affairs of trusts and involving trustees, beneficiaries, or persons with authority to act under the trust instrument must be commenced in the following order of priority:

(a) The county of venue specified by the terms of the trust if that county has a substantial relationship to the present administration of the trust;

(b) The county in which the trust is registered;

(c) Either:

(I) The county in which the trust's principal place of administration is or is to be located; or

(II) If the trust is created by a will, the county in which the decedent's estate is being administered.

(2) If a trust has no trustee, a judicial proceeding for the appointment of a trustee must be commenced in the following order of priority:

(a) The county required pursuant to subsection (1) of this section;

(b) Any of the following:

(I) A county in which a beneficiary resides;

(II) A county in which the trust property, or some portion of the trust property, is located; or

(III) A county in which a trust director resides or has a principal place of business.

(3) A judicial proceeding other than one described in subsection (1) or (2) of this section must be commenced in accordance with the rules of venue applicable to civil actions.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1154, § 1, effective January 1, 2019. **L. 2019:** (2)(b) amended, (SB 19-105), ch. 51, p. 174, § 5, effective August 2.

15-5-205. Registration of trusts.

(1) The trustee of a trust having its principal place of administration in this state may, after its acceptance of the trust, register the trust in the court of this state at the principal place of administration unless registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

(2) Registration of a fully and concurrently revocable inter vivos trust shall not be made until such a time as the settlor's power to revoke such a trust has terminated.

(3) A trust that divides the corpus into multiple trusts or a will that creates multiple trusts needs only one registration rather than a registration of each separate trust.

(4) This section and sections 15-5-206 to 15-5-209 do not apply to any trust created pursuant to section 15-14-412.5 or 15-14-412.6.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1155, § 1, effective January 1, 2019.

15-5-206. Registration procedures and content of statement.

(1) Registration may be accomplished by filing a trust registration statement with the court as described in section 15-5-205 indicating the name and address of the trustee in which the trustee acknowledges the trusteeship. The statement must indicate whether the trust has been registered elsewhere, if known.

(2) The statement must identify the trust as follows:

(a) In the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate;

(b) In the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or

(c) In the case of an oral trust, by information identifying the settlor or other source of funds or assets and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries, and time of performance.

(3) Within sixty days after filing the trust registration statement, the trustee shall notify in writing all cotrustees, qualified beneficiaries, and other fiduciaries and persons having authority to act under the terms of the trust. For purposes of privacy, the names of qualified beneficiaries may be redacted from the copy of the statement filed with the court or provided to other qualified beneficiaries.

(4) The trust registration statement must contain language indicating that, because a court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person, all interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the trust estate.

(5) If a trust has been registered in a foreign court, registration in this state is ineffective to the extent it is inconsistent with the foreign registration until the earlier registration is released, or an instrument executed by the trustee and all qualified beneficiaries is filed with the registration in this state.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1155, § 1, effective January 1, 2019.

15-5-207. Effect of failure to register.

A trustee who does not register a trust in a proper place, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any court in which the trust could have been registered and otherwise as provided by section 15-5-205. In addition, any trustee who, within thirty days after receipt of a written demand by a settlor or qualified beneficiary of the trust, fails to register a trust may be subject to removal or to surcharge as the court may direct.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1156, § 1, effective January 1, 2019.

15-5-208. Registration - qualification of a foreign trustee.

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within this state. A foreign cotrustee is not required to qualify in this state solely because its cotrustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage, or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1156, § 1, effective January 1, 2019.

15-5-209. Release of trust registration statement.

(1) If a trust's principal place of administration changes after the trust has been registered in this state, the trustee may withdraw that registration by:

(a) Filing a notice of release of trust registration statement in the same court in which the last registration statement was filed; and

(b) Serving the notice of release upon all persons described in section 15-5-206 (3).

(2) The trust registration is deemed released thirty-five days after the filing of the notice of release with the court unless an objection to the release is filed with that court and the objector

files a notice to set a hearing on the objection within said period and serves the objection and the notice to set on those persons described in section 15-5-206 (3).

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1157, § 1, effective January 1, 2019.

15-5-210. Judicially approved settlements.

(1) A settlement of any controversy as to the administration of a trust; the construction, validity, or effect of any trust; or the rights or interests of the beneficiaries or persons having claims against a trust, if approved in a formal proceeding in the court for that purpose, is binding on all parties thereto, including an unborn individual, an unascertained individual, or a person who could not be located. An approved settlement does not impair the rights of creditors or taxing authorities who are not parties to it.

(2) Notice of a judicially approved settlement must be given to every interested person or to one who can bind an interested person as provided in this code.

(3) The procedure for securing court approval of a settlement is as follows:

(a) The terms of the settlement must be set forth in an agreement in writing, which must be executed by all competent persons and parents of any minor child having a beneficial interest or having claims that will or may be affected by the settlement. Execution is not required by any person whose identity or whereabouts are unknown and cannot be reasonably ascertained.

(b) Any interested person, including a trustee, then may submit the settlement to the court for its approval and for execution by the trustee, the trustee of every affected testamentary trust, other fiduciaries, and representatives.

(c) After notice to all interested persons or their representatives, the court, if it finds that the contest or controversy is in good faith and that the effect of the settlement upon the interests of the persons represented by the fiduciaries or representatives is just and reasonable, shall make an order approving the settlement and directing all fiduciaries under its supervision to execute the agreement. A minor child represented only by his or her parents may be bound only if there is no conflict of interest between the parent and the child. Upon the making of the order and the execution of the settlement, all further disposition of trust property affected by the settlement must be in accordance with the terms of the settlement.

(4) Notice to a person who may be represented and bound pursuant to this code of an agreement to be approved by the court must be given:

(a) Directly to the person or to one who may bind the person if the person may be represented and bound pursuant to section 15-5-302 or 15-5-303; or

(b) In the case of a person who may be represented and bound pursuant to section 15-5-304 and who is unborn or whose identity or location is unknown and not reasonably ascertainable, to all persons whose interests in the judicial proceedings are substantially identical and whose identities and locations are known; or, in the case of other persons who may be represented and bound pursuant to section 15-5-304, directly to the person.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1157, § 1, effective January 1, 2019.

PART 3

REPRESENTATION

15-5-301. Representation - basic effect.

(1) Notice to a person who may represent and bind another person pursuant to this part 3 has the same effect as if notice were given directly to the other person.

(2) The consent of a person who may represent and bind another person pursuant to this part 3 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(3) A person who pursuant to this part 3 may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(4) A settlor may not represent and bind a beneficiary pursuant to this part 3 with respect to the termination or modification of a trust pursuant to section 15-5-411 (1).

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1158, § 1, effective January 1, 2019.

15-5-301.5. Scope of representative's authority and duty of certain representatives - definitions.

(1) As used in this section, unless the context otherwise requires, "representative" means a representative acting pursuant to section 15-5-302, 15-5-303, 15-5-304, or 15-5-305.

(2) A representative may receive notice, give consent, and otherwise represent, bind, and act on behalf of the individual represented with respect to any matter arising pursuant to this article 5, regardless of whether a judicial proceeding concerning the trust is pending.

(3) In making decisions, a representative may consider general benefits accruing to the living members of the represented individual's family.

(4) A representative acting pursuant to section 15-5-303 (1)(f) or section 15-5-305 shall act in good faith on behalf of the person represented. As used in this subsection (4), with respect to representatives acting pursuant to sections 15-5-303 (1)(f) and 15-5-305 only, "good faith" means honesty in fact.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1158, § 1, effective January 1, 2019.

15-5-302. Representation by a holder of general testamentary power of appointment.

To the extent that there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. For persons bound by orders binding holders of a presently exercisable general power of appointment, see section 15-10-403 (3)(a).

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1159, § 1, effective January 1, 2019.

15-5-303. Representation by fiduciaries and parents.

(1) To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(a) A conservator may represent and bind the protected person whose estate the conservator controls;

(b) A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;

(c) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(d) A trustee may represent and bind the beneficiaries of the trust;

(e) A personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(f) A parent may represent and bind, or appoint another person to represent and bind, the parent's minor or unborn child if a conservator or guardian for the child has not been appointed, provided that a person appointed by a settlor to represent the settlor's minor or unborn child may not be related or subordinate to the settlor within the meaning of section 672 (c) of the federal "Internal Revenue Code of 1986", as amended.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1159, § 1, effective January 1, 2019.

15-5-304. Representation by person having substantially identical interest.

Unless otherwise represented, a minor, an incapacitated person, or an unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1159, § 1, effective January 1, 2019.

15-5-305. Appointment of representative.

If the court determines that an interest is not represented pursuant to this part 3, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, an incapacitated person, a protected person, or an unborn individual, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1160, § 1, effective January 1, 2019.

PART 4

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

15-5-401. Methods of creating trust.

(1) A trust may be created by:

(a) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(b) Declaration by the owner of property that the owner holds identifiable property as trustee;

(c) Exercise of a power of appointment in favor of a trustee; or

(d) A statute, judgment, or decree authorizing the creation of a trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1160, § 1, effective January 1, 2019.

ANNOTATION

Law Reviews. For article, "The Lifecycle of a Revocable Trust", see 49 Colo. Law. 56 (Feb. 2020).

15-5-402. Requirements for creation.

(1) A trust is created only if:

(a) Either:

(I) The settlor has capacity to create a trust and indicates an intention to create a trust; or

(II) A statute, judgment, or decree authorizes creation of a trust;

(b) The trust has a definite beneficiary or is:

(I) A charitable trust;

(II) A trust for the care of an animal, as provided in section 15-5-408; or

(III) A trust for a noncharitable purpose, as provided in section 15-5-409;

(c) The trustee has duties to perform; and

(d) The same person is not the sole trustee and sole beneficiary.

(2) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(3) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1160, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "The Lifecycle of a Revocable Trust", see 49 Colo. Law. 56 (Feb. 2020).

15-5-403. Trusts created in other jurisdictions.

(1) A trust not created by a will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(a) The settlor was domiciled, had a place of abode, or was a national;

(b) A trustee was domiciled or had a place of business; or

(c) Any trust property was located.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-404. Trust purposes.

A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-405. Charitable purposes - enforcement.

(1) A charitable trust may be created for the relief of poverty; the advancement of education or religion; the promotion of health, governmental, or municipal purposes; or other purposes the achievement of which is beneficial to the community.

(2) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the trustee, if authorized by the terms of the trust, or, if not, the court, may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent that such intention can be ascertained.

(3) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-406. Creation of trust induced by fraud, duress, or undue influence.

A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-407. Evidence of oral trust.

Except as required by a statute other than this article 5, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-408. Trust for care of an animal.

Subject to this section and section 15-5-409.5, a trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid. For purposes of this section, the determination of the "animals' offspring in gestation" is made at the time the designated domestic or pet animals become present beneficiaries of the trust. Unless the trust instrument provides for an earlier termination, the trust terminates when no living animal is covered by the trust. A trust instrument must be liberally construed to bring the trust within this section, to presume against the merely precatory or honorary nature of its disposition, and to carry out the general intent of the settlor. Extrinsic evidence is admissible in determining the settlor's intent. Any trust pursuant to this section is an exception to any statutory or common law rule against perpetuities.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1161, § 1, effective January 1, 2019.

15-5-409. Noncharitable trust without ascertainable beneficiary.

Subject to section 15-5-409.5 and except as provided pursuant to sections 38-30-110 to 38-30-112, if a trust is for a specific, lawful, noncharitable purpose or for lawful, noncharitable purposes to be selected by the trustee, and there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for twenty-one years but no longer, regardless of whether the terms of trust contemplate a longer duration.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1162, § 1, effective January 1, 2019.

15-5-409.5. Additional provisions applicable to noncharitable trusts without ascertainable beneficiary and trusts for care of animal.

(1) In addition to the provisions of sections 15-5-408 and 15-5-409, a trust covered by either of those sections is subject to the following provisions:

(a) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the trust's purposes or for the benefit of a covered animal or animals;

(b) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(I) As directed in the trust instrument;

(II) If the trust was created in a nonresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will; and

(III) If no taker is produced by the application of subsections (1)(b)(I) and (1)(b)(II) of this section, to the settlor's heirs pursuant to part 5 of article 11 of this title 15;

(c) (Reserved)

(d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual;

(e) All trusts created pursuant to this section may be registered, and all trustees are subject to the laws of this state applying to trusts and trustees; and

(f) (Reserved)

(g) (I) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee if required to ensure that the intended use is carried out and if:

(A) No successor trustee is designated in the trust instrument; or

(B) No designated successor trustee agrees to serve or is able to serve.

(II) A court may also make such other orders and determinations as shall be advisable to carry out the intent of the settlor and the purposes of sections 15-5-408 and 15-5-409.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1162, § 1, effective January 1, 2019.

15-5-410. Modification or termination of trust - proceedings for approval or disapproval.

(1) In addition to the methods of termination prescribed by sections 15-5-411 to 15-5-414, a trust terminates to the extent that:

(a) The trust is revoked or expires pursuant to its terms;

(b) No purpose of the trust remains to be achieved; or

(c) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(2) A proceeding to approve or disapprove a proposed modification or termination pursuant to sections 15-5-411 to 15-5-416, or trust combination or division pursuant to section 15-5-417, may be commenced by a trustee or a beneficiary.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1163, § 1, effective January 1, 2019.

15-5-411. Modification or termination of noncharitable irrevocable trust by consent.

(1) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to a trust's modification or termination may be given by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(2) Other than a trust established by court order under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d)(4), a noncharitable irrevocable trust may:

(a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or

(b) Be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) A spendthrift provision in the terms of a trust is not presumed to constitute a material purpose of the trust.

(4) Upon termination of a trust pursuant to subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(5) If not all of the beneficiaries consent to a proposed modification or termination of a trust pursuant to subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and

(b) The interests of a beneficiary who does not consent will be adequately protected.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1163, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Pulling the Plug on Perpetual Trusts: Legal and Tax Considerations for Early Termination of an Irrevocable Trust in Colorado", see 55 Colo. Law. 40 (Jan.-Feb. 2026).

Subsection (2) does not apply to a disability trust. Termination of a trust established by court order under 42 U.S.C. § 1396p(d)(4) does not require the consent of all of the beneficiaries under subsection (2). Matter of Mendy Brockman Disability Trust, 2022 COA 75, 519 P.3d 373.

Because subsection (2) does not apply to disability trusts, state regulation mandating when disability trusts terminate was not inconsistent with this subsection. Matter of Mendy Brockman Disability Trust, 2022 COA 75, 519 P.3d 373.

Subsection (5) does not apply to a trust that terminates by its terms, as permitted by § 15-5-410 (1)(a). Court not required to make factual determination that interests of beneficiary would be adequately protected upon termination of disability trust where trust terminated by its terms. Matter of Mendy Brockman Disability Trust, 2022 COA 75, 519 P.3d 373.

15-5-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(1) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(2) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(3) Upon termination of a trust pursuant to this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1164, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Pulling the Plug on Perpetual Trusts: Legal and Tax Considerations for Early Termination of an Irrevocable Trust in Colorado", see 55 Colo. Law. 40 (Jan.-Feb. 2026).

15-5-413. Cy pres.

(1) Except as otherwise provided in subsection (2) of this section, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(a) The trust does not fail, in whole or in part;

(b) The trust property does not revert to the settlor or the settlor's successors in interest; and

(c) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(2) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court pursuant to subsection (1) of this section to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(a) The trust property is to revert to the settlor and the settlor is still living; or

(b) Fewer than twenty-one years have elapsed since the date of the trust's creation.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1164, § 1, effective January 1, 2019.

15-5-414. Modification or termination of uneconomic trust.

(1) After notice to the qualified beneficiaries, the trustee of a trust property having a total value less than one hundred thousand dollars may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust pursuant to this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(4) This section does not apply to an easement for conservation or preservation.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1165, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Pulling the Plug on Perpetual Trusts: Legal and Tax Considerations for Early Termination of an Irrevocable Trust in Colorado", see 55 Colo. Law. 40 (Jan.-Feb. 2026).

15-5-415. Reformation to correct mistakes.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1165, § 1, effective January 1, 2019.

15-5-416. Modification to achieve settlor's tax objectives.

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1165, § 1, effective January 1, 2019.

15-5-417. Combination and division of trusts.

After notice to the qualified beneficiaries and trust directors, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does

not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1165, § 1, effective January 1, 2019. **L. 2019:** Entire section amended, (SB 19-105), ch. 51, p. 174, § 6, effective August 2.

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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 939, § 1, effective September 7.

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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 939, § 1, effective September 7.

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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 940, § 1, effective September 7.

15-5-504. Discretionary trusts - effect of standard - 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) 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 child support order to which the beneficiary is an obligor; 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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 941, § 1, effective September 7. **L. 2023:** (3)(a) amended, (HB 23-1301), ch. 303, p. 1819, § 17, effective August 7.

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 does 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)

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 942, § 1, effective September 7.

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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 943, § 1, effective September 7.

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.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 943, § 1, effective September 7.

15-5-508. Application of part.

(1) This part 5 applies to all trusts created before, on, or after July 1, 2022.

(2) This part 5 applies to all judicial proceedings concerning trusts commenced on or after July 1, 2022.

(3) This part 5 applies to judicial proceedings concerning trusts commenced before July 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 July 1, 2022, unless there is a clear indication of a contrary intent in the terms of the trust.

(5) An act done before July 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 July 1, 2022, then the period prescribed by that statute continues to apply to the right.

Source: L. 2021: Entire part added, (SB 21-162), ch. 170, p. 943, § 1, effective September 7.

PART 6

REVOCABLE TRUSTS

15-5-601. (Reserved)

15-5-602. Revocation or amendment of revocable trust.

(1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection (1) does not apply to a trust created under an instrument executed before August 7, 2013.

(2) Unless the terms of a trust expressly provide otherwise, if a revocable trust is created or funded by more than one settlor:

(a) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone, with regard to the portion of the trust property attributable to that settlor's contribution, but may be amended only by joint action of both spouses;

(b) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(c) Upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(3) The settlor may revoke or amend a revocable trust:

(a) By substantial compliance with a method provided in the terms of the trust; or

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by any other method manifesting clear and convincing evidence of the settlor's intent, which may include a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust. A provision in a trust specifying a method to revoke or amend the trust does not make the specified method exclusive unless the specified method is referred to as the "sole", "exclusive", or "only" method of revoking or amending the trust or the provision includes similar language manifesting the settlor's intent that the trust may not be revoked or amended by any other method.

(4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(6) Unless the terms of a trust expressly provide otherwise, or the power to do so has been expressly granted to another person, a conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor, may exercise the settlor's powers with respect to revocation, amendment, or distribution of trust property, but only with the approval of the court supervising the conservatorship or guardianship.

(7) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or the settlor's successors in interest for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1166, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Measuring the Value of Trust Interests in Dissolution of Marriage Proceedings", see 51 Colo. Law. 38 (Mar. 2022).

If a trust does not expressly make its specified manner of revocation exclusive, the district court must make factual findings as to the settlor's intent to revoke by other means. This section abrogates the common law rule that, if a trust provides that it may be revoked in a particular way, strict compliance with that method is required to revoke the trust, even if the trust does not say that the method it provides is exclusive. Matter of Thomas E. Hunn Living Trust, 2024 COA 51, 553 P.3d 1279.

15-5-603. Settlor's powers.

(1) To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor that is contrary to the terms of the trust. To the extent a trust is revocable by a settlor in conjunction with a person other than a trustee or person holding an adverse interest, the trustee may follow a direction from the settlor and the other person holding the power to revoke, even if the direction is contrary to the terms of the trust.

(2) To the extent a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(3) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1167, § 1, effective January 1, 2019. **L. 2019:** Entire section amended, (SB 19-105), ch. 51, p. 174, § 7, effective August 2.

15-5-604. Limitation on action contesting validity of revocable trust.

(1) (a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(I) Three years after the settlor's death; or

(II) One hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and

of the time allowed for commencing a proceeding. A trustee is not liable to any person for giving or failing to give notice under this section.

(b) The applicable time limit described in subsection (1)(a) of this section is an absolute bar that may not be waived or tolled.

(2) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(a) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(b) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty days after the contestant sent the notification.

(3) Unless a distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a beneficiary of a trust that is determined to have been invalid, or a distributee of property improperly distributed or paid, or a claimant who is improperly paid, is liable for the return of the property improperly received and its income, if any, since the distribution, if he or she has the property. If he or she does not have the property, then he or she is liable for the return of the value as of the date of his or her disposition of the property improperly received, and its income and gain, if any received by him or her.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1167, § 1, effective January 1, 2019.

PART 7

OFFICE OF TRUSTEE

15-5-701. Accepting or declining trusteeship.

(1) Except as otherwise provided in subsection (3) of this section, a person designated as trustee accepts the trusteeship:

(a) By substantially complying with a method of acceptance provided in the terms of the trust; or

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as a trustee, or otherwise indicating acceptance of the trusteeship. A provision in a trust specifying a method to accept or decline trusteeship does not make the specified

method exclusive unless the specified method is referred to as the "sole", "exclusive", or "only" method of accepting or declining trusteeship or the provision includes similar language manifesting that the settlor's intent was that the trusteeship may not be accepted or declined by any other method.

(2) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(3) A person designated as a trustee, without accepting the trusteeship, may:

(a) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to any acting trustee and a qualified beneficiary; and

(b) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1168, § 1, effective January 1, 2019.

15-5-702. Trustee's bond.

(1) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(2) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(3) Unless otherwise directed by the court or the terms of the trust, the cost of a bond is charged to the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1168, § 1, effective January 1, 2019.

15-5-703. Cotrustees.

(1) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(3) Subject to section 15-16-812, a cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(5) A trustee may not delegate to a costrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(6) Except as otherwise provided in subsection (7) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(7) Subject to section 15-16-812, each trustee shall exercise reasonable care to:

(a) Prevent a cotrustee from committing a serious breach of trust; and

(b) Pursue a remedy, at trust expense, for a cotrustee's serious breach of trust.

(8) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1169, § 1, effective January 1, 2019. **L. 2019:** (3) and IP(7) amended, (SB 19-105), ch. 51, p. 175, § 8, effective August 2.

15-5-704. Vacancy in trusteeship - appointment of successor.

(1) A vacancy in a trusteeship occurs if:

(a) A person designated as trustee rejects the trusteeship;

(b) A person designated as trustee cannot be identified or does not exist;

(c) A trustee resigns;

(d) A trustee is disqualified or removed;

(e) A trustee dies; or

(f) A guardian or conservator is appointed for an individual serving as trustee.

(2) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(3) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(a) By a person designated in the terms of the trust to act as successor trustee;

(b) By a person appointed by unanimous agreement of the qualified beneficiaries; or

(c) By a person appointed by the court.

(4) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(a) By a person designated in the terms of the trust to act as successor trustee;

(b) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general is provided written notice of the selection and fails to object or concurs in the selection within thirty days of such notice; or

(c) By a person appointed by the court.

(5) Regardless of whether a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1169, § 1, effective January 1, 2019.

15-5-705. Resignation of trustee.

(1) A trustee may resign:

(a) Upon at least thirty days' notice to the qualified beneficiaries; the settlor, if living; and all cotrustees; or

(b) With the approval of the court.

(2) In approving a resignation pursuant to this section, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(3) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1170, § 1, effective January 1, 2019.

15-5-706. Removal of trustee.

(1) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(2) The court may remove a trustee if:

(a) The trustee has committed a serious breach of trust;

(b) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

(c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(d) (I) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries;

(II) The court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust; and

(III) A suitable cotrustee or successor trustee is available.

(3) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief pursuant to section 15-5-1001 (2) as may be necessary to protect the trust property or the interests of the beneficiaries.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1171, § 1, effective January 1, 2019.

15-5-707. Delivery of property by former trustee.

(1) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(2) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1171, § 1, effective January 1, 2019.

15-5-708. Compensation of trustee.

(1) If the terms of the trust do not specify the trustee's compensation, a trustee's compensation is determined in accordance with part 6 of article 10 of this title 15.

(2) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if the compensation specified by the terms of the trust would be unreasonably low or high as determined in accordance with the factors set forth in part 6 of article 10 of this title 15 and taking into consideration whether the duties of the trustee are substantially different from those contemplated when the trust was created.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1171, § 1, effective January 1, 2019.

15-5-709. Reimbursement of expenses.

(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(a) Expenses that were properly incurred in the administration of the trust; and

(b) To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(2) A reasonable advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1172, § 1, effective January 1, 2019.

PART 8

DUTIES AND POWERS OF TRUSTEE

Law reviews: For article, "Holding Closely Held Business Assets in Trust", see 49 Colo. Law. 49 (Mar. 2020).

15-5-801. Duty to administer trust.

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article 5.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1172, § 1, effective January 1, 2019.

15-5-802. Duty of loyalty.

(1) A trustee shall administer the trust solely in the interests of the beneficiaries.

(2) Subject to the rights of persons dealing with or assisting the trustee as provided in section 15-5-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(a) The transaction was authorized by the terms of the trust;

(b) The transaction was approved by the court;

(c) The beneficiary did not commence a judicial proceeding within the time allowed by section 15-5-1005;

(d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 15-5-1009; or

(e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(3) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(a) The trustee's spouse;

(b) The trustee's descendants, siblings, parents, or their spouses;

(c) An agent or attorney of the trustee; or

(d) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(4) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(5) A transaction not concerning trust property, and in which the trustee engages in the trustee's individual capacity, involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(6) An investment by a trustee in securities of an investment company or investment trust to which the trustee or its affiliate provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the "Colorado Uniform Prudent Investor Act", article 1.1 of this title 15. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled pursuant to section 15-5-813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(7) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(8) This section does not preclude the following transactions, if fair to the beneficiaries:

(a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(b) Payment of reasonable compensation to the trustee;

(c) A transaction between a trust and another trust, decedent's estate, guardianship, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(d) A deposit of trust money in a regulated financial service institution operated by the trustee; or

(e) An advance by the trustee of money for the protection of the trust.

(9) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1172, § 1, effective January 1, 2019.

ANNOTATION

Law reviews. For article, "Class Action Liability for Trustees after Banks v. Northern Trust", see 50 Colo. Law. 38 (Dec. 2021).

15-5-803. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, taking into account any differing interests of the beneficiaries.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1174, § 1, effective January 1, 2019.

15-5-804. Prudent administration.

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1174, § 1, effective January 1, 2019.

15-5-805. Costs of administration.

In administering a trust, the trustee may incur only costs that are appropriate and reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1174, § 1, effective January 1, 2019.

15-5-806. Trustee's skills.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1174, § 1, effective January 1, 2019.

15-5-807. Delegation by trustee.

(1) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(a) Selecting an agent;

(b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(3) A trustee who complies with subsection (1) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(4) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1174, § 1, effective January 1, 2019.

15-5-808. Powers to direct. (Reserved)

15-5-809. Control and protection of trust property.

A trustee shall take reasonable steps to take control of and protect the trust property.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1175, § 1, effective January 1, 2019.

15-5-810. Record keeping and identification of trust property.

(1) A trustee shall keep adequate records of the administration of the trust.

(2) A trustee shall keep trust property separate from the trustee's own property.

(3) (a) Except as otherwise provided in subsection (4) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(b) Nothing in subsection (3)(a) of this section may be construed as preventing a trustee from holding a property in the name of a nominee or other form, without disclosure of the trust, as authorized in section 15-5-816 (1)(g)(II) and in section 15-1-804 (2)(o), provided the trustee maintains adequate records of all trust property so held.

(c) This subsection (3) does not apply to tangible personal property other than motor vehicles, airplanes, and other property the title of which is registered with a governmental authority.

(4) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1175, § 1, effective January 1, 2019.

15-5-811. Enforcement and defense of claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust of which the trustee has knowledge.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1175, § 1, effective January 1, 2019.

15-5-812. Collecting trust property.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1176, § 1, effective January 1, 2019.

15-5-813. Duty to inform and report.

(1) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

(2) A trustee:

(a) Upon request of a qualified beneficiary, shall promptly furnish to the qualified beneficiary a copy of the portions of the trust instrument that describe or affect the beneficiary's interest;

(b) Within sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(c) Within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request portions of the trust instrument that describe or affect the beneficiary's interest, and of the right to a trustee's report as provided in subsection (3) of this section; and

(d) Shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(3) (a) At least annually and at the termination of the trust, a trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it:

(I) A report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation; and

(II) A listing of the trust assets and, if feasible, their respective market values.

(b) Upon a vacancy in a trusteeship, unless a cotrustee remains in office, the former trustee shall send a report to the qualified beneficiaries. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(4) A qualified beneficiary may waive the right to a trustee's report or other information required to be furnished pursuant to this section. A qualified beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(5) Subsections (2)(b) and (2)(c) of this section do not apply to a trustee who accepts a trusteeship before January 1, 2019, to an irrevocable trust created before January 1, 2019, or to a revocable trust that becomes irrevocable before January 1, 2019.

(6) Nothing in this section may be construed to impose on the trustee a duty to inform or report to any person other than a qualified beneficiary or as directed by the court.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1176, § 1, effective January 1, 2019.

15-5-814. Discretionary powers - tax savings.

(1) (a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith. The parameters for that exercise are established by the terms and purposes of the trust, the interests of the beneficiaries, and relevant fiduciary duties. A trustee does not abuse its discretion if the trustee, following the terms and purposes of the trust and considering the interests of its beneficiaries, exercises its judgment honestly and with a proper motive.

(b) Where a trust gives a trustee unlimited discretion, including the use of such terms as "absolute", "sole", or "uncontrolled", a court may not determine that a trustee abused its

discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(2) Subject to subsection (4) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection (2) does not apply:

(a) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

(b) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(3) A power whose exercise is limited or prohibited by subsection (2) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(4) Subsection (2) of this section does not apply to:

(a) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056 (b)(5) or 2523 (e) of the federal "Internal Revenue Code of 1986", as amended, was previously allowed;

(b) Any trust during any period that the trust may be revoked or amended by its settlor; or

(c) A trust, if contributions to the trust qualify for the annual exclusion under section 2503 (c) of the federal "Internal Revenue Code of 1986", as amended.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1177, § 1, effective January 1, 2019.

15-5-815. General powers of trustee.

(1) A trustee, without authorization by the court, may exercise:

(a) Powers conferred by the terms of the trust; and

(b) Except as limited by the terms of the trust:

(I) All powers over the trust property that an unmarried competent owner has over individually owned property;

(II) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(III) Any other powers conferred by this code and the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15.

(2) The exercise of a power is subject to the fiduciary duties prescribed by this code.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1178, § 1, effective January 1, 2019.

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:

(a) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(b) Acquire or sell property, for cash or on credit, at public or private sale;

(c) Exchange, partition, or otherwise change the character of trust property;

(d) Deposit trust money in an account in a regulated financial service institution;

(e) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(f) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(g) With respect to stocks or other securities, exercise the rights of an absolute power, including the right to:

(I) Vote or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(II) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(III) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(IV) Deposit the securities with a depositary or other regulated financial service institution;

(h) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures; demolish improvements; raze existing or erect new party walls or buildings; subdivide or develop land; dedicate land to public use or grant public or private easements; and make or vacate plats and adjust boundaries;

(i) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(j) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(k) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(l) Abandon or decline to administer property of no value or insufficient value to justify its collection or continued administration;

(m) With respect to possible liability for violation of environmental law:

(I) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(II) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of government enforcement;

(III) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(IV) Compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

(V) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(n) Pay or contest any claim, settle a claim by or against the trust, and release, in whole in or in part, a claim belonging to the trust;

(o) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(p) Exercise elections with respect to federal, state, and local taxes;

(q) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(r) (Reserved)

(s) (Reserved)

(t) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(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:

(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 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;

(v) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(w) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternate dispute resolution;

(x) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(y) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(z) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1178, § 1, effective January 1, 2019. **L. 2021:** IP(1)(u) amended, (SB 21-162), ch. 170, p. 944, § 3, effective September 7.

15-5-817. Distribution on termination.

(1) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent, but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(2) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payments of debts, expenses, and taxes.

(3) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(a) It was induced by improper conduct of the trustee; or

(b) The beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1181, § 1, effective January 1, 2019.

15-5-818. Reimbursement for taxes - definitions.

(1) As used in this section:

(a) "Independent trustee" means a trustee who is not related or subordinate to the settlor within the meaning of section 672 (c) of the federal "Internal Revenue Code of 1986", as amended.

(b) "Settlor" means the grantor or another person treated as the owner of any portion of a trust under section 671 of the federal "Internal Revenue Code of 1986", as amended.

(2) Unless otherwise provided in the governing instrument, an independent trustee of a trust may, from time to time, in the trustee's discretion, distribute to the settlor an amount equal to any income taxes on any portion of the trust's taxable income for which the settlor is liable.

(3) A trustee shall not exercise or participate in the exercise of discretion pursuant to this section that would cause the inclusion of the trust assets in the settlor's gross taxable estate for federal estate tax purposes at the time of exercise or in a manner inconsistent with the qualification of all or any portion of the trust for the federal gift or estate tax marital deduction, to the extent the trust is intended to qualify for such deduction.

(4) The provisions of this section do not apply to:

(a) Any trust by which a future estate is indefeasibly vested in the United States or a political subdivision thereof for exclusively public purposes;

(b) A corporation organized exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation;

(c) A trustee, or a fraternal society, order, or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or of such fraternal society, order, or association is carrying on propaganda or otherwise attempting to influence legislation; or

(d) Any veterans' organization incorporated by an act of congress, or any department or local chapters or posts of such an organization, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(5) A creditor of the settlor of an irrevocable trust is not entitled to attach or otherwise reach any trust property due to the power granted to a trustee or other third party by the terms of the trust, court order, agreement of the beneficiaries, or any other provision of law, including subsection (2) of this section, to reimburse the settlor of the trust an amount for which the settlor is liable for income tax on the taxable income of the trust.

(6) The provisions of this section apply to all trusts unless an independent trustee of a trust elects otherwise in writing.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1182, § 1, effective January 1, 2019.

PART 9

(Reserved)

PART 10

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

15-5-1001. Remedies for breach of trust.

(1) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(2) To remedy a breach of trust that has occurred or may occur, the court may:

(a) Compel the trustee to perform the trustee's duties;

(b) Enjoin the trustee from committing a breach of trust;

(c) Compel the trustee to redress a breach of trust by paying money, restoring property, being surcharged or sanctioned, or other means;

(d) Order a trustee to account, provide a status or financial report, or provide an inventory;

(e) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(f) Restrain, restrict, or suspend the trustee;

(g) Remove the trustee as provided in section 15-5-706;

(h) Reduce or deny compensation to the trustee or require the trustee to disgorge compensation previously paid;

(i) Subject to section 15-5-1012, void an act of the trustee, impose a lien or constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(j) Order other appropriate relief.

(3) If a remedy for a breach of trust is sought by a cotrustee, beneficiary, or interested person, or the court acts sua sponte, the provisions of part 5 of article 10 of this title 15 apply.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1183, § 1, effective January 1, 2019.

15-5-1002. Damages for breach of trust.

(1) In addition to other remedies provided by this article 5, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(b) The profit the trustee made, or the benefit the trustee received, other than reasonable compensation, by reason of the breach.

(2) Except as otherwise provided in this subsection (2), if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1184, § 1, effective January 1, 2019.

15-5-1003. Damages in absence of breach.

(1) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(2) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1184, § 1, effective January 1, 2019.

15-5-1004. Compensation and costs.

Except as otherwise provided in this article 5, the provisions of part 6 of article 10 of this title 15 govern the entitlement to and payment of compensation and costs to trustees, their attorneys, and third parties involved with trusts.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1184, § 1, effective January 1, 2019.

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

(1) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date that the beneficiary or a person who may represent and bind the beneficiary, as provided in part 3 of this article 5, was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(2) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(3) If subsection (1) of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three years after the first to occur of:

(a) The removal or resignation of the trustee;

(b) The termination of the beneficiary's interest in the trust; or

(c) The termination of the trust.

(4) For purposes of subsection (1) of this section, a beneficiary is deemed to have been sent a report if:

(a) In the case of a beneficiary having capacity, it is sent to the beneficiary; or

(b) In the case of a beneficiary who, pursuant to part 3 of this article 5, may be represented and bound by another person, it is sent to the other person.

(5) This section does not preclude an action to recover for fraud or misrepresentation related to the report.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1185, § 1, effective January 1, 2019.

15-5-1006. Reliance on trust instrument.

A trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1185, § 1, effective January 1, 2019.

15-5-1007. Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1185, § 1, effective January 1, 2019.

15-5-1008. Exculpation of trustee.

(1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(a) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(b) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1185, § 1, effective January 1, 2019.

15-5-1009. Beneficiary's consent, release, or ratification.

(1) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(a) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(b) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1186, § 1, effective January 1, 2019.

15-5-1010. Limitation on personal liability of trustee.

(1) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(2) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(3) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

(4) The question of liability as between the trust estate and the trustee individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In other appropriate proceedings.

(5) A trustee is not personally liable for making a distribution of property that does not take into consideration the possible birth of a posthumously conceived child unless, prior to the distribution, the trustee received notice or acquired actual knowledge that:

(a) There is or may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the trust assets.

(6) If a trustee has reviewed the records of the county clerk and recorder in every county in Colorado in which the trustee has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death and the trustee does not have actual notice or actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession, the trustee is not individually liable for distributions made to devisees or heirs at law that do not take into consideration the designated beneficiary agreement.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1186, § 1, effective January 1, 2019.

15-5-1011. Interest as a general partner.

(1) Except as provided in subsection (3) of this section, or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the "Colorado Uniform Partnership Act (1997)", article 64 of title 7, or the "Colorado Uniform Limited Partnership Act of 1981", article 62 of title 7.

(2) Except as otherwise provided in subsection (3) of this section, a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(3) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(4) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1187, § 1, effective January 1, 2019.

15-5-1012. Protection of person dealing with trustee.

(1) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee were properly exercising the power.

(2) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise and, in the absence of contrary knowledge, may assume the existence and proper use of the power being exercised.

(3) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(4) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.

(5) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1188, § 1, effective January 1, 2019.

15-5-1013. Certification of trust.

(1) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(a) That the trust exists and the date the trust instrument was executed;

(b) The identity of the settlor;

(c) The identity and address of the currently acting trustee;

(d) The powers of the trustee in the pending transaction;

(e) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(f) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and

(g) The name in which title to trust property may be taken.

(2) A certification of trust may be signed or otherwise authenticated by any trustee.

(3) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(4) A certification of trust need not contain the dispositive terms of a trust.

(5) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(6) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(7) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(8) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for costs, expenses, attorney fees, and damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(9) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1188, § 1, effective January 1, 2019.

PART 11

(Reserved)

PART 12

(Reserved)

PART 13

LIFE INSURANCE POLICY OWNED BY A TRUSTEE

15-5-1301. Life insurance policy owned by a trustee - definition.

(1) Notwithstanding any other provision of law and the provisions of the "Colorado Uniform Prudent Investor Act", article 1.1 of this title 15, a trustee may not acquire or hold as a trust asset a life insurance policy on the life of a person unless the trustee has an insurable interest, as described in section 15-5-114, in the person. A trustee who acquires as a trust asset a life insurance policy on the life of a person in whom the trustee has an insurable interest may continue to hold the life insurance policy without liability for loss arising from the trustee's failure to:

(a) Determine whether the policy is or remains a proper investment;

(b) Investigate the financial strength of the life insurance company;

(c) Exercise or not exercise any option, right, or privilege available under the policy, including financing the payment of premiums, unless there is sufficient cash or there are other readily marketable trust assets from which to pay premiums, regardless of whether the exercise or nonexercise of these powers results in the lapse or termination of the policy;

(d) Inquire about or investigate the health or financial condition of any insured under the policy; or

(e) Retain the policy without regard to any lack of diversification of trust assets resulting from ownership of such policy and without regard to the terms and conditions of the policy.

(2) (a) This section does not relieve a trustee of liability with respect to any life insurance policy purchased from an affiliated company, or with respect to which the trustee or any affiliated company of the trustee receives any commission, unless either:

(I) The trustee has given written notice of such intended purchase to all qualified beneficiaries of the trust as defined in section 15-5-103 (16), or to their legal representatives, and either receives written consent to such purchase from qualified beneficiaries or does not receive from a qualified beneficiary a response to written notice by the trustee within thirty days after the

mailing of such notice to the qualified beneficiary or legal representative at his or her last-known address; or

(II) The trust agreement contains a provision that permits purchases of life insurance from an affiliate.

(b) For purposes of this section, an "affiliated company" has the same meaning as set forth in 15 U.S.C. sec. 80a-2 (a)(2).

(3) This section applies to a trust established before, on, or after August 7, 2013, and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after August 7, 2013.

(4) Notwithstanding the provisions of this section, this section does not apply to any trust that expressly provides that this section does not apply to such trust, or to any trust that otherwise provides for a different standard of fiduciary care or obligation greater than that provided in this section; except that a trust may not permit a trustee to acquire or hold as a trust asset a life insurance policy on the life of a person in whom the trustee does not hold an insurable interest.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1189, § 1, effective January 1, 2019. **L. 2021:** (2)(a)(I) amended, (SB 21-171), ch. 143, p. 841, § 4, effective January 1, 2022.

PART 14

MISCELLANEOUS PROVISIONS

15-5-1401. Uniformity of application and construction.

In applying and construing the language of this article 5 that is consistent with uniform law, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1191, § 1, effective January 1, 2019.

15-5-1402. Electronic records and signatures.

The provisions of this article 5 governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7002, and supersede, modify,

and limit the requirements of the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1191, § 1, effective January 1, 2019.

15-5-1403. Severability clause.

If any provision of this article 5 or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions of applications of this article 5 that can be given effect without the invalid provision or application, and to this end the provisions of this article 5 are severable.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1191, § 1, effective January 1, 2019.

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:

(a) This article 5 applies to all trusts created before, on, or after January 1, 2019;

(b) This article 5 applies to all judicial proceedings concerning trusts commenced on or after January 1, 2019;

(c) This article 5 applies to judicial proceedings concerning trusts commenced before January 1, 2019, unless the court finds that application of a particular provision of this article 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 article 5 does not apply and the superseded law applies;

(d) Any rule of construction or presumption provided in this article 5 applies to trust instruments executed before January 1, 2019, unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) An act done before January 1, 2019, is not affected by this article 5.

(2) If a right 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, 2019, then the period

prescribed by that statute as it existed prior to January 1, 2019, continues to apply to the right, even if the statute has been repealed or suspended.

Source: L. 2018: Entire article added, (SB 18-180), ch. 169, p. 1191, § 1, effective January 1, 2019. **L. 2021:** IP(1) amended, (SB 21-162), ch. 170, p. 944, § 4, effective September 7.

COLORADO PROBATE CODE

Editor's note: (1) Articles 10 to 17 of this title were numbered as articles 1 to 8 of chapter 153, C.R.S. 1963. The substantive provisions of these articles were repealed and reenacted in 1973, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to these articles prior to 1973, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of these articles, see the comparative tables located in the back of the index.

(2) Articles 10 to 17 of this title, the Colorado Probate Code, are an adaptation of the Uniform Probate Code with some additions, deletions, and changes. The comments appearing with the Uniform Probate Code located on the National Conference of Commissioners on Uniform State Laws website would be helpful in understanding certain sections of this code.

Cross references: For dead man's statute, see § 13-90-102; for investment of estate funds, see part 3 of article 1 of this title; for investment of veterans' estate funds, see § 28-5-301; for estate income tax, see § 39-22-104; for rule against perpetuities nullified as to designated trust, see §§ 38-30-110 to 38-30-114; for motor vehicle title by bequest or inheritance, see § 42-6-114; for uniform veterans' guardianship law, see part 2 of article 5 of title 28; for powers of appointment as affecting wills and estates, see article 2 of this title; for witnesses, see part 1 of article 90 of title 13; for the Colorado estate tax, see article 23.5 of title 39.

ARTICLE 10

General Provisions, Definitions, Jurisdiction

PART 1
SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

15-10-101. Short title.

15-10-102. Purposes - rule of construction.

15-10-103. Supplementary general principles of law applicable.

15-10-104. Severability.

15-10-105. Construction against implied repeal.

15-10-106. Effect of fraud and evasion.

15-10-106.5. Petition to determine cause and date of death resulting from disaster - body unidentifiable or missing.

15-10-107. Evidence of death or status.

15-10-108. Acts by holder of general power.

15-10-109. Remarriage of absentee's spouse.

15-10-110. Insurance and other contracts - surrender value - effect of contract provisions - suit on claim of death.

15-10-111. Entry into safe deposit box of decedent - definitions.

15-10-112. Cost of living adjustment of certain dollar amounts.

PART 2
DEFINITIONS

15-10-201. General definitions.

PART 3
SCOPE, JURISDICTION, AND COURTS

15-10-301. Territorial application.

15-10-302. Subject matter jurisdiction.

15-10-303. Venue - multiple proceedings - transfer.

15-10-304. Practice in court.

15-10-305. Records and certified copies.

15-10-306. Jury trial.

15-10-307. Registrar - powers.

15-10-308. Appeals.

15-10-309. (Reserved)

15-10-310. Oath or affirmation on filed document.

PART 4
NOTICE, PARTIES, AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

15-10-401. Notice - method and time of giving.

15-10-402. Notice - waiver.

15-10-403. Pleadings - when parties bound by others - notice.

PART 5
FIDUCIARY OVERSIGHT, REMOVAL, SANCTIONS, AND CONTEMPT

15-10-501. Court powers - definitions - application.

15-10-502. Initial investigation.

15-10-503. Power of a court to address the conduct of a fiduciary - emergencies - nonemergencies.

15-10-504. Surcharge - contempt - sanctions against fiduciaries.

15-10-505. Notice to fiduciary - current address on file.

PART 6
COMPENSATION AND COST RECOVERY

15-10-601. Definitions.

15-10-602. Recovery of reasonable compensation and costs.

15-10-603. Factors in determining the reasonableness of compensation and costs.

15-10-604. Fee disputes - process and procedure.

15-10-605. Compensation and costs - assessment - limitations.

15-10-606. Applicability.

PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

15-10-101. Short title.

Articles 10 to 17 of this title shall be known and may be cited as the "Colorado Probate Code" and is referred to in said articles as "this code" or "code".

Source: L. 73: R&RE, p. 1538, § 1. **C.R.S. 1963:** § 153-1-101.

ANNOTATION

Law reviews. For article, "New Probate Code for Colorado", see 13 Rocky Mt. L. Rev. 85 (1941). For article, "Check Lists for Court Proceedings in Which Titles to Real Estate Are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "Some Suggested Changes in the Colorado Statutes Concerning Wills and Estates", see 29 Rocky Mt. L. Rev. 595 (1957). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Family Protection Under the Uniform Probate Code", see 50 Den. L.J. 137 (1973). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "The Life Beneficiary — Trustee", see 12 Colo. Law. 52 (1983). For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

Applied in Bohl v. Haney, 671 P.2d 991 (Colo. App. 1983).

15-10-102. Purposes - rule of construction.

(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors;

(d) To facilitate use and enforcement of certain trusts;

(d.1) To promote a speedy and efficient system for managing and protecting the estates of protected persons so that assets may be preserved for application to the needs of protected persons and their dependents;

(d.2) To provide a system of general and limited guardianships for minors and incapacitated persons and to coordinate guardianships and protective proceedings concerned with management and protection of the estates of incapacitated persons;

(e) To make uniform the law among the various jurisdictions.

(3) Under this code, the rights of partners in a civil union created pursuant to the "Colorado Civil Union Act", article 15 of title 14, C.R.S., are the same rights as those extended to spouses who are married pursuant to the provisions of the "Uniform Marriage Act", part 1 of article 2 of title 14, C.R.S.

Source: L. 73: R&RE, p. 1538, § 1. **C.R.S. 1963:** § 153-1-102. **L. 88:** (2)(d.1) and (2)(d.2) added, p. 649, § 1, effective July 1. **L. 2013:** (3) added, (SB 13-011), ch. 49, p. 164, § 17, effective May 1.

ANNOTATION

Applied in In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); Strong Bros. Enters. v. Estate of Strong, 666 P.2d 1109 (Colo. App. 1983); In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

15-10-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.

Source: L. 73: R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-103.

15-10-104. Severability.

If any provision of this code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Source: L. 73: R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-104.

15-10-105. Construction against implied repeal.

This code is a general act intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

Source: L. 73: R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-105.

15-10-106. Effect of fraud and evasion.

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within five years after the discovery of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Source: L. 73: R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-106.

ANNOTATION

Because this section provides an adequate legal remedy for plaintiff's claim that her son fraudulently induced her into not contesting her husband's will, the statute of limitations in § 15-12-108 is not subject to equitable tolling. In re Estate of Kubby, 929 P.2d 55 (Colo. App. 1996).

In the city and county of Denver, the jurisdiction for a claim of fraud lies only with the probate court and district court properly determined that it lacked jurisdiction in this matter. Pound v. Fletter, 39 P.3d 1241 (Colo. App. 2001).

15-10-106.5. Petition to determine cause and date of death resulting from disaster - body unidentifiable or missing.

(1) If the occurrence of a disaster has been declared by proclamation of the governor under section 24-33.5-704, C.R.S., and it appears that a person has died as a direct result, but the remains have not been located or are unidentifiable, the coroner, sheriff, or district attorney for the county in which any part of such disaster occurred, the spouse, next of kin, or public administrator for such county, or, thirty days after the disaster was declared, any other person, may apply to the coroner of such county asking that the coroner determine the cause, manner, and date of death of the alleged decedent.

(2) (a) Such application shall contain the facts and circumstances concerning the disaster, the reasons for the belief that the alleged decedent perished, a statement that the alleged decedent's remains have not been located or are unidentifiable, and the names and addresses of all persons known or believed to be heirs at law of the alleged decedent.

(b) The application shall contain an affidavit in which the applicant states the following information to the extent of the applicant's personal knowledge, information, and belief:

(I) The full name of the alleged decedent;

(II) The alleged decedent's residential address, including city, county, and zip code;

(III) The alleged decedent's date and place of birth;

(IV) The alleged decedent's sex, race, ethnicity, and social security number;

(V) The full names of the alleged decedent's parents and the mother's maiden name;

(VI) The applicant's name, address, telephone number, and relationship to the alleged decedent;

(VII) The identification number of any missing person report filed concerning the alleged decedent;

(VIII) The date and time of the applicant's last contact with the alleged decedent and a description of that contact;

(IX) The basis for the belief that the alleged decedent was physically present at the time and place of an occurrence declared under section 24-33.5-704, C.R.S.;

(X) A description of the efforts undertaken by the applicant, and efforts the applicant knows others to have undertaken, to locate or identify the alleged decedent;

(XI) Whether the alleged decedent served in the armed forces of the United States and, if so, the branch and dates of service;

(XII) If the alleged decedent was employed, the name of the alleged decedent's employer and the employer's address and telephone number; and

(XIII) The alleged decedent's marital status, the name of spouse, and wife's maiden name, if applicable.

(c) The applicant shall pay an application fee of twenty-five dollars when filing the application.

(d) The coroner shall assign an application number to the application.

(3) If the coroner finds sufficient evidence that a disaster occurred and that the alleged decedent named in the application may be presumed to have died, then the coroner shall issue a certificate of death under this section.

(4) A certified copy of an order issued pursuant to subsection (7) of this section shall be sufficient when presented to the coroner or other person acting in place of the coroner for the issuance of a certificate of death under this section.

(5) An application for the finding of death under this section shall not be filed later than five years following the initial proclamation of the disaster.

(6) This section shall apply only under the circumstances specified in subsection (1) of this section. In all other cases and if the coroner finds the evidence insufficient to support the issuance of a death certification, the provisions of section 15-10-107 with respect to determination of death and status apply.

(7) If the coroner denies or fails to act within thirty days on an application that complies with subsection (2) of this section, the applicant may file a petition, in the district court for the county in which any part of the disaster occurred or in the Denver probate court if any part of the disaster occurred in the city and county of Denver, for an expedited determination of death in accordance with this section. If the court determines the alleged decedent died, a certified copy of the court's order shall constitute sufficient evidence for the coroner under subsection (4) of this section.

Source: L. 77: Entire section added, p. 838, § 1, effective July 1. **L. 83:** (1) amended, p. 964, § 1, effective July 1, 1984. **L. 92:** (1) amended, p. 1042, § 6, effective March 12. **L. 2004:** Entire section amended, p. 624, § 1, effective August 4. **L. 2013:** (1) and (2)(b)(IX) amended, (HB 13-1300), ch. 316, p. 1675, § 36, effective August 7.

15-10-107. Evidence of death or status.

(1) In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a court determination of death and status apply:

(a) Death occurs when an individual is determined dead under section 12-240-140.

(b) An authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.

(c) An authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(d) In the absence of prima facie evidence of death under paragraph (b) or (c) of this subsection (1), the fact of death shall be established by clear and convincing evidence, including circumstantial evidence.

(e) An individual whose death is not established under paragraphs (a) to (d) of this subsection (1) or under section 15-10-106.5 who is absent for a continuous period of five years, during which he or she has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His or her death is presumed to have occurred at the end of the period unless there is sufficient evidence, including, without limitation, a determination under section 15-10-106.5 that death occurred earlier.

(f) In the absence of evidence disputing the time of death stated on a document described in paragraph (b) or (c) of this subsection (1), a document described in paragraph (b) or (c) of this subsection (1) that states a time of death one hundred twenty hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by one hundred twenty hours.

(2) In the event that the fact of death of an absentee is entered in any action brought before a finding of death is entered in a formal testacy proceeding under this code, the finding relating to death of the absentee in such action shall not be determinative of any finding to be made in any proceeding under this code.

Source: L. 73: R&RE, p. 1539, § 1. **C.R.S. 1963:** § 153-1-107. **L. 94:** Entire section R&RE, p. 969, § 1, effective July 1, 1995. **L. 2004:** IP(1) and (1)(e) amended, p. 626, § 2, effective August 4. **L. 2019:** (1)(a) amended, (HB 19-1172), ch. 136, p. 1670, § 79, effective October 1.

ANNOTATION

Law reviews. For article, "Decedent's Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986). For article, "Dealing With a Decedent's Mineral Interests", see 44 Colo. Law. 53 (Feb. 2015).

15-10-108. Acts by holder of general power.

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all coholders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent that their interests (as objects, takers in default, or otherwise) are subject to the power.

Source: L. 73: R&RE, p. 1540, § 1. **C.R.S. 1963:** § 153-1-108.

15-10-109. Remarriage of absentee's spouse.

(1) At any time after a finding of death of an absentee in a formal testacy proceeding under this code, the spouse of an absentee may remarry, and:

(a) Such subsequent marriage shall not constitute the offense of bigamy or any other criminal offense under the laws of this state, even though the absentee shall later be determined to be alive; and

(b) Upon such subsequent marriage, the marriage between the absentee and his said spouse shall be deemed to have been dissolved as of the date of the absentee's death as determined in accordance with section 15-10-107.

Source: L. 73: R&RE, p. 1540, § 1. **C.R.S. 1963:** § 153-1-109.

15-10-110. Insurance and other contracts - surrender value - effect of contract provisions - suit on claim of death.

(1) A finding of death in a formal testacy proceeding under this code shall be fully effective as to rights under insurance, annuity, and endowment contracts dependent upon the life of an absentee, and the receipts of beneficiaries for payments made under any such contracts shall be a release to the contract issuer of all claims under such contracts.

(2) If, in any proceeding under this code, the absentee is not found to be deceased and any policy of insurance or any annuity or endowment contract owned by the absentee provides for a surrender value, the conservator, acting for the insured, with court approval and a finding of necessity, may demand the payment of surrender value to the estate of the absentee. The receipt of the conservator for such payment shall be a release to the contract issuer of all claims under the contract.

(3) Notwithstanding the provisions in any annuity or endowment contract or policy of life or accident insurance or in the charter or bylaws of any mutual or fraternal insurance association hereafter executed or adopted, the provisions of this section shall govern the effect to be given to evidence of absence or of death.

(4) When any annuity or endowment contract, any policy of life or accident insurance, or the charter or bylaws of any mutual or fraternal insurance association hereafter executed or adopted contains a provision requiring a beneficiary to bring suit upon a claim of death within a stated period after the death of the insured and the fact of the absence of the insured is relied upon by the beneficiary as evidence of the death, the action may be begun, notwithstanding such provision in the contract, policy, charter, or bylaws, at any time within the statutory period of limitation for actions on contracts in writing dating from the date of death of the absentee, as determined in a formal testacy proceeding under this code.

Source: L. 73: R&RE, p. 1540, § 1. **C.R.S. 1963:** § 153-1-110.

15-10-111. Entry into safe deposit box of decedent - definitions.

(1) (a) Whenever a decedent at the time of his or her death was a sole or joint lessee of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed, allow access to the box by:

(I) If the decedent was the sole lessee of the box, a person claiming to be a successor of the decedent, or acting on behalf of a successor of the decedent, upon presentation of an affidavit

made pursuant to section 15-12-1201 for the purpose of delivering the contents of the box in accordance with said section; or

(II) If the decedent was the sole lessee or a joint lessee of the box, a person who is reasonably believed to be an heir at law or devisee of the decedent, a person nominated as a personal representative pursuant to the provisions of section 15-12-203 (1)(a), or the agent or attorney of any such person for the purpose of determining whether the box contains an instrument that appears to be a will of the decedent, deed to a burial plot, or burial instructions.

(b) (I) If a person described in subparagraph (I) or (II) of paragraph (a) of this subsection (1) desires access to a safe deposit box but does not possess a key to the box, the custodian shall drill the safe deposit box at the person's expense.

(II) In the case of a person described in subparagraph (I) of paragraph (a) of this subsection (1), the custodian shall deliver the contents of the box, other than a purported will, deed to a burial plot, and burial instructions, to the person in accordance with section 15-12-1201. In order to protect a custodian in carrying out his or her duty under the foregoing sentence to examine such contents solely for the purpose of identifying and withholding specified documents and making delivery of such contents other than the specified documents to such person, a custodian is not deemed to have acquired knowledge, either actual or constructive, pertaining to the value of any of the contents of the box delivered to the person as a consequence of the examination and delivery.

(III) In the case of a person described in subparagraph (II) of paragraph (a) of this subsection (1), the custodian shall retain, in a secure location at the person's expense, the contents of the box other than a purported will, deed to a burial plot, and burial instructions.

(IV) A custodian shall deliver a purported will as described in subsection (2) of this section.

(V) If the safe deposit box contains a deed to a burial plot or burial instructions that are not a part of a purported will, the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section may remove these instruments, and the custodian shall not prevent the removal.

(VI) Expenses incurred by a custodian pursuant to this section shall be considered an estate administration expense.

(c) A representative of the custodian shall be present during the entry of a safe deposit box pursuant to this section.

(1.3) Nothing in this section affects the rights and responsibilities of a public administrator, as described in sections 15-12-620 and 15-12-621.

(1.5) As used in this section, unless the context otherwise requires:

(a) "Custodian" means a bank, savings and loan association, credit union, or other institution acting as a lessor of a safe deposit box, as defined in section 11-46-101, C.R.S., or section 11-101-401, C.R.S.

(b) "Representative of a custodian" means an authorized officer or employee of a custodian.

(2) (a) If an instrument purporting to be a will is found in a safe deposit box as the result of an entry pursuant to subsection (1) of this section, the purported will shall be removed by the representative of the custodian.

(b) At the request of the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section, the representative of the custodian shall copy each purported will of the decedent, at the expense of the requesting person, and shall deliver the copy of each purported will to the person, or if directed by the person, to the person's agent or attorney. In copying any purported will, the representative of the custodian shall not remove any staples or other fastening devices or disassemble the purported will in any way.

(c) The custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the clerk of the district or probate court of the county in which the decedent was a resident. If the custodian is unable to determine the county of residence of the decedent, the custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the office of the clerk of the proper court of the county in which the safe deposit box is located.

(d) Repealed.

(3) After the appointment of a personal representative or special administrator for the decedent, the personal representative or special administrator shall be permitted to enter the safe deposit box upon the same terms and conditions as the decedent was permitted to enter during his or her lifetime.

(4) Nothing in this section affects the right of surviving joint lessees to enter a safe deposit box after the death of a decedent.

(5) A custodian shall not be liable to a person for an action taken pursuant to this section or for a failure to act in accordance with the requirements of this section unless the action or failure to act is shown to have resulted from the custodian's bad faith, gross negligence, or intentional misconduct.

Source: L. 73: R&RE, p. 1540, § 1. **C.R.S. 1963:** § 153-1-111. **L. 75:** (1) amended, p. 588, § 8, effective July 1. **L. 77:** (1) amended, p. 840, § 1, effective July 1. **L. 80:** Entire section R&RE, p. 522, § 1, effective July 1. **L. 2007:** Entire section amended, p. 124, § 1, effective July 1. **L. 2009:** (1)(b) and (2)(b) amended, (HB 09-1241), ch. 169, p. 760, § 15, effective April 22. **L.**

2014: (1)(a)(I) amended, (HB 14-1322), ch. 296, p. 1220, § 1, effective August 6. **L. 2015:** (1)(a), (1)(b), and (4) amended and (2)(d) repealed, (HB 15-1064), ch. 32, p. 76, § 1, effective August 5.

Editor's note: The provisions of subsection (1) as amended by House Bill 07-1003, including subsection (1)(e) renumbered to subsection (1.3), and the paragraphs in subsection (2) as amended by House Bill 07-1003 have been renumbered on revision to conform to standard C.R.S. format.

15-10-112. Cost of living adjustment of certain dollar amounts.

(1) As used in this section, unless the context otherwise requires:

(a) "CPI" means the consumer price index (annual average) for all urban consumers (CPI-U): United States city average -- all items, reported by the bureau of labor statistics, United States department of labor or its successor agency or, if the index is discontinued, an equivalent index reported by a federal authority. If no such index is reported, the term means the substitute index chosen by the department of revenue; and

(b) "Reference base index" means the CPI for the calendar year 2010.

(2) The dollar amounts stated in sections 15-11-102, 15-11-202 (2), 15-11-403, and 15-11-405 apply to the estate of a decedent who died during or after 2010, but for the estate of a decedent who died after 2011, these dollar amounts must be increased or decreased if the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. The amount of any increase or decrease is computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. If the amount of the increase or decrease produced by the computation is not a multiple of one thousand dollars, then the amount of the increase or decrease is rounded down if it is an increase, or rounded up if it is a decrease, to the next multiple of one thousand dollars, but for the purpose of section 15-11-405, the periodic installment amount is the lump-sum amount divided by twelve. If the CPI for 2010 is changed by the bureau of labor statistics, the reference base index must be revised using the rebasing factor reported by the bureau of labor statistics, or other comparable data if a rebasing factor is not reported.

(3) Before February 1, 2012, and before February 1 of each succeeding year, the department of revenue shall publish a cumulative list, beginning with the dollar amounts effective for the estate of a decedent who died in 2012 of each dollar amount as increased or decreased under this section.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1670, § 1, effective July 1, 2010. **L. 2010:** (1)(b), (2), and (3) amended, (SB 10-199), ch. 374, p. 1747, § 2, effective July 1. **L. 2014:** (2) amended, (HB 14-1322), ch. 296, p. 1240, § 12, effective August 6.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Automatic Adjustments for Inflation. Added in 2008, Section 1-109 operates in conjunction with the inflation adjustments of the dollar amounts listed in subsection (b) also adopted in 2008. Section 1-109 was added to make it unnecessary in the future for the ULC or individual enacting states to continue to amend the UPC periodically to adjust the dollar amounts for inflation. This section provides for an automatic adjustment of each of the above dollar amounts annually.

In each January, the Bureau of Labor Statistics of the U.S. Department of Labor reports the CPI (annual average) for the preceding calendar year. The information can be obtained by telephone (202/691-5200) or on the Bureau's website (http://www.bls.gov/cpi).

Subsection (c) tasks an appropriate state agency, such as the Department of Revenue, to issue an official cumulative list of the adjusted amounts beginning in January of the year after the effective date of the act. This subsection is bracketed because some enacting states might not have a state agency that could appropriately be assigned the task of issuing updated amounts. Such an enacting state might consider tasking the state supreme court to issue a court rule each year making the appropriate adjustment.

PART 2

DEFINITIONS

15-10-201. General definitions.

Subject to additional definitions contained in this article 10 and the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this code:

(1) "Agent" means an attorney in fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under the "Colorado Patient Autonomy Act".

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under part 3 of article 12 of this title.

(3) "Augmented estate" means the estate described in sections 15-11-203, 15-11-204, 15-11-205, 15-11-206, 15-11-207, and 15-11-208.

(4) "Authenticated" means certified, when used in reference to copies of official documents, and only certification by the official having custody is required.

(5) "Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation", includes a beneficiary of an insurance or annuity policy, of an account with payment on death (POD) designation, of a security registered in beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(6) "Beneficiary designation" means a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in the beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(6.5) "Business trust" includes, but is not limited to, Massachusetts business trusts created for business or investment purposes; Delaware statutory trusts; Illinois land trusts; mutual fund trusts; common trust funds; voting trusts; liquidation trusts; real estate investment trusts; environmental remediation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, compensation, annuities, profits, pensions, or employee benefits of any kind; and other trusts with purposes that are the same or similar to any of the trusts enumerated in this subsection (6.5), regardless of whether such other trusts are created under statutory or common law, and regardless of whether the beneficial interests in such other trusts are evidenced by certificates.

(7) "Child" includes an individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(8) "Claims", in respect to the estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or taxes due the state of Colorado, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(9) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(10) "Court" means the court or division thereof having jurisdiction in matters relating to the affairs of decedents and protected persons. This court is the district court, except in the city and county of Denver where it is the probate court.

(11) "Descendant" means all of the individual's lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code.

(12) "Devise", when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(13) "Devisee" means a person designated in a will to receive a devise. For the purposes of article 12 of this title, in the case of a devise to an existing trust or trustee, or to a trustee in trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(14) "Disability" means cause for a protective order as described in section 15-14-401.

(15) "Distributee" means any person who has received property of a decedent from his or her personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his or her hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(16) "Divorce" includes a dissolution of marriage, and "annulment" includes a declaration of invalidity, as such terms are used in the "Uniform Dissolution of Marriage Act", article 10 of title 14, C.R.S.

(16.5) "Domiciliary foreign personal representative" means a personal representative appointed by another jurisdiction in which the decedent was domiciled at the time of the decedent's death.

(16.7) "Donee", as used in the context of powers of appointment, has the same meaning as "powerholder" as set forth in section 15-2.5-102 (13).

(17) "Estate" means the property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.

(18) "Exempt property" means that property of a decedent's estate which is described in section 15-11-403.

(19) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(20) "Foreign personal representative" means a personal representative appointed by another jurisdiction.

(21) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(22) "Governing instrument" means a deed, will, trust, insurance or annuity policy, multiple-party account, security registered in beneficiary form (TOD), pension, profit sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or power of attorney, or a donative, appointive, or nominative instrument of any other type.

(23) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(24) "Heirs", except as controlled by section 15-11-711, means persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(25) "Incapacitated person" means an individual described in section 15-14-102 (5).

(26) "Informal proceedings" means those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will, appointment of a personal representative, or determination of a guardian under sections 15-14-202 and 15-14-301.

(27) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, trust directors, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person, which may be affected by the proceeding. It also includes persons having priority for an appointment as a personal representative and other fiduciaries representing the interested person. The meaning as it relates to particular persons may vary from time to time and is determined according to the particular purposes of, and matter involved in, any proceeding.

(28) "Issue" of a person means descendant as defined in subsection (11) of this section.

(29) "Joint tenants with right of survivorship" and "community property with the right of survivorship" for the purposes of this code only includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(30) "Lease" includes an oil, gas, or other mineral lease.

(31) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(32) "Minor" means a person who is under eighteen years of age.

(33) "Mortgage" means any conveyance, agreement, or arrangement in which the property is used as security.

(34) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(35) "Organization" means a corporation, business trust, estate, trust, partnership, joint venture, limited liability company, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(36) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(37) "Payer" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(38) "Person" means an individual or an organization.

(39) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(40) "Petition" means a written request to the court for an order after notice.

(41) "Proceeding" includes action at law and suit in equity.

(42) "Property" means both real and personal property or any interest therein and anything that may be the subject of ownership.

(43) "Protected person" has the same meaning as set forth in section 15-14-102 (11).

(44) "Protective proceeding" has the same meaning as used in section 15-14-401.

(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.

(45) "Registrar" refers to the official of the court designated to perform the functions of registrar as provided in section 15-10-307.

(46) "Security" includes any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; collateral trust certificate; transferable share; voting trust certificate; or, in general, any interest or instrument commonly known as security; any certificate of interest or participation; any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the items enumerated in this subsection (46).

(47) "Settlement", in reference to a decedent's estate, means the full process of administration, distribution, and closing.

(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.

(48) "Special administrator" means a personal representative as described by sections 15-12-614 to 15-12-618.

(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.

(50) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(51) "Successors" means persons other than creditors, who are entitled to property of a decedent under his or her will or this code.

(52) "Supervised administration" means the proceedings described in part 5 of article 12 of this title.

(53) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under section 15-11-104, 15-11-702, or 15-11-712. The term includes its derivatives, such as "survives", "survived", "survivor", and "surviving".

(54) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(55) "Testator" includes an individual of either sex.

(56) (a) Except as provided in paragraph (b) of this subsection (56):

(I) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created and any amendments to such trusts.

(II) "Trust" also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.

(b) (I) "Trust" excludes constructive trusts unless a court, in determining such a trust, provides that the trust is to be administered as an express trust.

(II) "Trust" also excludes resulting trusts; conservatorships; personal representatives; accounts as defined in section 15-15-201 (1); custodial arrangements pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.; security arrangements; business trusts, as defined in subsection (6.5) of this section; and any arrangement under which a person is nominee or escrowee for another.

(57) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(58) "Ward" means an individual described in section 15-14-102 (15).

(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.

Source: L. 73: R&RE, p. 1541, § 1. **C.R.S. 1963:** § 153-1-201. **L. 74:** (27) amended, p. 422, § 74, effective April 11. **L. 75:** (1) amended, p. 589, § 9, effective July 1. **L. 84:** (48) amended, p. 394, § 6, effective July 1. **L. 90:** (48) amended, p. 921, § 5, effective July 1. **L. 94:** Entire section R&RE, p. 970, § 2, effective July 1, 1995. **L. 95:** (11) amended, p. 362, § 16, effective July 1. **L. 2000:** (25), (26), (43), (44), and (58) amended, p. 1833, § 8, effective January 1, 2001. **L. 2006:** (16.5) added, p. 391, § 24, effective July 1. **L. 2009:** (44.5) and (47.5) added, (HB 09-1287), ch. 310, p. 1671, § 2, effective July 1, 2010. **L. 2010:** (59) amended, (SB 10-199), ch. 374, p. 1748, § 3, effective July 1. **L. 2013:** IP and (56) amended and (6.5) added, (SB 13-077), ch. 190, p. 778, § 13, effective August 7. **L. 2014:** (3) amended, (HB 14-1322), ch. 296, p. 1240, § 14, effective August 6; (16.7) added, (HB 14-1353), ch. 209, p. 782, § 4, effective July 1, 2015. **L. 2019:** IP and (27) amended, (SB 19-105), ch. 51, p. 175, § 9, effective August 2.

Editor's note: This section was repealed and reenacted in 1994, resulting in the relocation of provisions. For a detailed comparison of this section for 1994, see the comparative tables located in the back of the index.

Cross references: For age of competence, see § 13-22-101; for the "Colorado Uniform Transfers to Minors Act", see article 50 of title 11. For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (June 2022). For article, "Guardians ad Litem — Part 1: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 30 (July 2022). For article, "Beneficiary Deeds in Colorado--20 Years Later", see 54 Colo. Law. 32 (Mar. 2025).

Recorded option to purchase land at death of decedent is not "claim" against the estate under this section, because it constitutes a demand or dispute regarding title to a specific asset of the estate. Brown v. Brown, 43 Colo. App. 535, 608 P.2d 840 (1980).

Nor equitable proceeding to redress breach of contract relating to will. Since an equitable proceeding to redress a breach of contract relating to a will is not in the nature of a demand which would reduce the size of the estate, such an action involves a dispute as to the ownership of the decedent's property and is not a "claim" against the estate. Thus, the nonclaims statute, § 15-12-803, does not determine the time within which the action must be started. Knies v. Gross, 43 Colo. App. 127, 599 P.2d 976 (1979).

Potential right of indemnity under insurance policy deemed "property". A decedent's potential right of indemnity under a liability insurance policy is personal property encompassed within the comprehensive meaning of "property" as defined in subsection (36), justifying the appointment of an administrator and the probate of an estate. Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

Definition of "claim" is applied in Matter of Estate of Musselman, 784 P.2d 858 (Colo. App. 1989).

Potential devisee is entitled to notice of hearing during which court will determine validity of will. If, at time of hearing, the court had yet to determine the validity of the will, and thus the status of the petitioner as an "interested party", the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

PART 3

SCOPE, JURISDICTION, AND COURTS

15-10-301. Territorial application.

(1) Except as otherwise provided in this code, this code applies to:

(a) The affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state;

(b) The property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state;

(c) Incapacitated persons and minors in this state;

(d) Survivorship and related accounts in this state;

(e) Trusts subject to administration in this state, to the extent such application is not inconsistent with the "Colorado Uniform Trust Code", article 5 of this title 15; and

(f) Declaration instruments created pursuant to article 19 of this title.

Source: L. 73: R&RE, p. 1545, § 1. **C.R.S. 1963:** § 153-1-301. **L. 2003:** (1)(f) added, p. 1355, § 2, effective August 6. **L. 2018:** (1)(e) amended, (SB 18-180), ch. 169, p. 1193, § 8, effective January 1, 2019.

ANNOTATION

When representative appointed for nonresident decedents. Personal representatives may be appointed for nonresident decedents only when there is property of the nonresident decedent located in the state. Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

When potential indemnity under insurance policy supports letters of administration. A potential right of indemnity under a liability insurance policy

is sufficient personal property to support letters of administration for a nonresident when the insurance carrier is authorized to transact business in this state. Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

A probate court may exercise in rem jurisdiction over conservatorship property that was transferred outside the state through its continuing jurisdiction over such property. Conservator's unilateral acts of seeking a state conservatorship over a protected person and then improperly transferring assets from the conservatorship to out-of-state trusts did not convert the assets from conservatorship assets into assets of the trusts or mean that those assets never touched Colorado. Black v. Black, 2020 COA 64M, 482 P.3d 460.

15-10-302. Subject matter jurisdiction.

(1) The court has jurisdiction over all subject matter vested by article VI of the state constitution and by articles 1 to 10 of title 13, C.R.S.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

Source: L. 73: R&RE, p. 1545, § 1. **C.R.S. 1963:** § 153-1-302.

ANNOTATION

Law reviews. For article, "Probate Jurisdiction for Creditors' Claims", see 29 Colo. Law. 57 (May 2000).

Specific enumeration of probate court's subject-matter jurisdiction is applicable to all district courts sitting in probate matters. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980).

Federal district court lacked diversity jurisdiction over will contest since probate exception to diversity jurisdiction applied. Exception applied because in Colorado a county court has exclusive original jurisdiction over probate matters. Johnson v. Porter, 931 F. Supp. 761 (D. Colo. 1996).

Probate court has jurisdiction to adjudicate constructive trust issue that arises in connection with the administration of decedent's estate. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980); Mitchem v. First Interstate Bank of Denver, 802 P.2d 1141 (Colo. App. 1990).

Probate court's jurisdiction in guardianship cases gives probate court the authority to determine related parenting time issues in accordance with § 14-10-129. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

Court may revoke its orders and reopen proceedings irregularly made. A probate court may revoke its orders and reopen proceedings with respect to the settlement of estates which have been irregularly made or procured by fraud or mistake. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980).

15-10-303. Venue - multiple proceedings - transfer.

(1) Where a proceeding under this code could be maintained in more than one place in this state, the court in which the proceeding is first commenced has the exclusive right to proceed.

(2) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this state, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(3) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court.

Source: L. 73: R&RE, p. 1545, § 1. **C.R.S. 1963:** § 153-1-303.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

Applied in Jenkins v. District Court, 620 P.2d 721 (Colo. 1980).

15-10-304. Practice in court.

Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the Colorado rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this code.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-304.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Everhart — Probate, Meet Civil", see 53 Colo. Law. 40 (Nov. 2024).

Motions to vacate formal testacy orders are analogous to motions to vacate default judgments under C.R.C.P. 55(c) and 60(b). Craig v. Rider, 651 P.2d 397 (Colo. 1982).

The provisions of C.R.C.P. 54(b) apply to probate proceedings and govern the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

15-10-305. Records and certified copies.

(1) The clerk of each court shall keep for each decedent, ward, protected person, or trust under the court's jurisdiction a record of any document which may be filed with the court under this code, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the registrar or court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

(2) All instruments purporting to be the original wills, upon presentation for probate thereof, shall be recorded by the clerk of the court, in a well-bound book, to be provided by him for that purpose, or photographed, microphotographed, or reproduced on film as a permanent record, and shall remain and be preserved in the office of the clerk of the court. Upon admission of such will to probate, such record shall be sufficient, without again recording the same in the records of the clerk of the court.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-305.

Cross references: For the recording of wills and decrees affecting land, see § 38-30-153.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

15-10-306. Jury trial.

(1) If duly demanded, a party is entitled to trial by jury in a formal testacy proceeding and any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

(2) If there is no right to trial by jury under subsection (1) of this section or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-306.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

Annotator's note. (1) Cases relevant to § 15-10-306 decided prior to its earliest source, § 153-1-306, C.R.S. 1963, have been included in the annotations to this section.

(2) For cases construing the right to jury trial in civil cases, see the annotations following C.R.C.P. 38.

Under prior law there was no right to trial by jury in probate proceeding. Stratton v. Rice, 66 Colo. 407, 181 P. 529 (1919); Miller v. O'Brien, 75 Colo. 117, 223 P. 1088 (1924).

Contestants entitled to jury if prima facie case is made. Where there is any substantial evidence tending to establish the facts necessary to make out a prima facie case, the contestants of a will are entitled to have the case submitted to the jury for determination on the merits. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

Trial court invades province of jury if it weighs evidence. Where trial court assumes to weigh the evidence adduced in support of a caveat and to determine what is and what is not credible evidence, it invades the province of the jury. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

Action to declare trust invalid not a "formal proceeding" so as to entitle the trust beneficiaries to a jury trial under this section. Ayres v. King, 665 P.2d 594 (Colo. 1983).

Applied in In re Malone v. Colo. Nat'l Bank, 658 P.2d 284 (Colo. App. 1982).

15-10-307. Registrar - powers.

The acts and orders which this code specifies as performable by the registrar may be performed either by a judge of the court or by a person, including the clerk, designated by the court by a written order filed and recorded in the office of the clerk of the court.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-307.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

15-10-308. Appeals.

Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments, and power of the appellate court, is governed by the Colorado appellate rules.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-308.

ANNOTATION

Law reviews. For article, "Appealing Orders in Probate Cases: The Finality Question", see 50 Colo. Law. 22 (Feb. 2021).

No guide as to which probate court orders appealable. The Colorado probate code furnishes no guidance as to the type of probate court orders which may be deemed final for purposes of appeal. In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

C.R.C.P. 54(b) governs the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511

(Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Those probate court orders which are final and appealable must be determined on a case-by-case basis. The test for finality is whether the order disposes of and is conclusive of the controverted claim for which the proceeding was brought. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

A party may not obtain a final appealable judgment by filing a new petition under a new case number, where determination of the new petition is inextricably linked to the main probate proceeding and there is no preclusive effect of the probate court's order that dismissed the new petition. In re Estate of Scott, 151 P.3d 642 (Colo. App. 2006).

An order which completely determines the issues of the trustee's indebtedness to and compensation from the estate is a final judgment on those issues. Retainer of jurisdiction by the probate court to later modify the trustee's rate of compensation does not change the order into an interlocutory order. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

Probate court's order appointing special administrator is final and appealable. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

Where probate court's order of partial summary judgment adjudicated fewer than all of the parties' claims, it was not a final judgment, and party could not appeal the order without C.R.C.P. 54(b) certification. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

15-10-309. (Reserved)

15-10-310. Oath or affirmation on filed document.

(1) Except as otherwise specifically provided in this code or by rule, every document filed with the court under this code, including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

(2) The court shall have jurisdiction over any person, resident or nonresident, who files any document with the court under this code and over any person, resident or nonresident, who executes any such document and who knows or has reason to know that the document will be filed with the court under this code in any proceeding for relief from fraud relating to such a document that may be initiated against such person. Service of process shall be as provided in the Colorado rules of civil procedure.

Source: L. 73: R&RE, p. 1546, § 1. **C.R.S. 1963:** § 153-1-310. **L. 77:** Entire section amended, p. 831, § 6, effective July 10.

Cross references: For service of process, see Rule 4, C.R.C.P.

PART 4

NOTICE, PARTIES, AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

15-10-401. Notice - method and time of giving.

(1) If notice of a hearing on any petition is required, and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing on any petition to be given to any interested person or to the interested person's attorney of record or the interested person's designee. Notice shall be given:

(a) By mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered, or ordinary first-class mail addressed to the person being notified at the post-office address given in any demand for notice, or at the person's office or place of residence, if known; or

(b) By delivering a copy thereof to the person being notified personally at least fourteen days before the time set for the hearing; or

(c) If the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing once a week for three consecutive weeks, a copy thereof in a newspaper having general circulation published in the county where the hearing is to be held, the last publication of which is to be at least fourteen days before the time set for the hearing. In case there is no newspaper of general circulation published in the county of appointment, said publication shall be made in such a newspaper in an adjoining county. A motion for court permission to publish the notice of any hearing shall not be required unless otherwise directed by the court.

(2) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(3) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding. If notice is given by publication, at the time the party who issued the notice by publication files proof of publication, that party shall also file an affidavit verified by the oath of

such party or by someone on his or her behalf stating the facts that warranted the use of publication for service of the notice of the hearing and stating the efforts, if any, that have been made to obtain personal service or service by mail. The affidavit shall also state the address, or last-known address, of each person served by publication or shall state that the person's address or identity is unknown and cannot be ascertained with reasonable diligence.

(4) "Publication once a week for three consecutive weeks" means publication once during each week of three consecutive calendar weeks with at least twelve days elapsing between the first and last publications.

Source: L. 73: R&RE, p. 1547, § 1. **C.R.S. 1963:** § 153-1-401. **L. 75:** (4) amended, p. 589, § 10, effective July 1. **L. 77:** (1)(a) amended, p. 831, § 7, effective July 1. **L. 2002:** Entire section amended, p. 651, § 4, effective July 1. **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 836, § 40, effective July 1.

ANNOTATION

Law reviews. For article, "Some Footnotes to the 1945 Statutes", see 22 Dicta 130 (1945). For article, "In Defense of H.B. 109 — Re Serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Inadequacy of Notice Provision for Obtaining Treasurers' Deeds", see 25 Dicta 144 (1948). For article, "One Year Review of Wills, Estates, and Trusts", see 37 Dicta 76 (1960). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985). For article, "Published Notice Held Ineffective as to Known Creditors", see 17 Colo. Law. 1320 (1988). For article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (Feb. 2007). For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

The service of process or notice in probate matters is governed by this section. Michels v. Clemens, 140 Colo. 82, 342 P.2d 693 (1959) (decided under repealed § 151-1-11, C.R.S. 1963).

Constitutionally required notice. Notice by publication in estate proceedings is constitutionally insufficient and inconsistent with Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950), and must be supplemented by personal service or mailing to interested persons whose names and addresses are known, or by reasonable diligence can be ascertained. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

Nothing in this section indicates that the form of notice is a jurisdictional requirement; thus, actual notice may be

substituted. In Interest of Black, 2018 COA 7, 422 P.3d 592.

Waiver of notice limited by fairness. To construe waiver of further notice of the admission to probate hearing of a will to include waiver of notice of the subsequent dismissal and intestacy proceedings would be fundamentally unfair. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

Potential devisee is entitled to notice of hearing during which court will determine validity of will. If, at time of hearing, the court had yet to determine the validity of the will, the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

Applied in Craig v. Rider, 651 P.2d 397 (Colo. 1982).

15-10-402. Notice - waiver.

A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

Source: L. 73: R&RE, p. 1547, § 1. **C.R.S. 1963:** § 153-1-402.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

15-10-403. Pleadings - when parties bound by others - notice.

(1) In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the provisions of this section are applicable.

(2) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(3) Persons are bound by orders binding others in the following cases:

(a) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(b) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate.

(c) If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child, and where there is such representation orders binding the parent bind the minor child.

(d) An unborn, unascertained, minor, or incapacitated person who is not otherwise represented is bound by an order to the extent his or her interest is adequately represented by another party having a substantially identical interest in the proceeding.

(4) Notice is required as follows:

(a) Notice as prescribed by section 15-10-401 shall be given to each interested person or to one who can bind an interested person as described in subsection (3) of this section. Notice may be given both to a person and to another who may bind him.

(b) Notice is given to unborn, unascertained, minor, or incapacitated persons who are not represented under subsection (3) of this section by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn, unascertained, minor, or incapacitated persons.

(5) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, protected, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that a need for such representation appears. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

Source: L. 73: R&RE, p. 1547, § 1. **C.R.S. 1963:** § 153-1-403. **L. 2000:** (3)(d) and (4)(b) amended, p. 1172, § 2, effective May 26. **L. 2009:** (5) amended, (HB 09-1241), ch. 169, p. 761, § 16, effective April 22.

ANNOTATION

Law reviews. For article, "Trust Termination and Modification", see 15 Colo. Law. 389 (1986). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

PART 5

FIDUCIARY OVERSIGHT, REMOVAL, SANCTIONS, AND CONTEMPT

Law reviews: For article, "The Dangers of Relying on Trust Language", see 45 Colo. Law. 55 (Mar. 2016).

15-10-501. Court powers - definitions - application.

(1) **Court powers.** A court, incident to a court proceeding, possesses and may employ all of the powers and authority expressed in the provisions of this part 5 to maintain the degree of supervision necessary to ensure the timely and proper administration of estates by fiduciaries over whom the court has obtained jurisdiction. Nothing in this part 5 shall be interpreted to limit a court's powers under Colorado law. The powers of a court as described in this part 5 do not confer jurisdiction over the fiduciaries of nonsupervised trusts, private trusts, agencies created by powers of attorney, and custodial accounts created under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., except as provided in paragraph (c) of subsection (2) of this section.

(2) **Definitions.** As used in this part 5, unless the context otherwise requires:

(a) "Court" means a district court of Colorado and the probate court of the city and county of Denver.

(b) "Estate" means the estate of a decedent; a guardianship; a protective proceeding; a trust, including an implied trust; an agency created by a power of attorney; or a custodial account created under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.

(c) "Jurisdiction" means, and is restricted to, the personal jurisdiction obtained by a court over a fiduciary as a result of the filing of a proceeding concerning the estate. The filing of a trust registration statement, by itself, shall not constitute a proceeding for the purposes of this part 5.

(3) **Application.** The provisions of this part 5 apply to any fiduciary over whom a court has obtained jurisdiction, including but not limited to a personal representative, special administrator,

guardian, conservator, special conservator, trustee, trust director, agent under a power of attorney, and custodian, including a custodian of assets or accounts created under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11.

Source: L. 2008: Entire part added, p. 477, § 1, effective July 1. **L. 2019:** (3) amended, (SB 19-105), ch. 51, p. 175, § 10, effective August 2.

ANNOTATION

This section applies to conservatorship cases with a surcharge proceeding that arises from the supervisory power of the court over parties listed in subsection (3). In Interest of Becker, 2017 COA 114, 405 P.3d 499.

Applied in Sandstead-Corona v. Sandstead, 2018 CO 26, 415 P.3d 310.

15-10-502. Initial investigation.

(1) If, during the administration of an estate, a court desires to be informed about the current status of the administration, then the court, on its own motion or the request of an interested person, and without the need to state any reason for its actions, may:

(a) Send a letter to the fiduciary of the estate directing the fiduciary to file with the court one or more of the following documents on or before a date to be determined by the court:

(I) A status report;

(II) An inventory of the current assets of the estate;

(III) An up-to-date interim accounting; or

(IV) A financial report concerning the estate;

(b) Order the fiduciary to file or appear before the court to submit one or more of the documents described in paragraph (a) of this subsection (1) on or before a date to be determined by the court.

(2) When a court has directed a fiduciary to file or appear before the court to submit one or more of the documents described in paragraph (a) of this subsection (1), the fiduciary may request that the documents be placed under security pursuant to rule 20 of the Colorado rules of probate procedure.

Source: L. 2008: Entire part added, p. 478, § 1, effective July 1.

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.

(2) **Nonemergency situations - court action after notice and hearing.** Upon petition by a person who appears to have an interest in an estate, or upon the court's own motion, and after a hearing for which notice to the fiduciary has been provided pursuant to section 15-10-505, a court may order any one or more of the following:

(a) Supervised administration of a decedent's estate, as described in part 5 of article 12 of this title. The degree and extent of the supervision shall be endorsed upon the fiduciary's letters, if any.

(b) A temporary restraint on the fiduciary's performance of specified acts of administration, disbursement, or distribution; a temporary restraint on the fiduciary's exercise of any powers or discharge of any duties of the office of the fiduciary; or any other order to secure proper performance of the fiduciary's duty if it appears to the court that, in the absence of such an order, the fiduciary may take some action that would unreasonably jeopardize the interest of the petitioner or of some other interested person. The court may make persons with whom the fiduciary may transact business parties to any order issued pursuant to this paragraph (b). The restraint shall be endorsed upon the fiduciary's letters, if any.

(c) Additional restrictions on the powers of the fiduciary. The restrictions shall be endorsed upon the fiduciary's letters, if any.

(d) The suspension of the fiduciary if the court determines that the fiduciary has violated his, her, or its fiduciary duties. If a court orders the suspension of a fiduciary pursuant to this paragraph (d), the court shall direct that the suspension be endorsed upon the fiduciary's letters, if any.

(e) The appointment of a temporary or permanent successor fiduciary;

(f) A review of the fiduciary's conduct. If a court orders a review of the fiduciary's conduct, the court shall specify the scope and duration of the review in the court's order.

(g) A surcharge or sanction of the fiduciary pursuant to section 15-10-504;

(h) The removal of the fiduciary; or

(i) Such further relief as the court deems appropriate to protect the ward or protected person or the assets of the estate.

(3) **Removal of a fiduciary - procedures.** A court may remove a fiduciary for cause at any time, and the following provisions apply:

(a) If a court orders the removal of a fiduciary, the court shall direct by order the disposition of the assets remaining in the name of, or under the control of, the fiduciary being removed.

(b) If a court orders the removal of a fiduciary, the court shall direct that the fiduciary's letters, if any, be revoked and that such revocation be endorsed upon the fiduciary's letters, if any.

(c) Cause for removal of a fiduciary exists when:

(I) Removal would be in the best interests of the estate;

(II) It is shown that the fiduciary or the person seeking the fiduciary's appointment intentionally misrepresented material facts in the proceedings leading to the fiduciary's appointment; or

(III) The fiduciary has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

(4) **Petition for removal - temporary restraints on fiduciary powers.** After a fiduciary receives notice of the filing of a petition for his, her, or its removal, the fiduciary shall not act except to account, to correct maladministration, or to preserve the estate.

Source: L. 2008: Entire part added, p. 478, § 1, effective July 1. **L. 2016:** (1), (2)(e), (2)(f), (2)(g), and (2)(h) amended and (3) and (4) added, (SB 16-131), ch. 286, p. 1163, § 1, effective August 10. **L. 2020:** (1) amended, (SB 20-129), ch. 270, p. 1318, § 5, effective September 1.

ANNOTATION

A court must hold a hearing before ruling on a petition filed by an interested person to remove or modify the authority of a guardian in a nonemergency situation. In Interest of Howard, 2020 COA 32, 487 P.3d 1218.

Trustee was not afforded the due process necessary to remove him as a trustee when the court did not set a hearing after it suspended him as a trustee and neither the court nor protected person provided him with notice that the court would consider suspending him as a trustee. Black v. Black, 2020 COA 64M, 482 P.3d 460.

Conservator's due process rights were not violated when the fiduciary received actual notice that the court would address request to remove him as a trustee. Protected person sent conservator notice indicating that the hearing would cover the court's continuing jurisdiction over the conservatorship; the existence of an emergency situation; the injunction against the conservator; and the protected person's ongoing efforts to remove conservator as a trustee. Black v. Black, 2020 COA 64M, 482 P.3d 460.

15-10-504. Surcharge - contempt - sanctions against fiduciaries.

(1) **Notice.** Except as provided in subsection (3) of this section, notice to a fiduciary concerning any matters governed by the provisions of this section shall be provided pursuant to section 15-10-505.

(2) **Surcharge.**

(a) If a court, after a hearing, determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, after applying the standards of care applicable to each fiduciary in a proceeding, the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries, or interested persons. Such damages may include compensatory damages, interest, and attorney fees and costs. When allocating any such damages among fiduciaries, the court shall consider the standards of care applicable to the fiduciaries in the proceeding.

(b) In awarding attorney fees and costs pursuant to this section, a court may consider the provisions of part 6 of this article 10 and shall consider the standards of care applicable to the fiduciaries in the proceeding.

(3) **Contempt proceedings against fiduciary.** Nothing in this part 5 shall be interpreted to limit or restrict a court's authority to proceed against a fiduciary for direct contempt as provided

in rule 107 of the Colorado rules of civil procedure. In addition, if a fiduciary fails to comply with an order of a court issued pursuant to this part 5, the court may proceed against the fiduciary for indirect contempt as provided in rule 107 of the Colorado rules of civil procedure. A court may initiate indirect contempt proceedings on its own motion or upon the filing of a motion supported by affidavit as described in rule 107 of the Colorado rules of civil procedure.

(4) **Sanctions.** If a court determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, the court, after a hearing, may order such other sanctions as the court deems appropriate, but the court shall take into account the standards of care applicable to each fiduciary in the proceeding.

(5) **Remedies.** If remedies are sought against a directed trustee for complying with the direction of a trust director under the "Colorado Uniform Directed Trust Act", part 8 of article 16 of this title 15, or comparable arrangement created under the terms of a trust, the court shall take into account the standards of care applicable to each fiduciary in the proceeding when apportioning damages, fees, costs, or fault among the fiduciaries.

Source: L. 2008: Entire part added, p. 480, § 1, effective July 1. **L. 2011:** (2)(b) amended, (SB 11-083), ch. 101, p. 302, § 2, effective August 10. **L. 2019:** (2) and (4) amended and (5) added, (SB 19-105), ch. 51, p. 175, § 11, effective August 2.

ANNOTATION

Subsection (2)(a) endorses the view that compensatory damages ought to be recoverable by third parties harmed by breaches of fiduciary duties owed to others. In Matter of Taylor Trust, 2016 COA 100, 381 P.3d 428.

The surcharge proceeding created from the plain language of subsection (2)(a) is distinct from a tort proceeding. In Interest of Becker, 2017 COA 114, 405 P.3d 499.

Applied in Sandstead-Corona v. Sandstead, 2018 CO 26, 415 P.3d 310.

15-10-505. Notice to fiduciary - current address on file.

(1) In all actions undertaken pursuant to this part 5, the following provisions shall govern notice to fiduciaries:

(a) **In emergency situations.** If it appears to a court that an emergency exists because there is 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 take appropriate action and issue an order with or without prior notice to a fiduciary as the court determines appropriate based upon the

nature of the emergency. If a fiduciary of an estate is not present when an emergency order is entered concerning the administration of the estate, the court shall attempt to notify the fiduciary of the court's action and mail a copy of the court's order to the fiduciary at the fiduciary's last address of record on file with the court. Notice of the court's order shall also be served, pursuant to section 15-10-401, upon all interested persons or as the court directs. Notice of all hearings set under section 15-10-503 (1) shall be given pursuant to section 15-10-401.

(b) **In nonemergency situations.** In nonemergency situations, notice to a fiduciary shall be governed by section 15-10-401.

(c) **Contempt.** For a hearing to determine possible contempt of a fiduciary, the court shall provide notice to the fiduciary as required by rule 107 of the Colorado rules of civil procedure.

(2) **Fiduciary's responsibility to keep current address in court file.** Every fiduciary appointed by a court is required to keep his, her, or its current address and telephone number on file with the court. The fiduciary shall promptly notify the court of any change in the fiduciary's address or telephone number.

Source: L. 2008: Entire part added, p. 481, § 1, effective July 1.

PART 6

COMPENSATION AND COST RECOVERY

15-10-601. Definitions.

As used in this part 6, unless the context otherwise requires:

(1) "Estate" means the property of the decedent, trust, or other person whose affairs are subject to this code or any code included as part of this title 15 as the estate is originally constituted and as the estate exists from time to time during administration. "Estate" includes custodial property as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11; custodial trust property as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title 15; and the property of a principal that is subject to a power of attorney.

(2) "Fiduciary" means:

(a) A personal representative, guardian, conservator, trust director, or trustee;

(b) A custodian as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.;

(c) A custodial trustee as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title;

(d) An agent as defined in sections 15-10-201 (1), 15-14-602 (3), and 15-14-702 (1); and

(e) A public administrator as described in section 15-12-619.

(3) (a) "Governing instrument" means a will or a trust or a donative, appointive, or nominative instrument of any other type, including but not limited to:

(I) An instrument that creates a custodial transfer as described in the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.;

(II) A custodial trust as described in the "Colorado Uniform Custodial Trust Act", article 1.5 of this title;

(III) A medical durable power of attorney as described in section 15-14-506;

(IV) An agency instrument as defined in section 15-14-602 (2);

(V) A power of attorney as defined in section 15-14-702 (7);

(VI) A court order appointing a guardian as described in parts 2 and 3 of article 14 of this title; and

(VII) A court order appointing a conservator as described in part 4 of article 14 of this title.

(b) "Governing instrument" does not include a deed; an insurance or annuity policy; a multiple-party account; a security registered in beneficiary form; a pension; a profit-sharing, retirement, or similar benefit plan; or an individual retirement account.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 295, § 1, effective August 10. **L. 2018:** (1) amended, (SB 18-180), ch. 169, p. 1193, § 9, effective January 1, 2019. **L. 2019:** (2)(a) amended, (SB 19-105), ch. 51, p. 176, § 12, effective August 2.

15-10-602. Recovery of reasonable compensation and costs.

(1) A fiduciary and his or her lawyer are entitled to reasonable compensation for services rendered on behalf of an estate.

(2) A lawyer hired by a respondent, ward, or protected person is entitled to reasonable compensation and costs incurred for the legal representation the lawyer provides for the respondent, ward, or protected person.

(3) A third party who performs services at the request of a court is entitled to reasonable compensation.

(4) A person's entitlement to compensation or costs shall not limit or remove a court's inherent authority, discretion, and responsibility to determine the reasonableness of compensation and costs when appropriate.

(5) Except as limited or otherwise restricted by a court order, compensation and costs that may be recovered pursuant to this section may be paid directly or reimbursed without a court order. After a fiduciary receives notice of proceedings for his, her, or its removal, the fiduciary shall not pay compensation or attorney fees and costs from the estate without an order of the court. A court shall order a person who receives excessive compensation or payment for inappropriate costs to make appropriate refunds.

(6) Except as provided in sections 15-10-605 (2), (3), and (4); 15-14-318 (4); and 15-14-431 (5), if any fiduciary or person with priority for appointment as personal representative, conservator, guardian, agent, custodian, or trustee defends or prosecutes a proceeding in good faith, whether successful or not, the fiduciary or person is entitled to receive from the estate reimbursement for reasonable costs and disbursements, including but not limited to reasonable attorney fees.

(7) (a) Except as otherwise provided in part 5 of this article or in this part 6, a nonfiduciary or his or her lawyer is not entitled to receive compensation from an estate.

(b) If a lawyer or another person not appointed by the court provides services that result in an order beneficial to the estate, respondent, ward, or protected person, the lawyer or other person not appointed by the court may receive costs and reasonable compensation from the estate as provided below:

(I) The lawyer or other person shall file a request for compensation for services or costs alleged to have resulted in the order within thirty-five days after the entry of the order or within a greater or lesser time as the court may direct. Any objection thereto must be filed within twenty-one days after the filing of the request for compensation or costs. Any reply to the objection must be filed within seven days after the filing of the objection.

(II) After a request for compensation or costs or an objection to such a request, if any, has been filed, the court shall determine, without a hearing, the benefit, if any, that the estate received from the services provided.

(III) If the court determines that a compensable benefit resulted from the services, then the person requesting compensation or costs shall submit to the court only those fees or costs purportedly incurred in providing the beneficial services. If no objection to those fees and costs is filed, the court shall determine the amount of compensation or costs to be awarded for the benefit, without a hearing.

(IV) An interested person disputing the reasonableness of the amount of compensation or costs requested for the beneficial services may file an objection. If an objection is filed, the proceedings to resolve the dispute shall be governed by section 15-10-604.

(c) In determining a reasonable amount of compensation or costs, the court may take into account, in addition to the factors set forth in section 15-10-603 (3):

(I) The value of a benefit to the estate, respondent, ward, or protected person;

(II) The number of parties involved in addressing the issue;

(III) The efforts made by the lawyer or person not appointed by the court to reduce and minimize issues; and

(IV) Any actions by the lawyer or person not appointed by the court that unnecessarily expanded issues or delayed or hindered the efficient administration of the estate.

(d) For the purposes of this subsection (7), services rendered by a lawyer or a person not appointed by a court that confer a benefit to an estate, respondent, ward, or protected person are those significant, demonstrable, and generally noncumulative services that assist the court in resolving material issues in the administration of an estate. By way of example and not limitation, such benefits may result in significantly increasing or preventing a significant decrease in the size of the estate, preventing or exposing maladministration or a material breach of fiduciary duty, or clarifying and upholding a decedent's, settlor's, principal's, respondent's, ward's, or protected person's intent with respect to a material issue in dispute.

(8) A fiduciary who is a member of a law firm may use the services of the law firm and charge for the reasonable value of the services of the members and staff of the firm that assist the fiduciary in performing his or her duties.

(9) Every application or petition for appointment of a fiduciary filed under this code, including without limitation those required under sections 15-12-301, 15-12-402, 15-12-614, 15-12-621, 15-12-622, 15-14-202, 15-14-204, 15-14-304, and 15-14-403, shall include a statement by the applicant or petitioner disclosing the basis upon which any compensation is to be charged to the estate by the fiduciary and his or her or its counsel or shall state that the basis has not yet been determined. The disclosure statement shall specifically describe, as is applicable, the hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated. This disclosure obligation shall be continuing in nature so as to require supplemental disclosures if material changes to the basis for charging fees take place.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 296, § 1, effective August 10. **L. 2012:** (7)(b)(I) amended, (SB 12-175), ch. 208, p. 837, § 41, effective July 1. **L. 2016:** (5), (6), and (7)(b)(I) amended, (SB 16-131), ch. 286, p. 1166, § 5, effective August 10.

15-10-603. Factors in determining the reasonableness of compensation and costs.

(1) A court may review and determine:

(a) The reasonableness of the compensation of any fiduciary, lawyer, or other person who:

(I) Is employed on behalf of an estate, fiduciary, respondent, ward, or protected person;

(II) Is appointed by the court; or

(III) Provides beneficial services to an estate, respondent, ward, or protected person; and

(b) The appropriateness of any cost sought to be paid by or recovered from an estate.

(2) In considering the reasonableness of the compensation, there shall be no presumption that any method of charging a fee for services rendered to an estate, fiduciary, principal, respondent, ward, or protected person is per se unreasonable. Regardless of the method used for charging a fee, in determining appropriate compensation, the court shall apply the standard of reasonableness in light of all relevant facts and circumstances.

(3) The court shall consider all of the factors described in this subsection (3) in determining the reasonableness of any compensation or cost. The court may determine the weight to be given to each factor and to any other factor the court considers relevant in reaching its decision:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service properly;

(b) The likelihood, if apparent to the fiduciary, that the acceptance of the particular employment will preclude the person employed from other employment;

(c) (I) The compensation customarily charged in the community for similar services with due consideration and allowance for the complexity or uniqueness of any administrative or litigated issues, the need for and local availability of specialized knowledge or expertise, and the need for and advisability of retaining outside fiduciaries or lawyers to avoid potential conflicts of interest;

(II) As used in this subsection (3), unless the context otherwise requires, "community" means the general geographical area in which the estate is being administered or in which the respondent, ward, or protected person resides.

(d) The nature and size of the estate, the liquidity or illiquidity of the estate, and the results and benefits obtained during the administration of the estate;

(e) Whether and to what extent any litigation has taken place and the results of such litigation;

(f) The life expectancy and needs of the respondent, ward, protected person, devisee, beneficiary, or principal;

(g) The time limitations imposed on or by the fiduciary or by the circumstances of the administration of the estate;

(h) The adequacy of any detailed billing statements upon which the compensation is based;

(i) Whether the fiduciary has charged variable rates that reflect comparable payment standards in the community for like services;

(j) The expertise, special skills, reputation, and ability of the person performing the services and, in the case of a fiduciary, whether and to what extent the fiduciary has had any prior experience in administering estates similar to those for which compensation is sought;

(k) The terms of a governing instrument;

(l) The various courses of action available to a fiduciary or an individual seeking compensation for a particular service or alleged benefit and whether the course of action taken was reasonable and appropriate under the circumstances existing at the time the service was performed; and

(m) The various courses of action available to a fiduciary or an individual seeking compensation for a particular service or alleged benefit and the cost-effectiveness of the action taken under the circumstances existing at the time the service was performed.

(4) If a governing instrument provides that a fiduciary is entitled to receive compensation in accordance with a published fee schedule in effect at the time the services are performed, fees charged in accordance with the published fee schedule shall be presumed to be reasonable. The absence of such a provision in a governing instrument shall not preclude the fiduciary from receiving compensation in accordance with a published fee schedule in effect at the time the services are performed.

(5) Nothing in this section shall be interpreted to prohibit members or employees of a professional fiduciary's organization or law firm, including partners, associates, paralegals, law clerks, trust officers, caregivers, and social workers, from collaborating on the same service so long as the collaboration is reasonable and the total compensation charged for the service in the aggregate is reasonable under the circumstances.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 298, § 1, effective August 10. **L. 2013:** (3)(j) amended, (SB 13-077), ch. 190, p. 767, § 2, effective August 7.

15-10-604. Fee disputes - process and procedure.

(1) A dispute over the reasonableness of a request for compensation or costs authorized by this part 6 shall be resolved in accordance with the factors set forth in section 15-10-603 (3) and the process and procedure set forth in this section.

(2) For purposes of this section, a fee dispute shall be deemed to have arisen when an objection to compensation or costs has been filed in a proceeding.

(3) After the objection to compensation or costs has been filed, the person requesting compensation or costs shall have thirty-five days, or a greater or lesser time as the court may direct, to make available to the objector for inspection and copying all documentation that the person deems necessary to establish the reasonableness of the compensation and costs in consideration of the factors set forth in section 15-10-603 (3) and to certify to the court that such documentation was made available to the objector on a certain date. The objector shall then have fourteen days, or a greater or lesser time as the court may direct, to file specific written objections to such compensation and costs based on the factors set forth in section 15-10-603 (3). The fourteen days shall commence on the date that the person makes the documentation available to the objector or upon the filing of the person's certification, whichever is later. The court may permit further discovery on the compensation and cost issues raised by the pleadings only upon good cause shown.

(4) Subject to the court's inherent authority to order alternative dispute resolution methods, the court shall determine, after notice and hearing, the amount of compensation and costs it considers to be reasonable and shall issue its findings of fact and conclusions of law referencing the factors set forth in section 15-10-603 (3) and any other factors it deems relevant to its decision.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 300, § 1, effective August 10. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 837, § 42, effective July 1.

ANNOTATION

Subsection (4) requires a court to hold a hearing before making a compensation determination regardless of whether a party requested a hearing. The order issued after the hearing must include all the necessary findings of fact and conclusions of law concerning the factors in § 15-10-603 (3)(a) or any other factor the court deems appropriate under the circumstances. In re Estate of Gonzalez, 2024 COA 63, 555 P.3d 1068.

15-10-605. Compensation and costs - assessment - limitations.

(1) If the court determines that any proceedings pursuant to this code or any pleadings filed in such proceedings were brought, defended, or filed in bad faith, the court may assess the fees and the costs, including reasonable attorney fees, incurred by the fiduciary and other affected parties in responding to the proceedings or pleadings, against an estate, party, person, or entity that brought or defended the proceedings or filed the pleadings in bad faith. Nothing in this section is intended to limit any other remedy, sanction, or surcharge provided by law.

(2) If any person entitled to compensation under this part 6 is required to defend the reasonableness of compensation or costs in a proceeding, the court may review the fees and costs incurred by the person in defending the compensation or costs, and the fees incurred in challenging the compensation and costs, and may assess the reasonable fees and costs incurred in the proceeding as the court deems equitable. The court may allocate fees or costs assessed pursuant to this subsection (2) in favor of or against the estate or any party, person, or entity involved in the proceeding as justice and equity may require.

(3) A person who is unsuccessful in defending the reasonableness of compensation or costs at a hearing shall not be entitled to recover the fees or costs of that defense as the court deems equitable.

(4) A fiduciary who is unsuccessful in defending the fiduciary's conduct in a proceeding pursuant to this code alleging breach of fiduciary duty shall not recover the fees or costs of that defense as the court deems equitable.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 301, § 1, effective August 10.

15-10-606. Applicability.

(1) This part 6 applies to:

(a) An estate existing before, on, or after August 10, 2011; and

(b) Proceedings to determine the reasonableness of compensation and costs commenced on or after August 10, 2011.

(2) This part 6 does not apply to proceedings to determine the reasonableness of compensation and costs commenced before August 10, 2011, unless the court determines that the application of this part 6 would not prejudice the rights of any party to the proceeding and the court directs otherwise.

Source: L. 2011: Entire part added, (SB 11-083), ch. 101, p. 302, § 1, effective August 10.

ARTICLE 11

Intestate Succession and Wills

PART 1
INTESTATE SUCCESSION

SUBPART 1
GENERAL RULES

15-11-101. Intestate estate.

15-11-102. Share of spouse.

15-11-102.5. Share of designated beneficiary.

15-11-103. Share of heirs other than surviving spouse and designated beneficiary - definitions.

15-11-104. Requirement of survival by one hundred twenty hours - individual gestation.

15-11-105. No taker.

15-11-106. Per capita at each generation.

15-11-107. Inheritance without regard to number of common ancestors in same generation.

15-11-108. After-born heirs - repeal. (Repealed)

15-11-109. Advancements.

15-11-110. Debts to decedent.

15-11-111. Alienage.

15-11-112. Dower and courtesy abolished.

15-11-113. Individual related to decedent through more than one line of relationship.

15-11-114. Parent barred from inheriting in certain circumstances.

SUBPART 2
PARENT-CHILD RELATIONSHIP

15-11-115. Definitions.

15-11-116. Effect of parent-child relationship.

15-11-117. No distinction based on marital status.

15-11-118. Adoptee and adoptee's adoptive parent or parents.

15-11-119. Adoptee and adoptee's genetic parents.

15-11-120. Child conceived by assisted reproduction other than child born to gestational carrier.

15-11-121. Child born to gestational carrier.

15-11-122. Equitable adoption.

PART 2
ELECTIVE-SHARE OF SURVIVING SPOUSE

15-11-201. Definitions.

15-11-202. Elective-share.

15-11-203. Composition of the marital-property portion of the augmented estate.

15-11-204. Decedent's net probate estate.

15-11-205. Decedent's nonprobate transfers to others.

15-11-206. Decedent's nonprobate transfers to the surviving spouse.

15-11-207. Surviving spouse's property and nonprobate transfers to others.

15-11-208. Exclusions, valuations, and overlapping application.

15-11-209. Sources from which elective-share payable.

15-11-210. Personal liability of recipients.

15-11-211. Proceeding for elective-share - time limit.

15-11-212. Right of election personal to surviving spouse - incapacitated surviving spouse.

15-11-213. Waiver of right to elect and of other rights.

15-11-214. Protection of payers and other third parties.

PART 3
SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

15-11-301. Entitlement of spouse; premarital will.

15-11-302. Omitted children.

PART 4
EXEMPT PROPERTY AND ALLOWANCES

15-11-401. Applicable law.

15-11-402. Homestead.

15-11-403. Exempt property.

15-11-404. Family allowance.

15-11-405. Source, determination, and documentation.

PART 5
WILLS AND WILL CONTRACTS AND CUSTODY AND DEPOSIT OF WILLS

15-11-501. Who may make a will.

15-11-502. Execution - witnessed or notarized wills - holographic wills.

15-11-503. Writings intended as wills.

15-11-504. Self-proved will.

15-11-505. Who may witness.

15-11-506. Choice of law as to execution.

15-11-507. Revocation by writing or by act.

15-11-508. Revocation by change of circumstances.

15-11-509. Revival of revoked will.

15-11-510. Incorporation by reference.

15-11-511. Testamentary additions to trusts.

15-11-512. Events of independent significance.

15-11-513. Separate writing or memorandum identifying devise of certain types of tangible personal property.

15-11-514. Contracts concerning succession.

15-11-515. Deposit of will with court in testator's lifetime.

15-11-516. Duty of custodian of will; lodging of will after death; transfer of lodged will; liability.

15-11-517. Penalty clause for contest.

PART 6
RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

15-11-601. Scope.

15-11-602. Will may pass all property and after-acquired property.

15-11-603. Antilapse; deceased devisee; class gifts.

15-11-604. Failure of testamentary provision.

15-11-605. Increase in securities; accessions.

15-11-606. Nonademption of specified devises - unpaid proceeds of sale, condemnation, or insurance - sale by conservator or agent.

15-11-607. Nonexoneration.

15-11-608. Exercise of power of appointment - repeal. (Repealed)

15-11-609. Ademption by satisfaction.

PART 7
RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

15-11-701. Scope.

15-11-702. Requirement of survival by one hundred twenty hours.

15-11-703. Choice of law as to meaning and effect of governing instrument.

15-11-704. Power of appointment; meaning of specific reference requirement - repeal. (Repealed)

15-11-705. Class gifts construed to accord with intestate succession.

15-11-706. Nonprobate transfers - deceased beneficiary.

15-11-707. Survivorship with respect to future interests under terms of trust; substitute takers.

15-11-708. Class gifts to "descendants", "issue", or "heirs of the body"; form of distribution if none specified.

15-11-709. By representation; per capita at each generation; per stirpes.

15-11-710. Worthier-title doctrine abolished.

15-11-711. Interests in "heirs" and like.

15-11-712. Simultaneous death; disposition of property.

15-11-713. Construction of wills and trusts containing formula marital clauses.

PART 8
GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

15-11-801. Disclaimer of property interests. (Repealed)

15-11-802. Effect of divorce, annulment, and decree of separation.

15-11-803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.

15-11-804. Revocation of probate and nonprobate transfers by divorce - no revocation by other changes of circumstances.

15-11-805. Ownership of personal property between spouses.

15-11-806. Reformation to correct mistakes.

15-11-807. Modification to achieve transferor's tax objectives.

PART 9
HONORARY TRUSTS; TRUSTS FOR PETS

15-11-901. Honorary trusts; trusts for pets.

PART 10
INTERNATIONAL WILLS

15-11-1001. Short title.

15-11-1002. Definitions.

15-11-1003. International wills - validity.

15-11-1004. International wills - requirements.

15-11-1005. International wills - other points of form.

15-11-1006. Certificate that requirements for an international will have been met.

15-11-1007. Effect of certificate.

15-11-1008. Revocation.

15-11-1009. Source and construction of this part.

15-11-1010. Persons authorized to act in relation to international will - eligibility - recognition by authorizing agency.

15-11-1011. Filing of international will - certificate and deposit of will.

PART 11
COLORADO STATUTORY RULE AGAINST PERPETUITIES ACT

15-11-1101. Short title.

15-11-1102. Statutory rule against perpetuities - applicability - repeal. (Repealed)

15-11-1102.5. Statutory rule against perpetuities.

15-11-1103. When nonvested property interest or power of appointment created.

15-11-1104. Reformation - repeal. (Repealed)

15-11-1104.5. Reformation.

15-11-1105. Exclusions from statutory rule against perpetuities.

15-11-1106. Prospective application.

15-11-1106.5. Retroactive application of certain provisions - notice of election.

15-11-1107. Uniformity of application and construction.

PART 12
UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

15-11-1201. Short title.

15-11-1202. Definitions.

15-11-1203. Scope.

15-11-1204. Part supplemented by other law.

15-11-1205. Power to disclaim - general requirements - when irrevocable.

15-11-1206. Disclaimer of interest in property.

15-11-1207. Disclaimer of rights of survivorship in jointly held property.

15-11-1208. Disclaimer of interest by trustee.

15-11-1209. Disclaimer of power of appointment or other power not held in fiduciary capacity.

15-11-1210. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.

15-11-1211. Disclaimer of power held in fiduciary capacity.

15-11-1212. Delivery or filing.

15-11-1213. When disclaimer barred or limited.

15-11-1214. Tax-qualified disclaimer.

15-11-1215. Filing or registering of disclaimer.

15-11-1216. Application to existing relationships.

15-11-1217. Uniformity of application and construction.

15-11-1218. Severability.

PART 13
COLORADO UNIFORM ELECTRONIC WILLS ACT

15-11-1301. Short title.

15-11-1302. Definitions.

15-11-1303. Law applicable to electronic wills - principles of equity.

15-11-1304. Choice of law regarding execution.

15-11-1305. Execution of electronic will.

15-11-1306. Harmless error.

15-11-1307. Revocation.

15-11-1308. Electronic will attested and made self-proving at time of execution.

15-11-1309. Certification of paper copy.

15-11-1310. Uniformity of application and construction.

15-11-1311. Application of part.

PREFATORY NOTE

The Uniform Probate Code was originally promulgated in 1969.

1990 Revisions. In 1990, Article II underwent significant revision. The 1990 revisions were the culmination of a systematic study of the Code conducted by the Joint Editorial Board for the Uniform Probate Code (now named the Joint Editorial Board for Uniform Trust and Estate Acts) and a special Drafting Committee to Revise Article II. The 1990 revisions concentrated on Article II, which is the article that covers the substantive law of intestate succession; spouse's elective share; omitted spouse and children; probate exemptions and allowances; execution and revocation of wills; will contracts; rules of construction; disclaimers; and the effect of homicide and divorce on succession rights; and the rule against perpetuities and honorary trusts.

Themes of the 1990 Revisions. In the twenty or so years between the original promulgation of the Code and 1990, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and (4) the acceptance of a partnership or marital-sharing theory of marriage.

The 1990 revisions responded to these themes. The multiple-marriage society and the partnership/marital-sharing theory were reflected in the revised elective-share provisions of Part 2. As the General Comment to Part 2 explained, the revised elective share granted the surviving spouse a

right of election that implemented the partnership/marital-sharing theory of marriage.

The children-of-previous-marriages and stepchildren phenomena were reflected most prominently in the revised rules on the spouse's share in intestacy.

The proliferation of will substitutes and other inter-vivos transfers was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency was reflected in the restructuring of the rules of construction. Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments. See Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 (2003). Part 6 of the pre-1990 Code contained several rules of construction that applied only to wills. Some of those rules of construction appropriately applied only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and ademption of a devise by satisfaction exemplify such rules of construction. Other rules of construction, however, properly apply to all governing instruments, not just wills; the provision relating to inclusion of adopted persons in class gift language exemplifies this type of rule of construction. The 1990 revisions divided pre-1990 Part 6 into two parts — Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction were also added.

In addition to separating the rules of construction into two parts, and adding new rules of construction, the revocation-upon-divorce provision (section 2-804) was substantially revised so that divorce not only revokes testamentary devises, but also nonprobate beneficiary designations, in favor of the former spouse. Another feature of the 1990 revisions was a new section (section 2-503) that brought the execution formalities for wills more into line with those for nonprobate transfers.

2008 Revisions. In 2008, another round of revisions was adopted. The principal features of the 2008 revisions are summarized as follows:

Inflation Adjustments. Between 1990 and 2008, the Consumer Price Index rose by somewhat more than 50 percent. The 2008 revisions raised the dollar amounts by 50 percent in Article II Sections 2-102, 2-102A, 2-201, 2-402, 2-403, and 2-405, and added a new cost of living adjustment section — Section 1-109.

Intestacy. Part 1 on intestacy was divided into two subparts: Subpart 1 on general rules of intestacy and subpart 2 on parent-child relationships. For details, see the General Comment to Part 1.

Execution of Wills. Section 2-502 was amended to allow notarized wills as an alternative to wills that are attested by two witnesses. That amendment necessitated minor revisions to Section 2-504 on self-proved wills and to Section 3-406 on the effect of notarized wills in contested cases.

Class Gifts. Section 2-705 on class gifts was revised in a variety of ways, as

explained in the revised Comment to that section.

Reformation and Modification. New Sections 2-805 and 2-806 brought the reformation and modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

Historical Note. This Prefatory Note was revised in 2008.

PART 1

INTESTATE SUCCESSION

GENERAL COMMENT

The pre-1990 Code's basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.

1990 Revisions. The principal features of the 1990 revisions were:

1. So-called negative wills were authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.

2. A surviving spouse was granted the whole of the intestate estate, if the decedent left no surviving descendants and no parents or if the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the decedent. The surviving spouse receives the first $200,000 plus three-fourths of the balance if the decedent left no surviving descendants but a surviving parent. The surviving spouse receives the first $150,000 plus one-half of the balance of the intestate estate, if the decedent's surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first $100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse. (To adjust for inflation, these dollar figures and other dollar figures in Article II were increased by fifty percent in 2008.)

3. A system of representation called per capita at each generation was adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

4. Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents was then made, the question was under continuing review and it was

anticipated that further revisions would be forthcoming in the future.

5. The section on advancements was revised so that it applies to partially intestate estates as well as to wholly intestate estates.

2008 Revisions. As noted in Item 4 above, it was recognized in 1990 that further revisions on matters of status were needed. The 2008 revisions fulfilled that need. Specifically, the 2008 revisions contained the following principal features:

Part 1 Divided into Two Subparts. Part 1 was divided into two subparts: Subpart 1 on general rules of intestacy and Subpart 2 on parent-child relationships.

Subpart 1: General Rules of Intestacy. Subpart 1 contains Sections 2-101 (unchanged), 2-102 (dollar figures adjusted for inflation), 2-103 (restyled and amended to grant intestacy rights to certain stepchildren as a last resort before the intestate estate escheats to the state), 2-104 (amended to clarify the requirement of survival by 120 hours as it applies to heirs who are born before the intestate's death and those who are in gestation at the intestate's death), 2-105 (unchanged), 2-106 (unchanged), 2-107 (unchanged), 2-108 (deleted and matter dealing with heirs in gestation at the intestate's death relocated to 2-104), 2-109 (unchanged), 2-110 (unchanged), 2-111 (unchanged), 2-112 (unchanged), 2-113 (unchanged), and 2-114 (deleted and replaced with a new section addressing situations in which a parent is barred from inheriting).

Subpart 2: Parent-Child Relationships. New Subpart 2 contains several new or substantially revised sections. New Section 2-115 contains definitions of terms that are used in subpart 2. New Section 2-116 is an umbrella section declaring that, except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-117 continues the rule that, except as otherwise provided in Sections 2-120 and 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status. Regarding adopted children, Section 2-118 continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-119 addresses the extent to which an adoption severs the parent-child relationship with the adoptee's genetic parents. New Sections 2-120 and 2-121 turn to various parent-child relationships resulting from assisted reproductive technologies in forming families. As one researcher reported: "Roughly 10 to 15 percent of all adults experience some form of infertility." Debora L. Spar, The Baby Business 31 (2006). Infertility, coupled with the desire of unmarried individuals to have children, have led to increased questions concerning children of assisted reproduction. Sections 2-120 and 2-121 address inheritance rights in cases of children of assisted reproduction, whether the birth mother is the one who parents the child or is a gestational carrier who bears the child for an intended parent or intended parents. As two authors have noted:

"Parents, whether they are in a married or unmarried union with another, whether they are a single parent, whether they procreate by sexual intercourse or by assisted reproductive technology, are entitled to the respect the law gives to family choice." Charles P. Kindregan, Jr. & Maureen McBrien, Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science 6-7 (2006). The final section, new Section 2-122, provides that nothing contained in Subpart 2 should be construed as affecting application of the judicial doctrine of equitable adoption.

Historical Note. This General Comment was revised in 2008.

SUBPART 1

GENERAL RULES

Cross references: For clarification of the term "surviving spouse", see § 15-11-802.

15-11-101. Intestate estate.

(1) Any part of a decedent's estate not effectively disposed of by will or otherwise passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.

(2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share.

Source: L. 94: Entire part R&RE, p. 976, § 3, effective July 1, 1995. **L. 2022:** (2) amended, (SB 22-092), ch. 60, p. 271, § 1, effective August 10.

Editor's note: This section is similar to former § 15-11-101 as it existed prior to 1995.

ANNOTATION

Law reviews. For article on administration of estates, see 10 Rocky Mt. L. Rev. 288 (1938). For note, "Non-Testamentary Transfers Effective at Death", see 24 Rocky Mt. L. Rev. 365 (1952). For article, "Administration of Intestate Estates",

see 29 Rocky Mt. L. Rev. 571 (1957). For article, "An Ecclesiastical Role for the Lawyer in a Secular Society", see 44 Den. L.J. 275 (1967). For article, "Probate and Non-probate Distribution Issues in the Case of A Murder/Suicide", see 17 Colo. Law. 1061 (1988).

Annotator's note. Since § 15-11-101 is similar to repealed laws antecedent to CSA, C. 176, § 1, relevant cases construing those provisions have been included in the annotations to this section.

Escheats and forfeitures are not favored by law, and a doubt as to whether property is subject to escheat is to be resolved against the state. Danks v. Herrmann, 94 Colo. 546, 31 P.2d 912 (1934).

Section inoperative where will disposes of the estate. When the existence of a will disposing of the estate is once conceded, no heir can establish any rights by inheritance on simple proof of descent. Under such circumstances the statutes of intestate succession do not become operative. Hall v. Cowles' Estate, 15 Colo. 343, 25 P. 705 (1890).

Where a will clearly limits participation in the estate to the devisees and unambiguously excludes other family members from participation, the omitted heirs cannot participate by intestacy in the distribution of the trust even if no devisee survives the termination of the trust. In re Estate of Walter, 97 P.3d 188 (Colo. App. 2003).

The right to inherit is statutory and the statute which governs is embraced in §§ 15-11-101 to 15-11-113 inclusive. Wilson v. Wilson, 95 Colo. 159, 33 P.2d 969 (1934).

The policy of our law is to have property descend to the heirs in the manner provided in this article. Danks v. Herrmann, 94 Colo. 546, 31 P.2d 912 (1934).

Remainder not devised or bequeathed shall be distributed as estate of an intestate. Provisions of a will reviewed, and held to dispose of a life estate in the property only, being silent with respect to the remainder, which was not devised or bequeathed, is to be distributed in the same manner as the estate of an intestate. Blatt v. Blatt, 79 Colo. 57, 243 P. 1099 (1926).

A testator is presumed to know the laws of the state in which he lives concerning the descent and distribution of intestate property. Blatt v. Blatt, 79 Colo. 57, 243 P. 1099 (1926).

The law of an intestate's actual domicile at the time of his death governs the intestate succession of his property, when it is all situate in that state. Blatt v. Blatt, 79 Colo. 57, 243 P. 1099 (1926).

Heirs cannot complain of steps taken by intestate to deprive them of inheritance. During the lifetime of the intestate, his property was subject to his control and disposition. If it was his pleasure to take such steps as would increase the inheritance of this minor grandchild, he could do so, either by adoption or testamentary provision, and his heirs, whom he could have deprived of any inheritance at all, cannot complain. Hughes v. Jones, 89 Colo. 455, 3 P.2d 1074 (1931); In re

Wilson's Estate, 95 Colo. 159, 33 P.2d 969 (1934).

15-11-102. Share of spouse.

The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied. The intestate share of a decedent's surviving spouse is:

(1) The entire intestate estate if:

(a) No descendant or parent of the decedent survives the decedent; or

(b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) The first three hundred thousand dollars, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) The first two hundred twenty-five thousand dollars, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(5) (Deleted by amendment, L. 2009, (HB 09-1287), ch. 310, p. 1671, § 3, effective July 1, 2010.)

(6) The dollar amounts stated in this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112.

Source: L. 94: Entire part R&RE, p. 976, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 352, § 1, effective July 1. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1671, § 3, effective July 1, 2010.

Editor's note: This section is similar to former § 15-11-102 as it existed prior to 1995.

Cross references: For the descent and distribution of property of aliens, see § 15-11-111. For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Purpose and Scope of 1990 Revisions. This section was revised in 1990 to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first $300,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first $225,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds $225,000.

If the decedent has other descendants, the surviving spouse receives $150,000 plus one-half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of $64,500.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants to one-half of the balance of the estate in excess of $50,000 (for example, $25,000 in a $100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in excess of $50,000.

2008 Cost-of-Living Adjustments. As revised in 1990, the dollar amount in paragraph (2) was $200,000, in paragraph (3) was $150,000, and in paragraph (4) was $100,000. To adjust for inflation, these amounts were increased in 2008 to $300,000, $225,000, and $150,000 respectively. The dollar amounts in these

paragraphs are subject to annual cost-of-living adjustments under Section 1-109.

References. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children. See C. Shammas, M. Salmon & M. Bahlin, Inheritance in America from Colonial Times to the Present 184-85 (1987); M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1970); Browder, "Recent Patterns of Testate Succession in the United States and England", 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, "The Method, Process and Frequency of Wealth Transmission at Death", 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, "Inheritance of Community Property in Texas — A Need for Reform", 47 Texas L. Rev. 359, 364-66 (1969); Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction", 50 Wash. L. Rev. 277, 283, 311-17 (1975). See also Fellows, Simon & Rau, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States", 1978 Am. B. F. Research J. 319, 355-68; Note, "A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes", 63 Iowa L. Rev. 1041, 1091-92 (1978).

Cross Reference. See Section 2-802 for the definition of spouse, which controls for purposes of intestate succession.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "The Validity in Colorado of Marriages by Proxy", see 20 Dicta 283 (1943). For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "Marital Property Interests", see 27 Rocky Mt. L. Rev. 180 (1955). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (June 2022). For article, "Omitted Spouse: Avoiding Questions of Intent After Death", see 52 Colo. Law. 46 (Jan.-Feb. 2023).

Annotator's note. Since § 15-11-102 is similar to repealed laws antecedent to CSA, C. 176, § 1, relevant cases construing those provisions have been included in the annotations to this section.

Widow is an heir. Under this section the widow takes by descent. The widow, therefore, is an heir. Anderson v. Groesbeck, 26 Colo. 3, 55 P. 1086 (1899); Binkley v.

Switzer, 75 Colo. 1, 223 P. 757 (1923); Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927).

Widow of testator's son who dies intestate takes whole estate. Daniels & Fisher Realty Co. v. Kenyon, 261 F. 407 (D. Colo. 1919).

Widow does not waive her right to take as an heir by tendering will for probate. A widow by tendering the will of her deceased husband for probate does not vouch for its validity, nor waive her right to take under the statute, nor her right to claim all the property of the estate undisposed of by the will, as the sole heir. Blatt v. Blatt, 79 Colo. 57, 243 P. 1099 (1926).

Widow cannot be deprived of her rights without her written consent. Under this and § 15-11-501, a husband cannot devise or bequeath away from his wife more than one-half of his property without her written consent executed after his death, and where he agrees to will to another a portion of his estate, the latter takes subject to this statutory provision. Such an agreement cannot deprive the widow of her lawful rights. Ward v. Ward, 94 Colo. 275, 30 P.2d 853 (1934).

If there are no children or descendants of any child, the wife becomes the sole heir at law. Anderson v. Groesbeck, 26 Colo. 3, 55 P. 1086 (1899).

Widow entitled to relief from fraud of husband. When the transaction by which the husband disposed of his property, real and personal, was colorable merely, and resorted to by him for the purpose of defeating his wife's right as heir, but with intent to reserve the benefit of the property to himself for life, it is a fraud upon the rights of his wife, from which she may be relieved after his death. Smith v. Smith, 22 Colo. 480, 46 P. 128 (1896).

Applied in In re Arrington, 618 P.2d 744 (Colo. App. 1980); In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

15-11-102.5. Share of designated beneficiary.

(1) If the decedent is survived by a person with the right to inherit real or personal property from the decedent in a designated beneficiary agreement executed pursuant to article 22 of this title, the intestate share of the decedent's designated beneficiary is:

(a) The entire estate if no descendent of the decedent survives the decedent; or

(b) One half of the intestate estate if one or more descendants of the decedent survive the decedent.

Source: L. 2010: Entire section added, (SB 10-199), ch. 374, p. 1748, § 4, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

15-11-103. Share of heirs other than surviving spouse and designated beneficiary - definitions.

(1) **Definitions.** In this section:

(a) "Deceased parent", "deceased grandparent", or "deceased spouse" means a parent, grandparent, or spouse who either predeceased the decedent or is deemed under this article 11 to have predeceased the decedent.

(b) "Surviving spouse", "surviving descendant", "surviving parent", or "surviving grandparent" means a spouse, descendant, parent, or grandparent who neither predeceased the decedent nor is deemed under this article 11 to have predeceased the decedent.

(2) **Heirs other than surviving spouse and designated beneficiary.** Any part of the intestate estate not passing to the decedent's surviving spouse under section 15-11-102, or to the decedent's surviving designated beneficiary under section 15-11-102.5, or the entire estate if there is no surviving spouse and no surviving designated beneficiary with the right to inherit real or personal property from the decedent through intestate succession, passes to the decedent's descendants, parents, or other heirs as provided in subsections (3) to (9) of this section.

(3) **Surviving descendants.** If a decedent is survived by one or more descendants, any part of the intestate estate not passing to the surviving spouse or surviving designated beneficiary passes per capita at each generation to the decedent's surviving descendants.

(4) **Surviving parent.** If a decedent is not survived by a descendant but is survived by one or more parents, any part of the intestate estate not passing to the surviving spouse or surviving designated beneficiary is distributed as follows:

(a) The intestate estate or part is divided into as many equal shares as there are:

(I) Surviving parents; and

(II) Deceased parents with one or more surviving descendants, if any, as determined under subsection (5) of this section.

(b) One share passes to each surviving parent.

(c) The balance of the intestate estate or part, if any, passes per capita at each generation to the surviving descendants of the decedent's deceased parents, as determined under subsection (5) of this section.

(5) **When parent survives - computation of shares of surviving descendants of deceased parent.** The following rules apply under subsection (4) of this section to determine whether a deceased parent of the decedent is treated as having a surviving descendant:

(a) If all the surviving descendants of one or more deceased parents also are descendants of one or more surviving parents and none of those surviving parents has any other surviving descendant, those descendants are deemed to have predeceased the decedent.

(b) If two or more deceased parents have the same surviving descendants and none of those deceased parents has any other surviving descendant, those deceased parents are deemed to be one deceased parent with surviving descendants.

(6) **Surviving descendant of deceased parent.** If a decedent is not survived by a descendant or parent but is survived by one or more descendants of a parent, the intestate estate passes per capita at each generation to the surviving descendants of the decedent's deceased parents.

(7) **Surviving grandparent.** If a decedent is not survived by a descendant, parent, or descendant of a parent but is survived by one or more grandparents, the intestate estate is distributed as follows:

(a) The intestate estate is divided into as many equal shares as there are:

(I) Surviving grandparents; and

(II) Deceased grandparents with one or more surviving descendants, if any, as determined under subsection (8) of this section.

(b) One share passes to each surviving grandparent.

(c) The balance of the intestate estate, if any, passes per capita at each generation to the surviving descendants of the decedent's deceased grandparents, as determined under subsection (8) of this section.

(8) **When grandparent survives - computation of shares of surviving descendants of deceased grandparent.** The following rules apply under subsection (7) of this section to determine whether a deceased grandparent of the decedent is treated as having a surviving descendant:

(a) If all the surviving descendants of one or more deceased grandparents also are descendants of one or more surviving grandparents and none of those surviving grandparents has any other surviving descendant, those descendants are deemed to have predeceased the decedent.

(b) If two or more deceased grandparents have the same surviving descendants and none of those deceased grandparents has any other surviving descendant, those deceased grandparents are deemed to be one deceased grandparent with surviving descendants.

(9) **Surviving descendant of deceased grandparent.** If a decedent is not survived by a descendant, parent, descendant of a parent, or grandparent but is survived by one or more descendants of a grandparent, the intestate estate passes per capita at each generation to the surviving descendants of the decedent's deceased grandparents.

Source: L. 94: Entire part R&RE, p. 977, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 353, § 2, effective July 1. **L. 2009:** Entire section amended, (HB 09-1260), ch. 107, p. 443, § 7, effective July 1; entire section amended, (HB 09-1287), ch. 310, p. 1672, § 4, effective July 1, 2010. **L. 2010:** IP, (1), and (7) amended, (SB 10-199), ch. 374, p. 1748, § 5, effective July 1. **L. 2022:** Entire section R&RE (SB 22-092), ch. 60, p. 271, § 2, effective August 10.

Editor's note: (1) This section is similar to former § 15-11-103 as it existed prior to 1995.

(2) Amendments to this section by House Bill 09-1260 and House Bill 09-1287 were harmonized, effective July 1, 2010; except that the second sentence of subsection (7) and the provisions of subsection (8), as amended by House Bill 09-1260, were superseded by House Bill 09-1287, effective July 1, 2010.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section provides for inheritance by descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

1990 Revisions. The 1990 revisions were stylistic and clarifying, not substantive. The pre-1990 version of this section contained the phrase "if they are all of the same degree of kinship to the decedent they take equally (etc.)." That language was removed. It was unnecessary and confusing because the system of representation in Section 2-106 gives equal shares if the decedent's descendants are all of the same degree of kinship to the decedent.

The word "descendants" replaced the word "issue" in this section and throughout the 1990 revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

2008 Revisions. In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b) grants inheritance rights to descendants of the intestate's deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse refers to an individual to whom the intestate was married at the individual's death.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (June 2022).

Annotator's note. Since § 15-11-103 is similar to repealed § 152-2-1, CRS 53, CSA, C. 176, § 1, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Natural inheritable interests follow the blood, and the law of adoption does not change the law of descent. In re Warr's Estate, 111 Colo. 85, 137 P.2d 408 (1943).

In the absence of nearer kin, the estate vests in such grandparents and uncles and aunts collectively, and not in the grandparents as a class, if there are any; and, if there be none, then in the uncles and aunts as a separate class. Thatcher v. Thatcher, 17 Colo. 404, 29 P. 800 (1892).

Applied in State v. Rogers, 140 Colo. 205, 344 P.2d 1073 (1959); Witherspoon v. Sanford, 44 Colo. App. 538, 616 P.2d 186 (1980); In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

15-11-104. Requirement of survival by one hundred twenty hours - individual gestation.

(1) For purposes of intestate succession and exempt property, and except as otherwise provided in paragraph (b) of this subsection (1), the following rules apply:

(a) An individual born before a decedent's death who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period.

(b) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

(2) This section is not to be applied if its application would result in a taking of intestate estate by the state under section 15-11-105.

Source: L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1673, § 5, effective July 1, 2010.

Editor's note: This section is similar to former § 15-11-104 as it existed prior to 1995.

Cross references: For requirement that a devisee survive a testator by one hundred twenty hours, see § 15-11-702. For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach & Waggoner, The UPC's New Survivorship and Antilapse Provisions, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. Subsection (b) prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives for any period.

In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship does not disqualify the spouse's intestate share for the federal estate-tax marital deduction. See Int.Rev.Code § 2056(b)(3).

2008 Revisions. In 2008, this section was reorganized, revised, and combined with former Section 2-108. What was contained in former Section 2-104 now appears as subsections (a)(1) and (b). What was contained in former Section 2-108 now appears as subsection (a)(2). Subsections (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent's death and an individual who was in gestation at the decedent's death. With respect to an individual who was born before the decedent's death, it must be established by clear and convincing evidence that the individual survived the decedent by 120 hours. For a comparable provision applicable to wills and other governing instruments, see Section 2-702. With respect to an individual who was in gestation at the decedent's death, it must be established by clear and convincing evidence that the individual lived for 120 hours after birth.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988).

Applied in In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

15-11-105. No taker.

If there is no taker under the provisions of this article, the intestate estate passes to the state of Colorado, subject to the provisions of section 15-12-914.

Source: L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-105 as it existed prior to 1995.

ANNOTATION

Where the language in a will limits participation in the estate to named devisees and all the devisees predecease the termination of a trust, the corpus of the trust escheats to the state, regardless of whether omitted heirs exist. In re Estate of Walter, 97 P.3d 188 (Colo. App. 2003).

15-11-106. Per capita at each generation.

(1) **Definitions.** In this section:

(a) "Deceased descendant", "deceased parent", "deceased grandparent", or "deceased spouse" means a descendant, parent, grandparent, or spouse who either predeceased the decedent or is deemed under this subpart 1 to have predeceased the decedent.

(b) "Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed under this subpart 1 to have predeceased the decedent.

(2) **Decedent's descendants.** If, under section 15-11-103 (3), all or part of a decedent's intestate estate passes "per capita at each generation" to the decedent's surviving descendants, the estate or part is divided into as many equal shares as there are (i) surviving descendants in the

generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

(3) **Descendants of parent when parent survives.** If a decedent is survived by one or more parents and, under section 15-11-103 (4) and (5), the balance of the decedent's intestate estate or part passes per capita at each generation to the surviving descendants of one or more of the decedent's deceased parents, the balance passes to those descendants as if they were the decedent's surviving descendants under subsection (2) of this section.

(4) **Descendants of parent when no parent survives.** If a decedent is not survived by a parent and, under section 15-11-103 (6), the decedent's intestate estate passes per capita at each generation to the surviving descendants of one or more of the decedent's deceased parents, the intestate estate passes to those descendants as if they were the decedent's surviving descendants under subsection (2) of this section.

(5) **Descendants of grandparent when grandparent survives.** If a decedent is survived by one or more grandparents and, under section 15-11-103 (7) and (8), the balance of the decedent's intestate estate passes per capita at each generation to the surviving descendants of one or more of the decedent's deceased grandparents, the balance passes to those descendants as if they were the decedent's surviving descendants under subsection (2) of this section.

(6) **Descendants of grandparent when no grandparent survives.** If a decedent is not survived by a grandparent and, under section 15-11-103 (9), the decedent's intestate estate passes per capita at each generation to the surviving descendants of one or more of the decedent's deceased grandparents, the intestate estate passes to those descendants as if they were the decedent's surviving descendants under subsection (2) of this section.

Source: L. 94: Entire part R&RE, p. 978, § 3, effective July 1, 1995. **L. 95:** (2) and (3) amended, p. 354, § 3, effective July 1. **L. 2009:** (2) and (3) amended, (HB 09-1260), ch. 107, p. 444, § 8, effective July 1. **L. 2022:** Entire section amended, (SB 22-092), ch. 60, p. 273, § 3, effective August 10.

Editor's note: This section is similar to former § 15-11-106 as it existed prior to 1995.

15-11-107. Inheritance without regard to number of common ancestors in same generation.

An heir inherits without regard to how many common ancestors in the same generation the heir shares with the decedent.

Source: L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995. **L. 2022:** Entire section R&RE, (SB 22-092), ch. 60, p. 275, § 4, effective August 10.

Editor's note: This section is similar to former § 15-11-107 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Children of the Half Blood", see 18 Dicta 158 (1941).

15-11-108. After-born heirs - repeal. (Repealed)

Source: L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995. **L. 2009:** (2) added by revision, (HB 09-1287), ch. 310, pp. 1674, 1688, §§ 6, 17.

Editor's note: (1) This section was similar to former § 15-11-108 as it existed prior to 1995.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2010. (See L. 2009, pp. 1674, 1688.)

15-11-109. Advancements.

(1) If an individual dies intestate as to all or a portion of the estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(2) For the purposes of subsection (1) of this section, property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(3) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

(4) An heir who has received from the intestate estate more than his or her share shall in no case be required to refund, except as otherwise provided by section 15-11-203.

Source: L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995. **L. 2022:** Entire section amended, (SB 22-092), ch. 60, p. 275, § 5, effective August 10.

Editor's note: This section is similar to former § 15-11-110 as it existed prior to 1995.

ANNOTATION

Annotator's note. Since § 15-11-109 is similar to repealed CSA, C. 176, § 5, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Definition of advancement. "In its strict technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent, during his lifetime, to his child, with the intention on the part of the donor that such gift shall represent a part of the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate." 1 R.C.L., p. 653. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927); Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

Expenditures incurred in the discharge of the ordinary parental duties will not be considered advancements to the child. Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

Where the decedent retained control of, and dominion over, an account, including the absolute right to withdraw all or any part of the funds at any time, an advancement will not be created. Albers v. Young, 119 Colo. 37, 199 P.2d 890 (1948).

Presumption that substantial remittance is an advancement. In the absence of a contrary intent, the presumption arises that the remittance of a substantial amount to a child by his father is intended as an advancement to be taken into account upon the final distribution of the father's estate, if he dies intestate. This presumption is rebuttable as the intent is controlling. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927).

Such intent is determined as of the time each remittance is made. The intention of a parent in making remittances to a child, as to whether the same are to be considered gifts or advancements, is to be determined as of the very time each remittance is made. Page v. Elwell, 81 Colo. 73, 253 P. 1059 (1927).

15-11-110. Debts to decedent.

A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.

Source: L. 94: Entire part R&RE, p. 979, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-111 as it existed prior to 1995.

Cross references: For an offset against a successor's interest for a noncontingent indebtedness to an estate, see § 15-12-903.

15-11-111. Alienage.

No individual is disqualified to take as an heir, devisee, grantee, lessee, mortgagee, assignee, or other transferee because the individual or an individual through whom he or she claims is or has been an alien.

Source: L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-112 as it existed prior to 1995.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provision similar to this section.

This section is valid and does not violate § 27 of art. II, Colo. Const. McConville v. Howell, 17 F. 104 (8th Cir. 1883).

This section is illustrative of the fact that the policy towards aliens has been one of marked liberality. Patek v. Am. Smelting & Ref. Co., 154 F. 190 (8th Cir. 1907).

Under this section an alien is possessed of right and title indefeasible as against all the world, save the sovereign, and defeasible by the latter only by direct proceedings for that purpose. Billings v. Aspen Mining & Smelting Co., 51 F. 338 (8th Cir. 1892).

15-11-112. Dower and courtesy abolished.

The estates of dower and courtesy are abolished.

Source: L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-113 as it existed prior to 1995.

15-11-113. Individual related to decedent through more than one line of relationship.

An individual who is related to the decedent through more than one line of relationship is entitled to only a single share based upon the relationship that would entitle the individual to the largest share. The individual and the individual's descendants are deemed to have predeceased the decedent with respect to a line of relationship resulting in a smaller share.

Source: L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995. **L. 2022:** Entire section amended, (SB 22-092), ch. 60, p. 275, § 6, effective August 10.

Editor's note: This section is similar to former § 15-11-114 as it existed prior to 1995.

15-11-114. Parent barred from inheriting in certain circumstances.

(1) A parent is barred from inheriting from or through a child of the parent if:

(a) The parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(b) The child died before reaching eighteen years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have

been terminated under the laws of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

(2) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is deemed to have predeceased the child.

Source: L. 94: Entire part R&RE, p. 980, § 3, effective July 1, 1995. **L. 2009:** (2) amended, (HB 09-1260), ch. 107, p. 444, § 9, effective July 1; entire section amended, (HB 09-1287), ch. 310, p. 1674 § 7, effective July 1, 2010. **L. 2022:** (2) amended, (SB 22-092), ch. 60, p. 275, § 7, effective August 10.

Editor's note: This section is similar to former § 15-11-109 as it existed prior to 1995.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101. For legal effects of a final decree of adoption, see § 19-5-211. For the legal effect of a final order of relinquishment, see § 19-5-104.

COMMENT

2008 Revisions. In 2008, this section replaced former Section 2-114(c), which provided: "(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child."

Subsection (a)(1) recognizes that a parent whose parental rights have been terminated is no longer legally a parent.

Subsection (a)(2) addresses a situation in which a parent's parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

Statutes providing the grounds for termination of parental rights include: Ariz. Rev. Stat. Ann. § 8-533; Conn. Gen. Stat. § 45a-717; Del. Code Ann. tit. 13 § 1103; Fla. Stat. Ann. § 39.806; Iowa Code § 600A.8; Kan. Stat. Ann. § 38-2269; Mich. Comp. L. Ann. § 712A.19b; Minn. Stat. Ann. § 260C.301; Miss. Code Ann. § 93-15-103;

Mo. Rev. Stat. § 211.447; Tex. Fam. Code §§ 161.001 to .007.

ANNOTATION

Law reviews. For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

SUBPART 2

PARENT-CHILD RELATIONSHIP

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101; for other provisions on parent-child relationships, see the "Uniform Parentage Act", article 4 of title 19.

Law reviews. For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

15-11-115. Definitions.

In this subpart 2:

(1) "Adoptee" means an individual who is adopted.

(2) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.

(3) "Divorce" includes an annulment, dissolution of marriage, and declaration of invalidity of a marriage.

(4) "Functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.

(5) "Genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity under section 19-4-105, C.R.S., the term means only the man for whom that relationship is established.

(6) "Genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father.

(7) "Genetic parent" means a child's genetic father or genetic mother.

(8) "Incapacity" means the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

(9) "Relative" means a grandparent or a descendant of a grandparent.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1675, § 8, effective July 1, 2010.

COMMENT

Scope. This section sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

Definition of "Adoptee". The term "adoptee" is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

Definition of "Assisted Reproduction". The definition of "assisted reproduction" is copied from the Uniform Parentage Act § 102. Current methods of assisted reproduction include intrauterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

Definition of "Functioned as a Parent of the Child". The term "functioned as a parent of the child" is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter's Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

Custodial responsibility refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

Decisionmaking responsibility refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.

Caretaking functions are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing,

grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;

(b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

Parenting functions are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child. Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned

as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

Definition of "Genetic Father". The term "genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the Uniform Parentage Act (2000, as amended) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.

Definition of "Relative". The term "relative" does not include any relative no matter how remote but is limited to a grandparent or a descendant of a grandparent, as determined under this subpart 2.

15-11-116. Effect of parent-child relationship.

Except as otherwise provided in section 15-11-119, if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010.

Cross references: For other provisions on establishing parent-child relationships, see the "Uniform Parentage Act", article 4 of title 19.

COMMENT

Scope. This section provides that if a parent-child relationship exists or is established under any section in subpart 2, the consequence is that the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession by, from, or through the parent and the child. The exceptions in Section 2-119(b) through (e) refer to cases in which a parent-child relationship exists but only for the purpose of the right of an adoptee or a descendant of an adoptee to inherit from or through one or both genetic parents.

15-11-117. No distinction based on marital status.

Except as otherwise provided in section 15-11-114, 15-11-119, 15-11-120, or 15-11-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010.

Cross references: For another provision on marital status, see § 19-4-103.

COMMENT

Scope. This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee's Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier), and 2-121(Child Born to Gestational Carrier).

This section replaces former Section 2-114(a), which provided: "(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference]."

Defined Terms.*Genetic parent* is defined in Section 2-115 as the child's genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child's genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child's genetic mother.

15-11-118. Adoptee and adoptee's adoptive parent or parents.

(1) **Parent-child relationship between adoptee and adoptive parent or parents.** A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.

(2) **Individual in process of being adopted by married couple - stepchild in process of being adopted by stepparent.** For purposes of subsection (1) of this section:

(a) An individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and

(b) A child of a genetic parent who is in the process of being adopted by a genetic parent's spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by one hundred twenty hours.

(2.5) **Individual in process of being adopted by second parent.** For purposes of subsection (1) of this section, a child who is in the process of being adopted by a second adult in a second-parent adoption when the second adult dies is treated as adopted by the second adult if the child's parent survives the second adult by one hundred twenty hours.

(3) **Child of assisted reproduction or gestational child in process of being adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent under section 15-11-120 or between a gestational child and a parent under section 15-11-121, the child is in the process of being adopted by the parent's spouse or another individual when that spouse or individual dies, the child is treated as adopted by the deceased spouse or individual for the purpose of paragraph (b) of subsection (2) of this section.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010. **L. 2010:** (2.5) added and (3) amended, (SB 10-199), ch. 374, p. 1749, § 6, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101. For other provisions on assisted reproduction and paternity, see § 19-4-106. For legal effects of a final decree of adoption, see § 19-5-211. For the legal effect of a final order of relinquishment, see § 19-5-104.

COMMENT

2008 Revisions. In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered

that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (b)(2) and (c), which are explained below.

Data on Adoptions. Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children's Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.

For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19th- and 20th-century America, to open adoption and international adoption, see Debora L. Spar, The Baby Business ch. 6 (2006) and sources cited therein.

Defined Term.*Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents. Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee's adoptive parent or parents.

Subsection (b)(1): Individual in Process of Being Adopted by Married Couple. If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the spouse died, the individual is "in the process of being adopted" by the deceased spouse when the spouse died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent. If the stepparent who subsequently died had filed a legal proceeding to adopt the stepchild before the stepparent died, the stepchild is "in the process of being adopted" by the deceased stepparent when the stepparent died. However, the phrase "in the process of being adopted" is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted. Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a

gestational child, and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase "in the process of being adopted" carries the same meaning under subsection (c) as it does under subsection (b)(2).

15-11-119. Adoptee and adoptee's genetic parents.

(1) **Parent-child relationship between adoptee and genetic parents.** Except as otherwise provided in this section, a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents.

(2) **Stepchild adopted by stepparent.** A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(a) The genetic parent whose spouse adopted the individual; and

(b) The other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(2.5) **Child of a second-parent adoption.** A parent-child relationship exists between an individual who is adopted by a second parent and:

(a) A genetic parent who consented to a second-parent adoption; and

(b) Another genetic parent who is not a third-party donor, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(3) **Individual adopted by relative of genetic parent.** A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(4) **Individual adopted after death of both genetic parents.** A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

(5) **Child of assisted reproduction or gestational child who is subsequently adopted.** If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under section 15-11-120 or between a gestational child and a parent or parents under section 15-11-121, the child is adopted by another or others, the child's parent or parents

under section 15-11-120 or 15-11-121 are treated as the child's genetic parent or parents for the purpose of this section.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1676, § 8, effective July 1, 2010. **L. 2010:** (2.5)(a) and (2.5)(b) amended, (SB 10-199), ch. 374, p. 1749, § 7, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101. For other provisions on assisted reproduction and paternity, see § 19-4-106. For legal effects of a final decree of adoption, see § 19-5-211. For the legal effect of a final order of relinquishment, see § 19-5-104.

COMMENT

2008 Revisions. In 2008, this section and Section 2-118 replaced former Section 2-114(b), which provided: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent". The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (c), (d), and (e), which are explained below.

Defined Terms. Section 2-119 uses terms that are defined in Section 2-115.

Adoptee is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

Genetic parent is defined in Section 2-115 as the child's genetic father or genetic mother. *Genetic mother* is defined as the woman whose egg was fertilized by the sperm of a child's genetic father. *Genetic father* is defined as the man whose sperm fertilized the egg of a child's genetic mother.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptee's Genetic Parents. Subsection (a) states the general rule that a parent-child relationship does not exist between an adopted child and the child's genetic parents. This rule recognizes that an adoption severs the parent-child relationship between the adopted child and the child's genetic parents. The adoption gives the adopted child a replacement family, sometimes referred to in the case law as "a fresh start". For further elaboration of this theory, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5(2)(A) & cmts. d & e (1999). Subsection (a) also states, however, that there are exceptions to this general rule in subsections (b) through (d).

Subsection (b): Stepchild Adopted by Stepparent. Subsection (b) continues the so-called "stepparent exception" contained in the Code since its original promulgation in 1969. When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and his or her adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the child's genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.

Example 1—Post-Widowhood Remarriage. A and B were married and had two children, X and Y. A died, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B's children and under Section 2-118(a) as C's children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A's children for purposes of inheritance from and through A but not for purposes of inheritance from or through X or Y. Thus, if A's father, G, died intestate, survived by X and Y and by G's daughter (A's sister), S, G's heirs would be S, X, and Y. S would take half and X and Y would take one-fourth each.

Example 2—Post-Divorce Remarriage. A and B were married and had two children, X and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B's children and under Section 2-118(a) as C's children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A's children for purposes of inheritance from and through A. On the other hand, neither A nor any of A's relatives can inherit from or through X or Y.

Subsection (c): Individual Adopted by Relative of a Genetic Parent. Under subsection (c), a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the spouse or surviving spouse of such a relative, remains a child of both genetic parents.

Example 3. F and M, a married couple with a four-year old child, X, were badly injured in an automobile accident. F subsequently died. M, who was in a vegetative state and on life support, was unable to care for X. Thereafter, M's sister, A, and A's husband, B, adopted X. F's father, PGF, a widower, then died intestate. Under subsection (c), X is treated as PGF's grandchild (F's child).

Subsection (d): Individual Adopted After Death of Both Genetic Parents. Usually, a post-death adoption does not remove a child from contact with the genetic families. When someone with ties to the genetic family or families adopts a child after the deaths of the child's genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the child continues to be in a parent-child relationship with both genetic parents. Once a child has taken root in a family, an adoption after the death of both genetic parents is likely to be by someone chosen or approved of by the genetic family, such as a person named as guardian of the child in a deceased parent's will. In such a case, the child does not become estranged from the genetic family. Such an adoption does not "remove" the child from the families of both genetic parents. Such a child continues to be a child of both genetic parents, as well as a child of the adoptive parents.

Example 4. F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M's parents nor F's father (F's mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M's close friends, A and B, a married couple approximately of the same ages as F and M. F's father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF's grandchild (F's child). The result would be the same if F's or M's will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

Subsection (e): Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted. Subsection (e) puts a child of assisted reproduction and a gestational child on the same footing as a genetic child for purposes of this section. The results in Examples 1 through 4 would have been the same had the child in question been a child of assisted reproduction or a gestational child.

ANNOTATION

Application of subsection (3) is not unconstitutionally retrospective when decedent died after subsection (3) became effective. Because no child has a vested right in a parent's property before the parent's death, the adopted child could not have permanently lost any right to biological father's estate when she was adopted in 1991. In re Estate of Gallegos, 2021 COA 115, 499 P.3d 1058.

Subsection (3) prevails over the conflicting provisions in § 19-3-608 (1) because subsection (3) is both more specific and more recent. Subsection (3) is more specific because it applies only to children who have been adopted by certain relatives of their biological parents; § 19-3-608 (1) continues to apply to nonrelative adoptions. In re Estate of Gallegos, 2021 COA 115, 499 P.3d 1058.

15-11-120. Child conceived by assisted reproduction other than child born to gestational carrier.

(1) **Definitions.** In this section:

(a) "Birth mother" means a woman, other than a gestational carrier under section 15-11-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother.

(b) "Child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a gestational carrier under section 15-11-121.

(c) "Third-party donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(I) A husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(II) The birth mother of a child of assisted reproduction; or

(III) An individual who has been determined under subsection (5) or (6) of this section to have a parent-child relationship with a child of assisted reproduction.

(2) **Third-party donor.** A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(3) **Parent-child relationship with birth mother.** A parent-child relationship exists between a child of assisted reproduction and the child's birth mother.

(4) **Parent-child relationship with husband whose sperm were used during his lifetime by his wife for assisted reproduction.** Except as otherwise provided in subsections (9) and (10) of this section, a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(5) **Birth certificate - presumptive effect.** A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(6) **Parent-child relationship with another.** Except as otherwise provided in subsections (7), (9), and (10) of this section, and unless a parent-child relationship is established under subsection (4) or (5) of this section, a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(a) Before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or

(b) In the absence of a signed record under paragraph (a) of this subsection (6):

(I) Functioned as a parent of the child no later than two years after the child's birth;

(II) Intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(III) Intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(7) **Record signed more than two years after the birth of the child - effect.** For the purpose of paragraph (a) of subsection (6) of this section, neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached eighteen years of age.

(8) **Presumption - birth mother is married or surviving spouse.** For the purpose of paragraph (b) of subsection (6) of this section, the following rules apply:

(a) If the birth mother is married at the time of conception and no divorce proceeding is then pending, her spouse is presumed to satisfy the requirements of subparagraph (I) or (II) of paragraph (b) of subsection (6) of this section.

(b) If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, her deceased spouse is presumed to satisfy the requirements of subparagraph (II) or (III) of paragraph (b) of subsection (6) of this section.

(9) **Divorce before placement of eggs, sperm, or embryos.** If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

(10) **Withdrawal of consent before placement of eggs, sperm, or embryos.** If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or

embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (6) of this section.

(11) **When posthumously conceived child treated as in gestation.** If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the time of the individual's death for purposes of section 15-11-104 (1)(b) if the child is:

(a) In utero not later than thirty-six months after the individual's death; or

(b) Born not later than forty-five months after the individual's death.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1677, § 8, effective July 1, 2010. **L. 2010:** (8) amended, (SB 10-199), ch. 374, p. 1750, § 8, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101. For other provisions on assisted reproduction and paternity, see § 19-4-106.

COMMENT

Data on Children of Assisted Reproduction. The Center for Disease Control (CDC) of the U.S. Department of Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at http://www.cdc.gov/ART/ART2004. The data, however, is of limited use because the definition of ART used in the CDC Report excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the most common form of assisted reproductive procedures. The CDC estimates that in 2004 ART procedures (excluding intrauterine insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According to the Report: "The number of infants born who were conceived using ART increased steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996." 2004 CDC Report at 57. "The average age of women using ART services in 2004 was 36. The largest group of women using ART services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged 41-42, and 9% among women older than 42." 2004 CDC Report at 15. Updates of the 2004 CDC

Report are to be posted at http://www.cdc.gov/ART/ART2004.

AMA Ethics Policy on Posthumous Conception. The ethics policies of the American Medical Association concerning artificial insemination by a known donor state that "[i]f semen is frozen and the donor dies before it is used, the frozen semen should not be used or donated for purposes other than those originally intended by the donor. If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for intrauterine insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it." Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics: Current Opinions E-2.04 (Issued June 1993; updated December 2004), available at http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc= policyfiles/HnE/E-2.0 (last visited October 16, 2008).

Subsection (a): Definitions. Subsection (a) defines the following terms:

Birth mother is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.

Child of assisted reproduction is defined as a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

Third-party donor. The definition of third-party donor is based on the definition of "donor" in the Uniform Parentage Act § 102.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic father is defined in Section 2-115 as the man whose sperm fertilized the egg of a child's genetic mother.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child's genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

Subsection (b): Third-Party Donor. Subsection (b) is consistent with the Uniform Parentage Act § 702. Under subsection (b), a third-party donor does not have a parent-child relationship with a child

of assisted reproduction, despite the donor's genetic relationship with the child.

Subsection (c): Parent-Child Relationship With Birth Mother. Subsection (c) is in accord with the Uniform Parentage Act § 201 in providing that a parent-child relationship exists between a child of assisted reproduction and the child's birth mother. The child's birth mother, defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the child, made the decision to undergo the procedure with intent to become pregnant and give birth to the child. Therefore, in order for a parent-child relationship to exist between her and the child, no proof that she consented to the procedure with intent to be treated as the parent of the child is necessary.

Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime By His Wife for Assisted Reproduction. The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsection (d) provides that, except as otherwise provided in subsection (i), a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband's sperm were used during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

Subsection (e): Birth Certificate: Presumptive Effect. A birth certificate will name the child's birth mother as mother of the child. Under subsection (c), a parent-child relationship exists between a child of assisted reproduction and the child's birth mother. Note that the term "birth mother" is a defined term in subsection (a) as not including a gestational carrier as defined in Section 2-121.

Subsection (e) applies to the individual, if any, who is identified on the birth certificate as the child's other parent. Subsection (e) grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction. In the case of unmarried parents, federal law requires that states enact procedures under which "the name of the father shall be included on the record of birth," but only if the father and mother have signed a voluntary acknowledgment of paternity or a court of an administrative agency of competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. § 666(a)(5)(D). This federal statute is included as an appendix to the Uniform Parentage Act.

The federal statute applies only to unmarried opposite-sex parents. Section 2-120(e)'s presumption, however, could apply to a same-sex couple if state law permits a woman who is not the birth mother to be

listed on the child's birth certificate as the child's other parent. Even if state law does not permit that listing, the woman who is not the birth mother could be the child's parent by adoption of the child (see Section 2-118) or under subsection (f) as a result of her consent to assisted reproduction by the birth mother "with intent to be treated as the other parent of the child," or by satisfying the "function as a parent" test in subsection (f)(2).

Section 2-120 does not apply to same-sex couples that use a gestational carrier. For same-sex couples using a gestational carrier, the parent-child relationship can be established by adoption (see Section 2-118 and Section 2-121(b)), or it can be established under subsection 2-121(d) if the couple enters into a gestational agreement with the gestational carrier under which the couple agrees to be the parents of the child born to the gestational carrier. It is irrelevant whether either intended parent is a genetic parent of the child. See Section 2-121(a)(4).

Subsection (f): Parent-Child Relationship with Another. In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual's genetic material might or might not have been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child. Subsection (f)(1) provides that a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child's birth, that considering all the facts and circumstances evidences the individual's consent. Recognizing consent in a record not only signed before the child's birth but also at any time after the child's birth is consistent with the Uniform Parentage Act §§ 703 and 704.

As noted, the signed record need not explicitly express consent to the procedure with intent to be treated as the other parent of child, but only needs to evidence such consent considering all the facts and circumstances. An example of a signed record that would satisfy this requirement comes form In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, the New York Surrogate's Court held that a child of posthumous conception was included in a class gift in a case in which the deceased father had signed a form that stated: "In the event of my death I agree that my spouse shall have the sole right to make decisions regarding the disposition of my semen samples. I authorize repro lab to release my specimens to my legal spouse [naming her]."

Another form he signed stated: "I, [naming him], hereby certify that I am married or intimately involved with [naming her] and the cryopreserved specimens stored at repro lab will be used for future inseminations of my wife/intimate partner." Although these forms do not explicitly say that the decedent consented to the procedure with intent to be treated as the other parent of the child, they do evidence such consent in light of all of the facts and circumstances and would therefore satisfy subsection (f)(1).

Subsection (f)(2): Ideally an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child will have signed a record that satisfies subsection (f)(1). If not, subsection (f)(2) recognizes that actions speak as loud as words. Under subsection (f)(2), consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual functioned as a parent of the child no later than two years after the child's birth. Under subsection (f)(2)(B), the same result applies if the evidence establishes that the individual had that intent but death, incapacity, or other circumstances prevented the individual from carrying out that intent. Finally, under subsection (f)(2)(C), the same result applies if it can be established by clear and convincing evidence that the individual intended to be treated as a parent of a posthumously conceived child.

Subsection (g): Record Signed More than Two Years after the Birth of the Child: Effect. Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of [18].

Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse. Under subsection (h), if the birth mother is married and no divorce proceeding is pending, then in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B) or if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

Subsection (i): Divorce Before Placement of Eggs, Sperm, or Embryos. Subsection (i) is derived from the Uniform Parentage Act § 706(b).

Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos. Subsection (j) is derived from the Uniform Parentage Act § 706(a). Subsection (j) provides that if, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual,

unless the individual subsequently satisfies the requirements of subsection (f).

Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation. Subsection (k) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero no later than 36 months after the individual's death or (ii) born no later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.

The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.

ANNOTATION

Law reviews. For comment, "Burns v. Astrue: 'Born in Peculiar Circumstances,' Posthumously Conceived Children and the Adequacy of State Intestacy Laws", see 91 Denv. U.L. Rev. 715 (2014). For article, "Disposition of Pre-Embryos upon Dissolution of Marriage in Colorado", see 50 Colo. Law. 40 (Feb. 2021).

15-11-121. Child born to gestational carrier.

(1) In this section:

(a) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (5) of this section.

(b) "Gestational carrier" means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

(c) "Gestational child" means a child born to a gestational carrier under a gestational agreement.

(d) "Intended parent" means an individual who entered into a validated gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(2) **Court order adjudicating parentage - effect.** A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(3) **Gestational carrier.** A parent-child relationship between a gestational child and the child's gestational carrier does not exist unless the gestational carrier is:

(a) Designated as a parent of the child in a court order described in subsection (2) of this section; or

(b) The child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

(4) **Parent-child relationship with intended parent or parents.** In the absence of a court order under subsection (2) of this section, a parent-child relationship exists between a gestational child and an intended parent who:

(a) Functioned as a parent of the child no later than two years after the child's birth; or

(b) Died while the gestational carrier was pregnant if:

(I) There were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth;

(II) There were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or

(III) There was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

(5) **Gestational agreement after death or incapacity.** In the absence of a court order under subsection (2) of this section, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by:

(a) A record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or

(b) Other facts and circumstances establishing the individual's intent by clear and convincing evidence.

(6) **Presumption - gestational agreement after spouse's death or incapacity.** Except as otherwise provided in subsection (7) of this section, and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of paragraph (b) of subsection (5) of this section if:

(a) The individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(b) When the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(c) The individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

(7) **Subsection (6) presumption inapplicable.** The presumption under subsection (6) of this section does not apply if there is:

(a) A court order under subsection (2) of this section; or

(b) A signed record that satisfies paragraph (a) of subsection (5) of this section.

(8) **When posthumously conceived gestational child treated as in gestation.** If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the time of the individual's death for purposes of section 15-11-104 (1)(b) if the child is:

(a) In utero not later than thirty-six months after the individual's death; or

(b) Born not later than forty-five months after the individual's death.

(9) **No effect on other laws.** This section does not affect laws of this state other than this code regarding the enforceability or validity of a gestational agreement.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1679, § 8, effective July 1, 2010.

Cross references: For other provisions on assisted reproduction and paternity, see § 19-4-106.

COMMENT

Subsection (a): Definitions. Subsection (a) defines the following terms:

Gestational agreement. The definition of gestational agreement is based on the Comment to Article 8 of the Uniform Parentage Act, which states that the term "gestational carrier" "applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman who is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents." The Comment also points out that "The [practice in which the woman is both the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational carrier's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement."

Gestational carrier is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child's genetic mother.

Gestational child is defined as a child born to a gestational carrier under a gestational agreement.

Intended parent is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Child of assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child's genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual's physical or mental condition.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (b): Court Order Adjudicating Parentage: Effect. A court order issued under § 807 of the Uniform

Parentage Act (UPA) would qualify as a court order adjudicating parentage for purposes of subsection (b). UPA § 807 provides:

UPA § 807. Parentage under Validated Gestational Agreement. (a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate State agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Subsection (c): Gestational Carrier. Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child's gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child's birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

Subsection (e): Gestational Agreement After Death or Incapacity. Subsection (e)

only applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual's intent or by other facts and circumstances establishing the individual's intent by clear and convincing evidence.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse's Death or Incapacity. Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation. Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is either (i) in utero not later than 36 months after the individual's death or (ii) born not later than 45 months after the individual's death. Note also that Section 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months

tacked on to allow for a typical period of pregnancy.

15-11-122. Equitable adoption.

This subpart 2 does not affect the doctrine of equitable adoption.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1682, § 8, effective July 1, 2010.

COMMENT

On the doctrine of equitable adoption, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5, cmt. k & Reporter's Note No. 7 (1999).

PART 2

ELECTIVE-SHARE OF SURVIVING SPOUSE

Editor's note: This part 2 was numbered as article 2 of chapter 153, C.R.S. 1963. It was repealed and reenacted in 1973 and 1994 and was subsequently repealed and reenacted in 2014, resulting in the addition, relocation, or elimination of sections as well as subject matter. For amendments to this part 2 prior to 2014, consult the 2013 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume. Former C.R.S. section numbers prior to 2014 are shown in editor's notes following those sections that were relocated.

Cross references: For clarification of the term "surviving spouse", see § 15-11-802; for the "Uniform Premarital and Marital Agreements Act", see part 3 of article 2 of title 14.

Law reviews: For article, "The Surviving Spouse Elective Share and the Augmented Estate", see 17 Colo. Law. 1985 (1988); for article, "Working with the New Augmented Estate", see 24 Colo. Law. 2337 (1995); for article, "Substitutes for Marital Agreements in Elective Share Planning The Surviving Spouse Incentive Trust and Source Stripping", see 44 Colo. Law. 57 (Dec. 2015); for article, "Estate Planning Tools for Second Marriages", see 45 Colo. Law. 45 (Dec. 2016).

GENERAL COMMENT

The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under the community-property system and under the system promulgated in the Model Marital Property Act. In the common-law states, however, elective-share law has not caught up to the partnership theory of marriage.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other's wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

The Partnership Theory of Marriage

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, The Transformation of Family Law 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." Id. See also American Law Institute, Principles of Family Dissolution § 4.09 Comment c (2002).

No matter how the rationale is expressed, the community-property system, including that version of community law promulgated in the Model Marital Property Act, recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce." J. Gregory, The Law of Equitable Distribution ¶ 1.03, at p. 1-6 (1989).

The other situation in which spousal property rights figure prominently is disinheritance at death. The original (pre-1990) Uniform Probate Code, along with almost all other non-UPC common-law states, treats this as one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent's intent, the original Uniform Probate Code and almost all of the non-UPC common-law states recognize that the surviving spouse does have some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, hence in the UPC the forced share is termed the "elective" share.

Elective-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the original Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate—not the 50 percent share of the couple's combined assets that the partnership theory would imply.

Long-term Marriages. To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The original elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

Example 1—Long-term Marriage under Conventional Forced-share Law. Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

Throughout their long life together, the couple managed to accumulate assets worth $600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these $600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third of A's "estate."

Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets. If all the marital assets were titled in A's name, B's claim against A's estate would only be for $200,000—well below B's $300,000 entitlement produced by the partnership/marital-sharing principle.

If $500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for $166,500 (1/3 of $500,000), which when combined with B's "own" $100,000 yields a $266,500 cut for B—still below the $300,000 figure produced by the partnership/marital-sharing principle.

Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share. If $300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for $100,000, which when combined with B's "own" $300,000 yields a $400,000 cut for B—well above the $300,000 amount to which the partnership/marital-sharing principle would lead.

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion. If only $200,000 were titled in A's name, B would still have a claim against A's estate for $66,667 (1/3 of $200,000), even though B was already overcompensated as judged by the partnership/marital-sharing theory.

Short-term, Later-in-Life Marriages. Short-term marriages, particularly the post-widowhood remarriage occurring later in life, present different considerations. Because each spouse in this type of marriage typically comes into the marriage owning

assets derived from a former marriage, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

Example 2—Short-term, Later-in-Life Marriage under Conventional Elective-share Law. Consider B and C. A year or so after A's death, B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

The value of the couple's combined assets is $600,000, $300,000 of which is titled in B's name (the decedent) and $300,000 of which is titled in C's name (the survivor).

For reasons that are not immediately apparent, conventional elective-share law gives the survivor, C, a right to claim one-third of B's estate, thereby shrinking B's estate (and hence the share of B's children by B's prior marriage to A) by $100,000 (reducing it to $200,000) while supplementing C's assets (which will likely go to C's children by C's prior marriage) by $100,000 (increasing their value to $400,000).

Conventional elective-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

The Redesigned Elective Share

The redesigned elective share is intended to bring elective-share law into line with the partnership theory of marriage.

In the long-term marriage illustrated in Example 1, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind

that in such a marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

2008 Revisions. When first promulgated in the early 1990s, the statute provided that the "elective-share percentage" increased annually according to a graduated schedule. The "elective-share percentage" ranged from a low of 0 percent for a marriage of less than one year to a high of 50 percent for a marriage of fifteen years or more. The "elective-share percentage" did double duty. The system equated the "elective-share percentage" of the couple's combined assets with 50 percent of the marital-property portion of the couple's assets — the assets that are subject to equalization under the partnership theory of marriage. Consequently, the elective share effected the partnership theory rather indirectly. Although the schedule was designed to represent by approximation a constant fifty percent of the marital-property portion of the couple's assets (the augmented estate), it did not say so explicitly.

The 2008 revisions are designed to present the system in a more direct form, one that makes the system more transparent and therefore more understandable. The 2008 revisions disentangle the elective-share percentage from the system that approximates the marital-property portion of the augmented estate. As revised, the statute provides that the "elective-share percentage" is always 50 percent, but it is not 50 percent of the augmented estate but 50 percent of the "marital-property portion" of the augmented estate. The marital-property portion of the augmented estate is computed by approximation—by applying the percentages set forth in a graduated schedule that increases annually with the length of the marriage (each "marital-portion percentage" being double the percentage previously set forth in the "elective-share percentage" schedule). Thus, for example, under the former system, the elective-share amount in a marriage of ten years was 30 percent of the augmented estate. Under the revised system, the elective-share amount is 50 percent of the marital-property portion of the augmented estate, the marital-property portion of the augmented estate being 60 percent of the augmented estate.

The primary benefit of these changes is that the statute, as revised, presents the elective-share's implementation of the partnership theory of marriage in a direct rather than indirect form, adding clarity and transparency to the system. An important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that want to implement the partnership theory of marriage but prefer not to define the marital-property portion by approximation but by classification. Under the deferred marital-property approach, the marital-property portion consists of the value of the couple's property that was

acquired during the marriage other than by gift or inheritance. (See below.)

The 2008 revisions are based on a proposal presented in Waggoner, "The Uniform Probate Code's Elective Share: Time for a Reassessment," 37 U. Mich. J. L. Reform 1 (2003), an article that gives a more extensive explanation of the rationale of the 2008 revisions.

Specific Features of the Redesigned Elective Share

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system. Under the redesigned elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance. For further discussion of the reasons for choosing this method, see Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683 (1992).

Section 2-202(a)—The "Elective-share Amount." Under Section 2-202(a), the elective-share amount is equal to 50 percent of the value of the "marital-property portion of the augmented estate." The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with the length of the marriage. The longer the marriage, the larger the "marital-property portion of the augmented estate." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the "marital-property portion of the augmented estate" starts low and increases annually according to a graduated schedule until it reaches 100 percent. After one year of marriage, the marital-property portion of the augmented estate is six percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 100 percent level after 15 years of marriage.

Section 2-203(a)—the "Augmented Estate." The elective-share percentage of 50 percent is applied to the value of the "marital-property portion of the augmented estate." As defined in Section 2-203, the "augmented estate" equals the value of the couple's *combined* assets, not merely the value of the assets nominally titled in the decedent's name.

More specifically, the "augmented estate" is composed of the sum of four elements:

Section 2-204—the value of the decedent's net probate estate;

Section 2-205—the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;

Section 2-206—the value of the decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and

Section 2-207—the value of the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

Section 2-203(b)—the "Marital-property portion" of the Augmented Estate. Section 2-203(b) defines the marital-property portion of the augmented estate.

Section 2-202(a)—the "Elective-share Amount." Section 2-202(a) requires the elective-share percentage of 50 percent to be applied to the value of the marital-property portion of the augmented estate. This calculation yields the "elective-share amount"—the amount to which the surviving spouse is entitled. If the elective-share percentage were to be applied only to the marital-property portion of the decedent's assets, a surviving spouse who has already been overcompensated in terms of the way the marital-property portion of the couple's assets have been nominally titled would receive a further windfall under the elective-share system. The marital-property portion of the couple's assets, in other words, would not be equalized. By applying the elective-share percentage of 50 percent to the marital-property portion of the augmented estate (the couple's combined assets), the redesigned system denies any significance to how the spouses took title to particular assets.

Section 2-209—Satisfying the Elective-share Amount. Section 2-209 determines how the elective-share amount is to be satisfied. Under Section 2-209, the decedent's net probate estate and nonprobate transfers to others are liable to contribute to the satisfaction of the elective-share amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1)—amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse; and

Subsection (a)(2)—the marital-property portion of amounts included in the augmented estate under Section 2-207.

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from recipients of the decedent's net probate estate or nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

Example 3—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name. A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of $100,000 as defined in Section 2-205.

Augment- Marital

	ed Estate	Property Portion (100%)
A's net probate estate	$300,000	$300,000
A's nonprobate transfers to others	$100,000	$100,000
A's nonprobate transfers to B	$0	$0
B's net assets and nonprobate transfers to others	$200,000	$200,000
Augmented Estate	$600,000	$600,000

Elective-Share Amount (50% of Marital-property portion).....$300,000

Less Amount Already Satisfied $200,000

Unsatisfied Balance.....$100,000

Under Section 2-209(a)(2), the full value of B's assets ($200,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received $200,000 of B's ultimate entitlement of $300,000. Section 2-209(c) makes A's net probate estate and nonprobate transfers to others liable for the unsatisfied balance of the elective-share amount, $100,000, which is the amount needed to bring B's own $200,000 up to $300,000.

Example 4—15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor's Name. As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of $50,000 as defined in Section 2-205.

	Augment-ed Estate	Marital Property Portion (100%)
A's net probate estate	$150,000	$150,000
A's nonprobate transfers to others	$50,000	$50,000
A's nonprobate transfers to B	$0	$0
B's net assets and nonprobate transfers to others	$400,000	$400,000
Augmented Estate	$600,000	$600,000

Elective-Share Amount (50% of Marital-property portion).....$300,000

Less Amount Already Satisfied $400,000

Unsatisfied Balance.....$0

Under Section 2-209(a)(2), the full value of B's assets ($400,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received more than B's ultimate entitlement of $300,000. B has no claim on A's net probate estate or nonprobate transfers to others.

In a marriage that has lasted less than 15 years, only a portion of the survivor's assets—not all—count toward making up the elective-share amount. This is because, in these shorter-term marriages, the marital-property portion of the survivor's assets under Section 2-203(b) is less than 100% and, under Section 2-209(a)(2), the portion of the survivor's assets that count toward making up the elective-share amount is limited to the marital-property portion of those assets.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the classification and tracing-to-source problems in determining the marital-property portion of the couple's assets. This is accomplished under Section 2-203(b) by applying an ever-increasing percentage, as the length of the marriage increases, to the couple's combined assets without regard to when or how those assets were acquired. By approximation, the redesigned system equates the marital-property portion of the couple's combined assets with the couple's marital assets—assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the marital-property portion of their assets to be 60% under Section 2-203(b), 60% of each spouse's assets are treated as marital assets. Section 2-209(a)(2) therefore counts only 60% of the survivor's assets toward making up the elective-share amount.

Example 5—Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name. A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of $100,000 as defined in Section 2-205.

	Augmented Estate	Marital Property Portion (30%)
A's net probate estate	$300,000	$90,000
A's nonprobate transfers to others	$100,000	$30,000
A's nonprobate	$0	$0

transfers to B		
B's net assets and nonprobate transfers to others	$200,000	$60,000
Augmented Estate	$600,000	$180,000

Elective-Share Amount (50% of Marital-property portion).....$90,000

Less Amount Already Satisfied $60,000

Unsatisfied Balance.....$30,000

Under Section 2-209(a)(2), the marital-property portion of B's assets (30% of $200,000, or $60,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received $60,000 of B's ultimate entitlement of $90,000. Under Section 2-209(c), B has a claim on A's net probate estate and nonprobate transfers to others of $30,000.

Deferred Marital-Property Alternative

By making the elective share percentage a flat 50 percent of the marital-property portion of the augmented estate, the 2007 revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital-property portion of the augmented estate to be defined either by the approximation schedule or by the deferred-marital-property approach. Although one of the benefits of the 2007 revision is added clarity, an important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer a deferred marital-property approach. See Alan Newman, Incorporating the Partnership Theory of Marriage into Elective-Share Law: the Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 Emory L.J. 487 (2000).

The Support Theory

The partnership/marital-sharing theory is not the only driving force behind elective-share law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law. The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In

implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

Section 2-202(b)—the "Supplemental Elective-share Amount." Section 2-202(b) is the provision that implements the support theory by providing a supplemental elective-share amount of $75,000. The $75,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount.

In satisfying this $75,000 amount, the surviving spouse's own titled-based ownership interests count first toward making up this supplemental amount; included in the survivor's assets for this purpose are amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluded are (1) amounts going to the survivor under the Code's probate exemptions and allowances and (2) the survivor's Social Security benefits (and other governmental benefits, such as Medicare insurance coverage). If the survivor's assets are less than the $75,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amount to a minimum of another $64,500) is pretty much on target — in conjunction with Social Security payments and other governmental benefits — to provide the survivor with a fairly adequate means of support.

Example 6—Supplemental Elective-share Amount. After A's death in Example 1, B married C. Five years later, B died, survived by C. B's will left nothing to C, and B made no nonprobate transfers to C. B made no nonprobate transfers to others as defined in Section 2-205.

	Augmented Estate	Marital Property Portion (30%)
B's net probate estate	$90,000	$27,000
B's nonprobate transfers to others	$0	$0
B's nonprobate transfers to C	$0	$0
C's net assets and nonprobate transfers to others	$10,000	$3,000
Augmented Estate	$100,000	$30,000

Elective-Share Amount (50% of Marital-property portion) $15,000

Less Amount Already Satisfied $3,000

Unsatisfied Balance $12,000

Solution under Redesigned Elective Share. Under Section 2-209(a)(2), $3,000 (30%) of C's assets count first toward making up C's elective-share amount; under Section 2-209(c), the remaining $12,000 elective-share amount would come from B's net probate estate.

Application of Section 2-202(b) shows that C is entitled to a supplemental elective-share amount. The calculation of C's supplemental elective-share amount begins by determining the sum of the amounts described in sections:

2-207 .....$10,000

2-209(a)(1) 0

Elective-share amount payable from decedent's probate estate under Section 2-209(c) $12,000

Total.....$22,000

The above calculation shows that C is entitled to a supplemental elective-share amount under Section 2-202(b) of $53,000 ($75,000 minus $22,000). The supplemental elective-share amount is payable entirely from B's net probate estate, as prescribed in Section 2-209(c).

The end result is that C is entitled to $65,000 ($12,000 + $53,000) by way of elective share from B's net probate estate (and nonprobate transfers to others, had there been any). Sixty-five thousand dollars is the amount necessary to bring C's $10,000 in assets up to $75,000.

Decedent's Nonprobate Transfers to Others

The original Code made great strides toward preventing "fraud on the spouse's share." The problem of "fraud on the spouse's share" arises when the decedent seeks to evade the spouse's elective share by engaging in various kinds of nominal inter-vivos transfers. To render that type of behavior ineffective, the original Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

In the redesign of the elective share, the augmented-estate concept has been strengthened. The pre-1990 Code left several loopholes ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share system includes these types of insurance policies in the augmented estate as part of the decedent's nonprobate transfers to others under Section 2-205.

Historical Note. This General Comment was revised in 1993 and in 2008.

15-11-201. Definitions.

(1) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. The notation of a state documentary fee on a recorded instrument pursuant to section 39-13-103, C.R.S., is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

(2) "Decedent's nonprobate transfers to others" means amounts that are included in the augmented estate under section 15-11-205.

(3) "Fractional interest in property held in joint tenancy with the right of survivorship", whether the fractional interest is unilaterally severable or not, and if the interests are equal, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants. If the interests are unequal, "fractional interest in property held in joint tenancy with the right of survivorship" means the decedent's interest immediately preceding the decedent's death.

(4) "Marriage", as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

(5) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(6) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation, including beneficiary designations under individual retirement accounts and annuities described in section 408 of the federal "Internal Revenue Code of 1986", as amended, as well as other pension plans or arrangements not subject to part 2 (section 201 et seq.) of the federal "Employee Retirement Income Security Act of 1974", as amended (29 U.S.C. sec. 1051 et seq.).

(7) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent held a power to create a present or future interest in the decedent, the decedent's creditors, the decedent's estate, or creditors of the decedent's estate, whether or not the decedent then had the capacity to exercise the power. The term includes a power to revoke or invade the principal of a trust or other property arrangement.

(8) "Property" includes values subject to a beneficiary designation.

(9) "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

(10) "Transfer", as it relates to a transfer by or on behalf of the decedent, includes:

(a) An exercise or release of a presently exercisable general power of appointment held by the decedent;

(b) A lapse at death of a presently exercisable general power of appointment held by the decedent; and

(c) An exercise, release, or lapse of a presently exercisable general power of appointment that the decedent reserved or of a power described in section 15-11-205 (2)(b) that the decedent conferred on a nonadverse party.

(11) "Value", unless otherwise indicated, means fair market value as of the decedent's date of death.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1220, § 2, effective August 6. **L. 2022:** (7) and (10)(c) amended, (SB 22-092), ch. 60, p. 275, § 8, effective August 10.

Editor's note: This section is similar to former § 15-11-202 (1) as it existed prior to 2014.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Pre-1990 Provision. The pre-1990 provisions granted the surviving spouse a one-third share of the augmented estate. The one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land.

Purpose and Scope of Revisions. The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.

Historical Note. This Comment was revised in 2008.

15-11-202. Elective-share.

(1) **Elective-share amount.** The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this part 2, to take an

elective-share amount equal to fifty percent of the value of the marital-property portion of the augmented estate.

(2) (a) **Supplemental elective-share amount.** If the sum of the amounts described in sections 15-11-207, 15-11-209 (1)(a), and that part of the elective-share amount payable from the decedent's net probate estate and nonprobate transfers to others under section 15-11-209 (3)(a) and (3)(b) is less than fifty thousand dollars, the surviving spouse is entitled to a supplemental elective-share amount equal to fifty thousand dollars, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's net probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in section 15-11-209 (3)(a) and (3)(b).

(b) The court shall increase or decrease the dollar amount stated in paragraph (a) of this subsection (2) based on the cost of living adjustment as calculated and specified in section 15-10-112.

(3) **Effect of election on statutory benefits.** If the right of election is exercised by or on behalf of the surviving spouse, the exempt property and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(4) **Nondomiciliary.** The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective-share in property in this state is governed by the law of the decedent's domicile at death.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1222, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-201 as it existed prior to 2014.

OFFICIAL COMMENT

Subsection (b). Subsection (b) implements the support theory of the elective share by providing a $75,000 supplemental elective-share amount, in case the surviving spouse's assets and other entitlements are below this figure.

2008 Cost-of-Living Adjustments. As originally promulgated in 1990, the dollar amount in subsection (b) was $50,000. To adjust for inflation, this amount was increased in 2008 to $75,000. The dollar amount in this subsection is subject to annual cost-of-living adjustments under Section 1-109.

Subsection (c). The homestead, exempt property, and family allowances provided by Article II, Part 4, are not charged to the electing spouse as a part of the elective

share. Consequently, these allowances may be distributed from the probate estate without reference to whether an elective share right is asserted.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "Omitted Spouse: Avoiding Questions of Intent After Death", see 52 Colo. Law. 46 (Jan.-Feb. 2023).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

In contrast to the Uniform Probate Code provisions concerning the augmented estate, which do not allow the surviving spouse to opt out of his beneficial interest in a trust established by the decedent, and which describe their second purpose as to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent through other means, the sole purpose of the Colorado provisions is to protect the surviving spouse. Matter of Estate of Grasseschi, 776 P.2d 1136 (Colo. App. 1989).

Widow is entitled to statutory allowance even though mutual wills are executed. Where a husband leaves a will, his widow is entitled to the statutory widow's allowance regardless of whether she intends to take under the statute or the will, and the fact that the husband and wife may have executed mutual wills, in itself, in the absence of an effective waiver of the widow's allowance by the wife, in no manner changes the rule. In re Williams, Estate, 101 Colo. 262, 72 P.2d 476 (1937).

Widow electing to take one-half of estate is entitled to such remaining moiety after discharge of debts. Where under this section a widow renounces the will of her deceased husband, and elects to take one-half of the whole estate of the deceased, she is entitled to such remaining moiety after the discharge of the debts against the estate. Hanna v. Palmer, 6 Colo. 156, 45 Am. R. 524 (1882).

A surviving spouse married for ten years or more is statutorily entitled to an elective share of half of the augmented estate or the $50,000 supplemental elective share of the estate, whichever is greater. In re Estate of Cloos, 2018 COA 161, 488 P.3d 449.

Husband is not entitled to a supplemental elective share of the estate when his share of the marital assets exceeds $50,000. In re Estate of Cloos, 2018 COA 161, 488 P.3d 449.

A devise by wife to husband of a life estate in the whole of her property is not the equivalent of one-half thereof. Wolfe v. Mueller, 46 Colo. 335, 104 P. 487 (1909).

Renouncing where estate is insolvent. Where the widow renounces under this section, giving her in such case one-half of the whole estate, and the estate is solvent, she is entitled to half the rents arising out of land devised under the will to one not an heir at law of the testator. Logan v. Logan, 11 Colo. 44, 17 P. 99 (1887).

Any election to renounce is contingent upon validity of will. Whether expressed therein or not, any election to renounce a will and take under the statute is contingent upon the establishment of the ultimate validity of the will. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

A widow who renounces all benefits under the will of her deceased husband is entitled to one-half of his estate under the provisions of this section. Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934).

Right of a surviving spouse applies to property of which the husband dies seized and possessed. Hageman v. First Nat'l Bank, 32 Colo. App. 406, 514 P.2d 328 (1973).

If by a will the husband attempts to dispose of his property in a manner adverse to the interest of the wife, she has the right to elect to take against the will and receive one-half of the husband's estate. Hageman v. First Nat'l Bank, 32 Colo. App. 406, 514 P.2d 328 (1973).

Property transferred to inter vivos trust. Where the settlor, in creating an inter vivos trust, transferred title to property owned by him, and his interest therein passed immediately to the trustee and a valid trust was established, the rights retained by the settlor in the trust did not defeat the trust nor the resulting exclusion of the trust property from the settlor's probate estate, and the transferred property was not subject to the surviving spouse's elective share. Hageman v. First Nat'l Bank, 32 Colo. App. 406, 514 P.2d 328 (1973).

Election of the surviving spouse to one-half of the augmented estate was disallowed insofar as it would affect assets transferred to a revocable inter vivos trust prior to July 1, 1974, the effective date of the Colorado probate code. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

This section is not limited to cases in which Colorado is the domiciliary state. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Election in case of ancillary administration. Nothing in this section expressly requires, in the case of an ancillary administration, that a valid election against the will be filed in the domiciliary state. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Rule that prohibits taking against the will and receiving benefits under the will is based upon the doctrine of equitable estoppel and is designed to prevent a surviving spouse from taking unfair advantage of the multijurisdictional distribution of an estate. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Rule precludes election in ancillary administration inconsistent with election in domiciliary estate. The rule that

prohibits taking against the will and receiving benefits under the will at the same time precludes an election by the surviving spouse in an ancillary administration that is inconsistent with an election already taken in the domiciliary estate. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Assertion of a contrary election is an affirmative defense that must be pleaded and proved by the party asserting the estoppel. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Section fixes the value of the property comprising an augmented estate on the decedent's date of death. Beren v. Beren, 2015 CO 29, 349 P.3d 233.

Section controls over the general equitable authority that the probate court may exercise under § 15-10-103. Beren v. Beren, 2015 CO 29, 349 P.3d 233.

Probate court erred in making an equitable adjustment to beneficiary's elective share to compensate for an appreciation in the value of the estate between death and distribution. Code protects beneficiary from any decreases in value and the corollary to that is that a beneficiary should not be able to benefit from any increases in value. In re Estate of Beren, 2012 COA 203, 412 P.3d 487, aff'd in part, rev'd in part on other grounds, 2015 CO 29, 349 P.3d 233.

Probate court did not err when considering the terms of wife's second marital agreement in denying petition for spouse's elective share. Wife and husband had three marital agreements, and none of the agreements contained a merger or integration clause. Therefore, the second marital agreement was not rendered void by the third marital agreement. In re Estate of Gadash, 2017 COA 54, 413 P.3d 272.

Applied in Lopata v. Metzel, 641 P.2d 952 (Colo. 1982); In re Estate of Smith, 674 P.2d 972 (Colo. App. 1983).

15-11-203. Composition of the marital-property portion of the augmented estate.

(1) Subject to section 15-11-208, the value of the augmented estate, to the extent provided in sections 15-11-204, 15-11-205, 15-11-206, and 15-11-207, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitutes:

(a) The decedent's net probate estate;

(b) The decedent's nonprobate transfers to others;

(c) The decedent's nonprobate transfers to the surviving spouse; and

(d) The surviving spouse's property and nonprobate transfers to others.

(2) The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection (1) of this section multiplied by the following percentage:

If the decedent and the spouse were married to each other:	The percentage is:
Less than 1 year	Supplemental amount only.
1 year but less than 2 years	10%
2 years but less than 3 years	20%
3 years but less than 4 years	30%
4 years but less than 5 years	40%
5 years but less than 6 years	50%
6 years but less than 7 years	60%
7 years but less than 8 years	70%
8 years but less than 9 years	80%
9 years but less than 10 years	90%
10 years or more	100%

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1223, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-201 (1) as it existed prior to 2014.

OFFICIAL COMMENT

Subsection (a). Subsection (a) implements the partnership theory by providing that the elective-share amount is 50 percent of the value of the marital-property portion of the augmented estate. The augmented estate is defined in Section

2-203(a) and the marital-property portion of the augmented estate is defined in Section 2-203(b).

Cross Reference. To have the right to an elective share under subsection (a), the decedent's spouse must survive the decedent. Under Section 2-702(a), the requirement of survivorship is satisfied only if it can be established that the spouse survived the decedent by 120 hours.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The legislative purpose in enacting the concept of the augmented estate was twofold: (1) To attempt to prevent the owner of wealth from making arrangements that transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share and (2) to insure that the spouse is adequately provided for. Matter of Estate of Grasseschi, 776 P.2d 1136 (Colo. App. 1989).

Except where inter-vivos transfers reduce the probate estate below a threshold amount, then all claims and expenses should be allowed against the total assets of the augmented estate and the surviving spouse's elective share awarded from a net value. Matter of Estate of Smith, 718 P.2d 1069 (Colo. App. 1986).

And computation of a negative value for the probate estate is merely an accounting tool to arrive at a proper allocation of the benefits and burdens accruing to the estate. Matter of Estate of Smith, 718 P.2d 1069 (Colo. App. 1986).

Application to joint tenancies. The probate court properly refused to apply the augmented estate provisions of this section to joint tenancies where the joint tenancies vested prior to the effective date of the Colorado probate code. Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977), aff'd, 194 Colo. 505, 574 P.2d 500 (1978).

Right of election may be waived. Where a husband and wife agree with each other to waive any and all claims of every kind to any property that might be due to either from the estate of the other, it is held that a claim of the widow for an allowance from the husband's estate was properly denied. Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928).

Waiver does not have to be express. It is sufficient if some term that clearly comprehends the scope of those words, and admits of no doubt, is used. Vincent v. Martin, 91 Colo. 106, 11 P.2d 1089 (1932).

Language constituting waiver. Where by contract between husband and wife the wife agreed to accept certain bequests under a

will to be and that was executed by the husband "in full satisfaction of any and all rights of dower, statutory allowances and rights of inheritance as surviving widow", she thereby waived her right to a widow's allowance. Vincent v. Martin, 91 Colo. 106, 11 P.2d 1089 (1932).

Wife did not waive her statutory right to take against her husband's will when neither the will, nor a signed statement by the wife, contained specific language of waiver of her statutory entitlement to one-half her husband's estate. In re Estate of Smith, 674 P.2d 972 (Colo. App. 1983).

Waiver cannot arise from presumption, assumption, or construction. It must be in terms clearly and definitely indicating a purpose to waive the specific statutory right. In re Williams' Estate, 101 Colo. 262, 72 P.2d 476 (1937); In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); In re Griffee's Estate, 108 Colo. 366, 117 P.2d 823 (1941).

State's interest in certainty of waiver. One reason why a waiver of the right should appear beyond any doubt is that the state also is vitally interested. If the husband fails to provide support for his widow, the state may have to do so. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

Intention to waive allowance must be established beyond doubt. The right to a widow's allowance is strongly favored by our representative legislative bodies as is indicated by long-standing laws upon the subject, and the right will not be held to have been waived or relinquished except in cases where the intention to waive or relinquish is established beyond doubt. In re McLaughlin's Estate, 117 Colo. 67, 184 P.2d 130 (1947).

A stipulation as to division of property entered into in a suit for divorce and incorporated in the interlocutory decree was not intended to waive any statutory allowance that the wife might enjoy as her husband's widow, and, on the death of the husband before the divorce became final, the widow was entitled to her allowance. In re McLaughlin's Estate, 117 Colo. 67, 184 P.2d 130 (1947).

15-11-204. Decedent's net probate estate.

The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administrative expenses, family allowance, exempt property, and enforceable claims.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1223, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-201 (2)(a) as it existed prior to 2014.

15-11-205. Decedent's nonprobate transfers to others.

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included in the decedent's probate estate under section 15-11-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(a) Property over which the decedent alone, immediately before death, held or retained a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent that the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise to or for the benefit of any person other than the decedent's estate or surviving spouse; except that property over which the decedent had only a testamentary power of appointment is not included. Property over which the decedent had a general inter vivos power of appointment or withdrawal created in the decedent by a third party is includable unless the governing instrument contains a provision for its termination or lapse, in full or in part, during the life of the decedent.

(b) The decedent's fractional interest in real property held by the decedent in joint tenancy with the right of survivorship created during the marriage to the surviving spouse, except as provided in section 15-11-208, and the decedent's fractional interest in personal property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent that the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(c) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent that the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(d) Except as provided in section 15-11-208, proceeds of insurance, including accidental death benefits, on the life of the decedent if the decedent owned the insurance policy immediately before death or if and to the extent that the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent that they were payable at the decedent's death to or for the benefit of the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(a) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent that the decedent's right

terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent that the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse; or

(b) Any transfer in which the decedent created a power over the income or principal of the transferred property, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent that the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent that the property subject to the power passed at the decedent's death, by exercise, release, lapse, in default, or otherwise to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(a) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (a), (b), or (c) of subsection (1) of this section or under subsection (2) of this section if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those provisions if the property were valued at the time that the right, interest, or power terminated and is included only to the extent that the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph (I), "termination", with respect to a right or an interest in property, occurs when the right or interest terminates by the terms of the governing instrument or the decedent transfers or relinquishes the right of interest and, with respect to a power over property, when the power terminates by exercise, release, lapse, in default, or otherwise; except that, with respect to a power described in subparagraph (I) of paragraph (a) of this subsection (1), "termination" occurs when the power is terminated by exercise or release but not otherwise.

(b) Any transfer of, or relating to, an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under subparagraph (IV) of paragraph (a) of this subsection (1) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent that the proceeds were payable at the decedent's death to or for the benefit of the decedent's estate or surviving spouse.

(c) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent that the aggregate transfers to any one donee in either of the two years exceeded the amount excludable from taxable gifts under 26 U.S.C. sec. 2503 (b) or its successor on the date next preceding the date of the decedent's death.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1223, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-201 (2)(b) as it existed prior to 2014.

15-11-206. Decedent's nonprobate transfers to the surviving spouse.

Excluding property passing to the surviving spouse under the federal social security system after the decedent's date of death, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) The decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

(2) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner; and

(3) All other property that would have been included in the augmented estate under section 15-11-205 (1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1226, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-202 (2)(c) as it existed prior to 2014.

Cross references: For protected persons and protective proceedings, see article 14 of this title.

15-11-207. Surviving spouse's property and nonprobate transfers to others.

(1) Except to the extent included in the augmented estate under section 15-11-204 or 15-11-206, the value of the augmented estate includes the value of:

(a) Property that was owned by the decedent's surviving spouse at the decedent's death, including:

(I) The surviving spouse's fractional interest in real property held in joint tenancy with the right of survivorship created during the marriage to the decedent, except as provided in section 15-11-208, and the surviving spouse's fractional interest in personal property held by the surviving spouse in joint tenancy with the right of survivorship;

(II) The surviving spouse's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship; and

(III) Property that passed to the surviving spouse by reason of the decedent's death but not including the spouse's right to family allowance, exempt property, or payments under the federal social security system after the decedent's date of death; and

(b) Property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under subparagraphs (I) and (II) of paragraph (a) of this subsection (1) had the spouse been the decedent.

(2) Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but for purposes of subparagraphs (I) and (II) of paragraph (a) of subsection (1) of this section, the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of this subsection (2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under section 15-11-205 (1)(d) are not valued as if he or she were deceased.

(3) The value of property included under this section is reduced by enforceable claims against the surviving spouse.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1226, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-202 (2)(d) as it existed prior to 2014.

Cross references: For rights of election, see § 15-11-201; for right to exempt property and family allowance, see §§ 15-11-403 and 15-11-404.

15-11-208. Exclusions, valuations, and overlapping application.

(1) **Exclusions.**

(a) The value of any property is excluded from the decedent's nonprobate transfers to others:

(I) To the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or

(II) If the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse; or

(III) If the property was transferred to a bona fide purchaser.

(b) For purposes of this subsection (1), in the absence of a finding of a contrary intent, joinder in the filing of a gift tax return does not constitute consent or joinder.

(c) Any life insurance maintained pursuant to a marriage dissolution settlement agreement or court order or any distribution from a plan qualified under section 401 (a) of the federal "Internal Revenue Code of 1986", as amended, is excluded from the decedent's nonprobate transfers to others to the extent such items are payable to a person other than the surviving spouse.

(d) Life insurance, accident insurance, pension, profit sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are excluded from the augmented estate.

(e) Any completed transfers made by the decedent prior to July 1, 1974, are excluded from the decedent's nonprobate transfers to others.

(f) Any fractional interest in real property held in joint tenancy with the right of survivorship, if such joint tenancy was created by a donative transfer by someone other than the decedent or the surviving spouse, is excluded from the augmented estate.

(2) **Valuations.** The value of property:

(a) Included in the augmented estate under section 15-11-205, 15-11-206, or 15-11-207 is reduced in each category by enforceable claims against the included property; and

(b) Includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.

(3) **Overlapping application - no double inclusion.** In case of overlapping application to the same property of the provisions of section 15-11-205, 15-11-206, or 15-11-207, the property

is included in the augmented estate under the provision yielding the highest value and under only one overlapping provision if they all yield the same value.

(4) **Community property.** If there is a disparity between the titling of property pursuant to sections 15-11-204, 15-11-205, 15-11-206, and 15-11-207 and the ownership of the property pursuant to article 20 of title 15, then the community property ownership controls and one-half of the community property must be included pursuant to sections 15-11-204, 15-11-205, 15-11-206, and 15-11-207, as applicable, and any administrative expenses relating to and enforceable claims against the community property must be allocated equally between the decedents and the surviving spouse's shares of the community property.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1227, § 2, effective August 6. **L. 2023:** (4) added, (SB 23-100), ch. 30, p. 106, § 2, effective July 1.

Editor's note: This section is similar to former § 15-11-202 (3) as it existed prior to 2014.

15-11-209. Sources from which elective-share payable.

(1) **Elective-share amount only.**

(a) In a proceeding for an elective-share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(I) Amounts included in the augmented estate under section 15-11-204 (the net probate estate) which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under section 15-11-206; and

(II) The marital-property portion of amounts included in the augmented estate under section 15-11-207 (the spouse's property).

(b) For the purposes of this subsection (1), if the surviving spouse disclaims any property, including interests in trust created by the decedent, such property shall not be applied under this subsection (1) to the extent that such property passes to a person other than the surviving spouse.

(2) **Marital-property portion.** The marital-property portion under subparagraph (II) of paragraph (a) of subsection (1) of this section is computed by multiplying the value of the amounts included in the augmented estate under section 15-11-207 by the percentage of the augmented estate set forth in the schedule in section 15-11-203 (2) appropriate to the length of time the spouse and the decedent were married to each other.

(3) **Unsatisfied balance - order of contribution.** If, after the application of subsection (1) of this section, the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount:

(a) Amounts included in the decedent's net probate estate after application of subsection (1) of this section and in the decedent's nonprobate transfers to others described in section 15-11-205 (3)(a)(during the marriage and the two-year period next preceding the decedent's death, the decedent's interest terminated and the property was transferred to someone other than the spouse), and in section 15-11-205 (3)(c)(any transfer during the same two-year period but only to the extent the transfer exceeded the applicable gift tax annual exclusion) are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's net probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is apportioned among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(b) If, after the application of subsection (1) of this section and paragraph (a) of this subsection (3), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is apportioned among the recipients of that remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(4) **Unsatisfied balance treated as general pecuniary devise.** The unsatisfied balance of the elective-share or supplemental elective-share amount as determined under subsection (3) of this section is treated as a general pecuniary devise for purposes of section 15-12-904, but interest shall commence to run one year after determination of the elective share amount by the court. This subsection (4) applies only to estates of decedents who die on or after August 6, 2014.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1228, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-203 as it existed prior to 2014.

15-11-210. Personal liability of recipients.

(1) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of

the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make a contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him or her or to pay the value of the amount for which he or she is liable.

(2) If any section or any part of any section of this part 2 is preempted by any federal law other than the federal "Employee Retirement Income Security Act of 1974", as amended, with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person, who, not for value, receives the payment, item of property, or any other benefit is obligated to return that payment, item of property, or benefit or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section 15-11-209, to the person who would have been entitled to it were that section or part of that section not preempted.

(3) A bona fide purchaser who purchases property from a recipient or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this part 2 to return the payment, item of property, or benefit nor liable under this part 2 for the amount of the payment or the value of the item of property or benefit.

Source: L. 2014: Entire part R&RE, (HB14-1322), ch. 296, p. 1229, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-204 as it existed prior to 2014.

15-11-211. Proceeding for elective-share - time limit.

(1) Except as provided in subsection (2) of this section, the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective-share within nine months after the date of the decedent's death or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give written notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective-share.

(2) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court, for cause shown by the surviving spouse, may extend the time for election.

(3) If the spouse makes an election by filing a petition for the elective-share more than nine months after the decedent's death, the decedent's nonprobate transfers to others are not included within the augmented estate unless the spouse had filed a petition for extension prior to the expiration of the nine-month period and the court granted the extension.

(4) The surviving spouse may withdraw his or her demand for an elective-share at any time before entry of a final determination by the court. Written notice of such withdrawal must be given to persons interested in the estate and the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective-share.

(5) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under sections 15-11-209 and 15-11-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under sections 15-11-209 and 15-11-210 had relief been secured against all persons subject to contribution.

(6) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1230, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-205 as it existed prior to 2014.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Purpose of section. The purpose of this section is to assure timely notice to the court, administrative officials, and interested parties, that the surviving spouse is dissatisfied with the will and elects to take and receive one-half of the estate of the testator. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

This section is simply one of limitation fixing a definite time after which an election, if filed, cannot be considered. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

This section is not directory only, but mandatory. In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

Widow's election must be made within time allowed. In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

Former § 15-11-205 (now this section) sets forth the time limits within which the surviving spouse must elect to take an augmented share of the estate. Because the renunciation described in former § 15-11-207 (now § 15-11-213) is inextricably intertwined with the entire election procedure, the time constraints enunciated in this section must also apply to it. Matter of Estate of Grasseschi, 776 P.2d 1136 (Colo. App. 1989).

Right to oppose petition. The requirement for notice and an opportunity to appear must be deemed to include the right to oppose a petition for an elective share. In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977).

The plain language of subsection (5) does not require a surviving spouse to bring a separate action after contribution liability has been fixed under subsection (4). In re Estate of Beren, 2013 COA 166, 321 P.3d 615.

Sufficiency of notice of election. Under this section any written form of notice that accomplishes the purpose of informing those charged with the administration of the estate that the surviving spouse is dissatisfied with the will and is asserting statutory rights is sufficient. In re Stitzer's Estate, 103 Colo. 529, 87 P.2d 745 (1939).

Express election must be made. Husband who applied for probate of the will of his wife and insisted, during a long litigation, upon the jurisdiction of the district court will not be heard to afterwards question the probate, for the absence of an express election by him. Whipple v. Wessels, 66 Colo. 120, 180 P. 309 (1919).

15-11-212. Right of election personal to surviving spouse - incapacitated surviving spouse.

(1) **Surviving spouse must be living at time of election.** The right of election may be exercised only by a surviving spouse who is living when the petition for the elective-share is filed in the court under section 15-11-211. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his or her conservator, guardian, or agent under the authority of a power of attorney.

(2) **Incapacitated surviving spouse.** If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under section 15-11-209 (1) and (3) and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection (2), an election on behalf of a surviving spouse by an agent under a

durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(a) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need;

(b) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust, but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination; and

(c) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order:

(I) Under the residuary clause, if any, of the will of the predeceased spouse against whom the elective-share was taken, as if that predeceased spouse died immediately after the surviving spouse; or

(II) To that predeceased spouse's heirs under section 15-11-711.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1231, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-206 as it existed prior to 2014.

ANNOTATION

Law reviews. For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Colorado's New Uniform Premarital and Marital Agreements Act", see 43 Colo. Law. 57 (Mar. 2014).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Creditor has no right to compel husband to renounce will. Neither spouse has any right, vested or inchoate, in the estate of the other. The husband's consent to the wife's testamentary disposition of her property is effective as against his creditors, and this even though such consent was given with the active purpose to defeat the right that, the husband surviving the wife, the

creditors might otherwise have to resort to the husband's moiety of the wife's estate. The creditor has no right to compel the husband to take as against the provisions of the will, and no standing to afterwards question the probate of the will or the disposition of the wife's property made thereby. Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912).

A surviving husband who dies without making an election not to take under the will is conclusively presumed to have consented to its terms. Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927).

A right of election is a personal privilege that does not pass to the heirs. Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927).

The court erred in attempting to shield the assets of the trust for the purpose of determining Medicaid eligibility because § 15-14-412.6 (2) prohibits any trust that has been "established by an individual that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance," and that section does not except from this prohibition elective-share trusts created pursuant to this section. In re Estate of Faller, 66 P.3d 114 (Colo. App. 2002).

15-11-213. Waiver of right to elect and of other rights.

(1) Any affirmation, modification, or waiver of a marital right or obligation, as defined in section 14-2-302, C.R.S., made on or after July 1, 2014, is unenforceable unless the affirmation, modification, or waiver is contained in a premarital or marital agreement, as defined in section 14-2-302, C.R.S., that is enforceable under part 3 of article 2 of title 14, C.R.S.

(2) Any affirmation, modification, or waiver of a marital right or obligation made before July 1, 2014, is governed by the law in effect at the time the affirmation, modification, or waiver was made.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1232 , § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-207 as it existed prior to 2014.

ANNOTATION

Law reviews. For article, "Pre-Nuptial Agreements Revisited", see 11 Colo. Law. 1882 (1982). For article, "Colorado's New Uniform Premarital and Marital Agreements Act", see 43 Colo. Law. 57 (Mar. 2014).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A complete property settlement entered into in anticipation of divorce is a waiver "unless it provides to the contrary." A property settlement that disposes of every item of property owned by the parties at the time of execution is complete within the meaning of this section. In re Estate of Morrell, 687 P.2d 1319 (Colo. App. 1984).

Nuptial agreements are valid and enforceable and will generally be given full force and effect. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

Nuptial agreement will be upheld unless the person attacking it proves fraud, concealment, or failure to disclose material information, and the burden of proof does not shift to the estate even if the amount received by the surviving spouse under the nuptial agreement is disproportionate to the value of the decedent's estate. In re Estate of Lewin v. First Nat'l Bank, 42 Colo. App. 129, 595 P.2d 1055 (1979).

Once the proponent of an antenuptial agreement has established the existence of the agreement itself, the party contesting the validity of the antenuptial agreement has the burden of proving fraud, concealment or failure to disclose material information. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

Confidential relationship requires good faith and fairness in dealings. Parties to nuptial agreements do not deal at arm's length as a confidential relationship exists between them, and each has a responsibility to act with good faith and fairness to the other. Such a responsibility contemplates that each party will make fair disclosure of his or her assets to the prospective spouse prior to the execution of the agreement. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

What constitutes fair disclosure. Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

Absence of detailed disclosure insufficient to set aside agreement. Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income, and the mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement and will not raise a presumption of fraudulent concealment. Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

Antenuptial agreement not sufficiently specific to constitute waiver. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

Where a valid antenuptial contract contained a specific provision that the wife to-be "doth acquit, release and discharge" the other contractor from all claim to a "widow's award", she thereby waived her right to any future demand for a widow's allowance against his estate, under the

statute or otherwise. In re Griffee's Estate, 108 Colo. 366, 117 P.2d 823 (1941).

15-11-214. Protection of payers and other third parties.

(1) Although under this part 2, a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payer or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument or for having taken any other action in good-faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payer or other third party received written notice from the surviving spouse or the spouse's representative of an intention to file a petition for the elective-share or that a petition for the elective-share has been filed. A payer or other third party is liable for payments made or other actions taken after the payer or other third party received written notice of an intention to file a petition for the elective-share or that a petition for the elective-share has been filed. Any form or service of notice other than that described in subsection (2) of this section is not sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.

(2) A written notice of intention to file a petition for the elective-share or that a petition for the elective-share has been filed must be mailed to the payer's or other third party's main office or home by registered or certified mail with return receipt requested or served upon the payer or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party.

(3) Upon receipt of a written notice of intention to file a petition for the elective-share or that a petition for the elective-share has been filed, a payer or other third party may pay any amount owed or transfer to or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The availability of such actions under this section does not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property even if no probate proceedings have been commenced before such payment, transfer, or deposit.

Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payer or other third party discharges the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(4) The court shall hold the funds or item of property and, upon its determination under section 15-11-211 (5), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under section 15-11-211 (1), or, if filed, the demand for an elective-share is withdrawn under section 15-11-211 (4), the court shall order disbursement to the designated beneficiary. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court in the discretion of the court. Payments or transfers to the court or deposits made into the court discharge the payer or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(5) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

Source: L. 2014: Entire part R&RE, (HB 14-1322), ch. 296, p. 1232, § 2, effective August 6.

Editor's note: This section is similar to former § 15-11-208 as it existed prior to 2014.

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Cross references: For clarification of the term "surviving spouse", see § 15-11-802.

15-11-301. Entitlement of spouse; premarital will.

(1) If a testator's surviving spouse married the testator after the testator executed his or her will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised outright to nor in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is so devised to a descendant of such a child, or passes under section 15-11-603 or 15-11-604 to such a child or to a descendant of such a child, unless:

(a) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(b) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(c) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(2) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise outright to or in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under section 15-11-603 or 15-11-604 to a descendant of such a child, abate as provided in section 15-12-902.

Source: L. 94: Entire part R&RE, p. 993, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-301 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "Omitted Spouse: Avoiding Questions of Intent After Death", see 52 Colo. Law. 46 (Jan.-Feb. 2023).

To determine whether an omitted spouse is entitled to an intestate share of an estate when a proponent of the will argues the exception under subsection (1)(c) applies, a court should examine the transfer in light of the following factors, to the extent they are addressed by the evidence: (1) the alternative takers under the will; (2) the dollar value of the testamentary gift to the surviving spouse; (3) the fraction of the estate represented by that gift; (4) whether comparable gifts were made to other persons; (5) the length of time between execution of the testamentary instrument and the marriage; (6) the duration of the marriage; (7) any inter vivos gifts the testator has made to the surviving spouse; (8) the separate property and needs of the surviving spouse; (9) a failure by the testator to provide for a surviving spouse in any capacity; and (10) the amount of the transfer in isolation or in relation to the total net probate estate. In re Estate of King, 2019 COA 82, 444 P.3d 863.

Applying subsection (1)(c), the court properly inferred decedent's intent to

provide for surviving spouse outside of will, where decedent left surviving spouse significant life insurance benefits ratified after marriage, bank account assets, and retirement account assets, and did not amend his will after marriage despite having amended the will several times before marriage. In re Estate of King, 2019 COA 82, 444 P.3d 863.

15-11-302. Omitted children.

(1) Except as provided in subsection (2) of this section, if a testator becomes a parent to a child after the execution of the testator's will and fails to provide in the will for the child, the omitted child receives a share in the estate as follows:

(a) If the testator had no child living when the testator executed the will, the omitted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to another parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(b) If the testator had one or more children living when the testator executed the will, and the will devised property or an interest in property to one or more of the then living children, the omitted child is entitled to share in the testator's estate as follows:

(I) The portion of the testator's estate in which the omitted child is entitled to share is limited to devises made to the testator's then living children under the will.

(II) The omitted child is entitled to receive the share of the testator's estate, as limited in subsection (1)(b)(I) of this section, that the child would have received had the testator included all omitted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(III) To the extent feasible, the interest granted the omitted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then living children under the will.

(IV) In the satisfaction of a share provided by this subsection (1)(b), devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(2) Neither subsection (1)(a) of this section nor subsection (1)(b) of this section applies if:

(a) It appears from the will that the omission was intentional; or

(b) The testator provided for the omitted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(3) If at the time of execution of the will the testator fails to provide in the will for a living child solely because the testator believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted child.

(4) In the satisfaction of a share provided by subsection (1)(a) of this section, devises made by the will abate under section 15-12-902.

Source: L. 94: Entire part R&RE, p. 993, § 3, effective July 1, 1995. **L. 2022:** (1), (2) introductory portion, (2)(b), (3), and (4) amended, (SB 22-092), ch. 60, p. 276, § 9, effective August 10.

Editor's note: This section is similar to former § 15-11-302 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

Posthumous child takes as though testator had died intestate. Testator leaving a widow and one child devises all his estate to his widow, not expressing any intention to disinherit an after-born child. The posthumous child takes one-fourth of the lands whereof the testator died seized, which is the interest the minor would have inherited had her father died intestate. Lowrey v. Harlow, 22 Colo. App. 73, 123 P. 143 (1912) (decided under repealed laws antecedent to repealed CSA, C. 176, § 41).

PART 4

EXEMPT PROPERTY AND ALLOWANCES

Cross references: For clarification of the term "surviving spouse", see § 15-11-802.

Law reviews: For article, "Estate Planning Tools for Second Marriages", see 45 Colo. Law. 45 (Dec. 2016).

15-11-401. Applicable law.

This part 4 applies to the estate of a decedent who dies domiciled in this state. Rights to exempt property and a family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995. **L. 96:** Entire section amended, p. 657, § 5, effective July 1.

15-11-402. Homestead.

The provisions of sections 38-41-201 and 38-41-204, C.R.S., provide for a homestead exemption but shall not create an allowance for the surviving spouse or minor children. A personal representative's obligation to distribute property as an exempt property allowance under section 15-11-403, to pay money as a family allowance under section 15-11-404, or to distribute property to devisees, heirs, or beneficiaries shall not be considered a debt, contract, or civil obligation, as referred to under sections 38-41-201 and 38-41-202, C.R.S.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995.

15-11-403. Exempt property.

(1) (a) Prior to January 1, 2012, the decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of twenty-six thousand dollars in excess of any security interests therein. If there is no surviving spouse, the decedent's dependent children are entitled jointly to the same exempt property. Rights to exempt property have priority over all claims against the estate, except claims for the costs and expenses of administration, and reasonable funeral and burial, interment, or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805. The right to exempt property shall abate as necessary to permit payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or dependent children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective-share.

(b) On and after January 1, 2012, the decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of thirty thousand dollars in excess of any security interests therein. If there is no surviving

spouse, the decedent's dependent children are entitled jointly to the same exempt property. Rights to exempt property have priority over all claims against the estate, except claims for the costs and expenses of administration and reasonable final disposition and funeral expenses, which are paid in the priority and manner set forth in section 15-12-805. The right to exempt property abates as necessary to permit payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or dependent children by the decedent's will, unless otherwise provided, by intestate succession or by way of elective-share.

(2) The dollar amount stated in paragraph (a) or (b) of subsection (1) of this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112; except that, when the increase in the dollar amount stated in paragraph (b) of subsection (1) of this section, as enacted in Senate Bill 11-016, enacted in 2011, takes effect, the next regularly scheduled cost of living adjustment will be suspended for one year.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995. **L. 96:** Entire section amended, p. 657, § 6, effective July 1. **L. 2002:** Entire section amended, p. 652, § 5, effective July 1. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1682, § 10, effective July 1, 2010. **L. 2011:** Entire section amended, (SB 11-016), ch. 77, p. 211, § 1, effective August 10. **L. 2021:** (1)(b) amended, (SB 21-006), ch. 123, p. 492, § 12, effective September 7.

Editor's note: This section is similar to former § 15-11-402 as it existed prior to 1995.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

As originally adopted in 1969, the dollar amount exempted was set at $3,500. To adjust for inflation, the amount was increased to $10,000 in 1990 and to $15,000 in 2008. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

Unlike the exempt amount described in Sections 2-402 and 2-404, the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that establishes priorities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 and 2-404.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an

election with reference to exemptions, but that no election is presumed to be required.

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

Annotator's note. Since § 15-11-403 is similar to §§ 15-11-402 and 15-11-405 as they existed prior to the 1994 repeal and reenactment of this entire part, relevant cases construing those provisions have been included in this section. For additional cases, see the annotations under former §§ 15-11-402 and 15-11-405 in the 1987 replacement volume.

The general assembly did not intend to limit claims for exempt property to living persons; rather, it only intended to limit the claim to spouses who survive the decedent by five or more days. The right to an exempt property allowance that automatically vested in a surviving spouse after she survived her husband by more than one hundred twenty hours therefore rightfully passed to her estate following her death ten months later. Foiles v. Whittman, 233 P.3d 697 (Colo. 2010).

This section and § 15-11-404 to be read with § 15-11-202 (1). This section and § 15-11-404, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in § 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Allowances to be claimed from probate estate. The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Medical services reimbursement funds not recoverable by treating physicians. Medical services reimbursement funds received by the personal representative are a part of the surviving spouse's exempt property allowance when there exists no basis to impress a constructive trust on such funds. The legislature in enacting this section clearly intended that a surviving spouse's exempt property allowance have

priority over all claims against the state. Timothy C. Wirt, M.D., P.C. v. Prout, 754 P.2d 429 (Colo. App. 1988).

Exempt property claim automatically vested in decedent's wife when she survived him and it passed to the estate following her subsequent death. In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

Applied in Lopata v. Metzel, 641 P.2d 952 (Colo. 1982); In re Estate of Smith, 674 P.2d 972 (Colo. App. 1983).

15-11-404. Family allowance.

(1) In addition to the right to exempt property, the decedent's surviving spouse and minor children who the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children or persons having the children's care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or the child's guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except claims for the costs and expenses of administration and reasonable final disposition and funeral expenses, which shall be paid in the priority and manner set forth in section 15-12-805.

(2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective-share. The death of any person entitled to a family allowance terminates the right to receive an allowance for any period arising after his or her death, but does not affect the right of his or her estate to recover the unpaid allowance for periods prior to his or her death.

Source: L. 94: Entire part R&RE, p. 996, § 3, effective July 1, 1995. **L. 2021:** (1) amended, (SB 21-006), ch. 123, p. 492, § 13, effective September 7.

Editor's note: This section is similar to former § 15-11-403 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "The Widow's Allowance", see 6 Dicta 11 (Apr. 1929). For article, "Widow's Allowance", see 25 Dicta 240 (1948). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Child Support Obligations after Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Section 15-11-403 and this section to be read with § 15-11-202 (1). Section 15-11-403 and this section, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in § 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976); In re Estate of Dowdy, 2021 COA 136, 503 P.3d 906.

This section is based upon sound public policy which the courts are zealous to effectuate. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

The purpose of this section is to secure support to the widow and children during the period of administration, and the prolonged litigation which sometimes ensues. Wilson v. Wilson, 55 Colo. 70, 132 P. 67 (1913); In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

The policy of providing a widow's allowance is to protect the surviving spouse during the period until a final distribution of the estate can be made. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

This section identifies three distinct groups of survivors who are entitled to a family allowance: (1) the decedent's surviving spouse; (2) the minor children who the decedent was obligated to support; and (3) any children who were in fact being supported by the decedent, including adult dependent children. In re Estate of Dowdy, 2021 COA 136, 503 P.3d 906.

A surviving spouse is entitled to a family allowance under this section even if there are no minor or dependent children. In re Estate of Dowdy, 2021 COA 136, 503 P.3d 906.

Rights in general. A widow may claim her allowance or waive it. She may take specific items or cash. Until her position is made known, or her right is terminated by limitation, property of the estate cannot be disposed of and claims against it can often not be settled. Wigington v. Wigington, 112 Colo. 78, 145 P.2d 980 (1944).

A claim for a widow's allowance is a claim against the estate of her deceased husband. Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923); Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928); In re Williams' Estate, 101 Colo. 262, 72 P.2d 476 (1937); In re Elam's Estate, 104 Colo. 126, 89 P.2d 243 (1939).

The allowance is a part of the expense of the administration of an estate. Deeble v. Alerton, 58 Colo. 166, 143 P. 1096 (1914); Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923); Ahlf v. King, 88 Colo. 425, 298 P. 647 (1931).

Allowances to be claimed from probate estate. The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Factors set forth for consideration as to whether family allowance should be extended and in what amount. In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

When ordered paid, an allowance is not in custodia legis. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

The allowance is subject to garnishment under C.R.C.P. 103. Whatever the public policy may be as to garnishment of a widow's allowance, these sections control. Policy in such a case is for the consideration of the general assembly and not the courts. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924); Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928).

The allowance is given independent of her distributive share in her husband's estate. Wilson v. Wilson, 55 Colo. 70, 132 P. 67 (1913).

The basic reason for a surviving spouse's allowance is that it is the duty of the husband to support her. Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928); In re Williams' Estate, 101 Colo. 262, 72 P.2d 476 (1937).

There is no statutory allowance to a widow other than a widow's allowance. Vincent v. Martin, 91 Colo. 106, 11 P.2d 1089 (1932); Moher v. Knauss, 150 Colo. 108, 370 P.2d 1017 (1962).

A widow's allowance is controlled by the law of the decedent's domicile. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Colorado need not be domiciliary state. Under this statute there is no requirement that the surviving spouse be a resident of this state or that this state be the domiciliary state. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

There is no statutory bar to filing for a widow's allowance in Colorado, where Colorado is the ancillary jurisdiction. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Where the assets of the domiciliary estate have been insufficient to satisfy a widow's allowance awarded in the

domiciliary proceeding, the spouse is entitled to satisfaction of the domiciliary allowance from the assets in the ancillary estate. In re Estate of Plazza, 34 Colo. App. 296, 526 P.2d 155 (1974).

When allowance is vested. The remarriage of a widow does not divest her or her minor children of an allowance already vested before her remarriage. A surviving spouse's allowance is vested when the court enters an order approving the estimate of the appraisers and setting aside specific articles of property to her. Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923).

Widow entitled to allowance regardless of election. The fact that a widow accepted her widow's allowance held of no significance one way or the other in determining whether or not there had been an election under § 15-11-201, for she was entitled to such allowance whether she intended to claim under the statute or under the will. Hodgkins v. Ashby, 56 Colo. 553, 139 P. 538 (1914).

Allowance protected against liability of husband. The last sentence of subsection (1) is a declaration of the legislative policy that the allowance should be protected against any indebtedness or liability of the husband. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940).

Where allowance satisfied. Where a widow is the sole heir of her deceased husband and receives his entire net estate, amounting to more than $2,000, it is immaterial whether she receives the amount to which she is entitled as a widow's allowance as such, or as a part of the estate, and in such circumstances where "other estate of the deceased" is discovered after final settlement and discharge of the widow as administratrix, and which was not inventoried or accounted for, as between the widow and a creditor whose claim had not been theretofore presented for allowance, the latter is entitled to the proceeds of the newly discovered estate in preference to the former's demand for a widow's allowance therefrom. Ahlf v. King, 88 Colo. 425, 298 P. 647 (1931).

An apportionment of the family allowance between a surviving spouse and a minor child will not be disturbed on review where there is evidence on the record to support it. In re Estate of Frazier, 30 Colo. App. 458, 494 P.2d 845 (1972).

Under this section, the court acting in probate may apportion the award of the family allowance between a surviving spouse and dependent children not living with the surviving spouse, as their needs may appear. In re Meek, 669 P.2d 628 (Colo. App. 1983).

Applied in Lopata v. Metzel, 641 P.2d 952 (Colo. 1982); In re Estate of Smith, 674 P.2d 972 (Colo. App. 1983).

15-11-405. Source, determination, and documentation.

(1) (a) (I) If the estate is otherwise sufficient, property specifically devised or disposed of by memorandum under section 15-11-513 to any person other than a person entitled to exempt

property may not be used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians of minor children, or dependent children who are adults may select property of the estate as their exempt property. The personal representative may make these selections if the surviving spouse, the dependent children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property allowance. Prior to January 1, 2012, the personal representative may determine the family allowance in a lump sum not exceeding twenty-four thousand dollars or periodic installments not exceeding two thousand dollars per month for one year and may disburse funds of the estate in payment of the family allowance. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may provide a family allowance other than that which the personal representative determined or could have determined.

(II) If the estate is otherwise sufficient, property specifically devised or disposed of by memorandum under section 15-11-513 to any person other than a person entitled to exempt property may not be used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians of minor children, or dependent children who are adults may select property of the estate as their exempt property. The personal representative may make these selections if the surviving spouse, the dependent children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property allowance. On and after January 1, 2012, the personal representative may determine the family allowance in a lump sum not exceeding thirty thousand dollars or periodic installments not exceeding two thousand five hundred dollars per month for one year and may disburse funds of the estate in payment of the family allowance. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may provide a family allowance other than that which the personal representative determined or could have determined.

(b) The dollar amount stated in subparagraph (I) or (II) of paragraph (a) of this subsection (1) shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112; except that, when the increase in the dollar amount stated in subparagraph (II) of paragraph (a) of this subsection (1), as enacted in Senate Bill 11-016, enacted in 2011, takes effect, the next regularly scheduled cost of living adjustment will be suspended for one year.

(2) If the right to an elective-share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable

under the exempt property and family allowance to the trust established under section 15-11-206 (2).

(3) No exempt property or family allowance shall be payable unless the person entitled to payment thereof requests such payment within six months after the first publication of notice to creditors for filing claims which arose before the death of the decedent, or within one year after the date of death, whichever time limitation first expires. The court may extend the time for presenting such request as it sees fit for cause shown by the person entitled to payment before the time limitation has expired; except that the time for presenting the request shall not be extended beyond two years after the date of death. The request shall be made to the personal representative, or, if none is appointed, to any other person having possession of the decedent's assets. A request on behalf of a minor or dependent child may be made by the child's guardian or other person having his or her care and custody.

Source: L. 94: Entire part R&RE, p. 996, § 3, effective July 1, 1995. **L. 96:** (1) amended, p. 658, § 7, effective July 1. **L. 2002:** (1) amended, p. 652, § 6, effective July 1. **L. 2009:** (1) amended, (HB 09-1287), ch. 310, p. 1682, § 11, effective July 1, 2010. **L. 2011:** (1) amended, (SB 11-016), ch. 77, p. 212, § 2, effective August 10.

Editor's note: This section is similar to former § 15-11-404 as it existed prior to 1995.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Scope and Purpose of 1990 Revision. As originally adopted in 1969, the maximum family allowance the personal representative was authorized to determine without court order was a lump sum of $6,000 or periodic installments of $500 per month for one year. To adjust for inflation, the amounts were increased in 1990 to $18,000 and $1,500 respectively and in 2008 to $22,500 and $2,250. The dollar amount in this section is subject to annual cost-of-living adjustments under Section 1-109.

A new subsection (b) was added to provide for the case where the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person. In that case, the personal representative is authorized to add any unexpended portions under the homestead allowance, exempt property, and family

allowance to the custodial trust established by Section 2-212(b).

If Domiciliary Assets Insufficient. Note that a domiciliary personal representative can collect against out of state assets if domiciliary assets are insufficient.

Cross References. See Sections 3-902, 3-906, and 3-907.

Historical Note. This Comment was revised in 1993 and 2008.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Factors set forth for consideration as to whether family allowance should be extended and in what amount. In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

Surviving spouse need not file a claim before his or her death to be necessarily timely filed. In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

Apportionment of family allowance. Under § 15-14-404, the court acting in probate may apportion the award of the family allowance between a surviving spouse and dependent children not living with the surviving spouse, as their needs may appear. In re Meek, 669 P.2d 628 (Colo. App. 1983).

Applied in In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

PART 5

WILLS AND WILL CONTRACTS AND CUSTODY AND DEPOSIT OF WILLS

Law reviews: For article, "Colorado's New Uniform Electronic Wills Act", see 51 Colo. Law. 46 (Feb. 2022).

15-11-501. Who may make a will.

An individual eighteen or more years of age who is of sound mind may make a will.

Source: L. 94: Entire part R&RE, p. 997, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-501 as it existed prior to 1995.

ANNOTATION

Law reviews. For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For note, "Some Problems Relating to Testamentary Witnesses", see 23 Rocky Mt. L. Rev. 458 (1951). For article, "Transmissibility of Future Interests in Colorado", see 27 Rocky Mt. L. Rev. 1 (1954). For article on will drafting, see 27 Rocky Mt. L. Rev. 306 (1955). For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Will Execution Ceremonies: Securing a Client's Last Wishes", see 23 Colo. Law. 47 (1994). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003). For article, "Anatomy of an Undue Influence Case", see 42 Colo. Law. 55 (Apr. 2013).

Annotator's note. Since § 15-11-501 is similar to repealed § 152-5-2, CRS 53, CSA, C. 176, § 36, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

A testator's soundness of mind may be evaluated under either the test set forth in Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953), or the insane delusion test. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

The test of testamentary capacity is a positive showing that at the time of executing the will, the testator understood the nature and extent of his property, understood the effect of the proposed testamentary disposition, knew the natural objects of his bounty, and that the proposed will represented his wishes. Lehman v. Lindenmeyer, 48 Colo. 305, 109 P. 956 (1910); Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953); In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Testamentary capacity consists of mentality and memory sufficient to understand intelligently the nature and purpose of the transaction, to comprehend generally the nature and extent of property to be disposed of, to remember who are the natural objects of the testator's bounty, and to understand the nature and effect of the desired disposition. Columbia Sav. & Loan Ass'n v. Carpenter, 33 Colo. App. 360, 521 P.2d 1299 (1974), rev'd on other grounds sub nom. Judkins v. Carpenter, 189 Colo. 95, 537 P.2d 737 (1975).

An individual lacks testamentary capacity under the insane delusion test when he or she suffers from an insane delusion that materially affects the disposition of the will. Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

An insane delusion is a persistent belief in something that has no existence in fact, which belief is adhered to in spite of all evidence to the contrary. Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

A contestant may challenge a testator's soundness of mind based on both or either of the Cunningham and insane delusion tests. Breeden v. Stone, 992 P.2d 1167 (Colo. 2000).

Testamentary capacity is a matter of fact to be determined by the trial court. Scott v. Leonard, 117 Colo. 54, 184 P.2d 138 (1947).

Testator held to be of sound mind when evidence reveals he had not been drinking at time will executed. In re Piercen's Estate, 118 Colo. 264, 195 P.2d 725 (1948).

Contractual capacity and testamentary capacity are the same. Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946); Breeden v. Stone, 992 P.2d 1167 (Colo. 2000); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

Symptoms of senile dementia prior to making a will are not conclusive of incapacity. Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

Likewise, an adjudication of unsoundness of mind and the appointment of a guardian is not conclusive evidence of testamentary incapacity, although the guardianship existed at the time the will was executed. In re McGrove's Estate, 106 Colo. 69, 101 P.2d 25 (1940).

Findings that warrant appointment of a guardian or conservator do not equate to a determination of testamentary incapacity. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

Effect of § 15-14-409, appointment of a conservator or guardianship, on testamentary capacity. Section 15-14-409 specifically provides that the appointment of a conservator or the entry of another protective order is not a determination of decedent's testamentary capacity. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

In addition, § 28-5-219 provides that neither the fact that a person has been rated incompetent by the veterans administration nor the fact that a guardian has been appointed for the person shall be construed as a legal adjudication of insanity or mental incompetency. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

Testator held not to be mentally incapacitated at time will executed by reason of drugs administered. In re Rentfro's Estate, 102 Colo. 400, 79 P.2d 1042 (1938).

Disinheritance of son by virtue of will does not indicate lack of testamentary capacity. Since one making a will is not bound to dispose of his property according to the rules of intestate succession, the fact that a testatrix practically disinherited her son in her will is no reason for regarding her as lacking testamentary capacity. In re Cole's Estate, 75 Colo. 264, 226 P. 143 (1924).

Burden of proving want of testamentary capacity is on proponent of

will. In re Roeber's Estate, 70 Colo. 196, 199 P. 481 (1921).

Burden of proof of lack of testamentary capacity. Once the proponent of a holographic will has offered prima facie proof that it was duly executed, the contestant must bear the burden of introducing prima facie evidence that the person who executed the will lacked testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

Effect of § 15-12-407 on burden of proof. Enactment of § 15-12-407 changes the long-established Colorado rule that the proponent of a will has the burden of proof and persuasion with regard to testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

For testatrix's mental capacity to direct making and execution of will, see In re Stitzer's Estate, 100 Colo. 521, 68 P.2d 561 (1937).

The fact that the testator believed the will contestant was not his son does not justify a conclusion of mental incompetency, even though for years the testator treated and recognized him as a son. Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920).

A testator's preference to a niece or nephew, or even to a stranger, creates no suspicion as to his mental capacity despite the fact that he thereby disinherits brothers and sisters or even children. Nelson v. Nelson, 27 Colo. App. 104, 146 P. 1079 (1915).

Decedent's lack of knowledge of the actual value of estate is not, by itself, proof of lack of testamentary capacity. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

Decedent's failure to accurately estimate the value of estate does not, in itself, amount to an insane delusion. The court found that decedent would not have left a larger bequest to the contestants even if decedent had been aware of the actual value of his or her estate. In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

Evidence of testamentary capacity. If the testamentary disposition is consistent with the testator's situation and in congruity with his affections and previous declarations and if the disposition might have been expected from one so situated, this is rational and legal evidence of testamentary capacity. In re Shapter's Estate, 35 Colo. 578, 85 P. 688 (1905).

In order to prove that a testator is not possessed of sufficient mental capacity to execute a valid will, evidence offered has to be calculated to establish his mental incapacity at the time of the will's execution. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

Testamentary incapacity to execute a valid will on a given day may be proven by evidence of incompetency at times prior to the date of execution. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

Expert opinion evidence describing mental incapacity at a time prior to the execution of a will, if not too remote in time, provides an inference, the weight of which is

left to the trier of fact, that the testator continued to be incompetent at the date of the will's execution, and the admissibility of such evidence is largely within the discretion of the trial court. In re Estate of Southwick v. First Nat'l Bank, 33 Colo. App. 86, 515 P.2d 484 (1973).

Probate court erred when it denied proponent's motion for partial summary judgment regarding the decedent's testamentary capacity at the time he or she executed the second codicil since decedent's testamentary capacity was a question of fact that needed to be determined by application of the Cunningham test. Proponent's pleadings submitted evidence that satisfied each element of the Cunningham test. The physician's letter submitted by the objector referred to a remote time 21 months prior to the execution of the second codicil and did not address any of the elements of the Cunningham test and therefore was insufficient to create a genuine issue of material fact. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

For evidence of lack of testamentary capacity, see In re D'Avignon's Will, 12 Colo. App. 489, 55 P. 936 (1899).

For cases in which undue influence by proponent of will is submitted as grounds for will's invalidity, see Gehm v. Brown, 125 Colo. 555, 245 P.2d 865 (1952); Igo v. Marshall, 140 Colo. 560, 345 P.2d 724 (1961); Krueger v. Ary, 205 P.3d 1150 (Colo. 2009).

At common law a feme covert was incapable of disposing of a freehold estate by will. Mitchell v. Hughes, 3 Colo. App. 43, 32 P. 185 (1893).

Applied in In re Hayes' Estate, 55 Colo. 340, 135 P. 449 (1913).

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

(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.

Source: L. 94: Entire part R&RE, p. 997, § 3, effective July 1, 1995. **L. 2001:** (1)(c) amended, p. 886, § 1, effective June 1. **L. 2009:** (1) amended, (HB 09-1287), ch. 310, p. 1683, § 12, effective July 1, 2010. **L. 2010:** (5) added, (SB 10-199), ch. 374, p. 1750, § 9, effective July 1.

Editor's note: This section is similar to former §§ 15-11-502 and 15-11-503 as they existed prior to 1995.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Subsection (a): Witnessed or Notarized Wills. Three formalities for execution of a witnessed or notarized will are imposed. Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. i (1999).

Under subsection (a)(2), the testator must sign the will or some other individual must sign the testator's name in the testator's presence and by the testator's direction. If the latter procedure is followed, and someone else signs the testator's name, the so-called "conscious presence" test is codified, under which a signing is sufficient if it was done in the testator's conscious presence, i.e., within the range of the

testator's senses such as hearing; the signing need not have occurred within the testator's line of sight. For application of the "conscious-presence" test, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. n (1999); Cunningham v. Cunningham, 83 N.W. 58 (Minn. 1900) (conscious-presence requirement held satisfied where "the signing was within the sound of the testator's voice; he knew what was being done ..."); Healy v. Bartless, 59 A. 617 (N.H. 1904) (individuals are in the decedent's conscious presence "whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses, and where he can readily see them if he is so disposed."); Demaris' Estate, 110 P.2d 571 (Or. 1941) ("[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence ...").

Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a "signature." See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. j (1999). There is no requirement that the testator "publish" the document as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be expressly stated, but can be inferred from the testator's conduct. Norton v. Georgia Railroad Bank & Tr. Co., 285 S.E.2d 910 (Ga. 1982).

There is no requirement that the testator's signature be at the end of the will; thus, if the testator writes his or her name in the body of the will and intends it to be his or her signature, the statute is satisfied. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmts. j & k (1999).

Subsection (a)(3) requires that the will either be (A) signed by at least two individuals, each of whom witnessed at least one of the following: (i) the signing of the will; (ii) the testator's acknowledgment of the signature; or (iii) the testator's acknowledgment of the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Subparagraph (B) was added in 2008 in order to recognize the validity of notarized wills.

Under subsection (a)(3)(A), the witnesses must sign as witnesses (see, e.g., Mossler v. Johnson, 565 S.W.2d 952 (Tex. Civ.App. 1978)), and must sign within a reasonable time after having witnessed the testator's act of signing or acknowledgment. There is, however, no requirement that the witnesses sign before the testator's death. In a particular case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death.

Under subsection (a)(3)(B), a will, whether or not it is properly witnessed under subsection (a)(3)(A), can be acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Note that a signature guarantee is not an acknowledgment before a notary public or other person authorized by law to take acknowledgments. The signature guarantee program, which is regulated by federal law, is designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

Allowing notarized wills as an optional method of execution addresses cases that have begun to emerge in which the supervising attorney, with the client and all witnesses present, circulates one or more estate-planning documents for signature, and fails to notice that the client or one of the witnesses has unintentionally neglected to sign one of the documents. See, e.g., Dalk v. Allen, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); Sisson v. Park Street Baptist Church, 24 E.T.R.2d 18 (Ont. Gen. Div. 1998). This often, but not always, arises when the attorney prepares multiple estate-planning documents — a will, a durable power of attorney, a health-care power of attorney, and perhaps a revocable trust. It is common practice, and sometimes required by state law, that the documents other than the will be notarized. It would reduce confusion and chance for error if all of these documents could be executed with the same formality.

In addition, lay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law. See, e.g., Estate of Saueressig, 136 P.3d 201 (Cal. 2006). In Estate of Hall, 51 P.3d 1134 (Mont. 2002), a notarized but otherwise unwitnessed will was upheld, but not under the pre-2008 version of Section 2-502, which did not authorize notarized wills. The will was upheld under the harmless-error rule of Section 2-503. There are also cases in which a testator went to his or her bank to get the will executed, and the bank's notary notarized the document, mistakenly thinking that notarization made the will valid. Cf., e.g., Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985). Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent's wishes.

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. See, e.g., Uniform Trust Code § 402(a)(2); Power of Attorney Act § 105; Uniform Health-Care Decisions Act § 2(f).

A will that does not meet the requirements of subsection (a) may be valid under subsection (b) as a holograph or under the harmless-error rule of Section 2-503.

Subsection (b): Holographic Wills. This subsection authorizes holographic wills. On holographic wills, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 (1999). Subsection (b) enables a testator to write his or her own will in handwriting. There need be no witnesses. The only requirement is that the signature and the material portions of the document be in the testator's handwriting.

By requiring only the "material portions of the document" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the decedent's handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as "I give, devise, and bequeath to _____" does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

Subsection (c): Extrinsic Evidence. Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document. Handwritten alterations, if signed, of a validly executed nonhandwritten will can operate as a holographic codicil to the will. If necessary, the handwritten codicil can derive meaning, and hence validity as a holographic codicil, from nonhandwritten portions of the document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g (1999). This position intentionally contradicts Estate of Foxley, 575 N.W.2d 150 (Neb. 1998), a decision condemned in Reporter's Note No. 4 to the Restatement as a decision that "reached a manifestly unjust result".

2008 Revisions. In 2008, this section was amended by adding subsection (a)(3)(B). Subsection (a)(3)(B) and its rationale are discussed in Waggoner, The UPC Authorizes Notarized Wills, 34 ACTEC J. 58 (2008).

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For note, "Control of Trust Property by the Settlor", see 11 Rocky Mt. L. Rev. 42 (1938). For article, "Family Law, Probate Law, and Constitutional Law", see 31 Dicta 471 (1954). For comment on Reed v. McLaughlin, appearing below, see 26 Rocky Mt. L. Rev. 337 (1954). For article on the necessity of attestation clause or proof of attestation, see 29 Rocky Mt. L. Rev. 475 (1957). For article, "The Sight and Sense Tests in Colorado", see 35 Dicta 114 (1958). For article, "Holographic and Nonconforming Wills: Dispensing With Formalities — Part I", see 31 Colo. Law. 57 (Dec. 2002). For article, "Holographic and Nonconforming Wills: Dispensing With Formalities — Part II", see 32 Colo. Law. 53 (Jan. 2003). For article, "Lights, Camera, Action — Video Will Executions", see 42 Colo. Law. 45 (Jan. 2013). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (June 2022).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The requirements of this section are plain. They are, to reiterate: The will must be written; it must be signed by the testator, or someone for him in his presence and by his direction; it must be signed or acknowledged by the testator in the presence of two or more witnesses; and the testator must request two persons to sign the instrument as witnesses. McGary v. Blakely, 127 Colo. 495, 258 P.2d 770 (1953).

A will not meeting the requirements of this section is void for all purposes. McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953).

The formalities required for valid will execution require strict adherence in order to prevent fraud because statutes governing execution are designed to safeguard and protect the decedent's estate. In re Estate of Royal, 826 P.2d 1236 (Colo. 1992).

For a will, so far as execution goes, is an entirety, and if defective because not executed in accordance with the requirements of law, it is void for all purposes. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

With reference to wills made by residents of the state, the provisions of this section are mandatory. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

Where testamentary capacity, sufficient witnessing, and a valid bequest are shown, a refusal to probate a will held error, regardless of whether a testamentary trust therein was valid or not. Frazier v. Frazier, 83 Colo. 188, 263 P. 413 (1927).

Court has duty as matter of law to hold will properly executed. Where proof of due execution has been made and no evidence presented to the contrary, it is the duty of the court to hold as a matter of law that the will was properly executed, and to remove that question from the jury's consideration. O'Brien v. Wallace, 145 Colo. 291, 359 P.2d 1029 (1961).

A will must be reduced to writing but its continued existence as a will should not be held to depend at all events upon the production and exhibition of the writing. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

Attempted creation of a trust by will held invalid as depending on oral instructions for its execution, since such instructions given before or after the execution of a will are in violation of this section requiring wills to be in writing. Frazier v. Frazier, 83 Colo. 188, 263 P. 413 (1927).

What constitutes "presence". If in the act of attesting the will the witnesses are where the testator can see them if he desires, they are in his presence within the meaning of this section. Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913).

This section requires that the witnesses shall sign the will. This means that something more is required of witnesses than the mere placing of their names on the document. It requires an observation by the witnesses to see that the will was executed by the testator and that the testator had capacity to make the will. McGary v.

Blakeley, 127 Colo. 495, 258 P.2d 770 (1953).

Witnesses must actually sign the will and may not substitute oral testimony to affirm testator's signature. In re Estate of Royal, 813 P.2d 790 (Colo. App. 1991), aff'd, 826 P.2d 1236 (Colo. 1992).

Will is valid despite failure of witnesses to sign on same page as testator. Although the witnesses' signatures do not appear on the same page as the signature of the testator, the witnesses did "subscribe" their names to the will and the will is valid. Additionally, all three witnesses testified as to the proper execution of the will in every essential element, therefore the will was properly admitted to probate. Brock v. Erickson, 28 Colo. App. 555, 475 P.2d 346 (1970).

Witnesses may attest to a will after the testator's death but only upon a showing of exceptional circumstances which made it impossible or extremely impractical for the witnesses to have signed the will before the testator's death. In re Estate of Royal, 813 P.2d 790 (Colo. App. 1991), aff'd, 826 P.2d 1236 (Colo. 1992).

Witnesses' signatures should be affixed to the document at least by the time the will becomes operative, namely the death of the testator. If the will speaks as of the date of the testator's death, it follows that the document should be complete at that time. In re Estate of Royal, 826 P.2d 1236 (Colo. 1992).

An attestation clause is prima facie evidence of the facts stated in such clause. Butcher v. Butcher, 21 Colo. App. 416, 122 P. 397 (1921); Lenahan v. White, 79 Colo. 347, 245 P. 711 (1926); Wehrkamp v. Burnett, 82 Colo. 5, 256 P. 630 (1927); Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934); McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953); Brock v. Erickson, 28 Colo. App. 555, 475 P.2d 346 (1970).

In the absence of an attestation clause, no presumption may be indulged as to due execution simply by the proof of signatures. If there is no attestation clause the facts of the execution may be shown by other evidence. McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953).

Sufficient publication. The testator said that he understood and asked them to sign as witnesses to his will. That constituted a publication of the will in compliance with this section. Wehrkamp v. Burnett, 82 Colo. 5, 256 P. 630 (1927); Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

Acknowledgment sufficient if testator clearly indicates that the instrument is his last will and testament. There was no evidence that the testator acknowledged that the writing was his last will and testament, as required by this section. But it is not necessary for testators to use the very words of this section, and they seldom do. If the testator, by word or deed, clearly indicates that the instrument is his last will and testament, it is sufficient. Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

A will is void and not entitled to probate where it appears that the testator did not declare the writing to be his last will

and testament, did not know its contents, and did not request the subscribing witnesses to attest the same. Wagner v. Heldt, 93 Colo. 442, 26 P.2d 813 (1933).

The provisions of this section, by force of the following section, are extended to codicils of wills. Int'l Trust Co. v. Anthony, 45 Colo. 474, 101 P. 781 (1909).

Thus a codicil attested by only one witness is without effect. Freeman v. Hart, 61 Colo. 455, 158 P. 305 (1916).

And the same is true where one witness did not sign in the presence of the testator. A codicil, the execution of which was witnessed by two witnesses, one of whom signed it in the testator's presence and the other at a later day, and not in his presence, will be rejected. Int'l Trust Co. v. Anthony, 45 Colo. 474, 101 P. 781 (1909).

No requirement that deed comply with statutory requirements of a will. First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398 (1971).

Testamentary intent required. To be a holographic will, the evidence must establish that the decedent intended the writing itself to make a testamentary disposition of decedent's property. In re Estate of Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978); Matter of Estate of Olschansky, 735 P.2d 927 (Colo. App. 1987).

The informal character of the decedent's letter as well as the statement she would leave something for her granddaughter reflected that the decedent did not intend the letter to make a testamentary disposition. Matter of Estate of Olschansky, 735 P.2d 927 (Colo. App. 1987).

Circumstantial evidence used in proving testator's signature. Where owing to the failure of the memory of the subscribing witnesses it is impossible to obtain direct testimony that the testator's signature was upon the paper when the witnesses subscribed it, circumstances may be resorted to. In re Carey's Estate, 56 Colo. 77, 136 P. 1175 (1913).

Burden is on contestants to overthrow will duly admitted to probate. The weight of authority is to the effect that, in a contest of a will which has theretofore been duly admitted to probate, the burden of proof is on the contestant to establish his grounds of contest. The probate is held to be prima facie evidence of the due attestation, execution, and validity of the will, and the burden is upon the contestants to overthrow the will. Aquilini v. Chamblin, 94 Colo. 367, 30 P.2d 325 (1934).

Burden is on proponent who presents will for probate to show due execution. Upon the proponent who presents a will for probate rests the burden of proof to show its execution in accordance with the requirements of the law. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908); Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922); O'Brien v. Wallace, 145 Colo. 291, 359 P.2d 1029 (1961).

Onus of proof. Where a will has been executed and witnessed under such circumstances that it is presumed the testator knew its contents, the onus of proving the contrary is upon him who alleges it. In re

Shapter's Estate, 35 Colo. 578, 85 P. 688 (1906); Kavanagh v. Jamison, 79 Colo. 115, 244 P. 476 (1926).

Testator's signature creates presumption of his awareness of its contents. Ordinarily, where the will has been executed under the formalities prescribed by law, and proof thereof has been made by the witnesses, the testator's bare signature to the will is taken as proof thereof, and it will be presumed that the will had been read by or to him, and that he was aware of its contents. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908); Kavanagh v. Jamison, 79 Colo. 115, 244 P. 476 (1926).

Signature not required by a cross-out to effectuate a partial revocation. When a holographic will was properly executed, no additional signature or acknowledgment is necessary to allow compliance with a cross-out if the testator's intent has been proved by clear and convincing evidence. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

Agreement as to disposition of joint bank account. Where testator placed money in joint bank account with another with agreement that at testator's death the other would withdraw money and give it to testator's beneficiaries, this agreement failed to comply with provisions of this section and testator's executor could recover money in action for conversion. Urbancich v. Jersin, 123 Colo. 88, 226 P.2d 316 (1950).

Probate not denied where portions are illegible or missing. A holographic will may not be denied probate merely because portions of the date not at issue are abbreviated, missing, or illegible, where the critical elements of the date are certain and unambiguous. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

Handwritten list found in safe deposit box of deceased may be found to be a valid holographic codicil to will if signature and material provisions are in handwriting of deceased, but evidence must show the writing was executed with testamentary intent and evidence failed to make such showing. Matter of Estate of Harrington, 850 P.2d 158 (Colo. App. 1993).

Applied in Friedholm v. Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978); Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

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.

Source: L. 94: Entire part R&RE, p. 998, § 3, effective July 1, 1995. **L. 2001:** Entire section amended, p. 886, § 2, effective June 1. **L. 2010:** (4) added, (SB 10-199), ch. 374, p. 1750, § 10, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Purpose of New Section. By way of dispensing power, this new section allows the probate Court to excuse a harmless error in complying with the formal requirements for executing or revoking a will. The measure accords with legislation in force in the Canadian province of Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian Uniform Wills Act in 1987.

Legislation of this sort was enacted in the state of South Australia in 1975. The experience there has been closely studied by a variety of law reform commissions and in the scholarly literature. *See, e.g., Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills* (1981); *New South Wales Law Reform Commission, Wills: Execution and Revocation* (1986); *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). A similar measure has been in effect in Israel since 1965 (*see British Columbia Report, supra, at 44-46; Langbein, supra,* at 48-51).

Consistent with the general trend of the revisions of the UPC, Section 2-503 unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to

defective compliance with the formal requirements for nonprobate transfers. *See, e.g., Annot.,* 19 A.L.R.2d 5 (1951) (life insurance beneficiary designations).

Evidence from South Australia suggests that the dispensing power will be applied mainly in two sorts of cases. *See Langbein, supra,* at 15-33. When the testator misunderstands the attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses, new Section 2-503 permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery - in other words, that the defect was harmless to the purpose of the formality. The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. Sometimes the testator adds a clause, that is, the testator attempts to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision - the testator crosses out former text and inserts replacement terms. Lay persons do not always understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which Courts at the trial and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue. Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power "actually prevents a great deal of unnecessary litigation," because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent. *British Columbia Report, supra,* at 46.

The larger the departure from Section 2-502 formality, the harder it will be to satisfy the Court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli Courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. See Langbein, supra, at 23-29, 49-50. The main circumstance in which the South Australian Courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by

two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., *Estate of Blakely*, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground "what has occurred is so obvious, and what was intended so clear." *In re Snide*, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error.

Reference. The rule of this section is supported by the Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3 (1999).

ANNOTATION

Law reviews. For article, "Probating Flawed Wills: Colorado's New CRS § 15-11-503", see 25 Colo. Law. 85 (Nov. 1996). For article, "Holographic and Nonconforming Wills: Dispensing With Formalities — Part II", see 32 Colo. Law. 53 (Jan. 2003). For article, "Lights, Camera, Action — Video Will Executions", see 42 Colo. Law. 45 (Jan. 2013). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

The statute does not apply to unexecuted instruments purporting to be wills. In re Estate of Sky Dancer, 13 P.3d 1231 (Colo. App. 2000).

A decedent need not both sign and acknowledge a document as his or her will for it to be admitted into probate. The language "signed or acknowledged" found in subsection (2) should be read in the disjunctive, not conjunctive. There is no restriction in the statute requiring the decedent to state, "This is my will". In re Estate of Wiltfong, 148 P.3d 465 (Colo. App. 2006).

Signature not required by a cross-out to effectuate a partial revocation. When a holographic will was properly executed, no additional signature or acknowledgment is necessary to allow compliance with a cross-out if the testator's intent has been proved by clear and convincing evidence. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

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, _____, _____ 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 will is considered a signature affixed to the will if necessary to prove the will's due execution.

Source: L. 94: Entire part R&RE, p. 998, § 3, effective July 1, 1995. **L. 2001:** (2) amended, p. 887, § 3, effective June 1. **L. 2009:** (1) and (2) amended, (HB 09-1287), ch. 310, p. 1683, § 13, effective July 1, 2010.

Editor's note: This section is similar to former § 15-11-504 as it existed prior to 1995.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

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.

15-11-505. Who may witness.

(1) An individual generally competent to be a witness may act as a witness to a will.

(2) The signing of a will by an interested witness does not invalidate the will or any provision of it.

Source: L. 94: Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-505 as it existed prior to 1995.

ANNOTATION

Law reviews. For note, "Some Problems Relating to Testamentary Witnesses", see 23 Rocky Mt. L. Rev. 458 (1951). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (Aug. 2005).

Annotator's note. Since § 15-11-505 is similar to repealed laws antecedent to CSA, C. 176, § 42, relevant cases construing those provisions have been included in the annotations to this section.

Under this section a legatee is competent as an attesting witness; but unless sufficiently attested by other competent witnesses, the will is void as to his legacy. White v. Bower, 56 Colo. 575, 136 P. 1053 (1913).

Competency of attesting witnesses to wills must be tested by the general law relating to competency of witnesses as provided by statute, and not by the common law. The test is whether she would have been a competent witness in court, at the time of attesting the will, to testify to the facts of its execution. White v. Bower, 56 Colo. 575, 136 P. 1053 (1913).

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.

Source: L. 94: Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-506 as it existed prior to 1995.

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.

Source: L. 94: Entire part R&RE, p. 1000, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-507 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Revocation of Wills — How Accomplished and the Effect", see 6 Dicta 7 (Oct. 1929). For article, "Colorado Legislature Grants Supreme Court Rule-Making Power", see 16 Dicta 90 (1939). For article, "The Colorado View on Alteration of Testamentary Instruments", see 16 Dicta 113 (1939). For article, "Revocation of Wills", see 29 Rocky Mt. L. Rev. 492 (1957). For comment, "No Revocation of Prior Will by Revocation of Subsequent Revoking Will", see 49 Den. L.J. 593 (1973). For article, "Partial Revocation of a Will by Revocatory Act", see 40 Colo. Law. 79 (Nov. 2011).

Annotator's note. Since § 15-11-507 is similar to repealed § 153-5-3, C.R.S. 1963, § 152-5-4, CRS 53, CSA, C. 176, § 40, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Will can be revoked only in manner provided by statute, and the statutory provisions for revocation of wills must be strictly construed. Scheer v. First Nat'l Bank, 43 Colo. App. 296, 605 P.2d 65 (1979).

Will is revoked if, with intent to revoke, testator performs any one of the acts deemed sufficient by statute to effectuate a revocation. Tong v. Tong, 619 P.2d 91 (Colo. App. 1980).

Acts of revocation are presumed to be intentional absent contrary evidence. Tong v. Tong, 619 P.2d 91 (Colo. App. 1980).

Where there is no provision for partial revocation of will by cancellation, tearing, etc., the courts are not at liberty to introduce such a provision into the statute by construction. Scheer v. First Nat'l Bank, 43 Colo. App. 296, 605 P.2d 65 (1979).

Ineffective attempt to revoke portion of will. A portion of a will cannot be revoked subsequent to its execution by the testator's cancelling or obliterating that portion. Scheer v. First Nat'l Bank, 43 Colo. App. 296, 605 P.2d 65 (1979).

Revocation becomes complete and effective by a subsequent will at the time the revoking instrument is executed as provided in § 15-11-502. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Will not revoked in accordance with this section must be held to be in existence. The original of a will must, of course, be produced if it is available, but if it is not, secondary evidence thereof may be adduced, and if it shall then appear that the will had not, prior to the testator's death, been revoked in accordance with this section, it must be held to be in existence. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

For the language of this section plainly indicates that only such testamentary instruments as have for their sole purpose the complete destruction or obliteration of a will fall within its provisions. That such is the purpose and intent of the section is manifest from the significant expressions used therein. It provides for the revocation of a will by burning, tearing, or obliterating. These terms must mean and refer to the utter annihilation and destruction of a will. Then

the section follows with the further provision that a will may be revoked, that is set aside and annulled in toto, by some other will or codicil in writing declaring the same, that is declaring the total revocation and destruction thereof. Only instruments having such effect and purpose, and such effect and purpose alone, fall within the purview of this section. In re Carey's Estate, 56 Colo. 77, 136 P. 1175 (1913); Freeman v. Hart, 61 Colo. 455, 158 P. 305 (1916).

Under this section no former will can be revoked by a writing, unless the revoking writing is itself a will. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

Instrument sufficient to revoke prior will. Generally, any instrument executed with the requisite statutory formalities for wills is sufficient to revoke a prior will. In re Estate of White, 39 Colo. App. 445, 566 P.2d 720 (1977).

A will which expressly revokes former wills must be signed by the testator in the presence of two or more witnesses, otherwise it will be invalid, and this is true even if the will be a disposing as well as a revoking document. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

Revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice. Woodward v. Woodward, 33 Colo. 457, 81 P. 322 (1905).

Presumption when will cannot be found. When a will, last seen in the possession of the testatrix, cannot be found following her death, there is a presumption that the testatrix destroyed the will with the intent to revoke it. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

This presumption may be rebutted by evidence of decedent's declarations tending to prove decedent believed the will to be in existence unrevoked. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

Testator's cancellation of fully executed carbon copy of will raises presumption of intent to cancel. A testator's cancellation of a duplicate original or fully executed carbon copy of a will which is in the testator's possession at his death raises a presumption that the testator intended to cancel the other duplicate original or the original will in the possession of another. Tong v. Tong, 619 P.2d 91 (Colo. App. 1980).

Thus, a subsequent conveyance of devised land does not revoke the will. Where a will devised real estate in fee, a subsequent conveyance of the real estate to the devisee in trust for the benefit of the devisor, did not revoke the will, and, at the death of the devisor, all the title which he had to the land devised, both legal and equitable, passed to the devisee. Woodward v. Woodward, 33 Colo. 457, 81 P. 322 (1905).

The word "will" in this section is used in the sense of a testamentary instrument which disposes of the testator's property, to take effect at his death. A written instrument under the section, unless it disposes of property, to take effect at the testator's death, is not a will within the meaning of our statute. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

The express revocation of a former will is at least prima facie evidence that such a former will was in existence at the time the will containing the revocation clause was made, and where the question becomes material, it is incumbent upon the proponent to show the nonexistence of a former will. Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922).

Evidence satisfying language of statute. Competent evidence received by the court that there was a writing executed, declared and attested to on a certain date, expressly revoking all previous wills, satisfies the language of the statute. Any other interpretation would give undue prominence and unwarranted preference to the actions of burning, tearing, or obliterating (which effectively at the moment of action accomplishes a revocation) and would hold in abeyance the efficacy of the other portion of the statute. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Evidence insufficient to show revocation. In re Chance's Estate, 124 Colo. 436, 238 P.2d 879 (1951).

No revocation by second testamentary instrument except by express language. While in certain cases it is possible to construe a second testamentary instrument as revoking a former, or as revoking certain bequests, or devises thereof, the second instrument may not effectuate the revocation of the former except by express language, or by necessary implication arising from express provisions of the later instrument. In re Estate of McKeown v. Macrum, 28 Colo. App. 49, 470 P.2d 611 (1970).

However, the use of the word "revocation" or "revoke" is not necessary. If the codicil amends and reamends, the effect is to remove the first article as it appears in the will. The first codicil removes the first article of the will and substitutes a new first article. The second codicil then removes the amended first article and substitutes a completely new first article. In re Estate of McKeown v. Macrum, 28 Colo. App. 49, 470 P.2d 611 (1970).

The same degree of mental capacity is required for the revocation of a will as is necessary for its execution. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

The presumption of revocation arising from the unavailability of a will may be rebutted by evidence that the testator was mentally incapacitated to revoke it. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

Nothing in the statute implies that the revocation does not really take effect until the day when the will is admitted to probate. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

If any of the acts called for by this section are done with animus revocandi, the revocation becomes complete. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Intent to revive not inferred from continued existence of revoked will. The mere continued existence physically of a will that has been expressly revoked by one of the means provided in the statute cannot support an inference that the decedent

intends such will to be revived at some later date. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Both methods of revocation contemplate utter destruction and annihilation. Since the general assembly provided two methods one by burning, etc., the other by a written will, and as the burning consumed the paper on which the earlier will was written, and with it the completed will itself, this language meant utter destruction and annihilation, whether revocation was effected by physical force, or by the execution of a later will by the testator. In the absence of a provision in the revoking statute to the contrary, courts will not assume that the general assembly intended solely and only to effect an entire destruction by the first, and either a partial or entire destruction by the second method. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Determination of "exclusive possession" contingent on the factual circumstances of each case and not to be construed too narrowly. Because the secretary was in the employ of the decedent, the decedent was still considered to have possession of the will when it was in the secretary's physical possession. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

Signature not required by a cross-out to effectuate a partial revocation. When a holographic will was properly executed, no additional signature or acknowledgment is necessary to allow compliance with a cross-out if the testator's intent has been proved by clear and convincing evidence. In re Estate of Schumacher, 253 P.3d 1280 (Colo. App. 2011).

Applied in In re Estate of Decker, 194 Colo. 143, 570 P.2d 832 (1977).

15-11-508. Revocation by change of circumstances.

Except as provided in sections 15-11-803 and 15-11-804, a change of circumstances does not revoke a will or any part of it.

Source: L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-508 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Dissolution of Marriage and Estate Planning Issues", see 18 Colo. Law. 439 (1989).

New probate code inapplicable to will automatically revoked by statute. Where decedent's will was automatically revoked

by operation of statute that was in effect at the time of decedent's marriage, the new probate code did not apply to will of decedent even though he died after 1974. Phillips v. Liechty, 674 P.2d 1001 (Colo. App. 1983).

Applied in Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

15-11-509. Revival of revoked will.

(1) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under section 15-11-507 (1)(b), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(2) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under section 15-11-507 (1)(b), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.

(3) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

Source: L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-509 as it existed prior to 1995.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Requisites for revival of revoked but undestroyed will. If the decedent intends to revive an existing previous will which has been revoked but undestroyed, that intention can only be manifest by declaration in compliance with § 15-11-502, thus accomplishing a republication of the will. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Situation in which "dependent relative revocation" will not apply. The doctrine of

"dependent relative revocation" which makes the revocation of a will ineffective and entitles the copy to be probated, cannot be applied where the will is lost or destroyed, and where the decedent tore up the will. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

15-11-510. Incorporation by reference.

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Source: L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-510 as it existed prior to 1995.

ANNOTATION

This section allows a court interpreting the intent of the testator of a trust to read and interpret all relevant documents as a whole. Denver Found. v. Wells Fargo Bank, 163 P.3d 1116 (Colo. 2007).

15-11-511. Testamentary additions to trusts.

(1) A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(2) Unless the testator's will provides otherwise, property devised to a trust described in subsection (1) of this section is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised, and is administered and disposed of in accordance with

the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(3) A revocation or termination of the trust before the death of the testator causes the devise to lapse, but exhaustion of trust corpus between the time of execution of the testator's will and the testator's death shall not constitute a lapse; a revocation or termination of the trust before the death of the testator shall not cause the devise to lapse, if the testator provides that, in such event, the devise shall constitute a devise to the trustee of the trust identified in the testator's will, and on the terms thereof, as they existed at the time of the execution of testator's will, or as they existed at the time of the revocation or termination of the trust, as the testator's will provides.

Source: L. 94: Entire part R&RE, p. 1001, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-511 as it existed prior to 1995.

ANNOTATION

Unfunded trust not invalid. The fact that a trust was not funded after it was created, or that a trust corpus did not exist, does not affect the validity of the trust. Ayres v. King, 643 P.2d 788 (Colo. App. 1981), rev'd on other grounds, 665 P.2d 594 (Colo. 1983).

15-11-512. Events of independent significance.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

Source: L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-512 as it existed prior to 1995.

15-11-513. Separate writing or memorandum identifying devise of certain types of tangible personal property.

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing shall be either in the handwriting of the testator or be signed by the testator and shall describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

Source: L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 355, § 5, effective July 1.

Editor's note: This section is similar to former § 15-11-513 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Estate Planning for Young Lawyers", see 14 Colo. Law. 53 (1985).

Handwritten list found in safe deposit box of deceased may be found to be a valid holographic codicil to will if signature and material provisions are in handwriting of deceased, but evidence must show the writing was executed with testamentary intent and evidence failed to make such showing since the list was undated and had no language indicating it was to operate as codicil. In the Estate of Harrington, 850 P.2d 158 (Colo. App. 1993).

If a contemplated post-will memorandum disposing of certain items of personal property is not in existence at the time of the decedent's death, the items of personal property sought to be transferred are limited to items of "tangible personal property", which could be disposed of by such memorandum. In the Estate of Sandstead, 897 P.2d 883 (Colo. App. 1995).

Applied in Robinson v. Blake, 638 P.2d 809 (Colo. App. 1981).

15-11-514. Contracts concerning succession.

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after July 1, 1995, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Source: L. 94: Entire part R&RE, p. 1002, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-701 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Ten Years of Domestic Relations in Colorado — 1940-1950", see 27 Dicta 399 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Reciprocal Wills and Contracts to Will", see 29 Rocky Mt. L. Rev. 453 (1957). For article, "Trust Termination and Modification", see 15 Colo. Law. 389 (1986). For article, "Estate Planning Tools for Second Marriages", see 45 Colo. Law. 45 (Dec. 2016). For article, "Securing Future Child Support Obligations", see 51 Colo. Law. 38 (Jan. 2022).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Section prescribes the only way in which a contract to make a will or devise, or not to revoke a will or devise, can be established. Rieck v. Rieck, 724 P.2d 674 (Colo. App. 1986).

Agreements as to heirship are not against public policy. In a controversy over the estate of a deceased person, there is no rule under which it is the absolute duty of the district court to decide the question of heirship irrespective of agreements between the parties; such agreements are not against public policy, and when valid and not questioned, are controlling of the rights of the parties thereto. In re Schofield's Estate, 101 Colo. 443, 73 P.2d 1381 (1937).

When the clear and unambiguous terms of a will are not the same as those of an alleged contract, the will does not constitute a sufficient memorandum of the agreement. Witmer v. Perini, 32 Colo. App. 110, 508 P.2d 413 (1973).

This section is analogous to the customary statute of frauds, the application of which requires that a sufficient memorandum must contain the terms of the contract sought to be enforced.

Witmer v. Perini, 32 Colo. App. 110, 508 P.2d 413 (1973).

A claim alleging fraudulent conduct is not precluded by the succession statute even if the alleged fraudulent conduct consists of oral statements that could not be enforced as creating contractual obligations because they fail to satisfy the requirements of the succession statute. Brody v. Bock, 897 P.2d 769 (Colo. 1995).

Whether a will is a contract will must be determined under the laws of the state in which the will was drafted. Using the law of the state of residence of the second to die at the time of death would allow surviving spouses to move to a state where contract wills are not recognized, or where more stringent requirements are imposed, and thereafter unilaterally revoke the contract will. In re Estate of Loflin, 81 P.3d 1112 (Colo. App. 2003).

Applied in Tarr v. Hicks, 155 Colo. 159, 393 P.2d 557 (1964).

15-11-515. Deposit of will with court in testator's lifetime.

A will may be deposited by the testator or the testator's agent with any court for safekeeping, under rules of the court. The will shall be sealed and kept confidential. During the testator's lifetime, a deposited will shall be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and kept on deposit after the examination.

Source: L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. **L. 96:** Entire section amended, p. 658, § 8, effective July 1.

Editor's note: This section is similar to former § 15-11-901 as it existed prior to 1995.

ANNOTATION

Applied in Jenkins v. Mesa County Dist. Court, 620 P.2d 721 (Colo. 1980) (decided under former § 15-11-901 as it existed prior to the 1994 repeal and reenactment of part 9).

15-11-516. Duty of custodian of will; lodging of will after death; transfer of lodged will; liability.

(1) Within ten days after a testator's death or as soon thereafter as the death becomes known to the custodian of an instrument purporting to be the testator's will, the custodian shall deliver the will to the court having probate jurisdiction in the Colorado county where the decedent resided or was domiciled at death for lodging in the records of such court. If the decedent was not a Colorado resident or domiciliary, the custodian shall deliver the will to the court having probate jurisdiction where the decedent was a resident or domiciliary at death, if known to the custodian, but if such residence or domicile is not known, to the court having probate jurisdiction in any Colorado county where property of the decedent was located at death. If the domicile, residence, and location of property are unknown to the custodian, or if the court having probate jurisdiction outside of Colorado refuses to accept delivery of the will, the custodian shall deliver the will to the court having probate jurisdiction in the Colorado county where the will was located. Upon being informed of the testator's death, a court holding a deposited will shall lodge the will in its records.

(2) Upon the filing of a petition or application showing appropriate venue to be in another state or in another Colorado county, the court shall order the lodged will transferred to the court having probate jurisdiction in that state or county. Any person who willfully fails to deliver an instrument purporting to be a will is liable to any person aggrieved for the damages that may be sustained by the failure.

(3) Any person who willfully refuses or fails to deliver an instrument purporting to be a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

Source: L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. **L. 96:** Entire section amended, p. 658, § 9, effective July 1.

Editor's note: This section is similar to former § 15-11-902 as it existed prior to 1995.

ANNOTATION

This section requires that any person having in possession any last will shall within a certain time after the death of the testator present the same to the district court of the county for probate. But no statute requires that he shall thereby become a party to a suit or to any proceeding by which he might become liable for any costs. It is immaterial by whom a will is presented. In fact, there are no parties to the proceeding in

a district court to probate a will. When the will is produced, the court may proceed of its own motion. The proceeding is in rem. The judgment is in rem, and is not for or against any party. From it any person interested may appeal. Blackman v. Edsall, 17 Colo. App. 429, 68 P. 790 (1902) (decided under repealed laws antecedent to CSA, C. 176, § 47).

15-11-517. Penalty clause for contest.

A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Source: L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995.

PART 6

RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

15-11-601. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this part 6 control the construction of a will. In the absence of a finding of a contrary intention, the provisions of sections 15-11-603 and 15-11-604 shall apply to wills and codicils executed or republished or reaffirmed on or after July 1, 1995, and prior law (sections 15-11-605 and 15-11-606) shall apply to wills and codicils executed prior to July 1, 1995, and not republished or reaffirmed on or after that date. In the process of determining whether a contrary intention exists, the rules of construction of this part 6 shall not apply.

Source: L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 356, § 6, effective July 1.

ANNOTATION

The cardinal rule in the interpretation of wills or other testamentary documents is that the testator's intent should be ascertained from the instrument itself and given effect. Meier v. Denver United States Nat'l Bank, 164 Colo. 25, 431 P.2d 1019 (1967); Mass. Co. v. Evans, 924 P.2d 1119 (Colo. App. 1996).

Executor of decedent's estate was entitled to principal of trust created by decedent as a fiduciary, and not personally, under trust provision indicating that principal should go to executor. The mere addition of a codicil to will that named executor in place of previously named corporate executor was not clear manifestation of a new intent to make the executor the trust beneficiary. Mass. Co. v. Evans, 924 P.2d 1119 (Colo. App. 1996).

15-11-602. Will may pass all property and after-acquired property.

A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.

Source: L. 94: Entire part R&RE, p. 1003, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-604 as it existed prior to 1995.

ANNOTATION

After-acquired property may pass by will. Unless a testator clearly shows an intention to not convey after-acquired property, all the property of which he died seized passes by the will. Woodward v. Woodward, 33 Colo. 457, 81 P. 322 (1905) (decided under repealed laws antecedent to CSA, C. 176, § 40).

15-11-603. Antilapse; deceased devisee; class gifts.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(b) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

(c) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(d) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) the beneficiary of a trust but not the trustee, (iii) an individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator, and (iv) an appointee under a power of appointment exercised by the testator's will.

(e) (Reserved)

(f) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 15-11-702.

(g) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(2) **Substitute gift.** If a devisee fails to survive the testator and is a grandparent or a descendant of a grandparent of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

(b) Except as provided in paragraph (d) of this subsection (2), if the devise is in the form of a class gift, other than a devise to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the deceased devisee's or devisees' surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee takes per capita at each generation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph (b), "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of

language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(e) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(3) **Dispositions under separate writing.** The provisions of this section shall not apply to dispositions of tangible personal property made under section 15-11-513.

(4) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (4), the devised property passes under the primary substitute gift.

(b) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) In this subsection (4):

(I) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(III) "Younger-generation devise" means a devise that:

(A) Is to a descendant of a devisee of the primary devise;

(B) Is an alternative devise with respect to the primary devise;

(C) Is a devise for which a substitute gift is created; and

(D) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

Source: L. 94: Entire part R&RE, p. 1004, § 3, effective July 1, 1995. **L. 95:** (2)(a) and (2)(b) amended, p. 356, § 7, effective July 1.

Editor's note: This section is similar to former § 15-11-605 as it existed prior to 1995.

ANNOTATION

Law reviews. For comments on In re Boyle's Estate, appearing below, see 23 Rocky Mt. L. Rev. 220 (1950) and 28 Dicta 223 (1951). For note, "Problems Under the Anti-Lapse Statute of Colorado", see 25 Rocky Mt. L. Rev. 334 (1953).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Plain meaning of section is that it is not limited to class gifts, but applies to any devisee who is a lineal descendant of a grandparent of the testator and leaves issue who survive the testator. In re Estate of Kerk v. Christy, 624 P.2d 373 (Colo. App. 1981).

Section does not include lapse of residuary legacy. This section refers to the lapsing of legacies outside the residue, and is not so all inclusive as to include the lapsing of a residuary legacy under any and all circumstances. The general assembly was treating that part of an estate which had not yet become a part of the residue. In re Boyle's Estate, 121 Colo. 599, 221 P.2d 357 (1950); In re Boyle's Estate, 123 Colo. 448, 231 P.2d 465 (1951).

And lapse of specific legacy to testator's sister is part of residue. The sister of a testator is not a descendant of the testator as provided in this section to prevent a lapse of the legacy, so that where a testator left a specific legacy to his sister and failed to provide for the contingency that occurred — the death of the sister before the testator — the estate disposed of by such specific legacy was deemed a part of the residue of the testator's estate. In re Boyle's Estate, 121 Colo. 599, 221 P.2d 357 (1950); In re Boyle's Estate, 123 Colo. 448, 231 P.2d 465 (1951).

Section is not applicable to children of collateral line. Plaintiffs in error are not named as devisees or legatees of the residuary estate; they are children of a collateral line, and so this section has no legitimate employment here. Gibson v. Hills, 84 Colo. 596, 272 P. 660 (1928).

15-11-604. Failure of testamentary provision.

(1) Except as provided in section 15-11-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) Except as provided in section 15-11-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

Source: L. 94: Entire part R&RE, p. 1006, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-606 as it existed prior to 1995.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Failure of residuary devise is controlled by rule of construction established by subsection (2); however, rule is inapplicable if will indicates contrary intent. Matter of Estate of Fryer, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

Where no contrary intent is evidenced in will, application of rule of construction set forth in subsection (2) is proper. Matter of Estate of Fryer, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

Rule of construction set forth in subsection (2) properly applied to construe effect of omission where will left estate to niece and three friends and provided for the possibility of the three friends predeceasing testatrix but did not provide for niece predeceasing testatrix. Deceased niece's share properly went to surviving friends. Matter of Estate of Fryer, 874 P.2d 490 (Colo. App. 1994) (decided under former § 15-11-606).

The rule of construction codified by this section does not apply if it is contrary to the testator's intent as expressed in the will. Haskins v. Garrett, 820 P.2d 350 (Colo. App. 1991).

If the life beneficiary of the trust predeceases the testator, the remainder beneficiary takes as if the provision for the life estate was not made. But this majority rule of construction will only apply if it is consistent with the language of the will and the circumstances existing at the time the will was executed. Haskins v. Garrett, 820 P.2d 350 (Colo. App. 1991).

Applied in Lujan v. United Bank of Greeley, 701 P.2d 1258 (Colo. App. 1985).

15-11-605. Increase in securities; accessions.

(1) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(a) Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

(b) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or

(c) Securities of the same organization acquired as a result of a plan of reinvestment.

(2) Distributions in cash before death with respect to a described security are not part of the devise.

Source: L. 94: Entire part R&RE, p. 1006, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-607 as it existed prior to 1995.

ANNOTATION

Absent a contrary intent by the testatrix, a specific devisee is entitled to receive any additional shares of stock resulting from action initiated by the issuing company, regardless of whether the issuing company takes action before or after execution of the will. Shriners Hospitals for Crippled Children v. United Bank of Denver, 821 P.2d 300 (Colo. App. 1991) (decided under former § 15-11-607 as it existed prior to the 1994 repeal and reenactment of this part).

15-11-606. Nonademption of specified devises - unpaid proceeds of sale, condemnation, or insurance - sale by conservator or agent.

(1) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(a) Any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;

(b) Any amount of a condemnation award for the taking of the property unpaid at death;

(c) Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(d) Property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(e) Real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and

(f) If not covered by any of paragraphs (a) to (e) of this subsection (1), a general pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime, but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition, or otherwise, the testator did not intend ademption of the devise.

(2) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(3) The right of a specific devisee under subsection (2) of this section is reduced by any right the devisee has under subsection (1) of this section.

(4) For the purposes of the references in subsection (2) of this section to a conservator, subsection (2) of this section does not apply if after the sale, mortgage, condemnation, casualty, or recovery it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.

(5) For the purposes of the references in subsection (2) of this section to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) "Incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

Source: L. 94: Entire part R&RE, p. 1007, § 3, effective July 1, 1995. **L. 2014:** (1)(f) amended, (HB 14-1322), ch. 296, p. 1233, § 3, effective August 6.

Editor's note: This section is similar to former § 15-11-608 as it existed prior to 1995.

15-11-607. Nonexoneration.

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

Source: L. 94: Entire part R&RE, p. 1008, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-609 as it existed prior to 1995.

15-11-608. Exercise of power of appointment - repeal. (Repealed)

Source: L. 94: Entire part R&RE, p. 1008, § 3, effective July 1, 1995. **L. 2014:** (2) added by revision, (HB 14-1353), ch. 209, pp. 782, 783, §§ 2, 5.

Editor's note: (1) This section was similar to former § 15-11-610 as it existed prior to 1995.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2015. (See L. 2014, pp. 782, 783.)

15-11-609. Ademption by satisfaction.

(1) Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(2) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(3) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying sections 15-11-603 and 15-11-604, unless the testator's contemporaneous writing provides otherwise.

Source: L. 94: Entire part R&RE, p. 1008, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-612 as it existed prior to 1995.

PART 7

RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

15-11-701. Scope.

For the purposes of this part 7, the term "governing instrument" shall be as defined in section 15-10-201 (22); except:

(1) "Governing instrument" shall not include a deed that transfers any interest in real property; however, section 15-11-712 shall apply to such deeds.

(2) As the application of a particular section is limited by its terms to a specific type of provision or governing instrument. In the absence of a finding of a contrary intention, the rules of construction in this part 7 control the construction of a governing instrument executed or republished or reaffirmed on or after July 1, 1995, and the rules of construction under prior law control the construction of a governing instrument executed prior to July 1, 1995, and not a governing instrument republished or reaffirmed after that date. In the process of determining whether a contrary intention exists, the rules of construction of this part 7 shall not apply.

(3) In the absence of a finding of a contrary intention, the rules of construction in section 15-11-705 apply to a governing instrument executed or republished or reaffirmed on or after July 1, 2010, and the rules of construction under section 15-11-705, as it existed prior to July 1, 2010, apply to a governing instrument executed prior to July 1, 2010, and not republished or reaffirmed after that date.

Source: L. 94: Entire part R&RE, p. 1009, § 3, effective July 1, 1995. **L. 95:** (2) amended, p. 357, § 8, effective July 1. **L. 2010:** (1) amended and (3) added, (SB 10-199), ch. 374, p. 1750, § 11, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

The rules of construction in this Part apply to governing instruments of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

The term "governing instrument" is defined in Section 1-201 as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type."

Certain of the sections in this Part are limited in their application to donative dispositions or governing instruments of a certain type or types. Section 2-704, for example, applies only to a governing instrument creating a power of appointment. Section 2-706 applies only to governing instruments that are "beneficiary designations," a term defined in Section 1-201 as referring to "a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death." Section 2-707 applies only to governing instruments creating a future interest under the terms of a trust.

Cross References. See the Comment to Section 2-601.

Historical Note. This Comment was revised in 1993. For the prior version, see 8 U.L.A. 138 (Supp. 1992).

15-11-702. Requirement of survival by one hundred twenty hours.

(1) **Requirement of survival by one hundred twenty hours under probate code.** For the purposes of this code, except as provided in subsection (4) of this section, an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the event.

(2) **Requirement of survival by one hundred twenty hours under other governing instrument.** Except as provided in subsection (4) of this section, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.

(3) **Co-owners with right of survivorship; requirement of survival by one hundred twenty hours.** Except as provided in subsection (4) of this section, if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours, and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection (3), "co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of one or more of the others.

(4) **Exceptions.** Survival by one hundred twenty hours is not required if:

(a) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and if that language is operable under the facts of the case;

(b) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival of the event or the specified period shall be established by clear and convincing evidence;

(c) The imposition of a one-hundred-twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under section 15-11-1102 (1)(a), (2)(a), or (3)(a) or section 15-11-1102.5 (1)(b)(I), (1)(b)(II), (1)(b)(III), (2)(b)(I)(A), (2)(b)(II)(A), or (2)(b)(III)(A), or to become invalid under section 15-11-1102 (1)(b), (2)(b), or (3)(b) or section 15-11-1102.5 (1)(b)(I), (1)(b)(II), or (1)(b)(III); but survival shall be established by clear and convincing evidence; or

(d) The application of a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival shall be established by clear and convincing evidence.

(5) **Protection of payers and other third parties.**

(a) A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under

this section, is not entitled to the payment or item of property, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party received written notice as described in paragraph (b) of this subsection (5). A payer or other third party shall have no duty or obligation to inquire as to the application of the one-hundred-twenty-hour survival or to seek any evidence with respect to any such survival. A payer or other third party is only liable for actions taken two or more business days after the payer or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (5) shall not be sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that the beneficiary designated in the governing instrument failed to survive the decedent by one hundred twenty hours. The written notice shall be mailed to the payer's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payer or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payer or other third party shall not constitute notice to the payer or other third party.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (5), a payer or other third party may pay to the court any amount owed, or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payer or other third party discharges the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(6) **Protection of bona fide purchasers; personal liability of recipient.**

(a) A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law (other than the federal "Employee Retirement Income Security Act of 1974", as amended) with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Source: L. 94: Entire part R&RE, p. 1009, § 3, effective July 1, 1995. **L. 2006:** (4)(c) amended, p. 393, § 28, effective July 1.

Editor's note: This section is similar to former § 15-11-601 as it existed prior to 1995.

Cross references: For requirement that an heir survive a decedent by one hundred twenty hours, see § 15-11-104.

ANNOTATION

Law reviews. For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988).

Applied in In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

15-11-703. Choice of law as to meaning and effect of governing instrument.

The meaning and legal effect of a governing instrument is determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective-share described in part 2 of this article, the provisions relating to exempt property and allowances described in part 4 of this article, or any other public policy of this state otherwise applicable to the disposition.

Source: L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-602 as it existed prior to 1995.

15-11-704. Power of appointment; meaning of specific reference requirement - repeal. (Repealed)

Source: L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995. **L. 2014:** (2) added by revision, (HB 14-1353), ch. 209, pp. 782, 783, §§ 2, 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2015. (See L. 2014, pp. 782, 783.)

15-11-705. Class gifts construed to accord with intestate succession.

(1) **Definitions.** In this section:

(a) "Adoptee" has the meaning set forth in section 15-11-115.

(b) "Child of assisted reproduction" has the meaning set forth in section 15-11-120.

(c) "Distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment.

(d) "Functioned as a parent of the adoptee" has the meaning set forth in section 15-11-115, substituting "adoptee" for "child" in that definition.

(e) "Functioned as a parent of the child" has the meaning set forth in section 15-11-115.

(f) "Genetic parent" has the meaning set forth in section 15-11-115.

(g) "Gestational child" has the meaning set forth in section 15-11-121.

(h) "Relative" has the meaning set forth in section 15-11-115.

(2) **Terms of relationship.** A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (5) and (6) of this section, an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships.

(3) **Relatives by marriage.** Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, standing alone shall be construed to exclude relatives by marriage.

(4) **Half-blood relatives.** Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, standing alone shall be construed to include both types of relationships.

(5) **Transferor not genetic parent.** In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached eighteen years of age.

(6) **Transferor not adoptive parent.** In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(a) The adoption took place before the adoptee reached eighteen years of age;

(b) The adoptive parent was the adoptee's stepparent or foster parent; or

(c) The adoptive parent functioned as a parent of the adoptee before the adoptee reached eighteen years of age.

(7) **Class-closing rules.** The following rules apply for purposes of the class-closing rules:

(a) A child in utero at a particular time is treated as living at that time if the child lives one hundred twenty hours after birth.

(b) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives one hundred twenty hours after birth and was in utero not later

than thirty-six months after the deceased parent's death or born not later than forty-five months after the deceased parent's death.

(c) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

Source: L. 94: Entire part R&RE, p. 1012, § 3, effective July 1, 1995. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1685, § 14, effective July 1, 2010. **L. 2010:** (3) and (4) amended, (SB 10-199), ch. 374, p. 1751, § 12, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules of construction contained in this section are substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5 through 14.9. These sections of the Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

The rules set forth in this section are rules of construction, which under Section 2-701 are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705 invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.

Subsection (a): Definitions. With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of "distribution date," which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

Subsection (b): Terms of Relationship. Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See Examples 11 through 15.

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor *is* the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.

Subsection (c): Relatives by Marriage. Subsection (c) provides that terms of relationship that do not differentiate relationships by blood from those by marriage, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by marriage.

Subsection (d): Half Blood Relatives. In providing that terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase "or either of them" in Section 2-103(3) and (4). As provided in subsection (g), inclusion of a half blood relative in a class is subject to the class-closing rules.

Subsection (e): Transferor Not Genetic Parent. The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child's genetic parent functioned as a parent of the child before the child reached the age of [18]. As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

Example 9. G's will created a trust, income to G's son, A, for life, remainder in corpus to A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D, never married each other, and A never functioned as a parent of the child, nor did any of A's relatives or spouses or surviving spouses of any of A's relatives. D later married E; D and E raised X as a member of their household. Because neither A nor any of A's specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A's child

for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is the genetic parent.

Subsection (f): Transferor Not Adoptive Parent. The general theory of subsection (f) is that a transferor who is not the adoptive parent of an adoptee would want the child to be included in a class gift as a child of the adoptive parent only if (i) the adoption took place before the adoptee reached the age of [18]; (ii) the adoptive parent was the adoptee's stepparent or foster parent; or (iii) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18]. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

Example 10. G's will created a trust, income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X. Because the adoption did not take place before X reached the age of [18], A was not X's stepparent or foster parent, and A did not function as a parent of X before X reached the age of [18]. X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-118, X would be A's child for purposes of intestate succession. Subsection (d) is inapplicable because the transferor, A, is an adoptive parent.

Subsection (g): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (i) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (ii) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

Subsection (g)(1): Child in Utero. Subsection (g)(1) codifies the well-accepted rule that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

Subsection (g)(2): Children of Assisted Reproduction and Gestational Children; Class Gift in Which Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously, and if the distribution date arises at the deceased parent's death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (i) in utero no later than 36 months after the deceased parent's death or (ii) born no later than 45 months after the deceased parent's death.

The 36-month period in subsection (g)(2) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

Example 11. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, W decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 12. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation." G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of a gestational carrier. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 13. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G's children. When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36

months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class under the rule of convenience.

Subsection (g)(2) Inapplicable Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent's death. Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent's death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (i) in utero within 36 months after the deceased parent's death or (ii) born within 45 months after the deceased parent's death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

A case that reached the same result that would be reached under this section is In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants". The children would be included under this section because (i) the deceased father signed a record that would satisfy Section 2-120(f)(1), (ii) the distribution dates arose after the deceased father's death, and (iii) the children were living on the distribution dates, thus satisfying subsection (g)(1).

Example 14. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive

the trust principal, because a parent-child relationship between G and X existed under § 2-120(f) and X was living on the distribution date.

Example 15. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class-gift of income under the rule of convenience. If G's widow later decides to use his frozen sperm to have another child or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G's death or born within 45 months after the G's death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

Subsection (g)(3). For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Companion Statute. A state enacting this provision should also consider enacting the Uniform Status of Children of Assisted Conception Act (1988).

Historical Note. This Comment was revised in 1993 and 2008.

ANNOTATION

Law reviews. For article, "The Adoptee Trap, the Accidental Beneficiary, and the Rational Testator", see 42 Colo. Law. 29 (Feb. 2013).

15-11-706. Nonprobate transfers - deceased beneficiary.

(1) **Definitions.** This section shall not apply to wills; beneficiary deeds; insurance or annuity policies; pension, profit sharing, retirement, or similar benefit plans; or a transfer of a vehicle title as described in section 42-6-110.5. As used in this section, unless the context otherwise requires:

(a) "Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

(b) "Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

(c) "Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(d) "Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he or she survived the decedent.

(e) (Reserved)

(f) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 15-11-702.

(2) **Substitute gift.** If a beneficiary fails to survive the decedent and is a grandparent, or a descendant of a grandparent of the decedent, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per capita at each generation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(b) Except as provided in paragraph (d) of this subsection (2), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs

of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the deceased beneficiary's or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he or she would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take per capita at each generation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph (b), "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(c) Except as otherwise provided in a governing instrument, for the purposes of this part 7, words of survivorship, such as in a beneficiary designation to an individual "if he survives me", or in a beneficiary designation to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.

(d) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(3) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (3), the property passes under the primary substitute gift.

(b) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) As used in this subsection (3), unless the context otherwise requires:

(I) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(III) "Younger-generation beneficiary designation" means a beneficiary designation that:

(A) Is to a descendant of a beneficiary of the primary beneficiary designation;

(B) Is an alternative beneficiary designation with respect to the primary beneficiary designation;

(C) Is a beneficiary designation for which a substitute gift is created; and

(D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

(4) **Protection of payers.**

(a) A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party has received written notice as described in paragraph (b) of this subsection (4). A payer or other third party shall have no duty or obligation to inquire as to the existence of a substituted gift under this section or to seek any evidence with respect to any such substituted gift. A payer or other third party is only liable for actions taken two or more business days after the payer or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (4) shall not be sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim to a substitute gift is being made under this section. The written notice shall be mailed to the payer's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payer or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (4), a payer or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payer or other third

party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payer or other third party discharges the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(5) **Protection of bona fide purchasers; personal liability of recipient.**

(a) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law (other than the federal "Employee Retirement Income Security Act of 1974", as amended) with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Source: L. 94: Entire part R&RE, p. 1013, § 3, effective July 1, 1995. **L. 95:** (2) amended, p. 357, § 9, effective July 1. **L. 2004:** IP(1) amended, p. 733, § 2, effective August 4. **L. 2017:** IP(1) amended, (HB 17-1213), ch. 184, p. 675, § 2, effective August 9.

15-11-707. Survivorship with respect to future interests under terms of trust; substitute takers.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(b) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(c) "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he or she survived the distribution date.

(d) "Distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.

(e) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

(f) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(g) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Survivorship required; substitute gift.** A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per capita at each generation

the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(b) Except as provided in paragraph (d) of this subsection (2), if the future interest is in the form of a class gift, other than a future interest to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the deceased beneficiary's or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he or she would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take per capita at each generation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph (b), "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

(c) For the purposes of this part 7, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(d) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(3) **More than one substitute gift; which one takes.** If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (3), the property passes under the primary substitute gift.

(b) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) As used in this subsection (3), unless the context otherwise requires:

(I) "Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary future interest.

(III) "Younger-generation future interest" means a future interest that:

(A) Is to a descendant of a beneficiary of the primary future interest;

(B) Is an alternative future interest with respect to the primary future interest;

(C) Is a future interest for which a substitute gift is created; and

(D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

(4) **If no other takers, property passes under residuary clause or to transferor's heirs.** Except as provided in subsection (5) of this section, if, after the application of subsections (2) and (3) of this section, there is no surviving taker, the property passes in the following order:

(a) If the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(b) If no taker is produced by the application of paragraph (a) of this subsection (4), the property passes to the transferor's heirs under section 15-11-711.

(5) **If no other takers and if future interest created by exercise of power of appointment.** If, after the application of subsections (2) and (3) of this section, there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(a) The property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(b) If no taker is produced by the application of paragraph (a) of this subsection (5), the property passes as provided in subsection (4) of this section. For purposes of subsection (4) of this section, "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

Source: L. 94: Entire part R&RE, p. 1017, § 3, effective July 1, 1995. **L. 95:** (2)(a) and (2)(b) amended, p. 358, § 10, effective July 1.

15-11-708. Class gifts to "descendants", "issue", or "heirs of the body"; form of distribution if none specified.

If a class gift in favor of "descendants", "issue", or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

Source: L. 94: Entire part R&RE, p. 1021, § 3, effective July 1, 1995.

15-11-709. By representation; per capita at each generation; per stirpes.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 15-11-702.

(b) "Distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.

(c) "Surviving ancestor", "surviving child", or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Per capita at each generation.** If an applicable statute or a governing instrument calls for property to be distributed "per capita at each generation", the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(3) **Per stirpes.** If a governing instrument calls for property to be distributed "per stirpes", the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants

is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(4) **Deceased descendant with no surviving descendant disregarded.** For the purposes of subsections (2), (3), and (5) of this section, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

(5) **By representation.** For all governing instruments executed before, on, or after July 1, 1995, unless the governing instrument provides otherwise, the following definition of "by representation" shall apply: If "by representation" is called for, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share and the share of each deceased descendant in the same generation is divided among his or her descendants in the same manner.

Source: L. 94: Entire part R&RE, p. 1021, § 3, effective July 1, 1995. **L. 95:** Entire section amended, p. 358, § 11, effective July 1.

15-11-710. Worthier-title doctrine abolished.

The doctrine of worthier-title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives", or "family", or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

Source: L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

15-11-711. Interests in "heirs" and like.

If an applicable statute or a governing instrument calls for a present or future distribution to, or creates a present or future interest in, a designated individual's "heirs", "heirs at law", "next of kin", "relatives", or "family", or language of similar import, the property passes to those persons in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the donative disposition is to take effect in possession or enjoyment. If the designated individual's

surviving spouse is living but is remarried at the time the interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

Source: L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

15-11-712. Simultaneous death; disposition of property.

The rules of construction in this section shall control in those situations not subject to the control of section 15-11-702.

(1) Where the title to property or the devolution thereof depends upon priority of death and there is no clear and convincing evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he or she had survived, except as provided otherwise in this section.

(2) (a) If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his or her surviving another person, and both persons die, and there is no clear and convincing evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived.

(b) If there is no clear and convincing evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their deaths each of such beneficiaries would have been entitled to the property if he or she had survived the others, the property shall be divided into as many equal portions as there were beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

(3) Where there is no clear and convincing evidence that two joint tenants have died otherwise than simultaneously, the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants. For the purposes of this section, the term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

(4) Where a husband and wife have died leaving community property and there is no clear and convincing evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived, and as if said one-half were his separate property, and the other one-half thereof shall pass as if the wife had survived, and as if said other one-half were her separate property.

(5) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no clear and convincing evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary; except that, if the policy is community property of the insured and his or her spouse, and there is no alternative beneficiary, or no alternative beneficiary except the estate or personal representative of the insured, the proceeds shall be distributed as community property.

(6) This section shall not apply in the case of wills, living trusts, deeds, or contracts of insurance or any other situation where provision is made for distribution of property different from the provisions of this section or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

Source: L. 94: Entire part R&RE, p. 1022, § 3, effective July 1, 1995.

Editor's note: This section is similar to former § 15-11-613 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "The Will in Estate Planning", see 29 Dicta 367 (1952). For comment, "Lovato v. District Court: The Dilemma of Defining Death", see 58 Den. L.J. 627 (1981).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

This section is inapplicable if there is evidence as to which one of the parties survived the other or if there are particular circumstances from which the fact of survivorship may be inferred. The presumption of simultaneous death of the parties was not intended to take the place of competent, positive and direct evidence, and the fact of survivorship requires no higher degree of proof than any other fact in the case. Sauers v. Stolz, 121 Colo. 456, 218 P.2d 741 (1950).

Provisions of separate trust not controlling over subsection (5). In cases when the beneficiary and insured die simultaneously, and where there are no words in the contract of insurance in any way reversing the statutory presumption of subsection (5), nor is there anything said in the beneficiary's will pertaining to simultaneous death, a presumption as to survivorship contained in the insured's trust does not result in a distribution of property different from that provided for by use of the statutory presumption. Estate of Ohre v. State Dept. of Rev., 41 Colo. App. 113, 585 P.2d 920 (1978).

Applied in Lovato v. District Court, 198 Colo. 419, 601 P.2d 1072 (1979); In re

Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

15-11-713. Construction of wills and trusts containing formula marital clauses.

(1) If a decedent dies leaving a will that was executed or a trust that was created before September 12, 1981, which will or trust contains a formula expressly providing that the decedent's spouse or a qualifying trust is to receive the maximum amount of property qualifying for the marital deduction allowable by federal law, such formula provision shall be construed as referring to the amount of property which, after utilization of the credits available to the decedent's estate, produces the least possible federal estate tax and is eligible for the marital deduction as allowed under the federal "Internal Revenue Code", as amended by section 403 (a) of the federal "Economic Recovery Tax Act of 1981", P. L. No. 97-34, in effect at the time of the decedent's death; except that such construction shall not be made if its effect is to reduce the amount of property passing to the surviving spouse or a qualifying trust. Such construction shall only be made if the following requirements are met:

(a) The decedent died after December 31, 1988;

(b) The formula referred to in this subsection (1) was not amended to refer specifically to an unlimited marital deduction under federal law at any time after September 12, 1981, and before the death of the decedent;

(c) The will or trust contains a devise to, or is in trust for the benefit of, the decedent's spouse which qualifies for a marital deduction pursuant to section 2056 of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056, as amended;

(d) There is no finding by the court having jurisdiction over the decedent's estate that the decedent intended to refer to the maximum marital deduction of the internal revenue code in effect at the time that the will or trust was drafted; and

(e) All distributions in satisfaction of the surviving spouse's share of the estate or the qualifying trust for the surviving spouse have not been completed.

(2) For the purposes of this section:

(a) "Amount" includes a fractional, pecuniary, or residual amount.

(b) "Optimum marital deduction formula" means any formula in a will or trust that provides that the decedent's spouse or a qualifying trust is to receive the maximum amount of property that qualifies for the estate tax marital deduction allowable by federal law that produces the least possible or no federal estate tax. A formula subject to construction under subsection (1) of this section is, as construed by subsection (1) of this section, an optimum marital deduction formula.

(c) "Qualifying trust" means any trust for the benefit of the decedent's spouse which qualifies for the marital deduction allowed under section 2056 of the federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 2056, as amended.

(3) In the case of an optimum marital deduction formula that contains a general reference to federal estate tax credits or otherwise requires the state death tax credit to be taken into account without a specific reference to such tax credit, the decedent is presumed to have intended that such tax credit be taken into account to reduce the amount that the decedent's spouse or a qualifying trust is to receive, only to the extent that the overall estate tax burden on the decedent's estate is not thereby increased. However, if a preponderance of the evidence shows that the decedent intended to increase the overall estate tax burden on the estate, the state death tax credit shall be taken into account fully for the purposes of reducing the amount that the decedent's spouse or a qualifying trust is to receive. Any formula subject to construction under subsection (1) of this section is subject to the presumption set forth in this subsection (3).

(4) In the case of an optimum marital deduction formula that specifically requires the state death tax credit to be taken into account and does not contain any words limiting the extent to which such credit shall be taken into account, the decedent is presumed to have intended that such credit be taken into account fully for the purpose of reducing the amount that the decedent's spouse or a qualifying trust is to receive, notwithstanding any resulting increase in the overall estate tax burden on the estate.

(5) Subsections (3) and (4) of this section apply with respect to any decedent who dies after December 31, 1988, unless all distributions in satisfaction of the surviving spouse's share of the estate or the qualifying trust for the surviving spouse are completed by July 1, 1994.

Source: L. 94: Entire part R&RE, p. 1024, § 3, effective July 1, 1995. **L. 95:** IP(1) amended, p. 360, § 12, effective July 1.

Editor's note: This section is similar to former § 15-11-614 as it existed prior to 1995.

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

GENERAL COMMENT

Part 8 contains five general provisions that cut across probate and nonprobate transfers. Part 8 previously contained a sixth provision, Section 2-801, which dealt with

disclaimers. Section 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). To avoid renumbering the other sections in this Part, Section 2-801 is reserved for possible future use.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Sections 2-805 and 2-806, added in 2008, bring the reformation provisions in the Uniform Trust Code into the UPC.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled "Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents", can be found at 17 ACTEC Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair St., Suite 1700, Chicago, IL 60611, Phone 312/915-0195, FAX 312/915-0187.

Historical Note. This General Comment was revised in 1993 and 2008.

2002 Amendment Relating to Disclaimers. In 2002, the Code's former disclaimer provision (§ 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (§§ 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.

15-11-801. Disclaimer of property interests. (Repealed)

Source: L. 94: Entire part R&RE, p. 1024, § 3, effective July 1, 1995. **L. 95:** (4) amended, p. 360, § 13, effective July 1. **L. 2011:** Entire section repealed, (SB 11-166), ch. 203, p. 868, § 2, effective August 10.

15-11-802. Effect of divorce, annulment, and decree of separation.

(1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separation that does not terminate the marriage is not a divorce for purposes of this section.

(2) For purposes of parts 1, 2, 3, and 4 of this article, and of section 15-12-203, a surviving spouse does not include:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or enter into a common-law marriage;

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony or enters into a common-law marriage with a third individual; or

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Source: L. 94: Entire part R&RE, p. 1027, § 3, effective July 1, 1995. **L. 2022:** (1) amended, (SB 22-092), ch. 60, p. 277, § 10, effective August 10.

Editor's note: This section is similar to former § 15-11-802 as it existed prior to 1995.

ANNOTATION

This section in no way limits a testator's authority to bequeath property to a person by name, whether that person is a former spouse or not. What the statute does prevent is a former spouse from taking property which the decedent has expressly devised to the "surviving spouse". Where a decedent has bequeathed property to a "surviving spouse" by specifically using the term "surviving spouse", this section bars the former spouse from taking that property. Christensen v. Sabad, 773 P.2d 538 (Colo. 1989).

Applied in McDonald v. Hutchins, 43 Colo. App. 135, 602 P.2d 889 (1979).

15-11-803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Felonious killing", except as provided in subsection (7) of this section, is the killing of the decedent by an individual who, as a result thereof, is convicted of, pleads guilty to, or enters a plea of nolo contendere to the crime of murder in the first or second degree or manslaughter, as said crimes are defined in sections 18-3-102 to 18-3-104, C.R.S.

(c) "Governing instrument" means a governing instrument executed by the decedent.

(d) "Killer" is any individual who has committed a felonious killing.

(e) "Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate the decedent in place of the killer and whether or not the decedent then had capacity to exercise the power.

(2) **Forfeiture of statutory benefits.** An individual who feloniously kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective-share, an omitted spouse's or child's share, the decedent's homestead exemption under section 38-41-204, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the intestate share.

(3) **Revocation of benefits under governing instruments.** The felonious killing of the decedent:

(a) Revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

(4) **Effect of severance.** A severance under paragraph (b) of subsection (3) of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property

which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(5) **Effect of revocation.** Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(6) **Wrongful acquisition of property.** A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from the killer's wrongdoing.

(7) **Felonious killing; how determined - time limitations on civil proceedings.**

(a) **Criminal proceedings.** After all right to appeal has been waived or exhausted following the entry of a judgment of conviction establishing criminal accountability for the felonious killing of the decedent, such judgment conclusively establishes the convicted individual as the decedent's killer for purposes of this section.

(b) **Civil proceedings.** Notwithstanding the status or disposition of a criminal proceeding, a court of competent jurisdiction, upon the petition of an interested person, shall determine whether, by a preponderance of evidence standard, each of the elements of felonious killing of the decedent has been established. If such elements have been so established, such determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(c) **Time limitations on civil proceedings.**

(I) A petition brought under paragraph (b) of this subsection (7) may not be filed more than three years after the date of the decedent's death.

(II) Notwithstanding any provision of subparagraph (I) of this paragraph (c) to the contrary, if a criminal proceeding is commenced in a court of this state or in another jurisdiction against an individual for the felonious killing of the decedent, a petition brought under paragraph (b) of this subsection (7) may be filed so long as the petition is filed no later than one year after all right to appeal has been waived or exhausted following an entry of a judgment of conviction, or a dismissal, or an acquittal in the criminal proceeding. However, if the death and the possible culpability of the slayer for the felonious slaying of the decedent is not known to the petitioner within the three-year period of limitations established pursuant to subparagraph (I) of this paragraph (c), the accrual of the action under paragraph (b) of this subsection (7) and the possibility of the tolling of the running of the three-year period of limitation under subparagraph (I) of this paragraph (c) shall be determined according to the principles of accrual and tolling established by case law with respect to similar limitations established under section 13-80-108, C.R.S.

(d) **Judgment of conviction.** For the purposes of this subsection (7), a "judgment of conviction" includes a judgment of conviction on a plea of guilty or nolo contendere, or a judgment of conviction on a verdict of guilty by the court or by a jury.

(8) **Protection of payers and other third parties.**

(a) A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a felonious killing, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party has received written notice as described in paragraph (b) of this subsection (8). A payer or other third party shall have no duty or obligation to make any determination as to whether or not the decedent was the victim of a felonious killing or to seek any evidence with respect to any such felonious killing even if the circumstances of the decedent's death are suspicious or questionable as to the beneficiary's participation in any such felonious killing. A payer or other third party is only liable for actions taken two or more business days after the payer or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this subsection (8) shall not be sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim of forfeiture or revocation is being made under this section. The written notice shall be mailed to the payer's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payer or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (8), a payer or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payer or other third party discharges the payer or other third party from all claims under the governing

instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(9) **Protection of bona fide purchasers; personal liability of recipient.**

(a) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Source: L. 94: Entire part R&RE, p. 1027, § 3, effective July 1, 1995. **L. 2011:** (7) amended, (SB 11-083), ch. 101, p. 302, § 3, effective August 10. **L. 2022:** (1)(e), (2), and (6) amended, (SB 22-092), ch. 60, p. 277, § 11, effective August 10.

Editor's note: This section is similar to former § 15-11-803 as it existed prior to 1995.

ANNOTATION

Law reviews. For article, "Revocation of Wills — How Accomplished and the Effect", see 6 Dicta 7 (1929). For article, "Some Will Drafting Pointers on Marital Deduction", see 27 Dicta 65 (1950). For article, "Probate and Non-probate Distribution Issues in the Case of a Murder/Suicide", see 17 Colo. Law. 1061 (1988). For article, "Anatomy of an Undue Influence Case", see 42 Colo. Law. 55 (Apr. 2013).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The federal Employee Retirement Income Security Act (ERISA) does not preempt this section. Hartford Life & Accident Ins. Co. v. Nickal, 743 F. Supp. 3d 1286 (D. Colo. 2024).

A person who has no legal relationship with the decedent's heirs lacks standing to assert a claim under this section for the heirs' financial benefit. An asserted claim of an intangible interest of "seeking justice" is insufficient to establish standing. In re Estate of Garcia, 2022 COA 58, 516 P.3d 962.

A person who cannot financially gain from the forfeiture or revocation provisions of this section may not bring a claim solely to obtain a judicial determination that the defendant feloniously killed the decedent. The purpose of this section is to "prevent the slayer" who has feloniously killed another party from benefitting financially from the death or profiting from the wrongdoing. If the party or parties bringing suit cannot gain financially from the decedent's death, they are therefore not "interested parties" and have no standing. In re Estate of Garcia, 2022 COA 58, 516 P.3d 962.

New evidence brought forth twelve years after the decedent's death is insufficient to bring a judicial determination of a felonious act by the defendant or grant standing to another party. In re Estate of Garcia, 2022 COA 58, 516 P.3d 962.

This section does not apply in the absence of a conviction. Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950).

Thus, where a husband murdered his wife and adopted daughter before committing suicide, one-half of the wife's property held as a tenant in common with her husband passed to her adopted daughter and thence to her husband, while the other half of her property passed directly to her husband. Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950).

Husband convicted of murdering his wife may not take. Though convict was the husband of the deceased, he could not have taken any of his wife's property "by descent, devise, inheritance, or any other manner", because he was convicted of murdering his wife. The petitioners, claiming through convict, would have had no interest in the estate had there been any assets to administer. That the court, in such circumstances, should not have appointed an administrator upon their application is clear. Rosenboom v. Cline, 90 Colo. 1, 6 P.2d 453 (1931).

For purposes of inheritance, convicted killer of decedent must be treated as having predeceased the decedent, and proceeds of life insurance policies pass directly to named contingent beneficiary as successor-owner. Seidlitz v. Eames, 753 P.2d 775 (Colo. App. 1987).

Convicted killer of spouse may not recover life insurance proceeds. If a court of competent jurisdiction finds by a preponderance of the evidence that a beneficiary of a life insurance policy is guilty of first or second-degree murder or manslaughter of his spouse, the named insured, the killer, may not recover under that policy. Bernstein v. Rosenthal, 671 P.2d 979 (Colo. App. 1983).

Though convicted killer of spouse was the life insurance policy's beneficiary, this section applies. Therefore, decedent's beneficiary designation in killer's favor was revoked and the policy's proceeds were to be paid to decedent's estate. Hartford Life & Accident Ins. Co. v. Nickal, 743 F. Supp. 3d 1286 (D. Colo. 2024).

The term "kills" as used in this section is not to be construed narrowly. It encompasses anyone who causes the death of another, as either principal or accessory, and does not imply actual delivery of the fatal blows. In re Estate of Walker, 847 P.2d 162 (Colo. App. 1992).

The word "individual" in the definition of "felonious killing" must be interpreted in the context for which it is used. In the context of § 13-21-203, the wrongful death act, the word "individual" encompasses both individuals and entities such as corporations. Estate of Ross v. Pub. Serv. Co., 2025 COA 31, 569 P.3d 882.

Trial court did not err in determining that decedent's death was caused by a felonious killing and that the statutory cap on noneconomic damages therefore did not apply. The language, "[n]otwithstanding the status or disposition of a criminal proceeding", is broad enough to allow a court of competent jurisdiction to make a civil determination whether the elements of felonious killing have been established by a preponderance of the evidence, even where the person was acquitted or was convicted of a lesser offense, or where no criminal proceeding was ever initiated. Estate of Wright ex rel. Wright v. United Serv. Auto. Assn., 53 P.3d 683 (Colo. App. 2001).

This section does not apply to immunize insurers when the guilt of a beneficiary is established after an insurer's payment of policy proceeds. Instead, a court must apply a negligence standard to the insurer's conduct in paying insurance proceeds to the insured's killer. Lunsford v. W. States Life Ins. Co., 908 P.2d 79 (Colo. 1995) (decided under law in effect prior to the 1994 repeal and reenactment).

This section does not obligate law firm to return the proceeds of decedent wife's life insurance policy held in a client trust account as a retainer for representing defendant in a criminal prosecution for the murder of decedent, or render the firm liable for their expenditure, but rather the firm may continue to earn those funds in accordance with their fee agreement. Where funds held by a law firm in a client trust

account as a retainer represent a disposition of property covered by subsection (3), they also fall within the ambit of subsection (9)(a)'s protection, which protects those funds from disgorgement. In re Estate of Feldman, 2019 CO 62, 443 P.3d 66.

15-11-804. Revocation of probate and nonprobate transfers by divorce - no revocation by other changes of circumstances.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(a) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 15-11-802. A decree of separation that does not terminate the marriage is not a divorce for purposes of this section.

(c) "Divorced individual" includes an individual whose marriage has been annulled.

(d) "Governing instrument" refers to a governing instrument executed by the divorced individual before the divorce or annulment of the marriage to the divorced individual's former spouse.

(e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(f) "Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the divorced individual's former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate the divorced individual in place of the divorced individual's former spouse or in place of the divorced individual's former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(2) **Revocation upon divorce.** Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) Revokes any revocable (i) disposition or appointment of property made by a divorced individual to the divorced individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general

or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(b) Severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

(3) **Effect of severance.** A severance under paragraph (b) of subsection (2) of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(4) **Effect of revocation.** Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(5) **Revival if divorce nullified.** Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(6) **No revocation for other change of circumstances.** No change of circumstances other than as described in this section and in section 15-11-803 effects a revocation.

(7) **Protection of payers and other third parties.**

(a) A payer or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other third party has received written notice as described in paragraph (b) of this subsection (7). A payer or other third party shall have no duty or obligation to inquire as to the continued marital relationship between the decedent and such beneficiary or to seek any evidence with respect to any such marital relationship. A payer or other third party is only liable for actions taken two or more business days after the payer or other third party has actual receipt of such written notice. Any form or service of notice other than that described in paragraph (b) of this

subsection (7) shall not be sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument.

(b) The written notice shall indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a divorce, annulment, or remarriage of the decedent and the designated beneficiary occurred. The written notice shall be mailed to the payer's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payer or other third party in the same manner as a summons in a civil action.

(c) Upon receipt of the written notice described in paragraph (b) of this subsection (7), a payer or other third party may pay to the court any amount owed or transfer to or deposit with the court any item of property held by it. The availability of such actions under this section shall not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. The court is the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transfer to or deposit with the court of any item of property, even if no probate proceedings have been commenced before such payment, transfer, or deposit. Payment of amounts to the court or transfer to or deposit with the court of any item of property pursuant to this section by the payer or other third party discharges the payer or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to the court or items of property transferred to or deposited with the court.

(d) The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. A filing fee, if any, shall be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court.

(e) Upon petition to the court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(8) **Protection of bona fide purchasers; personal liability of recipient.**

(a) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return

the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Source: L. 94: Entire part R&RE, p. 1031, § 3, effective July 1, 1995. **L. 95:** (2)(a) amended, p. 361, § 14, effective July 1. **L. 2022:** (1)(b), (1)(d), (1)(f), and (2)(a) amended, (SB 22-092), ch. 60, p. 278, § 12, effective August 10.

ANNOTATION

Law reviews. For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "Divorce and the Effects of CRS § 15-11-804 on Estate Planning Documents", see 34 Colo. Law. 93 (Jan. 2005). For article, "Reformation: From Here to Uncertainty", see 44 Colo. Law. 59 (Sept. 2015). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (June 2022).

Revocation of life insurance policy upon divorce does not violate the prohibition against retrospective legislation, when statute is enacted after divorce, but before the death of a spouse. Subsection (2) is not retrospective with regard to beneficiaries' and decedents' interests. In re Estate of Becker, 32 P.3d 557 (Colo. App. 2000), aff'd sub nom. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

Subsection (2) is procedural because it relates only to a mode of procedure to enforce the right of each decedent to designate a beneficiary. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

Subsection (2) does not violate the contract clause of either the Colorado or United States Constitution. This subsection addresses the donative aspect of

an insurance contract, and does not impair contracts between decedents and insurance companies. Subsection (2) merely creates a default rule by changing the identity of the presumptive beneficiary, and does not impact any contractual obligations. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002).

Real property that was divided in separation agreement and in control of husband did not become former wife's property by virtue of a joint tenancy right of survivorship after former husband's death due to former wife's failure to execute deed or otherwise transfer her interest in the property to him; instead, decree of dissolution severed former wife's interest in the property. Camack v. Camack, 62 P.3d 1097 (Colo. App. 2002).

Subsection (7)(c) is in direct conflict with the federal Employee Retirement Income Security Act of 1974 (ERISA) and is thus preempted (citing Boggs v. Boggs, 520 U.S. 833 (1997)). The relevant "act or omission"—the death of the maker of the annuity contracts—occurred after the effective date of ERISA and the application of federal common law is not appropriate. In re Estate of MacAnally, 20 P.3d 1197 (Colo. App. 2000).

Subsection (8)(b) is preempted by ERISA. ERISA preemption extends to post-distribution lawsuits. Absent an express waiver of rights to the proceeds, ERISA precludes a lawsuit against a former spouse to recover insurance proceeds that were distributed to the former spouse as the named beneficiary. Ragan v. Ragan, 2021 COA 75, 494 P.3d 664.

Subsection (2) does not foreclose a former spouse from bringing a reformation claim pursuant to § 15-11-806. In re Estate of Little, 2018 COA 169, 433 P.3d 172.

General assembly did not intend for subsection (5) to be the exclusive remedy available to a former spouse. Former spouse may also seek reformation of will pursuant to § 15-11-806. In re Estate of Little, 2018 COA 169, 433 P.3d 172.

Section applies even though policy language required written notification by the insured for any modification of the insurance contract. In re Estate of Johnson, 2012 COA 209, 304 P.3d 614.

15-11-805. Ownership of personal property between spouses.

(1) For purposes of this article, tangible personal property in the joint possession or control of the decedent and his or her surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not otherwise evidenced by a certificate of title, bill of sale, or other writing. This presumption shall not apply to:

(a) Property acquired by either spouse before the marriage;

(b) Property acquired by either spouse by gift or inheritance during the marriage;

(c) Property used by the decedent spouse in a trade or business in which the surviving spouse has no interest; or

(d) Property held for another.

(e) (Deleted by amendment, L. 2002, p. 653, § 8, effective July 1, 2002.)

(2) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.

Source: L. 99: Entire section added, p. 466, § 4, effective July 1. **L. 2002:** Entire section amended, p. 653, § 8, effective July 1.

ANNOTATION

Law reviews. For article, "Estate Planning Tools for Second Marriages", see 45 Colo. Law. 45 (Dec. 2016).

Applied in In re Estate of Whittman, 220 P.3d 961 (Colo. App. 2009), aff'd, 233 P.3d 697 (Colo. 2010).

15-11-806. Reformation to correct mistakes.

The court may reform the terms of a governing instrument other than a trust that is governed by section 15-5-415, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intent was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1687, § 15, effective July 1, 2010. **L. 2018:** Entire section amended, (SB 18-180), ch. 169, p. 1193, § 10, effective January 1, 2019.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Added in 2008, Section 2-805 is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-805 is broader in scope than Section 415 of the Uniform Trust Code because Section 2-805 applies but is not limited to trusts.

Section 12.1, and hence Section 2-805, is explained and illustrated in the Comments to Section 12.1 of the Restatement and also, in the case of a trust, in the Comment to Section 415 of the Uniform Trust Code.

ANNOTATION

Law reviews. For article, "Correcting Documentary Misdescription With Reformation", see 39 Colo. Law. 97 (Aug. 2010). For article, "Court-Approved Trust Modifications—Binding Effect on IRS and Tax Consequences", see 41 Colo. Law. 55 (June 2012). For article, "Reformation: From Here to Uncertainty", see 44 Colo. Law. 59 (Sept. 2015). For article, "Avoiding Pitfalls for Minor Beneficiaries of IRAs and Other Qualified Retirement Benefits", see 46 Colo. Law. 47 (Oct. 2017).

This section is not a rule of construction. In re Estate of Ramstetter, 2016 COA 81, 411 P.3d 1043.

Former spouse has standing to pursue reformation claim. Section 15-11-804 does not foreclose a former spouse from bringing a reformation claim pursuant to this section. In re Estate of Little, 2018 COA 169, 433 P.3d 172.

15-11-807. Modification to achieve transferor's tax objectives.

To achieve the transferor's tax objectives, the court may modify the terms of a governing instrument other than a trust that is governed by section 15-5-416 in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.

Source: L. 2009: Entire section added, (HB 09-1287), ch. 310, p. 1687, § 15, effective July 1, 2010. **L. 2018:** Entire section amended, (SB 18-180), ch. 169, p. 1193, § 11, effective January 1, 2019.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

Added in 2008, Section 2-806 is based on Section 416 of the Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-806 is broader in scope than Section 416 of the Uniform Trust Code because Section 2-806 applies but is not limited to trusts.

Section 12.2, and hence Section 2-806, is explained and illustrated in the Comments to Section 12.2 of the Restatement and also, in the case of a trust, in the Comment to Section 416 of the Uniform Trust Code.

ANNOTATION

Law reviews. For article, "Court-Approved Trust Modifications—Binding Effect on IRS and Tax Consequences", see 41 Colo. Law. 55 (June 2012).

PART 9

HONORARY TRUSTS; TRUSTS FOR PETS

15-11-901. Honorary trusts; trusts for pets.

(1) **Honorary trust.** Subject to subsection (3) of this section, and except as provided under sections 38-30-110, 38-30-111, and 38-30-112, C.R.S., if (i) a trust is for a specific, lawful, noncharitable purpose or for lawful, noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for twenty-one years but no longer, whether or not the terms of the trust contemplate a longer duration.

(2) **Trust for pets.** Subject to this subsection (2) and subsection (3) of this section, a trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid. For purposes of this subsection (2), the determination of the "animals' offspring in gestation" is made at the time the designated domestic or pet animals become present beneficiaries of the trust. Unless the trust instrument provides for an earlier termination, the trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection (2), to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent. Any trust under this subsection (2) shall be an exception to any statutory or common law rule against perpetuities.

(3) **Additional provisions applicable to honorary trusts and trusts for pets.** In addition to the provisions of subsection (1) or (2) of this section, a trust covered by either of those subsections is subject to the following provisions:

(a) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the trust's purposes or for the benefit of a covered animal or animals.

(b) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(I) As directed in the trust instrument;

(II) If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(III) If no taker is produced by the application of subparagraph (I) or (II) of this paragraph (b), to the transferor's heirs under part 5 of this article.

(c) (Reserved)

(d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual.

(e) All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees.

(f) (Reserved)

(g) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

Source: L. 94: Entire part R&RE, p. 1034, § 3, effective July 1, 1995. **L. 95:** (2) amended, p. 361, § 15, effective July 1.

ANNOTATION

Law reviews. For article, "The Basics of Pet Trusts for Estate Planning Attorneys", see 37 Colo. Law. 49 (May 2008).

PART 10

INTERNATIONAL WILLS

Law reviews: For article, "Foreign Jurisdiction Property Interests -- the Case for Multiple Wills", see 18 Colo. Law. 1519 (1989).

15-11-1001. Short title.

This part 10 shall be known and may be cited as the "Uniform International Wills Act".

Source: L. 89: Entire part added, p. 811, § 1, effective April 17.

15-11-1002. Definitions.

As used in this part 10, unless the context otherwise requires:

(1) "Authorized person" and "person authorized to act in connection with international wills" means a person who, by section 15-11-1010 or the laws of the United States, including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills.

(2) "International will" means a will executed in conformity with sections 15-11-1003 to 15-11-1006.

Source: L. 89: Entire part added, p. 811, § 1, effective April 17.

15-11-1003. International wills - validity.

(1) A will is valid as regards form irrespective particularly of the place where it is made, of the location of the assets, and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this part 10.

(2) The invalidity of a will as an international will does not affect its formal validity as a will of another kind.

(3) This part 10 does not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Source: L. 89: Entire part added, p. 811, § 1, effective April 17.

15-11-1004. International wills - requirements.

(1) An international will shall be made in writing. It need not be written by the testator himself. It may be written in any language by hand or by any other means.

(2) A testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. Such testator need not inform the witnesses or the authorized person of the contents of the will.

(3) In the presence of the witnesses and of the authorized person the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

(4) If the testator is unable to sign, the absence of his signature shall not affect the validity of the international will if such testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In such case, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator, to sign the testator's name for him if the authorized person makes note of this on the will, but it is not required that any person sign the testator's name for him.

(5) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

(6) The provisions of section 15-11-501 shall apply.

Source: L. 89: Entire part added, p. 812, § 1, effective April 17.

15-11-1005. International wills - other points of form.

(1) All the signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet must be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet must be numbered.

(2) The date of the will shall be the date of its signature by the authorized person. Such date shall be noted at the end of the will by the authorized person.

(3) The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator, the place where he intends to have his will kept shall be mentioned in the certificate provided for in section 15-11-1006.

(4) A will executed in compliance with section 15-11-1004 shall not be invalid as an international will merely because it does not comply with this section.

Source: L. 89: Entire part added, p. 812, § 1, effective April 17.

15-11-1006. Certificate that requirements for an international will have been met.

(1) The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of this part 10 for valid execution of an international will have been fulfilled. The authorized person shall keep a copy of the certificate and deliver another to the testator.

(2) The certificate shall be substantially in the following form:

CERTIFICATE

1. I, _____ (name, address, and capacity), a person authorized to act in
connection with international wills,

2. certify that on _____ (date) at _____ (place)

3. (testator)_____
(name, address, and date and place of birth) in my presence and that of the
witnesses

4. (a) _____ (name, address, and date and place of birth)
(b) _____ (name, address, and date and place of birth) has declared
that the attached document is his will and that he knows the contents

thereof.
*(c) _____ (social security number or any other individual-identifying
number established by law)

5. I furthermore certify that:

6. (a) In my presence and in that of the witnesses
(1) the testator has signed the will or has acknowledged his signature previously
affixed.
*(2) following a declaration of the testator stating that he was unable to sign his
will for the following reason _____, I have mentioned
this declaration on the will,
* and the signature has been affixed by _____ (name and address)
(to be completed if testator unable to sign)

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by _____ and numbered (to be completed if testator unable to sign);

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses
as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
*(f) the intended place of deposit of safekeeping of the instrument pending the death of the testator is _____.

11. *(g) the testator has requested me to include the following statement concerning the safekeeping of his will:

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12. PLACE OF EXECUTION

13. DATE

14. SIGNATURE

* to be completed if appropriate

Source: L. 89: Entire part added, p. 812, § 1, effective April 17.

15-11-1007. Effect of certificate.

In the absence of evidence to the contrary, the certificate of the authorized person is conclusive of the formal validity of the instrument as a will under this part 10. The absence or irregularity of a certificate does not affect the formal validity of a will under this part 10.

Source: L. 89: Entire part added, p. 814, § 1, effective April 17.

15-11-1008. Revocation.

An international will is subject to the rules of revocation of wills set forth in part 5 of this article.

Source: L. 89: Entire part added, p. 814, § 1, effective April 17.

15-11-1009. Source and construction of this part.

Sections 15-11-1001 to 15-11-1008 derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this part 10, regard shall be had to its international origin and to the need for uniformity in its interpretation.

Source: L. 89: Entire part added, p. 814, § 1, effective April 17.

15-11-1010. Persons authorized to act in relation to international will - eligibility - recognition by authorizing agency.

Individuals who have been admitted to practice law before the courts of this state and are currently licensed so to do are authorized persons in relation to international wills.

Source: L. 89: Entire part added, p. 814, § 1, effective April 17.

15-11-1011. Filing of international will - certificate and deposit of will.

(1) (a) The authorized person may file, at the time the international will is made, a completed copy of the certificate required by this part 10 with the clerk of the court having probate jurisdiction in the county in which the testator is domiciled.

(b) If the testator is not domiciled in Colorado, the authorized person may file the completed copy of the certificate with the clerk of the court having probate jurisdiction in the county where the international will was executed.

(c) The failure of the authorized person to correctly file a properly completed certificate with the appropriate court shall not in and of itself invalidate the international will.

(2) Nothing in this section shall be construed to limit the ability of the testator or the testator's agent to deposit an international will with any court for safekeeping as authorized in section 15-11-515.

Source: L. 89: Entire part added, p. 814, § 1, effective April 17. **L. 94:** (2) amended, p. 1037, § 8, effective July 1, 1995.

PART 11

COLORADO STATUTORY RULE AGAINST PERPETUITIES ACT

Law reviews: For article, "Colorado Revisits the Rule Against Perpetuities", see 35 Colo. Law. 75 (Nov. 2006); for article, "Forever is an Awfully Long Time: Affordable Housing Covenants in Colorado (Part II)", see 48 Colo. Law. 44 (Aug.-Sept. 2019).

15-11-1101. Short title.

This part 11 shall be known and may be cited as the "Colorado Statutory Rule Against Perpetuities Act".

Source: L. 91: Entire part added, p. 1445, § 9, effective May 31.

15-11-1102. Statutory rule against perpetuities - applicability - repeal. (Repealed)

Source: L. 91: Entire part added, p. 1445, § 9, effective May 31. **L. 2001:** (1) amended, p. 888, § 4, effective June 1. **L. 2006:** (6) and (7) added, p. 377, § 7, effective July 1.

Editor's note: Subsection (7) provided for the repeal of this section, effective July 1, 2008. (See L. 2006, p. 377.)

15-11-1102.5. Statutory rule against perpetuities.

(1) **Year 2001 rule.**

(a) Paragraph (b) of this subsection (1) shall apply to interests in trust and powers of appointment with respect to all or any part of a trust, which interest or power is created after May 31, 2001.

(b) (I) A nonvested property interest is invalid unless it either vests or terminates within one thousand years after its creation.

(II) A general power of appointment not presently exercisable because of a condition precedent is invalid unless the condition precedent either is satisfied or becomes impossible to satisfy within one thousand years after its creation.

(III) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless the power is irrevocably exercised or otherwise terminates within one thousand years after its creation.

(2) **Year 1991 rule.**

(a) Paragraph (b) of this subsection (2) shall apply to interests and powers created on or after May 31, 1991, other than interests and powers subject to paragraph (b) of subsection (1) of this section.

(b) (I) A nonvested property interest is invalid unless:

(A) When the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual who is then alive; or

(B) The interest either vests or terminates within ninety years after its creation.

(II) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(A) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than twenty-one years after the death of an individual who is then alive; or

(B) The condition precedent either is satisfied or becomes impossible to satisfy within ninety years after its creation.

(III) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(A) When the power is created, it is certain to be irrevocably exercised or to otherwise terminate no later than twenty-one years after the death of an individual who is then alive; or

(B) The power is irrevocably exercised or otherwise terminates within ninety years after its creation.

(IV) In determining whether a nonvested property interest or a power of appointment is valid under subparagraphs (I) to (III) of paragraph (b) of this subsection (2), the possibility that a child will be born to an individual after the individual's death is disregarded.

(V) If, in measuring a period from the creation of a trust or other property arrangement for purposes of interests, powers, and trusts subject to this paragraph (b), language in a governing instrument seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon the later of the expiration of a period of time not exceeding twenty-one years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or the expiration of a period of time that exceeds or might exceed twenty-one years after the death of the survivor or lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds twenty-one years after the death of the survivor of the specified lives.

(3) **Nonvested interest or power created by the exercise of a power.**

(a) For the purposes of paragraph (a) of subsection (1) of this section, paragraph (a) of subsection (2) of this section, and subparagraph (II) of paragraph (c) of this subsection (3), a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) For the purposes of paragraph (b) of subsection (1) of this section and paragraph (b) of subsection (2) of this section, a power of appointment created by the exercise of a nongeneral power of appointment shall be considered as created when the first power of appointment is

created. This paragraph (b) shall be applied and construed in a manner that is consistent with the treatment of the exercise of a nongeneral power of appointment as nontaxable for purposes of the estate and gift tax under the federal internal revenue laws.

(c) (I) Paragraph (b) of subsection (1) of this section shall not apply with respect to nonvested property interests and powers of appointment created by the exercise of a nongeneral power of appointment over all or any part of a trust that was irrevocable on September 25, 1985.

(II) Nonvested property interests and powers of appointment, which interests or powers are so created on or after May 31, 1991, shall be subject to paragraph (b) of subsection (2) of this section.

(III) This paragraph (c) shall be applied and construed in a manner that is consistent with the treatment of such a trust as exempt from the generation-skipping transfer tax under the federal internal revenue laws.

Source: L. 2006: Entire section added, p. 378, § 8, effective July 1.

ANNOTATION

Law reviews. For article, "Pulling the Plug on Perpetual Trusts: Legal and Tax Considerations for Early Termination of an Irrevocable Trust in Colorado", see 55 Colo. Law. 40 (Jan.-Feb. 2026).

15-11-1103. When nonvested property interest or power of appointment created.

(1) Except as provided in subsections (2) and (3) of this section and in sections 15-11-1102.5 (3)(a) and 15-11-1106 (1), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(2) For purposes of this part 11, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of either a nonvested property interest or a property interest subject to a power of appointment described in section 15-11-1102 (2) or (3), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. For purposes of this part 11, a joint power with respect to community property or to marital property under the "Uniform Marital Property Act" held by individuals married to each other is a power exercisable by one person alone.

(3) For purposes of this part 11, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property

arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Source: L. 91: Entire part added, p. 1446, § 9, effective May 31. **L. 2006:** (1) amended, p. 381, § 11, effective July 1.

15-11-1104. Reformation - repeal. (Repealed)

Source: L. 91: Entire part added, p. 1446, § 9, effective May 31. **L. 2006:** (2) and (3) added, p. 380, § 9, effective July 1.

Editor's note: Subsection (3) provided for the repeal of this section, effective July 1, 2008. (See L. 2006, p. 380.)

15-11-1104.5. Reformation.

(1) **Year 2001 rule.** Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the one thousand years allowed by section 15-11-1102.5 (1)(b)(I), (1)(b)(II), or (1)(b)(III) if:

(a) A nonvested property interest or a power of appointment becomes invalid under section 15-11-1102.5 (1)(b); or

(b) A class gift is not, but might become, invalid under section 15-11-1102.5 (1)(b), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(2) **Year 1991 rule.** Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years allowed by section 15-11-1102.5 (2)(b)(I)(B), (2)(b)(II)(B), or (2)(b)(III)(B) if:

(a) A nonvested property interest or a power of appointment becomes invalid under section 15-11-1102.5 (2)(b);

(b) A class gift is not, but might become, invalid under section 15-11-1102.5 (2)(b), and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(c) A nonvested property interest that is not validated by section 15-11-1102.5 (2)(b)(I)(A) can vest but not within ninety years after its creation.

Source: L. 2006: Entire section added, p. 380, § 10, effective July 1.

15-11-1105. Exclusions from statutory rule against perpetuities.

(1) The statutory rule against perpetuities, as set forth in sections 15-11-1102 and 15-11-1102.5, does not apply to invalidate:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

(I) A premarital or postmarital agreement;

(II) A separation or divorce settlement;

(III) A spouse's election;

(IV) A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;

(V) A contract to make or not to revoke a will or trust;

(VI) A contract to exercise or not to exercise a power of appointment; or

(VII) A transfer in satisfaction of a duty of support.

(VIII) (Deleted by amendment, L. 2006, p. 381, § 12, effective July 1, 2006.)

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(c) A power to appoint a fiduciary;

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more

employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(g) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state.

Source: L. 91: Entire part added, p. 1447, § 9, effective May 31. **L. 2006:** IP(1) and (1)(a) amended, p. 381, § 12, effective July 1.

15-11-1106. Prospective application.

(1) Except as extended by subsection (2) of this section, this part 11 applies to a nonvested property interest or a power of appointment that is created on or after May 31, 1991. For purposes of this section and section 15-11-1107, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(2) If a nonvested property interest or a power of appointment was created before May 31, 1991, and is determined in a judicial proceeding, commenced on or after May 31, 1991, to violate this state's rule against perpetuities as that rule existed before May 31, 1991, a court upon the petition of an interested person shall reform the disposition by inserting a saving clause that preserves most closely the transferor's manifested plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Source: L. 91: Entire part added, p. 1448, § 9, effective May 31. **L. 2006:** (1) amended, p. 381, § 13, effective July 1.

ANNOTATION

Subsection (2) does not allow a party to bring a new action for reformation after a judicial determination that a property interest violated the common law rule against perpetuities. The statute does not authorize a party to file a second lawsuit, because there is no evidence of the general assembly's intent to create an exception to the doctrine of claim preclusion. Argus Real

Estate, Inc. v. E-470 Pub. Hwy. Auth., 109 P.3d 604 (Colo. 2005).

15-11-1106.5. Retroactive application of certain provisions - notice of election.

(1) Sections 15-11-1102.5 and 15-11-1104.5 shall apply retroactively with respect to an interest in a trust or a power of appointment over all or any part of a trust, which interest or power was created before July 1, 2006, unless a person who owns or holds such interest or power makes and delivers a notice of election as provided in this section.

(2) (a) The notice of election pursuant to subsection (1) of this section shall be a written statement of such person's election against the retroactive application of sections 15-11-1102.5 and 15-11-1104.5. The notice of election shall include a reference to this section, the name and date of the trust, the names of the settlor and the trustee of the trust, a description of the interest or power, and the name and address of the person making the election. The notice of election shall be signed and acknowledged by such person.

(b) The notice of election shall be delivered to a trustee of such trust on or before July 1, 2008. If there is no person serving as trustee at the time delivery is to be made, the notice of election may instead be delivered to a person authorized to appoint a successor trustee of the trust. When the successor trustee is appointed, the person to whom the notice of election was delivered shall deliver it to the successor trustee.

(c) The notice of election shall be considered delivered to the person to whom delivery is required to be made when the notice of election or a copy thereof is delivered in person or when mailed by registered or certified mail, return receipt requested, to such person.

(d) The trustee of the trust shall file the notice of election with the records maintained by the trustee for the trust. There shall be a rebuttable presumption that the notice of election was not delivered as provided in this section unless the notice of election or a copy of such notice is in the records of the trust maintained by the trustee.

(3) No fiduciary for any trust, estate, individual, or other person with an interest, right, or power affected by the retroactive application of such amendments shall be required to make such election, nor shall such fiduciary be held responsible for not making such election.

Source: L. 2006: Entire section added, p. 392, § 27, effective July 1.

15-11-1107. Uniformity of application and construction.

(1) This part 11 shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part 11 among states enacting the "Uniform

Statutory Rule Against Perpetuities Act". With respect to any matter relating to the validity of an interest within the rule against perpetuities, unless a contrary intent appears, it shall be presumed that the transferor of the interest intended that the interest be valid.

(2) This part 11 supersedes and abolishes the rule of the common law known as the rule against perpetuities for nonvested interests created after May 31, 1991.

Source: L. 91: Entire part added, p. 1448, § 9, effective May 31. **L. 2006:** (2) amended, p. 382, § 14, effective July 1.

PART 12

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

15-11-1201. Short title.

This part 12 shall be known and may be cited as the "Uniform Disclaimer of Property Interests Act".

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 859, § 1, effective August 10.

15-11-1202. Definitions.

As used in this part 12, unless the context otherwise requires:

(1) "Disclaimant" means the person to whom a disclaimed interest or power would have passed if the disclaimer had not been made.

(2) "Disclaimed interest" means the interest that would have passed to the disclaimant if the disclaimer had not been made.

(3) "Disclaimer" means the refusal to accept an interest in or power over property.

(4) "Fiduciary" means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person.

(5) "Jointly held property" means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property.

(6) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(7) "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 an Indian tribe or band or an Alaskan native village recognized by federal law or formally acknowledged by a state.

(8) "Trust" means:

(a) An express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(b) A trust created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 859, § 1, effective August 10.

15-11-1203. Scope.

This part 12 applies to disclaimers of any interest in or power over property, whenever created.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

15-11-1204. Part supplemented by other law.

(1) Unless displaced by a provision of this part 12, the principles of law and equity supplement this part 12.

(2) This part 12 does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this part 12.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

15-11-1205. Power to disclaim - general requirements - when irrevocable.

(1) A person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(2) Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or if an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(3) To be effective, a disclaimer shall be in writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed, and, with regard to an interest in real property, be recorded in the manner provided for in section 15-11-1212. In this subsection (3), "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.

(4) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(5) A disclaimer becomes irrevocable when it is delivered or filed and, with regard to an interest in real property, recorded pursuant to section 15-11-1212, or when it becomes effective as provided for in sections 15-11-1206 through 15-11-1211, whichever occurs later.

(6) A disclaimer made pursuant to this part 12 is not a transfer, assignment, or release.

(7) No person obligated to distribute an interest disclaimed under this part 12 shall be liable to any person for distributing the interest as if the interest were not disclaimed unless the person obligated to distribute the interest receives a copy of the disclaimer prior to distributing the interest.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 860, § 1, effective August 10.

15-11-1206. Disclaimer of interest in property.

(1) As used in this section, unless the context otherwise requires:

(a) "Future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(b) "Method of representation" includes any method of division described in section 15-11-709.

(c) "Time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(2) Except for a disclaimer governed by section 15-11-1207 or 15-11-1208, the following rules apply to a disclaimer of an interest in property:

(a) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(b) The disclaimed interest passes according to any provision in the instrument creating the interest, providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(c) If the instrument does not contain a provision described in paragraph (b) of this subsection (2), the following rules apply:

(I) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant had ceased to exist immediately before the time of distribution.

(II) If the disclaimant is an individual, except as otherwise provided for in subparagraphs (III) and (IV) of this paragraph (c), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(III) If, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died immediately before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(IV) (A) If the disclaimed interest would pass as part of the disclaimant's estate had the disclaimant died immediately before the time of distribution, the disclaimed interest instead passes as if by representation to the descendants of the disclaimant who are living at the time of distribution.

(B) If the disclaimed interest would pass as part of the disclaimant's estate had the disclaimant died immediately before the time of distribution and no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state to which such interest would escheat, but excluding the disclaimant, and in such shares as such persons would succeed to the transferor's intestate estate under the applicable law had the transferor died at the time of distribution. However, for purposes of this sub-

subparagraph (B), if the transferor's surviving spouse is living but remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(C) As used in sub-subparagraph (B) of this subparagraph (IV), "applicable law" refers to the intestate succession law of the transferor's domicile with respect to a disclaimer of an interest in personal property and refers to the intestate succession law of this state with respect to a disclaimed interest that is real property located in this state.

(D) In addition to other applications of this sub-subparagraph (D) that are apparent, the general assembly declares its intent to have the rules of this sub-subparagraph (D) apply with respect to present interests in real property and personal property that are transferred outright or in trust to an individual by a transferor during the lifetime of the transferor where the interest disclaimed would, if not disclaimed, have vested in the individual to whom the property is transferred and would be part of that individual's estate if he or she had died immediately after the transfer. Accordingly, this sub-subparagraph (D) shall be so construed to determine the disposition of the present interest. For purposes of the application of the rules to such present interests, the reference to "immediately before the time of distribution" in sub-subparagraphs (A) and (B) of this subparagraph (IV) shall instead be considered as references to "immediately after the time of distribution".

(E) In sub-subparagraph (D) of this subparagraph (IV), "present interest" means an interest that takes effect in possession or enjoyment, if at all, at the time of its creation.

(d) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 861, § 1, effective August 10.

15-11-1207. Disclaimer of rights of survivorship in jointly held property.

(1) Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or in part, the incremental portion of the jointly held property devolving to the surviving holder by right of survivorship.

(2) A disclaimer pursuant to subsection (1) of this section takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(3) In the event of a disclaimer pursuant to subsection (1) of this section with only one holder surviving the death of the holder to whose death the disclaimer relates, the incremental

portion disclaimed shall, as a consequence of the disclaimer, pass as part of the estate of the deceased holder.

(4) In the event of a disclaimer pursuant to subsection (1) of this section with two or more of the holders surviving the death of the holder to whose death the disclaimer relates:

(a) The disclaimer does not sever the joint tenancy with respect to the jointly held property as among the surviving holders;

(b) The incremental portion disclaimed shall, as a consequence of a disclaimer, devolve to the surviving holders in proportion to their respective interests in the jointly held property excluding the disclaimant and any other surviving holder who disclaims to the extent of his or her disclaimer of the incremental portion;

(c) An incremental portion devolving to a surviving holder, as a consequence of one or more disclaimers, may be disclaimed by the surviving holder;

(d) To the extent that all of the surviving holders disclaim an incremental portion devolving to them, the portion shall instead pass as part of the estate of the deceased holder; and

(e) The proportion of each of the surviving holders with respect to the jointly held property shall be adjusted to take into account the devolution of the incremental portion to the extent that the portion is disclaimed.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 863, § 1, effective August 10.

15-11-1208. Disclaimer of interest by trustee.

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

15-11-1209. Disclaimer of power of appointment or other power not held in fiduciary capacity.

(1) If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the disclaimer applies only to that holder, and the following rules apply:

(a) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable;

(b) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power; and

(c) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

15-11-1210. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.

(1) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(2) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

15-11-1211. Disclaimer of power held in fiduciary capacity.

(1) If a fiduciary disclaims a power held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If a fiduciary disclaims a power held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(3) A disclaimer pursuant to this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 864, § 1, effective August 10.

15-11-1212. Delivery or filing.

(1) As used in this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(a) An annuity or insurance policy;

(b) An account with a designation for payment on death;

(c) A security registered in beneficiary form;

(d) A pension, profit-sharing, retirement, or other employment-related benefit plan; or

(e) Any other nonprobate transfer at death.

(2) Subject to subsections (3) to (15) of this section, delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(3) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(a) A disclaimer shall be delivered to the personal representative of the decedent's estate; or

(b) If no personal representative is then serving, a disclaimer shall be filed with a court having jurisdiction to appoint a personal representative.

(4) In the case of an interest in a testamentary trust:

(a) A disclaimer shall be delivered to the trustee then serving or, if no trustee is then serving, to the personal representative of the decedent's estate; or

(b) If no personal representative is then serving, the disclaimer shall be filed with a court having jurisdiction to enforce the trust.

(5) In the case of an interest in an inter vivos trust:

(a) A disclaimer shall be delivered to the trustee then serving;

(b) If no trustee is then serving, the disclaimer shall be filed with a court having jurisdiction to enforce the trust; or

(c) If the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it shall be delivered to the settlor of a revocable trust or the transferor of the interest.

(6) In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, a disclaimer shall be delivered to the person making the beneficiary designation.

(7) In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer shall be delivered to the person obligated to distribute the interest.

(8) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer shall be delivered to the person to whom the disclaimed interest passes.

(9) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(a) The disclaimer shall be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(b) If no fiduciary is then serving, the disclaimer shall be filed with a court having authority to appoint a fiduciary.

(10) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(a) The disclaimer shall be delivered to the holder, the personal representative of the holder's estate, or to the fiduciary under the instrument that created the power; or

(b) If no fiduciary is then serving, the disclaimer shall be filed with a court having authority to appoint a fiduciary.

(11) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer shall be delivered as provided for in subsection (3), (4), or (5) of this section, as if the power disclaimed were an interest in property.

(12) In the case of a disclaimer of a power by an agent, the disclaimer shall be delivered to the principal or the principal's agent, guardian, or conservator.

(13) In the case of a disclaimer of a power not held in a fiduciary capacity, the disclaimer shall be delivered to the fiduciary under the instrument that created the power, or to the person obligated to distribute the property.

(14) Except as provided for in subsections (3) to (8) of this section, in the case of an interest the disposition of which is determined pursuant to section 15-11-1206 (2)(c)(IV), the disclaimer shall be delivered or filed as follows:

(a) Delivered to the transferor of the interest if the transferor is then living;

(b) Delivered to the personal representative of the estate of the transferor, if the transferor is not then living; or

(c) Filed with a court having jurisdiction to appoint a personal representative for the estate of the transferor, if the transferor is not then living and a personal representative of the estate of the transferor is not then serving.

(15) In the case of a disclaimer of an interest in real property in which the disclaimant has a recorded interest, a copy of the disclaimer shall be recorded in the office of the clerk and recorder of the county in which the interest disclaimed is located. For purposes of this subsection (15) and section 15-11-1215, "recorded interest" means an interest in real property that has been recorded in the office of the county clerk and recorder of the county in which the real property is located.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 865, § 1, effective August 10.

15-11-1213. When disclaimer barred or limited.

(1) A disclaimer is barred by a written waiver of the right to disclaim.

(2) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(a) The disclaimant accepts the interest sought to be disclaimed;

(b) The disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or

(c) A judicial sale of the interest sought to be disclaimed occurs.

(3) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(4) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(5) A disclaimer is barred or limited if so provided by law other than this part 12.

(6) A disclaimer of a power over property that is barred by this section is ineffective. A disclaimer of an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this part 12 had the disclaimer not been barred.

(7) Notwithstanding any other provision in this part 12, this part 12 shall not modify the construction of law or application of law with respect to:

(a) A disqualification of medical assistance benefits under title 25.5, C.R.S., to a disclaimant who is or was an applicant for or recipient of such benefits; or

(b) A recovery from the estate of a deceased recipient of such medical assistance benefits.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 867, § 1, effective August 10.

15-11-1214. Tax-qualified disclaimer.

Notwithstanding any other provision of this part 12, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of title 26 of the United States internal revenue code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer pursuant to this part 12.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

15-11-1215. Filing or registering of disclaimer.

If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed or registered, the disclaimer may be filed or registered. Failure to file or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer, provided, however, that a disclaimer of an interest in real property in which the disclaimant has a recorded interest is not effective and therefore is not valid as between any persons until a copy of the disclaimer is recorded in section 15-11-1212 (15).

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10. **L. 2013:** Entire section amended, (HB 13-1300), ch. 316, p. 1675, § 37, effective August 7.

15-11-1216. Application to existing relationships.

Except as otherwise provided for in section 15-11-1213, an interest in or power over property existing on August 10, 2011, for which the time for delivering or filing a disclaimer under law superseded by this part 12 has not expired may be disclaimed after August 10, 2011.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

15-11-1217. Uniformity of application and construction.

In applying and construing this part 12, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

15-11-1218. Severability.

If any provision of this part 12 or its application to any person or circumstance is held invalid, the invalidity shall not affect any other provision or application of this part 12 that can be given effect without the invalid provision or application.

Source: L. 2011: Entire part added, (SB 11-166), ch. 203, p. 868, § 1, effective August 10.

PART 13

COLORADO UNIFORM ELECTRONIC WILLS ACT

Editor's note: The "Colorado Uniform Electronic Wills Act" was added in 2021 by House Bill 21-1004 and relocated from part 15 of article 12 of this title 15 to this part 13. For the text of this part 13 prior to its relocation, see chapter 3 of the 2021 Session Laws of Colorado, p. 7.

Law reviews: For article, "Colorado's New Uniform Electronic Wills Act", see 51 Colo. Law. 46 (Feb. 2022).

15-11-1301. Short title.

This part 13 may be cited as the "Colorado Uniform Electronic Wills Act".

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2796, § 11, effective July 2.

15-11-1302. Definitions.

In this part 13:

(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 15-11-1305 (1).

(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) (a) "Sign" means, with present intent to authenticate or adopt a record, and subject to subsection (5)(b) of this section, to execute or adopt a tangible symbol or to affix to or logically associate with the record an electronic symbol or process.

(b) An electronic symbol of a testator or witness must be an electronic image of the testator's or witness's signature in the testator's or witness's handwriting 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).

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2796, § 11, effective July 2.

15-11-1303. Law applicable to electronic wills - 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 part 13.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2797, § 11, effective July 2.

15-11-1304. Choice of law regarding execution.

(1) A will executed electronically but not in compliance with section 15-11-1305 (1) is an electronic will under this part 13 if executed in compliance with the law of the jurisdiction where the testator is:

(a) Physically located when the will is signed; or

(b) Domiciled or resides when the will is signed or when the testator dies.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2797, § 11, effective July 2.

15-11-1305. Execution of electronic will.

(1) Subject to section 15-11-1308 (4), and except as provided in section 15-11-1306, an electronic will must be:

(a) A record that is readable as text at the time of signing under subsection (1)(b) of this section;

(b) Signed by:

(I) The testator; or

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

(c) Either:

(I) 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) The signing of the will under subsection (1)(b) of this section; or

(B) The testator's acknowledgment of the signing of the will under subsection (1)(b) of this section or acknowledgment of the will; or

(II) 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.

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

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2797, § 11, effective July 2.

15-11-1306. Harmless error.

Section 15-11-503 applies to a will executed electronically.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2798, § 11, effective July 2.

15-11-1307. Revocation.

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

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

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

(b) 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.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2798, § 11, effective July 2.

15-11-1308. Electronic will attested and made self-proving at time of execution.

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

(2) The acknowledgment and affidavits under subsection (1) of this section must be:

(a) Made in the physical presence of an officer authorized to administer oaths under law of the state in which the testator signs pursuant to section 15-11-1305 (1)(b) or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing pursuant to section 15-11-1305 (1)(b), 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

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

(3) The acknowledgment and affidavits under subsection (1) of this section must be in substantially the following form:

I, _____, the testator, and, being sworn, declare to the undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another to sign for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am eighteen 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 eighteen 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)

_____

(Official capacity of officer)

(4) 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 15-11-1305 (1).

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2798, § 11, effective July 2.

15-11-1309. 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.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2799, § 11, effective July 2.

15-11-1310. 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.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2800, § 11, effective July 2.

15-11-1311. Application of part.

This part 13 applies to the will of a decedent who dies on or after July 2, 2021.

Source: L. 2021: Entire part added with relocations, (SB 21-266), ch. 423, p. 2800, § 11, effective July 2.

ARTICLE 12

Probate of Wills and Administration

PART 1
GENERAL PROVISIONS

15-12-101. Devolution of estate at death; restrictions.

15-12-102. Necessity of order of probate for will.

15-12-103. Necessity of appointment for administration.

15-12-104. Claims against decedent.

15-12-105. Proceedings affecting devolution and administration - jurisdiction of subject matter.

15-12-106. Proceedings within the exclusive jurisdiction of court - service - jurisdiction over persons.

15-12-107. Scope of proceedings - proceedings independent - exception.

15-12-108. Probate, testacy, and appointment proceedings - ultimate time limit.

15-12-109. Statutes of limitations on decedent's cause of action.

PART 2
VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

15-12-201. Venue for first and subsequent estate proceedings - location of property.

15-12-202. (Reserved)

15-12-203. Priority among persons seeking appointment as personal representative.

15-12-204. Demand for notice of order or filing concerning decedent's estate.

PART 3
INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

15-12-301. Informal probate or appointment proceedings - application - contents.

15-12-302. Informal probate - duty of registrar - effect of informal probate.

15-12-303. Informal probate - proof and findings required.

15-12-304. Informal probate - unavailable in certain cases.

15-12-305. Informal probate - registrar not satisfied.

15-12-306. Informal probate - notice and information requirements.

15-12-307. Informal appointment proceedings - delay in order - duty of registrar - effect of appointment.

15-12-308. Informal appointment proceedings - proof and findings required.

15-12-309. Informal appointment proceedings - registrar not satisfied.

15-12-310. Informal appointment proceedings - notice requirements.

15-12-311. Informal appointment unavailable in certain cases.

PART 4
FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

15-12-401. Formal testacy proceedings - nature - when commenced.

15-12-402. Formal testacy or appointment proceedings - petition - contents.

15-12-403. Formal testacy proceedings - notice of hearing on petition.

15-12-404. Formal testacy proceedings - written objections to probate.

15-12-405. Formal testacy proceedings - uncontested cases - hearings and proof.

15-12-406. Formal testacy proceedings - contested cases.

15-12-407. Formal testacy proceedings - burdens in contested cases.

15-12-408. Formal testacy proceedings - will construction - effect of final order in another jurisdiction.

15-12-409. Formal testacy proceedings - order - foreign will.

15-12-410. Formal testacy proceedings - probate of more than one instrument.

15-12-411. Formal testacy proceedings - partial intestacy.

15-12-412. Formal testacy proceedings - effect of order - vacation.

15-12-413. Formal testacy proceedings - vacation of order for other cause.

15-12-414. Formal proceedings concerning appointment of personal representative.

PART 5
SUPERVISED ADMINISTRATION

15-12-501. Supervised administration - nature of proceedings.

15-12-502. Supervised administration - petition - order.

15-12-503. Supervised administration - effect on other proceedings.

15-12-504. Supervised administration - powers of personal representative.

15-12-505. Supervised administration - interim orders - distribution and closing orders.

PART 6
PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL, AND TERMINATION OF AUTHORITY

15-12-601. Qualification.

15-12-602. Acceptance of appointment - consent to jurisdiction.

15-12-603. Bond not required without court order - exceptions.

15-12-604. Bond amount - security - procedure - reduction.

15-12-605. Demand for bond by interested person.

15-12-606. Terms and conditions of bonds.

15-12-607. Order restraining personal representative.

15-12-608. Termination of appointment - general.

15-12-609. Termination of appointment - death or disability.

15-12-610. Termination of appointment - voluntary.

15-12-611. Termination of appointment by removal - cause - procedure.

15-12-612. Termination of appointment - change of testacy status.

15-12-613. Successor personal representative.

15-12-614. Special administrator - appointment.

15-12-615. Special administrator - who may be appointed.

15-12-616. Special administrator - appointed informally - powers and duties.

15-12-617. Special administrator - formal proceedings - power and duties.

15-12-618. Termination of appointment - special administrator.

15-12-619. Public administrator - appointment - oath - bond - deputy.

15-12-620. Public administrator - responsibility for protecting decedent's estate - duty of persons holding property.

15-12-621. Public administrator - decedents' estates - areas of responsibility.

15-12-622. Public administrator - acting as conservator or trustee.

15-12-623. Public administrator - administration - reports - fees.

PART 7
DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

15-12-701. Time of accrual of duties and powers.

15-12-702. Priority among different letters.

15-12-703. General duties - relation and liability to persons interested in estate - duty to search for a designated beneficiary agreement - standing to sue.

15-12-704. Personal representative to proceed without court order - exception.

15-12-705. Duty of personal representative - information to heirs and devisees.

15-12-706. Duty of personal representative - inventory and appraisement.

15-12-707. Employment of appraisers.

15-12-708. Duty of personal representative - supplementary inventory.

15-12-709. Duty of personal representative - possession of estate.

15-12-710. Power to avoid transfers.

15-12-711. Powers of personal representatives - in general.

15-12-712. Improper exercise of power - breach of fiduciary duty.

15-12-713. Sale, encumbrance, or transaction involving conflict of interest - voidable - exceptions.

15-12-714. Persons dealing with personal representative - protection.

15-12-715. Transactions authorized for personal representatives - exceptions.

15-12-716. Powers and duties of successor personal representative.

15-12-717. Corepresentatives - when joint action required.

15-12-718. Powers of surviving personal representative.

15-12-719. Compensation of personal representative. (Repealed)

15-12-720. Expenses in estate litigation. (Repealed)

15-12-721. Proceedings for review of employment of agents and compensation of personal representatives

and employees of estate. (Repealed)

15-12-722. Failure to comply with court orders - penalty. (Repealed)

15-12-723. Assets concealed or embezzled.

PART 8
CREDITORS' CLAIMS

15-12-801. Notice to creditors.

15-12-802. Statutes of limitations.

15-12-803. Limitations on presentation of claims.

15-12-804. Manner of presentation of claims.

15-12-805. Classification of claims.

15-12-806. Allowance of claims.

15-12-807. Payment of claims.

15-12-808. Individual liability of personal representative.

15-12-809. Secured claims.

15-12-810. Claims not due and contingent or unliquidated claims.

15-12-811. Counterclaims.

15-12-812. Execution and levies prohibited.

15-12-813. Compromise of claims.

15-12-814. Encumbered assets.

15-12-815. Administration in more than one state - duty of personal representative.

15-12-816. Final distribution to domiciliary representative.

PART 9
SPECIAL PROVISIONS RELATING TO DISTRIBUTION

15-12-901. Successors' rights if no administration.

15-12-902. Distribution - order in which assets appropriated - abatement.

15-12-903. Right of retainer.

15-12-904. Interest on general pecuniary devise.

15-12-905. Penalty clause for contest.

15-12-906. Distribution in kind - valuation - method.

15-12-907. Distribution in kind - evidence.

15-12-908. Distribution - right or title of distributee.

15-12-909. Improper distribution - liability of distributee.

15-12-910. Purchasers from distributees protected.

15-12-911. Partition for purpose of distribution.

15-12-912. Private agreements among successors to decedent

binding on personal representative.

15-12-913. Distributions to trustee.

15-12-914. Disposition of unclaimed assets.

15-12-915. Distribution to person under disability.

15-12-916. Apportionment of estate taxes.

PART 10
CLOSING ESTATES

15-12-1001. Formal proceedings terminating administration - testate or intestate - order of general protection.

15-12-1002. Formal proceedings terminating testate administration - order construing will without adjudicating testacy.

15-12-1003. Closing estates - by sworn statement of personal representative.

15-12-1004. Liability of distributees to claimants.

15-12-1005. Limitations on proceedings against personal representative.

15-12-1006. Limitations on actions and proceedings against distributees.

15-12-1007. Certificate discharging liens securing fiduciary performance.

15-12-1008. Subsequent administration.

15-12-1009. Estates not closed after three years or more.

PART 11
COMPROMISE OF CONTROVERSIES

15-12-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

15-12-1102. Procedure for securing court approval of compromise.

PART 12
COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

15-12-1201. Collection of personal property by affidavit.

15-12-1202. Effect of affidavit.

15-12-1203. Small estates - summary administrative procedure.

15-12-1204. Small estates - closing by sworn statement of personal representative.

15-12-1205. Time of taking effect - provisions for transition.

PART 13
DETERMINATION OF HEIRS, DEVISEES, AND PROPERTY INTERESTS BY SPECIAL PROCEEDING

15-12-1301. Definitions.

15-12-1302. Petition to determine heirship - devisees - interests in property.

15-12-1303. Hearing - notice - service.

15-12-1304. Appearance - hearing.

15-12-1305. Judgment.

15-12-1306. Decree - conclusive and when - reopening.

15-12-1307. Title of proceedings.

15-12-1308. Proceedings under the rules of civil procedure.

15-12-1309. Effective date - applicability.

PART 14
COLORADO UNIFORM ESTATE TAX APPORTIONMENT ACT

15-12-1401. Short title.

15-12-1402. Definitions.

15-12-1403. Apportionment by will or other dispositive instrument.

15-12-1404. Statutory apportionment of estate taxes.

15-12-1405. Credits and deferrals.

15-12-1406. Insulated property, advancement of tax - definitions.

15-12-1407. Apportionment and recapture of special elective benefits.

15-12-1408. Securing payment of estate tax from property in possession of fiduciary.

15-12-1409. Collection of estate tax by fiduciary.

15-12-1410. Right of reimbursement.

15-12-1411. Action to determine or enforce part.

15-12-1412. Uniformity of application and construction.

15-12-1413. Severability.

15-12-1414. Delayed application.

PART 15
COLORADO UNIFORM ELECTRONIC WILLS ACT

15-12-1501 to

15-12-1511. (Repealed)

PART 1

GENERAL PROVISIONS

15-12-101. Devolution of estate at death; restrictions.

The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of the testate estate or, in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to exempt property and family allowances, rights of creditors, elective share of the surviving spouse, and administration.

Source: L. 73: R&RE, p. 1565, § 1. **C.R.S. 1963:** § 153-3-101. **L. 75:** Entire section amended, p. 594, § 22, effective July 1.

Cross references: For intestate succession, see article 11 of this title; for the elective share of a surviving spouse, see § 15-11-201; for exempt property allowance and family allowance, see §§ 15-11-403 and 15-11-404, respectively; for lapse of a devise, see § 15-11-511 (3); for renunciation of succession, see the "Uniform Disclaimer of Property Interests Act", part 12 of article 11 of this title; for rights of creditors, see part 8 of this article.

15-12-102. Necessity of order of probate for will.

Except as provided in sections 15-12-901, 15-12-1201, 15-13-204, and 15-13-205 and in part 13 of this article, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court.

Source: L. 73: R&RE, p. 1565, § 1. **C.R.S. 1963:** § 153-3-102. **L. 2011:** Entire section amended, (SB 11-083), ch. 101, p. 303, § 4, effective August 10. **L. 2014:** Entire section amended, (HB 14-1322), ch. 296, p. 1234, § 4, effective August 6.

15-12-103. Necessity of appointment for administration.

Except as otherwise provided in article 13 of this title, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify, and be issued letters. Administration of an estate is commenced by the issuance of letters.

Source: L. 73: R&RE, p. 1565, § 1. **C.R.S. 1963:** § 153-3-103.

15-12-104. Claims against decedent.

No claim may be presented and no proceeding to enforce a claim against the estate of a decedent or his or her successors may be revived or commenced before the appointment of a personal representative, except as permitted by section 15-12-804. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article. After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in section 15-12-1004 or from a former personal representative individually liable as provided in section 15-12-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his or her right to his or her security except as to any deficiency judgment that might be sought therein.

Source: L. 73: R&RE, p. 1565, § 1. **C.R.S. 1963:** § 153-3-104. **L. 2006:** Entire section amended, p. 373, § 1, effective July 1.

ANNOTATION

Applied in Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978).

15-12-105. Proceedings affecting devolution and administration - jurisdiction of subject matter.

Persons interested in decedents' estates may apply to the registrar for determination in the informal proceedings provided in this article and may petition the court for orders in formal proceedings within the court's jurisdiction. The court has jurisdiction as provided in section 15-10-302.

Source: L. 73: R&RE, p. 1566, § 1. **C.R.S. 1963:** § 153-3-105.

15-12-106. Proceedings within the exclusive jurisdiction of court - service - jurisdiction over persons.

In proceedings where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with section 15-10-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

Source: L. 73: R&RE, p. 1566, § 1. **C.R.S. 1963:** § 153-3-106.

15-12-107. Scope of proceedings - proceedings independent - exception.

(1) Unless supervised administration as described in part 5 of this article is involved:

(a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate;

(b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order;

(c) Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and

(d) A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

Source: L. 73: R&RE, p. 1566, § 1. **C.R.S. 1963:** § 153-3-107.

ANNOTATION

This section, along with the definition of "proceeding" in § 15-10-201, instructs that unsupervised administration of an estate may involve multiple proceedings, that a petition initiates an independent proceeding and defines its scope, and that a single proceeding may dispose of multiple claims. Scott v. Scott, 136 P.3d 892 (Colo. 2006).

The initial petition outlines a set of claims and begins a proceeding. Subsequent pleadings that relate to that set of claims are part of the same proceeding. Scott v. Scott, 136 P.3d 892 (Colo. 2006).

Section inapplicable to informal proceeding regarding a claim for services against the estate, as section specifically relates to petitions for formal orders of the court. In re Estate of Bell, 4 P.3d 504 (Colo. App. 2000).

Res judicata does not apply to bar challenge to the validity of a will when former informal dispute was over distribution of the estate and not a claim against the estate. Res judicata only operates as a bar to a second action on a claim that was litigated in a prior proceeding when there is a final judgment and identity of subject matter, claims for relief, and parties to the action. In re Estate of Bell, 4 P.3d 504 (Colo. App. 2000).

Probate court did not err by treating wife's claims separately because wife raised two distinct claims that were subject to different statutory requirements and alleged different facts. Although wife filed two claims on the same day addressing different elements of a singular probate proceeding, each claim was reviewed as an independent claim, and the probate court could rightfully rule on each claim separately. In re Estate of Gadash, 2017 COA 54, 413 P.3d 272.

15-12-108. Probate, testacy, and appointment proceedings - ultimate time limit.

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(a) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceedings;

(b) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and

(c) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.

(2) These limitations do not apply to:

(a) Proceedings to construe probated wills; or

(b) Proceedings to determine heirs of an intestate and related appointment proceedings; or

(c) Appointment proceedings and testacy proceedings if no previous testacy proceedings or proceedings determining heirship relating to the decedent's estate have been concluded in this state.

(3) In cases under subsection (1) of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purpose of other limitation provisions of this code which relate to the date of death.

Source: L. 73: R&RE, p. 1566, § 1. **C.R.S. 1963:** § 153-3-108. **L. 77:** (2) R&RE, p. 833, § 14, effective July 1. **L. 79:** (2)(b) and (2)(c) amended, p. 657, § 1, effective May 25.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Statutes of Limitation in Probate and Trust Litigation", see 45 Colo. Law. 35 (May 2016).

The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 93 Colo. 144, 563 P.2d 943 (1977).

This statute is a statute of limitations, and not a non-claim statute depriving the probate court of jurisdiction. In re Estate of Kubby, 929 P.2d 55 (Colo. App. 1996).

Because § 15-10-106 provides an adequate legal remedy for plaintiff's claim that her son fraudulently induced her into not contesting her husband's will, the statute of limitations in this section is not subject to equitable tolling. In re Kubby, 929 P.2d 55 (Colo. App. 1996).

15-12-109. Statutes of limitations on decedent's cause of action.

No statute of limitations running on a cause of action belonging to a decedent which had not been barred as of the date of his death shall apply to bar a cause of action surviving the decedent's death sooner than one year after death. A cause of action which, but for this section, would have been barred less than one year after death is barred after one year unless tolled.

Source: L. 73: R&RE, p. 1567, § 1. **C.R.S. 1963:** § 153-3-109. **L. 79:** Entire section amended, p. 629, § 2, effective July 1.

PART 2

VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

15-12-201. Venue for first and subsequent estate proceedings - location of property.

(1) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(a) In the county where the decedent had his domicile or his residence at the time of his death; or

(b) If the decedent was not domiciled in nor a resident of this state, in any county where property of the decedent was located at the time of his death.

(2) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in section 15-10-303 or subsection (3) of this section.

(3) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(4) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

Source: L. 73: R&RE, p. 1567, § 1. **C.R.S. 1963:** § 153-3-201. **L. 77:** (1)(a) amended, p. 833, § 15, effective July 1. **L. 96:** (1)(b) amended, p. 659, § 10, effective July 1.

ANNOTATION

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For article, "One Year Review of Torts", see 36 Dicta 64 (1959). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

Annotator's note. Since § 15-12-201 is similar to repealed § 152-1-3, CRS 53, CSA, C. 176, § 71, and laws antecedent thereto relevant cases construing those provisions have been included in the annotations to this section.

A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed prima facie to base its adjudication respecting the last domicile upon sufficient evidence, and under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. Corrigan v. Jones, 14 Colo. 311, 23 P. 913 (1890); Estate of Vilm v. Vilm, 134 Colo. 43, 299 P.2d 513 (1956).

Although provision of section is mandatory it may be waived. The provisions of this section, that administration of the estate of every decedent shall be had in the district court of his last known residence, is mandatory; but it may nevertheless be waived. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914).

A district court sitting in probate has exclusive jurisdiction to hear all claims presented, and a claimant has no option to file suit in another court after the issuance of letters, hence a district court is without jurisdiction of an action against the executor of deceased's estate in an action for wrongful death, for which a claim had been filed in the estate. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914); Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956); Weller v. Bank of Vernal, 137 Colo. 32, 321 P.2d 216 (1958); Meyers v. Williams, 137 Colo. 325, 324 P.2d 788 (1958).

Where jurisdiction depends upon a question of fact, it must be taken advantage of in apt time and in the right manner. Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920).

If a case is pending at the time of the death of a decedent, then the jurisdiction lies in that court having acquired jurisdiction during the lifetime, and the filing of the claims in the probate court is only for the purpose of showing assets, in other words, complying with that portion of the statute concerning the unliquidated or unmatured claims. Film Enters., Inc. v. Wolfberg, 137 Colo. 84, 321 P.2d 218 (1958).

Administrator subject to direction of court. The administrator of the estate of a deceased person is a creature of the court, wholly subject to its directions in estate matters, and the court retains jurisdiction until the estate is finally closed and the administrator discharged. People v.

Cartwright, 99 Colo. 437, 63 P.2d 454 (1936).

Situs courts have usually applied their own local law to determine the validity of a will insofar as it affects interests in local land even though the testator died domiciled in another state. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

15-12-202. (Reserved)

15-12-203. Priority among persons seeking appointment as personal representative.

(1) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(a) The person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(b) The surviving spouse of the decedent who is a devisee of the decedent;

(b.3) The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S., who is a devisee of the decedent;

(b.5) A person given priority to be a personal representative in a designated beneficiary agreement made pursuant to article 22 of this title;

(c) Other devisees of the decedent;

(d) The surviving spouse of the decedent;

(d.5) The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S.;

(e) Other heirs of the decedent;

(f) Forty-five days after the death of the decedent, any creditor.

(2) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in subsection (1) of this section apply, except that:

(a) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(b) In case of objection to appointment of a person, other than one whose priority is determined by will, by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate

appear to be worth in total more than half of the probable distributable value or, in default of this accord, any suitable person.

(3) A person entitled to letters under paragraphs (b) to (e) of subsection (1) of this section and a person between the ages of eighteen and twenty-one who would be entitled to letters but for his age may nominate a qualified person to act as personal representative. Any person eighteen years of age or older may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment.

(4) Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(5) Appointment of a person with priority, a person who is nominated pursuant to subsection (3) of this section, or a person whose entitlement to appointment results from renunciation by another person with priority may be made in an informal proceeding. Before formal appointment of one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

(6) No person is qualified to serve as a personal representative who is:

(a) Under the age of twenty-one;

(b) A person whom the court finds unsuitable in formal proceedings.

(7) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(8) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

(9) If there be more than one fiduciary of an estate, and one of such fiduciaries shall die, resign, or be removed, the court may in its discretion appoint a successor fiduciary to act in place and instead of the former fiduciary, together with the remaining fiduciary or fiduciaries, or the court may permit the remaining fiduciary or fiduciaries to serve without any new or additional fiduciary; except that, if there be a will providing for the fiduciaries, the provisions of the will shall control when applicable.

Source: L. 73: R&RE, p. 1567, § 1. **C.R.S. 1963:** § 153-3-203. **L. 91:** (5) amended, p. 1449, § 10, effective July 1. **L. 93:** (2)(b) and (5) amended, p. 513, § 2, effective July 1. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 444, § 10, effective July 1. **L. 2010:** (1)(b.5) amended, (SB 10-199), ch. 374, p. 1751, § 13, effective July 1. **L. 2013:** (1) amended, (SB 13-011), ch. 49, p. 164, § 18, effective May 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the Court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV. Other provisions in Article III which are relevant to administration of assets in a state or other than that of the decedent's domicile are 1-301 (territorial effect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is in more than one state) and 4-201 to 4-205 (local recognition of foreign personal representatives).

The meaning of "spouse" is determined by Section 2-802.

ANNOTATION

Law reviews. For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986). For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986). For article, "Dealing With a Decedent's Mineral Interests", see 44 Colo. Law. 53 (Feb. 2015). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

Annotator's note. Since § 15-12-203 is similar to repealed § 152-7-1, CRS 53, CSA, C. 176, § 74, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section 15-12-619 of this title modifies this section insofar as it defines the right to administer estates in any county having a population of more than 20,000. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

Exclusive right of husband to administer does not exist. The common-law right of the husband surviving the wife to exclusively administer upon and enjoy her personal estate does not here exist. Goodrich v. Treat, 3 Colo. 408 (1877).

Statutes which establish priorities of those preferentially entitled to administer estates are mandatory, and may not be disregarded by courts if the person entitled to the preference is not otherwise disqualified, and this disqualification must be made to appear by competent evidence, and the burden of showing the disqualification is upon the one asserting it. Thompson v. Jack, 90 Colo. 470, 10 P.2d 947 (1932); In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

In a collateral proceeding the court may not inquire whether the letters were issued to a person entitled to them or not. As the judge of probate had competent jurisdiction of the cause, the regularity of the administrator's appointment can only be questioned in a direct proceeding for that purpose. Denver, etc., Ry. v. Woodward, 4 Colo. 1 (1877).

This section gives husband, widow, or next of kin a preferential right of administration. Rosenboom v. Cline, 90 Colo. 1, 6 P.2d 453 (1931).

Child who was sole heir of natural father had statutory priority to be appointed personal representative of father's estate pursuant to the provisions of this section and trial court improperly denied the child's motion to remove the personal representative as the child was not bound by the court's prior rulings when she was not a party or in privity with the movant. Matter of Estate of Bomareto, 757 P.2d 1135 (Colo. App. 1988).

Where probate court finds that appointment of a special administrator is necessary under § 15-12-614, court may appoint any proper person as such under § 15-12-615 notwithstanding this section's provisions governing priority of appointment of a personal representative. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

It is immaterial who presents the petition and facts as a result of which administration is granted. Rosenboom v. Cline, 90 Colo. 1, 6 P.2d 453 (1931).

Appointment of "next of kin" rests in the discretion of the court. This section provides that in granting administration the husband or widow, if such there be, shall be preferred. If none such, or if that right be relinquished, then the preference, for 45 days, goes to the "other heirs of the decedent". In re Woody's Estate, 93 Colo. 169, 24 P.2d 754 (1933).

Parties entitled to apply for administration may waive their rights. Denver, etc., Ry. v. Woodward, 4 Colo. 1 (1877).

Where petition of husband states grounds for relief from fraud. Petition of a surviving husband who had not applied for letters of administration within the period of time prescribed by this section to remove the administrator of his wife's estate and to set aside an order allowing a claim against it alleged to have been procured by fraud, states grounds for the relief sought. Koshir v. Snedec, 82 Colo. 245, 259 P. 4 (1927).

Where appointment of noncreditor is reversible error. Appointment of a noncreditor as the administrator of an estate over the objection and instead of a petitioning creditor is reversible error. In re Webb's Estate, 90 Colo. 470, 10 P.2d 947 (1932).

No power of nomination for the appointment of administrators is conferred upon creditors of an estate by this section, and they have nothing to relinquish so far as such appointments are concerned. In re Webb's Estate, 90 Colo. 470, 10 P.2d 947 (1932).

Holder of option to purchase land at death of decedent is not "creditor" of the estate within the meaning of subsection (1)(f) and cannot instigate the appointment of a personal representative. Brown v. Brown, 43 Colo. App. 535, 608 P.2d 840 (1980).

The granting of letters of administration is a judicial act of the judge. He may judicially determine whether he has jurisdiction over the matters before him, must determine the approximate value of the estate, determine the person to be appointed administrator, fix and approve the bond required, and administer the oath. These acts require judicial discretion. Jackson v. Bates, 133 Colo. 248, 293 P.2d 962 (1956).

Nominee is conferred with priority status of nominating daughters. Although nominee had no priority status in his own right, the daughters' priority was conferred to him. In re Estate of Newton, 313 P.3d 619 (Colo. App. 2011).

15-12-204. Demand for notice of order or filing concerning decedent's estate.

Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest may file a demand for notice with the court at any time after

the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in section 15-10-401 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

Source: L. 73: R&RE, p. 1569, § 1. **C.R.S. 1963:** § 153-3-204.

PART 3

INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

15-12-301. Informal probate or appointment proceedings - application - contents.

(1) Applications for informal probate or informal appointment shall be directed to the registrar and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the information required by this section.

(2) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(a) A statement of the interest of the applicant;

(b) The name and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs, and devisees, and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(c) If the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(d) A statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(e) A statement indicating whether the applicant has received a demand for notice or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere;

(f) A statement indicating that the time limit for informal probate or appointment provided in this article has not expired either because three years or less have passed since the decedent's death or, if more than three years have passed since the decedent's death, because the circumstances described in section 15-12-108 authorizing tardy probate or appointment have occurred.

(3) An application for informal probate of a will shall state the following in addition to the statements required by subsection (2) of this section:

(a) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(b) That the applicant, to the best of his knowledge, believes the will to have been validly executed;

(c) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

(d) Repealed.

(4) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought.

(5) An application for informal appointment of an administrator in intestacy shall state, in addition to the statements required by subsection (2) of this section:

(a) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked will relating to property having a situs in this state under section 15-10-301 or a statement why any such will of which he may be aware is not being probated;

(b) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 15-12-203.

(6) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(7) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 15-12-610 (3) or whose

appointment has been terminated by death or removal shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

Source: L. 73: R&RE, p. 1569, § 1. **C.R.S. 1963:** § 153-3-301. **L. 77:** (2)(f) amended and (3)(d) repealed, pp. 833, 837, §§ 16, 27, effective July 1.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

15-12-302. Informal probate - duty of registrar - effect of informal probate.

Upon receipt of an application requesting informal probate of a will, the registrar, upon making the findings required by section 15-12-303, shall issue a written statement of informal probate. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

Source: L. 73: R&RE, p. 1571, § 1. **C.R.S. 1963:** § 153-3-302.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

15-12-303. Informal probate - proof and findings required.

(1) In an informal proceeding for original probate of a will, the registrar shall determine that:

(a) The application is complete;

(b) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(c) The applicant appears from the application to be an interested person as defined in section 15-10-201 (27);

(d) On the basis of the statements in the application, venue is proper;

(e) An original, duly executed, and apparently unrevoked will is in the registrar's possession;

(f) Any notice required by section 15-12-204 has been given and that the application is not within section 15-12-304;

(g) It appears from the application that the time limit for original probate has not expired; and

(h) One hundred twenty hours have elapsed since decedent's death.

(2) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or, except as provided in subsection (4) of this section, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(3) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under section 15-11-502, 15-11-503, or 15-11-506 have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(4) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(5) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (1) of this section may be probated in this state upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

Source: L. 73: R&RE, p. 1571, § 1. **C.R.S. 1963:** § 153-3-303. **L. 94:** (1)(c) amended, p. 1037, § 9, effective July 1, 1995.

Cross references: For establishment of lost or destroyed will, see § 15-12-402 (3).

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Practice and procedure under this section. It will be observed that the court is not required in express terms to hear the testimony of any witnesses except those who attested the will. No provision is made for a contest. Upon the hearing of "such proof", that is the testimony of the attesting witnesses that the will was properly signed and attested, and that they believe the testator was of sound mind and memory at the time it was signed and acknowledged, the court is compelled to admit the will to probate and record, provided that no proof of fraud, compulsion, or improper conduct be exhibited, which in the opinion of the court shall be deemed sufficient to invalidate or destroy it. It is true that the proviso in this section contains an implied permission, presumably to interested parties, to offer testimony tending to invalidate the will on account of fraud, compulsion, or other improper conduct, and there is of course implied authority to receive it, but no practice or procedure is specified, and no provision made for a hearing or trial in which the persons offering such evidence shall have a standing as parties. It will be seen too, that no authority is given for the exhibition or reception of any proof impeaching the validity of the will for want of testamentary capacity by the testator. In either case, a would-be contestant therefore, although present in obedience to the citation of the court, would have no standing in the court as a party to a suit, with the rights and privileges thereto attaching, if it be held that the practice and procedure in this respect are only such as are in terms permitted or directed by the statute. The authority therefor is derived from the practice which prevailed before the enactment of the statute, so far as it has not been changed thereby nor become inconsistent therewith. The mode of procedure and practice on the hearing of probate wills is not expressly provided by statute. Clough v. Clough, 10 Colo. App. 433, 51 P. 513 (1897) (decided under repealed laws antecedent to CSA, C. 176, § 56).

15-12-304. Informal probate - unavailable in certain cases.

(1) Applications for informal probate that relate to any of the following must be declined:

(a) One or more of a known series of testamentary instruments, other than a will and one or more codicils thereto, the latest of which does not expressly revoke the earlier; or

(b) A copy of the decedent's original will certified by the state court administrator pursuant to article 23 of this title 15.

Source: L. 73: R&RE, p. 1572, § 1. **C.R.S. 1963:** § 153-3-304. **L. 77:** Entire section amended, p. 834, § 17, effective July 1. **L. 2019:** Entire section R&RE, (HB 19-1229), ch. 252, p. 2446, § 3, effective January 1, 2023 (see editor's note).

Editor's note: HB 20-1368 amended the effective date of HB 19-1229 to change the date from January 1, 2021, to January 1, 2023. (See L. 2020, p. 1441.)

15-12-305. Informal probate - registrar not satisfied.

If the registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 15-12-303 and 15-12-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

Source: L. 73: R&RE, p. 1572, § 1. **C.R.S. 1963:** § 153-3-305.

15-12-306. Informal probate - notice and information requirements.

The moving party must give notice as described by section 15-10-401 of his application for informal probate to any person demanding it pursuant to section 15-12-204 and to any personal representative of the decedent whose appointment has not been terminated. If a personal representative has not been appointed, then not later than thirty days after a will has been informally probated the moving party shall give information of the probate to the persons and in the manner prescribed by section 15-12-705 and shall promptly file with the court a statement that such information has been given, to whom, and at what addresses, if mailed. No other notice of informal probate is required.

Source: L. 73: R&RE, p. 1572, § 1. **C.R.S. 1963:** § 153-3-306. **L. 75:** Entire section amended, p. 595, § 23, effective July 1.

15-12-307. Informal appointment proceedings - delay in order - duty of registrar - effect of appointment.

(1) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in section 15-12-614, the registrar, after making the findings required by section 15-12-308, shall appoint the applicant subject to qualification

and acceptance; except that, if the decedent was a nonresident, the registrar shall delay the order of appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

(2) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 15-12-608 to 15-12-612, but is not subject to retroactive vacation.

Source: L. 73: R&RE, p. 1572, § 1. **C.R.S. 1963:** § 153-3-307.

15-12-308. Informal appointment proceedings - proof and findings required.

(1) In informal appointment proceedings, the registrar must determine that:

(a) The application for informal appointment of a personal representative is complete;

(b) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(c) The applicant appears from the application to be an interested person as defined in section 15-10-201 (27);

(d) On the basis of the statements in the application, venue is proper;

(e) Any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(f) Any notice required by section 15-12-204 has been given;

(g) From the statements in the application, the person whose appointment is sought has priority entitling him to the appointment;

(h) One hundred twenty hours have elapsed since the decedent's death.

(2) Unless section 15-12-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in section 15-12-610 (3) has been appointed in this or another county of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

Source: L. 73: R&RE, p. 1572, § 1. **C.R.S. 1963:** § 153-3-308. **L. 94:** (1)(c) amended, p. 1037, § 10, effective July 1, 1995.

ANNOTATION

Law reviews. For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

15-12-309. Informal appointment proceedings - registrar not satisfied.

If the registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 15-12-307 and 15-12-308 or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

Source: L. 73: R&RE, p. 1573, § 1. **C.R.S. 1963:** § 153-3-309.

15-12-310. Informal appointment proceedings - notice requirements.

(1) The moving party must give notice as described by section 15-10-401 of his intention to seek an appointment informally:

(a) To any person demanding it pursuant to section 15-12-204; and

(b) To any person having a prior or equal right to appointment not waived in writing and filed with the court.

(2) No other notice of an informal appointment proceeding is required.

Source: L. 73: R&RE, p. 1573, § 1. **C.R.S. 1963:** § 153-3-310.

15-12-311. Informal appointment unavailable in certain cases.

If an application for informal appointment indicates the existence of a possible unrevoked will which may relate to property subject to the laws of this state and which is not filed for probate in this court, the registrar shall decline the application.

Source: L. 73: R&RE, p. 1573, § 1. **C.R.S. 1963:** § 153-3-311.

PART 4

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

Law reviews: For article, "Will Contests -- Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

15-12-401. Formal testacy proceedings - nature - when commenced.

(1) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 15-12-402 (1) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with section 15-12-402 (4) for an order that the decedent died intestate.

(2) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(3) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(4) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

Source: L. 73: R&RE, p. 1573, § 1. **C.R.S. 1963:** § 153-3-401.

ANNOTATION

Law reviews. For article, "Recent Statutes", see 4 Den. B. Ass'n Rec. 11 (1927). For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Practical Problems of Evidence in Real Estate Titles", see 24 Rocky Mt. L. Rev. 430 (1952). For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "Court Proceedings Relating to Real Estate Titles", see 35 U. Colo. L. Rev. 65 (1962). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Annotator's note. Cases relevant to § 15-12-401 decided prior to its earliest source, § 153-3-401, C.R.S. 1963, have been included in the annotations to this section.

The purpose of a proceeding to contest a will is to divest the legatees and devisees of rights in the estate of the testator and to vest the property in his heirs at law or in the beneficiaries named in another will. Unless the contestant will take or may take by an adjudication that the will in question is invalid he has not sufficient interest to give him legal standing to contest its validity. In re Stoiber's Estate, 101 Colo. 192, 72 P.2d 276 (1937).

The right to contest the validity of a probate may be exercised by any person whose interests are affected by the will so established, whether such will be domestic or foreign. Foster v. Kragh, 107 Colo. 389, 113 P.2d 666 (1941).

A petition objecting to informal probate and commencing formal probate proceedings is subject to dismissal under C.R.C.P. 12(b)(5). Section 15-12-403's requirement that the court "fix a time and place of hearing" on every petition does not prohibit application of C.R.C.P. 12(b)(5). In re Estate of Everhart, 2021 COA 63, 493 P.3d 272.

A guardian ad litem appointed to represent persons under legal disability in an estate matter is not an aggrieved person, and has no standing to prosecute a writ of error to the supreme court from a decree of heirship entered in the probate court finding a named person to be the sole and only heir at law of the deceased. Miller v. Clark, 144 Colo. 431, 356 P.2d 965 (1960).

Likewise, a wife has no standing to contest the will of her deceased husband where the husband and wife entered into a separation agreement, and following its execution no claim of duress, overreaching, fraud, coercion, or complaint of any nature regarding the property settlement is made until after the death of the husband, during which time the wife kept possession of the assets acquired under the agreement.

Thomas v. Eaton, 138 Colo. 512, 335 P.2d 270 (1959).

Applied in In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978); Ayres v. King, 665 P.2d 594 (Colo. 1983).

15-12-402. Formal testacy or appointment proceedings - petition - contents.

(1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will must:

(a) Request an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) Contain the statements required for informal applications as stated in section 15-12-301 (2) and the statements required by section 15-12-301 (3); and

(c) State whether the original of the last will of the decedent, or a copy of the decedent's original will certified by the state court administrator pursuant to article 23 of this title 15, is in the possession of the court or accompanies the petition.

(2) If the original will, or a copy of the decedent's original will certified by the state court administrator pursuant to article 23 of this title 15, is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(3) If a will has been lost or destroyed, or for any other reason is unavailable, and the fact of the execution thereof is established, as herein provided, and the contents thereof are likewise established to the satisfaction of the court, and the court is satisfied that the will has not been revoked by the testator, the court may admit the same to probate and record, as in other cases. In every such case the order admitting such will to probate shall set forth the contents of the will at length, and the names of the witnesses by whom the same was proved, and such order shall be recorded in the record of wills.

(4) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by section 15-12-301 (2) and (5), and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case the statements required by section 15-12-301 (5)(b) may be omitted.

Source: L. 73: R&RE, p. 1574, § 1. **C.R.S. 1963:** § 153-3-402. **L. 79:** (3) amended, p. 649, § 8, effective July 1. **L. 2019:** IP(1), (1)(c), and (2) amended, (HB 19-1229), ch. 252, p. 2446, § 4, effective January 1, 2023 (see editor's note).

Editor's note: HB 20-1368 amended the effective date of HB 19-1229 to change the date from January 1, 2021, to January 1, 2023. (See L. 2020, p. 1441.)

ANNOTATION

Law reviews. For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

Annotator's note. Since § 15-12-402 is similar to repealed § 153-5-28, C.R.S. 1963, § 152-5-29, CRS 53, CSA, C. 176, § 57, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The standards established in this section control whether a will may be admitted to probate. Although CRE 1003 and 1004 may allow for admission into evidence of duplicates in lieu of originals, when an original will is lost or destroyed, the standards specified in this section will control whether the will can be admitted to probate. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

To establish a lost will under this section, the proponent must prove that such will has been lost or destroyed or is otherwise unavailable and that it was properly executed; that it was in existence at the time of the death of the testator; and its contents. Failure to prove any one of such elements results in denial of probate. Todd v. Rennick, 13 Colo. 546, 22 P. 898 (1889); Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934); Estate of Varnum v. Witt, 144 Colo. 422, 357 P.2d 370 (1960).

To prove the contents of a purported last will, the standard is that the proof must be "clear and strong". Estate of Varnum v. Witt, 144 Colo. 422, 357 P.2d 370 (1960).

Likewise, proof of the existence of the will should be clear and strong. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

The statute unmistakably requires proof that such lost will or destroyed will was actually in existence at the time of the death of the testator. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

Despite its loss a properly executed will remains in existence. A will once validly made and published remains a will, in the absence of a showing of intent to revoke, although the writing, the best evidence of it,

is lost or destroyed; it is still in "existence" as that word is used in this section. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

Court properly considered the issue of revocation where the will was missing. In the case of a missing or lost will, a court must be satisfied that a will has not been revoked by the testator before admitting a copy of the will to probate. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

And subsection (3) provides the will proponent adequate notice that she is required to establish that a missing will has not been revoked. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

No allegation of proper making, publication and declaration of will. In re Chance's Estate, 124 Colo. 436, 238 P.2d 879 (1951).

"Dependent relative revocation" not applicable in case of lost will. The doctrine of "dependent relative revocation", which makes the revocation of a will ineffective and entitles the copy to be probated, cannot be applied in this case because of the statute on lost or destroyed wills, and because the decedent tore up the 1963 will. Bailey v. Kennedy, 162 Colo. 135, 425 P.2d 304 (1967).

In the case of a missing or destroyed will, common law establishes a rebuttable presumption that the decedent destroyed the will with intent to revoke it. Because neither this section nor §15-12-407 addresses the burden of proof when a will is lost or destroyed, the common law presumption applies. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

Presumption that unfound will was destroyed may be rebutted. The universally recognized presumption that a will that may have been in the testator's possession and cannot be found at his death was destroyed animo revocandi may be rebutted by evidence of his declarations tending to prove he believed the will to be in existence unrevoked, and that the loss or destruction of the will without the knowledge or consent of the testator may be inferred from such declarations without positive proof of loss or destruction, when diligent search and inquiry have failed to locate it in the places where it would most probably have been found if in physical existence. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

When a will, last seen in the possession of the testatrix, cannot be found following her death, there is a presumption that the testatrix destroyed the will with the intent to revoke it, but this presumption may be rebutted by evidence of decedent's declarations tending to prove decedent believed the will to be in existence unrevoked. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

Decedent's attorney was not incompetent to testify in proceeding to establish lost will although, as attorney for the estate, he had a financial interest in the estate. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

Waiver of objection to competency of decedent's attorney to testify. Where at trial to establish lost will, the caveators did not object to the competency of decedent's attorney or to the admissibility of his

testimony, and subsequently cross-examined him concerning his conversations with decedent pertaining to the lost will, the actions of the caveators constituted a waiver of their objection to the competency of the witness to testify concerning decedent's declarations. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

Trial court's refusal to submit to jury instructions tendered by caveators in proceeding to establish lost will held not error. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

Applied in Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

15-12-403. Formal testacy proceedings - notice of hearing on petition.

(1) (a) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 15-10-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 15-12-204.

(b) Notice shall be given to the following persons: The surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being or has been probated or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons, if the petitioner has reasonable cause to believe that unknown persons may claim an interest, and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(2) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered or certified mail to the alleged decedent at his last-known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) By engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

Source: L. 73: R&RE, p. 1575, § 1. **C.R.S. 1963:** § 153-3-403. **L. 77:** (1)(b) amended, p. 847, § 1, effective March 26.

ANNOTATION

Law reviews. For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985). For article, "Everhart — Probate, Meet Civil", see 53 Colo. Law. 40 (Nov. 2024).

Section's requirement that the court "fix a time and place of hearing" does not prohibit dismissal under C.R.C.P. 12(b)(5) of a petition objecting to informal probate and commencing formal probate proceedings. In re Estate of Everhart, 2021 COA 63, 493 P.3d 272.

This section provides for notice by publication and that notice served upon all persons named in the petition. Cisneros v. Cisneros, 163 Colo. 245, 430 P.2d 86 (1967) (decided under repealed § 153-4-2, C.R.S. 1963).

Applied in Craig v. Rider, 651 P.2d 397 (Colo. 1982); Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

15-12-404. Formal testacy proceedings - written objections to probate.

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

Source: L. 73: R&RE, p. 1575, § 1. **C.R.S. 1963:** § 153-3-404.

15-12-405. Formal testacy proceedings - uncontested cases - hearings and proof.

If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 15-12-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of the attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an

attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

Source: L. 73: R&RE, p. 1575, § 1. **C.R.S. 1963:** § 153-3-405.

ANNOTATION

Where there is no hint of objection to the probate of a will, the probate court is not obliged to invite objections at the probate hearing. In re Estate of Decker, 194 Colo. 143, 570 P.2d 832 (1977).

15-12-406. Formal testacy proceedings - contested cases.

(1) In a contested case in which the proper execution of a will is at issue, the following rules apply:

(a) If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit.

(b) If the will is notarized pursuant to section 15-11-502 (1)(c)(II), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

(c) If the will is witnessed pursuant to section 15-11-502 (1)(c)(I), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

Source: L. 73: R&RE, p. 1576, § 1. **C.R.S. 1963:** § 153-3-406. **L. 2009:** Entire section amended, (HB 09-1287), ch. 310, p. 1687, § 16, effective July 1, 2010.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

2008 Revisions. This section, which applies in a contested case in which the proper execution of a will is at issue, was substantially revised and clarified in 2008.

Self-Proved Wills: Paragraph (1) provides that a will that is self-proved pursuant to Section 2-504 satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit. Paragraph (1) does not preclude evidence of undue influence, lack of testamentary capacity, revocation, or any relevant evidence that the testator was unaware of the contents of the document.

Notarized Wills: Paragraph (2) provides that if the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

Witnessed Wills: Paragraph (3) provides that if the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred. For further explanation of the effect of an attestation clause, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. q (1999).

Historical Note. This Comment was revised in 2008.

ANNOTATION

Law reviews. For article, "In Defense of H.B. 109 — Re Serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article on the necessity of attestation clause or proof of attestation, see 29 Rocky Mt. L. Rev. 475 (1957). For article, "One Year Review of Evidence", see 35 Dicta 44 (1958).

Annotator's note. Cases relevant to § 15-12-406 decided prior to its earliest source, § 153-3-406, C.R.S. 1963, have been included in the annotations to this section.

Under the provisions of this section it is the duty of witnesses to a will to appear when duly summoned and testify concerning the execution and validity of the same. In re Ainsworth's Estate, 102 Colo. 392, 79 P.2d 1045 (1938).

Trial judge may properly interrogate witnesses. In a will contest proceeding, deficiencies of proof being evident from the answers of witnesses given in response to

questions by counsel, not only is it proper for the trial judge to interrogate such witnesses on his own motion, but he would be derelict in his duty had he failed to do so, in view of the provisions of this section. In re Livingston's Estate, 102 Colo. 148, 77 P.2d 649 (1938).

15-12-407. Formal testacy proceedings - burdens in contested cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and, if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

Source: L. 73: R&RE, p. 1576, § 1. **C.R.S. 1963:** § 153-3-407.

ANNOTATION

Law reviews. For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For article, "Powers and Perpetuities in Colorado", see 10 Rocky Mt. L. Rev. 249 (1938). For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency", see 19 Colo. Law. 1813 (1990). For article, "Anatomy of an Undue Influence Case", see 42 Colo. Law. 55 (Apr. 2013). For article, "Conservator-Created Wills: Issues in Litigation", see 44 Colo. Law. 53 (Aug. 2015). For article, "Everhart — Probate, Meet Civil", see 53 Colo. Law. 40 (Nov. 2024).

Annotator's note. Since § 15-12-407 is similar to repealed § 153-5-27, C.R.S. 1963, § 152-5-34, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The burden rests upon the proponents to establish the mental capacity of the person executing the will. This is a substantive question of fact, not a technical one of procedure. As a question of fact, it is for the trier of fact to make determination, based upon the presented evidence, as to whether the testatrix had the testamentary capacity to make a will. In re Estate of Murphy v. Warner, 29 Colo. App. 297, 483

P.2d 1364 (1971) (decided under section prior to 1973 repeal and reenactment).

Section changed burden of proof of testamentary capacity. Enactment of this section changed the long-established Colorado rule that the proponent of a will has the burden of proof and persuasion with regard to testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

Contestant has burden to prove lack of capacity. Once the proponent of a holographic will has offered prima facie proof that it was duly executed, the contestant must bear the burden of introducing prima facie evidence that the person who executed the will lacked testamentary capacity. Nunez v. Jersin, 635 P.2d 231 (Colo. App. 1981).

In order to establish that testator was not possessed of sufficient mental capacity to execute a valid will, evidence offered by contestants must be calculated to establish mental incapacity at the time of the execution of the will. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

Proof required is of facts from which mental incapacity may be inferred. The law recognizes the difficulty if not the impossibility of establishing mental incapacity by direct or positive evidence such as is required to establish a tangible physical fact, and that the only positive and affirmative proof to be expected or required is of facts and circumstances from which mental incapacity may reasonably be inferred. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

Under this section courts do not knowingly admit fraudulent wills to probate. Bigler v. Bigler, 82 Colo. 463, 260 P. 1081 (1927).

Where a will is presented for probate and an objection is filed, the burden of sustaining its allegations is upon objectors. Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

Burden of going forward with proof is on proponent of will. In re Estate of Sebben, 151 Colo. 12, 375 P.2d 516 (1962).

The burden of proof to show undue influence is upon the one who asserts it. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908).

Rebuttable presumptions of undue influence and fairness do not continue in a case after they are sufficiently rebutted. However, though the presumed facts may not be established as a matter of law at that point, the jury may nevertheless infer the presumed facts from the evidence that gave rise to the presumptions. Krueger v. Ary, 205 P.3d 1150 (Colo. 2009).

The acts of friendship and kindness performed by one neighbor to another are not to be stigmatized as undue influence. In re Carey's Estate, 56 Colo. 77, 136 P. 1175 (1913).

The opportunity to exert undue influence creates no presumption against the will. In re Shell's Estate, 28 Colo. 167, 63 P. 413 (1900); Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908).

Trial court did not err by holding the caregiver rebutted the presumption of

undue influence, to the extent that the principles of Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926), and Lamborn v. Kirkpatrick, 97 Colo. 421, 50 P.2d 542 (1935), still have vitality. In re Estate of Schlagel, 89 P.3d 419 (Colo. App. 2003).

The fact that the scrivener of a will is executor and legatee therein, at most raises a suspicion, strong or weak, or, in some cases, of no force at all, depending upon the attending circumstances, which, in a proper case, should cause the court to require of proponent, in addition to proof of formal execution, other clear and satisfactory evidence, not necessarily that the will was real or by the testator, but that he knew its contents and was free from undue influence. Snodgrass v. Smith, 42 Colo. 60, 94 P. 312 (1908).

Refusal of court to release will so that it could be destroyed has no effect on testator's right to execute subsequent will. Retention by the court does not mean that the will ultimately will be probated, nor does it indicate any judgment by the court regarding testator's capacity to execute a valid will. Jenkins v. Mesa County Dist. Court, 620 P.2d 721 (Colo. 1980).

This section does not address the issue of burden of proof in the case of a lost or missing will. Thus, the rebuttable presumption that arises in such cases under common law, that the decedent destroyed the will with intent to revoke it, applies. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

15-12-408. Formal testacy proceedings - will construction - effect of final order in another jurisdiction.

A final order of a court of another state determining testacy or the validity or construction of a will made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

Source: L. 73: R&RE, p. 1576, § 1. **C.R.S. 1963:** § 153-3-408.

ANNOTATION

Law reviews. For article, "In Re: The Mourners", see 6 Dicta 7 (1929). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Five New Real Estate Standards for Denver", see 26 Dicta 131 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Family Law, Probate Law, and Constitutional Law", see 31 Dicta 471

(1954). For comment on Reed v. McLaughlin, appearing below, see 26 Rocky Mt. L. Rev. 337 (1954). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For article, "Another Decade of Colorado Conflicts", see 33 Rocky Mt. L. Rev. 139 (1961).

Annotator's note. Since § 15-12-408 is similar to repealed CSA, C. 176, § 62, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionally required notice. Notice by publication in estate proceedings is constitutionally insufficient and inconsistent with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and must be supplemented by personal service or mailing to interested persons whose names and addresses are known, or by reasonable diligence can be ascertained. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

Waiver of notice limited by fairness. To construe waiver of further notice of the admission to probate hearing of a will to include waiver of notice of the subsequent dismissal and intestacy proceedings would be fundamentally unfair. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

A "foreign will" is (a) an instrument in writing, (b) which has been admitted to probate as a last will, (c) before a court other than a court of this state, and (d) which court is authorized by the laws of such jurisdiction to admit the same to probate. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

This section sets forth procedures for probating a foreign will in this state. Sayre v. Sage, 47 Colo. 559, 108 P. 160 (1910); Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

There is an intent on the part of the general assembly to treat a foreign will as a validly executed will in Colorado. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

Foreign will probated in another state is entitled to probate in this state. A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. Corrigan v. Jones, 14 Colo. 311, 23 P. 913 (1890).

Probate procedure concerning a foreign will devising real estate in this state permits the transfer thereof in accordance with the terms of such will, subject to the statutory rights of creditors and such a will, as applied to real property in this state, is taken as valid unless a contest is instituted

on or before the day set for the probate hearing and is successfully maintained. Foster v. Kragh, 107 Colo. 389, 113 P.2d 666 (1941).

Laws of state in which foreign will devises property must permit it. The probate of a will in one state does not establish its validity as a will devising real estate in another state unless the laws of the latter permit it. Sayre v. Sage, 47 Colo. 559, 108 P. 160 (1910); Foster v. Kragh, 107 Colo. 389, 113 P.2d 666 (1941).

Situs courts have usually applied their own local law to determine the validity of a will insofar as it affects interests in local land even though the testator died domiciled in another state. Wimbush v. Wimbush, 41 Colo. App. 289, 587 P.2d 796 (1978).

The full faith and credit clause of the federal constitution is not denied by disregarding the decree of probate of a foreign will. Foster v. Kragh, 107 Colo. 389, 113 P.2d 666 (1941).

Filing of objections alone cannot destroy effect of section. If this section gives validity to the will in the absence of objection to the formality of execution thereof, the mere filing of an objection cannot logically be held to destroy the force and effect of the section. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

Issue of residency. In this section it is provided that a copy of a foreign will with appropriate accompanying documents showing probate in the foreign jurisdiction, on presentation to the court in this state, gives the court the right to inquire into only one issue. This issue is "Whether the decedent was, or was not, a resident of this state". If the court finds that the decedent was not a resident of this state the court shall by order admit such foreign will to probate without further proof of the execution thereof. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

15-12-409. Formal testacy proceedings - order - foreign will.

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed by section 15-12-108, it shall determine the decedent's domicile at death, his heirs, and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 15-12-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

Source: L. 73: R&RE, p. 1576, § 1. **C.R.S. 1963:** § 153-3-409.

15-12-410. Formal testacy proceedings - probate of more than one instrument.

If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 15-12-412.

Source: L. 73: R&RE, p. 1576, § 1. **C.R.S. 1963:** § 153-3-410.

ANNOTATION

Proposed will need not be filed with motion to vacate. This section does not require the filing of a proposed will on the same date as the filing of a motion to vacate. However, it does require that any subsequent petition to probate be filed no later than 12 months after the entry of the challenged order. Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 886 (Colo. App. 1982).

15-12-411. Formal testacy proceedings - partial intestacy.

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

Source: L. 73: R&RE, p. 1577, § 1. **C.R.S. 1963:** § 153-3-411.

15-12-412. Formal testacy proceedings - effect of order - vacation.

(1) Subject to appeal and subject to vacation as provided in this section and in section 15-12-413, a formal testacy order under sections 15-12-409 to 15-12-411, including an order that the

decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs; except that:

(a) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication;

(b) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication;

(c) A petition for vacation under either paragraph (a) or (b) of this subsection (1) must be filed prior to the earlier of the following time limits:

(I) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;

(II) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by section 15-12-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent;

(III) Twelve months after the entry of the order sought to be vacated.

(d) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs;

(e) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last-known address and the court finds that a search under section 15-12-403 (2) was made.

(2) If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances. An action for recovery from distributees not based on fraud or intentional wrongdoing shall not be brought by the alleged decedent or any person

claiming through him more than three years from the date of such distribution. In no event shall any recovery be made by the alleged decedent against any person who, in accordance with law and in good faith and for adequate value, purchased or acquired a lien upon property of the alleged decedent.

Source: L. 73: R&RE, p. 1577, § 1. **C.R.S. 1963:** § 153-3-412.

ANNOTATION

Law reviews. For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

A statute of limitations should not be applied to cases not clearly within its provisions. Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922).

This section involves no question of jurisdiction but is merely regulatory, determining the period in which an order of probate may be attacked, under circumstances named, and the conclusiveness of such probate, if not so questioned. Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922).

Remedy of heir. The only remedy of the heir under this section seems to be to appear and object at the time of the hearing or, within one year thereafter, to ask for a revocation of the order admitting the will to probate. In re Dunphy's Will, 60 Colo. 196, 153 P. 89 (1915).

One purpose of this section is to permit the heir, upon whom the law casts the property at the death of the ancestor, to come into court and object to the probate of a purported will which disinherits or cuts him off from participating in the ancestor's estate, and if he fails to do so, to bar any right of objecting which he might have had, within one year after probate. In re Dunphy's Will, 60 Colo. 196, 153 P. 89 (1915).

Order admitting will to probate is conclusive of the legality of its contents. In this case, the husband waived his right of election by appearing at the probate of the will and filing his written consent to and acceptance of its provisions, and the will was thereupon duly and solemnly admitted to probate. By his election thus made, he was irrevocably bound, and the order admitting the will to probate is conclusive of the legality and validity of its contents, as against all persons under this section. Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912).

Subsection (1)(c)(III) is designed to encourage speedy resolution of probate proceedings, for the benefit of all heirs and beneficiaries. Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

Section fixes limitation on right to question finality of proceedings. This

section deals with the effect of probate orders and fixes a limitation upon the right of persons to question the finality of proceedings resulting in the admission or denial of a foreign will to probate in this state. Reed v. McLaughlin, 128 Colo. 581, 265 P.2d 691 (1954).

Probate code's statute of limitations is applicable to action seeking imposition of a constructive trust upon the assets of an estate because such an imposition would effectively negate the probate court's determination of heirship. Mitchem v. First Interstate Bank of Denver, 802 P.2d 1141 (Colo. App. 1990).

Potential devisee is entitled to notice of hearing during which court will determine validity of will. If, at time of hearing, the court had yet to determine the validity of the will, the potential devisee must be given notice in order to have the opportunity to meet her burden to prove decedent's intent and overcome any presumption of revocation. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

Statute of limitations should have been tolled with respect to potential devisee's claim if he or she did not receive the statutorily required notice. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

Applied in In re Estate of Decker, 194 Colo. 143, 570 P.2d 832 (1977).

15-12-413. Formal testacy proceedings - vacation of order for other cause.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

Source: L. 73: R&RE, p. 1578, § 1. **C.R.S. 1963:** § 153-3-413.

ANNOTATION

Analogous to motion to set aside default judgment. Where there has been no trial of any issues presented upon the pleadings, a motion to vacate an order admitting a will to probate is analogous to a motion to set aside a default judgment for good cause shown under C.R.C.P. 55(c) and 60(b). Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Criteria to be utilized by a court in ruling on a motion to set aside a default judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with equitable considerations, such as the protection of action taken in reliance on the order and the prevention of prejudice by reason of evidence lost or

impaired by the passage of time. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

Excusable neglect sufficient to vacate an order results from circumstances which would cause a reasonably careful person to neglect a duty, and the issue of negligence is determined by the trier of fact. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Meritorious defense alone insufficient. A party may not have a judgment vacated solely upon an allegation of the existence of a meritorious defense. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

A movant must support a claim of meritorious defense by averments of fact, not simply legal conclusions. The factual allegations must be set forth with sufficient fullness and particularity to show that a defense is substantial, not technical; meritorious, not frivolous; and that it may change the result upon trial. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

Burden of proof. The party seeking relief has the burden of establishing his grounds by clear, strong and satisfactory proof. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

Regardless of good cause for delay in filing challenge to formal probate orders, challenges filed after the time allowed by this section are barred. Matter of Estate of Anderson, 727 P.2d 867 (Colo. App. 1986).

15-12-414. Formal proceedings concerning appointment of personal representative.

(1) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 15-12-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 15-12-301 (2) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(2) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 15-12-203, make a proper appointment, and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 15-12-611.

Source: L. 73: R&RE, p. 1578, § 1. **C.R.S. 1963:** § 153-3-414.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

PART 5

SUPERVISED ADMINISTRATION

15-12-501. Supervised administration - nature of proceedings.

Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in sections 15-12-502 to 15-12-505, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

Source: L. 73: R&RE, p. 1578, § 1. **C.R.S. 1963:** § 153-3-501.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Applied in In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978).

15-12-502. Supervised administration - petition - order.

(1) A petition for supervised administration may be filed by any interested person or by a personal representative at any time, or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the

priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding, and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied.

(1.5) A supervised administration proceeding may also be initiated by the court upon its own motion after notice and findings as required under subsection (2) of this section.

(2) After notice to interested persons, the court shall order supervised administration of a decedent's estate:

(a) If the decedent's will directs supervised administration, unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(b) If the decedent's will directs unsupervised administration such provision shall control unless the personal representative petitions for supervised administration, in which case such petition shall be granted unless the court finds that supervised administration is unnecessary for protection of persons interested in the estate; or

(c) In other cases if the court finds that supervised administration is necessary under the circumstances.

Source: L. 73: R&RE, p. 1579, § 1. **C.R.S. 1963:** § 153-3-502. **L. 75:** (1.5) added, p. 595, § 24, effective July 1.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

15-12-503. Supervised administration - effect on other proceedings.

(1) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(2) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 15-12-401.

(3) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

Source: L. 73: R&RE, p. 1579, § 1. **C.R.S. 1963:** § 153-3-503.

15-12-504. Supervised administration - powers of personal representative.

Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to transfer, surrender, or release estate assets to a distributee without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

Source: L. 73: R&RE, p. 1579, § 1. **C.R.S. 1963:** § 153-3-504. **L. 75:** Entire section amended, p. 595, § 25, effective July 1.

15-12-505. Supervised administration - interim orders - distribution and closing orders.

Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under section 15-12-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

Source: L. 73: R&RE, p. 1580, § 1. **C.R.S. 1963:** § 153-3-505.

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL, AND TERMINATION OF AUTHORITY

Law reviews: For article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

15-12-601. Qualification.

Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

Source: L. 73: R&RE, p. 1580, § 1. **C.R.S. 1963:** § 153-3-601.

15-12-602. Acceptance of appointment - consent to jurisdiction.

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be provided to the personal representative pursuant to section 15-10-401.

Source: L. 73: R&RE, p. 1580, § 1. **C.R.S. 1963:** § 153-3-602. **L. 2008:** Entire section amended, p. 481, § 2, effective July 1.

15-12-603. Bond not required without court order - exceptions.

(1) No bond is required of a personal representative appointed in informal proceedings, except:

(a) Upon the appointment of a special administrator;

(b) When an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond; or

(c) When bond is required under section 15-12-605.

(2) Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding; except that bond is not required of a personal

representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

Source: L. 73: R&RE, p. 1580, § 1. **C.R.S. 1963:** § 153-3-603. **L. 77:** Entire section R&RE, p. 848, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

15-12-604. Bond amount - security - procedure - reduction.

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the registrar, or give other suitable security, in an amount not less than the estimate. The registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. If the personal representative be a company or association with capital and surplus at least equal to that required by law of a corporate surety, the registrar may excuse a requirement of bond. The registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in section 15-15-201) whose deposits are insured to the satisfaction of the court in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person, the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

Source: L. 73: R&RE, p. 1580, § 1. **C.R.S. 1963:** § 153-3-604. **L. 90:** Entire section amended, p. 921, § 6, effective July 1.

ANNOTATION

Law reviews. For article, "Curative Statutes of Colorado Respecting Title to Real Estate", see 16 Dicta 35 (1939).

15-12-605. Demand for bond by interested person.

Subject to the provisions of sections 15-12-603 and 15-12-604, and to a determination by the court that bond is desirable, any person apparently having an interest worth in excess of five thousand dollars, or any creditor having a claim in excess of five thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, the court may require bond in such amount as it may determine and notify the personal representative to file the same, but the requirement ceases if the person demanding bond ceases to be interested in the estate. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative.

Source: L. 73: R&RE, p. 1581, § 1. **C.R.S. 1963:** § 153-3-605.

15-12-606. Terms and conditions of bonds.

(1) The following requirements and provisions apply to any bond required by sections 15-12-604 and 15-12-605:

(a) Bonds shall name the people of the state of Colorado as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law;

(b) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(c) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligator in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party.

Notice of any such proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(d) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative;

(e) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted;

(f) Unless expressly stated in the bond to the contrary, no surety shall be liable for any actions of the personal representative taken prior to the date of such bond.

(2) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

Source: L. 73: R&RE, p. 1581, § 1. **C.R.S. 1963:** § 153-3-606. **L. 75:** (1)(f) added, p. 595, § 26, effective July 1.

ANNOTATION

Law reviews. For article, "In Re: The Mourners", see 6 Dicta 7 (1929).

Annotator's note. Since § 15-12-606 is similar to repealed § 153-10-45, C.R.S. 1963, CSA, C. 176, § 244, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

All that is required to expose the surety to liability on the executor's bond is the commission of the wrongful act. People ex rel. Barker v. Transamerica Ins. Co., 385 F.2d 61 (10th Cir. 1967).

Under this section the obligee in an administrator's bond may sue all or any one or more of the obligors, and where an action was brought against the principal and surety on such bond the action could be dismissed as to the principal and continued as to the surety without discharging the surety from liability. McAllister v. People ex rel. Brisbane, 28 Colo. 156, 63 P. 308 (1900).

One sued as an administrator cannot be joined with other defendants who are sued in their individual capacity upon the bond. Metz v. People ex rel. Reid, 6 Colo. App. 57, 40 P. 51 (1895).

It is not essential that guardian be made a party to the action or that a judgment be first obtained. It is not essential to a recovery against sureties on a guardian's bond, in an action against them on behalf of the minors for breaches of its conditions by the guardian, that the guardian

be made party to the action, or that a judgment should first have been obtained against him which he had failed to satisfy. The instrument itself stipulates for the faithful discharge by the guardian of the obligations imposed on him by this section, which provides that it may be put in suit against all or any one of the obligors to the use and benefit of any person entitled by breach thereof. Proceedings for accounting or orders of court need not precede an action for a breach of the bond. Gebhard v. Smith, 1 Colo. App. 342, 29 P. 303 (1892).

Section permits recovery by any person who may be injured. This and the next preceding section permit a recovery on an administrator's bond by any person who may be injured by the conduct of the representative. The enactment is a very broad one, and, in general, provides that any violation of the provisions of articles 10 to 17 of this title shall be treated as a devastavit, and shall entitle the party to maintain his suit. Metz v. People ex rel. Reid, 6 Colo. App. 57, 40 P. 51 (1895).

It only gives strangers a right to sue on the bond when they have sustained some damage which they show. When the plaintiffs failed to prove that they had a claim against the estate, or that the administrator had received any assets, they failed to establish some of the essential elements of their cause of action. They were not injured by the misconduct of the administrator, and consequently there came to them no cause of action on the bond. Metz v. People ex rel. Reid, 6 Colo. App. 57, 40 P. 51 (1895).

15-12-607. Order restraining personal representative.

(1) On petition of any person who appears to have an interest in the estate, or on its own motion, a court by temporary order may restrain a personal representative pursuant to section 15-10-503.

(2) (Deleted by amendment, L. 2008, p. 482, § 3, effective July 1, 2008.)

Source: L. 73: R&RE, p. 1582, § 1. **C.R.S. 1963:** § 153-3-607. **L. 2008:** Entire section amended, p. 482, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

The court may terminate a personal representative at any time for various reasons including mismanagement of the estate's assets or failure to perform any duty pertaining to the office. In the Estate of Sandstead, 897 P.2d 883 (Colo. App. 1995).

15-12-608. Termination of appointment - general.

Termination of appointment of a personal representative occurs as indicated in sections 15-12-609 to 15-12-612. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will; except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor, and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

Source: L. 73: R&RE, p. 1582, § 1. **C.R.S. 1963:** § 153-3-608.

Editor's note: Termination under this section does not discharge the personal representative; for discharge, see §§ 15-12-1001 and 15-12-1002.

ANNOTATION

Law reviews. For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

Personal representative had continuing authority to represent estates in pending legal malpractice action after initial appointment terminated. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

15-12-609. Termination of appointment - death or disability.

The death of a personal representative or the appointment of a conservator for the estate of a personal representative terminates his appointment. Until a duly appointed and qualified successor personal representative or corepresentative has taken possession of the estate possessed and being administered by a deceased or protected personal representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection, and shall

account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification, or to any remaining corepresentative.

Source: L. 73: R&RE, p. 1582, § 1. **C.R.S. 1963:** § 153-3-609.

ANNOTATION

Law reviews. For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

15-12-610. Termination of appointment - voluntary.

(1) An appointment of a personal representative terminates as provided in section 15-12-1003 one year after the filing of a closing statement.

(2) An order closing an estate as provided in section 15-12-1001 or 15-12-1002 terminates an appointment of a personal representative.

(3) A personal representative may resign his or her position by filing a written statement of resignation with the registrar after he or she has given at least fourteen days' written notice to the persons known to be interested in the estate. If the person resigning is a sole representative and if no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him or her. If the person resigning is a corepresentative, such resignation is effective only upon delivery of the assets in his or her possession to any remaining corepresentatives.

Source: L. 73: R&RE, p. 1582, § 1. **C.R.S. 1963:** § 153-3-610. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 837, § 43, effective July 1.

ANNOTATION

Law reviews. For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

Personal representative had continuing authority to represent estates in pending legal malpractice action as personal representative after initial appointment

terminated. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

15-12-611. Termination of appointment by removal - cause - procedure.

(1) The court shall have the power to remove a personal representative for cause at any time. Removal proceedings shall be governed by the provisions of section 15-10-503.

(2) Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or herself or his or her nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

Source: L. 73: R&RE, p. 1582, § 1. **C.R.S. 1963:** § 153-3-611. **L. 2008:** Entire section amended, p. 482, § 4, effective July 1.

ANNOTATION

Law reviews. For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

Annotator's note. Since § 15-12-611 is similar to repealed § 152-10-8, CRS 53, CSA, C. 176, § 90, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The power to remove an administrator is largely discretionary. The action of a court should not be interfered with by any other court, unless an abuse of discretion is shown. Shore v. Wall, 22 Colo. App. 146, 122 P. 1124 (1912); Canaday v. Kauffman, 140 Colo. 165, 342 P.2d 1027 (1959); In re Estate of Jefferson v. Hough, 140 Colo. 347, 344 P.2d 179 (1959).

The court may terminate a personal representative at any time for various reasons including mismanagement of the estate's assets or failure to perform any duty pertaining to the office. In the Estate of Sandstead, 897 P.2d 883 (Colo. App. 1995).

Dilatoriness of an administrator in filing inventories or making reports is not ground for removal. In re Estate of Jefferson v. Hough, 140 Colo. 347, 344 P.2d 179 (1959).

The language of this section is sufficiently broad to admit proof of any waste or mismanagement. Miller v. Hider, 9 Colo. App. 50, 47 P. 406 (1896).

Failure to collect debts is mismanagement. If an executor or

administrator should refuse to collect debts due to the estate from others, he would be justly chargeable with mismanagement; and, surely, his refusal to account to the estate for money owing to it by himself, cannot be characterized by any milder term. Haines v. Christie, 17 Colo. App. 272, 68 P. 669 (1902).

Court, therefore, may commit administration to another in proper situation. The law is a jealous guardian of the estates of deceased persons, and when the appointment of the executor named in the will of the decedent may endanger the estate, or lead to embarrassment in the administration, it is within the power of the court, and is its clear duty, to commit administration to another. Deeble v. Alerton, 58 Colo. 166, 143 P. 1096 (1914).

Bank was not subject to removal from its position as administrator where, knowing of its appointment as executor from copy of will, it began probate proceedings in regard to the will even though the original of the will was lost. In re Estate of Enz, 33 Colo. App. 24, 515 P.2d 1133 (1973).

15-12-612. Termination of appointment - change of testacy status.

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in section 15-12-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

Source: L. 73: R&RE, p. 1583, § 1. **C.R.S. 1963:** § 153-3-612.

ANNOTATION

Law reviews. For article, "Termination of a Personal Representative", see 19 Colo. Law. 213 (1990).

15-12-613. Successor personal representative.

Parts 3 and 4 of this article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

Source: L. 73: R&RE, p. 1583, § 1. **C.R.S. 1963:** § 153-3-613.

ANNOTATION

Successor fiduciary of an estate is in privity with his predecessor. In re Estate of Perini, 34 Colo. App. 201, 526 P.2d 313 (1974).

15-12-614. Special administrator - appointment.

(1) A special administrator may be appointed:

(a) Informally by the registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative, or if a prior appointment has been terminated as provided in section 15-12-609;

(b) In a formal proceeding by order of the court on the petition of any interested person, or by the court on the court's own motion, and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-614. **L. 2007:** (1)(b) amended, p. 127, § 5, effective July 1.

ANNOTATION

Law reviews. For article, "The Use of Special Administrators in Colorado", see 19 Colo. Law. 2433 (1990).

When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution, rather than allowing substantial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an amended motion or, failing that, appoint a proper personal representative such as the public administrator. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

Where probate court finds under this section that appointment of a special administrator is necessary, court may appoint any proper person as such under § 15-12-615 notwithstanding the provisions in § 15-12-203 on priority of appointment of a personal representative. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

15-12-615. Special administrator - who may be appointed.

(1) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available and qualified.

(2) In other cases, any proper person may be appointed special administrator.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-615.

ANNOTATION

When appointment of special administrator is necessary under § 15-12-614, such appointment is proper under this section, notwithstanding the provisions in § 15-12-203 governing priority of appointment of a personal representative. In re Estate of Franchs, 722 P.2d 422 (Colo. App. 1986).

15-12-616. Special administrator - appointed informally - powers and duties.

A special administrator appointed by the registrar in informal proceedings pursuant to section 15-12-614 (1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the code necessary to perform his duties.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-616.

15-12-617. Special administrator - formal proceedings - power and duties.

A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts, or on other terms as the court may direct.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-617.

15-12-618. Termination of appointment - special administrator.

The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 15-12-608 to 15-12-611.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-618.

15-12-619. Public administrator - appointment - oath - bond - deputy.

(1) The district or probate court in each judicial district may appoint a person who shall be known as the public administrator. The appointee shall be a qualified elector over twenty-one years of age and shall be a resident of or maintain a principal place of business in the judicial district in which the appointee is to act as public administrator. Unless authorized by the appointing court, the appointee shall remain a resident of or maintain a principal place of business in the judicial district in which the appointee has been appointed during the period in which the appointee holds the office of public administrator. The person appointed as the public administrator shall serve at the pleasure of the appointing court until discharged by the court or until such person's resignation is accepted by the appointing court. Any person appointed as a public administrator shall not be considered an employee of either the state of Colorado or of the judicial district or the city or the county in which such person has been appointed public administrator because of his or her appointment as public administrator.

(2) Before taking office, a public administrator shall take and subscribe an oath, before a district or probate judge of the appointing judicial district, in the following form:

I, _____, in accepting the position of the public administrator in and for the _____ judicial district of the state of Colorado, do solemnly swear (or affirm) that I will support the constitution of the United States and of the state of Colorado, and that I will faithfully perform the duties of the office of public administrator as required by law.

(3) If a public administrator is discharged or resigns from office, the public administrator may, at the court's discretion, be permitted to complete the administration of any estate or trust in which the public administrator has been previously appointed, or is acting as the public administrator, at the time of discharge or resignation.

(4) Every public administrator shall procure and maintain a general bond in the sum of one hundred thousand dollars covering the public administrator's performance and the performance of the public administrator's employees to the people of the state of Colorado. Such bond shall be conditioned on the faithful discharge of the duties of the office of the public administrator and must be filed in the office of the secretary of state on an annual basis. If the Colorado attorney general finds reasonable grounds to believe that a public administrator has improperly administered a public administrator's estate, the attorney general may sue upon such bond in the name of the people of the state of Colorado to compensate any party harmed by any neglect or wrongful act by a public administrator or the public administrator's employees. In addition to the above general bond, a public administrator may also be required to give such bonds as are required of other fiduciaries.

(5) The public administrator is authorized to act as provided in this section and sections 15-12-620, 15-12-621, 15-12-622, and 15-12-623 and as directed by the appointing court. A public administrator may also be appointed as a fiduciary in other cases in any judicial district in the state of Colorado or elsewhere as needed.

(6) Subject to the approval and confirmation by the district or probate court in each judicial district, the public administrator may also appoint one or more deputy public administrators. Deputy public administrators must be qualified electors over the age of twenty-one. Any deputy public administrator serves at the pleasure of the appointing court and the public administrator in that judicial district until such time as the deputy public administrator is discharged by the court or the public administrator or until the deputy public administrator resigns. The resignation of a deputy public administrator is not effective until it is filed with and approved by the appointing court. The deputy public administrator shall act as directed by the public administrator in the deputy public administrator's judicial district. Deputy public administrators are subject to all

requirements of public administrators as set forth in this section, including the bond requirement in subsection (4) of this section.

(7) Any acting public administrator or deputy public administrator who was appointed prior to July 1, 1991, shall be exempt from the appointment criteria required by this section.

Source: L. 73: R&RE, p. 1584, § 1. **C.R.S. 1963:** § 153-3-619. **L. 91:** Entire section R&RE, p. 1453, § 1, effective July 1. **L. 2006:** (1) amended, p. 377, § 6, effective July 1. **L. 2018:** (4) and (6) amended, (SB 18-165), ch. 101, p. 777, § 1, effective August 8.

ANNOTATION

Law reviews. For article, "Administration of Intestate Estates", see 29 Rocky Mt. L. Rev. 571 (1957). For article, "Streamlining the Public Administrators' Operations: Changes Resulting from the 2017 OSA Audit", see 48 Colo. Law. 49 (May 2019).

When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution, rather than allowing substantial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an amended motion or, failing that, appoint a proper personal representative such as the public administrator. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

15-12-620. Public administrator - responsibility for protecting decedent's estate - duty of persons holding property.

(1) Upon notification of the death of any person who was either a resident of Colorado, or a nonresident who died owning real or personal property located in Colorado, it shall be the responsibility of the public administrator of the judicial district of the decedent's residence, or, in the case of a nonresident, of the public administrator of the judicial district wherein the decedent's property is located, to take possession of the decedent's property or to take such measures as are reasonably necessary to protect and secure the decedent's property. The public administrator need not act in cases where such property can be protected by a person who is in the vicinity of the property and who is willing and able to provide such protection, if such person is either an heir of the decedent or has apparent authority to act as the personal representative of the decedent's estate as set forth in an original document that reasonably appears to be the last will of the decedent.

(2) In appropriate cases, the public administrator shall act as soon as the public administrator receives notice of the decedent's death. The public administrator shall continue to protect the decedent's property until the administration of the decedent's estate is granted to a person or

entity by a court of proper jurisdiction or until the public administrator is presented with a properly executed affidavit pursuant to section 15-12-1201. The ten-day waiting period required in section 15-12-1201 (1)(b) shall not apply to affidavits presented to a public administrator to obtain property being protected by a public administrator pursuant to this section.

(3) Reasonable administration fees and costs including reasonable attorney fees incurred in efforts to protect the decedent's property shall be paid to the public administrator at the time such property is released by the public administrator. Upon the presentation or mailing of an itemized statement of fees and costs to the person assuming responsibility for the case, the public administrator shall be entitled to deduct such fees and costs from any cash assets of the decedent's estate that are in the public administrator's possession. Any fee dispute regarding a public administrator's fees and costs shall be resolved by petition to the district or probate court that has jurisdiction over the estate.

(4) When a person dies leaving property located in any house, residence, or apartment, on the premises of another, or in a nursing home, coroner's office, mortuary, state agency, or public or private hospital, without leaving either a known heir residing in this state or a resident of this state who has been nominated as a personal representative in an original document that reasonably appears to be the last will of the decedent, the person in possession of such house, residence, apartment or premises, or the administrator of such nursing home, coroner's office, mortuary, state agency, or public or private hospital, shall give prompt notice of death, and notice of the existence of the property, to the public administrator of that judicial district. Any person who fails to act in compliance with this section shall be liable for all damages and any loss that may be sustained as a result of the neglect or refusal of such person to report the death or the existence of property to the public administrator. Such damages may be recovered by the decedent's heirs or successors, or by the public administrator. It shall be the responsibility of any law enforcement agency, coroner, or other public agency to give notice to the public administrator of the appropriate jurisdiction at any time they believe that property of a decedent located within their jurisdiction is not properly secured or protected.

Source: L. 73: R&RE, p. 1585, § 1. **C.R.S. 1963:** § 153-3-620. **L. 75:** (4) added, p. 596, § 27, effective July 1. **L. 91:** Entire section R&RE, p. 1455, § 2, effective July 1.

ANNOTATION

Law reviews. For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (Jan. 2011).

Annotator's note. Since § 15-12-620 is similar to repealed CSA, C. 176, § 104, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section must be construed as superseding earlier statutes to the extent of its declaration of rights of administration. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

This section modifies § 15-12-203 insofar as it defines the right to administer estates in any county having a population of more than 20,000 inhabitants. In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

Nominee of residuary legatee chosen within 60 days of death preferred as administrator. In re Bourquin's Estate, 84 Colo. 275, 269 P. 903 (1928); In re Ove's Estate, 114 Colo. 286, 163 P.2d 651 (1945).

15-12-621. Public administrator - decedents' estates - areas of responsibility.

(1) The public administrator of each judicial district shall be responsible for handling the administration of decedents' estates within such judicial district under the following circumstances:

(a) (I) Where the decedent died a resident of that judicial district; or

(II) Where the decedent was a nonresident of the state of Colorado and the decedent has property located within that judicial district; and

(b) Where no individual can be found who is willing and able to administer the estate of the decedent by virtue of being either nominated to act as a personal representative under the last will of the decedent, or is an heir or devisee of the decedent entitled to receive a portion of the decedent's estate.

(2) A public administrator may also administer a decedent's estate within the public administrator's judicial district in cases where the decedent's heirs, devisees, creditors, or nominated personal representative, do not act to evidence their willingness or intention to administer the decedent's estate within sixty days from the date of death, by either:

(a) Assuming responsibility for the administration of the estate by use of an affidavit pursuant to sections 15-12-1201 and 15-12-1202; or

(b) By filing a petition or application to open the estate in a district or probate court in this state.

(3) The grant of authority to a public administrator in this section shall not supersede the normal priority for the appointment of a personal representative as set forth in section 15-12-203; except that a public administrator shall have priority for appointment over creditors of the estate.

(4) In estates where the location or identity of some or all of the decedent's heirs or devisees is unknown, the requirement for the publication of notice to such persons concerning the petition for the appointment of a public administrator as personal representative or special administrator of the estate shall be waived unless the court otherwise directs.

(5) All decedent estates in which the public administrator has been appointed as the personal representative of the estate shall be closed in a formal hearing in accordance with section 15-12-1001.

(6) Small estates, as defined in section 15-12-1201, may be administered by the public administrator using an affidavit as provided in section 15-12-1201, with the same effect as provided in section 15-12-1202. The claims period ends one year from the date of the decedent's death. At the end of the claims period, the public administrator shall summarily make distribution of estate assets by distribution to allowed claimants pursuant to the priorities set forth in section 15-12-805. The remainder of the estate's funds, if any, must be distributed to the decedent's heirs or devisees as determined under this code. In determining who is entitled to an estate's funds, a public administrator may rely on affidavits by persons who set forth facts to establish their claims, heirship, or the validity of a testamentary document. The public administrator is not liable for any improper distributions made in reasonable reliance on information contained in such affidavits. All estates administered by a public administrator pursuant to the small estate procedure are closed by the filing of a public administrator's statement of account with the appointing district or probate court. The statement of account must set forth all receipts and disbursements made during the administration of the estate, including the public administrator's fees and costs, and the fees and costs of the public administrator's staff and investigators. Copies of all fee statements reflecting such fees and costs must be filed with the statement of the account. Upon filing of the public administrator's statement of account, the public administrator must be discharged and released from all further responsibility and all liability with regards to the estate.

(7) In the absence of any interested person willing to make funeral and final disposition arrangements, a public administrator may make funeral and final disposition arrangements for the decedent. The public administrator shall make reasonable efforts to see that the arrangements are consistent with the decedent's apparent religious or other preferences regarding such matters. A public administrator may authorize the cremation or natural reduction of the decedent's remains if the decedent left signed written instructions, or other funeral arrangements authorized by the decedent, that indicated the decedent's wish to be cremated or naturally reduced. A public administrator may authorize cremation or natural reduction if public funds will be needed to complete the administration of an estate because the estate lacks the apparent assets to pay fully all necessary administration, funeral, and burial costs and expenses. In cases of doubt, the public administrator may decline to authorize cremation or natural reduction.

(8) Whenever a public administrator is administering or investigating a decedent's estate, the public administrator or the public administrator's authorized employee or agent may make an immediate search for the decedent's assets and burial instructions; and in furtherance thereof, a public administrator may prepare a certificate stating that he or she is a public administrator administering or investigating the estate of the decedent, that the decedent died on a stated date, and that such person may have assets or a will or burial instructions which are needed for the

proper administration of the decedent's estate. Any entity, person, bank, corporation, or financial institution that receives such a certificate shall promptly release to the public administrator, or to the public administrator's authorized employees or agents, all information that such entity has at its disposal concerning any assets in which the decedent had any interest, whether such assets be jointly or individually owned; and any such entity, person, bank, corporation, or financial institution shall promptly grant access to the public administrator, or to the public administrator's authorized employees or agents, to any safe deposit box which the decedent had the right of entry to search and remove any will or burial instructions concerning the decedent's estate. For this preliminary investigation, the public administrator shall not be required to furnish a death certificate, an affidavit pursuant to section 15-12-1201, or letters. If a will, codicil, or burial instructions concerning the decedent is discovered as a result of this investigation, upon giving a receipt for same, the public administrator, or the public administrator's authorized employee or agent, shall be entitled to receive the original of such document. The public administrator shall lodge the original of any will or codicil so discovered in the district or probate court having proper jurisdiction. A copy of such instrument shall be provided to any heir or devisee of the decedent who requests it. Any costs incurred in the drilling of a safe deposit box or the copying of any estate documents shall be paid by the estate of the decedent. If any burial instructions are found, the public administrator shall promptly deliver such instructions to the person or persons who have the right to dispose of the decedent's remains. Receipt of a certificate of the public administrator as provided by this section shall fully discharge any entity, person, bank, corporation, or other financial institution from all liability for the release of any information concerning the decedent's assets or the granting of access to a safe deposit box, or for any acts or omissions by the public administrator with reference to these items, without the necessity of inquiring into the truth of any facts stated in the certificate. Any entity, person, bank, corporation, or other financial institution who refuses to honor a properly presented certificate as provided in this section shall be liable for all damages and costs, including reasonable attorney fees and costs, suffered by the estate as a result of the failure of such entity to comply with the public administrator's request for information.

(9) A public administrator may act as a special administrator in a decedent's estate when a creditor or claimant requests such an appointment for the purpose of having the public administrator represent the estate in an action to be brought by the creditor or claimant against the estate. A public administrator requested to act as a special administrator in such cases need act only if the creditor or claimant makes advance arrangements, satisfactory to the public administrator, to pay all reasonable fees and costs likely to be incurred by the public administrator in the public administrator's performance as special administrator regardless of the outcome of the creditor's or claimant's claim or litigation against the estate.

Source: L. 73: R&RE, p. 1586, § 1. **C.R.S. 1963:** § 153-3-621. **L. 91:** Entire section R&RE, p. 1456, § 3, effective July 1. **L. 2018:** (6) amended, (SB 18-165), ch. 101, p. 778, § 2, effective

August 8. **L. 2019:** (6) amended, (SB 19-241), ch. 390, p. 3464, § 8, effective August 2. **L. 2021:** (7) amended, (SB 21-006), ch. 123, p. 493, § 14, effective September 7.

ANNOTATION

Law reviews. For article, "Practical Problems of Evidence in Real Estate Titles", see 24 Rocky Mt. L. Rev. 430 (1952). For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (Jan. 2011). For article, "Streamlining the Public Administrators' Operations: Changes Resulting from the 2017 OSA Audit", see 48 Colo. Law. 49 (May 2019).

15-12-622. Public administrator - acting as conservator or trustee.

(1) When appointed by a court of appropriate jurisdiction, the public administrator may act as a conservator, temporary conservator, special conservator, trustee, or other fiduciary of any estate that has assets requiring protection. Each county department of human or social services may refer any resident of that county, or any nonresident located in that county, to that county's public administrator for appropriate protective proceedings if the department determines that the person meets the standards required for court protective action.

(2) Any case referred to the public administrator pursuant to this section by a county department of human or social services must be presented to the court of appropriate jurisdiction by a petition that states to the court that the public administrator has been requested by the county department of human or social services to act as a conservator or other fiduciary for the person in need of protection, that the public administrator is the nominee of that department, and that the public administrator is not acting as an attorney for that department. The public administrator may prepare and file such a petition if requested to do so by the county department of human or social services. The fact that a public administrator has been requested by a county department of human or social services to act as a conservator or other fiduciary shall not be construed by the court as granting any priority for his or her appointment, and the court shall make that determination solely upon the best interests of the person in need of protection. If the public administrator is not appointed as conservator or other fiduciary and the court determines that another individual should act as the conservator or fiduciary, the court may award reasonable fees and costs to the public administrator if the court determines that the efforts of the public administrator were beneficial to the estate or contributed to the protection of the protected person's assets. In cases where the court awards fees and costs to the public administrator, to the extent that such funds are available, such fees must be paid from the protected person's estate. In cases in which the public administrator is not compensated from the protected person's estate, the court may approve the payment of such fees from state funds designated for the payment of

court-appointed counsel or fiduciaries. The court may determine the amount of fees to be paid from such state funds as it deems to be just.

(3) In any case in which the public administrator has been nominated to act as conservator or other fiduciary at the request of the county department of human or social services and the case develops into a contested court proceeding, the department's own attorney shall assume all aspects of the contested court case, and the public administrator must not be required to be involved in such hearings unless specifically directed to do so by the court.

(4) **Missing persons.** A public administrator has standing to petition a court of appropriate jurisdiction for his or her appointment to act as a conservator, temporary conservator, or special conservator to protect a person's assets and manage the person's estate if:

(a) The person is missing, detained, or unable to return to the United States; and

(b) No interested person has initiated protective proceedings to accomplish this purpose.

Source: L. 73: R&RE, p. 1586, § 1. **C.R.S. 1963:** § 153-3-622. **L. 91:** Entire section R&RE, p. 1460, § 4, effective July 1. **L. 2007:** (4) added, p. 126, § 4, effective July 1. **L. 2018:** (1) to (3) amended, (SB 18-092), ch. 38, p. 403, § 18, effective August 8.

Cross references: For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

ANNOTATION

Law reviews. For article, "Practical Problems of Evidence in Real Estate Titles", see 24 Rocky Mt. L. Rev. 430 (1952). For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (Jan. 2011).

15-12-623. Public administrator - administration - reports - fees.

(1) The following court docket fees shall be charged:

(a) Public administrator statements of account in small estates, as "small estates" is defined in section 15-12-1201, having gross assets:

	Fee	**Tax**	**Total**
(I) Less than $500.00	fee waived		

(II) $500.00 or more, but less than $2,000.00	$ 9.00	1.00	10.00
(III) $2,000.00 or more	$ 108.00	1.00	109.00

(b) The docket fee charged in all other decedent, trust, or conservatorship estates filed by a public administrator shall be the same fee as those charged to the general public filing a similar type of action.

(c) Nineteen dollars of each fee collected pursuant to subsection (1)(a)(III) of this section shall be transmitted to the state treasurer, who shall deposit it in the office of public guardianship cash fund established pursuant to section 13-94-108 (1).

(2) On or before March 1 of each year, each public administrator and deputy public administrator shall file with the appointing court, using a standard report form directed by the chief justice, an annual report concerning the administration of the public administrator cases during the previous calendar year. In addition to the information required on the standard report form, the public administrator shall provide any additional information required by the appointing court.

(3) The office of the public administrator shall only charge fees and costs that are reasonable and proper for similar services in the community. The public administrator shall maintain detailed time records for all charged services. The public administrator shall attempt to minimize fees while providing quality fiduciary, administrative, and legal services to all assigned estates. The public administrator may charge the estates under his or her administration for the services of attorneys, paralegals, bookkeepers, certified public accountants, investigators, tax counsel, or any other professional or nonprofessional who provides necessary services which further the cost-effective administration of the estates. A public administrator who is a member of a law firm may use the legal services of that firm to assist the public administrator in his or her duties as the public administrator or as a fiduciary. All fees of the public administrator or of the public administrator's agents and employees are subject to review by the court having jurisdiction over the estate in which the fees were incurred. The payment of public administrators' administrative fees and costs shall have priority over all other claims and exempt property or family allowances. In cases in which the public administrator is appointed to administer an estate and a more suitable person is subsequently located and such person is then appointed to continue the administration of the estate, the public administrator shall be entitled to receive the prompt payment of his fees and costs for the period of his administration of the estate.

(4) Cash assets collected by the public administrator in small decedent estates may be combined into a single public administrator's trust account which shall be held in a federally

insured bank or savings and loan association located in this state. The total amount of the funds in a single public administrator's trust account shall not exceed the federal deposit insurance limits for such accounts. When an additional account is required, such account shall be opened in a different Colorado bank or savings and loan association which has the required federal deposit insurance protection. Regardless of whether the public administrator is an attorney, all estate funds under the control of a public administrator shall be governed by the rules set forth by the Colorado supreme court in the code of professional responsibility, DR 9-102, dealing with trust accounts, unless otherwise modified by this section. Any public administrator's trust account may be utilized as the temporary depository for any public administrator funds. When letters are issued in an estate, the funds belonging to such an estate shall be promptly transferred to an account or accounts in the individual estate's name.

Source: L. 91: Entire section added, p. 1461, § 5, effective July 1. **L. 95:** (1)(a)(III) amended, p. 741, § 6, effective July 1, 1997. **L. 2018:** (2) amended, (SB 18-165), ch. 101, p. 778, § 3, effective August 8. **L. 2019:** (1)(a)(III) amended and (1)(c) added, (HB 19-1045), ch. 366, p. 3366, § 6, effective July 1.

ANNOTATION

Law reviews. For article, "The Public Administrator: A User's Guide", see 40 Colo. Law. 81 (Jan. 2011). For article, "Streamlining the Public Administrators' Operations: Changes Resulting from the 2017 OSA Audit", see 48 Colo. Law. 49 (May 2019).

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

Law reviews: For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986); for article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990); for article, "Who's on First - The Client in Estate Administration", see 22 Colo. Law. 2393 (1993); for article, "A Personal Representative's Right to Participate in a Will Contest", see 33 Colo. Law. 57 (April 2004); for article, "Who's In Charge Here? Priority for Appointment as a Personal Representative in Colorado", see 51 Colo. Law. 48 (Mar. 2022).

15-12-701. Time of accrual of duties and powers.

The duties and powers of a personal representative commence upon his or her appointment. The powers of a personal representative relate back in time to give acts by the person appointed that are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person nominated to serve as personal representative in a will may carry out written instructions of the decedent or of the persons designated to control disposition of the decedent's last remains under section 15-19-106, relating to his or her body, anatomical gifts, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

Source: L. 73: R&RE, p. 1587, § 1. **C.R.S. 1963:** § 153-3-701. **L. 2003:** Entire section amended, p. 1355, § 3, effective August 6.

ANNOTATION

Law reviews. For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "Testamentary Disposition of a Decedent's Body", see 18 Colo. Law. 435 (1989).

Annotator's note. Since § 15-12-701 is similar to repealed laws antecedent to CSA, C. 176, § 113, relevant cases construing those provisions have been included in the annotations to this section.

Even before probate of the will, the executor may employ an attorney to aid in securing moneys pertaining to the estate. In re Macky's Estate, 68 Colo. 556, 191 P. 106 (1920).

Prior to appointment as personal representative, a suit may not be maintained against executor. Stratton's Independence, Ltd. v. Dines, 126 F. 968 (D. Colo. 1904).

Absent an appointment, a designee for personal representative has limited powers and duties. Such powers and duties extend no further than the limited tasks described in this section. Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

If no personal representative has ever been appointed, the "relation back" authority is insufficient to authorize a mere designee to accept presentment pursuant to § 15-12-804 (1). Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

Better price available does not negate benefit to estate. The fact that a better price could have been obtained for the decedent's real property does not, under this section, negate the actual benefit to the estate resulting from decedent's son, prior to his appointment as personal representative, accepting payment from an option holder for

purchase of the property. Brown v. Brown, 43 Colo. App. 535, 608 P.2d 840 (1980).

15-12-702. Priority among different letters.

A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

Source: L. 73: R&RE, p. 1587, § 1. **C.R.S. 1963:** § 153-3-702.

15-12-703. General duties - relation and liability to persons interested in estate - duty to search for a designated beneficiary agreement - standing to sue.

(1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by part 8 of article 5 of this title 15. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this code, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning the personal representative's appointment or fitness to continue, or a supervised administration proceeding. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children, and any omitted child of the decedent as described elsewhere in this code.

(3) Repealed.

(3.5) A personal representative shall not be surcharged for distributions made that do not take into consideration the possible birth of a posthumously conceived child unless prior to such distribution:

(a) The personal representative has received notice or has actual knowledge that there is an intention to use an individual's genetic material to create a child or has received written notice that there may be an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the decedent's estate.

(4) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had immediately prior to death.

(5) A personal representative shall not be surcharged for distributions made that do not take into consideration a designated beneficiary agreement if:

(a) The personal representative has reviewed the records of the county clerk and recorder's office in every county in Colorado in which the personal representative has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death for a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession; and

(b) The personal representative has not received actual notice nor has actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession.

(6) Subject to the good faith standard of section 15-10-602 (6), the provisions of section 15-10-605, and subsections (7) and (8) of this section, personal representatives, persons with priority for appointment as personal representative, and court-appointed fiduciaries may ascertain the testator's probable intent or estate planning purpose on issues involving the decedent's estate and, where not contrary to public policy or law, shall have standing and may prosecute or defend that intent or purpose, at the expense of the estate, in proceedings brought under this code.

(7) Without limiting the general applicability of subsection (6) of this section:

(a) (I) A person serving as personal representative or a person nominated as personal representative in a will or appointed as public or special administrator has standing, but no duty, to offer a will for probate. If such person declines or is unable to offer the will for probate, any person who is a successor of the decedent under the will may offer the will for probate and defend the validity of the will in proceedings under this code. In either case, the person may act notwithstanding the fact that he or she may be a devisee under the will. The will proponent's reasonable fees and costs are payable as an expense of administration.

(II) For purposes of this subsection (7), a proponent other than the nominated personal representative should be treated as a nominated personal representative in cases where the nominated personal representative has declined or is unable to offer the will for probate. Such treatment shall not confer upon the proponent a higher priority for appointment than was conferred upon such proponent pursuant to section 15-12-203 before the will was offered for probate.

(b) The personal representative has standing to oppose, at estate expense, a person's claim to be an heir; an omitted spouse or child; a spouse, including a common law spouse; or a devisee.

(c) The personal representative has standing to oppose, at estate expense, a surviving spouse's attempt to invalidate a marital agreement that limits his or her share in the estate.

(d) Where a surviving spouse petitions for an elective share, the court proceeding is an action between the spouse and the interested person or persons whose interests may be affected, and the personal representative is a neutral party to the proceeding. In such a proceeding, the fees and costs reasonably incurred by the personal representative and his or her agents in providing basic information to the parties regarding the augmented estate are payable as an estate expense. The personal representative may prepare a calculation of the augmented estate at estate expense.

(8) (a) In any proceeding brought under this code where any personal representative, person with priority for appointment as a personal representative, nominated personal representative, or court-appointed fiduciary purports to participate in the proceeding at estate expense and has a material conflict of interest, any interested person may petition the court pursuant to section 15-12-614 (1)(b) or 15-12-713 for the appointment of an independent special administrator to represent, to the extent the court directs, the estate's interests in the litigation at estate expense.

(b) For purposes of this subsection (8), the fact that a personal representative, a person with priority for appointment as a personal representative, a nominated personal representative, or a court-appointed fiduciary is also a successor or a potential successor of the estate is not, in and of itself, a material conflict of interest.

Source: L. 73: R&RE, p. 1587, § 1. **C.R.S. 1963:** § 153-3-703. **L. 75:** (3) repealed, p. 606, § 62, effective July 1. **L. 2010:** (3.5) added, (SB 10-199), ch. 374, p. 1751, § 14, effective July 1. **L. 2011:** (3.5)(a) amended, (SB 11-083), ch. 101, p. 303, § 5, effective August 10. **L. 2012:** (5) added, (SB 12-131), ch. 114, p. 393, § 1, effective April 13. **L. 2013:** (6), (7), and (8) added, (SB 13-077), ch. 190, p. 767, § 3, effective August 7. **L. 2018:** (1) amended, (SB 18-180), ch. 169, p. 1193, § 12, effective January 1, 2019. **L. 2022:** (1), (2), and (4) amended, (SB 22-092), ch. 60, p. 279, § 13, effective August 10.

Cross references: For the duty of a personal representative to take possession of decedent's estate, see § 15-12-709.

COMMENT

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the Court is created. *See* Section 3-501.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. *See* Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. *See* Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does *not* follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. *See* Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

1997 Technical Amendment. By technical amendment effective July 31, 1997, the final sentence of Section 3-703(b) was modified to clarify the originally intended meaning that a personal representative of a decedent's estate does not owe fiduciary duties to a person whose claim has not yet been allowed. This added language is not intended to affect any duty to give notice to

prospective claimants under Section 3-801 or *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988).

ANNOTATION

Personal representatives vested with broad powers. In order to facilitate the performance of this statutory duty, personal representatives are vested with broad powers. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

Personal representative cannot recover noneconomic damages such as emotional stress or loss of enjoyment of life. Only the personal representative acting on behalf of an estate and not a beneficiary may represent an estate in the interest of the beneficiaries in a malpractice action. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd in part, rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

When beneficiaries are not indispensable parties to partition action. Estate beneficiaries are not indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

By law the executor of an estate has no choice but to tender all the assets bequeathed to the various beneficiaries, for were he not to do so, he would subject himself to suit by the beneficiaries. Estate of Riggs v. Midwest Steel & Iron Works, 36 Colo. App. 302, 540 P.2d 361 (1975).

A personal representative has a duty to exercise the representative's powers in a neutral fashion and in the best interests of all intended beneficiaries and interested persons. In re Estate of Treviño, 2020 COA 125, 474 P.3d 223.

A personal representative, who is the sole beneficiary of the estate, breaches the representative's duty when the representative fails to use the estate's available liquid assets to pay or reduce the amount due on a loan but instead uses money from a payable on death certificate of deposit account that is owned by another. In re Estate of Treviño, 2020 COA 125, 474 P.3d 223.

Section does not empower a personal representative to resolve a dispute after it has been raised in the probate court. Personal representative's discretion was limited to deciding whether the estate would accede or seek reformation of a conveyance for mistake. If the personal representation chose to seek reformation, the probate court was obligated to take evidence and make a ruling. In re Estate of Beren, 2012 COA 203, 412 P.3d 487, aff'd in part, rev'd in part on other grounds, 2015 CO 29, 349 P.3d 233.

15-12-704. Personal representative to proceed without court order - exception.

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

Source: L. 73: R&RE, p. 1587, § 1. **C.R.S. 1963:** § 153-3-704.

ANNOTATION

A personal representative has the same standing to sue as the decedent had immediately prior to his or her death, except for proceedings that do not survive the decedent's death. Steiger v. Burroughs, 878 P.2d 131 (Colo. App. 1994).

15-12-705. Duty of personal representative - information to heirs and devisees.

(1) Not later than thirty days after appointment, every personal representative, except any special administrator, shall give information of his or her appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall:

(a) Include the name, address, and date of appointment of the personal representative;

(b) Include the date of death of the decedent;

(c) Indicate whether the decedent died intestate or testate and, if the decedent died testate, the dates of the will and any codicils thereto, the date of admission to probate, and whether the probate was formal or informal;

(d) Indicate that it is being sent to persons who have or may have some interest in the estate being administered;

(e) Indicate whether bond has been filed;

(f) Indicate whether administration is supervised and, if administration is unsupervised, that the court will consider ordering supervised administration if requested by an interested person;

(g) Indicate that papers relating to the estate, including an inventory of estate assets, as described in section 15-12-706, are either on file with the court or available to be obtained by interested persons from the personal representative;

(h) Indicate that interested persons are entitled to receive an accounting;

(i) Indicate that the surviving spouse, minor children, and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by statutes;

(j) Indicate that the surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by statute;

(k) Indicate that, because a court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person, all interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate in the manner provided by the provisions of this code by filing an appropriate pleading with the court by which the estate is being administered and serving it on all interested persons pursuant to section 15-10-401;

(l) Indicate that all interested parties have the right to obtain information about the estate by filing a demand for notice pursuant to section 15-12-204;

(m) Indicate that any individual who has knowledge that there is or may be an intention to use an individual's genetic material to create a child and that the birth of the child could affect the distribution of the decedent's estate should give written notice of such knowledge to the personal representative of the decedent's estate; and

(n) Indicate that any individual who has knowledge that there is a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession should give written notice of such knowledge to the personal representative of the decedent's estate.

(2) The personal representative's failure to give the information required by this section is a breach of his or her duty to the persons concerned but does not affect the validity of the personal representative's appointment, powers, or other duties. A personal representative may inform other persons of his or her appointment by delivery or ordinary first-class mail.

(3) The personal representative shall file with the court a copy of the information provided and a statement of when, to whom, and at which address or addresses it was provided.

Source: L. 73: R&RE, p. 1588, § 1. **C.R.S. 1963:** § 153-3-705. **L. 96:** Entire section amended, p. 659, § 11, effective July 1. **L. 2008:** (1) amended, p. 483, § 5, effective July 1. **L. 2010:** (1)(g) and (1)(h) amended and (1)(i) added, (SB 10-199), ch. 374, p. 1752, § 15, effective July 1. **L. 2011:** (1)(i) amended, (SB 11-083), ch. 101, p. 304, § 6, effective August 10. **L. 2013:** (1) amended and (3) added, (SB 13-077), ch. 190, p. 769, § 4, effective August 7. **L. 2015:** (1)(i) amended, (SB 15-264), ch. 259, p. 951, § 38, effective August 5.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

ANNOTATION

Applied in Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

15-12-706. Duty of personal representative - inventory and appraisement.

(1) Within three months after his appointment, a personal representative who is not a successor to another representative who has previously discharged this duty shall prepare an inventory of property owned by the decedent and subject to disposition by will or intestate succession at the time of his death, listing it with reasonable detail and indicating, as to each listed item, its fair market value as of the date of the decedent's death and the type and amount of any encumbrance that may exist with reference to any item. The inventory shall include the oath or affirmation of the personal representative that it is complete and accurate so far as he is informed.

(2) The personal representative shall send a copy of the inventory to interested persons who request it, or he may file the original of the inventory with the court.

(3) If it appears that the heirs of an intestate or the devisees of a testator are unknown, or if known and there is no person qualified to receive the distributive share of such heirs or devisees, the personal representative shall also, within said three months, deliver or mail to the attorney general a copy of the inventory.

Source: L. 73: R&RE, p. 1588, § 1. **C.R.S. 1963:** § 153-3-706. **L. 75:** (1) amended, p. 596, § 28, effective July 1. **L. 77:** (1) amended, p. 834, § 18, effective July 1.

ANNOTATION

Law reviews. For article, "The Inventory and Final Report", see 27 Dicta 291 (1950).

Annotator's note. Since § 15-12-706 is similar to repealed CSA, C. 176, § 145, relevant cases construing that provision have been included in the annotations to this section.

The detailed requirements of this section for a valid inventory are mandatory. Meyer v. Milliken, 111 Colo. 113, 138 P.2d 276 (1943).

Effect of personal representative's failure to file inventory within statutory time. Failure of an executor or administrator to file an inventory of the estate within the time fixed by this section does not automatically extend the time for the filing of a widow's election not to take under the

will of her deceased husband, and there is no statutory indication that the time for filing such election depends directly or indirectly upon the filing of the inventory. In re Sheely's Estate, 102 Colo. 194, 78 P.2d 378 (1938).

15-12-707. Employment of appraisers.

The personal representative may employ qualified and disinterested appraisers to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

Source: L. 73: R&RE, p. 1588, § 1. **C.R.S. 1963:** § 153-3-707.

15-12-708. Duty of personal representative - supplementary inventory.

If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to interested persons who request the inventory.

Source: L. 73: R&RE, p. 1588, § 1. **C.R.S. 1963:** § 153-3-708.

15-12-709. Duty of personal representative - possession of estate.

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property; except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for the purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for the purposes of administration. The personal representative shall pay taxes on and take all steps reasonably

necessary for the management, protection, and preservation of the estate in such representative's possession. The personal representative may maintain an action to recover possession of the property or to determine the title thereto. If the personal representative incurs expenses necessary for the protection or disposition of property not subject to such representative's administration, such as those incurred to fix the amount of death taxes thereon, or to compel the contribution contemplated in section 15-11-204 or 15-12-916 (4), the court may fix such liability for the same as it determines to be equitable against any person entitled to or wrongfully withholding the property.

Source: L. 73: R&RE, p. 1589, § 1. **C.R.S. 1963:** § 153-3-709. **L. 81:** Entire section amended, p. 914, § 7, effective July 1. **L. 94:** Entire section amended, p. 1037, § 11, effective July 1, 1995. **L. 2009:** Entire section amended, (HB 09-1241), ch. 169, p. 761, § 17, effective April 22.

ANNOTATION

Law reviews. For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950). For article, "The Awkward Status of Colorado Real Property in a Decedent's Estate", see 41 Den. L. Ctr. J. 129 (1964).

Annotator's note. Since § 15-12-709 is similar to repealed § 152-10-13, CRS 53, CSA, C. 176, § 115, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section expressly confers the power upon an administrator and makes it his duty to sue for, recover, and preserve the estate, both real and personal. Grover v. Clover, 69 Colo. 72, 169 P. 578 (1917); De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 P. 1049 (1924); Swartz v. Rosenkrans, 78 Colo. 167, 240 P. 333 (1925); Norris v. Bradshaw, 92 Colo. 34, 18 P.2d 467 (1932); Weaver v. Weaver, 99 Colo. 74, 60 P.2d 227 (1936); Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

That duty implies the further one to employ counsel for the purpose. People ex rel. Eaton v. El Paso County Court, 74 Colo. 123, 219 P. 215 (1923).

Aggrieving administrator. Any injury to the interests of heirs, beneficiaries, or creditors of the decedent arising through a diminution of the assets of the estate, even though not aggrieving the administrator personally, in legal effect is a grievance affecting him in his fiduciary and representative capacity. Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

Duty to take appeal necessary to prevent injury to interests. The administrator represents the creditors and the whole of the estate, and it is his duty to

take steps, such as appeal, as are necessary to prevent injury to the interests which he represents resulting from improper orders with respect to the estate of which he is representative. Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

A personal representative is required to preserve the real estate under this section. People v. Cooke, 150 Colo. 52, 370 P.2d 896 (1962).

Prior to closing estate, personal representative collects rents. Normally in the course of administration of an estate a life tenant or other devisee is not given possession of realty until the estate is closed, meanwhile the representative of the estate collects the rents therefrom. Robinson v. Tubbs, 140 Colo. 471, 344 P.2d 1080 (1959).

Power to bring actions to set aside colorable inter vivos transfers. The administrator of the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In re Scavello v. Scott, 194 Colo. 64, 570 P.2d 1 (1977).

He may maintain an action for the cancellation of irrigation district bonds, regardless of whether he has an interest in the real estate involved or not, it being his duty to receive, take possession of, sue for, recover and preserve the estate. Fowler v. Badger Irrigation Dist., 74 Colo. 109, 219 P. 209 (1923).

Taxes are a proper administration expense. The taxes are a proper administration expense, and where their payment has been approved by the state court the taxes are not a claim against the decedent, since they accrued after his death. The payment is therefore necessarily approved as a part of the administration expense. Since the executor must pay them, he must be recouped. Such charges cannot be claims against the estate. He can only be recouped by allowing them as a part of the administration expenses, which they are. Brown v. Comm'r 74 F.2d 281 (10th Cir. 1934).

The estate is subject to taxation so long as the estate remains unsettled in the hands of the executor. A testator directed that after the payment of certain specific legacies and the expense of administration, the residue of his estate should be paid to an institution of learning, the properties which are exempt by law from taxation. So long as the estate remained unsettled the funds in the hands of the executors were subject to taxation under this section, and upon final settlement, the residue, if any, should be delivered to the regents. Davis v. Regents of the Univ. of Colo., 63 Colo. 506, 168 P. 404 (1917).

The administrator may assume possession of real property pertaining to the estate of the decedent, and if withheld, may sue for and recover it. Galligan v. Hayden Realty Co., 62 Colo. 477, 163 P. 295 (1917).

For the purpose of this section, a decedent-client's documents held by the client's attorney that have intrinsic value or directly affect valuable rights are the client's property. The rest of the legal files held by the attorney are the attorney's

property. In re Estate of Rabin, 2020 CO 77, 474 P.3d 1211.

A personal representative does not acquire a right to take possession of a decedent's legal files under this section, except for documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. In re Estate of Rabin, 2020 CO 77, 474 P.3d 1211.

Applied in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

15-12-710. Power to avoid transfers.

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and, subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

Source: L. 73: R&RE, p. 1589, § 1. **C.R.S. 1963:** § 153-3-710.

ANNOTATION

Law reviews. For article, "Decedents' Creditors and Nonprobate Assets," see 15 Colo. Law. 2190 (1986).

Power to bring actions to set aside colorable inter vivos transfers. The administrator of the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In re Scavello v. Scott, 194 Colo. 64, 570 P.2d 1 (1977).

15-12-711. Powers of personal representatives - in general.

Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

Source: L. 73: R&RE, p. 1589, § 1. **C.R.S. 1963:** § 153-3-711.

ANNOTATION

Annotator's note. Cases relevant to § 15-12-711 decided prior to its earliest source, § 153-3-711, C.R.S. 1963, have been included in the annotations to this section.

The Uniform Probate Code vests a personal representative with broad powers. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd in part, rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

An administrator is charged with a trust concerning decedent's interest in real estate. Murray v. Stuart, 79 Colo. 454, 247 P. 187 (1926).

He is forbidden by law to make a profit out of dealing on behalf of the estate. In re Macky's Estate, 73 Colo. 1, 213 P. 131 (1922); Murray v. Stuart, 79 Colo. 454, 247 P. 187 (1926).

Power to bring actions to set aside colorable inter vivos transfers. The administrator of the transferor's estate is authorized and also has standing to bring actions to set aside colorable inter vivos transfers. In re Scavello v. Scott, 194 Colo. 64, 570 P.2d 1 (1977).

The personal representative must act for the benefit of all interested in the estate. When there is a dispute regarding ownership of interstitial property, the personal representative must bring a separate proceeding to determine ownership. In re Estate of Masden, 24 P.3d 634 (Colo. App. 2001).

Applied in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

15-12-712. Improper exercise of power - breach of fiduciary duty.

If the exercise of power concerning the estate is improper, the personal representative is subject to the provisions of section 15-10-504 and is liable to interested persons for damage or loss resulting from breach of his or her fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 15-12-713 and 15-12-714.

Source: L. 73: R&RE, p. 1589, § 1. **C.R.S. 1963:** § 153-3-712. **L. 2008:** Entire section amended, p. 483, § 6, effective July 1.

ANNOTATION

Applied in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

15-12-713. Sale, encumbrance, or transaction involving conflict of interest - voidable - exceptions.

(1) Any sale or encumbrance to the personal representative, his spouse, agent, or attorney, or any corporation or trust in which he has a beneficial interest, or any transaction which is affected by a conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented, unless:

(a) The will or a contract entered into by the decedent expressly authorized the transaction; or

(b) The transaction is approved by the court after notice to interested persons.

(c) Repealed.

(2) Any transaction previously declared by subsection (1) of this section to be void shall be deemed voidable unless a petition has been filed with the court to set aside any such transaction and a lis pendens has been recorded in the county where any affected real property is located, within sixty days after July 16, 1975.

Source: L. 73: R&RE, p. 1589, § 1. **C.R.S. 1963:** § 153-3-713. **L. 75:** IP(1) amended, (1)(c) repealed, and (2) added, pp. 596, 606, §§ 29, 62, effective July 1.

15-12-714. Persons dealing with personal representative - protection.

(1) A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 15-12-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective, except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

(2) For purposes of this section, any recorded instrument evidencing a transaction with a personal representative on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transaction was made for value.

Source: L. 73: R&RE, p. 1590, § 1. **C.R.S. 1963:** § 153-3-714. **L. 75:** Entire section amended, p. 596, § 30, effective July 1.

15-12-715. Transactions authorized for personal representatives - exceptions.

(1) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-12-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(a) Exercise any of the powers enumerated in the "Colorado Fiduciaries' Powers Act" at the time of such exercise; and

(b) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances.

Source: L. 73: R&RE, p. 1590, § 1. **C.R.S. 1963:** § 153-3-715.

Cross references: For the "Colorado Fiduciaries' Powers Act", see part 8 of article 1 of this title.

ANNOTATION

Applied in Fry & Co. v. Dist. Court, 653 P.2d 1135 (Colo. 1982).

15-12-716. Powers and duties of successor personal representative.

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

Source: L. 73: R&RE, p. 1590, § 1. **C.R.S. 1963:** § 153-3-716.

15-12-717. Corepresentatives - when joint action required.

If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a corepresentative has been delegated to act for the others. Persons dealing with a corepresentative, if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

Source: L. 73: R&RE, p. 1590, § 1. **C.R.S. 1963:** § 153-3-717.

ANNOTATION

Law reviews. For article, "Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues", see 34 Colo. Law. 65 (July 2005).

15-12-718. Powers of surviving personal representative.

Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as personal corepresentatives is not appointed, those appointed may exercise all the powers incident to the office.

Source: L. 73: R&RE, p. 1591, § 1. **C.R.S. 1963:** § 153-3-718.

15-12-719. Compensation of personal representative. (Repealed)

Source: L. 73: R&RE, p. 1591, § 1. **C.R.S. 1963:** § 153-3-719. **L. 2001:** Entire section amended, p. 888, § 5, effective June 1. **L. 2011:** Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

15-12-720. Expenses in estate litigation. (Repealed)

Source: L. 73: R&RE, p. 1591, § 1. **C.R.S. 1963:** § 153-3-720. **L. 2001:** Entire section amended, p. 888, § 6, effective June 1. **L. 2011:** Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

15-12-721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate. (Repealed)

Source: L. 73: R&RE, p. 1591, § 1. **C.R.S. 1963:** § 153-3-721. **L. 75:** (2)(f) repealed, p. 606, § 62, effective July 1. **L. 2001:** (3) added, p. 889, § 7, effective June 1. **L. 2011:** Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

15-12-722. Failure to comply with court orders - penalty. (Repealed)

Source: L. 75: Entire section added, p. 597, § 31, effective July 1. **L. 2008:** Entire section repealed, p. 484, § 7, effective July 1.

15-12-723. Assets concealed or embezzled.

If any personal representative, heir, legatee, creditor, guardian, or conservator or other person interested in the estate of any deceased person or protected person complains to the court, in writing, that any person is suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the deceased or protected person, or that such person has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the decedent or protected person to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said district or probate court may cite such suspected person to appear before it and may examine him on oath upon the matter of such complaint. If the person cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail until he complies with the order of the court. All such

interrogatories and answers may be in writing and signed by the party examined and filed in the district or probate court.

Source: L. 75: Entire section added, p. 597, § 31, effective July 1.

ANNOTATION

Law reviews. For article, "Proper Application of CRS § 15-12-723 for Recovery of Estate Assets", see 32 Colo. Law. 59 (May 2003). For article, "Practical Solutions to Elder Financial Abuse and Fiduciary Theft", see 41 Colo. Law. 61 (Dec. 2012).

PART 8

CREDITORS' CLAIMS

Law reviews: For article, "Creditors' Claims", see 13 Colo. Law. 1399 (1984); for article, "The Colorado Non-Claim Statute", see 21 Colo. Law. 45 (1992); for article, "Claims Against Decedents' Estates", see 27 Colo. Law. 45 (May 1998); for article, "Probate Jurisdiction for Creditors' Claims", see 29 Colo. Law. 57 (May 2000); for article, "Pre-Death Creditors' Claims Under the Colorado Probate Code: Part I", see 30 Colo. Law. 81 (Aug. 2001); for article, "Pre-Death Creditors' Claims Under the Colorado Probate Code: Part II", see 30 Colo. Law. 77 (Sept. 2001); for article, "New Developments in Creditor Claims Provisions of the Colorado Probate Code", see 35 Colo. Law. 67 (Dec. 2006); for article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

15-12-801. Notice to creditors.

(1) Unless one year or more has elapsed since the death of the decedent, a personal representative shall cause a notice to creditors to be published in some daily or weekly newspaper published in the county in which the estate is being administered, or if there is no such newspaper, then in some newspaper of general circulation in an adjoining county. Such notice shall be published not less than three times, at least once during each of three successive calendar weeks. The notice shall be substantially as follows:

NOTICE TO CREDITORS

Estate of .....(Deceased)

No. .....

All persons having claims against the above-named estate are required to present them to the undersigned or to the District Court of .....County, Colorado (or Probate Court of the City and County of Denver, Colorado), on or before

(a date not earlier than four months from date of first publication

or the date one year from date of death, whichever occurs first),

..... 20 ....., or said claims may be forever barred.

.....

Personal Representative

(2) A personal representative may give written notice by mail or other delivery to any creditor. Written notice shall be the notice described in subsection (1) of this section or a similar notice. Such written notice shall notify the creditor to present his claim within the later of the following time periods or be forever barred:

(a) Within the time set in the notice to creditors by publication in compliance with subsection (1) of this section; or

(b) Within sixty days from the mailing or other delivery of such notice, but not later than the date one year from date of death.

(3) A personal representative shall not be liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

Source: L. 73: R&RE, p. 1592, § 1. **C.R.S. 1963:** § 153-3-801. **L. 75:** Entire section R&RE, p. 597, § 32, effective July 1. **L. 79:** Entire section amended, p. 649, § 9, effective July 1. **L. 90:** Entire section amended, p. 904, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Decedents' Creditors and Nonprobate Assets," see 15 Colo. Law. 2190 (1986).

Failure to file claim within four months bars claim. The failure of a creditor to file a claim on its judgment within the four months required by this section bars it from asserting any claim based on the judgment. Park State Bank v. McLean, 660 P.2d 13 (Colo. App. 1982).

A known or reasonably ascertainable creditor must present claims by the published deadline if the creditor has actual knowledge of the deadline. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

Ex-wife's right to enforce a judicial lien through foreclosure is not affected by this section where, as a secured creditor, she could proceed against the property without filing a claim against the estate. Wright v. Estate of Valley, 827 P.2d 579 (Colo. App. 1992).

Wife's creditor's claim barred because she failed to timely file notice of appeal for that specific claim. Although wife filed two claims on the same day addressing different elements of a singular probate case, each claim was a distinctive claim, and neither overlapped nor involved the same subject matter. Because wife's creditor's claim was governed by a proceeding independent of the petition for spouse's elective share, the probate court's order barring wife's creditor's claim was a final order, and wife failed to timely appeal. In re Estate of Gadash, 2017 COA 54, 413 P.3d 272.

Applied in In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); Barnhill v. Pub. Serv. Co., 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

15-12-802. Statutes of limitations.

(1) Unless an estate is insolvent, or would thereby be rendered insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.

(2) The running of any statute of limitations measured from some event other than death or the giving of notice to creditors for claims against a decedent is suspended during the four months following the decedent's death but resumes thereafter as to claims not barred pursuant to the provisions of this part 8.

(3) For purposes of any statute of limitations other than those time periods specified in sections 15-12-801, 15-12-803, 15-12-804, and 15-12-806, the proper presentation of a claim under section 15-12-804 is equivalent to commencement of a proceeding on the claim.

Source: L. 73: R&RE, p. 1592, § 1. **C.R.S. 1963:** § 153-3-802. **L. 75:** Entire section amended, p. 598, § 33, effective July 1. **L. 90:** Entire section amended, p. 905, § 2, effective July 1.

ANNOTATION

Law reviews. For article, "Practical Administrative Problems in Average-Sized Estates", see 27 Dicta 285 (1950).

Annotator's note. Since § 15-12-802 is similar to repealed laws antecedent to CSA, C. 176, § 200, relevant cases construing those provisions have been included in the annotations to this section.

Where a claim was filed and later withdrawn, it was held that the claim was barred by the statute of limitations as not having been filed within four months after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running. Morse v. Clark, 10 Colo. 216, 14 P. 327 (1887).

The filing and docketing of a claim stops running of statute. Gordon-Tiger Mining & Reduction Co. v. Loomer, 50 Colo. 409, 115 P. 717 (1911).

Claim may consist of new judgment based on an original judgment. Scholtz v. Hazard, 68 Colo. 343, 191 P. 123 (1920).

"Creditor" refers to any person with a legally cognizable claim for money from an estate. Estate of Walter v. Corr. Healthcare Cos., 232 F. Supp. 3d 1157 (D. Colo. 2017).

15-12-803. Limitations on presentation of claims.

(1) (a) All claims against a decedent's estate that arose before the death of the decedent, including claims of the state of Colorado and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative, any transferee or other person incurring liability under section 15-15-103, and the heirs and devisees of the decedent, unless presented as follows:

(I) As to creditors barred by publication, within the time set in the published notice to creditors;

(II) As to creditors barred by written notice, within the time set in the written notice;

(III) As to all creditors, within one year after the decedent's death.

(b) In addition to the limitations on presentation of claims in paragraph (a) of this subsection (1), claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(2) All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, any transferee or other person incurring liability under section 15-15-103, and the heirs and devisees of the decedent, unless presented as follows:

(a) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(b) Any other claim, within four months after it arises.

(3) Nothing in this section affects or prevents:

(a) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(c) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

(4) This section is a nonclaim statute that cannot be waived or tolled, and it shall not be considered a statute of limitations.

(5) Unless section 15-10-106 is determined to apply, and subject to the provisions of subsection (3) of this section, claims that are not presented in accordance with subsections (1) and (2) of this section are barred even if addressing the merits of the claim would not delay the settlement and distribution of the estate.

Source: L. 73: R&RE, p. 1592, § 1. **C.R.S. 1963:** § 153-3-803. **L. 75:** (3)(c) added, p. 598, § 34, effective July 1. **L. 79:** (1)(a) amended, p. 650, § 10, effective July 1. **L. 90:** (1) R&RE, p. 905, § 3, effective July 1. **L. 2006:** IP(1)(a) and IP (2) amended and (4) and (5) added, p. 373, § 2, effective July 1.

ANNOTATION

Law reviews. For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "The Awkward Status of Colorado Real Property in a Decedent's Estate", see 41 Den. L. Ctr. J. 129 (1964). For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985). For article, "Decedents' Creditors

and Nonprobate Assets", see 15 Colo. Law. 2190 (1986). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

Annotator's note. Since § 15-12-803 is similar to repealed § 153-12-12, C.R.S. 1963, § 152-12-12, CRS 53, CSA, C. 176, § 207, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (3)(b) constitutional. The statutory classification of subsection (3)(b) between claims and estates protected by liability insurance and those that are not is reasonable and does not violate equal protection of the laws. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

Subsection (1)(a), setting forth one-year period for bringing a claim against an estate, is not so limited as to amount to a denial of justice or due process. A statute of limitations does not deprive a claimant of its rights to due process unless the time for bringing the claim is so limited as to amount to a denial of justice. The general assembly is the primary judge of what amount of time is reasonable, and has determined that a one-year period is necessary to promote the speedy and efficient settlement of estates. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

This section represents substantial change in Colorado law, not merely a codification of existing law and public policy. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 193 Colo. 144, 563 P.2d 943 (1977).

The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 193 Colo. 144, 563 P.2d 943 (1977).

Purpose of a nonclaim statute is to impose a condition precedent, namely, filing notice within the time specified, to the enforcement of the right of action for the benefit of the party against whom the claim is made. It also serves to effectuate the substantive rights of the party against whom the claim is asserted, usually a governmental entity or a court officer. Barnhill v. Pub. Serv. Co., 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

Purpose of subsection (1)(a). In order to preserve the finality of distributions of the estate, subsection (1)(a) creates a jurisdictional bar to untimely claims. Strong Bros. Enters. v. Estate of Strong, 666 P.2d 1109 (Colo. App. 1983).

Nonclaim statute intended to expedite settlement of estate. The nonclaim statute providing for an absolute bar of a claim filed late is intended to expedite the orderly and exact settlement of estates of decedents. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968); In re Estate of Dire, 851 P.2d 271 (Colo. App. 1993) (decided under this section as it existed prior to 1990 amendment); In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

Effect of a nonclaim statute is to bar substantive claims. Barnhill v. Pub. Serv.

Co., 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984).

Nonclaim statute operates to deprive a court of jurisdiction. In re Estate of Plank, 32 Colo. App. 126, 509 P.2d 812 (1973); In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

Nonclaim statute does not operate to deprive a court of jurisdiction, but instead bars the enforcement of late-filed claims against an estate. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

But the bar created by this section is not an absolute bar. This section does not necessarily bar an untimely claim if addressing the merits of the claim would not delay settlement of the estate and distribution of assets. De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

Nonclaim statute not applicable to equitable proceeding to redress breach of contract relating to will. Since an equitable proceeding to redress a breach of contract relating to a will is not in the nature of a demand which would reduce the size of the estate, such an action involves a dispute as to the ownership of the decedent's property and is not a claim against the estate. Thus, this nonclaims statute does not determine the time within which the action must be started. Knies v. Gross, 43 Colo. App. 127, 599 P.2d 976 (1979).

Disability trust is not subject to claims filing requirements of this section. Since department of health care policy and financing has a first priority right to all amounts remaining in the trust, the department is not required to file a claim against the estate. Stell v. Colo. Dept. of Health Care Policy & Fin., 78 P.3d 1142 (Colo. App. 2003), rev'd on other grounds, 92 P.3d 910 (Colo. 2004).

Subsection (2) creates jurisdictional bar to claim untimely filed on behalf of minor against a decedent's estate, except to the extent of the liability insurance exemption of subsection (3). In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

Nonclaim statute and statute of limitations distinguished. A nonclaim statute imposes a condition precedent to the enforcement of a right of action; the claim must be presented within the time set in the notice to creditors or be barred. A statute of limitations, on the other hand, does not bar the right of action but only the remedy. Such a statute, unlike a nonclaim statute, may be tolled. Such a statute is a defense which is waived if not affirmatively pleaded. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968); In re Estate of Plank, 32 Colo. App. 126, 509 P.2d 812 (1973); In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Nonclaim statute clearly not statute of limitations. While a nonclaim statute appears to be in the nature of a statute of limitations, it is clearly not such. In re Estate of Plank, 32 Colo. App. 126, 509 P.2d 812 (1973).

Construing the nonclaim statute as a statute of limitations would frustrate the legislative purpose of promoting the speedy

and efficient settlement of estates. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

Nonclaim statute not subject to tolling provisions. The nonclaim statute is jurisdictional in character, and therefore not subject to the tolling provisions otherwise applicable to statutes of limitations. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); In re Estate of Ongaro, 973 P.2d 660 (Colo. App. 1998); In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

Unlike a statute of limitations, the deadline for filing claims established by this section generally cannot be waived or tolled, since the estate's personal representative is a trustee of the estate for the benefit of its creditors and heirs and as such cannot by his or her conduct waive any provision of the statute affecting their substantive rights, nor should the representative interfere with the orderly and exact settlement of the estates of decedents. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

Purpose of section is to bar untimely claims, and time limitation for presenting claim is jurisdictional. Claim disallowed where presented more than three years after decedent's death. Matter of Estate of Musselman, 784 P.2d 858 (Colo. App. 1989).

Subsection (1)(a)(I) is not a self-executing statute. Russo v. Sunrise Healthcare Corp., 994 P.2d 491 (Colo. App. 1999).

Due process requires personal representative to give actual notice to known or reasonably ascertainable creditors of an estate. Russo v. Sunrise Healthcare Corp., 994 P.2d 491 (Colo. App. 1999).

A known or reasonably ascertainable creditor must present claims by the published deadline if the creditor has actual knowledge of the deadline. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

A will contest, or a dispute over the distribution of the estate, is not a claim against the estate as contemplated by this section. Therefore, this section does not apply. In re Estate of Haywood, 43 Colo. App. 127, 599 P.2d 976 (1979)(decided under law in effect prior to the 1990 repeal and reenactment); Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

This section and § 15-12-804 do not apply to a devisee's demand for distribution of a devise under a will. The devisee's demand was not a claim against the estate as envisioned by the nonclaim statutes. In re Estate of Colby, 2021 COA 31, 486 P.3d 466.

This section and § 15-12-804, in referring to claims "against the decedent's estate", mean merely "payable out of the estate". Heuschel v. Wagner, 73 Colo. 327, 215 P. 476 (1923).

Illustrations of contingent claims. Decedent had signed as a guarantor on a note of which another person was the maker. State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952).

A lessor of premises, at the time of the death of his lessee, has a claim against the

estate for the rental due under the terms of the lease executed by deceased. Lieber v. Sherman, 130 Colo. 216, 274 P.2d 816 (1954).

Where a claim is not filed within the statutory period, the same is forever barred. Lieber v. Sherman, 130 Colo. 216, 274 P.2d 816 (1954); Jackson v. Bates, 133 Colo. 248, 293 P.2d 962 (1956); Koon v. Bartmettler, 134 Colo. 221, 301 P.2d 713 (1956); Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

The failure of a creditor to file a claim on its judgment within the four months required by § 15-12-801 bars it from asserting any claim based on the judgment. Park State Bank v. McLean, 660 P.2d 13 (Colo. App. 1982).

The claim of a reinstated corporation is not validated by reinstatement when the corporation was in suspension during the statutory period for filing. This section is a non-claim statute which provides an absolute bar to claims which are not timely filed. Alperstein v. Sherwood Int'l, Inc., 778 P.2d 279 (Colo. App. 1989).

Failure to file a timely claim constitutes a jurisdictional defect and can be raised for first time on appeal. Failure to file a claim against an estate prior to the date fixed in the notice of creditors as the last date for filing claims can be raised for the first time on appeal. In re Estate of Plank, 32 Colo. App. 126, 509 P.2d 812 (1973).

If claim is filed within four months, the notice of application for allowance may be given after the four months. Where a claim is filed against a decedent's estate within four months from the granting of letters, it is immaterial that no notice to the executor of an application for its allowance is given, until the lapse of the four months. Metz v. People ex rel. Reid, 6 Colo. App. 57, 40 P. 51 (1895); Loveland's Estate v. Union Nat'l Bank, 25 Colo. 499, 56 P. 61 (1898); Altvater v. First Nat'l Bank, 45 Colo. 528, 103 P. 378 (1909); Milner Bank & Trust Co. v. Whipple's Estate, 61 Colo. 252, 156 P. 1098 (1916).

Claims against estate seeking equitable remedies timely presented. Where a mutual mistake in the claimants' deeds was not discovered until the estate conveyed adjacent land to a third party and where claimants presented their claim for equitable relief from such mistake within four months from its discovery, the claim asserted by claimants was timely filed. Matter of Estate of Scott, 735 P.2d 924 (Colo. App. 1986).

Only a filing of claim within four months is necessary to arrest statute. Under the former act it was held that a claim was not exhibited until notice was given. That rule does not apply to this section in which filing only is necessary within four months to arrest the running of the statute. Brown's Estate v. Stair, 25 Colo. App. 140, 136 P. 1003 (1913).

Generally a personal representative cannot waive either the requirements or limitations of a statute of nonclaim. This rule is grounded upon the principle that the personal representative is a trustee of the estate for the benefit of its creditors and heirs, and as such cannot by his conduct waive any provision of a statute affecting their substantial rights. Crowley v. Farmers

State Bank, 109 Colo. 146, 123 P.2d 407 (1942).

The personal representative of an estate can neither waive nor toll a nonclaim statute. In re Estate of Plank, 32 Colo. App. 126, 509 P.2d 812 (1973).

But personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Statutes must be read together. A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under § 15-12-806 or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to this section. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Renewal note by administratrix will not change character of original indebtedness. Renewal notes given by the administratrix of an estate for a debt existing at the time of the death of the decedent do not change the character of the original indebtedness, a claim not presented within the time prescribed and thus barred by this section. Haley v. Austin, 74 Colo. 571, 223 P. 43 (1924).

If original debt is barred the mortgage securing the renewal note cannot be foreclosed. This debt, being barred by this section, insofar as the right to satisfaction out of the estate property not included in the chattel mortgage is concerned, it necessarily follows that the claimants were not entitled to a foreclosure of the mortgage securing the renewal notes. The note is the principal thing, the mortgage merely an incident. Haley v. Austin, 74 Colo. 571, 223 P. 43 (1924).

Under prior law, claims of state hospital not barred by limitation or nonclaim statute. State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952); State v. Estate of Griffith, 130 Colo. 312, 275 P.2d 945 (1954).

Likewise under prior law, state claim for income taxes not barred by limitation or nonclaim statute. Ray v. State, 123 Colo. 144, 226 P.2d 804 (1950); State v. Barr, 159 Colo. 88, 409 P.2d 832 (1966); In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968).

Insofar as claims are for care and maintenance, the weight of authority is that a sovereign or its subdivisions is subject to the same limitations for filing a claim as any other creditor who may make a claim against the estate of a decedent. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968).

One who pays inheritance tax becomes creditor. When one voluntarily pays an inheritance tax, she becomes a creditor of the estate and must file her claim for reimbursement within the four-month period

of subsection (2). Valks v. Krabacher, 639 P.2d 1086 (Colo. App. 1980).

Claim arising under workmen's compensation act is within section's purview. Since a claim arises at the time of the accident for purposes of the workmen's compensation act, it is a claim within the purview of this section notwithstanding the fact that a department of labor referee has not made a determination in a workmen's compensation proceeding concerning the claimant's eligibility for compensation nor an order entered pursuant to § 8-44-107 (3). First Nat'l Bank v. Long, 44 Colo. App. 317, 616 P.2d 180 (1980).

Debt of decedent asserted against estate within section's time limitation is deductible. Under § 39-23-114 (1)(a)(I) any debt, except as qualified within that subparagraph, for which the decedent was personally liable, and which has been asserted against his estate within the time limitations of this section is deductible. State Inheritance & Gift Tax Div. v. Bugdanowitz, 44 Colo. App. 337, 614 P.2d 902 (1980).

Valid liens are not affected. This statute which bars the claims of unsecured creditors provides that valid liens of secured creditors are not affected and a secured creditor may disregard the estate and proceed against his security. In re Estate of Blanpied v. Robinson, 155 Colo. 133, 393 P.2d 355 (1964); Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973); Alberico v. Health Mgmt. Sys., Inc., 5 P.3d 967 (Colo. App. 2000); Oldham v. Pedrie, 2015 COA 95, 411 P.3d 933.

Once a secured creditor presents an unconditional claim, without expressly reserving the right to enforce the security, and it is disallowed by an estate's personal representative, the creditor need not contest the disallowance in court within sixty-three days. If the secured creditor does not do so, the debt is not extinguished, and any lien securing the debt may be pursued in a foreclosure proceeding. Oldham v. Pedrie, 2015 COA 95, 411 P.3d 933.

As holders of a valid lien, defendants were secured creditors and, thus, were not required to file a claim against plaintiff's mother's estate. Accordingly, non-claim statute does not bar defendants' claims. Alberico v. Health Mgmt. Sys., Inc., 5 P.3d 967 (Colo. App. 2000).

Although not filed within the four months, claims secured by mortgage or deed of trust may be allowed when the creditor relies solely upon the property covered by his lien and relinquishes all claim against the general assets of the estate. Reid v. Sullivan, 20 Colo. 498, 39 P. 338 (1895); Sullivan v. Sheets, 22 Colo. 153, 43 P. 1012 (1896).

In fact, the holder of an encumbrance upon property of the deceased may follow one of three routes: (1) He may ignore the estate entirely and look only to his security; (2) he may file a conditional claim so that he may share in any of the assets in the event there is a deficiency; or (3) he may ignore the security and look only to the assets of the estate. The failure to file a claim does not discharge the lien nor render it unenforceable. In re Estate of Blanpied v.

Robinson, 155 Colo. 133, 393 P.2d 355 (1964).

Subsection (3)(b) creates an exception to the time limitations of the probate code where the decedent is "protected by liability insurance". Vigil v. Lewis Maintenance Serv., Inc., 38 Colo. App. 209, 554 P.2d 703 (1976).

The nonclaim statute, subsection (3)(b), bars an award of prejudgment interest and costs above the limit of a liability insurance policy when the action is filed after expiration of the statutory period for presentation of claims. White v. Estate of Soto-Lerma, 2018 COA 35, 425 P.3d 1183.

Publication of notice which does not comply with § 15-12-801 is equivalent to no publication at all. In such a case, the general one-year period in former subsection (1)(b) of this section was held to apply. In re Estate of Dire, 851 P.2d 271 (Colo. App. 1993) (decided under this section as it existed prior to 1990 amendment).

Contingent legal malpractice claim arose when claimant knew or should have known that he might suffer damage due to decedent's conduct. When claim arose after the death of decedent attorney, contingent claim was barred if not filed within four months, even if still only a contingent claim. Poleson v. Wills, 998 P.2d 469 (Colo. App. 2000).

Failure to present a contingent claim should not bar a subsequent liquidated claim based on the same instrument when the obligation becomes fixed or ascertainable. Sec. Savings & Loan Ass'n v. Estate of Kite, 857 P.2d 430 (Colo. App. 1992), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Claim of father for reimbursement of funeral expenses against decedent son's estate arose within the meaning of subsection (2) at the time the father paid the funeral expenses in November 1996, even though the funeral expenses were incurred by the decedent's brother in March 1994. Accordingly, the father's claim was not barred on the grounds that it was untimely filed, and the court properly asserted jurisdiction over the claim. In re Estate of Boyd, 972 P.2d 1075 (Colo. App. 1988).

A loan payment receipt did not present sufficient notice of a claim against the estate for compliance with this section. In re Estate of Ongaro, 973 P.2d 660 (Colo. App. 1998), aff'd, 998 P.2d 1097 (Colo. 2000).

Applied in Price v. Sommermeyer, 41 Colo. App. 147, 584 P.2d 1220 (1978); Wickham v. Wickham, 670 P.2d 452 (Colo. App. 1983).

15-12-804. Manner of presentation of claims.

(1) Before a claim may be presented, the decedent's estate must first have been commenced in a court of appropriate jurisdiction by the filing of an application or petition pursuant to part 3 or 4 of this article. A claimant may thereafter present a claim only by:

(a) Filing a written statement of the claim with the clerk of the court, in the form approved by the supreme court, whether or not a personal representative has been appointed;

(b) Delivering or mailing a written statement of the claim to the court-appointed personal representative; or

(c) In the case of a claimant who has a claim described in section 15-12-803 (1), presenting a claim by commencing a proceeding against the personal representative in the court where the personal representative was appointed to obtain payment of the claim. A claimant having a claim described in section 15-12-803 (2) may present a claim by commencing a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction under the rules of civil procedure or statutes of this state to obtain payment of his or her claim against the estate. In order to constitute a timely presentation of a claim, the commencement of any proceeding under this paragraph (c) must occur within the time limited for presenting the claim. Time limits on proceedings to enforce timely presented claims are determined by section 15-12-806 (1) and not by this paragraph (c).

(2) Unless presentation is made pursuant to paragraph (a) of subsection (1) of this section, a claim against a decedent's estate is not validly presented by delivering or mailing a claim to any person unless that person has been appointed by the court or registrar of the court as the personal representative of the decedent's estate prior to the time the presentation is attempted.

(3) A personal representative's knowledge that a creditor could bring a claim against an estate shall not be treated as a valid substitute for the proper presentation of a written claim authorized by subsection (1) of this section.

(4) Each written statement of a claim shall include:

(a) A request or demand for payment from the decedent or the estate; and

(b) Sufficient information to allow the personal representative to investigate and respond to the claim, including the basis of the claim, the name and address of the claimant, and the amount claimed.

(5) Except in the situation where a special administrator has been formally appointed with specific powers to deal with the specific claim being presented or has been formally appointed to deal with claims generally under this part 8, a special administrator appointed in informal proceedings, or a special administrator who lacks the powers and authority of a general personal representative, is not a personal representative to whom presentation of a claim may properly be made.

(6) A claim shall be deemed presented on the date that the court-appointed personal representative receives the written statement of claim or the date the claim is filed with the court, whichever is earlier. If a claim is not yet due, the claim shall state the date when it will become due. If the claim is contingent or unliquidated, the claim shall state the nature of the uncertainty.

If the claim is secured, the claim shall describe the security. Failure to describe correctly the security, the nature of any uncertainty, or the due date of a claim not yet due does not invalidate the presentation made.

(7) The personal representative shall inform any interested person, upon request, as to the existence, amounts, and nature of all claims against the estate that are known to him or her, but the personal representative shall not be required to express any opinion as to the probable outcome of any claim.

(8) If a claim is presented under subsection (1) of this section, a proceeding thereon may not be commenced more than sixty-three days after the personal representative has mailed a notice of disallowance; except that, in the case of a claim that is not presently due or that is contingent or unliquidated, the personal representative may consent to an extension of the sixty-three-day period, or, to avoid injustice, the court, on petition, may order an extension of the sixty-three-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Source: L. 73: R&RE, p. 1593, § 1. **C.R.S. 1963:** § 153-3-804. **L. 75:** (2) amended, p. 598, § 35, effective July 1. **L. 96:** Entire section amended, p. 660, § 12, effective July 1. **L. 2006:** Entire section amended, p. 374, § 3, effective July 1. **L. 2012:** (8) amended, (SB 12-175), ch. 208, p. 838, § 44, effective July 1.

ANNOTATION

Law reviews. For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Evidence in Estate Proceedings", see 24 Rocky Mt. L. Rev. 437 (1952). For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

Annotator's note. Since § 15-12-804 is similar to repealed § 153-12-5, C.R.S. 1963, CSA, C. 176, § 201, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section simplifies procedure. Pierpoint v. Earl, 80 Colo. 328, 251 P. 529 (1926).

The requirements of this statute are mandatory. Crowley v. Farmers State Bank, 109 Colo. 146, 123 P.2d 407 (1942).

One designated in a will as a personal representative is not always the personal representative for purposes of subsection (1). Such persons may possess priority for appointment but may not necessarily be deemed qualified and appointed by the

court. Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

Nevertheless, a claim inartistically drawn is sufficient, where the administratrix had long known of the claim and, in a general way, of the facts upon which it was based, for she could not have been misled by the manner in which it was presented. Brown's Estate v. Stair, 25 Colo. App. 140, 136 P. 1003 (1913).

Excuse for failure to comply with section. An executor is the representative of the estate, and he cannot properly accept employment from, or act as agent of, a claimant in presenting a claim against the estate for adjustment; and his failure to comply with the request of a claimant in this regard, is no excuse for the latter's failure to file his claim in accordance with the provisions of this section. In re Hobson's Estate, 40 Colo. 332, 91 P. 929 (1907).

The intent of the law with respect to the filing and hearing of claims against an estate contemplates that the claim should be heard upon its merits. Where the trial court takes no testimony and the plaintiff has no opportunity to show that laches or the statute of limitations might or might not have been tolled, dismissing the claims on motions improperly raised under the rules of civil procedure agreed by the parties is erroneous. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The Colorado probate code cannot be deemed to indicate a legislative intent to eradicate all time limitations. In re Estate of Wehling, 37 Colo. App. 276, 547 P.2d 1289 (1976), aff'd sub nom. Kropp v. Farmers Ins. Exch., 193 Colo. 144, 563 P.2d 943 (1977).

But personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Statutes must be read together. A claimant who has presented a claim pursuant to subsection (1) of this section rather than commencing a civil proceeding under subsection (2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under § 15-12-806 or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

There are three methods of presenting a claim against an estate. First, a claimant may mail or deliver a written statement to the estate's personal representative. Second, a claimant may file its written claim with the clerk of the court where the estate is being probated. Third, a claimant may commence litigation against the personal representative to obtain payment of its claim against the estate. In re Estate of Hall, 948 P.2d 539 (Colo. 1997); In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000).

A creditor need not strictly comply with each formal requirement for presentation

of claims, however, this section does require that a creditor provide a personal representative with reasonable notice that it is making a claim against an estate, which, at a minimum, must contain a request or demand for payment from the estate and sufficient information to allow the personal representative to investigate and respond to the claim. In re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000); In re Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004).

Individual can claim against self as personal representative. A person acting in his individual capacity as a claimant can file or accept a filing of such a claim with himself as personal representative. Wickham v. Wickham, 670 P.2d 452 (Colo. App. 1983).

Notice to the attorney for the personal representative satisfies the requirement of notice to the personal representative. Strong Bros. Enters. v. Estate of Strong, 666 P.2d 1109 (Colo. App. 1983).

The personal representative's full knowledge of his or her own claims does not satisfy the presentation requirement. Personal representative must satisfy this section like any other claimant. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

None of the items the personal representative represented as a presentation of claim were a written request or demand for payment from estate; therefore, the personal representatives claims were not properly presented. In re Estate of Sheridan, 117 P.3d 39 (Colo. App. 2004).

Subsection (1) requires that a claim be mailed or delivered to a personal representative who has been formally appointed by order of the court, if the claim has not been filed with the clerk of the court. Estate of Rienks v. Rienks, 844 P.2d 1295 (Colo. App. 1992).

This section and § 15-12-803 do not apply to a devisee's demand for distribution of a devise under a will. The devisee's demand was not a claim against the estate as envisioned by the nonclaim statutes. In re Estate of Colby, 2021 COA 31, 486 P.3d 466.

Applied in In re Estate of Hamilton v. Egan, 633 P.2d 1100 (Colo. App. 1981).

15-12-805. Classification of claims.

(1) The personal representative shall pay allowed claims against the estate of a decedent in the following order:

(a) Property held by or in the possession of the deceased person as fiduciary or trustee of a trust, which shall include a resulting trust, as long as the reasonable expenses of administering such property and of investigating and determining such claim, as provided by section 15-10-602, but subject to section 15-10-605, shall be paid from such property as determined by the court;

(b) Other costs and expenses of administration;

(c) Reasonable funeral and final disposition expenses;

(d) Debts and taxes with preference under federal law;

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him or her;

(f) Debts and taxes with preference under other laws of this state;

(f.5) The claim of the department of health care policy and financing for the net amount of medical assistance, as defined in section 25.5-4-302 (5), C.R.S., paid to or for the decedent;

(f.7) The claim of a county department of human or social services, the state department of human services, or the department of early childhood for the excess public assistance, including child care assistance, paid or provided for which the recipient was ineligible;

(g) Any child support obligations of the decedent that were due and unpaid at death in accordance with a valid court order or agreement of record in which the decedent was a party, and any future child support obligations of the decedent as determined by the court;

(h) All other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

Source: L. 73: R&RE, p. 1593, § 1. **C.R.S. 1963:** § 153-3-805. **L. 79:** (1)(a) amended, p. 650, § 11, effective July 1. **L. 91, 2nd Ex. Sess.:** (1)(f.5) added, p. 91, § 7, effective October 16. **L. 94:** (1)(f.5) amended, p. 2647, § 113, effective July 1. **L. 96:** (1)(f.5) amended, p. 824, § 8, effective May 23. **L. 2002:** (1) amended, p. 653, § 9, effective July 1. **L. 2006:** (1)(f.5) amended, p. 2002, § 49, effective July 1; (1)(f.7) added, p. 948, § 5, effective August 7. **L. 2011:** (1)(a) amended, (SB 11-083), ch. 101, p. 304, § 7, effective August 10. **L. 2013:** (1)(g) amended and (1)(h) added, (SB 13-077), ch. 190, p. 770, § 5, effective August 7. **L. 2014:** IP(1) and (1)(g) amended, (HB 14-1322), ch. 296, p. 1234, § 5, effective August 6. **L. 2018:** (1)(f.7) amended, (SB 18-092), ch. 38, p. 404, § 19, effective August 8. **L. 2021:** (1)(c) amended, (SB 21-006), ch. 123, p. 493, § 15, effective September 7. **L. 2022:** (1)(f.7) amended, (HB 22-1295), ch. 123, p. 829, § 32, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative intent contained in the 2006 act enacting subsection (1)(f.7), see section 8 of chapter 208, Session Laws of Colorado 2006. For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

ANNOTATION

I. General Consideration.

II. Personal Property Held by Deceased as Trustee.

III. Costs of Administration.

IV. Funeral Expenses.

V. Other Claims.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "The Tax Liability of the Executor", see 28 Rocky Mt. L. Rev. 95 (1955). For article, "Some Suggested Changes in the Colorado Statutes Concerning Wills and Estates", see 29 Rocky Mt. L. Rev. 595 (1957). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

Annotator's note. Since § 15-12-805 is similar to repealed § 153-12-2, C.R.S. 1963, § 152-12-2, CRS 53, CSA, C. 176, § 195, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The purpose of the provision allowing certain claims in an estate to be given first priority was to avoid subjecting property not owned by the decedent to disposition by the estate. In re Estate of Gray, 37 Colo. App. 47, 541 P.2d 336 (1975).

Section should not be extended beyond language used. A statute giving a preference to one class of claims over all others should not be construed to extend farther than its language clearly demands. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

The provisions of this section are mandatory. State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952).

Section not applicable to claim against estate of incompetent. This section, setting up classes of claims to be filed in an estate, applies to the estate of a deceased person, and, standing alone, clearly is not applicable to a conservatorship of the estate of a mental incompetent. The general assembly recognized the inapplicability of this section to conservatorships when it enacted § 15-14-428 especially applying to that subject. State ex rel. Zimmerman v. Estate of Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952).

Section not applicable when determining whether a disability trust qualifies for exemption from the Medicaid calculation. Stell v. Colo. Dept. of Health Care Policy & Fin., 78 P.3d 1142 (Colo. App. 2003), rev'd on other grounds, 92 P.3d 910 (Colo. 2004).

Classification of claims within probate jurisdiction of the district court. Whitlock v. Alliance Coal Co., 73 Colo. 205, 214 P. 546 (1923).

After the sale a secured creditor shares pro rata with other creditors. In the case

of a secured creditor, after the property mortgaged has been sold and its proceeds applied to his debt, leaving a balance unpaid, as to that balance the creditor is no longer a mortgage creditor, but is entitled only to have the same paid from the fund realized from the general assets of the estate pro rata with other creditors. Erle v. Lane, 22 Colo. 273, 44 P. 591 (1896).

II. PERSONAL PROPERTY HELD BY DECEASED AS TRUSTEE.

Fiduciary relationship must exist. Both parties were attorneys, and aware that specificity of language or conduct is required to prove the essential elements of an express trust. Had they intended a fiduciary relationship, they would have used language which speaks of more than the debtor-creditor relationship evident. Fleming v. Singer, 168 Colo. 195, 450 P.2d 635 (1969).

The word "trustee" in this section, is to be construed in connection with the other words of the section, and as importing a technical and special trust, not the bailee of chattels, in a particular instance, charged with the duty to sell and account for the proceeds. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

This paragraph does not encompass a demand against a decedent's estate founded upon the receipt of certain negotiable paper, to be sold by decedent, and the proceeds accounted for. The deceased is not regarded as a trustee within this section. McCutchen v. Osborne, 61 Colo. 408, 158 P. 136 (1916).

Likewise, partial assignment of a chose in action does not in and of itself render an assignor a trustee for the assignee. It does not, as a matter of law, necessarily create a fiduciary relationship between the partial assignor and the partial assignee. Fleming v. Singer, 168 Colo. 195, 450 P.2d 635 (1969).

Where the trustee under a trust deed releases the trust deed and wrongfully appropriates the money received for the release to his own use, he holds the fund in trust, for which a claim against his estate should be allowed under this section. Chavez v. Gallup, 77 Colo. 141, 235 P. 345 (1925).

III. COSTS OF ADMINISTRATION.

Expenses incurred in settlement of the estate are claims against the estate encompassed by subsection (1)(c). Fleming v. Kelly, 18 Colo. App. 23, 69 P. 272 (1902); United States Fid. & Guar. Co. v. People ex rel. Miller, 44 Colo. 557, 98 P. 828 (1908); Proudfit v. Coons, 137 Colo. 353, 325 P.2d 273 (1958).

Section 15-12-803 does not apply to expenses incurred in the administration and settlement of the estate. Gordon-Tiger Mining & Reduction Co. v. Loomer, 50 Colo. 409, 115 P. 717 (1911).

The executrix may treat the federal estate taxes and the state inheritance and succession taxes as a part of the cost of administration and as a claim against the estate under subsection (1)(c). In turn such claims against the estate are satisfied by contributions or abatements from the bequests and devises of the testator's will or

by payment from the estate assets if the testator so provides. Meier v. Denver United States Nat'l Bank, 164 Colo. 25, 431 P.2d 1019 (1967).

Purchases to replenish stock of goods. Generally speaking, an administrator may not continue the business of the decedent, nor use the assets of the estate for business purposes. To this rule, however, there are exceptions. Where the decedent was engaged in the mercantile or manufacturing business, his representative may, under order of court, carry on the business for a sufficient time to close it up. The administrator, if properly authorized, could continue the business for the purpose of disposing of the stock to advantage, and might purchase necessary merchandise to make the property more salable. Such purchases would constitute a proper claim in the settlement of the estate. A person from whom he bought goods could present the claim to the court for allowance, and § 15-12-803 from the very nature of the transaction would not apply. Gordon-Tiger Mining & Reduction Co. v. Loomer, 50 Colo. 409, 115 P. 717 (1911).

Attorney fees for services rendered personal representative of decedent's estate are costs of administration. United States Fid. & Guar. Co. v. People ex rel. Miller, 44 Colo. 557, 98 P. 828 (1908); In re Curtis Estate, 103 Colo. 361, 86 P.2d 260 (1938).

No allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate, where the services are rendered for the sole benefit of an individual or group of individuals interested in the estate, and where the services are rendered in a proceeding purely personal and adversary between the parties. Proudfit v. Coons, 137 Colo. 353, 325 P.2d 273 (1958).

An unauthorized loan is not a claim against the estate. An order of the court to carry on a mercantile business, and replenish the stock as occasion may require, carries no implied authority to borrow money, and a loan made in such case is not a claim against the estate. Gordon-Tiger Mining & Reduction Co. v. Loomer, 50 Colo. 409, 115 P. 717 (1911).

IV. FUNERAL EXPENSES.

Funeral expenses and expenses of last illness both appear as claims under this section and both items constitute valid claims, and the estate of deceased wife is primarily liable for both to husband who paid same. In re Kefover's Estate, 112 Colo. 53, 145 P.2d 879 (1944).

V. OTHER CLAIMS.

Law reviews. For comment on Eisenberg v. Reininger, appearing below, see 9 Rocky Mt. L. Rev. 294 (1937).

Under prior law a widow's allowance, while in nature of cost of administration, was only superior to fifth class claims. Eisenberg v. Reininger, 90 Colo. 511, 10 P.2d 945 (1932).

State hospital's claim falls within this section. Although the personal representative has the duty to pay the hospital's claim to the extent of the assets, such payment is to be made in the order of

priority provided for in this section. State v. Estate of Taylor, 29 Colo. App. 231, 484 P.2d 1262 (1971).

Since decedent held funds pursuant to an agency coupled with an interest, his rights thereto pass to his personal representative, and the first class claim section of this section does not apply. In re Estate of Gray, 37 Colo. App. 47, 541 P.2d 336 (1975).

15-12-806. Allowance of claims.

(1) The personal representative may mail a notice to any claimant stating that the claim has been disallowed. If the personal representative fails to mail notice to a claimant of action on his or her claim within sixty-three days after the time for original presentation of the claim has expired, the claim shall be deemed to be allowed. After any claim has been deemed to be allowed or disallowed, the personal representative may change the status of the allowance or disallowance of the claim by notice to the claimant; except that the personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty-three days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

(2) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (1) of this section. Notice in this proceeding shall be given to the claimant, the personal representative, and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(3) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(4) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty-three days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

Source: L. 73: R&RE, p. 1594, § 1. **C.R.S. 1963:** § 153-3-806. **L. 79:** (1) amended, p. 650, § 12, effective July 1. **L. 2006:** (1) amended, p. 376, § 4, effective July 1. **L. 2012:** (1) and (4) amended, (SB 12-175), ch. 208, p. 838, § 45, effective July 1.

ANNOTATION

Failure of personal representative to provide notice of 60-day time limitation did not render the disallowance defective. Wishbone, Inc., v. Eppinger, 829 P.2d 434 (Colo. App. 1991), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Failure to provide notice concerning the 60-day time bar has no effect on the substance or the intended effect of the notice of disallowance, it only relieves the plaintiff of the requirement to file their claim within 60 days. Wishbone, Inc., v. Eppinger, 829 P.2d 434 (Colo. App. 1991), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Nor does such failure remove a claim from the requirements of the probate code or general statutes of limitation. Wishbone, Inc., v. Eppinger, 829 P.2d 434 (Colo. App. 1991), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

A nonclaim statute is not a statute of limitations and to employ such a construction would frustrate the statutory goal underlying the distribution of estates. Wishbone, Inc., v. Eppinger, 829 P.2d 434 (Colo. App. 1991), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Since this nonclaim statute is self-executing, any lack of prior notice to plaintiffs of its operation does not constitute a deprivation of due process. Wishbone, Inc., v. Eppinger, 829 P.2d 434 (Colo. App. 1991), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

The filing of a petition to allow a claim under subsection (1) is not governed by the time limit in § 15-12-804 (2). In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Claim allowed by failure to act not barred by failure to act. A claim against an estate which is allowed by the personal representative's failure to act is not barred by the limitation period of this section. In re Estate of Hamilton v. Egan, 633 P.2d 1100 (Colo. App. 1981).

A personal representative may change a previous allowance of a claim to a disallowance even if the allowance resulted from the failure of the personal representative to deny the claim within 60 days after the time for original presentation of the claim. Claimant may properly contest such disallowance by petition to the court, and an adjudication of the claim is proper. Matter of Estate of Roddy, 784 P.2d 841 (Colo. App. 1989).

Nonclaim statute requires a claimant to commence an action within the time permitted for presentation of a claim, even though the personal representative has not yet allowed or disallowed a claim. Sec. Sav. & Loan Ass'n v. Estate of Kite, 857 P.2d 430 (Colo. App. 1992), overruled in In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

The court has broad discretion in determining whether a contingent claim should be allowed, the amount of time to give a claimant to secure a judgment on the claim, and the amount of assets to be held in reserve for the contingency. Powers Blvd. Assoc. Ltd. v. Estate of Reel, 839 P.2d 516 (Colo. App. 1992).

When contingent claims force the court to hold open the administration of an estate, the court must balance the heirs' interests in the prompt, orderly, and efficient administration of the estate against the protection of contingent claims being pursued against the estate in other courts. Powers Blvd. Assoc. Ltd. v. Estate of Reel, 839 P.2d 516 (Colo. App. 1992).

Personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Statutes must be read together. A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under this section or § 15-12-807, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Claimant may not assert surprise where the record shows that her opponent's defense arises from the very evidence on which claimant's case is based. Pierce v. Erzen, 672 P.2d 1023 (Colo. App. 1983).

The time limit in subsection (2) does not govern the filing of a petition to allow a claim under § 15-12-806 (1). In re Estate of Hall, 948 P.2d 539 (Colo. 1997).

Applied in In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

15-12-807. Payment of claims.

(1) One year after the decedent's death, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for family and exempt property allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid as provided in this subsection (1) may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

(2) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if:

(a) The payment was made before the expiration of the time limit stated in subsection (1) of this section and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(b) The payment was made, due to the negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

Source: L. 73: R&RE, p. 1594, § 1. **C.R.S. 1963:** § 153-3-807. **L. 90:** (1) amended, p. 906, § 4, effective July 1.

ANNOTATION

Annotator's note. Since § 15-12-807 is similar to repealed § 153-12-13, C.R.S. 1963, and § 152-12-11, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Personal representative cannot defeat rights of creditor by failing timely to allow or disallow claims. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

Statutes must be read together. A claimant who has presented a claim pursuant to § 15-12-804(1) rather than commencing a civil proceeding under § 15-12-804(2) has opted for consideration of the claim on its merits by the personal representative. If, thereafter, a claim initially deemed allowed is purportedly disallowed or not paid by the personal representative, the claimant is entitled to petition the court for allowance and payment of the claim under this section or § 15-12-806, even though such petition is brought more than 60 days after the deadline for presenting a claim pursuant to § 15-12-803. In re Estate of Hall, 936 P.2d 592 (Colo. App. 1996), aff'd, 948 P.2d 539 (Colo. 1997).

An order directing payment of a claim forthwith does not have the effect of relieving the executor of performing his duties in accordance with law. Irwin v. Robinson, 143 Colo. 336, 355 P.2d 108 (1960).

When a surcharge is adjudged against a fiduciary, the amount is required to be paid into the estate forthwith. It becomes an asset of the estate and subject to the claims against the estate. The claim here was subjected to certain conditions because of its late filing. The executor, whose improper handling of this claim caused it to be classified as a late filed claim, should not benefit by these conditions by being reimbursed from these estate assets for expenses thereby prejudicing the right to payment on the claim. In re Estate of

Blanpied v. Robinson, 163 Colo. 433, 431 P.2d 481 (1967).

15-12-808. Individual liability of personal representative.

(1) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a personal representative in his fiduciary capacity on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(4) Issues of liability as between the estate and the personal representative individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In other appropriate proceedings.

(5) A personal representative is not individually liable for making distributions that do not take into consideration the possible birth of a posthumously conceived child if the personal representative made the distribution prior to:

(a) Receiving notice or acquiring actual knowledge of the existence of an intention to use an individual's genetic material to create a child; and

(b) The birth of the child could affect the distribution of the decedent's estate.

(6) If a personal representative has reviewed the records of the county clerk and recorder in every county in Colorado in which the personal representative has actual knowledge that the decedent was domiciled at any time during the three years prior to the decedent's death and the personal representative does not have actual notice or actual knowledge of the existence of a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession, the personal representative shall not be individually liable for distributions made to devisees or heirs at law that do not take into consideration the designated beneficiary agreement.

Source: L. 73: R&RE, p. 1595, § 1. **C.R.S. 1963:** § 153-3-808. **L. 2008:** (4) amended, p. 484, § 8, effective July 1. **L. 2010:** (5) added, (SB 10-199), ch. 374, p. 1752, § 16, effective July 1. **L. 2011:** IP(5) and (5)(a) amended, (SB 11-083), ch. 101, p. 304, § 8, effective August 10. **L. 2012:** (6) added, (SB 12-131), ch. 114, p. 393, § 2, effective April 13.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

ANNOTATION

Bank, acting as personal representative for a particular decedent, may not be held liable in an individual capacity for tortious interference with a contract which entitled a surviving partner to purchase partnership interest held by such decedent at the time of death. Colo. Nat. Bank v. Friedman, 846 P.2d 159 (Colo. 1993).

15-12-809. Secured claims.

(1) Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(a) If the creditor exhausts his security before receiving payment, (unless precluded by other law) upon the amount of the claim allowed less the fair value of the security; or

(b) If the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.

(2) A claim for a decedent's proportionate share of liability for a secured debt, made by a third party who is jointly liable with the decedent to the secured creditor, based on the third party's right to contribution from the decedent, shall be reduced by the fair market value, as of the date of death, of the decedent's interest in the property securing the debt, if the property securing the debt is owned by the decedent and not subject to disposition by will or intestate succession at the time of death, and if the decedent's interest passed to the third party on decedent's death.

Source: L. 73: R&RE, p. 1595, § 1. **C.R.S. 1963:** § 153-3-809. **L. 91:** Entire section amended, p. 1449, § 11, effective July 1.

ANNOTATION

Law reviews. For article, "Decedents' Creditors and Nonprobate Assets", see 15 Colo. Law. 2190 (1986).

15-12-810. Claims not due and contingent or unliquidated claims.

(1) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(2) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(a) If the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(b) Arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

Source: L. 73: R&RE, p. 1595, § 1. **C.R.S. 1963:** § 153-3-810.

15-12-811. Counterclaims.

In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

Source: L. 73: R&RE, p. 1596, § 1. **C.R.S. 1963:** § 153-3-811.

15-12-812. Execution and levies prohibited.

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, or liens upon real or personal property in an appropriate proceeding.

Source: L. 73: R&RE, p. 1596, § 1. **C.R.S. 1963:** § 153-3-812.

ANNOTATION

Law reviews. For article, "Creditors' Rights in Probate Part I", see 44 Colo. Law. 55 (May 2015).

A judgment creditor of a deceased person has no right or power to attach property after death by an execution lien. Great W. Exch., Inc. v. Walters, 819 P.2d 1093 (Colo. App. 1991).

15-12-813. Compromise of claims.

When a claim against the estate has been presented in any manner, the personal representative may, if it appears to be in the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

Source: L. 73: R&RE, p. 1596, § 1. **C.R.S. 1963:** § 153-3-813.

ANNOTATION

Law reviews. For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987).

15-12-814. Encumbered assets.

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance, or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be in the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

Source: L. 73: R&RE, p. 1596, § 1. **C.R.S. 1963:** § 153-3-814. **L. 75:** Entire section amended, p. 599, § 36, effective July 1.

15-12-815. Administration in more than one state - duty of personal representative.

(1) All assets of estates being administered in this state are subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed.

(2) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges, and claims, after satisfaction of the exemptions, allowances, and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so

benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(3) In case the exempt property and family allowances, prior charges, and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

Source: L. 73: R&RE, p. 1596, § 1. **C.R.S. 1963:** § 153-3-815.

15-12-816. Final distribution to domiciliary representative.

(1) The estate of a nonresident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless:

(a) By virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile;

(b) The personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or

(c) The court orders otherwise in a proceeding for a closing order under section 15-12-1001 or incident to the closing of a supervised administration.

(2) In other cases distribution of the estate of a decedent shall be made in accordance with the applicable provisions of this article.

Source: L. 73: R&RE, p. 1597, § 1. **C.R.S. 1963:** § 153-3-816.

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

15-12-901. Successors' rights if no administration.

(1) (a) As used in this subsection (1), "will probated in this state" means a will that is declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court.

(b) Except as otherwise provided in paragraph (c) of this subsection (1) and in part 13 of this article:

(I) In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a will probated in this state or the laws of intestate succession.

(II) Devisees may establish title by the will probated in this state to devised property.

(c) A duly executed and unrevoked will that is not a will probated in this state may be admitted as evidence of a devise if:

(I) A court proceeding concerning the succession or administration of the estate has not occurred; and

(II) Either the devisee or his or her successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

(2) Persons entitled to property by exemption or intestacy may establish title thereto by proof of the decedent's ownership, his or her death, and their relationship to the decedent.

(3) Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

Source: L. 73: R&RE, p. 1597, § 1. **C.R.S. 1963:** § 153-3-901. **L. 2011:** Entire section amended, (SB 11-083), ch. 101, p. 304, § 9, effective August 10.

ANNOTATION

Law reviews. For article, "Dealing With a Decedent's Mineral Interests", see 44 Colo. Law. 53 (Feb. 2015).

15-12-902. Distribution - order in which assets appropriated - abatement.

(1) (a) Except as provided in subsection (2) of this section and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(I) Property not disposed of by the will;

(II) Residuary devises;

(III) General devises;

(IV) Specific devises.

(b) For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(2) If the will expresses an order of abatement, or the express purpose of the devise would be defeated by the order of abatement stated in subsection (1) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(3) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

Source: L. 73: R&RE, p. 1597, § 1. **C.R.S. 1963:** § 153-3-902.

ANNOTATION

Annotator's note. Since § 15-12-902 is similar to repealed § 152-14-5, CRS 53, CSA, C. 176, § 226, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Effect of widow's taking elective share on other devises. Upon renunciation by the widow under § 15-11-201, giving her in such case half of the whole estate, the will was not revoked as to a devise to one not an heir at law, but that such a devise abated one half. Logan v. Logan, 11 Colo. 44, 17 P. 99 (1887).

How interest of widow derived. A will devised to the widow an undivided half of

the estate of decedent for life, remainder to a brother and sister and three children and the residue to another. The widow elected to renounce under the will and take under the statute. A judgment declaring void a part of the bequests held objectionable; the interest of the widow should be derived from the entire estate and the interests of the beneficiaries abated proportionally under this section. Binkley v. Switzer, 69 Colo. 176, 192 P. 500 (1920).

Loss to devisee attributed to this section. Where the widow's half which she has elected to take might encroach upon a part of the devise to the son because the estate property outside of the devise to the son and outside of the legacy to the daughter is not sufficient to pay the widow's half in full, the loss to the son must then be attributed to this section. The courts have no power to repeal the section. Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934).

A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. Breymaier v. Davidson, 149 Colo. 218, 368 P.2d 965 (1962).

While a specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given. Breymaier v. Davidson, 149 Colo. 218, 368 P.2d 965 (1962).

A demonstrative legacy partakes of the nature of both a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. Breymaier v. Davidson, 149 Colo. 218, 368 P.2d 965 (1962).

Therefore, bequests to daughters of sums of money are general legacies, as distinguished from specific legacies, and are subject to abatement under this section as unamended. Breymaier v. Davidson, 149 Colo. 218, 368 P.2d 965 (1962).

Settlement contract confirming legacy does not exempt it from abatement. A gift of $30,000 to a daughter of the testator to be paid out of the general estate of testator is a general legacy, and a contract made by the parties in settlement of a contest which merely confirmed such legacy cannot be held to exempt it from abatement under this section as unamended. Breymaier v. Davidson, 149 Colo. 218, 368 P.2d 965 (1962).

15-12-903. Right of retainer.

Unless a contrary intent is indicated by the will, the amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

Source: L. 73: R&RE, p. 1598, § 1. **C.R.S. 1963:** § 153-3-903.

Cross references: For debts to a decedent, see § 15-11-110.

15-12-904. Interest on general pecuniary devise.

General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

Source: L. 73: R&RE, p. 1598, § 1. **C.R.S. 1963:** § 153-3-904.

ANNOTATION

Law reviews. For article, "Fiduciary Accounting — Are the Ground Rules Clear?", see 11 Colo. Law. 1192 (1982). For article, "Show Me the Money: The Surprising Complexity of Cash Bequests", see 55 Colo. Law. 42 (Mar. 2026).

15-12-905. Penalty clause for contest.

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Source: L. 73: R&RE, p. 1598, § 1. **C.R.S. 1963:** § 153-3-905.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "No-Contest Clauses: Issues for Drafting and Litigating", see 29 Colo. Law. 57 (Dec. 2000). For article, "To Contest or Not: Drafting and Litigating No-Contest Clauses", see 46 Colo. Law. 39 (Jan. 2017).

For purposes of this section, offering a later will can constitute a contest of an earlier will and the fact that the later will

was a product of undue influence does not, as a matter of law, preclude the application of the good faith-probable cause exception set forth in this section. In re Estate of Peppler, 971 P.2d 694 (Colo. App. 1998).

15-12-906. Distribution in kind - valuation - method.

(1) A specific devisee is entitled to distribution of the thing devised to him.

(2) (a) Any exempt property or family allowance or devise payable in money may be satisfied by value in kind, if:

(I) The person entitled to the payment has requested distribution in kind;

(II) The property distributed in kind is valued at fair market value as of the date of its distribution; and

(III) No residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(b) For the purpose of valuation under paragraph (a) of this subsection (2), securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(c) The residuary estate may be distributed in cash or in kind, without requiring a pro rata distribution of specific assets, if there is no objection to the proposed distribution. In other cases, residuary property may be converted into cash for distribution, subject to all applicable fiduciary duties, or may be distributed in cash or in kind, without requiring a pro rata distribution of specific assets, pursuant to a court order.

(3) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

(4) If, in any instrument which provides for a devise or transfer intended to qualify for a federal estate tax marital deduction, the personal representative or trustee is required, or expressly authorized, by the terms of the instrument, to satisfy such devise or transfer by a distribution of property in kind at values as finally determined for federal estate tax purposes or at values which are the same as the federal income tax bases of such property to the estate or trust, then, unless the instrument expressly requires that such devise or transfer be satisfied with property having an aggregate fair market value at the date, or dates, of distribution amounting to no less than the amount of such devise or transfer as finally determined for federal estate tax purposes, the distributee of such devise or transfer shall be entitled to a distribution of property which will have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation in the value to the date, or dates, of distribution of all property then available for distribution, and the personal representative or trustee shall satisfy such devise or transfer accordingly.

Source: L. 73: R&RE, p. 1598, § 1. **C.R.S. 1963:** § 153-3-906. **L. 81:** (2)(c) amended, p. 914, § 8, effective July 1.

ANNOTATION

Law reviews. For article, "Marital Bequest Computations (Pecuniary Bequests)", see 13 Colo. Law. 43 (1984).

15-12-907. Distribution in kind - evidence.

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

Source: L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-907.

15-12-908. Distribution - right or title of distributee.

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons

interested in the estate; except that the personal representative may recover the assets or their value if the distribution was improper.

Source: L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-908.

15-12-909. Improper distribution - liability of distributee.

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable for return of the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable for return of the value as of the date of disposition of the property improperly received and its income and gain received by him.

Source: L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-909.

Cross references: For liability to persons interested in an estate, see § 15-12-703.

15-12-910. Purchasers from distributees protected.

If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order and whether or not the authority of the personal representative was terminated prior to execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated prior to the distribution. For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from or lender to a distributee on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transfer was made for value.

Source: L. 73: R&RE, p. 1599, § 1. **C.R.S. 1963:** § 153-3-910. **L. 75:** Entire section R&RE, p. 599, § 37, effective July 1.

15-12-911. Partition for purpose of distribution.

When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court, prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

Source: L. 73: R&RE, p. 1600, § 1. **C.R.S. 1963:** § 153-3-911.

15-12-912. Private agreements among successors to decedent binding on personal representative.

Subject to the rights of creditors, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in a written agreement, whether or not supported by a consideration, executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his or her obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his or her office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts.

Source: L. 75: Entire section added, p. 599, § 38, effective July 1. **L. 99:** Entire section amended, p. 467, § 5, effective July 1.

ANNOTATION

Law reviews. For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013).

When attempting to carry out private agreement among successors, the personal representative must act for the benefit of all successors including those who are not parties. When a stipulated order for property distribution involves competing parties and interests, all parties must be given an opportunity to participate in the proceedings to determine the ownership interests. In re Estate of Masden, 24 P.3d 634 (Colo. App. 2001).

Where the will clearly limits participation in the estate to devisees and unambiguously excludes other family members from participation, the omitted heirs have no interest in the estate, are not affected by any agreement entered pursuant to this section, and are not entitled to any notice of such an agreement. In re Estate of Walter, 97 P.3d 188 (Colo. App. 2003).

15-12-913. Distributions to trustee.

(1) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in section 15-5-206.

(2) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(3) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (1) and (2) of this section.

Source: L. 73: R&RE, p. 1600, § 1. **C.R.S. 1963:** § 153-3-913. **L. 2018:** (1) amended, (SB 18-180), ch. 169, p. 1194, § 13, effective January 1, 2019.

15-12-914. Disposition of unclaimed assets.

(1) If any heirs or devisees of any intestate or testator are unknown, or if known and there is no person qualified to receive devises or distributive shares of such heirs or devisees at the time of making final settlement of the estate, or if such heirs or devisees refuse to receive and receipt for such devises or distributive shares, or in the event there is no taker under the provisions of article 11 of this title, the personal representative shall reduce all such devises or distributive

shares to cash and shall be ordered by the court to pay any balances remaining in his hands to the state treasurer; and the state shall be answerable for the same, without interest, anytime within twenty-one years after the same shall have been paid into the treasury, to such person or persons as shall appear to be legally entitled to the same, upon order of the court having administration of the estate.

(2) Except as provided in subsection (1) of this section, any person, corporation, association, or other entity in possession of moneys paid to him or it or in his or its possession in any fiduciary capacity, and the said moneys are unclaimed, or the person to whom the person in possession may lawfully pay the same, or the person who may be entitled thereto is unknown or absent or fails to receive and properly receipt therefor, may pay said moneys to the state treasurer; and the state shall be answerable for the same, without interest, anytime within twenty-one years after the same shall have been paid to the state treasurer; such payment to the state treasurer shall discharge the person making the same from any further liability or responsibility for such moneys.

(3) After the lapse of twenty-one years from the time any such moneys shall be paid into the state treasury, and no claim therefor having been made and established by any person entitled thereto, said moneys shall become the property of the state and shall be transferred to the public school fund thereof, and the state shall not be liable therefor. Prior to said lapse of twenty-one years, such moneys may be invested by the state treasurer, and all interest or increment therefrom shall be credited to the general fund.

(4) At the time any personal representative or other fiduciary pays into the state treasury any moneys, he or she shall make a written report thereof to the attorney general of the state, giving the attorney general such information as he or she may have, under oath or affirmation, touching the identity and antecedents of the deceased, as well as of any person supposed to be entitled to said moneys, to the end that fictitious claims to the moneys may be forestalled. The attorney general shall file such reports in his or her office and keep the index thereof, and a court shall not make an order for the repayment of any moneys so paid into the state treasury without the attorney general having first been served with written notice thirty days before the time of making application therefor. Upon the serving of such notice, the attorney general is classified as an interested person under this code and may appear and take all steps for and on behalf of the state that any person who might be a defendant to such action might take. The reasonable expense of any such action taken by the attorney general must be initially paid out of the attorney general's contingent fund; but, with the approval, order, and direction of the court having jurisdiction of the estate, any such reasonable expense incurred by the attorney general in conserving the estate and in investigating and litigating the claim of any alleged heir, devisee, distributee, or creditor must be repaid to said contingent fund out of the moneys in the estate or fund in controversy before final settlement thereof.

(5) No estate or trust shall be permitted to remain open for the reason that an heir or devisee or beneficiary is unknown or cannot be located or refuses to receive and receipt for his share. All property subject to the provisions of subsection (1) of this section shall be paid to the state treasurer no later than three months after the entry of the order of final settlement or no later than six months after such property becomes eligible for distribution, whichever date is the earlier.

Source: L. 73: R&RE, p. 1600, § 1. **C.R.S. 1963:** § 153-3-914. **L. 81:** (1), (4), and (5) amended, p. 920, § 1, effective June 9. **L. 84:** (4) amended, p. 1118, § 11, effective June 7. **L. 2016:** (4) amended, (HB 16-1094), ch. 94, p. 267, § 11, effective August 10.

15-12-915. Distribution to person under disability.

(1) A personal representative or trustee may discharge his obligation to distribute to any person under legal disability:

(a) By distributing to his conservator; or

(b) By distributing to any person authorized by law to give a valid receipt and discharge for the distribution; or

(c) The court may authorize distribution to a parent or relative of or a person having the custody and being responsible for the care of the person under disability for such person's use or benefit, subject to such terms and conditions as the court shall direct and approve; or

(d) By distributing in any way authorized by the terms of the will or trust instrument or by the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.; but, in making any such distribution, the personal representative or trustee has a duty to act as a prudent man with due regard to the obligations of a fiduciary.

Source: L. 73: R&RE, p. 1601, § 1. **C.R.S. 1963:** § 153-3-915. **L. 81:** (1)(d) amended, p. 915, § 9, effective July 1. **L. 84:** (1)(d) amended, p. 394, § 7, effective July 1.

15-12-916. Apportionment of estate taxes.

(1) For purposes of this section:

(a) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state.

(b) "Fiduciary" means personal representative or trustee.

(c) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(d) "Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

(e) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) "Tax" means the federal estate tax, the additional inheritance tax imposed by section 26-2-113, C.R.S., the Colorado estate tax imposed by article 23.5 of title 39, C.R.S., and interest and penalties imposed in addition to the tax.

(2) Unless otherwise provided in the will or other dispositive instrument, the tax shall be apportioned among all persons interested in the estate, subject to the exceptions specified in this section. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for tax apportionment purposes. In all instances not involving a spouse unprovided for in a will as provided in section 15-11-301 or an election by a surviving spouse as provided in section 15-11-202, if the decedent's will or other dispositive instrument directs a method of apportionment of tax different from the method described in this code, the method described in the will or other dispositive instrument controls. In instances involving such a spouse unprovided for in a will or election, if the decedent's will or other dispositive instrument directs a method of apportionment of tax different from the method described in this code, the apportionment of tax to the spouse unprovided for in the will or to the surviving spouse shall be in accordance with the method described in this code, and the apportionment of tax to the remaining persons interested in the estate shall be in accordance with the method described in the will or other dispositive instrument.

(3) (a) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

(b) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (2) of this section, because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(c) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(d) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this code, the determination of the court in respect thereto shall be prima facie correct.

(4) (a) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this section.

(b) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(5) (a) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(b) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but, if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(c) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(d) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(e) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or devise is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (2) of this section, and to that extent no apportionment is made against the property. The provisions of this paragraph (e)

do not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the federal "Internal Revenue Code of 1986", as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(6) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(7) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(8) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state, or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

(9) If the liabilities of persons interested in the estate as prescribed by this code differ from those which result under the federal estate tax law, the liabilities imposed by the federal law shall control, and all other provisions of this code shall apply as if the amounts and liabilities prescribed by the federal law had been prescribed by subsection (2) of this section.

Source: L. 73: R&RE, p. 1602, § 1. **C.R.S. 1963:** § 153-3-916. **L. 75:** (2) amended, p. 600, § 39, effective July 1. **L. 79:** (1)(f) amended, p. 1436, § 18, effective July 3. **L. 81:** (2) amended, p. 915, § 10, effective July 1. **L. 83:** (9) added, p. 660, § 1, effective April 21. **L. 85:** (2) amended, p. 605, § 1, effective April 30. **L. 94:** (2) amended, p. 1038, § 12, effective July 1, 1995. **L. 2000:** (5)(e) amended, p. 1846, § 29, effective August 2. **L. 2002:** (1)(f) amended, p. 1360, § 10, effective July 1. **L. 2014:** (2) amended, (HB 14-1322), ch. 296, p. 1240, § 13, effective August 6.

ANNOTATION

Law reviews. For article, "Estate Tax Apportionment", see 14 Colo. Law. 208 (1985).

Specific bequest not direction against apportionment. A testator's bequest of a stated sum of money to a legatee does not constitute a direction against apportionment within the meaning of the apportionment statute. Barton v. Kelly, 41 Colo. App. 316, 584 P.2d 640 (1978).

Without clear expression of testator's intent. This section is applicable unless the testator expresses a clear and unambiguous intent that legacies and devises be transferred without deduction for taxes, and an intent to shift the burden of the tax will not be inferred from vague and uncertain language, and ambiguous language will be interpreted in favor of apportionment. Barton v. Kelly, 41 Colo. App. 316, 584 P.2d 640 (1978).

Decedent's daughter who received assets from her father's estate pursuant to a settlement agreement was a "person interested in her father's estate" pursuant to subsections (1)(d), (2), and (4) of this section for purposes of apportioning estate taxes. In re Estate of Barnard, 867 P.2d 47 (Colo. App. 1993).

Decedent's daughter was responsible for payment of estate taxes on money received from decedent's business partner for settlement of claim as pretermitted heir where partner transferred estate assets to the daughter by executing a disclaimer. In re Estate of Barnard, 867 P.2d 47 (Colo. App. 1993).

Application of proportionate formula in subsection (2) to the apportionment of federal estate taxes on a trust is improper. Rather, the calculation required under federal law concerning the difference between the total federal estate tax and the amount payable if the trust had not been included in the gross estate should be used. In re Estate of Klarner, 98 P.3d 892 (Colo. App. 2003), rev'd on other grounds, 113 P.3d 150 (Colo. 2005).

This section is a harmonizing statute that renders Colorado law consistent with federal law. In re Estate of Klarner, 113 P.3d 150 (Colo. 2005).

Section 2207A of the federal Internal Revenue Code of 1986, and not this section, controls the apportionment of both federal and state estate taxes. In re Estate of Klarner, 113 P.3d 150 (Colo. 2005).

Estate taxes not to be considered a general administrative expense. In re Estate of Beren, 2012 COA 203, 412 P.3d 487, aff'd in part, rev'd in part on other grounds, 2015 CO 29, 349 P.3d 233.

Subsection (2) is not a basis for apportioning administrative expenses. In re Estate of Klarner, 98 P.3d 892 (Colo. App. 2003), rev'd on other grounds, 113 P.3d 150 (Colo. 2005).

The use of "may" in subsection (3)(a) does not grant the court discretion to determine apportionment based on equitable considerations. This provision merely addresses which court has the authority to determine apportionment. It must be read in conjunction with subsection (2), which requires apportionment among all interested persons unless the will provides otherwise or a statutory exception applies. Estate of Petteys v. Farmers State Bank of Brush, 2016 COA 34, 381 P.3d 386.

By its plain language, subsection (3)(b) applies only to apportionment of interest and penalties, not to apportionment of the underlying tax liability. Therefore, the provision does not provide a statutory basis to deny apportionment of the estate tax based on equitable considerations. Estate of Petteys v. Farmers State Bank of Brush, 2016 COA 34, 381 P.3d 386.

PART 10

CLOSING ESTATES

15-12-1001. Formal proceedings terminating administration - testate or intestate - order of general protection.

(1) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative; except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs, and to adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(2) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy

proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

Source: L. 73: R&RE, p. 1604, § 1. **C.R.S. 1963:** § 153-3-1001.

Cross references: For the termination of a conservatorship, see § 15-14-431.

ANNOTATION

Law reviews. For article, "How Many Times", see 19 Dicta 231 (1942). For article, "Colorado Bar Association Meeting", see 23 Dicta 261 (1946). For article, "Denver Institute", see 24 Dicta 168 (1947). For article, "Testamentary Trusts Should Remain Under County Court Jurisdiction", see 27 Dicta 283 (1950). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Commitment Procedures in Colorado", see 29 Dicta 273 (1952). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record?", see 34 Dicta 7 and 335 (1957). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. J. 296 (1966). For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Annotator's note. Since § 15-12-1001 is similar to repealed § 153-14-11, C.R.S. 1963, and CSA, C. 176, § 227, relevant cases construing those provisions have been included in the annotations to this section.

This section provides for the final settlement of an estate. Archuleta v. Archuleta, 160 Colo. 32, 413 P.2d 704 (1966).

Section operates retroactively. It is likely that this section, being purely remedial and procedural in character, properly could be given a retroactive operation and no contract obligation or vested right would be violated in so doing. Dunklee v. County Court, 106 Colo. 77, 103 P.2d 484 (1940).

When determining whether this section or § 15-12-1002 applies, a court must consider two factors: (1) whether the party's request for formal closure of the estate also included a request to adjudicate testacy; and (2) whether the orders settling the estate may impact persons other than the personal representative or a devisee of the will. In re Estate of Schmier, 2025 COA 19, 568 P.3d 35.

15-12-1002. Formal proceedings terminating testate administration - order construing will without adjudicating testacy.

A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative; except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 15-12-1001.

Source: L. 73: R&RE, p. 1604, § 1. **C.R.S. 1963:** § 153-3-1002.

ANNOTATION

When determining whether this section or § 15-12-1001 applies, a court must consider two factors: (1) whether the party's request for formal closure of the estate also included a request to adjudicate testacy; and (2) whether the orders settling the estate may impact persons other than the personal representative or a devisee of the will. In re Estate of Schmier, 2025 COA 19, 568 P.3d 35.

15-12-1003. Closing estates - by sworn statement of personal representative.

(1) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than six months after the date of original appointment of a general personal representative for the estate or one year after the date of death, whichever occurs first, a verified statement stating that he or she, or a prior personal representative whom he or she has succeeded, has or have:

(a) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all lawful claims, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities; and

(b) Sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(2) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

Source: L. 73: R&RE, p. 1605, § 1. **C.R.S. 1963:** § 153-3-1003. **L. 77:** IP(1) amended, p. 834, § 19, effective July 1. **L. 90:** IP(1) and (1)(a) amended, p. 906, § 5, effective July 1. **L. 94:** IP(1) amended, p. 770, § 3, effective April 20.

ANNOTATION

Personal representative had continuing authority to represent estates in pending legal malpractice action as personal representative after initial appointment terminated. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

15-12-1004. Liability of distributees to claimants.

After assets of an estate have been distributed and subject to section 15-12-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property or family allowances or for amounts in excess of the value of his other distributions as of the time of such distributions. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

Source: L. 73: R&RE, p. 1605, § 1. **C.R.S. 1963:** § 153-3-1004. **L. 77:** Entire section amended, p. 834, § 20, effective July 1.

ANNOTATION

Applied in In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

15-12-1005. Limitations on proceedings against personal representative.

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

Source: L. 73: R&RE, p. 1606, § 1. **C.R.S. 1963:** § 153-3-1005.

ANNOTATION

Court may revoke order and reopen proceedings irregularly made. A probate court may revoke its orders and reopen proceedings with respect to the settlement of estates which have been irregularly made or procured by fraud or mistake. Lembach v. Lembach, 622 P.2d 606 (Colo. App. 1980).

Applied in In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

15-12-1006. Limitations on actions and proceedings against distributees.

(1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred as follows:

(a) A claim by a creditor of the decedent is forever barred at one year after the decedent's death.

(b) Any other claimant or any heir or devisee is forever barred at the later of the following:

(I) Three years after the decedent's death; or

(II) One year after the time of distribution thereof.

(2) This section does not bar an action to recover property or value received as the result of fraud.

Source: L. 73: R&RE, p. 1606, § 1. **C.R.S. 1963:** § 153-3-1006. **L. 90:** Entire section amended, p. 907, § 6, effective July 1.

ANNOTATION

This statute (formerly § 15-12-803) is a nonclaim statute and not a statute of limitations and therefore creates a jurisdictional bar to a claim that is untimely filed. In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

A claim not raised in a testacy proceeding or in a proceeding settling the accounts of a personal representative is not immediately barred by the nonclaim statute. In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

Where brokerage account was owned by decedent and husband as joint tenants and passed by operation of law upon decedent's death to husband, husband's claim to brokerage account did not arise during decedent's lifetime but at or after her death and therefore husband is not a creditor of the decedent and his claim is not subject to the one-year bar in § 15-12-1006 (1)(a). In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

15-12-1007. Certificate discharging liens securing fiduciary performance.

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

Source: L. 73: R&RE, p. 1606, § 1. **C.R.S. 1963:** § 153-3-1007.

15-12-1008. Subsequent administration.

If, after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, it is determined that the estate has not been fully administered or fully distributed by reason of subsequently discovered property or for any other reason, the court, upon petition of any interested person, and upon notice as it directs, may appoint the same or a successor personal representative to complete the administration or distribution of the estate. If a new appointment is made, unless the court orders otherwise, the provisions of this code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

Source: L. 73: R&RE, p. 1606, § 1. **C.R.S. 1963:** § 153-3-1008. **L. 79:** Entire section amended, p. 651, § 13, effective July 1.

ANNOTATION

Trial court sitting in probate may reopen an estate in furtherance of justice. In re Estate of Hamilton v. Egan, 633 P.2d 1100 (Colo. App. 1981).

Probate court had authority under this statute to expand personal representative's authority and scope of administration as necessary during the course of the proceedings. In re Estate of Shuler, 981 P.2d 1109 (Colo. App. 1999).

15-12-1009. Estates not closed after three years or more.

(1) When records of the court indicate no action has been taken in an estate for a period of three years or more, the court may, on its own motion, and after notice to the attorney of record, if available, or if there is no attorney of record, then to the personal representative, enter an order closing the estate without further accounting. Such closure may likewise be ordered upon the motion of any interested person, as defined in section 15-10-201 (27), or upon motion of the attorney of record. Any order in such case shall provide for the closing of the estate without further accounting, and such order shall not discharge the personal representative or any other person from any liability to the estate, the court, or any other person; except that sureties upon any bond posted in such proceedings shall be released as to any claim arising after closure of the estate under such circumstances.

(2) Unless the court has reason to believe the personal representative's conduct in the administration of the estate has been improper, closure of the estate as provided in this section shall be without further accounting, report, or hearing.

(3) Upon motion of any interested person, an estate closed pursuant to this section shall be reopened by the court.

(4) This section shall be applicable to all decedents' estates, whether instituted before or after the effective date of this code.

Source: L. 73: R&RE, p. 1606, § 1. **C.R.S. 1963:** § 153-3-1009. **L. 79:** Entire section R&RE, p. 659, § 1, effective February 22; entire section R&RE, p. 657, § 2, effective May 25. **L. 87:** (1) amended, p. 602, § 3, effective July 1. **L. 94:** (1) amended, p. 1038, § 13, effective July 1, 1995.

Cross references: For effective date of this code, see § 15-17-101.

ANNOTATION

Claim against surety "arising after" closure, within the meaning of subsection (1), is a claim based on facts which occurred after order of closure was issued. The surety is not released from a claim based on facts occurring before order of closure merely because the claim was not filed before issuance of order. In re Estate of DeAndrea, 847 P.2d 249 (Colo. App. 1993).

PART 11

COMPROMISE OF CONTROVERSIES

15-12-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

Source: L. 73: R&RE, p. 1607, § 1. **C.R.S. 1963:** § 153-3-1101.

ANNOTATION

Law reviews. For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989). For article, "Court-Approved Trust Modifications—Binding Effect on IRS and Tax Consequences", see 41 Colo. Law. 55 (June 2012). For article, "Dealing With a Decedent's Mineral Interests", see 44 Colo. Law. 53 (Feb. 2015).

Execution of agreement settling will contest under this section was binding on all parties where all parties agreed to compromise of controversy and agreement was approved in formal proceeding. Matter of Estate of Barnard, 867 P.2d 47 (Colo. App. 1993).

Court may properly approve a settlement agreement even over the objection of one of the petitioner beneficiaries, provided the court's determination is fair, reasonable, and in the parties' best interests. The principle is similar to that behind a shareholder derivative suit, where the plaintiffs are acting as representatives of the corporation and the court is charged with protecting the interests of the corporation as a whole. Saunders v. Muratori, 251 P.3d 550 (Colo. App. 2010).

15-12-1102. Procedure for securing court approval of compromise.

(1) The procedure for securing court approval of a compromise is as follows:

(a) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(b) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(c) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. A minor child represented only by his parents may be bound only if his parents join

with other competent persons in execution of the compromise, and if there is no conflict of interest between parent and child. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

Source: L. 73: R&RE, p. 1607, § 1. **C.R.S. 1963:** § 153-3-1102.

ANNOTATION

Law reviews. For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

Court may properly approve a settlement agreement even over the objection of one of the petitioner beneficiaries, provided the court's determination is fair, reasonable, and in the parties' best interests. The principle is similar to that behind a shareholder derivative suit, where the plaintiffs are acting as representatives of the corporation and the court is charged with protecting the interests of the corporation as a whole. Saunders v. Muratori, 251 P.3d 550 (Colo. App. 2010).

Applied in Cavanaugh v. State, Dept. of Rev. Inheritance & Gift Tax Div., 42 Colo. App. 453, 599 P.2d 965 (1979).

PART 12

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

Law reviews: For article, "Streamlining the Public Administrators' Operations: Changes Resulting from the 2017 OSA Audit", see 48 Colo. Law. 49 (May 2019).

15-12-1201. Collection of personal property by affidavit.

(1) At any time ten or more days after the date of death of a decedent, any person indebted to the decedent or having possession of any personal property, including but not limited to funds on deposit at, or any contents of a safe deposit box at, any financial institution; tangible personal property; or an instrument evidencing a debt, obligation, stock, chose in action, or stock brand belonging to the decedent shall pay or deliver such property to a person claiming to be a successor of the decedent or acting on behalf of a successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating:

(a) The fair market value of property owned by the decedent and subject to disposition by will or intestate succession at the time of his or her death, wherever that property is located, less liens and encumbrances, does not exceed twice the amount set forth in section 15-11-403, as adjusted by section 15-10-112;

(b) At least ten days have elapsed since the death of the decedent;

(c) No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(d) Each person is entitled to payment or delivery of the property as set forth in such affidavit.

(1.5) An instrument or other property that is payable or deliverable to a decedent or to the estate of a decedent is considered property of the decedent subject to subsection (1) of this section. A successor or person acting on behalf of a successor under subsection (1) of this section may endorse an instrument that is so payable and collect such amount.

(2) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1) of this section.

(3) The public official having cognizance over the registered title of any personal property of the decedent shall change the registered ownership from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1) of this section.

(3.5) In the event that an instrument or other evidence of an indebtedness is secured by real property, in order to act on behalf of the holder of the indebtedness secured by a mortgage, deed of trust, or other security document, the person making the affidavit must record, with the clerk and recorder of the county where the real property is located, a copy of the affidavit and a copy of the decedent's death certificate or a verification of death document.

(3.7) Pursuant to section 15-10-111 (1)(a)(I) and (1)(b), a safe deposit box may be entered and its contents shall be delivered upon presentation of an affidavit made pursuant to subsection (1) of this section.

(4) The duties owed to a successor by a person acting on behalf of the successor in the making, presentation, or other use of an affidavit under this section are the same as the duties of an agent to the agent's principal, and the breach of such duty is subject to the same remedies as are available under the law of this state with respect to an agent subject to part 7 of article 14 of this title, including but not limited to the remedies available under part 5 of article 10 of this title. A successor who makes, presents, or uses such an affidavit where there are two or more successors is a person acting on behalf of each other successor.

Source: L. 73: R&RE, p. 1607, § 1. **C.R.S. 1963:** § 153-3-1201. **L. 75:** (1)(d) amended, p. 600, § 40, effective July 1. **L. 77:** IP(1) amended and (3) added, p. 835, § 21, effective July 1. **L. 81:** (1)(a) amended, p. 915, § 11, effective July 1. **L. 91:** (1)(a) amended, p. 1449, § 12, effective July 1. **L. 2002:** (1)(a) amended, p. 652, § 7, effective July 1. **L. 2011:** (1)(a) amended, (SB 11-083), ch. 101, p. 306, § 11, effective August 10. **L. 2013:** IP(1) amended, (SB 13-077), ch. 190, p. 771, § 6, effective August 7. **L. 2014:** IP(1), (1)(a), and (1)(d) amended and (1.5), (3.5), (3.7), and (4) added, (HB 14-1322), ch. 296, p. 1234, § 6, effective August 6.

Editor's note: The amendments to this section made after July 1, 1974, are not affected by the provisions of § 15-12-1205.

ANNOTATION

Law reviews. For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013). For article, "The Affidavit for Small Estates: How, When, and Why to Use It", see 46 Colo. Law. 43 (June 2017).

15-12-1202. Effect of affidavit.

(1) The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he or she dealt with a personal representative of the decedent. He or she is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

(2) If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of the right of persons entitled thereto in a proceeding brought for the purpose by or on behalf of such persons.

(3) If a proof of right has been established in a proceeding under subsection (2) of this section, any person to whom an affidavit was delivered and who refused, without reasonable cause, to pay, deliver, transfer, or issue any personal property or evidence thereof belonging to the decedent, as provided in section 15-12-1201, shall be liable for all costs, including reasonable attorney fees and costs, incurred by or on behalf of the persons entitled thereto. The person to whom an affidavit was delivered bears the burden of proving reasonable cause by a preponderance of the evidence.

(4) Any person to whom payment, delivery, transfer, or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

Source: L. 73: R&RE, p. 1608, § 1. **C.R.S. 1963:** § 153-3-1202. **L. 2014:** Entire section amended, (HB 14-1322), ch. 296, p. 1235, § 7, effective August 6.

ANNOTATION

Law reviews. For article, "JDF 999 Collection of Personal Property by Affidavit Pursuant to CRS §§ 15-12-1201 and -1202", see 42 Colo. Law. 49 (June 2013). For article, "The Affidavit for Small Estates: How, When, and Why to Use It", see 46 Colo. Law. 43 (June 2017).

15-12-1203. Small estates - summary administrative procedure.

If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed the value of personal property held by or in the possession of the decedent as fiduciary or trustee, exempt property allowance, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 15-12-1204.

Source: L. 73: R&RE, p. 1608, § 1. **C.R.S. 1963:** § 153-3-1203. **L. 75:** Entire section amended, p. 600, § 41, effective July 1.

15-12-1204. Small estates - closing by sworn statement of personal representative.

(1) Unless prohibited by order of the court, and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 15-12-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(a) To the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed the value of personal property held by or in the possession of the decedent as fiduciary or trustee, exempt property, family allowance, costs and

expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent;

(b) The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(c) The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(2) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

(3) A closing statement filed under this section has the same effect as one filed under section 15-12-1003.

Source: L. 73: R&RE, p. 1608, § 1. **C.R.S. 1963:** § 153-3-1204. **L. 75:** (1)(a) amended, p. 600, § 42, effective July 1.

Cross references: For remedies for fraud or intentional misstatements, see § 15-10-106.

15-12-1205. Time of taking effect - provisions for transition.

The provisions of sections 15-12-1201 and 15-12-1202 became effective on July 1, 1974, regardless of the date of the death of the decedent.

Source: L. 75: Entire section added, p. 601, § 43, effective July 1.

Editor's note: This section does not apply to the amendments made to § 15-12-1201 after July 1, 1974.

PART 13

DETERMINATION OF HEIRS, DEVISEES, AND PROPERTY INTERESTS BY SPECIAL PROCEEDING

Editor's note: Articles 10 to 17 of this title were repealed and reenacted in 1973, and this part 13 was subsequently repealed and reenacted in 1993, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 13 prior to 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following this article heading. Former C.R.S. section numbers prior to 1993 are shown in editor's notes following those sections that were relocated.

15-12-1301. Definitions.

As used in this part 13, unless the context otherwise requires:

(1) "Interested person" means an owner by descent or succession, an alleged heir or devisee of a decedent, any other person claiming an ownership interest derived from an owner by descent or succession, or an alleged heir or devisee in any property the descent or succession of which is to be determined pursuant to this part 13, but excluding any person holding a nonownership interest in such property.

(2) "Owner by descent or succession" means a person in whom all or any part of the decedent's interest in the property vests as a result of intestate or testate succession.

(3) "Property" means the property interest owned by the decedent at the time of death without regard to other property interests which may be owned by other persons in the same parcel of real property or item of personal property.

Source: L. 93: Entire part R&RE, p. 1241, § 1, effective July 1. **L. 2016:** (1) and (2) amended, (SB 16-133), ch. 145, p. 429, § 2, effective August 10.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985).

15-12-1302. Petition to determine heirship - devisees - interests in property.

(1) When any person dies leaving an interest in real property in this state, or dies domiciled in this state leaving an interest in personal property wherever located, and there is no probate proceeding presently pending for such person in any jurisdiction, any interested person or person who may be affected by the ownership of such property may petition the court having jurisdiction over probate matters in and for the county in which the real property or some portion thereof is situated, or, if the proceeding is to affect an interest in personal property, the county in which the decedent was domiciled or resided at the time of death to determine:

(a) The heirs of the decedent and the descent of all or any portion of intestate property; or

(b) The devisees of the decedent under a will and the succession of all or any portion of testate property.

(2) The petition may include more than one decedent if they are related by successive interests in the property.

(3) The petition must be in writing, signed, and verified, and it must include the following:

(a) The name and address of the petitioner;

(b) A statement of the interest of the petitioner;

(c) A description of the property, including a legal description if the property is real property;

(d) As to each decedent addressed in the petition:

(I) The name of the decedent;

(II) The age of the decedent at the decedent's death;

(III) A statement of the date and place of the decedent's death;

(IV) A statement that one year has passed since the decedent's date of death;

(V) A statement that either administration of the decedent's estate has not been granted or commenced in any jurisdiction, or, if administration has been granted or commenced in any jurisdiction, the estate has been settled without determination of the descent or succession of all or a portion of the decedent's property;

(VI) A statement as to the county and state of the decedent's last place of domicile or residence;

(VII) A statement of whether the decedent died intestate or testate, and, if testate, the additional information required by subsection (4) of this section;

(VIII) The names, addresses, and relationships of all interested persons;

(IX) A statement containing the age and disability of any interested person who is known to the petitioner to be a minor or under legal disability;

(X) A description of the decedent's interest in the property the descent or succession of which is to be determined through the petition, which description includes property located in the county where the petition is filed and real property located in any other Colorado county;

(XI) A description of the interests held by all owners by descent or succession for the decedent in the property; and

(XII) A statement that the relief sought by the petition is consistent with any previous administration of the decedent's property; and

(e) If the name or address of any interested person is unknown, a statement detailing the reasonable, diligent efforts made to determine the name or address of the interested person.

(4) If the decedent died testate, one of the following conditions must be satisfied:

(a) If the decedent's will has been previously admitted to probate, the petition must include the name of the court that admitted the will to probate, the case number, and the date upon which the will was admitted to probate, and the petitioner shall provide a certified copy of the will and the order admitting the will to probate; or

(b) If the admissibility of the decedent's will to probate has not been previously determined by a court, the petition must include a statement that the original will has been lodged with a court, that the petitioner believes the will to be the decedent's last will, that the will was validly executed, and that the petitioner is unaware of any instrument revoking the will or of any prior will relating to the property that has not been expressly revoked by a later instrument, and the petitioner shall provide a certified copy of such will or, if certification is not possible, a copy of such will and a statement concerning the absent certification; or

(c) If the admissibility of the decedent's will to probate has not been previously determined by a court and the original will has not been lodged with a court, the provisions of section 15-12-402 (3) apply and the petition must include a statement that the original will is lost, destroyed, or otherwise unavailable; that the will was validly executed; that the petitioner believes the will to be the decedent's last will; and that the petitioner is unaware of any instrument revoking the will or of any prior will relating to the property that has not been expressly revoked by a later instrument, and the petitioner shall provide a copy of the will or otherwise establish the contents of the will to the satisfaction of the court.

(5) Upon filing of the petition, the court shall set a time and date for hearing the petition.

Source: L. 93: Entire part R&RE, p. 1242, § 1, effective July 1. **L. 2016:** Entire section amended, (SB 16-133), ch. 145, p. 430, § 3, effective August 10.

Editor's note: This section is similar to former § 15-12-1301 as it existed prior to 1993.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Dealing With a Decedent's Mineral Interests", see 44 Colo. Law. 53 (Feb. 2015).

15-12-1303. Hearing - notice - service.

(1) The petitioner shall prepare a notice that identifies the petition and includes the name of each decedent; the name of each interested person; a description of the property set forth in the petition, including a legal description if the property is real property; and the time and place of the hearing on the petition. The notice must direct all interested persons to appear and object to the petition on or before the hearing date and time specified in the notice. The notice must further direct that all objections to the petition must be filed in writing with the court and be served on the petitioner, and that the filing fee must be paid on or before the hearing date and time specified in the notice. The notice must set forth that the hearing will be limited to objections timely filed and served and that, if no objections are timely filed and served, then the court may enter a decree without a hearing.

(2) The notice must be served on each interested person named in the petition whose address is shown on the petition and who does not join in the petition; or who does not consent to the granting of the petition or enter a personal appearance; or who does not admit, accept, or waive service. Service may be by personal service or by mailing. If service is by personal service within the state, service must be completed at least twenty-one days prior to the hearing. If service is by personal service outside the state or by mailing a copy thereof, postage prepaid, addressed to the address shown on the petition either within or outside the state, service must be completed at least thirty-five days prior to the hearing. The petitioner shall file a return of service for each instance of personal service and shall make and file a certificate of mailing stating the name of the person to whom the copy was mailed, the address to which the copy was mailed, that it was mailed postage prepaid, and the date of mailing. A copy of the petition must be served with the notice.

(3) The petitioner shall also cause the notice to be published once a week for three consecutive weeks, as defined in section 15-10-401 (4), in a newspaper of general circulation in the county in which the proceeding is filed, or if there is no such newspaper in the county, then in a newspaper of general circulation in an adjoining Colorado county. Additionally, such notice must also be published once a week for three consecutive weeks in a newspaper of general

circulation in any other county in which real property that is subject to the proceeding is located, or if there is no such newspaper in such county, then in a newspaper of general circulation in an adjoining Colorado county. Service by publication is complete on the last day of publication, which must occur on or before thirty-five days before the hearing. The petitioner shall file with the court the publisher's affidavit or affidavits of publication stating the dates of publication.

Source: L. 93: Entire part R&RE, p. 1243, § 1, effective July 1. **L. 2012:** (1) and (3) amended, (SB 12-175), ch. 208, p. 838, § 46, effective July 1. **L. 2016:** Entire section amended, (SB 16-133), ch. 145, p. 433, § 4, effective August 10.

Editor's note: This section is similar to former § 15-12-1302 as it existed prior to 1993.

15-12-1304. Appearance - hearing.

Any interested person or person who may be affected by the ownership of the decedent's interest in the property, the descent or succession of which is to be determined in the petition, may appear and object and establish any proper defense to the petition or any part thereof, or assert or protect any interest the person may claim. An appearance and objection must be presented in writing within the time period for filing an objection as set forth in the notice; except that, for good cause, the court may allow an entry of appearance and objection by an interested person or person who may be affected by the ownership of the property at any time prior to the entry of the court's judgment and decree. If an interested person or person who may be affected by the ownership of the property appears and files a timely objection, the court shall proceed with the hearing on the petition; except that the court may continue the hearing in its discretion or direct such further proceeding as the court may determine. Otherwise, if after proper service pursuant to section 15-12-1303 there are no objections filed to the petition, then the court may enter a judgment and decree pursuant to this part 13 without a hearing.

Source: L. 93: Entire part R&RE, p. 1243, § 1, effective July 1. **L. 2016:** Entire section amended, (SB 16-133), ch. 145, p. 434, § 5, effective August 10.

Editor's note: This section is similar to former § 15-12-1302 as it existed prior to 1993.

15-12-1305. Judgment.

The court shall determine the standing of the petitioner to bring the action; the heirs and devisees of the decedent; the owners by descent or succession of the property; a description of the property, including a legal description if the property is real property; and any other pertinent facts, and shall enter judgment on the petition.

Source: L. 93: Entire part R&RE, p. 1244, § 1, effective July 1. **L. 2016:** Entire section amended, (SB 16-133), ch. 145, p. 435, § 6, effective August 10.

15-12-1306. Decree - conclusive and when - reopening.

A decree entered pursuant to this part 13 is conclusive as to the rights of heirs or devisees in the property described in the order from the date of its entry. If such a decree affects title to real property, a certified copy of the decree must be recorded and indexed in the office of the county clerk and recorder of each county in which real property is located in like manner and in like effect as if it were a deed of conveyance from the decedent to the heirs or devisees. Any person claiming to be an heir or devisee, or the grantee or successor in interest of an heir or devisee, not served with notice by personal service or by mail, and who did not admit, accept, or waive service, or consent to the granting of the petition or enter a personal appearance, may petition to reopen the proceeding and modify the decree within one year after the entry thereof, but not thereafter; except that no such modification of the decree may serve to impair the rights of any person who, in reliance upon such decree, in good faith, for value, and without notice, purchased property or acquired a lien upon property. Notwithstanding any provision of this part 13 to the contrary, the admission of a previously unprobated will as part of a proceeding under this part 13 applies only to the decedent's particular property interests described in the petition, in accordance with section 15-12-1302 (3)(d)(X), for the decedent.

Source: L. 93: Entire part R&RE, p. 1244, § 1, effective July 1. **L. 2016:** Entire section amended, (SB 16-133), ch. 145, p. 435, § 7, effective August 10.

15-12-1307. Title of proceedings.

All such proceedings shall be titled substantially in the following form:

"IN THE MATTER OF THE DETERMINATION OF HEIRS OR DEVISEES OR BOTH, AND OF INTERESTS IN PROPERTY, OF _____(Names of decedents)_____, Deceased.".

Source: L. 93: Entire part R&RE, p. 1244, § 1, effective July 1.

15-12-1308. Proceedings under the rules of civil procedure.

Nothing herein shall be construed to prevent determination of the descent or the succession of property pursuant to the Colorado Rules of Civil Procedure or any other provision of this code.

Source: L. 93: Entire part R&RE, p. 1244, § 1, effective July 1. **L. 2019:** Entire section amended, (SB 19-241), ch. 390, p. 3464, § 9, effective August 2.

Editor's note: This section is similar to former § 15-12-1304 as it existed prior to 1993.

15-12-1309. Effective date - applicability.

This part 13 shall take effect July 1, 1993, and shall apply to all proceedings commenced on or after said date.

Source: L. 93: Entire part R&RE, p. 1244, § 1, effective July 1.

PART 14

COLORADO UNIFORM ESTATE TAX APPORTIONMENT ACT

PREFATORY NOTE

The Internal Revenue Code places the primary responsibility for paying federal estate taxes on the decedent's executor and empowers, but does not direct, the executor to collect from recipients of certain non-probate transfers included in the taxable estate a prorated portion of the estate tax attributable to those types of property. In the absence of specific contrary directions of the decedent, the Code generally provides as to other transfers that taxes are to be borne by the persons who would bear that cost if the taxes were paid by the executor prior to distributing the estate. The determination of

who should bear the ultimate burden of the estate taxes is left to state law.

If a state does not have a statutory apportionment law, the burden of the estate taxes generally will fall on residuary beneficiaries of the probate estate. This means that recipients of many types of nonprobate assets (such as beneficiaries of revocable trusts and surviving joint tenants) may be exonerated from paying a portion of the tax. Also, it generates a risk that residual gifts to the spouse or a charity may result in a smaller deduction and a larger tax. A number of states have adopted legislation apportioning the burden of estates taxes among the beneficiaries.

The National Conference of Commissioners on Uniform State Laws' original Uniform Estate Tax Apportionment Act, completed in 1958, was superseded in 1964 by a revision later incorporated into the Uniform Probate Code as UPC § 3-916, a section that was slightly changed in 1982. The project to replace the 1964 Act and the Uniform Probate Code section with an updated version was announced at the Conference's 1999 annual meeting, but did not get underway until the first meeting of the drafting committee in November of 2000. The current Act was approved and recommended for enactment in all states at the annual meeting of the National Conference of Commissioners on Uniform State Laws in August 2003.

The Act continues to advance the principle of the 1964 Act that the decedent's expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent's tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent's direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The Act provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary. The Act also addresses the allocation of the burden incurred because of several federal transfer tax provisions that did not exist when the 1964 Act was adopted.

15-12-1401. Short title.

This part 14 shall be known and may be cited as the "Colorado Uniform Estate Tax Apportionment Act".

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 699, § 1, effective August 10.

15-12-1402. Definitions.

As used in this part 14, unless the context otherwise requires:

(1) "Apportionable estate" means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned, reduced by:

(a) Any claim or expense allowable as a deduction for purposes of the estate tax;

(b) The value of any interest in property that, for purposes of the estate tax, qualifies for a marital or charitable deduction or is otherwise deductible or exempt; and

(c) Any amount added to the decedent's gross estate because of a gift tax on transfers made before death.

(2) "Apportionment provision" means any provision of a dispositive instrument having the effect of allocating estate tax to certain property or recipients, or exonerating certain property or recipients from liability for estate tax. An apportionment provision may include, but is not equivalent to, a provision affecting rights of recovery or reimbursement under federal estate tax law.

(3) "Estate tax" means a federal, state, or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect on death.

(4) "Gross estate" means, with respect to an estate tax, all interests in property subject to the estate tax.

(5) "Person" has the same meaning as set forth in section 15-10-201 (38).

(6) "Ratable" means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. "Ratably" has a corresponding meaning.

(7) "Time-limited interest" means an interest in property that terminates on a lapse of time or on the occurrence or nonoccurrence of an event or that is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

(8) "Value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 699, § 1, effective August 10.

OFFICIAL COMMENT

The starting point for calculating the apportionable estate is the value of the gross estate. Since the properties included and deductions allowed for determining different taxes can differ, the apportionable estate figure may not be the same for different taxes.

Property not included in the apportionable estate for an estate tax typically will not bear any of that tax. However, the donee recipients of such property will bear part of an estate tax to the extent that the available assets of the apportionable estate are insufficient to pay the tax. See sections 15-12-1406 (3) and 15-12-1409 (2). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those transfers from the allocation of that tax to the extent that properties of the apportionable estate are sufficient.

A gift tax paid by the decedent on a gift that was made by the decedent or the decedent's spouse within three years of the decedent's death is added back to the decedent's gross estate for federal estate tax purposes by Internal Revenue Code §2035(b). A State or foreign estate tax may have a similar provision or effect. Subsection (1)(c) excludes any such gift tax from the apportionable estate.

The value of the apportionable estate is reduced by claims and expenditures that are allowable estate tax deductions whether or not allowed. For example, administrative expenses that could have been claimed as estate tax deductions, but instead are taken as income tax deductions, will reduce the apportionable estate. When a decedent's estate includes property in more than one State, the apportionable estate for each State's estate tax will be reduced by the expenses and claims that are deductible for purposes of that tax. Where an expenditure cannot be identified as pertaining to property in the gross estate of only one State tax, the expenditure is to be apportioned ratably among the taxes of the States in which the relevant properties are located, in accordance with the values of those properties.

A spouse's elective share of a decedent's estate is excluded from the apportionable estate to the extent that the spouse's share qualifies for an estate tax deduction. Other statutory claims against a decedent's estate that do not qualify for an estate tax deduction (for example, a pretermitted heir) do not reduce the apportionable estate.

The term "estate tax" is defined in the Act to include all estate taxes and certain generation-skipping taxes arising because of an individual's death. The term estate tax does not include any inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping tax that is incurred because of a direct skip that takes place because of the decedent's death is included in the term "estate tax."

Currently, no United States income tax is imposed on the unrealized appreciation of a decedent's assets at the time of death. While Canada and some other foreign countries impose an income tax at death, those income taxes are not apportioned by the Act.

Some States impose an inheritance tax on recipients of property from a decedent. This Act does not apportion those taxes.

This Act does not provide for the apportionment of the income tax payable on the receipt of Income in Respect of a Decedent (IRD). If a decedent held an installment obligation the payment on which is accelerated by the decedent's death, the income tax incurred thereby is not apportioned by the Act.

If a donor pays a gift tax during the donor's life, the amount paid will not be part of the donor's assets when the donor dies; and so the gift tax will not be subject to apportionment among the persons interested in the donor's gross estate. This consequence is consistent with the typical donor's wish that the gifts made during life pass to the donee free of any transfer tax. If all or part of a gift tax was not paid at the time of the donor's death and is subsequently paid by the donor's personal representative, the burden of the gift tax should lie with the same persons who would have borne it if the donor had paid it during life, typically, the residuary beneficiaries. A gift tax liability is not apportioned by this Act, but is treated the same as any other debt of the estate. A gift tax deficiency that becomes due after the decedent's death also is treated as a debt of the decedent's estate.

The kinds of death benefits included in a gross estate depend upon the particular estate tax to be apportioned and may not be the same for each tax. For example, some State death taxes will have an exemption for a homestead; some will exclude life insurance proceeds and pensions. In determining the gross estate for such taxes, the property excluded from the tax will also be excluded from the gross estate for that tax. Property that is deductible under an estate tax, such as property that qualifies for a marital or charitable deduction, is nevertheless "subject to" that tax and included in the gross estate. Once the value of the gross estate for an estate tax is determined, the reductions described in subsection (1) are applied to ascertain the apportionable estate.

A "time-limited interest" includes a term of years, a life interest, a life income interest, an annuity interest, an interest that is subject to a power of transfer, a unitrust interest, and similar interests, whether present or future, and whether held alone or in cotenancy. The fact that an interest that otherwise is not a time-limited interest is held in cotenancy does not make it a time-limited interest.

If a debt is secured by more than one interest in property, the value of each such interest is the fair market value of that interest less a ratable portion of the debt that it secures.

If the beneficiary of an interest in property is required by the terms of the transfer to make a payment to a third party or to pay a liability of the transferor, that obligation constitutes an encumbrance on

the property, but does not necessarily reduce the value of the apportionable estate. If the obligation is to make a transfer or payment to a third party, other than an obligation to satisfy a debt of the decedent based on money or money worth's consideration, the right of the third person constitutes an interest in the apportionable estate and so is subject to apportionment.

A decedent's direction by will or other dispositive instrument that property controlled by that instrument is to be used to pay a debt secured by an interest in property is an additional bequest to the person who is to receive the interest securing the debt.

Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the property or payable by the recipient of the property, do not reduce the value of the property for purposes of apportioning estate taxes by this Act.

The date on which gross estate property is to be valued for federal estate tax purposes (and for some other estate tax purposes) is either the date of the decedent's death or an alternate valuation date elected by the decedent's personal representative pursuant to the estate tax law. An estate tax value that is determined on the alternate valuation date is not, as such, a "special valuation adjustment." A "special valuation adjustment" refers to a reduction of the valuation of an item included in the gross estate pursuant to a provision of the estate tax law. See the Comment to section 15-12-1407.

If a person has a right by contract or by the decedent's will or other dispositive instrument to purchase gross estate property at a price below its estate tax value, the estate tax value of the property is the amount included in the value of the decedent's gross estate. The difference or discount between the purchase price and the estate tax value of the property can be viewed as an interest which the decedent passed to that person. If the right to purchase is exercised, the amount of the discount is the value of that person's interest in the apportionable estate.

The value of a person's interest in the apportionable estate can depend upon the value of the apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the amount of allowable deductions which, under this Act, reduce the apportionable estate, but will not be reduced by expenditures that are not allowable deductions for that estate tax. The formula for allocating estate taxes in section 15-12-1404 (1)(a) utilizes a fraction of which the numerator is the value of a person's interest in the apportionable estate rather than the value of the person's interest in the net estate or in the taxable estate. Since the denominator of the fraction is the value of the apportionable estate, the sum of the numerators of all persons having an interest in the apportionable estate will equal the denominator, and so 100% of the estate taxes will be apportioned. Consider the following example.

Ex. D died leaving a gross estate with a value of $10,150,000 and made no provision for apportionment of taxes. D's will made pecuniary devises totaling $1,000,000, and gave the residue to A and B equally. There are no claims against the estate and no

marital or charitable deductions are allowable. The funeral expenses are $10,000, and the estate incurred administrative expenses of $240,000 of which, while all were allowed as administrative expenses by the State probate court, $100,000 was disallowed by the Service for a federal estate tax deduction on the ground that $100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul. 77-461 and TAM 7912006. The personal representative elected to deduct the remaining $140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax purposes, the apportionable estate is equal to the difference between the gross estate ($10,150,000) and the allowable deductions of $150,000 ($140,000 deductible administrative expenses and $10,000 deductible funeral expenses); and so the apportionable estate is $10,000,000. The value of the two residuary beneficiaries' interests in the apportionable estate is equal to the difference between the entire apportionable estate of $10,000,000 and the $1,000,000 that was devised to the pecuniary beneficiaries. While the residuary beneficiaries will not receive any part of the $100,000 of administrative expenses for which no federal estate tax deduction is allowable, that expense does not reduce the gross estate in determining the apportionable estate, and so does not affect the value of their residuary interests for the purpose of apportioning the federal estate tax. So, for purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the apportionable estate valued at $4,500,000, which constitutes 45% of the apportionable estate of $10,000,000. Forty-five percent of the federal estate taxes is apportioned each to A and B, and 10% of the federal estate taxes is apportioned to the pecuniary beneficiaries.

15-12-1403. Apportionment by will or other dispositive instrument.

(1) Except as otherwise provided in subsection (3) of this section, the following rules apply:

(a) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax shall be apportioned accordingly.

(b) Any portion of an estate tax not apportioned pursuant to paragraph (a) of this subsection (1) shall be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor that expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph (b):

(I) A trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(II) The date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(c) If any portion of an estate tax is not apportioned pursuant to paragraph (a) or (b) of this subsection (1), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(2) Subject to subsections (3) and (4) of this section, and unless the decedent expressly and unambiguously directs to the contrary, the following rules apply:

(a) If an apportionment provision specifically directs that a person receiving an interest in a property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned the interest:

(I) The tax attributable to the exonerated interest shall be apportioned among other persons receiving interests in the apportionable estate passing under the same instrument; or

(II) The deficiency shall be apportioned ratably among other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax if the values of the other interests are less than the tax attributable to the exonerated interest.

(b) If an apportionment provision directs that an estate tax is to be apportioned to a specific interest in property, recipients of other interests in the apportionable estate are indirectly exonerated from the responsibility to pay such tax; however, such indirect exoneration does not preclude the application of section 15-12-1404 if the value of the interest to which the tax is apportioned is insufficient to pay the tax in full.

(c) If an apportionment provision directs that an estate tax is to be apportioned to a specific interest in property, a portion of which qualifies for a marital or charitable deduction, the estate tax shall first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(d) Except as otherwise provided for in paragraph (e) of this subsection (2), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under section 15-12-1407, the tax shall be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(e) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax shall first be apportioned, to the extent feasible, to interests in property that have not been distributed to persons entitled to receive the interests.

(3) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent has no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection (3), a testamentary power of appointment is a power to transfer the property that is subject to the power.

(4) An apportionment provision expressly directing estate taxes to be paid from the "residue" of the subject probate or trust estate, or using language of similar effect, shall be subject to the following construction:

(a) If the gross estate includes assets not passing under the dispositive instrument and the beneficiaries of those assets and the beneficiaries of the residue are different persons, this part 14 shall apply unless there is an express and unambiguous statement that the estate tax attributable to the assets shall also be paid from the residue.

(b) If the dispositive instrument contains pre-residuary gifts and the residuary estate is insufficient to pay all estate taxes due, the apportionment provision directing payment from the residue shall be effective with respect to the residue as provided for pursuant to paragraph (b) of subsection (2) of this section, and this part 14 shall apply only to specify the source of payment for estate tax that cannot be paid from the residue. In this event, neither section 15-12-902 nor any other statutory or common law rule of abatement shall affect the apportionment of estate tax among the pre-residuary gifts.

(c) When a gift qualifying for an estate tax marital or charitable deduction is made from a portion of the residue, the provisions of paragraph (c) of subsection (2) of this section shall apply, unless there is an express and unambiguous statement in the dispositive instrument of an intent to not fully utilize the available marital or charitable deduction. For this purpose, a direction to pay estate tax from the residue without "apportionment" or "right of contribution", or language of similar effect, does not constitute an express and unambiguous statement sufficient to avoid the application of paragraph (c) of subsection (2) of this section.

(5) An express and unambiguous apportionment of estate tax pursuant to this section does not, by itself, affect rights of recovery that may be available to a fiduciary under federal tax law. An intent to waive a right of recovery provided in sections 2206, 2207, 2207A, and 2207B of the internal revenue code of 1986, as amended, shall be expressly stated in the dispositive instrument in the manner described in such sections.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 700, § 1, effective August 10.

OFFICIAL COMMENT

A decedent's direction will not control the apportionment of taxes unless it explicitly refers to the payment of an estate tax and is specific and unambiguous as to the direction it makes for that payment. For example, a testamentary direction that "all debts and expenses of and claims against me or my estate are to be paid out of the residuary of my probate estate" is not an express direction for the payment of estate taxes and will not control apportionment. While an estate tax is a claim against the estate, a will's direction for payment of claims that does not explicitly mention estate taxes is likely to be a boiler plate that was written with no intention of controlling tax apportionment. To protect against an inadvertent inclusion of estate tax payment in a general provision of that nature, the Act requires that the direction explicitly mention estate taxes.

On the other hand, a direction in a will that "all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate" satisfies the Act's requirement for an explicit mention of estate taxes and is specific and unambiguous as to what properties are to bear the payment of those taxes.

Whether other directions of a decedent that explicitly mention estate taxes comply with the Act's requirement that they be specific and unambiguous is a matter for judicial construction. For example, there is a split among judicial decisions as to whether a direction such as "all estate taxes be paid out of the residue of my estate" is ambiguous because it is unclear whether it is intended to apply to taxes attributable to nonprobate assets. To the extent that it is determined that a decedent failed to apportion an estate tax, then the Act will apply to apportion that amount of the tax.

If an amendment is made to a revocable trust instrument, and if the amendment itself contains an express and unambiguous provision apportioning an estate tax, the date of the amendment is the date of the revocable trust instrument. However, if an amendment to a revocable trust instrument does not contain an express and unambiguous provision apportioning an estate tax, the date of the revocable trust instrument is the date on which it was executed or the date of the most recent amendment containing an express and unambiguous provision apportioning an estate tax. An express and unambiguous provision apportioning an estate tax includes a provision directing that payment of an estate tax be made from specified property.

The statutory apportionment rules of the Act are default rules applicable to the extent that the decedent does not make a valid provision as to how estate taxes are to be apportioned. The decedent has the power to determine which recipients of decedent's property will bear the estate taxes and in what proportion. If provisions conflict, it is necessary to determine which prevails. A possible choice would permit the directions in each of decedent's instruments determine the extent to which property controlled by that instrument bears a share of estate taxes, but having the provisions for an allocation scheme scattered among a number of documents would make decedent's personal

representative search multiple instruments to ascertain the decedent's directions. Instead, the Act provides an order of priority for a decedent's provisions for estate tax allocations. To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument. To the extent that the will does not expressly and unambiguously provide for the allocation of some estate taxes, an express and unambiguous provision in a revocable trust instrument will control. If the decedent executed more than one revocable trust instrument, the express provisions in the instrument that was executed most recently will control. In determining which revocable trust instrument was executed most recently, the date of any amendment containing an express and unambiguous apportionment provision will be taken into account. In the event that the allocation of estate taxes is not fully provided for by the decedent's will or revocable trust instrument, an express and unambiguous provision in other instruments executed by the decedent controls to the extent that the provision applies to the property disposed of in that instrument. An example of a provision in an instrument disposing of property, other than a will or revocable trust instrument, is a provision in a designation of a beneficiary of life insurance proceeds either that the proceeds will or will not be used to pay a portion of estate taxes. A designation of that form will be honored if there is no conflicting valid provision in a will or revocable trust instrument.

A provision in decedent's will, revocable trust, or other instrument will not be honored to the extent that it would contravene subsection (3).

The exclusivity of the provisions of this section apply only to apportionment rules; they do not prevent a dispositive instrument from making additional gifts; nor do they prevent a governing instrument of an entity from rearranging the internal division of the assets of that entity.

Ex. (1). On D's death, her will apportioned $100,000 of estate taxes to the holders of interests in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is divided into two separate shares: the William Share, and the Franklin Share, each of which is for a different child of D. The William Share is for the benefit of William, and the Franklin Share is for the benefit of Franklin. The trust instrument provides that any taxes apportioned to the holders of interests in the trust or to any share of the trust are to be paid from the William Share. The effect of that trust provision is to require that taxes reduce the size of the William Share and do not reduce the Franklin Share. The apportionment provision in D's will established the amount of estate tax that the trust must bear; the amount apportioned to the D Family Trust makes all of the assets of that trust liable for that amount. Since the decedent's will did not direct how the trust's burden should be allocated between the two shares of the trust, the direction in the trust instrument is not inconsistent with the will provision and so can control the allocation of taxes between properties disposed of in the trust instrument under subsection (3). Even if the direction in the trust instrument

were deemed not to be permitted by subsection (3), the direction would be effective as a disposition of trust assets as explained in Example (2).

Ex. (2). The same facts as those stated in Ex. (1) except that D's will apportioned the $100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing the burden of the tax on the William Share cannot qualify as an apportionment direction since it is in conflict with the will provision allocating all of the trust's share of the estate tax to the Franklin Share. But the settlor has the power to direct trust assets to whomever the settlor pleases. The direction in the trust instrument that assets of the William Share are to be used to pay any taxes apportioned to the Franklin Share is a gift to Franklin of assets from the William Share. The direction is valid as a provision shifting trust assets from the William Share to the Franklin Share, which is a permissible disposition of a trust instrument.

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain nonprobate property that is included in the decedent's gross estate. See e.g., §§2206 to 2207B of the Internal Revenue Code. There is a conflict among the courts as to whether those federal provisions preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the Act apportions taxes without regard to the federal provisions. The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by State law or with other rights of collection granted by State law. Since there is no conflict, this Act does not include a direction as to whether federal or State law takes priority.

The Act does not permit anyone other than the decedent to override the allocation provisions of the Act. For example, if X created a QTIP trust for Y, the value of the trust assets will be included in Y's gross estate for federal estate tax purposes on Y's death. See §2044 of the Internal Revenue Code of 1986. If X's QTIP trust provided that the trust is not to bear any of the estate taxes imposed at Y's death, the direction would be ineffective under the Act because only Y can direct apportionment of taxes on Y's estate. In this regard, it is noteworthy that the right granted to a decedent's estate by §2207A of the Internal Revenue Code to collect a share of the federal estate tax from a QTIP included in the decedent's gross estate can be waived only by direction of the decedent in a will or revocable trust instrument. Y is in the best position to determine the optimum allocation of Y's estate taxes among the various assets that comprise Y's gross estate. If Y fails to make an allocation, the default provisions of the Act are more likely to reflect Y's intentions than would a direction of a third person.

If an instrument transferring property that may be included in the taxable estate of someone other than the transferor directs payment from the transferred property of any part of the estate taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather than an apportionment provision, and is not subject to this Act.

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, the tax that would have been borne by that person will, instead, be borne by other persons receiving interests under the instrument directing the exoneration. Thus, if several assets are disposed of by a governing instrument, which exonerates one or more of those assets from bearing an estate tax, the exoneration will not reduce the amount of estate tax to be allocated to all of the assets disposed of by that instrument, including the exonerated assets. For example, if decedent's will directs that all federal estate taxes attributable to decedent's probate estate be paid from the residuary of his estate, the exoneration of the pre-residuary devises will not affect the total amount of federal estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is insufficient to pay the estate taxes, the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction, the provision making that direction may designate the extent to which the charitable or marital interests will or will not bear a portion of the tax. If the decedent makes no provision as to whether the marital or charitable interests bear a portion of the tax, the Act provides a default rule that exempts the marital or charitable interests from payment of the tax to the extent that it is feasible to do so. An example of when this circumstance arises is when the decedent's will makes a residuary devise, a portion of which qualifies for a marital or charitable deduction and a portion of which does not. If the decedent provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the Act will require the payment to be made first from the nondeductible interests in the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in property in which there is a time-limited interest; the tax allocated to any interest in that property is to be paid from the principal of the property unless the decedent expressly directed otherwise or unless section 15-12-1407 applies to the property.

If a decedent created a trust during life the value of which is included in the decedent's gross estate at death, if immediately after decedent's death, there were one or more time-limited interests in the trust that did not qualify for an estate tax deduction, and if one or more charities held a remainder interest in the trust that otherwise qualified for an estate tax charitable deduction, the charitable deduction for the remainder

interests may be lost if the estate taxes generated by the nondeductible time-limited interests are to be paid from assets in the trust. See Rev. Rul. 82-128, Rev. Proc. 90-30 (§§ 4 and 5), and Rev. Proc. 90-31 (§§ 5 and 6). It is possible that if the payment of an estate tax is made from funds that, while directed to be added to the trust's assets, had not been distributed to the trust before payment of the estate tax, the payment will not disqualify the charitable deduction. There are numerous instances in which estate taxes are required to be paid from a charitable remainder trust that was created inter vivos. Subsection (2)(e) is an attempt to protect the deduction in such cases by establishing a rule of construction requiring that funds directed to be added to the trust be used to pay any required estate tax before assets already in the trust itself are used. It seems unlikely that a decedent would wish to negate this construction of decedent's direction, but the decedent has the power to do so by including an express statement to that effect in a will or revocable trust instrument.

If a decedent had made an irrevocable transfer during his life, over which the decedent did not retain a power to make a subsequent transfer, and if that transfer is included in the decedent's gross estate for estate tax purposes, a portion of the estate tax will be apportioned to the transferee unless the decedent effectively provides otherwise in a will, revocable trust or other instrument. While, by an express provision in the appropriate instrument, a decedent can reduce the amount of tax apportioned to such inter vivos transfers, the decedent is not permitted to increase the amount of tax apportioned to such a transferee. If a decedent attempts to do so, whether directly by apportioning more estate tax to the inter vivos transfer or indirectly by insulating some person interested in the gross estate from all or part of that person's share of the estate tax, the amount of estate tax that is apportioned to the transferee of an irrevocable inter vivos transfer will not be greater than the amount that would have been apportioned to that transferee if the decedent had made no provision for apportionment in another instrument.

Subsection (3) does not apply to a decedent's provision that no estate tax be apportioned to the recipient of an interest who would be excluded from apportionment by this Act in the absence of a contrary direction by the decedent. For example, a decedent's provision that no estate tax be apportioned to the recipient of property that qualifies for a marital or charitable deduction is not subject to subsection (3).

If a decedent transferred property to a revocable trust prior to executing a will that directs the apportionment of taxes to that trust, the apportionment direction will be valid even if the decedent subsequently released the power of revocation so that the trust became irrevocable prior to the decedent's death. In such a case, subsection (3) does not invalidate the will's direction. If, immediately before the decedent's death, the decedent had a power of appointment, whether inter vivos or testamentary, the decedent had the power to transfer the property interest within the meaning of this provision.

COLORADO COMMENT

This section addresses a myriad of issues involved in tax apportionment analysis. This section recognizes that a decedent may specify directions for the apportionment of estate taxes in a variety of instruments, including a will, a revocable trust which the decedent established or some "other dispositive instrument" such as a beneficiary designation for non-probate assets.

The section also specifies default rules for the apportionment of estate taxes when a decedent (a) exonerates a beneficiary from the responsibility to pay estate taxes; (b) directs that property which qualifies for a marital or charitable deduction is to bear the burden of some or all of the estate taxes; and (c) directs that estate taxes are apportioned to split-interest gifts.

Limits are placed on the effectiveness of tax apportionment clauses that attempt to increase the estate tax borne by persons having interests in property over which the decedent had no power to transfer.

As the Commissioners point out in their comments, only the decedent can override the statutory tax apportionment provisions. C.R.S. § 15-12-916 (2009) does not contain an express statement to this effect.

There are a number of other issues implicitly addressed by this section. These include the distinctions between (a) tax apportionment clauses and property disposition clauses and (b) federal estate tax reimbursement provisions and tax apportionment clauses.

Subsection (1):

This section prioritizes, among multiple instruments executed by a decedent, which instrument will govern the apportionment of estate taxes.

In order for any instrument to govern tax apportionment, the ACT requires that the instrument contain an "express and unambiguous" tax apportionment clause. The Commissioners' comments recognize that determining whether a decedent's directions on tax apportionment are "express and unambiguous" will be the subject of judicial construction.

The Colorado Committee believes that no substantive difference exists or was intended by the Commissioners when they use the phrase "expressly and unambiguously" in the Act and the phrase "specific and unambiguous" in their comments.

This section provides exclusive rules for determining when statutory apportionment or a tax apportionment clause in a decedent's will, revocable trust or other dispositive instrument will govern. However, if a purported tax apportionment clause fails to so qualify, the clause may nonetheless create a gift for federal gift tax purposes. As noted in the article authored by Douglas A. Kahn, *The 2003 Revised Uniform Estate Tax Apportionment Act*, 38 Real Property, Probate and Trust Journal 613 (Winter 2004), it is "critical" to differentiate between a tax apportionment clause and a clause disposing of the decedent's property. As Mr. Kahn writes,

"[t]he shifting of the tax burden from one person to another is one means of affecting

the amount of the decedent's property that passes to those persons. But, while the decedent's apportionment of taxes may be regarded as a subcategory of property disposition, it is a special category with specific rules and should be isolated when analyzing issues that arise."

The Commissioners spend considerable space in the comments addressing this distinction by illustrating, in two examples, that a clause in a trust that was presumably intended to serve as a tax apportionment clause, did not so qualify due to a conflict with a will, but was given effect as a dispositive direction, resulting in a gift between trust beneficiaries.

Subsection (2):

Subsection (b) of the Model Act (subsection (2) of this section) refers to the apportionment of estate tax to, alternatively, "property," an "interest in property," a "person receiving an interest in property," and a "holder of an interest in property." As recognized in the Colorado committee's definition of "apportionment provision" (*See* section 15-12-1402 (2)), apportionment may be accomplished by the allocation of estate tax to a certain property or recipient, or by exonerating a certain property or recipient from liability. For purposes of this section, no substantive distinction is to be drawn between apportionment to the recipient of property (or an interest therein) and the property being received.

The NCCUSL Comments to subsection (2) also require some further elaboration, because they do not distinguish between property that is specifically exonerated from an estate tax obligation and property that is indirectly exonerated from such an obligation by the allocation of estate tax to another source of payment. Subject to the rules of construction set forth in subsection (4), paragraph (c), property that is specifically exonerated may be used for the payment of estate tax only after all other sources of payment have been exhausted. On the other hand, property that is only indirectly exonerated remains subject to the provisions of section 15-12-1404 (the statutory provisions for apportionment of estate taxes) if the property to which estate tax has been apportioned is insufficient to pay the tax in full; this is set forth in new section 15-12-1403 (2)(b).

By way of further explanation, often a testator will make pecuniary or specific devises (which may or may not have significant value); the scrivener needs to determine the client's intentions as to whether these devises are exonerated from estate taxes and if so, who will pay the estate taxes on the exonerated devises. If the decedent directs that certain property dispositions are to be exonerated from estate taxes, section 15-12-1403 (2)(a)(I) specifies that the taxes attributable to the exonerated interest must be apportioned among other persons receiving interests *passing under the instrument* (i.e., "inside" apportionment). Notice, however, that section 15-12-1403 (2)(a)(I) does not specify the method of apportionment (i.e., proportionality vs. some other method, however, Section 4 of the Act fills this gap (section 15-12-1404)). As Mr. Pennell suggests in his article at page 17, when addressing "inside" apportionment of estate taxes for dispositions made within a

decedent's single dispositive instrument and when pre- residuary pecuniary or specific devises are made, the "common law abatement and apportionment rules are likely to be directly contrary to the intent of the client in the sense that, if anyone should suffer for insufficient assets in the estate, it should be these takers."

If the value of the other interests is insufficient to fully pay all of the estate taxes on the exonerated interests, then section 15-12-1403 (2)(a)(II) fills the gap and apportions the tax ratably among other recipients receiving interests in the *apportionable estate* (i.e., "outside" apportionment not just among the recipients of interests under the instrument). This language requires that the apportionment rules will apply over statutory abatement rules, to the extent the abatement rules might otherwise have been applicable. Note that section 15-12-1403 (2)(a)(II) apportions the tax ratably; if the decedent desired a different apportionment (perhaps based upon marginal rates or some other means), the decedent would need to so direct in the dispositive instrument.

A recipient of an interest in property may be indirectly exonerated from the payment of estate taxes by a provision that apportions estate tax to one or more other recipients of interests in other property. Section 15-12-1403 (2)(c) addresses the determination of the source of payment of estate taxes in this situation where the value of the property received by a recipient to whom estate tax is apportioned is insufficient to pay the estate tax in full. In this situation, the statutory apportionment provisions of section 15-12-1404 will apply (rather than rules of abatement) if the value of the interest in property to which estate tax is apportioned is insufficient to pay the estate tax in full.

Subsection (3):

This section specifies that a provision in an instrument which apportions estate tax with respect to property that the decedent did not have any power to transfer immediately before the decedent executed the instrument is ineffective to increase estate taxes apportioned to any person having an interest in such property. The Colorado Committee discussed at least one situation in which subsection (3) would have direct application. For example, assume that wife created a testamentary QTIP trust for the benefit of her surviving husband, granting husband a special power to appoint the QTIP trust property remaining at his death among wife's children from a prior marriage. In the governing instrument creating the QTIP trust, wife also provided that estate taxes attributable to the inclusion of the QTIP trust in husband's estate at his later death are to be paid from the QTIP trust unless husband waives that right of reimbursement in the manner provided in Internal Revenue Code §2207A. Under subsection (3), any provision in husband's governing instrument that would exercise the special power of appointment over the QTIP trust property in a manner that purports to apportion estate taxes imposed with respect to the husband's personal estate, to the property of the QTIP trust (and thereby attempt to increase the amount of estate taxes borne by the QTIP trust beyond

the amount specified in Internal Revenue Code §2207A) would be ineffective.

The second sentence is necessary to avoid unintentionally invalidating an otherwise enforceable apportionment clause contained in a decedent's Will simply because the apportionment clause apportions estate tax to property (or an interest in property) over which the decedent holds a testamentary power of appointment. Hence, this section clarifies that if a decedent has a testamentary power of appointment over property which is validly exercised by the decedent's Will and the decedent's Will contains a provision apportioning estate taxes to the appointment property, the apportionment clause will be effective (assuming it is otherwise effective under the provisions of this section) notwithstanding that the decedent had no power to transfer the appointment property immediately prior to executing his or her Will.

Subsection (4):

Even though a dispositive instrument may direct payment of estate taxes from a specific source, often the residuary estate, at times the direction cannot be carried out or becomes ambiguous due to circumstances existing at death that the decedent did not contemplate. Subsection (d) (subsection (4) of this section) has been added to the Act to assist in resolving certain of these situations which arise with some frequency by providing rules of construction designed to address common situations when estate taxes are directed to be paid from the residue of the probate or trust estate. This addition reflects the notion that principles of equitable apportionment, and the provisions of the Act, should be superseded only by clearly intentional statements for that purpose a notion that is consistent with Colorado case law. In re Estate of Kelly, 41 Colo. App. 316, 584 P.2d 640 (1978).

Three situations (or a combination of them) often cause ambiguity or impossibility of performance with respect to an estate tax payment direction in a dispositive instrument:

1. When the gross federal estate contains substantial non-probate assets, the dispositive instrument directs payment from the estate residue, and the non-probate beneficiaries and residuary beneficiaries are different persons.

2. When the dispositive instrument contains substantial pre-residuary gifts, the dispositive instrument directs payment from the residue, and the residue is insufficient to discharge the estate tax liability.

3. When a marital or charitable gift is made from the residue and the dispositive instrument directs payment from the residue without recognizing the potential diminution of an available estate tax deduction.

Each of these situations is addressed below.

1. *Residuary Estate / Non-Probate Assets Conflict*

In the first situation, when (a) the dispositive instrument directs payment of estate taxes from the residuary estate but substantial non-probate assets exist, and (b) the residuary and non-probate beneficiaries are different, the NCCUSL comments indicate that the question of whether the

direction is "specific and unambiguous" is a matter for judicial construction, because it is unclear whether taxes attributable to property not passing under the dispositive instrument also shall be paid from the estate residue. The Colorado committee has adopted a rule of construction that relieves courts from the need to determine the intent of such a direction, by requiring an express and unambiguous acknowledgment that non-probate assets are covered by the apportionment provision. Examples of such express and unambiguous language might include, but are not limited to, the following:

"All taxes payable by reason of my death, whether attributable to assets passing under this instrument or otherwise, shall be paid out of the residue of my probate estate." (This language is identified by NCCUSL as specific and unambiguous as to the proper source of estate taxes).

"All estate tax shall be paid from the residuary estate, without apportionment to other assets."

"All estate tax shall be paid from the residuary estate, without right of contribution from recipients of other assets."

"All estate tax shall be paid from the residuary estate, without apportionment to other assets or right of contribution from recipients of other assets."

However, even where a dispositive instrument directs apportionment to the residue in an express and unambiguous manner, federal estate tax laws present a complicating factor that the NCCUSL comments do not adequately address. See Comments to subsection (5) below.

2. *Pre-Residuary / Residuary Conflict (No Marital or Charitable Gift)*

As noted above, the NCCUSL comments suggest that, under some circumstances, a direction that "all taxes arising as a result of my death, whether attributable to assets passing under this instrument or otherwise, be paid out of the residue of my probate estate" is specific and unambiguous. There may be some question as to whether this is true where estate taxes exceed the assets of the residuary probate estate. Subsection (2), paragraph (a) and the corresponding NCCUSL comments indicate that an apportionment provision such as the one described above effectively "exonerates" the preresiduary interests and forces the residuary beneficiaries to bear all taxes if the residue is sufficient. However, the Colorado committee believes that situations in which the residue is not sufficient to bear all taxes should be addressed more directly in the statutory text.

In such an instance, while the apportionment directive is not fully operative (due to deficient residuary assets), the directive can be followed to the greatest extent possible; and any shortfall in the tax payment sources is adequately addressed through the default rules of 15-12-1404. The rules of abatement set forth in 15-12-902 and any corresponding distinctions drawn between classes of pre-residuary devises are not to be applied with respect to the apportionment of estate taxes. Thus, the provision described above is "specific and unambiguous" and should be given effect with respect to residuary assets, but the Act should be applied to resolve the uncertainty

created by the apportionment provision's failure to contemplate exhaustion of the residue.

3. *Apparent Specific Allocation to Marital or Charitable Property*

A more difficult dilemma arises when the dispositive instrument (a) directs that estate tax be paid by all recipients pro rata, including a surviving spouse or a charity; or (b) provides that payment of estate taxes shall be made from the residue "without apportionment or contribution" and a marital or charitable gift is made from the residue. Subsection (2), paragraph (c) and the accompanying NCCUSL comments address these situations by apportioning estate tax ratably among property interests that do not qualify for a marital or charitable deduction, unless there is an "express and unambiguous" direction to the contrary; however, there is no indication as to what constitutes an adequate contrary direction.

The Colorado Committee believes that the Act should apply to shield the surviving spouse or charity from the tax burden in all of the instances described above, unless there is a clear and unambiguous statement in the dispositive instrument of an intent not to benefit from an available marital or charitable deduction. See, e.g., Restatement (Third) of Property, Wills, and Other Donative Transfers § 11.3, subsection (c)(4), which states that "the construction that gives more favorable tax consequences than other plausible constructions" is preferred, as most donors would prefer that their dispositions receive "as favorable a tax treatment as is consistent with their general dispositive plan." Id., Comment k.

In this light, the Colorado committee concludes that, absent unusual circumstances, the Act should insulate a charity or spouse from estate tax liability notwithstanding a direction in the dispositive instrument against apportionment or contribution, or a direction that taxes are to be borne pro rata. An exception to this general rule exists only where the instrument states explicitly that the decedent is aware of the increased tax burden that results if a charity or spouse is burdened with any tax liability, or that a named spouse or charity is to contribute to such liability. Examples of such clear and unambiguous language (as mandated by Sections 3(b) and (d)(3) of the Act (subsections (2) and (4)(c) of this section) might include, but are not limited to, the following:

In a Tax Allocation Provision:

"I specifically recognize that the allocation of estate taxes provided above could result in the apportionment of estate taxes to the gift to [spousal / charitable beneficiary], and that the estate taxes imposed against my estate could thereby be increased" or

"Even if the allocation of estate taxes provided above does not fully utilize the marital or charitable deductions otherwise allowable to my estate, I intend that the gift to [spousal / charitable beneficiary] shall bear a proportionate share of estate taxes payable by reason of my death."

In a Provision for Disposition of Residue:

"I intend that the devises of my residuary estate shall be calculated and distributed

after the payment of all estate taxes, without regard to whether any such devise would result in a federal estate tax charitable or marital deduction, and despite any increase in estate taxes as a consequence of this intent" or

"Each devise of my net residuary estate provided herein shall bear its proportionate share of estate taxes, even if the federal estate tax marital or charitable deduction allowable by reason of such devise is thereby reduced."

Such language clearly indicates that the fiduciary must reduce the spouse's/charity's share by means of a circular calculation in determining the available deduction.

Subsection (5):

Additional uncertainty may arise out of the inconsistencies between the Act and federal estate tax recovery statutes (sometimes referred to as "reimbursement" statutes). This problem is only cursorily addressed in the NCCUSL comments. Subsection (e) (subsection (5) of this section) has been added to ensure that an estate tax apportionment provision is not confused with or viewed as necessarily effecting a waiver of federal tax recovery rights.

Internal Revenue Code §§ 2206 to 2207B authorize a personal representative to collect a portion of the decedent's federal estate tax from the recipients of non-probate property that is included in the decedent's taxable estate. § 2206 covers life insurance proceeds includible under § 2042; § 2207 covers power of appointment property includible under § 2041; § 2207A covers qualified terminable interest property ("QTIP property") includible under § 2044; and § 2207B covers prior transfers in which the decedent retained a life interest as described by § 2036. The right of recovery granted under each of these statutes may be waived by a contrary direction in the decedent's will. Under §§ 2207A and 2207B, a waiver of the recovery rights must specifically express an intent to waive the right. Courts have indicated that similar specificity may be required to effectively waive the provisions under §§ 2206 and 2207, although those statutes do not, by their terms, require such specificity.

Technically, Code §§ 2206 to 2207B are not apportionment statutes. These statutes do not expressly compel the exercise of available reimbursement rights or any particular application of collected amounts; they simply grant recovery rights to the personal representative. NCCUSL adopted the position that there is no conflict between the Act and the Code's recovery provisions, hence no federal "preemption" of state estate tax apportionment. The uniform Act does not reference the federal statutes; and the NCCUSL comments are non-committal as to the effects of federal recovery rights on state apportionment laws. Thus, the uniform Act leaves open the possibility that a dispositive instrument could require apportionment from the residue of the decedent's probate estate, notwithstanding the personal representative's lingering federal "right to recover" taxes from certain non-probate property. Conversely, a dispositive instrument could effectively waive the personal representative's right of recovery under federal law, but still expressly or

under the Act's default provisions provide for the apportionment of taxes against QTIP property. In both situations, the personal representative (or a court) would be left to ascertain how the ultimate burden of tax payments is to be borne.

NCCUSL may be correct as to the theoretical difference between estate tax apportionment and federal recovery rights. However, certain case law and standard practice in estate administration supports the notion that such recovery rights even though they may be couched in discretionary terms — create a "duty" to collect taxes in the manner contemplated by Code §§ 2206 to 2207B. In that light, the federal provisions may be viewed as tantamount to federal estate tax apportionment laws.

Further, courts have blurred the distinction between federal recovery statutes and state tax apportionment laws. In Colorado, for instance, the decision of In re Estate of Klarner, 113 P.3d 150 (Colo. 2005) directly holds that Internal Revenue Code §2207A preempts the state's estate tax apportionment laws. Under Klarner, absent a specific waiver of the statute's application, §2207A requires both federal and state estate taxes to be apportioned against a QTIP trust that is includible in the decedent's taxable estate. The Act and the NCCUSL comments leave continuing room for argument as to (a) whether the holding of Klarner would remain intact after the Act's adoption, and (b) how discrepancies between the Act's apportionment principles and federal recovery provisions will be managed in the future.

Beyond the fundamental question as to whether the federal recovery provisions effectively preempt state apportionment laws, there are numerous other issues that arise out of incongruity between the federal scheme and the Act. For example: What kind of specificity is required to deflect recovery rights/apportionment from non-probate property? What kind of instrument can be used to direct the apportionment? (Internal Revenue Code §§ 2206 and 2207 do not permit rights of recovery to be waived in a trust instrument.) How can the incremental allocation of estate taxes to QTIP property under Section 4 of the Act (section 15-12-1404) and Internal Revenue Code § 2207A be altered to create a pro rata burden?

Subsection (5) expressly preserves the distinction between state estate tax apportionment laws and federal statutes granting estate tax recovery rights to personal representatives. However, the Colorado committee suggests that the tensions between these two sources of authority may be significantly minimized through some standardized drafting precautions.

With respect to non-probate assets that are included in a decedent's taxable estate, practitioners must recognize that language which may be sufficient to override the Act's default apportionment rules is not necessarily adequate to waive the personal representative's federal right to collect from the recipients a proportionate share (under Internal Revenue Code §§ 2206, 2207 or 2207B) or an incremental share (under Internal Revenue Code § 2207A) of the

taxes attributable to such property. Thus, for instance, if the estate tax burden is intended to be borne by the decedent's residuary probate estate, rather than by QTIP property includible in the decedent's taxable estate, the following direction would be sufficient: "All taxes payable by reason of my death, whether attributable to assets passing under this instrument or otherwise, shall be paid out of the residue of my probate estate without apportionment to or right of contribution from any person; and I waive any right of recovery otherwise available to my personal representative under Internal Revenue Code § 2207A." Practitioners should consider including similar references to other federal estate tax reimbursement statutes providing rights that are intended to be waived in conjunction with tax apportionment even where the statutes or applicable regulations do not require such express acknowledgments.

Similarly, if apportionment to QTIP property is to be obtained on a proportionate basis, instead of an incremental basis, the calculation mechanics provided under the Act and Internal Revenue Code § 2207A should be specifically superseded by a reference to and expressed intent to deviate from the federal statute. Otherwise, the federal recovery scheme could result in a different and preemptive apportionment computation.

The Colorado committee notes that the Act's maintenance of a distinction between estate tax apportionment and federal recovery rights may conflict with the rationale applied by the Colorado Supreme Court in In re Estate of Klarner, 113 P.3d 150 (Colo. 2005). However, the committee believes that the distinction is in keeping with federal law and the uniformity sought by NCCUSL.

In this context, federal recovery statutes must also be distinguished from the power of a fiduciary under section 15-12-1409 to collect estate taxes due from recipients of a decedent's property. Such authority, while also sometimes referred to as a right of recovery, arises out of the need to ensure that the responsible fiduciary has the means to pay the taxes due in a timely manner. Thus, this collection power will be exercised in a manner that is consistent with the Act. Federal recovery rights, on the other hand, create burdens on beneficiaries and entitlements in fiduciaries that are independent of state laws of apportionment.

15-12-1404. Statutory apportionment of estate taxes.

(1) To the extent that apportionment of an estate tax is not controlled by an instrument described in section 15-12-1403, and except as otherwise provided for in sections 15-12-1406 and 15-12-1407, the following rules apply:

(a) Subject to paragraphs (b) to (d) of this subsection (1), the estate tax shall be apportioned ratably to each person that has an interest in the apportionable estate.

(b) A generation-skipping transfer tax incurred on a direct skip taking effect at death shall be charged to the person to which the interest in property is transferred.

(c) If property is included in the decedent's gross estate because of section 2044 of the internal revenue code of 1986, as amended, or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate shall be apportioned ratably among the holders of interests in the property. The balance of the tax, if any, shall be apportioned ratably to each other person having an interest in the apportionable estate.

(d) Except as otherwise provided for in section 15-12-1403 (2)(d), and except as to property to which section 15-12-1407 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest shall be apportioned, without further apportionment, to the principal of that property.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 703, § 1, effective August 10.

OFFICIAL COMMENT

The value of an interest in the apportionable estate is determined in accordance with Section 2(7) (section 15-12-1402 (8)) of the Act.

Property values subtracted from the decedent's gross estate in determining the apportionable estate under section 15-12-1402 (1) are excluded from the apportionable estate, and beneficiaries of those properties do not have any estate tax apportioned to them because of their interest in those properties. This treatment is consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §1.1, comment g (1998). The Act adopts a method of equitable apportionment of estate taxes, but does not follow the Restatement method which allocates taxes apportioned to probate assets first to the residuary beneficiaries and invites preferential treatment for beneficiaries of specific and pecuniary gifts by will over beneficiaries of gifts by various non-probate transfer methods.

A "direct skip" currently is defined in §§ 2612(c) and 2613 of the Internal Revenue Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the governing instrument, the tax on a generation-skipping transfer is charged to the property constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of paying the tax on a direct skip on the transferor of the property. Under subsection (1)(b), the decedent's personal representative will pay the generation-skipping tax on a direct skip out of the transferred property (or the

proceeds from a sale of all or some of that property). To the extent that it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay their proportionate share of the shortfall. Subsection (1)(b) is consistent with the treatment provided by federal law.

The property to which subsection (1)(c) applies is sometimes referred to as "QTIP property" since § 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable interest property." See §§ 2044(b)(1), 2056(b)(7), and 2523(f) of the Internal Revenue Code of 1986. Although the general rule of apportionment in the Act is to apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of interests in QTIP property by the Act is based on the marginal rate of tax. Note that federal estate tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property the estate tax generated by that property at the marginal estate tax rate of the decedent's estate. The Act tracks the federal law in this respect.

It would be harsh to collect the estate tax from persons holding discretionary or contingent interests in property since they may not obtain possession for many years, if at all. Hence, when the tax is apportioned to persons holding interests in property in which there are time-limited interests, subsection (1)(d) requires the tax to be paid from principal. This provision does not apply to property for which a special elective benefit (as described in section 15-12-1407) has been elected.

An estate tax that is apportioned to an interest in property that cannot be reached because of legal or practical obstacles but is not subject to a time-limited interest is to be collected from the interest holder to the extent feasible. In that circumstance, since there is no time-limited interest, the tax will not be apportioned to a person who may not receive property for many years if at all.

When some of the interests in property qualify for a charitable or marital deduction and some do not, requiring the tax to be paid from the principal of the property may reduce the amount of marital or charitable deduction that is allowable. Although the likely intent of a decedent would be to maximize the marital and charitable deductions available for the estate, subsection (1)(d) provides that the estate tax is to be paid from the principal of the property, a choice that avoids administrative complexity.

15-12-1405. Credits and deferrals.

(1) Except as otherwise provided for in sections 15-12-1406 and 15-12-1407, the following rules apply to credits and deferrals of estate taxes:

(a) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(b) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(c) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to whom the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 703, § 1, effective August 10.

OFFICIAL COMMENT

Section 2013 of the Internal Revenue Code of 1986 allows a credit for federal estate taxes paid on certain properties that were included in the taxable estate of a person who died within a relatively short time of the decedent's death. This credit often is referred to as a credit for property previously taxed.

A beneficiary of property attracting a foreign or State death tax may have paid that tax directly or may have paid it indirectly by virtue of the tax's being paid out of the property passing to that person. If that occurs, while the beneficiary's payment of the foreign or State tax reduces the amount that the beneficiary will receive, it will not reduce the value of the beneficiary's interest in the apportionable estate according to the definition of "value" in this Act. See section 15-12-1402 (8). The Act mitigates the beneficiary's burden by giving the beneficiary the benefit of any estate tax credit allowed for the foreign or State tax and paid by the beneficiary.

The benefits and burdens described in subsection (1)(c) are to be allocated ratably among persons in accordance with the amount of deferral or extension attributable to their interests in the apportionable estate.

15-12-1406. Insulated property, advancement of tax - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(b) "Advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property that is required to be advanced by uninsulated holders under subsection (3) of this section.

(c) "Insulated property" means property subject to a time-limited interest that is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(d) "Uninsulated holder" means a person who has an interest in uninsulated property.

(e) "Uninsulated property" means property included in the apportionable estate, other than insulated property.

(2) If estate tax is to be advanced pursuant to subsection (3) of this section by persons holding interests in uninsulated property subject to a time-limited interest other than property to which section 15-12-1407 applies, the estate tax shall be advanced, without further apportionment, from the principal of the uninsulated property.

(3) Subject to sections 15-12-1409 (2) and 15-12-1409 (4), an estate tax attributable to interests in insulated property shall be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency shall be advanced ratably by the person holding interests in any property that is excluded from the apportionable estate as defined in section 15-12-1402 (1)(b) as if those interests were in uninsulated property.

(4) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(5) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total uninsulated property.

(6) Upon a distribution of insulated property for which the distributee becomes obligated to make a payment to uninsulated holders pursuant to subsection (4) of this section, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 704, § 1, effective August 10.

OFFICIAL COMMENT

The term "time-limited interest" is defined in section 15-12-1402 (7).

Subsection (2) applies to property in which at least one person has a time-limited interest and which property can be reached by the personal representative of the decedent. In such cases, an estate tax that is payable as an advanced tax under subsection (3), is charged against the principal of the property, and is not apportioned among the several interests in that property. While there is no express apportionment of the advanced tax to the time-limited interests in the property, the holders of the time-limited interests will bear a share of the tax burden in that the resulting reduction of the value of the principal will reduce the value of the time-limited interests, except that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity interest will be exonerated from sharing in the burden of estate taxes.

Since the estate tax apportioned to the owners of insulated property cannot be collected from the property, the tax is to be paid (as an advancement) by persons having interests in other assets of the estate (uninsulated holders), provided however that the total tax attributed to and advanced by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated property. See section 15-12-1409 (4). If the amount of the aggregate tax apportioned to and to be advanced by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property, then the deficiency shall be apportioned to the holders of interests in properties that otherwise qualify for charitable or marital deductions. In such cases, those charitable and marital properties are reclassified as uninsulated properties, and so the beneficiaries of those properties will be uninsulated holders who will have a right of recovery from the distributees of insulated properties for which they paid a portion of the estate tax.

It would be harsh to make persons holding future interests in insulated property pay tax on properties that they will not receive until years later and may never receive. If they were required to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that reason, with one exception set forth in subsection (4), the tax attributable to insulated properties is reallocated to uninsulated holders who are required to advance the funds to pay the tax.

The tax attributable to the insulated property that is required to be paid by the uninsulated holders is referred to as an "advanced tax." To permit the uninsulated holders who bear the advanced tax to be reimbursed, the Act effectively provides the uninsulated holders with a phantom percentage interest in the property whose transfer is the source of the advanced tax. While the phantom percentage interest of the uninsulated holder remains constant, its value will increase or decrease as the value

of the property changes. The phantom percentage interest is determined by dividing the advanced tax by the aggregate value of insulated properties as determined for purposes of the estate tax. When a distribution of insulated property is made, a percentage of that distribution must be paid over to the uninsulated holders; and this is a personal obligation of the distributee. If it were not for this Section, the uninsulated holders would have had a right of reimbursement under section 15-12-1410 for the amount of their outlay from the distributees; but instead, subsection (5) gives them a right to a fraction of the distributed amount rather than to a fixed dollar amount. The amount collected from a distributee is divided among the uninsulated holders according to the percentage of the advanced tax that they paid.

It is important to note that the uninsulated holders do not have an actual interest in the insulated property and have no lien or security interest in that property while it is in the possession of the trust or fund. The uninsulated holders only have a claim against the persons who receive distributions from the trust or fund which holds the insulated property. The only exception is where previously insulated property loses its insulation so that it can be reached by the uninsulated holders without violating any prohibition against alienation of interests. Once insulated property is in the hands of a distributee, subsection (6) permits the uninsulated holders to seek a lien on the distributee's property for the amount owed to them; but there is no lien or other encumbrance on the insulated property while it is in the possession of the trust or fund.

The operation of this Section is illustrated in the following examples.

Ex. (1) X dies having a gross estate and an apportionable estate of $10M and devises his probate property (with a value of $8M) to A, B and C, with A and B each receiving 40% of the probate estate, and C receiving 20%. In addition to the probate property, X had an interest in a nonqualified pension plan at his death which interest had a value of $2M. X's contract with the plan provides that an annuity of $120,000 per year is to be paid to G for life, and upon G's death the remainder of the corpus is to be paid to L. The only estate tax to which X's estate is subject is the federal estate tax. The federal estate tax on X's $10M gross estate is $4M. So, the average rate of the estate tax is 40%. Under section 15-12-1404 (1)(a), the estate tax that is attributable to the $2M pension fund is $800,000 — the value of the property interests that G and L hold in the fund ($2M) is 20% of the $10M value of the entire apportionable estate, and so 20% of the $4M estate tax is attributable to the pension fund. Assume that under local law, the assets of the pension fund cannot be reached by creditors or by the personal representative of X's estate in order to use those funds to pay estate taxes. Under subsection (3), the personal representative will collect 40% of the $800,000 (i.e., $320,000) from A and a like amount from B; and the personal representative will collect $160,000 from C.

The advanced fraction for the pension fund is $800,000 (the amount of the estate

tax that was advanced by A, B, and C) divided by the $2M value of the fund (the insulated property), which division results in a percentage of 40%. Putting it differently, the $800,000 estate tax attributable to the fund but not paid by those interested in the fund constitutes 40% of the $2M value of the fund. To compensate A, B and C for paying the advanced tax, they obtain what amounts to a 40% phantom interest in the fund. Their actual interest arises only when distributions are made from the fund or, in the event that the fund loses its insulation from creditors, when that occurs.

In Year One, the fund pays $120,000 to G pursuant to the terms of the contract. Forty percent of that distribution ($48,000) must be paid by G to A, B and C — 40% or $19,200 payable to A and another $19,200 payable to B, and 20% or $9,600 payable to C, since that is the proportion in which they bore the advanced tax. The next year, the fund distributes another $120,000 to G, and the same payments must be made to A, B and C. In the third year, G dies, and the fund distributes the remaining principal of $2,400,000 to L; the value of the principal had increased because of an increase in the value of the investments the fund held. A, B, and C are entitled to 40% of that $2,400,000, and so L must pay them $960,000, to be divided among them. A and B will each receive $384,000 (40% of the $960,000), and C will receive $192,000 (20% of $960,000).

Ex. (2) X dies leaving a taxable estate of $10,000,000 on which a federal estate tax of $5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left $4,000,000 of assets in an offshore trust that cannot be reached by X's personal representative and so constitutes insulated property. The federal estate tax attributable to that property is $2,000,000. X had other nonprobate assets having an aggregate value of $2,000,000 and a residuary estate of $4,000,000. The holders of the nonprobate assets will have $1,000,000 in federal estate taxes apportioned to them, and the holders of the residuary interests will have $2,000,000 of federal estate taxes attributed to them. But, the personal representative must also pay the $2,000,000 of federal estate taxes attributable to the offshore assets. If the holders of interests in those assets cannot be reached, and if the Act did not apply, the personal representative would have to pay the $2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the Act, 1/3 of the $2,000,000 of federal estate tax attributable to the offshore assets ($666,667) will be paid by the holders of the other nonprobate assets, and the remaining $1,333,333 of that tax will be paid by the beneficiaries of the residuary estate. Under the Act, the holders of the other nonprobate assets will have to bear their proportionate share of the tax on the offshore assets. When distributions are made of the offshore assets, the distributees will be personally liable to pay a portion of their distribution to the persons who paid the estate tax on the offshore fund.

If undistributed insulated property loses its insulation from claims, the uninsulated

holders can collect the balance of their interest from the property at that time.

In certain circumstances, it would be more equitable to require the beneficiary of an interest in insulated property to bear the tax on that interest than to reapportion it to others. For example, if the beneficiary's interest is one that will become possessory in a short period of time, so that the beneficiary will soon have possession of assets from the fund or trust, it would be more equitable to place personal liability on that beneficiary; and the court has discretion to do so. In determining whether a beneficiary is likely to obtain possession of all or a significant part of the beneficiary's interest in the insulated property, the court can consider not only distributions that are required to be made to the beneficiary, but also distributions that, based on an examination of the history of the administration of the fund or trust, are likely to be made in the near future. Subsection (4) provides the court with the discretion to make that determination. While a beneficiary's receipt of a distribution from the trust or fund would make that beneficiary liable to uninsulated holders who paid the advanced tax, that places a burden of collection on the uninsulated holders; and so, when the distribution is likely to be made to a beneficiary within a short period of time, it would be more equitable to have that beneficiary bear the tax.

15-12-1407. Apportionment and recapture of special elective benefits.

(1) As used in this section, unless the context otherwise requires:

(a) "Special elective benefit" means a reduction in an estate tax obtained by an election for:

(I) A reduced valuation of specified property that is included in the gross estate;

(II) A deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(III) An exclusion from the gross estate of specified property.

(b) "Specified property" means property for which an election has been made for a special elective benefit.

(2) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax shall be computed as if no election for any of such benefits had been made. The aggregate reduction in estate tax resulting from all elections made shall be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations, and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in

specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(3) An additional estate tax imposed to recapture all or part of a special elective benefit shall be charged to any person who is liable for the additional tax pursuant to the law providing for the recapture.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 705, § 1, effective August 10.

OFFICIAL COMMENT

The types of special elective benefits at which this provision is aimed are currently set forth in §§ 2031(c), 2032A, and 2057 of the Internal Revenue Code of 1986. Section 2032A provides an election whereby "qualified real property" (real property that is used for a specified purpose and is held by certain parties related to the decedent) will be given a lower valuation for federal estate tax purposes than otherwise would have been true. Under § 2032A(c), if within 10 years after the decedent's death the qualified heir disposes of an interest in the qualified realty or ceases to use it for its required purpose, an additional estate tax will be imposed to recapture some of the estate tax reduction that was obtained through the election. The purpose of this section is to define how the benefit of an estate tax reduction of this or a similar type will be allocated and how any additional estate tax imposed to recapture some of that tax benefit will be allocated.

Another federal estate tax provision to which this Section applies is § 2057 of the Internal Revenue Code of 1986. That provision grants an election to receive a special estate tax deduction for a "qualified family-owned business interest." Under § 2057(f), if, within 10 years after the decedent's death, one of four listed events occurs, an additional federal estate tax will be imposed in order to recapture some of the tax reduction obtained by electing to take the deduction. This Section defines how the benefits of the election and the burden of an additional tax will be apportioned. The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed § 2057 for the estates of decedent's dying after the year 2003. However, the 2001 Act retains the 10-year recapture provision, and the sunset provision will reinstate § 2057 in the year 2011 unless the repeal is made permanent.

Section 2031(c) of the Internal Revenue Code of 1986 provides an election whereby a portion of the value of land that is subject to a qualified conservation easement, as defined in § 2031(c)(8), is excluded from the gross estate. The exclusion does not apply to the value of a retained development right; but if, prior to the date for filing the estate tax return, all the persons who have an interest in the land execute an agreement to extinguish some or all of the development

rights, an additional estate tax deduction will be allowed by § 2031(c)(5). A failure to implement that agreement within a specified time will cause the imposition of an additional estate tax to recapture that deduction. The allocation of the benefits of the exclusion and of the deduction for making the agreement, and the allocation of any additional estate tax, is determined by this section.

The allocation of the aggregate tax reduction obtained from all special elective benefits is made among the holders of interests in the specified properties in accordance with the reduction of the decedent's taxable estate that is attributable to each holder's interest. Since the determination of the amount of estate tax benefit is made by applying the marginal rate of estate tax to the reduced value of the gross estate, it is necessary to aggregate the tax reduction obtained from all of the special election benefits so that the greater tax reduction obtained from using a marginal rate is not duplicated by applying that rate to several distinct reductions.

Once the amount of estate tax that is apportioned to the holder of an interest in specified property is determined, it will have to be paid. The holders of interests in a specified property may have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral provisions and pay the tax in installments with income produced by the property. If they were to sell the property, the special elective benefit would be lost; so a sale is not a viable option. Accordingly, the requirement of sections 15-12-1403 (2)(d), 15-12-1404 (1)(d), and 15-12-1406 (2) that the estate tax or an advanced tax be paid from the principal of property subject to a time-limited interest does not apply to properties for which an election for a special elective benefit is made. The solution chosen in section 15-12-1406 (3) and (5) of having other persons interested in the apportionable estate pay the tax and then collect reimbursement from distributees of the property is not practical here because there would be difficulty in determining what income was derived from the property itself, and there would be no trustee or other fiduciary to see that the amounts were turned over to the persons who paid the tax. So, that approach was not adopted. Instead, section 15-12-1404 and this section apportion the estate tax to the holders of the interests in the properties who, facing the obligation to pay, can determine the best method for obtaining the funds to make that payment.

If additional estate taxes are imposed to recapture some or all of a special elective benefit, this section follows the allocation of liability imposed by the estate tax law that generated the additional tax. The burden of the additional estate tax will be borne by the persons who hold interests in the specified property at the time that the additional tax payment is made, and those persons may not be the same ones who held the specified property when the special elective benefit was allowed and so derived the benefit of that election.

15-12-1408. Securing payment of estate tax from property in possession of fiduciary.

(1) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(2) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(3) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.

OFFICIAL COMMENT

This section grants a fiduciary discretion either to retain funds or to require a distributee to provide security for payment of that distributee's share of the estate tax. The fiduciary's exercise of that discretion and use of retained properties are subject to the fiduciary's duty to treat the parties fairly.

15-12-1409. Collection of estate tax by fiduciary.

(1) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by that person.

(2) Except as otherwise provided for in section 15-12-1406, any estate tax due from a person that cannot be collected from that person may be collected by the fiduciary from other persons in the following order of priority:

(a) A person having an interest in the apportionable estate that is not exonerated from the tax;

(b) Any other person having an interest in the apportionable estate; and

(c) A person having an interest in the gross estate.

(3) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(4) The total tax collected from a person pursuant to this part 14 may not exceed the value of that person's interest.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.

OFFICIAL COMMENT

If a fiduciary is unable to collect from a person the estate tax apportioned to that person or to be advanced by that person, the fiduciary is authorized to collect the deficiency from any person interested in the apportionable estate whose interest is not exonerated from tax apportionment. The fiduciary is not obliged to collect the deficiency ratably from such persons. At the fiduciary's discretion, the fiduciary is authorized to collect all of the deficiency from one person or from several persons in any proportion that the fiduciary chooses. The reason that the fiduciary is not required to collect a deficiency ratably is that the payment of the estate tax should not be delayed because of difficulties in collecting from a number of persons.

If the amount collected from persons whose interests in the apportionable estate is not exonerated from tax apportionment is insufficient to make up the deficiency, the fiduciary can then collect any remaining deficiency from persons interested in the apportionable estate whose interests are exonerated from tax apportionment. This class excludes persons holding interests in property that qualified for a marital or charitable deduction since those interests are excluded from the apportionable estate. Again, the fiduciary is not required to collect the remaining deficiency ratably from the persons holding exonerated interests.

Finally, if the amount collected from persons holding exonerated interests is insufficient, the fiduciary can collect the balance from persons holding interests that qualify for a marital or charitable deduction. The fiduciary is not required to make that collection ratably.

Anyone who pays more than his share of an estate tax or an advanced tax has a ratable right of reimbursement from those who did not pay their share. If requested, the fiduciary may assist in collecting that reimbursement.

15-12-1410. Right of reimbursement.

(1) A person required pursuant to section 15-12-1409 to pay an estate tax greater than the amount due from the person pursuant to sections 15-12-1403 and 15-12-1404 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by sections 15-12-1403 and 15-12-1404 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected pursuant to section 15-12-1409 (2).

(2) A fiduciary may enforce the right of reimbursement under subsection (1) of this section on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if so requested by the person.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 706, § 1, effective August 10.

OFFICIAL COMMENT

The Act does not include a provision for interest on the collection of a reimbursement, and the question of whether interest will be payable is left to the courts to decide.

15-12-1411. Action to determine or enforce part.

A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this part 14.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

15-12-1412. Uniformity of application and construction.

In applying and construing this part 14, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

15-12-1413. Severability.

If any provision of this part 14 or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part 14 that can be given effect without the invalid provision or application, and to this end the provisions of this part 14 are severable.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

15-12-1414. Delayed application.

(1) Sections 15-12-1403 to 15-12-1407 shall not apply to the estate of a decedent who dies on or within three years after August 10, 2011, nor to the estate of a decedent who dies more than three years after August 10, 2011, if the decedent continuously lacked testamentary capacity from the expiration of the three-year period after August 10, 2011, until the date of death.

(2) For the estate of a decedent who dies on or after August 10, 2011, to which sections 15-12-1403 to 15-12-1407 do not apply, estate taxes shall be apportioned pursuant to the law in effect immediately before August 10, 2011.

(3) The provisions of this part 14 may be adopted as applicable law in a governing instrument at any time on or after August 10, 2011. The provisions of this part 14 may be incorporated by reference, in whole or in part, into a governing instrument at any time.

Source: L. 2011: Entire part added, (SB 11-165), ch. 184, p. 707, § 1, effective August 10.

OFFICIAL COMMENT

Testamentary capacity was chosen as the standard for determining whether the preclusion for applying the Act's apportionment rules is extended beyond the statutory period despite the fact that a different standard is employed to determine whether a person has the capacity to execute non-testamentary instruments. Testamentary capacity is employed in the Act because it has a well established meaning and will provide a uniform standard. See Restatement (Third) of Property: Wills and Other Donative Transfers, Section 8.1 (2003).

PART 15

COLORADO UNIFORM ELECTRONIC WILLS ACT

15-12-1501 to 15-12-1511. (Repealed)

Source: L. 2021: Entire part added, (HB 21-1004), ch. 3, p. 7, § 1, effective January 21; entire part repealed, (SB 21-266), ch. 423, p. 2800, § 12, effective July 2.

Editor's note: (1) This part 15 was added in HB 21-1004 but was superseded by the repeal and relocation of this part in SB 21-266, effective July 2, 2021. For the text of this part 15 in

effect from January 21, 2021, to July 2, 2021, see chapter 3, Session Laws of Colorado 2021. (L. 2021, p. 7.)

(2) This part 15 was relocated to part 13 of article 11 of this title 15 in 2025.

ARTICLE 13

Ancillary Administration

PART 1
DEFINITIONS

15-13-101. Definitions.

PART 2
POWERS OF FOREIGN PERSONAL REPRESENTATIVES

15-13-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.

15-13-202. Payment or delivery discharges.

15-13-203. Resident creditor notice.

15-13-204. Proof of authority.

15-13-205. Powers.

15-13-206. Power of representatives in transition.

15-13-207. Ancillary and other local administrations - provisions governing.

PART 3
JURISDICTION OVER FOREIGN REPRESENTATIVES

15-13-301. Jurisdiction by act of foreign personal representative.

15-13-302. Jurisdiction by act of decedent.

15-13-303. Service on foreign personal representative.

PART 4
JUDGMENTS AND PERSONAL REPRESENTATIVE

15-13-401. Effect of adjudication for or against personal representative.

PART 1

DEFINITIONS

15-13-101. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in article 12 of this title.

(2) "Local personal representative" includes any personal representative appointed in this state pursuant to appointment proceedings described in article 12 of this title and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 15-13-205.

(3) "Resident creditor" means a person domiciled in, or doing business in, this state, who is, or could be, a claimant against an estate of a nonresident decedent.

Source: L. 73: R&RE, p. 1609, § 1. **C.R.S. 1963:** § 153-4-101.

PART 2

POWERS OF FOREIGN PERSONAL REPRESENTATIVES

15-13-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.

(1) At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of the representative's appointment, and an affidavit made by or on behalf of the representative stating:

(a) The date of the death of the nonresident decedent;

(b) That no local administration, or application or petition therefor, is pending in this state;

(c) That the domiciliary foreign personal representative is entitled to payment or delivery.

Source: L. 73: R&RE, p. 1609, § 1. **C.R.S. 1963:** § 153-4-201. **L. 2002:** IP(1) amended, p. 1360, § 11, effective July 1.

15-13-202. Payment or delivery discharges.

Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-202.

15-13-203. Resident creditor notice.

Payment or delivery under section 15-13-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-203.

15-13-204. Proof of authority.

If no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in this state, in a county in which property belonging to the decedent is located, authenticated copies of the appointment documents.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-204. **L. 87:** Entire section amended, p. 602, § 4, effective July 1. **L. 2006:** Entire section amended, p. 392, § 25, effective July 1.

15-13-205. Powers.

A domiciliary foreign personal representative who has complied with section 15-13-204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-205.

ANNOTATION

Annotator's note. Since § 15-13-205 is similar to repealed CSA, C. 176, § 141, relevant cases construing that provision have been included in the annotations to this section.

Inspection of corporation books not allowed until provisions of section complied with. Officers of a local corporation will not be compelled to allow an inspection of the corporation books by an administrator in another state, upon the estate of the owner of stock in such corporation, without having complied with the provisions of this section. Clark v. Tindolph, 67 Colo. 67, 185 P. 648 (1919).

Foreign personal representative who complies with § 15-13-204 may prosecute action without taking out appointment here. Executor to whom appointment has issued from the proper court of another state may, upon complying with § 15-13-204, prosecute an action in the courts of the state without taking out appointment here. Berkey v. Bd. of Comm'rs, 48 Colo. 104, 110 P. 197 (1910).

Foreign personal representative may amend petition to incorporate copies of appointment and bond. On the question of executor's legal capacity to sue, where the record shows that duly authenticated copies of his official bond and appointment issued out of the probate court of another state were filed with the clerk of the court in this state, in compliance with the preceding section, the proper practice is to incorporate copies of these documents in the body of the petition itself, and an executor should be allowed to so amend. Berkey v. Bd. of Comm'rs, 48 Colo. 104, 110 P. 197 (1910).

Substantial compliance is sufficient and defect may be cured at any time before hearing. Cordingly v. Kennedy, 239 F. 645 (8th Cir. 1917).

Foreign personal representative must file the appointment and a bond. The substance of this and the preceding section is that upon filing his appointment a foreign personal representative may prosecute or defend an action but the court shall not grant him authority to do so until he has filed the appointment and a bond. Where the question, therefore, is of plaintiff's "legal capacity to sue", this objection, if it appears on the face of the complaint should be taken by answer, and where the objection is not taken by answer, it is waived. Funk v. Funk, 76 Colo. 45, 230 P. 611 (1924).

15-13-206. Power of representatives in transition.

The power of a domiciliary foreign personal representative under section 15-13-201 or 15-13-205 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the

foreign personal representative to act under section 15-13-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-206.

15-13-207. Ancillary and other local administrations - provisions governing.

(1) In respect to a nonresident decedent, the provisions of article 12 of this title govern:

(a) Proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and

(b) The status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration.

Source: L. 73: R&RE, p. 1610, § 1. **C.R.S. 1963:** § 153-4-207.

PART 3

JURISDICTION OVER FOREIGN REPRESENTATIVES

15-13-301. Jurisdiction by act of foreign personal representative.

(1) A foreign personal representative submits personally to the jurisdiction of the courts of this state in any proceeding relating to the estate by:

(a) Filing authenticated copies of his appointment as provided in section 15-13-204;

(b) Receiving payment of money or taking delivery of personal property under section 15-13-201; or

(c) Doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual.

(2) Jurisdiction conferred by this section shall not include jurisdiction over the personal representative for matters unrelated to the estate for which he was acting when he submitted himself to the jurisdiction of the courts of this state by performing any of the acts enumerated in this section and, under paragraph (b) of subsection (1) of this section, is limited to the money or value of personal property collected.

Source: L. 73: R&RE, p. 1611, § 1. **C.R.S. 1963:** § 153-4-301. **L. 75:** IP(1) amended, p. 601, § 44, effective July 1.

15-13-302. Jurisdiction by act of decedent.

In addition to jurisdiction conferred by section 15-13-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

Source: L. 73: R&RE, p. 1611, § 1. **C.R.S. 1963:** § 153-4-302.

15-13-303. Service on foreign personal representative.

(1) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting and receiving a return receipt signed by addressee only. Notice by ordinary first-class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(2) If service is made upon a foreign personal representative as provided in subsection (1) of this section, he or she shall be allowed at least thirty-five days within which to appear or respond.

Source: L. 73: R&RE, p. 1611, § 1. **C.R.S. 1963:** § 153-4-303. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 839, § 47, effective July 1.

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVE

15-13-401. Effect of adjudication for or against personal representative.

An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

Source: L. 73: R&RE, p. 1611, § 1. **C.R.S. 1963:** § 153-4-401.

ARTICLE 14

Persons Under Disability - Protection

PART 1
GENERAL PROVISIONS

15-14-101. Short title.
15-14-102. Definitions.
15-14-103. Guardianship bill of rights.
15-14-104. Facility of transfer.
15-14-105. Delegation of power by parent or guardian.
15-14-106. Subject-matter jurisdiction.
15-14-107. Transfer of jurisdiction.
15-14-108. Venue.
15-14-109. Practice in court - consolidation of proceedings.
15-14-110. Letters of office.
15-14-111. Effect of acceptance of appointment.
15-14-112. Termination of or change in guardian's or conservator's appointment.
15-14-113. Notice.
15-14-113.5. Appointments without notice - investigation - report - procedures.
15-14-114. Waiver of notice.
15-14-115. Guardian ad litem.
15-14-116. Request for notice - interested persons.
15-14-117. Multiple appointments or nominations.
15-14-118. Small estate - person under disability - no personal representative.
15-14-119. Notice to public institutions on appointment of guardian or conservator.

15-14-120. Uniform veterans' guardianship act not affected.

15-14-121. Uniformity of application and construction.

15-14-122. Severability clause.

PART 2
GUARDIANSHIP OF MINOR

15-14-201. Appointment and status of guardian.

15-14-202. Testamentary appointment of guardian - appointment by written instrument.

15-14-203. Objection of others to parental appointment - consent by minor of twelve years of age or older to appointment of guardian.

15-14-204. Judicial appointment of guardian - conditions for appointment - definition.

15-14-205. Judicial appointment of guardian - procedure.

15-14-206. Judicial appointment of guardian - priority of minor's nominee - limited guardianship.

15-14-207. Duties of guardian.

15-14-208. Powers of guardian.

15-14-209. Rights and immunities of a guardian.

15-14-210. Termination of guardianship - other proceedings after appointment.

PART 3
GUARDIANSHIP OF INCAPACITATED PERSON

15-14-301. Appointment and status of guardian.

15-14-302. (Reserved)

15-14-303. (Reserved)

15-14-304. Judicial appointment of guardian - petition.

15-14-305. Preliminaries to hearing.

15-14-306. Professional evaluation.

15-14-307. (Reserved)

15-14-308. Presence and rights at hearing.

15-14-309. Notice.

15-14-310. Who may be guardian - priorities - prohibition of dual roles.

15-14-311. Findings - order of appointment.

15-14-312. Emergency guardian.

15-14-313. Temporary substitute guardian.

15-14-314. Duties of guardian.

15-14-315. Powers of guardian.

15-14-315.5. Dissolution of marriage and legal separation.

15-14-316. Rights and immunities of guardian - limitations.

15-14-317. Reports - monitoring of guardianship - court access to records.

15-14-318. Termination or modification of guardianship - resignation or removal of guardian.

15-14-319. Right to a lawyer post-adjudication.

PART 4
PROTECTION OF PROPERTY OF PROTECTED PERSON

15-14-401. Protective proceeding.

15-14-402. Jurisdiction over business affairs of protected person.

15-14-403. Original petition for appointment or protective order.

15-14-404. Notice.

15-14-405. Original petition - minors - preliminaries to hearing.

15-14-406. Original petition - persons under disability - preliminaries to hearing.

15-14-406.5. Professional evaluation.

15-14-407. (Reserved)

15-14-408. Original petition - procedure at hearing.

15-14-409. Original petition - orders.

15-14-410. Powers of court.

15-14-411. Required court approval.

15-14-412. Protective arrangements and single transactions.

15-14-412.5. Limited court-approved arrangements authorized for persons seeking medical assistance for nursing home care - applicable to trusts established before a certain date.

15-14-412.6. Trust established by an individual - eligibility for certain public assistance programs - general provisions.

15-14-412.7. Income trusts - limitations.

15-14-412.8. Disability trusts - limitations.

15-14-412.9. Pooled trusts - limitations.

15-14-413. Who may be conservator - priorities - prohibition of dual roles.

15-14-414. Petition for order subsequent to appointment.

15-14-415. Bond.

15-14-416. Terms and requirements of bond.

15-14-417. Compensation, fees, costs, and expenses of administration - expenses. (Repealed)

15-14-418. General duties of conservator - financial plan.

15-14-419. Inventory.

15-14-420. Reports - appointment of monitor - monitoring - records - court access to records.

15-14-421. Title by appointment.

15-14-422. Protected person's interest inalienable.

15-14-423. Sale, encumbrance, or other transaction involving conflict of interest.

15-14-424. Protection of person dealing with conservator.

15-14-425. Powers of conservator in administration.

15-14-425.5. Authority to petition for dissolution of marriage or legal separation.

15-14-426. Delegation.

15-14-427. Principles of distribution by conservator.

15-14-428. Death of protected person.

15-14-429. Presentation and allowance of claims.

15-14-430. Personal liability of conservator.

15-14-431. Termination of proceedings.

15-14-432. Payment of debt and delivery of property to foreign conservator without local proceeding.

15-14-433. Foreign conservator - proof of authority - bond - powers.

15-14-434. Right to a lawyer post-adjudication.

PART 5
POWERS OF ATTORNEY

15-14-500.3. Legislative declaration.

15-14-500.5. Definitions - excluded powers.

15-14-501. When power of attorney not affected by disability.

15-14-502. Other powers of attorney not revoked until notice of death or disability.

15-14-503. Short title.

15-14-504. Legislative declaration - construction of statute.

15-14-505. Definitions.

15-14-506. Medical durable power of attorney.

15-14-507. Transfer of principal.

15-14-508. Immunities.

15-14-509. Interstate effect of medical durable power of attorney.

PART 6
POWER OF ATTORNEY

15-14-601. Legislative declaration. (Repealed)

15-14-602. Definitions.

15-14-603. Applicability.

15-14-604. Duration of agency - amendment and

revocation - resignation of agent.

15-14-605. Dissolution of marriage. (Repealed)

15-14-606. Duty - standard of care - record keeping - exoneration.

15-14-607. Reliance on an agency instrument.

15-14-608. Preservation of estate plan and trusts. (Repealed)

15-14-609. Agency - court relationship. (Repealed)

15-14-610. Statutory form agent's affidavit regarding power of attorney. (Repealed)

15-14-611. Applicability of part.

PART 7
UNIFORM POWER OF ATTORNEY ACT

SUBPART 1
GENERAL PROVISIONS

15-14-701. Short title.

15-14-702. Definitions.

15-14-703. Applicability.

15-14-704. Power of attorney is durable.

15-14-705. Execution of power of attorney.

15-14-706. Validity of power of attorney.

15-14-707. Meaning and effect of power of attorney.

15-14-708. Nomination of conservator or guardian - relation of agent to court-appointed fiduciary.

15-14-709. When power of attorney effective.

15-14-710. Termination of power of attorney or agent's authority.

15-14-711. Coagents and successor agents.

15-14-712. Reimbursement and compensation of agent.

15-14-713. Agent's acceptance.

15-14-714. Agent's duties.

15-14-715. Exoneration of agent.

15-14-716. Judicial relief.

15-14-717. Agent's liability.

15-14-718. Agent's resignation - notice.

15-14-719. Acceptance of and reliance upon acknowledged power of attorney.

15-14-720. Liability for refusal to accept acknowledged power of attorney.

15-14-721. Principles of law and equity.

15-14-722. Laws applicable to financial institutions and entities.

15-14-723. Remedies under other law.

SUBPART 2
AUTHORITY

15-14-724. Authority that requires specific grant - grant of general authority.

15-14-725. Incorporation of authority - incorporation by reference.

15-14-726. Construction of authority generally.

15-14-727. Real property.

15-14-728. Tangible personal property.

15-14-729. Stocks and bonds.

15-14-730. Commodities and options.

15-14-731. Banks and other financial institutions.

15-14-732. Operation of entity or business.

15-14-733. Insurance and annuities.

15-14-734. Estates, trusts, and other beneficial interests.

15-14-735. Claims and litigation.

15-14-736. Personal and family maintenance.

15-14-737. Benefits from governmental programs or civil or military service.

15-14-738. Retirement plans.

15-14-739. Taxes.

15-14-740. Gifts.

SUBPART 3
STATUTORY FORMS

15-14-741. Statutory form - power of attorney.

15-14-742. Certification.

SUBPART 4
MISCELLANEOUS PROVISIONS

15-14-743. Uniformity of application and construction.

15-14-744. Relation to "Electronic Signatures in Global and National Commerce Act".

15-14-745. Effect on existing powers of attorney.

PART 8
SUPPORTED DECISION-MAKING AGREEMENTS FOR ADULTS WITH A DISABILITY

15-14-801. Legislative declaration.

15-14-802. Definitions.

15-14-803. Supported decision-making agreement - term.

15-14-804. Access to personal information.

15-14-805. Agreement requirements - signature - witnesses or notary public.

15-14-806. Reliance on agreement - limitation of liability.

PART 1

GENERAL PROVISIONS

Editor's note: Section 15-17-103 provides that parts 1 to 4 of this article, as repealed and reenacted effective January 1, 2001, apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after January 1, 2001.

Law reviews: For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986); for article, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency", see 19 Colo. Law. 1813 (1990); for article, "Protecting a Disabled Client in a Dissolution of Marriage Action", see 24 Colo. Law. 795 (1995); for article, "Highlights of Colorado's New Guardianship and Conservatorship Laws", see 30 Colo. Law. 5 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I", see 30 Colo. Law. 43 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (Feb. 2001); for article, "Examination of Selected Provisions of Colorado's Uniform Guardianship and Protective Proceedings Act", see 31 Colo. Law. 71 (Sept. 2002); for article, "Crisis Intervention to Prevent Elder Abuse: Emergency Guardianships and Other Legal Procedures" see 33 Colo. Law. 91 (July 2004); for article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (Feb. 2007); for article, "Practical Solutions to Elder Financial Abuse and Fiduciary Theft", see 41 Colo. Law. 61 (Dec. 2012).

15-14-101. Short title.

Parts 1 to 4 of this article may be cited as the "Colorado Uniform Guardianship and Protective Proceedings Act".

Source: L. 2000: Entire part R&RE, p. 1778, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

The trial court has a broad discretion in all matters relating to protected persons, which is exclusive. Sweeney v. Summers, 194 Colo. 149, 571 P.2d 1067 (1977) (decided prior to 2000 repeal and reenactment).

This section does not create an exception for a "protected person" within the definition of "incapacitated person". A person who is an "incapacitated person" under this section, and thus ineligible to elect to receive a lump sum damage award

payment under § 13-64-205 (1)(f) of the Health Care Availability Act, is not entitled to such election merely because the incapacitated person also is a "protected person". Rather, this section and the sections that follow, when read as a whole, provide that protected persons are necessarily incapacitated for purposes of § 13-64-205 (1)(f). Rodriguez ex rel. Rodriguez v. Healthone, 24 P.3d 9 (Colo. App. 2000), rev'd on other grounds, 50 P.3d 879 (Colo. 2002).

15-14-102. Definitions.

In parts 1 to 4 of this article 14:

(1) "Claim", with respect to a protected person, includes a claim against an individual, whether arising in contract, tort, or otherwise, and a claim against an estate which arises at or after the appointment of a conservator, including expenses of administration.

(2) "Conservator" means a person at least twenty-one years of age, resident or non-resident, who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

(3) "Court" means the court or division thereof having jurisdiction in matters relating to the affairs of decedents and protected persons. This court is the district court, except in the city and county of Denver where it is the probate court.

(4) "Guardian" means an individual at least twenty-one years of age, resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

(5) "Incapacitated person" means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

(6) "Legal representative" includes a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, or an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

(7) "Letters" includes letters of guardianship or letters of conservatorship.

(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.

(8) "Minor" means an unemancipated individual who has not attained eighteen years of age; except that in proceedings pursuant to section 15-14-204 (2.5) only, "minor" means an unmarried individual who has not attained twenty-one years of age.

(9) "Parent" means a parent whose parental rights have not been terminated.

(10) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10.5) "Post-adjudication" means after appointment of a permanent guardian or special or permanent conservator after a hearing for which a respondent was provided notice pursuant to section 15-14-309 or section 15-14-404, or both, and at which the respondent had an opportunity to present evidence and be heard.

(11) "Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(12) "Respondent" means an individual for whom the appointment of a guardian or conservator or other protective order is sought.

(13) "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.

(13.5) "Supported decision-making" means the way an adult 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.

(14) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Ward" means an individual for whom a guardian has been appointed.

Source: L. 2000: Entire part R&RE, p. 1778, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2016:** (10.5) added, (SB 16-131), ch. 286, p. 1165, § 2, effective August 10. **L. 2019:** IP and (8) amended, (HB 19-1042), ch. 55, p. 192, § 1, effective March 28. **L. 2020:** (7.5) and (13.5) added, (SB 20-129), ch. 270, p. 1315, § 1, effective September 1.

Editor's note: This section is similar to former § 15-14-101 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003). For article, "How to Reconcile Advance Care Directives With Attempted Suicide", see 42 Colo. Law. 97 (July 2013).

Government entity may serve as a guardian. Although subsection (4) provides that "guardian" means "an individual", the guardianship provisions as a whole lead to the conclusion that the probate court as a government entity may serve as a guardian. In re J.C.T., 176 P.3d 726 (Colo. 2007).

15-14-103. Guardianship bill of rights.

(1) A ward has the right to:

(a) Be treated with dignity and respect;

(b) Be free from abuse, neglect, exploitation, and discrimination;

(c) Remain as independent as possible;

(d) Express and practice their own religious preferences;

(e) Personal privacy;

(f) Humane, safe, and sanitary living, learning, and working environments;

(g) Sexual expression and respect for their gender identity;

(h) A competent guardian who advocates for their goals, needs, and preferences and prioritizes their desires, including medical treatment preferences, cultural practices, and religious beliefs;

(i) Participate, to the extent possible, in all decisions, especially those affecting their care, where they live, their activities, and their social interactions, to the extent they wish to be involved and are able to be involved;

(j) Receive necessary services and rehabilitation, within available resources, that protect their personal liberty and are provided with the least restrictive conditions;

(k) Prudent management of their resources by their guardian;

(l) Participate, to the extent possible, in decisions about how their property is managed, to the extent they wish to be involved and are able to be involved;

(m) Confidentiality for those matters that they wish to keep confidential, unless the information is necessary to obtain services; to prevent abuse, neglect, or exploitation; or to modify the guardianship order or other orders entered pursuant to this article 14 or article 14.5 of this title 15;

(n) Maintain all rights that the court has not granted to their guardian;

(o) A lawyer who advocates for the outcome the ward wants;

(p) Be present and participate in all court hearings;

(q) Share concerns or complaints about their guardianship with the court;

(r) Ask the court to review the need for their guardianship to change, continue, or end and whether their guardian is an appropriate fit for them;

(s) If a question arises about their capacity to exercise a specific right, have a court review and determine if an evaluation is necessary in order to determine their capacity to exercise the right;

(t) The support and accommodations they need to be able to effectively communicate with the court and to understand the court proceedings; and

(u) Have their rights explained to them in their preferred method of communication and in the language they choose.

(2) The court may authorize a guardian to make decisions for the following rights on behalf of the ward:

(a) To determine the ward's social environment and the social aspects of their personal life;

(b) To file and defend lawsuits;

(c) To make contracts;

(d) To make gifts of the ward's money; and

(e) To manage the ward's money and property.

(3) The ward retains the right to vote, to maintain their reproductive health and ability to procreate, and to change their marital status, unless the court restricts those rights by stating the

restrictions and the relevant findings to support the restrictions in the order appointing the guardian.

(4) Nothing in this section alters, limits, or affects the court's authority or the standards and procedures for appointing a guardian, determining the scope of guardianship, or modifying or terminating a guardianship pursuant to this article 14 or article 14.5 of this title 15. The rights set forth in this section are subject to any limitations imposed by court order.

(5) This section does not create a new cause of action or affect any existing cause of action or remedy available to a ward.

Source: L. 2026: Entire section added, (HB 26-1100), ch. 227, p. 1318, § 1, effective August 12.

15-14-104. Facility of transfer.

(1) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding ten thousand dollars a year or the then current annual gift tax exclusion as stated in the internal revenue code, whichever is greater, by transferring it to:

(a) A person who has the care and custody of the minor and with whom the minor resides;

(b) A guardian of the minor;

(c) A custodian under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., or a custodial trustee under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; or

(d) A financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(2) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(3) A guardian or other person who receives money or property for a minor under paragraph (a) of subsection (1) of this section or subsection (2) of this section may only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor, and any balance must be transferred to the minor upon emancipation or attaining majority with an accounting of all income and disbursements.

Source: L. 2000: Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-103 as it existed prior to 2001.

15-14-105. Delegation of power by parent or guardian.

A parent or guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding twelve months, any power regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

Source: L. 2000: Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-104 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (Nov. 2000).

15-14-106. Subject-matter jurisdiction.

(1) Except as provided in subsection (2) of this section, parts 1 to 4 of this article apply to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this state, protective proceedings for individuals domiciled in or having property located in this state, and property coming into the control of a guardian or conservator who is subject to the laws of this state. Such jurisdiction is subject to the provisions of section 19-1-104 (4) and (5), C.R.S., with respect to guardianships for children under the "Colorado Children's Code".

(2) In matters concerning adults, article 14.5 of this title shall apply and shall supersede the terms of subsection (1) of this section.

Source: L. 2000: Entire part R&RE, p. 1780, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** Entire section amended, p. 797, § 2, effective May 14.

Editor's note: This section is similar to former § 15-14-102 as it existed prior to 2001.

15-14-107. Transfer of jurisdiction.

(1) After the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another county in this state or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(2) (a) Except as provided in paragraph (b) of this subsection (2), if a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this state, the court in this state shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(b) In matters concerning adults, the provisions of article 14.5 of this title shall apply.

(3) (a) Except as provided in paragraph (b) of this subsection (3), a guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this state if venue in this state is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this state. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained twelve years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under parts 1 to 4 of this article were applicable. The court shall make the appointment in this state unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within ten days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained twelve years of age, and to all persons given notice of the hearing on the petition.

(b) In matters concerning adults, the provisions of article 14.5 of this title shall apply.

Source: L. 2000: Entire part R&RE, p. 1781, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (2) and (3) amended, p. 797, § 3, effective May 14.

ANNOTATION

Law reviews. For article, "Multi-State Issues When Appointing Guardians for Minors", see 43 Colo. Law. 65 (Nov. 2014).

15-14-108. Venue.

(1) Venue for a guardianship proceeding for a minor is in the county of this state in which the minor resides or is present at the time the proceeding is commenced.

(2) Venue for a guardianship proceeding for an incapacitated person is in the county of this state in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the county in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the county in which the respondent is present.

(3) Venue for a protective proceeding is in the county of this state in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this state, in any county of this state in which property of the respondent is located.

(4) If a proceeding under parts 1 to 4 of this article is brought in more than one county in this state, the court of the county in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

Source: L. 2000: Entire part R&RE, p. 1781, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-109. Practice in court - consolidation of proceedings.

(1) Except as otherwise provided in parts 1 to 4 of this article, the rules of civil procedure and the Colorado rules of probate procedure, including the rules concerning appellate review, govern proceedings under parts 1 to 4 of this article.

(2) If guardianship and protective proceedings as to the same individual are commenced or pending in the same court, the proceedings may be consolidated.

Source: L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-110. Letters of office.

(1) A nominee for guardian, emergency guardian, conservator, or special conservator shall file an acceptance of office with the court. The acceptance of office shall be signed by the nominee and, except as otherwise provided in this section, shall include a statement by the nominee informing the court of the following:

(a) Whether the nominee has been convicted of, pled nolo contendere to, or received a deferred sentence for a felony or misdemeanor, and, if so, the name of the state and court issuing the order;

(b) Whether a temporary civil protection or restraining order or a permanent civil protection or restraining order has been issued against the nominee in the state of Colorado or another state at any time;

(c) Whether a civil judgment has been entered against the nominee, and, if so, the name of the state and court granting the judgment;

(d) Whether the nominee has been relieved of any court-appointed responsibilities, and, if so, the name of the court relieving the nominee; and

(e) That the nominee acknowledges and understands that if the nominee fails to file required reports with the court or fails to respond to an order of the court to show cause why the nominee should not be held in contempt of court, Colorado law authorizes the court to access data and records of state agencies in order to obtain contact information, as defined in sections 15-14-317 (4)(c) and 15-14-420 (6)(c).

(2) (a) In support of the statement set forth in the acceptance of office pursuant to subsection (1) of this section, the nominee for guardian, conservator, emergency guardian, or special conservator shall:

(I) Obtain and attach to the acceptance of office a name-based criminal history record check through the Colorado bureau of investigation. The nominee shall be responsible for the cost of the name-based criminal history record checks.

(II) Obtain and attach to the acceptance of office a current credit report of the nominee paid for by the nominee; and

(III) Verify the acceptance of office under penalty of perjury, stating that, to the best of his or her knowledge or belief, the statements in the acceptance of office and attached documentation are accurate and complete.

(b) The court may, in its discretion, waive any or all of the requirements of paragraph (a) of this subsection (2) for good cause shown when making an emergency appointment of a guardian pursuant to section 15-14-204 or 15-14-312, or when making an appointment of a special conservator pursuant to sections 15-14-405, 15-14-406, and 15-14-412.

(3) After a hearing, the court shall issue appropriate letters of guardianship or emergency guardianship if it finds, upon review of the acceptance of office, that the nominee is appropriate for the office. Letters of guardianship shall indicate whether the guardian was appointed by the court or a parent. After a hearing and the filing of any required bond, the court shall issue appropriate letters of conservatorship or special conservatorship if it finds, upon review of the acceptance of office, that the nominee is appropriate for the office. Any limitation on the powers of a guardian, emergency guardian, conservator, or special conservator or of the assets subject to a conservatorship shall be endorsed on the guardian's or conservator's letters.

(4) The specifications required pursuant to paragraphs (a) to (d) of subsection (1) of this section and the requirements of subsection (2) of this section shall not apply to the following nominees:

(a) A public administrator nominated as a guardian or conservator;

(b) A trust company nominated as a guardian or conservator;

(c) A bank nominated as a guardian or conservator;

(d) A credit union, savings and loan, or other financial institution nominated as a guardian or conservator pursuant to state law;

(e) A state or county agency nominated as a guardian or conservator pursuant to state law;

(f) A parent residing with his or her child who is nominated as a guardian or conservator of his or her child; and

(g) Any other person or entity for whom the court, for good cause shown, determines that the requirements shall not apply.

(5) (a) Nothing in this section shall be construed to prohibit the court from requiring a nominee to obtain additional background information as the court deems necessary to assist the court in determining the fitness of the nominee for the appointment sought by the nominee, including requiring a nominee to obtain fingerprint-based criminal history record checks through the Colorado bureau of investigation and the federal bureau of investigation. If the court requires a nominee to submit fingerprint-based criminal history record checks, the nominee shall be responsible for providing a complete set of fingerprints to the Colorado bureau of investigation and for obtaining the fingerprint-based criminal history record checks and presenting them with the acceptance of office. The nominee shall also be responsible for the cost of the fingerprint-based criminal history record checks.

(b) When the results of a fingerprint-based criminal history record check of an applicant performed pursuant to this subsection (5) reveal a record of arrest without a disposition, the court shall require that nominee to submit to a name-based judicial record check, as defined in section

22-2-119.3 (6)(d). The applicant is responsible for the cost of the name-based judicial record check.

Source: L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2005:** Entire section amended, p. 1046, § 1, effective June 3. **L. 2012:** (1) amended, (HB 12-1074), ch. 46, p. 169, § 3, effective March 22. **L. 2019:** (5) amended, (HB 19-1166), ch. 125, p. 544, § 19, effective April 18. **L. 2022:** (5)(b) amended, (HB 22-1270), ch. 114, p. 518, § 20, effective April 21.

ANNOTATION

Court lacked statutory authority to appoint an unwilling guardian. When a person, including a state agency, objects to being appointed as guardian of an incapacitated person, a court has no authority to order the person to become a guardian over the person's objection. There is no indication the general assembly intended to empower courts to order state agencies to serve as guardians. In re Estate of Morgan, 160 P.3d 356 (Colo. App. 2007).

15-14-111. Effect of acceptance of appointment.

By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship.

Source: L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Section permits probate court to exercise personal jurisdiction over conservator in any matter related to the conservatorship. Actions before the probate court involving conservator's diversion of conservatorship assets to trusts for which he served as trustee and later his attempt to defeat the conservatorship's efforts to recover those assets were proceedings relating to the conservatorship, so conservator personally submitted to the court's jurisdiction in his capacity as a conservator, individually, and as a trustee of the trusts. Black v. Black, 2020 COA 64M, 482 P.3d 460.

Application of section to nonresident conservator does not violate federal and state rights to due process. Black v. Black, 2020 COA 64M, 482 P.3d 460.

15-14-112. Termination of or change in guardian's or conservator's appointment.

(1) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by the court. A parental appointment as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination of the appointment of a guardian or conservator without a decree of discharge does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(2) A guardian or conservator may petition for permission to resign. A petition for removal of a guardian or conservator shall be governed by the provisions of section 15-10-503. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(3) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than thirty days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever occurs last. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

Source: L. 2000: Entire part R&RE, p. 1782, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (2) amended, p. 484, § 9, effective July 1.

ANNOTATION

Before acting as a successor guardian, a nominee must file an "acceptance of office" and submit to the court any and all associated information required by law. The requirement that a person nominated to be guardian file an acceptance of appointment is not satisfied by filing guardian reports. Actarus, LLC v. Johnson, 2019 COA 122, 451 P.3d 1270.

The probate code displaced the common law to the extent that it would allow for the recognition of a "de facto guardian" by establishing procedures for filling a vacancy in the office of guardian.

Actarus, LLC v. Johnson, 2019 COA 122, 451 P.3d 1270.

15-14-113. Notice.

(1) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with Colorado rules of probate procedure, at least fourteen days before the hearing.

(2) Proof of notice must be made before or at the hearing and filed in the proceeding.

(3) A notice under parts 1 to 4 of this article must be given in plain language.

Source: L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 839, § 48, effective July 1.

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.

Source: L. 2020: Entire section added, (SB 20-129), ch. 270, p. 1316, § 2, effective September 1.

15-14-114. Waiver of notice.

A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding in accordance with Colorado rules of probate procedure. However, a respondent, ward, or protected person may not waive notice.

Source: L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-115. Guardian ad litem.

At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

Source: L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Law reviews. For article, "Guardians ad Litem — Part 1: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 30 (July 2022). For article, "Guardians ad Litem — Part 2: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 40 (Aug.-Sept. 2022).

15-14-116. Request for notice - interested persons.

An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending in accordance with Colorado rules of probate procedure. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

Source: L. 2000: Entire part R&RE, p. 1783, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-117. Multiple appointments or nominations.

If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

Source: L. 2000: Entire part R&RE, p. 1784, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-118. Small estate - person under disability - no personal representative.

(1) Any interested person may file a verified petition for the distribution without administration of the estate of a person under disability under the provisions of this section.

(2) The petition must state, so far as known to petitioner:

(a) The name, date of birth, county, and state of residence of the person under disability;

(b) If the person under disability is a nonresident of the state, that he or she has a chose in action or other personal property within the county which must be conserved and has no guardian or conservator determined to be appointed by any court;

(c) The date upon which and the court by which the person under disability was adjudged as having a behavioral or mental health disorder, an intellectual and developmental disability, or other incapacitating disability;

(d) The description and value of each chose in action or other personal property owned by the person under disability and subject to administration as a part of his or her estate;

(e) The name, address, relationship, and date of birth, if a minor, of each person who would inherit the estate of the person under disability if the person under disability were then deceased;

(f) The name and address of each person who would have a claim against the estate if the estate were to be administered and the amount of any such claim;

(g) The name and address of any person or institution having the care and custody of the person under disability and the post-office address of the person under disability.

(3) The court may hear such petition without notice or upon such notice as the court may direct.

(4) If the court finds that the total personal estate of the person under disability subject to administration is ten thousand dollars, or less, that no conservator for the estate has been appointed, and that no useful purpose would be served by the appointment of a conservator, the court may order the personal estate be distributed without the appointment of a conservator as provided in this section.

(5) The court shall direct the distribution of said personal estate as the court finds the estate would be distributed in case of administration, the claimants being first paid in the order of the class of their claims. The court may order the distribution of any surplus to the person under disability, to the guardian or conservator of person under disability, if the court has appointed a guardian or conservator or to the next friend appointed by the court, or as otherwise provided by law for the distribution of property to persons under legal disability. If distribution to a next friend is ordered, the court, in its order, may attach such conditions regarding bond, reports to the court, and otherwise as it may deem proper.

(6) The order of court shall constitute sufficient legal authority to any person owing any money, having custody of any property, or acting as a registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the persons described in the order as entitled to receive the estate without administration.

(7) Anytime within thirty-five days after the making of an order pursuant to this section, any person interested in the estate may file a petition to revoke the same, alleging that other personal property was not included in the petition or that the property described in the petition was improperly valued, and that if said property were added, included, or properly valued as the case may be, the total value of the personal property would exceed ten thousand dollars, or that the order ordered money paid or property distributed to a person not entitled thereto. Upon proof of any such grounds, the court shall revoke the order and enter a more appropriate order, but the revocation or modification of such order shall not impose any liability upon any person who, in reliance upon such order, in good faith, for value, and without notice, paid money or delivered property, or impair the rights of any person who, in reliance on such order, in good faith, for value, and without notice, purchased property or acquired a lien on property.

(8) If a next friend shall be named to enter into the settlement of a claim of a person under disability against another person for personal injury to the person under disability or for injury to his or her property and the entire net value of the personal estate of the person under disability, including the proposed settlement, after providing for expenses of settlement, is ten thousand dollars or less, such proceeding for approval of the settlement by the court may be had in connection with the petition for the disposition of the estate of the person under disability, including the proceeds of the settlement, under this section, and the court may proceed with the settlement as though a legal guardian or conservator had been appointed and may distribute the net proceeds of the settlement under the provisions of this section. The next friend named may

execute releases with the same effect as though they had been executed by a duly appointed legal guardian or conservator.

(9) For purposes of this section, "person under disability" means a person for whom a protective proceeding could be instituted.

Source: L. 2000: Entire part R&RE, p. 1784, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (2)(c) amended, p. 1397, § 40, effective August 7. **L. 2012:** (7) amended, (SB 12-175), ch. 208, p. 839, § 49, effective July 1. **L. 2017:** IP(2) and (2)(c) amended, (HB 17-1046), ch. 50, p. 157, § 8, effective March 16; (2)(c) amended, (SB 17-242), ch. 263, p. 1296, § 116, effective May 25.

Editor's note: This section is similar to former § 15-14-107 as it existed prior to 2001.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

ANNOTATION

Law reviews. For article, "Colorado Small Estate Law", see 23 Dicta 223 (1946). For article, "The Inventory and Final Report", see 27 Dicta 291 (1950). For article, "Trusts and Estates", see 30 Dicta 435 (1953). For article, "Administration of Testate Estates", see 29 Rocky Mt. L. Rev. 557 (1957). For note, "Settling the Personal Injury Claim of a Minor", see 38 U. Colo. L. Rev. 377 (1966).

Distribution under this statute is authorized only in those cases where "no useful purpose would be served by the appointment of a personal representative". This statute does not provide an alternative procedure which may be substituted for the appointment of a personal representative for a decedent who at the time of his death is engaged in litigation which should be continued. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972) (decided under repealed 153-7-4, C.R.S. 1963).

Son may bring action on behalf of his incompetent father by proceeding as his next friend although son had not been appointed guardian. Delsas ex rel. Delsas v. Centex Home Equity, 186 P.3d 141 (Colo. App. 2008).

15-14-119. Notice to public institutions on appointment of guardian or conservator.

When any court shall appoint a conservator of the estate of a protected person or a guardian of an incapacitated person committed to or residing in any public institution of this state, the court shall notify the superintendent or chief administrative officer of said public institution or, if unknown, the executive director of the department of human services in writing of the fact of such appointment, giving the name and address of the conservator or guardian.

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-106 as it existed prior to 2001.

15-14-120. Uniform veterans' guardianship act not affected.

If any of the provisions of parts 1 to 4 of this article are inconsistent with the provisions of part 2 of article 5 of title 28, C.R.S., known as the "Uniform Veterans' Guardianship Act", the provisions of that act shall prevail with respect to funds or proceedings subject thereto.

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-105 as it existed prior to 2001.

15-14-121. 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.

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-122. Severability clause.

If any provision of parts 1 to 4 of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of parts 1 to 4 of

this article which can be given effect without the invalid provision or application, and to this end the provisions of parts 1 to 4 of this article are severable.

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103).

PART 2

GUARDIANSHIP OF MINOR

Editor's note: Section 15-17-103 provides that parts 1 to 4 of this article, as repealed and reenacted effective January 1, 2001, apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after January 1, 2001.

Law reviews: For article, "Age Requirements in Colorado: A Guide for Estate Planners", see 34 Colo. Law. 87 (Aug. 2005); for article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (Feb. 2007); for article, "Multi-State Issues When Appointing Guardians for Minors", see 43 Colo. Law. 65 (Nov. 2014); for article, "State Court Orders Supporting Special Immigrant Juvenile Status", see 45 Colo. Law. 45 (June 2016).

15-14-201. Appointment and status of guardian.

A person becomes a guardian of a minor by appointment by a parent or guardian by will or written instrument or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or minor ward.

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 290, § 8, effective January 1, 2001.

Editor's note: This section is similar to former § 15-14-201 as it existed prior to 2001.

15-14-202. Testamentary appointment of guardian - appointment by written instrument.

(1) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. A guardian may also be appointed by will or other

signed writing by a guardian of a minor child. The appointment may specify the desired limitations on the powers to be given to the guardian. A guardian may not appoint a surviving parent who has no parental rights to be a successor guardian. The appointing parent or guardian may revoke or amend the appointment before confirmation by the court.

(2) Upon petition of an appointing parent or guardian and a finding that the appointing parent or guardian will likely become unable to care for the child within two years, and after notice as provided in section 15-14-205 (1), the court, before the appointment becomes effective, may confirm the selection of a guardian by a parent or guardian and terminate the rights of others to object. If the minor has attained twelve years of age, the minor must consent to the appointment of a guardian pursuant to section 15-14-203 (2).

(3) Subject to section 15-14-203, the appointment of a guardian becomes effective upon the death of the appointing parent or guardian, an adjudication that the parent or guardian is an incapacitated person, or a written determination by a physician who has examined the parent or guardian that the parent or guardian is no longer able to care for the child, whichever occurs first.

(4) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within thirty days after the guardian's appointment becomes effective. The guardian shall:

(a) File the acceptance of appointment and a copy of the will with the court of the county in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court of the county in which the minor resides or is present; and

(b) Give written notice of the acceptance of appointment to the appointing parent or guardian, if living, the minor, if the minor has attained twelve years of age, and a person other than the parent or guardian having care and custody of the minor.

(5) Unless the appointment was previously confirmed by the court, the notice given under paragraph (b) of subsection (4) of this section must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in section 15-14-203 (1) and of the right of a minor who has attained twelve years of age to refuse to consent to the appointment of the guardian as provided in section 15-14-203 (2).

(6) Unless the appointment was previously confirmed by the court, within thirty days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in section 15-14-205 (1).

(7) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. If a guardian survives the death or adjudication of incapacity of both parents, an appointment by the last parent or guardian

who died or was adjudged incapacitated has priority. An appointment by a parent or guardian which is effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(8) The powers of a guardian who complies timely with the requirements of subsections (4) and (6) of this section relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(9) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to section 15-14-203 (1) or of the refusal of a minor child who has attained the age of twelve years to consent pursuant to section 15-14-203 (2).

Source: L. 2000: Entire part R&RE, p. 1786, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 291, § 9, effective January 1, 2001. **L. 2009:** (1) amended, (HB 09-1241), ch. 169, p. 762, § 18, effective April 22.

Editor's note: This section is similar to former § 15-14-202 as it existed prior to 2001.

ANNOTATION

Law reviews. For note, "Appointment of a Guardian by Will", see 34 Rocky Mt. L. Rev. 200 (1962). For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (Nov. 2000). For article, "Issues for the Elderly and Disabled Client—Part II: Estate and Health Care Planning", see 30 Colo. Law. 5 (Mar. 2001).

15-14-203. Objection of others to parental appointment - consent by minor of twelve years of age or older to appointment of guardian.

(1) Until the court has confirmed an appointee under section 15-14-202, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial appointment of the person selected by the parent or guardian. The court may treat the filing of an objection or the

refusal of the minor to consent as a petition for the appointment of an emergency or a temporary guardian under section 15-14-204, and proceed accordingly.

(2) Until the court has confirmed an appointee under section 15-14-202, a minor who is the subject of an appointment by a parent or guardian and who has attained twelve years of age has the right to consent or refuse to consent to an appointment of a guardian. If the minor consents to the appointment of the guardian, the minor shall file with the court in which the will is probated or the written instrument is filed a written consent to the appointment before it is accepted or within thirty-five days after notice of its acceptance. If the minor does not consent to the appointment of a guardian, then the court shall appoint a guardian pursuant to section 15-14-204.

Source: L. 2000: Entire part R&RE, p. 1787, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 292, § 10, effective January 1, 2001. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 840, § 50, effective July 1.

Editor's note: This section is similar to former § 15-14-203 as it existed prior to 2001.

ANNOTATION

Objection to a parental appointment under subsection (1) terminates and may prevent the appointment and triggers a judicial appointment by the trial court. However, the trial court's involvement in the appointment process upon objection by another party does not prevent the court from reappointing the testamentary appointee. In re R.M.S., 128 P.3d 783 (Colo. 2006).

Best interest of the child standard applies when a court must appoint a guardian for a minor when a person with the care or custody of the child objects to a testamentary appointment. The testamentary nomination, while one of many factors to consider, shall not be considered binding where the trial court determines that a party with the care or custody of the minor is better suited to act as permanent guardian. In re R.M.S., 128 P.3d 783 (Colo. 2006).

15-14-204. Judicial appointment of guardian - conditions for appointment - definition.

(1) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.

(2) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

(a) The parents consent;

(b) All parental rights have been terminated;

(c) The parents are unwilling or unable to exercise their parental rights; or

(d) Guardianship of a child has previously been granted to a third party and the third party has subsequently died or become incapacitated and the guardian has not made an appointment of a guardian either by will or written instrument; however, the court shall not presume it is in the best interests of a child to be in the care of a parent in circumstances where a court has previously granted custody of a child to a third party.

(2.5) (a) For purposes of this subsection (2.5) only, "minor" means an unmarried individual who has not attained twenty-one years of age.

(b) The court may enter an order appointing a guardian of a minor, as defined in subsection (2.5)(a) of this section, and a determination of whether the minor shall be reunified with a parent or parents, when the requirements of subsection (2) of this section are met, the order is in the minor's best interests, and:

(I) The minor has not attained twenty-one years of age;

(II) The minor is residing with and dependent upon a caregiver; and

(III) A request is made for findings from the court to establish the minor's eligibility for classification as a special immigrant juvenile pursuant to 8 U.S.C. sec. 1101 (a)(27)(J).

(c) If a request is made for findings establishing the minor's eligibility for classification as a special immigrant juvenile under federal law and the court determines there is sufficient evidence to support the findings, the court shall enter an order, including factual findings and conclusions of law, determining that:

(I) The minor has been placed under the custody of an individual appointed by the court through the appointment of a guardian;

(II) Reunification of the minor with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found pursuant to state law. For purposes of this subsection (2.5)(c)(II), "abandonment" includes, but is not limited to, the death of one or both parents.

(III) It is not in the best interests of the minor to be returned to the minor's or parents' previous country of nationality or country of last habitual residence.

(3) If a guardian is appointed by a parent or guardian pursuant to section 15-14-202 and the appointment has not been prevented or terminated under section 15-14-203 (1) or the minor has consented to the appointment pursuant to section 15-14-203 (2), that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the

appointee under section 15-14-202 has failed to accept the appointment within thirty days after notice of the guardianship proceeding.

(4) If necessary and on petition or motion and whether or not the conditions of subsection (2) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in section 15-14-113 must be given to the parents and to a minor who has attained twelve years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under section 15-14-205.

(5) If the court finds that following the procedures of this part 2 will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the emergency guardian's authority may not exceed sixty days and the emergency guardian may exercise only the powers specified in the order. Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor, if the minor has attained twelve years of age, to each living parent of the minor, and a person having care or custody of the minor, if other than a parent. The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the emergency guardian is appointed without notice, notice of the appointment must be given within forty-eight hours after the appointment and a hearing on the appropriateness of the appointment held within five days after the appointment.

Source: L. 2000: Entire part R&RE, p. 1788, § 1, effective January 1, 2001 (see § 15-17-103); entire section amended, p. 293, § 11, effective January 1, 2001. **L. 2003:** (5) amended, p. 2110, § 4, effective May 22. **L. 2019:** (2.5) added, (HB 19-1042), ch. 55, p. 192, § 2, effective March 28. **L. 2024:** IP(2.5)(c) and (2.5)(c)(II) amended, (SB 24-119), ch. 33, p. 102, § 2, effective August 7.

Editor's note: This section is similar to former § 15-14-204 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (Nov. 2000).

Best interest of the child standard applies when a court must appoint a guardian for a minor when a person with the care or custody of the child objects to a testamentary appointment. The testamentary nomination, while one of many factors to consider, shall not be considered binding where the trial court determines that a party with the care or custody of the minor is better suited to act as permanent guardian. In re R.M.S., 128 P.3d 783 (Colo. 2006).

There would be a chilling effect on parental willingness to give consent to a guardianship under subsection (2)(a) if fit parents' interests are not appropriately recognized and protected when they seek to terminate the consensual guardianship. Just as the fit parents' decision to consent to a guardianship is presumed to be in the best interests of the child, so too their decision to seek termination of guardianship and regain care, custody, and control of the child is presumed to be in the best interests of the child, unless the guardianship order contains an express provision limiting the parents from asserting the presumption. In the absence of such a limitation in the guardianship order, when fit parents seek to terminate the guardianship, guardians bear the burden of demonstrating by a preponderance of the evidence that termination of the guardianship is not in the best interests of the child. In re D.I.S., 249 P.3d 775 (Colo. 2011).

15-14-205. Judicial appointment of guardian - procedure.

(1) After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

(a) The minor, if the minor has attained twelve years of age and is not the petitioner;

(b) Any person alleged to have had the primary care and custody of the minor during the sixty days before the filing of the petition;

(c) Each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;

(d) Any person nominated as guardian by the minor if the minor has attained twelve years of age;

(e) Any appointee of a parent or guardian whose appointment has not been prevented or terminated under section 15-14-203 (1) or whose appointment was consented to under section 15-14-203 (2); and

(f) Any guardian or conservator currently acting for the minor in this state or elsewhere.

(2) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of

section 15-14-204 (2) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

(3) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained twelve years of age.

Source: L. 2000: Entire part R&RE, p. 1789, § 1, effective January 1, 2001 (see § 15-17-103); (1) amended, p. 294, § 12, effective January 1, 2001.

Editor's note: This section is similar to former § 15-14-207 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Securing the Nonparent's Place in a Child's Life Through Adoption and Adoption Alternatives", see 37 Colo. Law. 27 (Oct. 2008).

Subsection (3) authorizes the appointment of a temporary guardian and does not incorporate the requirement of abandonment or such other requirements of § 15-14-204 for the appointment of a permanent guardian. O.R.L. v. Smith, 996 P.2d 788 (Colo. App. 2000).

15-14-206. Judicial appointment of guardian - priority of minor's nominee - limited guardianship.

(1) The court shall appoint a guardian whose appointment will be in the best interest of the minor. The court shall appoint a guardian nominated by the minor, if the minor has attained twelve years of age, unless the court finds the appointment will be contrary to the best interest of the minor.

(2) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit the powers of a guardian otherwise granted by this part 2 and thereby create a limited guardianship. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

Source: L. 2000: Entire part R&RE, p. 1789, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-206 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Legal Protection of Children in Nontraditional Families", see 29 Colo. Law. 79 (Nov. 2000).

In the initial selection of a conservator the wishes of the ward should be given consideration, premised upon the mental ability of the ward to exercise a "sensible opinion" on the matter. The instant record demonstrates that the ward is unable to exercise such a sensible opinion as to who should serve as the conservator of his estate. No authority requires the probate court to substitute conservators because the ward prefers a different conservator. In re Estate of Alencoy v. Wysowatcky, 170 Colo. 385, 461 P.2d 210 (1969) (decided under repealed § 153-9-1, C.R.S. 1963).

15-14-207. Duties of guardian.

(1) Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward's support, care, education, health, and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian shall:

(a) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(b) Take reasonable care of the ward's personal effects and bring a protective proceeding if necessary to protect other property of the ward;

(c) Expend money of the ward which has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(d) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs;

(e) Report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and

(f) Inform the court of any change in the ward's custodial dwelling or address.

Source: L. 2000: Entire part R&RE, p. 1790, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-209 as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 15-14-207 is similar to repealed and reenacted § 153-5-209, C.R.S. 1963, and repealed laws antecedent to CSA, C. 76, § 4, relevant cases construing those provisions have been included in the annotations to this section.

In disposing of the custody of a child, the paramount consideration is the child's welfare, to which even the paternal right must yield. People ex rel. Flannery v. Bolton, 27 Colo. App. 39, 146 P. 489 (1915).

Courts recognize expressed or presumed wishes of parents as to custody of child. The right of the disposition of the custody, tuition, and nurture of a minor, and the duty of the enforcement of such right by the courts, has been recognized to the extent that in the absence of testamentary disposition the expressed or presumed wishes of the parents in this respect, including religious training of the minor, have been enforced with great uniformity. People v. Bolton, 27 Colo. App. 39, 146 P. 489 (1915).

Generally, a guardian is entitled to legal custody of a minor ward. Clark v. Kendrick, 670 P.2d 32 (Colo. App. 1983).

Conduct of parents toward child, financial ability, etc., are considered in awarding custody of infant. Breene v. Breene, 51 Colo. 342, 117 P. 1000 (1911).

Court not required to order an accounting of ward's money on application of interested person. The phrase, "As ordered by the court on application", allows the court to exercise its discretion as to whether to order the accounting when it receives the application. Sidman v. Sidman, 2016 COA 44, 411 P.3d 167.

15-14-208. Powers of guardian.

(1) Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.

(2) A guardian may:

(a) Apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(b) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;

(c) If a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(d) Consent to medical or other care, treatment, or service for the ward;

(e) Consent to the marriage of the ward; and

(f) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(3) The court may specifically authorize the guardian to consent to the adoption of the ward.

Source: L. 2000: Entire part R&RE, p. 1790, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-209 as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 15-14-208 is similar to repealed and reenacted § 153-5-209, C.R.S. 1963, and repealed laws antecedent to CSA, C. 76, § 4, relevant cases construing those provisions have been included in the annotations to this section.

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Conduct of parents toward child, financial ability, etc., are considered in awarding custody of infant. Breene v. Breene, 51 Colo. 342, 117 P. 1000 (1911).

15-14-209. Rights and immunities of a guardian.

(1) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room and board provided by the guardian or one who is affiliated with the guardian, but only as approved by the court. If a conservator, other than the guardian or a person who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(2) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service for the ward except to the extent that a parent would be liable under the circumstances.

Source: L. 2000: Entire part R&RE, p. 1791, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-209 as it existed prior to 2001.

15-14-210. Termination of guardianship - other proceedings after appointment.

(1) A guardianship of a minor terminates upon the minor's death, adoption, emancipation, or attainment of majority or as ordered by the court; except that the appointment of a guardian of a minor pursuant to section 15-14-204 (2.5) does not terminate based on age until twenty-one years of age.

(2) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained twelve years of age and is not the petitioner, the guardian, and any other person as ordered by the court.

(3) Issues of liability as between an estate and the estate's guardian individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In other appropriate proceedings.

Source: L. 2000: Entire part R&RE, p. 1791, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (3) added, p. 484, § 10, effective July 1. **L. 2019:** (1) amended, (HB 19-1042), ch. 55, p. 193, § 3, effective March 28.

Editor's note: This section is similar to former § 15-14-210 as it existed prior to 2001.

ANNOTATION

Where a parent's role as day-to-day caregiver of a minor is relinquished through contested or uncontested judicial proceedings and with no indication by the court that the relinquishment was intended to be temporary, the parent has enjoyed and exercised his or her fundamental rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

Subsequent application of the statutory standards for terminating guardianships or modifying allocations of parental responsibility, which standards certainly allow a court to consider the relationship between the biological parent and the child, does not violate the parent's constitutional rights. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

To hold otherwise would effectively afford a parent who relinquishes his or her day-to-day parenting responsibilities through judicial processes a substantial, if not automatic, right to terminate a guardianship or modify an allocation of parental rights with no regard for the perhaps significant impact on his or her children. In re M.J.K., 200 P.3d 1106 (Colo. App. 2008).

PART 3

GUARDIANSHIP OF INCAPACITATED PERSON

Editor's note: Section 15-17-103 provides that parts 1 to 4 of this article, as repealed and reenacted effective January 1, 2001, apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after January 1, 2001.

Law reviews: For article, "Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565; for article, "Highlights of Colorado's New Guardianship and Conservatorship Laws", see 30 Colo. Law. 5 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I", see 30 Colo. Law. 43 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (Feb. 2001); for article, "Placement on a Secure Unit by Surrogate Decision-Makers", see 34 Colo. Law. 49 (Oct. 2005); for article, "Colorado Medicaid Home and Community-Based Services and Least-Restrictive Environment", see 39 Colo. Law. 35 (May 2010); for article, "Practical Solutions to Elder Financial Abuse and Fiduciary Theft", see 41 Colo. Law. 61 (Dec. 2012); for article, "Mental Health Certifications in Colorado: A Primer for Attorneys", see 51 Colo. Law. 48 (Dec. 2022).

15-14-301. Appointment and status of guardian.

A person becomes a guardian of an incapacitated person upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

Source: L. 2000: Entire part R&RE, p. 1792, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-302. (Reserved)

15-14-303. (Reserved)

15-14-304. Judicial appointment of guardian - petition.

(1) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual.

(2) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(a) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(b) (I) The name and address of the respondent's:

(A) Spouse or partner in a civil union or, if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition; and

(B) Adult children and parents; or

(II) If the respondent has neither spouse, partner in a civil union, adult child, nor parent, at least one of the adults nearest in kinship to the respondent who can be found with reasonable efforts;

(c) The name and address of each person responsible for care or custody of the respondent, including the respondent's treating physician;

(d) The name and address of each legal representative of the respondent;

(e) The name and address of each person nominated as guardian by the respondent;

(f) The name and address of each proposed guardian and the reason why the proposed guardian should be selected;

(g) The reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

(h) If an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

(i) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

Source: L. 2000: Entire part R&RE, p. 1792, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2013:** (2)(b)(I)(A) and (2)(b)(II) amended, (SB 13-011), ch. 49, p. 165, § 19, effective May 1.

Editor's note: This section is similar to former § 15-14-303 as it existed prior to 2001.

ANNOTATION

Law reviews. For note, "Settling the Personal Injury Claim of a Minor", see 38 U. Colo. L. Rev. 377 (1966). For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Interrogating Medical Witnesses As to Mental Capacity", see 23 Colo. Law. 2753 (1994). For article, "The Self-Interested Fiduciary: Implications in Guardianship and Conservatorship Law", see 24 Colo. Law. 2181 (1995). For article, "The Court Friends Program of the Denver Probate Court", see 25 Colo. Law. 49 (Mar. 1996). For article, "Defects, Due Process, and Protective Proceedings", see 27 Colo. Law. 39 (Apr. 1998). For article, "How to Reconcile Advance Care Directives With Attempted Suicide", see 42 Colo. Law. 97 (July 2013).

Annotator's note. Since § 15-14-304 is similar to repealed and reenacted § 15-14-303 and repealed § 152-9-2, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

The use of the term adjudicating in article 10 of title 27 indicates that a jury verdict is not an essential requisite of adjudication within the meaning of this section. Young v. Brofman, 139 Colo. 296, 338 P.2d 286 (1959).

Allegations of complaint insufficient to confer jurisdiction to appoint guardian. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Proof by clear and convincing evidence is required in guardianship proceedings because of the possibility of being deprived of basic liberties. Sabrosky v. Denver Dept. of Soc. Servs., 781 P.2d 106 (Colo. App. 1989).

An evidentiary hearing is necessary to consider the factual circumstances to determine whether a petitioner is a person interested in the welfare of the incapacitated person. In re Estate of Edwards, 794 P.2d 1092 (Colo. App. 1990).

No authority existed to interview allegedly incapacitated person in her home ex parte, even though the probate judge was motivated by her concern for the allegedly incapacitated person's welfare, by her deteriorated physical and mental condition, and by the court's desire to evaluate her without the undue influence of third parties. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. App. 1998).

This section unambiguously entitled the allegedly incapacitated person to attend her competency hearing. Anything less would implicate constitutional concerns because a potential deprivation of fundamental rights and liberties is involved. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. App. 1998).

A necessary inference from the express right to be present by counsel is the right

to retain counsel. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. App. 1998).

No authority existed to deny the allegedly incapacitated person counsel on the grounds that she was incompetent to engage counsel. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. App. 1998).

Because a guardian ad litem and counsel represent different interests, appointment of a guardian ad litem for the allegedly incapacitated person did not substitute for counsel. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. App. 1998).

It is within the court's discretion to appoint legal counsel in addition to a guardian ad litem for an incapacitated person where the guardian ad litem does not undertake to represent the incapacitated person's legal interests in a proceeding to gain permission to withhold life-sustaining treatment. Dept. of Insts. v. Carothers, 821 P.2d 891 (Colo. App. 1991).

Although subsection (6) does not unambiguously grant the court power to assess attorney fees against another branch of government, it was within the court's discretion to assess attorney fees against the department of institutions. Dept. of Insts. v. Carothers, 821 P.2d 891 (Colo. App. 1991).

Defendant, department of institutions, waived its right to appeal issue that attorney fees may not be assessed against it on grounds that this section does not contain express authorization for the assessment of such fees against state agencies where argument was not presented at trial and there was no indication that the court of appeals ruled on the issue. Carothers v. Dept. of Insts., 845 P.2d 1179 (Colo. 1993).

Applied in Romberg v. Slemon, 778 P.2d 315 (Colo. App. 1989); Arguello v. Balsick, 2019 COA 20M, 446 P.3d 937.

15-14-305. Preliminaries to hearing.

(1) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a visitor. The duties and reporting requirements of the visitor are limited to the relief requested in the petition. The visitor must be a person who has such training as the court deems appropriate.

(2) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(a) Requested by the respondent;

(b) Recommended by the visitor; or

(c) The court determines that the respondent needs representation.

(3) The visitor 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 rights at the hearing, and the general powers and duties of a guardian;

(b) Determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(c) Inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(d) Inform the respondent that all costs and expenses of the proceeding, including respondent's attorney fees, will be paid from the respondent's estate unless the court directs otherwise.

(4) In addition to the duties imposed by subsection (3) of this section, the visitor shall:

(a) Interview the petitioner and the proposed guardian;

(b) Visit the respondent's present dwelling and any dwelling in which the respondent will live, if known, if the appointment is made;

(c) Obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(d) Make any other investigation the court directs.

(5) The visitor shall promptly file a report in writing with the court, which must include:

(a) A recommendation as to whether a lawyer should be appointed to represent the respondent and whether a guardian ad litem should be appointed to represent the respondent's best interest;

(b) A summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(c) Recommendations regarding the appropriateness of guardianship, including whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(d) A statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of:

(I) The proposed guardian;

(II) The powers and duties proposed; and

(III) The scope of the guardianship;

(e) A statement as to whether the proposed dwelling meets the respondent's individual needs;

(f) A recommendation as to whether a professional evaluation or further evaluation is necessary; and

(g) Any other matters the court directs.

Source: L. 2000: Entire part R&RE, p. 1793, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Law reviews. For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986).

The plain language of this section mandates the appointment of a court visitor and requires the court to receive the visitor's report before appointing a guardian. Arguello v. Balsick, 2019 COA 20M, 446 P.3d 937.

The plain language of this section requires the court visitor's report to include a statement that the court visitor visited the proposed dwelling and a statement about whether the proposed dwelling meets the respondent's individual needs. In Interest of Diaz, 2024 COA 101, 560 P.3d 434.

15-14-306. Professional evaluation.

(1) At or before a hearing under this part 3, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

(a) A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any;

(b) An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(c) A prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

(d) The date of any assessment or examination upon which the report is based.

Source: L. 2000: Entire part R&RE, p. 1794, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-307. (Reserved)

15-14-308. Presence and rights at hearing.

(1) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the visitor; and otherwise participate in the hearing. The hearing may be held in a manner that reasonably accommodates the respondent and may be closed upon the request of the respondent or upon a showing of good cause, except that the hearing may not be closed over the objection of the respondent.

(2) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

(3) The petitioner shall make every reasonable effort to secure the respondent's attendance at the hearing.

Source: L. 2000: Entire part R&RE, p. 1795, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Law reviews: For article, "Guardians ad Litem — Part 2: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 40 (Aug.-Sept. 2022).

15-14-309. Notice.

(1) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an

appointment. A failure to serve the respondent with a notice substantially complying with this subsection (1) is jurisdictional and thus precludes the court from granting the petition.

(2) In a proceeding to establish a guardianship, a copy of the petition for guardianship and notice of the hearing meeting the requirements of subsection (1) of this section must be given to the persons listed in the petition. Failure to give notice under this subsection (2) is not jurisdictional and thus does not preclude the appointment of a guardian or the making of a protective order.

(3) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court directs.

(4) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice must be delivered or sent within ten days after the filing of the report.

Source: L. 2000: Entire part R&RE, p. 1795, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-309 as it existed prior to 2001.

ANNOTATION

Section does not require petitioner to personally serve respondent with additional notice of a continued guardianship hearing after an initial notice was made. Requiring the service of additional notices would not further protect a respondent's rights under the statutory scheme. In Interest of Spohr, 2019 COA 171, 456 P.3d 86.

Applied in In Interest of Spohr, 2018 COA 74, 422 P.3d 625.

15-14-310. Who may be guardian - priorities - prohibition of dual roles.

(1) Subject to subsection (4) of this section, the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

(a) A guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;

(b) A person nominated as guardian by the respondent, including the respondent's specific nomination of a guardian made in a durable power of attorney or given priority to be a guardian in a designated beneficiary agreement made pursuant to article 22 of this title;

(c) An agent appointed by the respondent under a medical durable power of attorney pursuant to section 15-14-506;

(d) An agent appointed by the respondent under a general durable power of attorney;

(e) The spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;

(e.5) The partner in a civil union of the respondent or a person nominated by will or other signed writing of a deceased partner in a civil union;

(f) An adult child of the respondent;

(g) A parent of the respondent or an individual nominated by will or other signed writing of a deceased parent; and

(h) An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.

(2) A respondent's nomination or appointment of a guardian shall create priority for the nominee or appointee only if, at the time of nomination or appointment, the respondent had sufficient capacity to express a preference.

(3) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, for good cause shown, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(4) An owner, operator, or employee of a long-term-care provider from which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

(5) (a) Unless the court makes specific findings for good cause shown or the person is a family caregiver, as defined in section 25.5-10-202, or the person is a caregiver to an eligible person, as defined in section 8-7.5-102, the same professional may not act as an incapacitated person's or a protected person's:

(I) Guardian and conservator; or

(II) Guardian and direct service provider; or

(III) Conservator and direct service provider.

(b) In addition, a guardian or conservator may not employ the same person to act as both care manager and direct service provider for the incapacitated person or protected person unless the person is a family caregiver as defined in section 25.5-10-202, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1796, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 445, § 11, effective July 1. **L. 2010:** (1)(b) amended, (SB 10-199), ch. 374, p. 1753, § 18, effective July 1. **L. 2011:** (5) amended, (SB 11-083), ch. 101, p. 305, § 10, effective August 10. **L. 2012:** (5)(a) amended, (SB 12-074), ch. 110, p. 386, § 1, effective April 13. **L. 2013:** (1) amended, (SB 13-011), ch. 49, p. 165, § 20, effective May 1; IP(5)(a) and (5)(b) amended, (HB 13-1314), ch. 323, p. 1803, § 25, effective March 1, 2014. **L. 2025:** IP(5)(a) amended, (HB 25-1325), ch. 255, p. 1268, § 4, effective August 6.

Editor's note: This section is similar to former § 15-14-311 as it existed prior to 2001.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section gives top priority for appointment as guardian to existing guardians appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing guardians are granted a first priority for two reasons. First, many of these cases will involve transfers of a guardianship from another state. To assure a smooth transition, the currently appointed guardian, whether appointed in this state or another, should have the right to the appointment at the new location. Second, other cases will involve situations where a guardianship appointment is sought despite the appointment in another place. Granting the existing guardian priority will deter such forum shopping. If the existing guardian is inappropriate for some reason, subsection (b) permits the Court to pass over the existing guardian and appoint another with or without priority. While an existing guardian is generally granted a first priority for appointment, a temporary substitute and an emergency guardian are excluded from priority because of the short-term nature of their involvement.

A guardian or individual nominated by the respondent or the agent named in the respondent's health care power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference.

The nomination may also be made by a separate document. While it is generally good practice for an individual to nominate as the guardian the agent named in a durable power of attorney, the section grants such an agent a preference even in the absence of a specific nomination. The agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent. To assure that the agent will be in a position to assert this priority, Sections 5-304(b)(4) and 5-309(b) require that the agent receive notice of the proceeding. Also, until the Court has acted to approve the revocation of that authority, Section 5-316(c) provides that the authority of an agent for health-care decisions takes precedence over that of the guardian.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note that there is no requirement that the respondent had resided with the adult for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, see the comment to Section 5-304, which discusses the interpretation of the phrase "an adult with whom the respondent has resided for more than six months before the filing of the petition" within the context of the persons required to be listed in the petition for appointment. Note that although the phrase can be interpreted quite broadly, it is intended to be descriptive of those individuals who have had an enduring relationship with the respondent for at least a six month period and who, because of this relationship, should be given a priority for consideration as guardian.

Subsection (c) prohibits anyone affiliated with a long-term care institution at which the respondent is receiving care from being appointed as guardian absent a blood, marital or adoptive relationship. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the ward. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for those facilities considered to be long-term care institutions.

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority for appointment as guardian because those given priority are limited to individuals with whom the ward has a close relationship. The committee which drafted the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) recognized the valuable service that a professional guardian, a public agency or nonprofit corporation provides. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve or if the Court, acting in the respondent's best interest, declines to appoint a person having priority.

A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the respondent, but is not entitled to statutory priority in appointment as guardian.

This section is based on UGPPA (1982) Section 2-205 (UPC Section 5-305 (1982)).

ANNOTATION

Law reviews. For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (Feb. 2007).

Trial court failed to make findings regarding whether the respondent had sufficient capacity to nominate a guardian or conservator. Although a trial court, upon a showing of good cause, has the authority to appoint a respondent's preferred guardian and conservator, the court must make findings relative to good cause. In re Estate of Runyon, 2014 COA 181, 343 P.3d 1072.

Trial court did not abuse discretion by denying appointment of potential guardian when it concluded that facts demonstrated a potential conflict of interest between potential guardian and a long-term care provider that rendered potential guardian unsuitable as a guardian. Arguello v. Balsick, 2019 COA 20M, 446 P.3d 937.

15-14-311. Findings - order of appointment.

(1) The court may:

(a) Appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

(I) The respondent is an incapacitated person; and

(II) The respondent's identified needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance; or

(b) With appropriate findings, treat the petition as one for a protective order under section 15-14-401, enter any other appropriate order, or dismiss the proceeding.

(2) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

(3) Within thirty days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

Source: L. 2000: Entire part R&RE, p. 1797, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-304 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Interrogating Medical Witnesses as to Mental Capacity", see 23 Colo. Law. 2753 (1994). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

Because there was no declaration of mental incapacity at a formal hearing prior to plaintiff's execution of a warranty deed, the good faith purchasers had no constructive notice of plaintiff's alleged mental state. Therefore, the good faith purchasers have a valid interest in the property even if it is later established that plaintiff was mentally incapacitated when he executed the deed. Delsas ex rel. Delsas v. Centex Home Equity, 186 P.3d 141 (Colo. App. 2008).

15-14-312. Emergency guardian.

(1) If the court finds that compliance with the procedures of this part 3 will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed sixty days and who may exercise only the powers specified in the order. Immediately upon appointment of an emergency guardian, the court shall appoint a lawyer to represent the respondent throughout the emergency guardianship. Except as otherwise provided in subsection (2) of this section, reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(2) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from testimony that the respondent will be substantially harmed if the appointment is delayed. If not present at the hearing, the respondent must be given notice of the appointment within forty-eight hours after the appointment. The

court shall hold a hearing on the appropriateness of the appointment within fourteen days after the court's receipt of such a request.

(3) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(4) The court may remove an emergency guardian or modify the powers granted at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of parts 1 to 4 of this article concerning guardians apply to an 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.

(6) In addition to a court with jurisdiction to hear proceedings pursuant to this title 15, a criminal court or another court with jurisdiction may appoint an emergency guardian as authorized pursuant to section 16-8.5-117 or 16-8.5-118, or a civil court supervising a civil commitment pursuant to section 27-65-201 or an enhanced protective placement pursuant to section 25.5-10-507 may appoint an emergency guardian.

Source: L. 2000: Entire part R&RE, p. 1797, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 840, § 51, effective July 1. **L. 2020:** (5) added, (SB 20-129), ch. 270, p. 1317, § 3, effective September 1. **L. 2026:** (6) added, (SB 26-149), ch. 142, p. 789, § 29, effective May 21.

ANNOTATION

Law reviews. For article, "Protecting Clients From Abuse and Identity Theft", see 34 Colo. Law. 43 (Oct. 2005).

Applied in In Interest of Spohr, 2018 COA 74, 422 P.3d 625.

15-14-313. Temporary substitute guardian.

(1) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously

appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward, the affected guardian, and other interested persons, the temporary substitute guardian, within five days after the appointment, shall inform them of the appointment.

(2) The court may remove a temporary substitute guardian or modify the powers granted at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of parts 1 to 4 of this article concerning guardians apply to a temporary substitute guardian.

Source: L. 2000: Entire part R&RE, p. 1798, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-310 as it existed prior to 2001.

15-14-314. Duties of guardian.

(1) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian, at all times, shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(2) A guardian shall:

(a) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(b) Take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(c) Expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(d) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;

(e) Immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed;

(f) Inform the court of a change in the ward's custodial dwelling or address;

(g) Immediately notify the court in writing of the ward's death; and

(h) Notify, to the extent reasonably feasible, the ward, at least thirty days before a change, if possible, at the ward's primary dwelling, of a forthcoming permanent move to a nursing home, mental health institution, or other facility that places restrictions on the ward's ability to leave the facility or have visitors, unless the change or move is proposed in the guardian's plan or authorized by the court by specific order.

Source: L. 2000: Entire part R&RE, p. 1798, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2026:** (2)(f) and (2)(g) amended and (2)(h) added, (HB 26-1100), ch. 227, p. 1320, § 3, effective August 12.

Editor's note: This section is similar to former § 15-14-312 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988).

This section confers upon the guardian no greater right to the custody of his ward than had the parent at common law. People ex rel. Flannery v. Bolton, 27 Colo. App. 39, 146 P. 489 (1915) (decided under repealed CSA, C. 176, § 140).

The trial court did not abuse its discretion in admitting evidence of the respondent's prognosis or the ethics of performing cardiopulmonary resuscitation as concerns the best interest standard of subsection (1). People ex rel. Yeager, 93 P.3d 589 (Colo. App. 2004).

Applied in In re A.W., 637 P.2d 366 (Colo. 1981).

15-14-315. Powers of guardian.

(1) Subject to the limitations set forth in section 15-14-316 and except as otherwise limited by the court, a guardian may:

(a) Apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(b) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this state upon express authorization of the court;

(c) If a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(d) Consent to medical or other care, treatment, or service for the ward; and

(e) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(2) The court may specifically authorize or direct the guardian to consent to the adoption or marriage of the ward.

Source: L. 2000: Entire part R&RE, p. 1799, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-312 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Adult Guardianships and Conservatorships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "Marriage, Divorce, and Annulment When One Party is Arguably Incapacitated", see 43 Colo. Law. 39 (Feb. 2014).

This section confers upon the guardian no greater right to the custody of his ward than had the parent at common law. People ex rel. Flannery v. Bolton, 27 Colo. App. 39, 146 P. 489 (1915) (decided under repealed CSA, C. 176, § 140).

A nonlawyer conservator or guardian in this state is a statutory legal representative only and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-425 and to guardians under this section and § 15-

14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010) (decided prior to 2017 amendments relocating article 5 of title 12 to article 93 of title 13).

The plain meaning of "outside this state" in subsection (1)(b) includes a foreign country. In Interest of Diaz, 2024 COA 101, 560 P.3d 434.

Applied in In re A.W., 637 P.2d 366 (Colo. 1981).

15-14-315.5. Dissolution of marriage and legal separation.

(1) The guardian may petition the court for authority to commence and maintain an action for dissolution of marriage or legal separation on behalf of the ward. The court may grant such authority only if satisfied, after notice and hearing, that:

(a) It is in the best interest of the ward based on evidence of abandonment, abuse, exploitation, or other compelling circumstances, and the ward either is incapable of consenting; or

(b) The ward has consented to the proposed dissolution of marriage or legal separation.

(2) Nothing in this section shall be construed as modifying the statutory grounds for dissolution of marriage and legal separation as set forth in section 14-10-106, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1800, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Law reviews. For article, "Marriage, Divorce, and Annulment When One Party is Arguably Incapacitated", see 43 Colo. Law. 39 (Feb. 2014). For article, "Guardians ad Litem — Part 2: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 40 (Aug.-Sept. 2022).

A nonlawyer conservator or guardian in this state is a statutory legal representative only and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-425 and to guardians under § 15-14-315 and this section do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010) (decided prior to 2017 amendments relocating article 5 of title 12 to article 93 of title 13).

15-14-316. Rights and immunities of guardian - limitations.

(1) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room and board provided by the guardian or one who is affiliated with the guardian, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(2) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the negligent or wrongful conduct of the third party.

(3) A guardian, without authorization of the court, may not revoke a medical durable power of attorney made pursuant to section 15-14-506 of which the ward is the principal. If a medical durable power of attorney made pursuant to section 15-14-506 is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(4) A guardian may not initiate certification of a ward to a mental health-care institution or facility except in accordance with the state's procedure for involuntary treatment and evaluation of a mental health disorder pursuant to article 65 of title 27. To obtain hospital or institutional care and treatment for a ward's mental health disorder, a guardian shall proceed as provided under article 65 of title 27. To obtain services and supports from an approved service agency as defined in section 25.5-10-202 for a ward with intellectual and developmental disabilities, a guardian shall proceed as provided pursuant to article 10 of title 25.5. To obtain care and treatment for a ward's substance use disorder, a guardian shall proceed as provided pursuant to articles 81 and 82 of title 27. A guardian shall not have the authority to consent to any such care or treatment against the ward's will.

Source: L. 2000: Entire part R&RE, p. 1800, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2010:** (4) amended, (SB 10-175), ch. 188, p. 782, § 19, effective April 29. **L. 2013:** (4) amended, (SB 13-1314), ch. 323, p. 1803, § 26, effective March 1, 2014. **L. 2017:** (4) amended, (SB 17-242), ch. 263, p. 1296, § 117, effective May 25.

Cross references: For the legislative declaration in SB 17-242, see section 1 of chapter 263, Session Laws of Colorado 2017.

15-14-317. Reports - monitoring of guardianship - court access to records.

(1) Within sixty days after appointment or as otherwise directed by the court, a guardian shall report to the court in writing on the condition of the ward, the guardian's personal care plan for the ward, and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. The annual report must state or contain:

(a) The current mental, physical, and social condition of the ward;

(b) The living arrangements for all addresses of the ward during the reporting period;

(c) The medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(d) A summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

(e) Whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(f) Plans for future care; and

(g) A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(2) The court may appoint a visitor or other suitable person to review a report, interview the ward or guardian, and make any other investigation the court directs.

(3) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

(4) (a) Whenever a guardian fails to file a report or fails to respond to an order of the court to show cause why the guardian should not be held in contempt of court, the clerk of the court or his or her designee may research the whereabouts and contact information of the guardian and the ward. To facilitate this research, the clerk of the court or his or her designee shall have access to data maintained by other state agencies, including but not limited to vital statistics information maintained by the department of public health and environment, wage and employment data maintained by the department of labor and employment, lists of licensed drivers and income tax data maintained by the department of revenue and provided pursuant to section 13-71-107, C.R.S., and voter registration information obtained annually by the state court administrator pursuant to section 13-71-107, C.R.S. The court may access the data only to obtain contact information for the guardian or the ward. Notwithstanding any provision of law to the contrary, the judicial department and the other state agencies listed in this paragraph (a) may enter into agreements for the sharing of this data. The judicial department and the courts shall not access

data maintained pursuant to the "Address Confidentiality Program Act", part 21 of article 30 of title 24, C.R.S.

(b) The court shall preserve the confidentiality of the data obtained from other state agencies and use the data only for the purposes set forth in this subsection (4). Notwithstanding the provisions of article 72 of title 24, C.R.S., documents and information obtained by the court pursuant to this subsection (4) are not public records and shall be open to public inspection only upon an order of the court based on a finding of good cause, except to the extent they would otherwise be open to inspection from the providing state agency.

(c) For purposes of this subsection (4), "contact information" means name, residential address, business address, date of birth, date of death, phone number, email address, or other identifying information as directed by the court.

Source: L. 2000: Entire part R&RE, p. 1801, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2012:** Entire section amended, (HB 12-1074), ch. 46, p. 166, § 1, effective March 22.

15-14-318. Termination or modification of guardianship - resignation or removal of guardian.

(1) A guardianship terminates upon the death of the ward or upon order of the court.

(2) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court shall terminate a guardianship if the ward no longer meets the standard for establishing the guardianship. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(3) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship.

(3.5) The following provisions apply in a termination proceeding that is initiated by the ward:

(a) The guardian may file a written report to the court regarding any matter relevant to the termination proceeding, and the guardian may file a motion for instructions regarding any relevant matter including, but not limited to, the following:

(I) Whether an attorney, guardian ad litem, or visitor should be appointed for the ward;

(II) Whether any further investigation or professional evaluation of the ward should be conducted, the scope of the investigation or professional evaluation, and when the investigation or professional evaluation should be completed; and

(III) Whether the guardian is to be involved in the termination proceedings and, if so, to what extent.

(b) If the guardian elects to file a written report or a motion for instructions, the guardian shall file such initial pleadings within twenty-one days after the petition to terminate has been filed. Any interested person shall then have fourteen days to file a response. If a response is filed, the guardian shall have seven days to file a reply. If a motion for instructions is filed by the guardian as his or her initial pleading, the court shall rule on the motion before the petition for termination of the guardianship is set for hearing. Unless a hearing on the motion for instructions is requested by the court, the court may rule on the pleadings without a hearing after the time period for the filing of the last responsive pleading has expired. After the filing of the guardian's initial motion for instructions, the guardian may file subsequent motions for instruction as appropriate.

(c) Except for the actions authorized in paragraphs (a), (b), and (e) of this subsection (3.5), or as otherwise ordered by the court, the guardian may not take any action to oppose or interfere in the termination proceeding. The filing of the initial or subsequent motion for instructions by the guardian shall not, in and of itself, be deemed opposition or interference.

(d) Unless ordered by the court, the guardian shall have no duty to participate in the termination proceeding, and the guardian shall incur no liability for filing the report or motion for instruction or for failing to participate in the proceeding.

(e) Nothing in this subsection (3.5) shall prevent:

(I) The court, on its own motion and regardless of whether the guardian has filed a report or request for instructions, from ordering the guardian to take any action that the court deems appropriate or from appointing an attorney, guardian ad litem, visitor, or professional evaluator;

(II) The court from ordering the guardian to appear at the termination proceeding and give testimony; or

(III) Any interested person from calling the guardian as a witness in the termination proceeding.

(f) Any individual who has been appointed as a guardian, and is an interested person in his or her individual capacity, and wants to participate in the termination proceeding in his or her individual capacity and not in his or her fiduciary capacity may do so without restriction or limitation. The payment of any fees and costs to that individual, related to his or her decision to participate in the termination proceeding, shall be governed by section 15-10-602 (7) and not by section 15-10-602 (1).

(4) The court may remove a guardian pursuant to section 15-10-503 or permit the guardian to resign as set forth in section 15-14-112.

(5) Issues of liability as between an estate and the estate's guardian individually may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In other appropriate proceedings.

(6) When a ward dies, all fees, costs, and expenses of the administration of the guardianship, including any unpaid guardian fees and costs and those of his or her counsel, may be submitted to the court for court approval in conjunction with the termination of the guardianship. Thereafter, all court-approved fees, costs, and expenses of administration arising from the guardianship shall be paid as court-approved claims for costs and expenses of administration in the decedent's estate. In the event that there are insufficient moneys to pay all claims in the decedent's estate in full, the fees, costs, and expenses of administration arising from the guardianship shall retain their classification as "costs and expenses of administration" in the decedent's estate and shall be paid pursuant to section 15-12-805.

Source: L. 2000: Entire part R&RE, p. 1801, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (4) amended and (5) added, p. 484, § 11, effective July 1. **L. 2011:** (3.5) and (6) added, (SB 11-083), ch. 101, p. 307, § 15, effective August 10. **L. 2012:** (3.5)(b) amended, (SB 12-175), ch. 208, p. 840, § 52, effective July 1.

Editor's note: This section is similar to former § 15-14-306 as it existed prior to 2001.

ANNOTATION

Under this section the guardian's discharge terminates the guardianship, as to the guardian, and the final account, when approved by the court, is a judgment conclusive upon the guardian and the sureties on his bond, unless impeached for fraud, or such other cause as would invalidate any other judgment. Am. Bonding Co. v. People ex rel. Kennedy, 46 Colo. 394, 104 P. 81 (1909) (decided under repealed CSA, C. 176, § 92).

15-14-319. Right to a lawyer post-adjudication.

(1) An adult ward has the right post-adjudication to be represented by a lawyer of the ward's choosing at the expense of the ward's estate unless the court finds by clear and convincing evidence that the ward lacks sufficient capacity to provide informed consent for representation by a lawyer. Upon such a finding, the court shall appoint a guardian ad litem, and the adult ward retains the right to a lawyer of the adult ward's choosing for the limited purpose of interlocutory appeal of the court's decision as to the right to a lawyer.

(2) The right to a lawyer described in subsection (1) of this section applies to a ward participating in proceedings or seeking any remedy under parts 1 to 4 of this article, including change or termination of a guardianship, judicial review of fiduciary conduct, appellate relief, and any other petition for relief from the court.

(3) Subject to subsection (1) of this section, the court shall appoint a lawyer to represent any adult ward in any proceedings pursuant to parts 1 to 4 of this article if the ward is not represented by a lawyer and the court determines the ward needs such representation.

(4) A lawyer for the ward, on presentation of proof of representation, must be given access to all information pertinent to proceedings under this title, including immediate access to medical records and information.

Source: L. 2016: Entire section added, (SB 16-131), ch. 286, p. 1165, § 3, effective August 10.

PART 4

PROTECTION OF PROPERTY OF PROTECTED PERSON

Editor's note: Section 15-17-103 provides that parts 1 to 4 of this article, as repealed and reenacted effective January 1, 2001, apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after January 1, 2001.

Law reviews: For article, "Statutory Custodianship Trusts", see 13 Colo. Law. 786 (1984); for article, "The Revocable Living Trust Revisited", see 18 Colo. Law. 225 (1989); for article, "Trust Protection of Personal Injury Recoveries from Public Creditors", see 19 Colo. Law. 2187 (1990); for article, "Personal Injury Settlements With Minors", see 21 Colo. Law. 1167 (1992); for article, "Avoiding Living Probate", see 27 Colo. Law. 5 (March 1998); for article, "Highlights of Colorado's New Guardianship and Conservatorship Laws", see 30 Colo. Law. 5 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part

I", see 30 Colo. Law. 43 (Jan. 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (Feb. 2001); for article, "Estate Planning Considerations when Distributing Assets from a Conservatorship Estate", see 32 Colo. Law. 55 (Aug. 2003); for article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (Feb. 2007); for article, "Practical Solutions to Elder Financial Abuse and Fiduciary Theft", see 41 Colo. Law. 61 (Dec. 2012); for article, "Securing Future Child Support Obligations", see 51 Colo. Law. 38 (Jan. 2022); for article, "Guardians ad Litem -- Part 2: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 40 (Aug.-Sept. 2022); for article, "Mental Health Certifications in Colorado: A Primer for Attorneys", see 51 Colo. Law. 48 (Dec. 2022).

15-14-401. Protective proceeding.

(1) Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this part 4 in relation to the estate and affairs of:

(a) A minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or

(b) Any individual, including a minor, if the court determines that, for reasons other than age:

(I) By clear and convincing evidence, the individual is unable to manage property and business affairs because the individual is unable to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(II) By a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

Source: L. 2000: Entire part R&RE, p. 1802, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-401 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969). For article, "Determination of Heirship by Special Proceedings and Temporary Conservationship", see 14 Colo. Law. 1781 (1985). For article, "Adult Guardianships: Protection of Constitutional Rights", see 15 Colo. Law. 820 (1986). For article, "Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565 (1995). For article, "Legal Guidelines and Methods for Evaluating Capacity", see 32 Colo. Law. 65 (June 2003).

Annotator's note. Since § 15-14-401 is similar to § 15-14-401 as it existed prior to the 2000 repeal and reenactment of this part 4, relevant cases construing that provision have been included in the annotation to this section.

The trial court has a broad discretion in all matters relating to protected persons, which is exclusive. Sweeney v. Summers, 194 Colo. 149, 571 P.2d 1067 (1977).

A conservator may be appointed for a person other than a minor only if court makes specific factual finding that the ability to manage property is impaired. In re Estate of Hickle v. Carney, 748 P.2d 360 (Colo. App. 1987).

The appointment of a conservator under this section does not include a finding of "incapacity." In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004).

Statute does not require medical evidence to make a proper determination of whether a person is impaired. A court can appoint a conservator without medical evidence of an impairment if the other requirements are met. Neher v. Neher, 2015 COA 103, 402 P.3d 1030.

Applied in Jenkins v. Mesa County Dist. Court, 620 P.2d 721 (Colo. 1980).

15-14-402. Jurisdiction over business affairs of protected person.

(1) After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(a) Exclusive jurisdiction to determine the need for a conservatorship or other protective order;

(b) Exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and

(c) Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

Source: L. 2000: Entire part R&RE, p. 1802, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-402 as it existed prior to 2001.

ANNOTATION

Applied in Jenkins v. Mesa County Dist. Court, 620 P.2d 721 (Colo. 1980) (decided prior to 2000 repeal and reenactment).

15-14-403. Original petition for appointment or protective order.

(1) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(a) The person to be protected;

(b) An individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(c) A person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(2) A petition under subsection (1) of this section must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(a) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(b) If the petition alleges impairment in the respondent's ability to effectively receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(c) If the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the

disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;

(d) (I) The name and address of the respondent's:

(A) Spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition; and

(B) Adult children and parents; or

(II) If the respondent has neither spouse, adult child, nor parent, at least one of the adults nearest in kinship to the respondent who can be found with reasonable efforts;

(e) The name and address of each person responsible for care or custody of the respondent, including the respondent's treating physician;

(f) The name and address of each legal representative of the respondent;

(g) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(h) The reason why a conservatorship or other protective order is in the best interest of the respondent.

(3) If a conservatorship is requested, the petition must also set forth to the extent known:

(a) The name and address of each proposed conservator and the reason why the proposed conservator should be selected;

(b) The name and address of each person nominated as conservator by the respondent if the respondent has attained twelve years of age; and

(c) The type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

Source: L. 2000: Entire part R&RE, p. 1803, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-404 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "The Self-Interested

Fiduciary: Implications in Guardianship and Conservatorship Law", see 24 Colo. Law. 2181 (1995).

Section 13-90-102 is inapplicable to a voluntary estate proceeding under this section. Patterson v. Pitoniak, 173 Colo. 454, 480 P.2d 579 (1971)(case decided prior to the earliest source this section).

15-14-404. Notice.

(1) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, if the respondent has attained twelve years of age, but if the respondent's whereabouts are unknown or personal service cannot be made, service on the respondent must be made by substituted service or publication. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection (1) is jurisdictional and thus precludes the court from granting the petition.

(2) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection (2) does not preclude the appointment of a conservator or the making of another protective order.

(3) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, must be given to the protected person, if the protected person has attained twelve years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(4) A conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person and any other person the court directs. The notice must be delivered or sent within ten days after the filing of the inventory, report, or plan of conservatorship.

Source: L. 2000: Entire part R&RE, p. 1804, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2001:** (1) amended, p. 889, § 8, effective June 1.

Editor's note: This section is similar to former § 15-14-405 as it existed prior to 2001.

ANNOTATION

Section does not address the probate court's subject matter jurisdiction, and failure to follow section's requirements does not divest the court of subject matter jurisdiction when the case falls within the class of cases that a probate court may hear. In Interest of Meggitt, 2021 COA 50, 488 P.3d 1220.

15-14-405. Original petition - minors - preliminaries to hearing.

(1) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained twelve years of age.

(2) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a special conservator to assist in that task.

Source: L. 2000: Entire part R&RE, p. 1805, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-406. Original petition - persons under disability - preliminaries to hearing.

(1) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a visitor unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the visitor are limited to the relief requested in the petition. The visitor must be a person who has such training or experience as the court deems appropriate.

(2) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(a) Requested by the respondent;

(b) Recommended by the visitor; or

(c) The court determines that the respondent needs representation.

(3) The visitor 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 and the nature, purpose, and effect of the proceeding;

(b) If the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(c) Inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and

(d) Inform the respondent that all costs and expenses of the proceeding, including respondent's attorney fees, will be paid from the respondent's estate unless the court directs otherwise.

(4) In addition to the duties imposed by subsection (3) of this section, the visitor shall:

(a) Interview the petitioner and the proposed conservator, if any; and

(b) Make any other investigation the court directs.

(5) The visitor shall promptly file a report with the court, which must include:

(a) A recommendation as to whether a lawyer should be appointed to represent the respondent and whether a guardian ad litem should be appointed to represent the respondent's best interest;

(b) Recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;

(c) A statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of:

(I) The proposed conservator;

(II) The powers and duties proposed; and

(III) The scope of the conservatorship;

(d) A recommendation as to whether a professional evaluation or further evaluation is necessary; and

(e) Any other matters the court directs.

(6) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a special conservator to assist in that task.

(7) Repealed.

Source: L. 2000: Entire part R&RE, p. 1805, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2013:** (6) amended and (7) repealed, (SB 13-077), ch. 190, p. 771, § 7, effective August 7.

15-14-406.5. Professional evaluation.

(1) At or before a hearing under this part 4, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless the court directs otherwise, the report must contain:

(a) A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any;

(b) An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(c) A prognosis for improvement and a recommendation as to the appropriate treatment of habilitation plan; and

(d) The date of any assessment or examination upon which the report is based.

Source: L. 2013: Entire section added, (SB 13-077), ch. 190, p. 771, § 8, effective August 7.

15-14-407. (Reserved)

15-14-408. Original petition - procedure at hearing.

(1) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. The respondent shall attend the hearing, unless excused by the court for good cause. The

respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the visitor, and otherwise participate in the hearing. The hearing may be held in a manner that reasonably accommodates the respondent and may be closed upon request of the respondent, or upon a showing of good cause; except that the hearing may not be closed over the objection of the respondent.

(2) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

(3) The petitioner shall make every reasonable effort to secure the respondent's attendance at the hearing.

Source: L. 2000: Entire part R&RE, p. 1807, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-407 as it existed prior to 2001.

15-14-409. Original petition - orders.

(1) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.

(2) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(3) Within thirty days after an appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained twelve years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

(4) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.

Source: L. 2000: Entire part R&RE, p. 1807, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-407 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "Determination of Heirship by Special Proceedings and Temporary Conservationship", see 14 Colo. Law. 1781 (1985). For article, "Appointment of Temporary Conservators: Their Ethical and Legal Imperatives", see 25 Colo. Law. 53 (Dec. 1996).

Findings that warrant appointment of a conservator under this section do not equate to a determination of testamentary incapacity. In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004); In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

15-14-410. Powers of court.

(1) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(a) With respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor that may be necessary for the best interest of the minor and members of the minor's immediate family; and

(b) With respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person that the person could exercise if the person were an adult, present, and not under conservatorship or other protective order.

(2) Subject to section 15-14-110 requiring endorsement of limitations on the letters of office, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation.

Source: L. 2000: Entire part R&RE, p. 1808, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-408 as it existed prior to 2001.

15-14-411. Required court approval.

(1) After notice to interested persons and upon express authorization of the court, a conservator may:

(a) Make gifts, except as otherwise provided in section 15-14-427 (2);

(b) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(c) Exercise or release a power of appointment;

(d) Create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;

(e) Exercise rights to elect options and change beneficiaries under retirement plans, insurance policies, and annuities or surrender the plans, policies, and annuities for their cash value;

(f) Exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and

(g) Make, amend, or revoke the protected person's will.

(2) A conservator, in making, amending, or revoking the protected person's will, shall comply with section 15-11-502 or 15-11-507.

(3) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (1) of this section, shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. To the extent the decision cannot be ascertained, the court shall consider the best interest of the protected person. The court shall also consider:

(a) The financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;

(b) Possible reduction of income, estate, inheritance, or other tax liabilities;

(c) Eligibility for governmental assistance;

(d) The protected person's previous pattern of giving or level of support;

(e) The existing estate plan;

(f) The protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and

(g) Any other factors the court considers relevant, including the best interest of the protected person.

Source: L. 2000: Entire part R&RE, p. 1808, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Law reviews. For article, "Will Preparation for Individuals Lacking Testamentary Capacity", see 33 Colo. Law. 93 (Aug. 2004). For article, "Conservator-Created Wills: Issues in Litigation", see 44 Colo. Law. 53 (Aug. 2015).

The requirement in subsection (1)(g) of this section that a conservator obtain court approval before making a protected person's will applies when the conservator executes the will in compliance with § 15-11-502, for instance, when the conservator executes the will in the presence of two witnesses who sign it. In re Estate of Davies, 2022 COA 90, 520 P.3d 207.

Conversely, when the protected person executes their own will in compliance with § 15-11-502, subsection (1)(g) does not apply, even if the conservator drafted the will. In re Estate of Davies, 2022 COA 90, 520 P.3d 207.

15-14-412. Protective arrangements and single transactions.

(1) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

(a) Authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

(I) Payment, delivery, deposit, or retention of funds or property;

(II) Sale, mortgage, lease, or other transfer of property;

(III) Purchase of an annuity;

(IV) Making a contract for life care, deposit contract, or contract for training and education; or

(V) Addition to or establishment of a suitable trust, including a trust created under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; and

(b) Authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of, and distribution of settlement of, a claim, upon determining that it is in the best interest of the protected person.

(2) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors described in section 15-14-411 (3).

(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 15-14-413 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.

Source: L. 2000: Entire part R&RE, p. 1809, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2020:** (3) amended, (SB 20-129), ch. 270, p. 1317, § 4, effective September 1. **L. 2021:** (3)(b) amended, (SB 21-266), ch. 423, p. 2800, § 13, effective July 2.

Editor's note: This section is similar to former § 15-14-409 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Determination of Heirship by Special Proceedings and Temporary Conservationship", see 14 Colo. Law. 1781 (1985). For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Trust Protection of Personal Injury Recoveries from Public Creditors", see 19 Colo. Law. 2187 (1990).

15-14-412.5. Limited court-approved arrangements authorized for persons seeking medical assistance for nursing home care - applicable to trusts established before a certain date.

(1) The general assembly hereby finds, determines, and declares that:

(a) The state makes significant expenditures for nursing home care under the "Colorado Medical Assistance Act";

(b) A large number of persons do not have enough income to afford nursing home care, but have too much income to qualify for state medical assistance, a situation popularly referred to as the "Utah gap";

(c) Some persons in the Utah gap, through innovative court-approved trust arrangements, have become qualified for state medical assistance, thereby increasing state medical assistance expenditures;

(d) It is therefore appropriate to enact state laws that limit such court-approved trusts in a manner that is consistent with Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396 et seq., as amended, and that provide that persons who qualify for assistance as a result of the creation of such trusts shall be treated the same as any other recipient of medical assistance for nursing home care;

(e) In enacting this section, the general assembly intends only to limit certain court-approved trusts and court-approved transfers of property. It is not the general assembly's intent to approve or disapprove of privately created trusts or private transfers of property made under the same or similar circumstances.

(2) The court shall not authorize, direct, or ratify any trust that either has the effect of qualifying or purports to qualify the trust beneficiary for medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., unless the circumstances surrounding the creation of the trust and the trust provisions meet the criteria set forth in section 25.5-6-102 (3), C.R.S. This section shall apply to any court-approved trust that is funded with property owned by the beneficiary at the time the trust is created but shall not apply to any trust that is established and directly funded by a defendant or insurance company in settlement of an action or claim for personal injury brought by or on behalf of the trust beneficiary.

(3) Except as otherwise permitted by Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p, as amended, the court shall not authorize, direct, or ratify the transfer of any property owned by a protected person if the transfer either has the effect of qualifying or purports to qualify the protected person for medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., unless the property is transferred into a trust established in accordance with subsection (2) of this section.

(4) This section shall take effect January 1, 1992, and shall apply to any court-approved trust established for or court-approved transfer of property made by or for a protected person applying for or receiving medical assistance for nursing home care pursuant to the provisions of title 25.5, C.R.S., on or after said date; except that such a trust created before said date that does not comply with this section shall be modified to comply with this section no later than July 1, 1992, before which time a court-approved trust or a court-approved transfer of property to a court-approved trust shall not render the protected person ineligible for medical assistance.

(5) The provisions of this section shall not apply if federal funds are not available for persons who would qualify for medical assistance as a result of a court-approved trust that meets the criteria set forth in section 25.5-6-102, C.R.S.

(6) This section applies to trusts established or transfers of property made prior to July 1, 1994. The provisions set forth in sections 15-14-412.6 to 15-14-412.9 and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S., apply to trusts established or property transferred on or after July 1, 1994.

Source: L. 2000: Entire part R&RE, p. 1810, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (2), (5), and (6) amended, p. 2002, § 50, effective July 1. **L. 2007:** (2), (3), and (4) amended, p. 2027, § 30, effective June 1.

Editor's note: This section is similar to former § 15-14-409.5 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Before the Miller Trust: Long-Term Care and HCBS Considerations", see 24 Colo. Law. 2721 (1995).

15-14-412.6. Trust established by an individual - eligibility for certain public assistance programs - general provisions.

(1) For purposes of this section and sections 15-14-412.7 to 15-14-412.9, unless the context otherwise requires the following definitions apply:

(a) "Asset" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(b) "Income" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(c) "Public assistance" means public assistance as provided by article 2 of title 26, C.R.S., and medical assistance as provided by articles 4, 5, and 6 of title 25.5, C.R.S.

(d) "Resources" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (e), as amended.

(e) "Trust established by an individual" has the same meaning as set forth in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d)(2), as amended.

(2) Notwithstanding any statutory provision to the contrary, a court shall not authorize, direct, or ratify any trust established by an individual that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance unless the trust meets the criteria set forth in this section, sections 15-14-412.7 to 15-14-412.9, and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

(3) The court shall not authorize, direct, or ratify the transfer of any assets owned by a protected person if the transfer has the effect of qualifying or purports to qualify the protected person for public assistance unless the assets are transferred to a trust that meets the criteria set forth in this section, sections 15-14-412.7 to 15-14-412.9, and any rule adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1811, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (1)(c), (2), and (3) amended, p. 2002, § 51, effective July 1.

Editor's note: This section is similar to former § 15-14-409.6 as it existed prior to 2001.

ANNOTATION

The court erred in attempting to shield the assets of the trust for the purpose of determining Medicaid eligibility because subsection (2) prohibits any trust that has been "established by an individual that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance," and this section does not except from this prohibition elective-share trusts created pursuant to § 15-11-206. In re Estate of Faller, 66 P.3d 114 (Colo. App. 2002).

15-14-412.7. Income trusts - limitations.

(1) An income trust within the meaning of this section is a trust established for the benefit of an individual that consists only of pension income, social security, and other monthly income to

the individual and accumulated income in the trust and that is established for the purpose or with the effect of establishing or maintaining income eligibility for certain medical assistance.

(2) An income trust shall not be effective for establishing or maintaining income eligibility for any category of public assistance other than nursing home care or home- and community-based services.

(3) In order to establish or maintain income eligibility, an income trust shall meet all of the following criteria:

(a) The assets used to fund the trust are limited to any monthly unearned income received by the applicant, including any pension payment;

(b) The sole lifetime beneficiaries of the trust are the person for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(c) The entire corpus of the trust, or as much of the corpus as may be distributed each month without violating federal requirements for federal financial participation, is distributed each month for expenses related to nursing home care or home- and community-based services for the beneficiary that are approved under the state medical assistance program; except that an amount reasonably necessary to maintain the existence of the trust and to comply with federal requirements may be retained in the trust;

(d) The trust provides that deductions may be made from the monthly trust distribution to the same extent that deductions from the income of a nursing home resident or home- and community-based services client are allowed under the state medical assistance program, articles 4, 5, and 6 of title 25.5, C.R.S., for nursing home residents and home- and community-based services clients who are not trust beneficiaries. Allowable deductions include the following:

(I) A monthly personal needs allowance;

(II) With respect to nursing home residents only, payments to the beneficiary's community spouse or dependent family members as provided and in accordance with Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396r-5, as amended, and section 25.5-6-101, C.R.S.;

(III) Specified health insurance costs and special medical services provided under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396a (r), as amended;

(IV) Any other deduction provided by rules of the medical services board, including rules concerning posteligibility treatment of income for home- and community-based services clients;

(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the state agency administering the state medical assistance program receives all amounts remaining in the trust up to the total medical assistance paid on behalf of the individual;

(f) The applicant's monthly gross income from all sources, without reference to the trust, exceeds the income eligibility standard for medical assistance then in effect but is less than the average private pay rate for nursing home care for the geographic region in which the applicant lives.

Source: L. 2000: Entire part R&RE, p. 1812, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** IP(3)(d) and (3)(d)(II) amended, p. 2003, § 52, effective July 1.

Editor's note: This section is similar to former § 15-14-409.7 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Impacts of Trusts on Public Benefits for Disabled Persons", see 46 Colo. Law. 43 (Nov. 2017).

15-14-412.8. Disability trusts - limitations.

(1) A disability trust within the meaning of this section is a trust that is established for an individual under sixty-five years of age who is disabled, as such term is defined in Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1382c (a)(3), as amended, consists of assets of the individual, and is established for the purpose or with the effect of establishing or maintaining the individual's resource eligibility for medical assistance.

(2) A disability trust is not valid for the purpose of establishing or maintaining a person's resource eligibility for medical assistance unless the trust meets all of the following criteria:

(a) The trust is funded by assets of an individual under age sixty-five who is disabled as defined in 42 U.S.C. sec. 1382c (a)(3), as amended, and which is established for the benefit of such individual by the individual, the individual's parent, the individual's grandparent, the individual's guardian, or by the court.

(b) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the department of health care policy

and financing receives any amount remaining in the trust up to the total medical assistance paid on behalf of the individual.

(c) The sole lifetime beneficiaries of the trust are the individual for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(3) A disability trust is not valid for the purpose of establishing or maintaining eligibility for any category of public assistance other than medical assistance.

(4) No disability trust shall be valid unless the department of health care policy and financing, or its designee, has reviewed the trust and determined that the trust conforms to the requirements of this section and any rules adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1813, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (4) amended, p. 2003, § 53, effective July 1. **L. 2017:** (2)(a) amended, (HB 17-1280), ch. 230, p. 894, § 1, effective May 23.

Editor's note: This section is similar to former § 15-14-409.8 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Preserving the Disabled Plaintiff's Access to Public Benefits with the Special Needs Trust," see 25 Colo. Law. 49 (May 1996).

This section does not violate the equal protection clause of the U.S. or Colorado Constitutions. Allowing specified funds to be used to fund a disability trust while other funds cannot be so used does not result in dissimilar treatment of similarly situated people. Because there is no dissimilar classification of individuals, no equal protection issue is presented. Colo. Dept. of Health Care Policy & Fin. v. Estate of Roberts, 18 P.3d 813 (Colo. App. 2000).

Federal law permits a state, for the purposes of determining medicaid eligibility, to permit applicants to exclude their income from eligibility by establishing a trust. However, federal law does not prohibit the state from adopting additional trust requirements, as in this section, for these purposes. Colo. Dept. of Health Care Policy & Fin. v. Estate of Roberts, 18 P.3d 813 (Colo. App. 2000); Matter of Mendy

Brockman Disability Trust, 2022 COA 75, 519 P.3d 373.

State regulation mandating when disability trusts terminate was not inconsistent with federal law. Regulation adopted pursuant to subsection (4) and stating that a disability trust "terminates upon the death of the individual or if the trust is no longer required for Medical Assistance eligibility" was not inconsistent with federal law, which neither requires nor prohibits a disability trust from terminating when a beneficiary dies or becomes ineligible for Medicaid benefits. Matter of Mendy Brockman Disability Trust, 2022 COA 75, 519 P.3d 373.

Upon termination, a trustee may pay federal and state taxes due from the corpus of the trust before reimbursing the state for medical assistance it rendered to the beneficiary. Stell v. Boulder County Dept. of Soc. Servs., 92 P.3d 910 (Colo. 2004).

The qualification of the trust for exemption from the Medicaid calculation, as opposed to its eventual distribution, is determined by the criteria set forth in this section, not § 15-12-805. Stell v. Colo. Dept. of Health Care Policy & Fin., 78 P.3d 1142 (Colo. App. 2003), rev'd on other grounds, 92 P.3d 910 (Colo. 2004).

15-14-412.9. Pooled trusts - limitations.

(1) A pooled trust within the meaning of this section is a trust consisting of individual accounts established for individuals who are disabled and is established for the purpose or with the effect of establishing or maintaining a person's resource eligibility for medical assistance.

(2) A pooled trust is not valid for the purposes of establishing or maintaining eligibility for medical assistance unless the trust meets the following criteria:

(a) The trust is established and managed by a nonprofit association that is approved by the United States internal revenue service.

(b) A separate account is maintained for each beneficiary of the trust; except that the accounts are pooled for purposes of investment and management of funds.

(c) The sole lifetime beneficiaries of the trust are the individual for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(d) Accounts in the trust are established solely for the benefit of individuals who are disabled as defined in 42 U.S.C. sec. 1382c (a)(3), as amended, and are established by the parent, grandparent, or legal guardian of such individual, by such individual, or by a court.

(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, to the extent that amounts remaining in the beneficiary's trust account are not retained by the trust, the state medical assistance program receives any amount remaining in that individual's trust account up to the total medical assistance paid on behalf of the individual.

(3) A pooled trust is not valid for the purpose of establishing or maintaining a person's eligibility for any category of public assistance other than medical assistance.

(4) No pooled trust shall be valid unless the department of health care policy and financing, or its designee, has reviewed the trust and determined that the trust conforms to the requirements of this section and any rules adopted by the medical services board pursuant to section 25.5-6-103, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1814, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (4) amended, p. 2003, § 54, effective July 1.

Editor's note: This section is similar to former § 15-14-409.9 as it existed prior to 2001.

15-14-413. Who may be conservator - priorities - prohibition of dual roles.

(1) Except as otherwise provided in subsection (4) of this section, the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

(a) A conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(b) A person nominated as conservator by the respondent, including the respondent's specific nomination of a conservator made in a durable power of attorney or given priority to be a conservator in a designated beneficiary agreement made pursuant to article 22 of this title, if the respondent has attained twelve years of age;

(c) An agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(d) The spouse of the respondent;

(d.5) The partner in a civil union of the respondent;

(e) An adult child of the respondent;

(f) A parent of the respondent; and

(g) An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.

(2) A respondent's nomination or appointment of a conservator shall create priority for the nominee or appointee only if, at the time of nomination or appointment, the respondent had sufficient capacity to express a preference.

(3) A person having priority under paragraph (a), (d), (d.5), (e), or (f) of subsection (1) of this section may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(4) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, for good cause, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(5) An owner, operator, or employee of a long-term care provider from which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

(6) (a) Unless the court makes specific findings for good cause shown or the person is a family caregiver as defined in section 25.5-10-202, C.R.S., the same professional may not act as an incapacitated person's or a protected person's:

(I) Guardian and conservator; or

(II) Guardian and direct service provider; or

(III) Conservator and direct service provider.

(b) In addition, a guardian or conservator may not employ the same person to act as both care manager and direct service provider for the incapacitated person or protected person unless the person is a family caregiver as defined in section 25.5-10-202, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1815, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 445, § 12, effective July 1. **L. 2010:** (1)(b) amended, (SB 10-199), ch. 374, p. 1753, § 19, effective July 1. **L. 2011:** (6) amended, (SB 11-083), ch. 101, p. 308, § 16, effective August 10. **L. 2013:** (1) and (3) amended, (SB 13-011), ch. 49, p. 166, § 21, effective May 1; IP(6)(a) and (6)(b) amended, (HB 13-1314), ch. 323, p. 1803, § 27, effective March 1, 2014.

Editor's note: This section is similar to former § 15-14-410 as it existed prior to 2001.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

COMMENT

This section gives top priority for appointment to existing conservators appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing conservators are granted a first priority for two reasons. First, many of these cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator appointed in this state or another should have the right to the appointment at the new location. Second, many cases may involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. Should the existing conservator be inappropriate for some reason, subsection (c) permits the court to skip over the existing conservator and appoint someone with lower priority or even no priority.

A conservator or individual nominated by the respondent or the agent named in the respondent's durable power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by separate document. While it is generally good practice for an individual to nominate as conservator the agent named in a durable power of attorney, the section grants such an agent a preference in the absence of a specific nomination. The agent is granted preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the agent's authority. To assure that the agent will be in a position to assert his priority, Section 5-404(b) requires that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 5-411(d) provides that the authority of an agent takes precedence over that of the conservator.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, *see* the detailed comment to Section 5-304.

While this section substantially overlaps with Section 5-310, the comparable provision on selection of guardians, there are some differences. For example, Section 5-310 denies a priority to an emergency or temporary guardian, but this section does not expressly deny a priority for appointment to an emergency or temporary conservator appointed in another state. But the failure in subsection (a)(1) to expressly exclude these categories of conservator does not mean that they enjoy a priority for appointment. Unlike the case with guardians, emergency or temporary conservators are not included within the definition of "conservator" found in Section 5-102(1).

Subsection (d) prohibits anyone affiliated with a long-term care facility at which the respondent is receiving care from being appointed as conservator absent a blood, marital or adoptive arrangement. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the protected person from potential financial exploitation. Each state enacting Parts 1-4 of this article needs to insert the particular term or terms used in the state for facilities considered to be long-term care institutions.

National Probate Court Standards, Standard 3.4.11 "Qualifications and Appointments of Conservators" (1993), recognizes that the court should appoint as conservator one who is both willing and suitable to manage the respondent's finances and property, based on the nature of the respondent's estate and the respondent's incapacity. The standard provides a preference in appointment to one known by, related to, or requested by the respondent.

This section is based on UGPPA (1982) Section 2-309 (UPC Section 5-409 (1982)).

ANNOTATION

Law reviews. For article, "Determination of Heirship by Special Proceedings and Temporary Conservationship", see 14 Colo. Law. 1781 (1985). For article, "Divorce Considerations Relevant to an Estate Planning Practice", see 29 Colo. Law. 53 (Feb. 2000). For article, "The Durable Power of Attorney: Defining the Agent's Duties", see 41 Colo. Law. 49 (May 2012).

In the initial selection of a conservator the wishes of the ward should be given consideration, premised upon the mental ability of the ward to exercise a "sensible opinion" on the matter. The instant record demonstrates that the ward is unable to exercise such a sensible opinion as to who should serve as the conservator of his estate. No authority requires the probate court to substitute conservators because the ward prefers a different conservator. In re Estate of Alencoy v. Wysowatcky, 170 Colo. 385, 461 P.2d 210 (1969) (decided under repealed § 153-9-1, C.R.S. 1963).

Trial court failed to make findings regarding whether the respondent had sufficient capacity to nominate a guardian or conservator. Although a trial court, upon a showing of good cause, has the authority

to appoint a respondent's preferred guardian and conservator, the court must make findings relative to good cause. In re Estate of Runyon, 2014 COA 181, 343 P.3d 1072.

15-14-414. Petition for order subsequent to appointment.

(1) A protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

(a) Requiring bond or collateral or additional bond or collateral, or reducing bond or collateral;

(b) Requiring an accounting for the administration of the protected person's estate;

(c) Directing distribution;

(d) Removing the conservator pursuant to section 15-10-503 and appointing a special or successor conservator;

(e) Modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or

(f) Granting other appropriate relief.

(2) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(3) Upon notice and hearing the petition, the court may give appropriate instructions and make any appropriate order.

(4) At the conclusion of the hearings authorized by this section, the court may review the motions and petitions filed by a party under this section to determine if they were substantially warranted and brought in good faith. If, after the hearing, the court determines that the motions and petitions filed under this section were not substantially warranted or were brought in bad faith, the court may award fees and costs against the movant or petitioner including, but not limited to, the attorney fees and costs incurred by the conservatorship, or the affected parties, in responding to the motions and petitions.

Source: L. 2000: Entire part R&RE, p. 1816, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (1)(d) amended, p. 485, § 12, effective July 1.

Editor's note: This section is similar to former § 15-14-416 as it existed prior to 2001.

ANNOTATION

An evidentiary hearing is necessary to consider the factual circumstances to determine whether a petitioner is a person interested in the welfare of the incapacitated person. In re Estate of Edwards, 794 P.2d 1092 (Colo. App. 1990) (decided prior to 2000 repeal and reenactment).

Award of attorney fees under subsection (4) upheld. "Bad faith" involves conduct that is arbitrary, vexatious, abusive, stubbornly litigious, aimed at unwarranted delay, or disrespectful of trust and accuracy. Similarly, a motion or petition is "not substantially warranted" if it is not supported by any rational argument or credible evidence. In re Estate of Becker, 68 P.3d 567 (Colo. App. 2003).

15-14-415. Bond.

Unless the court makes specific findings as to the reasons a bond is not required in the present case, the court shall require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. In the alternative, the court may impose restrictions upon the conservator's access to, or transfer of, the assets of the conservatorship estate. Unless otherwise directed by the court, the cost of the bond shall be charged to the protected person's estate and the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

Source: L. 2000: Entire part R&RE, p. 1817, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-411 as it existed prior to 2001.

15-14-416. Terms and requirements of bond.

(1) The following rules apply to any bond required:

(a) Except as otherwise provided by the terms of the bond, sureties and the conservator are jointly and severally liable.

(b) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding must be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(c) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(d) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(e) Unless otherwise directed by the court, the cost of the bond shall be paid from the protected person's estate.

(2) A proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred.

(3) If there is a request for the waiver or reduction of a surety upon a bond, the court may require the conservator to supply the court with a credit report, a statement of the conservator's assets, liabilities, income, and expenses, and a statement about any interests the conservator may have in or liability to the conservatorship estate, or any other information the court may wish to consider.

Source: L. 2000: Entire part R&RE, p. 1817, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-412 as it existed prior to 2001.

15-14-417. Compensation, fees, costs, and expenses of administration - expenses. (Repealed)

Source: L. 2000: Entire part R&RE, p. 1818, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2001:** (1) amended, p. 889, § 9, effective June 1. **L. 2011:** Entire section repealed, (SB 11-083), ch. 101, p. 317, § 27, effective August 10.

Editor's note: This section was similar to former § 15-14-414 as it existed prior to 2001.

ANNOTATION

Because this section does not specify the amount of compensation to be granted a conservator, the determination of such amount is within the sound discretion of the probate court. Such determination will not be overturned except upon a showing of abuse of discretion. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992) (decided prior to 2000 repeal and reenactment).

Section impliedly supports a "reasonably and in good faith" standard that conforms to the common law. A conservator can reasonably and in good faith oppose a protected person's motion to terminate the conservatorship. In re Estate of Keenan, 252 P.3d 539 (Colo. App. 2011) (decided prior to 2011 repeal).

Section implicitly authorizes actions that trigger payment by specifying when payment to the conservator from the protected person's estate is appropriate. In re Estate of Keenan, 252 P.3d 539 (Colo. App. 2011) (decided prior to 2011 repeal).

15-14-418. General duties of conservator - financial plan.

(1) A conservator, in relation to powers conferred by this part 4 or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee.

(2) A conservator shall take into account the limitations of the protected person, and to the extent possible, as directed by the order of appointment or the financial plan, encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.

(3) Within a time set by the court, but no later than ninety days after appointment, a conservator shall file for approval with the appointing court a financial plan for protecting, managing, expending, and distributing the income and assets of the protected person's estate. The financial plan shall be based upon a comparison of the projected income and expenses of the protected person and shall set forth a plan to address the needs of the person and how the assets and income of the protected person shall be managed to meet those needs. The financial plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the financial plan steps to the extent possible to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

(4) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator. The conservator may examine the will and any other donative, nominative, or other appointive instrument of the person.

(5) A conservator shall file an amended financial plan whenever there is a change in circumstances that requires a substantial deviation from the existing financial plan.

Source: L. 2000: Entire part R&RE, p. 1819, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-417 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988).

15-14-419. Inventory.

(1) Within a time set by the court, but no later than ninety days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(2) If any property not included in the original inventory comes to the knowledge of a conservator or if the conservator learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he or she shall prepare an amended inventory and file it with the court and provide copies to interested parties as directed by prior court orders.

Source: L. 2000: Entire part R&RE, p. 1820, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-418 as it existed prior to 2001.

15-14-420. Reports - appointment of monitor - monitoring - records - court access to records.

(1) A conservator shall report to the court about the administration of the estate annually unless the court otherwise directs. Upon filing a petition or motion and after notice, a conservator shall be entitled to a hearing to settle all matters covered in an intermediate or final report. An order, after notice and hearing, allowing an intermediate report of a conservator adjudicates all of the conservator's, his or her other counsel's, and his or her other agent's liabilities concerning all matters adequately disclosed in the report. An order, after notice and hearing, allowing a final report adjudicates all previously unsettled liabilities of the conservator, his or her counsel, and that of his or her agents relating to the conservatorship, the protected person, or the protected person's successors.

(2) Unless the court orders otherwise, a report must:

(a) Contain a list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;

(b) Reflect the services provided to the protected person; and

(c) State any recommended changes in the plan for the conservatorship as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(3) The court may appoint a visitor or other suitable person to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs.

(4) The court shall establish a system for monitoring conservatorships, including the filing and review of conservators' reports and plans.

(5) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person within thirty days unless the court otherwise directs.

(6) (a) Whenever a conservator fails to file a report or fails to respond to an order of the court to show cause why the conservator should not be held in contempt of court, the clerk of the court or his or her designee may research the whereabouts and contact information of the conservator and the protected person. To facilitate this research, the clerk of the court or his or her designee shall have access to data maintained by other state agencies, including but not limited to vital statistics information maintained by the department of public health and environment, wage and employment data maintained by the department of labor and employment, lists of licensed drivers and income tax data maintained by the department of revenue and provided pursuant to section 13-71-107, C.R.S., and voter registration information obtained annually by the state court

administrator pursuant to section 13-71-107, C.R.S. The court may access the data only to obtain contact information for the conservator or the ward. Notwithstanding any provision of law to the contrary, the judicial department and the other state agencies listed in this paragraph (a) may enter into agreements for the sharing of this data. The judicial department and the courts shall not access data maintained pursuant to the "Address Confidentiality Program Act", part 21 of article 30 of title 24, C.R.S.

(b) The court shall preserve the confidentiality of the data obtained from the other state agencies and use the data only for the purposes set forth in this subsection (6). Notwithstanding the provisions of article 72 of title 24, C.R.S., documents and information obtained by the court pursuant to this subsection (6) are not public records and shall be open to public inspection only upon an order of the court based on a finding of good cause, except to the extent they would otherwise be open to inspection from the providing state agency.

(c) For purposes of this subsection (6), "contact information" means name, residential address, business address, date of birth, date of death, phone number, email address, or other identifying information as directed by the court.

Source: L. 2000: Entire part R&RE, p. 1820, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2011:** IP(2) and (5) amended, (SB 11-083), ch. 101, pp. 309, 306, §§ 17, 12, effective August 10. **L. 2012:** Entire section amended, (HB 12-1074), ch. 46, p. 167, § 2, effective March 22.

ANNOTATION

Legitimate expenses of conservator. Where the conservator attends to his ward's property in good faith and preserves it, expenses for that purpose are legitimate and constitute a proper accounting for such of ward's money as came into the conservator's hands. Hunt v. Hunt, 83 Colo. 282, 264 P. 662 (1928)(case decided prior to the earliest source of this section).

15-14-421. Title by appointment.

(1) Except as limited in the appointing order, the appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired, including title to any property held for the protected person by custodians or attorneys-in-fact. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order. Notwithstanding the language vesting title in the conservator in this section, this vesting of title shall not be construed to sever any joint tenancies.

(2) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the person's successors.

(3) Subject to the requirements of other statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

(4) Neither the appointment of a conservator nor the establishment of a trust in accordance with sections 15-14-412.5 to 15-14-412.9 is a transfer or an alienation within the meaning of the general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument imposing restrictions upon or penalties for the transfer or alienation by the protected person of his or her rights or interest, but this section does not restrict the ability of a person to make specific provisions by contract or dispositive instrument relating to a conservator.

(5) Except as limited in the appointing order, a conservator has the authority to continue, modify, or revoke any financial power of attorney previously created by the protected person.

(6) (a) Upon notice of the appointment of a conservator, all agents acting under a previously created power of attorney by the protected person:

(I) Shall take no further actions without the direct written authorization of the conservator;

(II) Shall promptly report to the conservator as to any action taken under the power of attorney; and

(III) Shall promptly account to the conservator for all actions taken under the power of attorney.

(b) Nothing in this section shall be construed to affect previously created medical decision-making authority. Any agent violating this section shall be liable to the protected person's estate for all costs incurred in attempting to obtain compliance, including but not limited to reasonable conservator and attorney fees and costs.

Source: L. 2000: Entire part R&RE, p. 1821, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2009:** IP(6)(a) and (6)(a)(I) amended, (SB 09-292), ch. 369, p. 1947, § 26, effective August 5.

Editor's note: This section is similar to former § 15-14-420 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Effect of Appointment of Conservator on Joint Tenancy Title", see 12 Colo. Law. 1237 (1983).

Even if appointment of a conservator prevents a protected person from creating an inter vivos trust, it does not prevent a protected person who has testamentary capacity from creating a testamentary trust. In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004).

15-14-422. Protected person's interest inalienable.

(1) Except as otherwise provided in subsections (3) and (4) of this section, the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages that, subject to presentation and allowance, may be satisfied as provided in section 15-14-429.

(2) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under section 15-14-429.

(3) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(4) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

Source: L. 2000: Entire part R&RE, p. 1822, § 1, effective January 1, 2001 (see § 15-17-103).

ANNOTATION

Even if appointment of a conservator prevents a protected person from creating an inter vivos trust, it does not prevent a protected person who has testamentary capacity from creating a testamentary trust. In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004).

15-14-423. Sale, encumbrance, or other transaction involving conflict of interest.

Any transaction involving the conservatorship estate that is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

Source: L. 2000: Entire part R&RE, p. 1823, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-422 as it existed prior to 2001.

ANNOTATION

Disclosure of a conflicted transaction is not enough to immunize a conservator from a breach of fiduciary duty claim. In addition, the fiduciary has an obligation, independent of this section, to establish that the conflicted transaction is fair and reasonable and not adverse to the interests of the protected person. In Interest of Black, 2018 COA 7, 422 P.3d 592.

15-14-424. Protection of person dealing with conservator.

(1) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under section 15-14-410 or 15-14-411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators that are endorsed on letters as provided in section 15-14-110 are effective as to third persons. A person who pays or delivers assets to a conservator is not responsible for their proper application.

(2) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

(3) Any recorded instrument evidencing a transaction described in this section on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that such transaction was made for value.

Source: L. 2000: Entire part R&RE, p. 1824, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-423 as it existed prior to 2001.

ANNOTATION

Third parties knowingly dealing with a conservator are not required to make inquiry into the existence or propriety of the conservator's power, except that restrictions on powers of conservators which are endorsed on letters provided in this section are effective as to third persons. In re Conservatorship of Roth, 804 P.2d 265 (Colo. App. 1990) (decided prior to 2000 repeal and reenactment).

15-14-425. Powers of conservator in administration.

(1) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this state.

(2) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

(a) Collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another state, until the conservator considers that disposition of an asset should be made;

(b) Receive additions to the estate;

(c) Continue or participate in the operation of any business or other enterprise;

(d) Acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;

(e) Invest assets of the estate as though the conservator were a trustee;

(f) Deposit money of the estate in a financial institution, including one operated by the conservator;

(g) Acquire or dispose of an asset of the estate, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate;

(h) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

(i) Subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(j) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(k) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) Grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(m) Vote a security, in person or by general or limited proxy;

(n) Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(o) Sell or exercise stock subscription or conversion rights;

(p) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(q) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(r) Insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(s) Borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(t) Pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(u) Pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(v) Allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;

(w) Pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(I) To the guardian of the distributee;

(II) To a distributee's custodian under the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S., or custodial trustee under the "Colorado Uniform Custodial Trust Act", article 1.5 of this title; or

(III) If there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(x) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and

(y) Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

(3) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator may exercise any of the powers enumerated in the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title.

(4) The court may confer on a conservator at the time of appointment or later, in addition to the powers conferred by sections 15-14-425, 15-14-426, and 15-14-427, any power that the court itself could exercise under section 15-14-410. The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by sections 15-14-425, 15-14-426, and 15-14-427, or previously conferred by the court, and may at any time relieve the conservator of any limitation. If the court limits any power conferred on the conservator by section 15-14-425, 15-14-426, or 15-14-427 or specifies, as provided in section 15-14-421 (1) that title to some but not all assets of the protected person vest in the conservator, the limitation shall be endorsed upon the conservator's letters of appointment.

(5) In investing the estate, and in selecting assets of the estate for distribution under section 15-14-427, in utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, and in exercising any other powers vested in them, the conservator and the court should take into account any known estate plan of the protected person, including his or her will, any revocable trust of which he or she is

settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his or her death to another or others which he or she may have originated. The conservator may examine the will of the protected person.

Source: L. 2000: Entire part R&RE, p. 1823, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-424 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Conservator-Created Wills: Issues in Litigation", see 44 Colo. Law. 53 (Aug. 2015).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

One of the prime purposes of an action for annulment is the protection of the property of the ward. Cox v. Armstrong, 122 Colo. 227, 221 P.2d 371 (1950); Young v. Brofman, 139 Colo. 296, 338 P.2d 286 (1959).

An annulment suit may be instituted by a conservator on behalf of a ward. Young v. Brofman, 139 Colo. 296, 338 P.2d 286 (1959).

A nonlawyer conservator or guardian in this state is a statutory legal representative only and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under this section and to guardians under §§ 15-14-315 and 15-14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010) (decided prior to 2017 amendments relocating article 5 of title 12 to article 93 of title 13).

Applied in Vallentine v. Taylor Inv. Co., 305 F. Supp. 1104 (D. Colo. 1969).

15-14-425.5. Authority to petition for dissolution of marriage or legal separation.

(1) The conservator may petition the court for authority to commence and maintain an action for dissolution of marriage or legal separation on behalf of the protected person. The court may grant such authority only if satisfied, after notice and hearing, that:

(a) It is in the best interests of the protected person based on evidence of abandonment, abuse, exploitation, or other compelling circumstances, and the protected person either is incapable of consenting; or

(b) The protected person has consented to the proposed dissolution of marriage or legal separation.

(2) Nothing in this section shall be construed as modifying the statutory grounds for dissolution of marriage and legal separation as set forth in section 14-10-106, C.R.S.

Source: L. 2000: Entire part R&RE, p. 1826, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-425.5 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "'Til Death Do Us Part", see 46 Colo. Law. 34 (July 2017). For article, "Guardians ad Litem — Part 2: Serving Adults with Diminished Capacity in Domestic Relations Matters", see 51 Colo. Law. 40 (Aug.-Sept. 2022).

A nonlawyer conservator or guardian in Colorado is a statutory legal representative only and is therefore prohibited from practicing law and serving as legal counsel in court. The powers granted to conservators under § 15-14-425 and to guardians under §§ 15-14-315 and 15-14-315.5 do not establish an exception to § 12-5-101 regarding the practice of law. In re Kanefsky, 260 P.3d 327 (Colo. App. 2010) (decided prior to 2017 amendments relocating article 5 of title 12 to article 93 of title 13).

15-14-426. Delegation.

(1) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(2) The conservator shall exercise reasonable care, skill, and caution in:

(a) Selecting an agent;

(b) Establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(c) Periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and

(d) Redressing an action or decision of an agent that would constitute a breach of trust if performed by the conservator.

(3) A conservator who complies with subsections (1) and (2) of this section is not liable to the protected person or to the estate or to the protected person's successors for the decisions or actions of the agent to whom a function was delegated.

(4) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(5) By accepting a delegation from a conservator subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state.

Source: L. 2000: Entire part R&RE, p. 1827, § 1, effective January 1, 2001 (see § 15-17-103).

15-14-427. Principles of distribution by conservator.

(1) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the financial plan filed pursuant to section 15-14-418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child support or spousal maintenance, in accordance with the following rules:

(a) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(b) A conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to a protected person, or an individual who is in fact dependent on the protected person, in accordance with the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(c) In making distributions under this paragraph (c), the conservator shall consider:

(I) The size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage his or her business affairs and the estate;

(II) The accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(III) Other money or sources used for the support of the protected person.

(d) Money expended under this paragraph (d) may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(2) If an estate is ample to provide for the distributions authorized by subsection (1) of this section, a conservator for a protected person other than a minor may make gifts that the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year twenty percent of the income of the estate in that year.

Source: L. 2000: Entire part R&RE, p. 1827, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-425 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Colorado Guardianship and Conservatorship Law: A Status Report", see 16 Colo. Law. 421 (1987). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988).

15-14-428. Death of protected person.

(1) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the protected person that is in the conservator's possession or control, inform the personal representative or devisees named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.

(2) After the death of the protected person, the conservator shall make no expenditures of conservatorship funds except with court authorization other than necessary to preserve the assets of the estate. However, the conservator may release funds for the funeral or final disposition of the deceased protected person if necessary to do so under the circumstances.

(3) When a protected person dies, all fees, costs, and expenses of administration of the conservatorship, including any unpaid conservator fees and costs and those of his or her counsel, may be submitted to the court for approval in conjunction with the termination of the conservatorship. Thereafter, all court-approved fees, costs, and expenses of administration arising from the conservatorship shall be paid as court-approved claims for costs and expenses of

administration in the decedent's estate. In the event that there are insufficient moneys to pay all claims in the decedent's estate in full, the fees, costs, and expenses of administration arising from the conservatorship shall retain their classification as "costs and expenses of administration" in the decedent's estate and shall be paid pursuant to section 15-12-805.

Source: L. 2000: Entire part R&RE, p. 1828, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2011:** (3) added, (SB 11-083), ch. 101, p. 309, § 18, effective August 10. **L. 2021:** (2) amended, (SB 21-006), ch. 123, p. 493, § 16, effective September 7.

15-14-429. Presentation and allowance of claims.

(1) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (4) of this section. A claimant may present a claim by:

(a) Delivering or mailing to the court-appointed conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(b) Filing a written statement of the claim with the clerk of the court, in the form approved by the supreme court, and delivering or mailing a copy of the statement to the conservator.

(2) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is deemed allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within sixty-three days after its presentation. The conservator before payment may change an allowance or deemed allowance to a disallowance in whole or in part, but not after allowance under a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until thirty-five days after its disallowance. If a claim is not yet due, the claim shall state the date when it will become due. If a claim is contingent or unliquidated, the claim shall state the nature of the uncertainty or the anticipated due date of the claim.

(3) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(4) If it appears that the estate is likely to be exhausted before all existing claims are paid:

(a) The conservator may, without a court order, distribute the estate in money or in kind in payment of claims in the following order:

(I) Costs and expenses of administration;

(II) Claims of the federal or state government having priority under other law;

(III) Claims incurred by the conservator for support, care, education, health, and welfare provided to the protected person or individuals who are in fact dependent on the protected person;

(IV) Claims arising before the conservatorship; and

(V) All other claims.

(b) (I) At any time during the administration, if the payment of claims as set forth in paragraph (a) of this subsection (4) would substantially deplete the conservatorship estate and leave the conservatorship estate with insufficient funds to pay for the protected person's basic living and health-care expenses, the conservator may file a motion with the court seeking permission to withhold payment of allowed claims, both those existing and incurred after the date of the motion, and pay only the expenses, claims, and amounts requested by the conservator regardless of the priority of the claim, as set forth in said paragraph (a).

(II) If the conservator files a motion as described in subparagraph (I) of this paragraph (b), the factors to be considered by the court include, but are not limited to:

(A) The current and future projected care costs of the protected person;

(B) The current and projected assets of the protected person, including the assets of the conservatorship estate;

(C) The life expectancy of the protected person;

(D) The current and projected income of the protected person and the conservatorship estate;

(E) The protected person's eligibility for benefits to cover living and health-care expenses; and

(F) Whether there are individuals who are in fact dependent on the protected person.

(III) Notice of a motion filed under this section shall be provided to all interested persons and to all creditors whose claims are affected.

(IV) If any order is entered restricting payments on any creditor's claims, the conservator shall provide information in the annual report regarding whether the order restricting payment of the creditor's claims should be modified.

(c) to (e) (Deleted by amendment, L. 2013.)

(5) Unless the court orders otherwise, allowed claims within the same class shall be paid pro rata. Preference may not be given in the payment of a claim over any other claim of the same class, and a claim due and payable may not be preferred over a claim not due.

(6) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to grant a security interest in the conservatorship estate for the payment of any or all claims at a future date.

(7) Nothing in this section affects or prevents:

(a) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(b) To the limits of the insurance protection only, any proceeding to establish liability of the protected person for which he or she is protected by liability insurance.

(8) Unless otherwise provided in any judgment in another court entered against the protected person or the protected person's estate, an allowed claim bears interest at the legal rate for the period commencing sixty-three days after the time the claim was originally filed with the court or delivered to the conservator, unless based on a contract making a provision for interest, in which case, such claim bears interest in accordance with that contract's provisions.

(9) Each written statement of a claim shall include:

(a) A request or demand for payment from the protected person or the conservatorship estate; and

(b) Sufficient information to allow the conservator to investigate and respond to the claim, including its basis, the name and address of the claimant, and the amount claimed.

Source: L. 2000: Entire part R&RE, p. 1829, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** (1) and (2) amended and (9) added, p. 376, § 5, effective July 1. **L. 2012:** (2) and (8) amended, (SB 12-175), ch. 208, p. 840, § 53, effective July 1. **L. 2013:** (4) and (5) amended, (SB 13-077), ch. 190, p. 772, § 9, effective August 7.

Editor's note: This section is similar to former § 15-14-428 as it existed prior to 2001.

15-14-430. Personal liability of conservator.

(1) Except as otherwise provided in the contract, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate

unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(2) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(3) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(4) A question of liability between the estate and the conservator personally may be determined:

(a) In a proceeding pursuant to section 15-10-504;

(b) In a proceeding for accounting, surcharge, indemnification, sanctions, or removal; or

(c) In another appropriate proceeding or action.

(5) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an acquisition of title under section 15-14-421.

Source: L. 2000: Entire part R&RE, p. 1830, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2008:** (4) amended, p. 485, § 13, effective July 1.

Editor's note: This section is similar to former § 15-14-429 as it existed prior to 2001.

15-14-431. Termination of proceedings.

(1) A conservatorship terminates upon the death of the protected person or upon order of the court determining that a conservatorship is no longer necessary or needed to protect the assets of the protected person. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains the age of twenty-one years. Upon learning of the protected person's death, the conservator shall promptly give notice of death to the court and all other persons designated to receive notice of subsequent actions in the order appointing the conservator.

(2) Upon receiving an order terminating the conservatorship or upon receiving notice of the death of a protected person, the conservator shall conclude the administration of the estate by filing a final report and a petition for discharge within sixty-three days after distribution unless otherwise directed by the court.

(3) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer meets the statutory requirements for the creation of a conservatorship. Termination of the conservatorship without a decree of discharge does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(4) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. The court shall order termination unless it is proved by clear and convincing evidence that continuation of the conservatorship is still statutorily warranted and is still in the best interest of the protected person.

(4.5) The following provisions apply in a termination proceeding that is initiated by the protected person:

(a) The conservator may file a written report to the court regarding any matter relevant to the termination proceeding, and the conservator may file a motion for instructions concerning any relevant matter including, but not limited to, the following:

(I) Whether an attorney, guardian ad litem, or visitor should be appointed for the protected person;

(II) Whether any further investigation or professional evaluation of the protected person should be conducted, the scope of the investigation or professional evaluation, and when the investigation or professional evaluation should be completed; and

(III) Whether the conservator is to be involved in the termination proceedings, and if so, to what extent.

(b) If the conservator elects to file a written report or a motion for instructions, the conservator shall file such initial pleadings within twenty-one days after the petition to terminate has been filed. Any interested person shall then have fourteen days to file a response. If a response is filed, the conservator shall have seven days to file a reply. If a motion for instructions is filed by the conservator as his or her initial pleading, the court shall rule on that motion before the petition for termination of the conservatorship is set for hearing. Unless a hearing on the motion for instructions is requested by the court, the court may rule on the pleadings without a hearing after the time period for the filing of the last responsive pleading has expired. After the filing of the conservator's initial motion for instructions, the conservator may file subsequent motions for instruction as appropriate.

(c) Except for the actions authorized in paragraphs (a), (b), and (e) of this subsection (4.5) or as otherwise ordered by the court, the conservator may not take any action to oppose or interfere in the termination proceeding. The filing of the initial or subsequent motion for instructions by the conservator shall not, in and of itself, be deemed opposition or interference.

(d) Unless ordered by the court, the conservator shall have no duty to participate in the termination proceeding, and the conservator shall incur no liability for filing the report or motion for instruction or for failing to participate in the proceeding.

(e) Nothing in this subsection (4.5) shall prevent:

(I) The court, on its own motion and regardless of whether the conservator has filed a report or request for instructions, from ordering the conservator to take any action that the court deems appropriate, or from appointing an attorney, guardian ad litem, visitor, or professional evaluator;

(II) The court from ordering the conservator to appear at the termination proceeding and give testimony; or

(III) Any interested person from calling the conservator as a witness in the termination proceeding.

(f) Any individual who has been appointed as a conservator, is an interested person in his or her individual capacity, and wants to participate in the termination proceeding in his or her individual capacity and not in his or her fiduciary capacity may do so without restriction or limitation. The payment of any fees and costs to the individual that are related to his or her decision to participate in the termination proceeding shall be governed by section 15-10-602 (7) and not section 15-10-602 (1).

(5) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person, the former protected person's successors, or as ordered by the court. The order of termination must provide for the payment of all fees, costs, and expenses of administration and direct the conservator to file appropriate instruments to evidence the transfer of title or confirm the ordered distribution pursuant to the schedule of distribution prior to receiving the decree of discharge.

(6) The court shall enter a decree of discharge upon being fully satisfied that the conservator has met all conditions required by the court for the conservator's discharge.

Source: L. 2000: Entire part R&RE, p. 1831, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2011:** (4.5) added, (SB 11-083), ch. 101, p. 309, § 19, effective August 10. **L. 2012:** (2) and (4.5)(b) amended, (SB 12-175), ch. 208, p. 841, § 54, effective July 1.

Editor's note: This section is similar to former § 15-14-430 as it existed prior to 2001.

15-14-432. Payment of debt and delivery of property to foreign conservator without local proceeding.

(1) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the state of residence of the protected person. Payment or delivery may be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this state and the foreign fiduciary is entitled to payment or to receive delivery.

(2) Payment or delivery in accordance with subsection (1) of this section discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this state.

Source: L. 2000: Entire part R&RE, p. 1832, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's note: This section is similar to former § 15-14-431 as it existed prior to 2001.

15-14-433. Foreign conservator - proof of authority - bond - powers.

If a conservator has not been appointed in this state and a petition in a protective proceeding is not pending in this state, a conservator appointed in the state in which the protected person resides may file in a district or probate court of this state, in a county in which property belonging to the protected person is located, authenticated copies of the conservator's appointment documents and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this state as to property in this state and may maintain actions and proceedings in this state subject to any conditions otherwise imposed upon nonresident parties.

Source: L. 2000: Entire part R&RE, p. 1832, § 1, effective January 1, 2001 (see § 15-17-103). **L. 2006:** Entire section amended, p. 392, § 26, effective July 1.

Editor's note: This section is similar to former § 15-14-432 as it existed prior to 2001.

15-14-434. Right to a lawyer post-adjudication.

(1) An adult protected person has the right post-adjudication to be represented by a lawyer of the protected person's choosing at the expense of the protected person's estate unless the court finds by clear and convincing evidence that the protected person lacks sufficient capacity to provide informed consent for representation by a lawyer. Upon such a finding, the court shall appoint a guardian ad litem, and the adult protected person retains the right to a lawyer of the adult protected person's choosing for the limited purpose of interlocutory appeal of the court's decision as to the right to a lawyer.

(2) The right to a lawyer described in subsection (1) of this section applies to a protected person participating in proceedings or seeking any remedy under parts 1 to 4 of this article, including change or termination of a guardianship, judicial review of fiduciary conduct, appellate relief, and any other petition for relief from the court.

(3) Subject to subsection (1) of this section, the court shall appoint a lawyer to represent any adult protected person in any proceedings pursuant to parts 1 to 4 of this article if the protected person is not represented by a lawyer and the court determines the protected person needs such representation.

(4) A lawyer for the protected person, on presentation of proof of representation, must be given access to all information pertinent to proceedings under this title, including immediate access to medical records and information.

Source: L. 2016: Entire section added, (SB 16-131), ch. 286, p. 1166, § 4, effective August 10.

PART 5

POWERS OF ATTORNEY

Cross references: For provisions relating to anatomical gifts and their effect on advance health-care directives, see part 2 of article 19 of this title; for provisions relating to a medical durable power of attorney, see § 15-14-506; for provisions relating to declarations concerning medical treatment, see article 18 of this title; for provisions relating to proxy decision-makers for medical treatment decisions, see article 18.5 of this title; for provisions relating to cardiopulmonary resuscitation directives, see article 18.6 of this title.

15-14-500.3. Legislative declaration.

(1) The general assembly hereby recognizes that each adult individual has the right as a principal to appoint an agent to deal with property or make personal decisions for the individual, but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal's lifetime, including during periods of disability, and be sure that any third party will honor the agent's authority at all times.

(2) The general assembly hereby finds, determines, and declares that:

(a) In light of modern financial needs, the statutory recognition of the right of delegation in Colorado must be restated, among other things, to expand its application and the permissible scope of the agent's authority, to clarify the power of the individual to authorize an agent to make financial decisions for the individual, and to better protect any third party who relies in good faith on the agent so that reliance will be assured.

(b) The public interest requires a standard form for certification of agency that any third party may use to assure that an agent's authority under an agency has not been altered or terminated.

(3) The general assembly hereby finds, determines, and declares that nothing in this part 5 or part 6 or 7 of this article shall be deemed to authorize or encourage any course of action that violates the criminal laws of this state or the United States. Similarly, nothing in this part 5 or part 6 or 7 of this article shall be deemed to authorize or encourage any violation of any civil right expressed in the constitution, statutes, case law, or administrative rulings of this state or the United States or any course of action that violates the public policy expressed in the constitution, statutes, case law, or administrative rulings of this state or the United States.

(4) The general assembly hereby recognizes each adult's constitutional right to accept or reject medical treatment, artificial nourishment, and hydration and the right to create advanced medical directives and to appoint an agent to make health-care decisions under a medical durable power of attorney. The "Colorado Patient Autonomy Act", sections 15-14-503 to 15-14-509, is intended to assist the exercise of such rights.

(5) In the event of a conflict between the provisions of part 7 of this article and the "Colorado Patient Autonomy Act" or between the provisions of powers of attorney prepared pursuant to part 7 of this article and the "Colorado Patient Autonomy Act", the provisions of the "Colorado Patient Autonomy Act" or provisions of powers of attorney prepared pursuant to the "Colorado Patient Autonomy Act" shall prevail.

(6) Parts 6 and 7 of this article 14 do not abridge the right of any person to enter into a verbal principal and agent relationship. A brokerage relationship between a real estate broker and a seller, landlord, buyer, or tenant in a real estate transaction established pursuant to part 4 of

article 10 of title 12 shall be governed by the provisions of part 4 of article 10 of title 12 and not by parts 6 and 7 of this article 14.

(7) Parts 6 and 7 of this article do not create any power or right in an agent that the agent's principal does not hold or possess and does not abridge contracts existing between principals and third parties.

Source: L. 2009: Entire section added with relocations, (HB 09-1198), ch. 106, p. 420, § 5, effective January 1, 2010. **L. 2019:** (6) amended, (HB 19-1172), ch. 136, p. 1670, § 80, effective October 1.

Editor's note: This section is similar to former § 15-14-601 as it existed prior to 2010.

15-14-500.5. Definitions - excluded powers.

(1) (a) For purposes of sections 15-14-501 and 15-14-502, "power of attorney" means a power to make health-care decisions granted by an individual.

(b) For purposes of section 15-14-502, "power of attorney" also includes a power or delegation that is:

(I) Excluded from the application of part 7 of this article pursuant to section 15-14-703;

(II) Not a power to make health-care decisions; and

(III) Not effective without application of section 15-14-502.

(c) For purposes of this part 5 and part 6 of this article, "medical durable power of attorney" and "medical power of attorney" means a power to make health-care decisions.

(2) A power and delegation that is excluded from the application of part 7 of this article by section 15-14-703, other than a power to make health-care decisions, may be exercised during the incapacity of the principal to the extent provided in the power or delegation or by applicable principles of law and equity.

Source: L. 2009: Entire section added, (HB 09-1198), ch. 106, p. 421, § 6, effective January 1, 2010.

15-14-501. When power of attorney not affected by disability.

(1) Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal." or "This power of attorney shall become effective upon the disability of the principal." or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. The authority of the attorney-in-fact or agent to act on behalf of the principal shall be set forth in the power and may relate to any act, power, duty, right, or obligation which the principal has or after acquires relating to the principal or any matter, transaction, or property, real or personal, tangible or intangible. The authority of the agent with regard to medical treatment decisions on behalf of a principal is set forth in sections 15-14-503 to 15-14-509. The attorney-in-fact or agent, however, is subject to the same limitations imposed upon court-appointed guardians contained in section 15-14-312 (1)(a). Additionally, the principal may expressly empower his attorney-in-fact or agent to renounce and disclaim interests and powers, to make gifts, in trust or otherwise, and to release and exercise powers of appointment. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. If a guardian or conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall consult with the guardian on matters concerning the principal's personal care or account to the conservator on matters concerning the principal's financial affairs. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to financial matters. Subject to any limitation or restriction of the guardian's powers or duties set forth in the order of appointment and endorsed on the letters of guardianship, a guardian has the same power to revoke, suspend, or terminate all or any part of the power of attorney or agency as it relates to matters concerning the principal's personal care that the principal would have had if the principal were not disabled or incompetent, except with respect to medical treatment decisions made by an agent pursuant to sections 15-14-506 to 15-14-509; however, such exception shall not preclude a court from removing an agent in the event an agent becomes incapacitated, or is unwilling or unable to serve as an agent.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the termination of the power of attorney by death is, in the absence of fraud, conclusive proof of the nontermination of the power at that time. If the exercise of the power requires execution and delivery of any

instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

Source: L. 73: R&RE, p. 1633, § 1. **C.R.S. 1963:** § 153-5-501. **L. 77:** Entire section amended, p. 836, § 25, effective July 1. **L. 83:** (1) amended, p. 661, § 1, effective April 26. **L. 91:** (1) amended, p. 1451, § 17, effective May 31. **L. 92:** (1) amended, p. 1978, § 1, effective June 4.

ANNOTATION

Law reviews. For article, "Estate Planning for Young Lawyers", see 14 Colo. Law. 53 (1985). For article, "The Use of Durable Powers of Attorney", see 14 Colo. Law. 548 (1985). For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "Suggested Modifications to the Durable Power of Attorney Form", see 17 Colo. Law. 2135 (1988). For article, "Dissolution of Marriage and Estate Planning Issues", see 18 Colo. Law. 439 (1989). For article, "Standby Trusts: Spare Tires For Late-Life Trips", see 19 Colo. Law. 851 (1990). For article, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency", see 19 Colo. Law. 1813 (1990). For article, "How to Reconcile Advance Care Directives With Attempted Suicide", see 42 Colo. Law. 97 (July 2013).

Power of attorney does not survive principal's disability if it does not contain language specified in this section. Visser ex rel. Eder v. Mahan, 111 P.3d 575 (Colo. App. 2005).

15-14-502. Other powers of attorney not revoked until notice of death or disability.

(1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing, other than a power as described by section 15-14-501, does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney-in-fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the

exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

(4) All powers of attorney executed for real estate and other purposes, pursuant to law, shall be deemed valid until revoked as provided in the terms of the power of attorney or as provided by law.

Source: L. 73: R&RE, p. 1634, § 1. **C.R.S. 1963:** § 153-5-502. **L. 75:** (1) and (2) amended, p. 603, § 52, effective July 1. **L. 85:** (4) added, p. 566, § 13, effective July 1.

15-14-503. Short title.

Sections 15-14-503 to 15-14-509 shall be known and may be cited as the "Colorado Patient Autonomy Act".

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4.

ANNOTATION

Law reviews. For article, "The Colorado Patient Autonomy Act: Opportunities and Challenges", see 21 Colo. Law. 1901 (1992). For article, "Surrogate Medical Decision-Making Under the Best Interests Standard", see 24 Colo. Law. 291 (1995). For article, "The Attorney's Role in Assisting Clients To Prepare Advance Directives", see 24 Colo. Law. 567 (1995). For article, "Rights to and Disclosure of Medical Information: HIPAA and Colorado Law", see 33 Colo. Law. 101 (Oct. 2004). For article, "The Lawyer's Role in End-of-Life Planning Moving Beyond Advance Medical Directives", see 44 Colo. Law. 101 (July 2015).

15-14-504. Legislative declaration - construction of statute.

(1) The general assembly hereby finds, determines, and declares that:

(a) Colorado law recognizes the right of an adult to accept or reject medical treatment and artificial nourishment and hydration;

(b) Each adult has the right to establish, in advance of the need for medical treatment, any directives and instructions for the administration of medical treatment in the event the person lacks the decisional capacity to provide informed consent to or refusal of medical treatment; and

(c) The enactment of a "Colorado Patient Autonomy Act" is appropriate to affirm a patient's autonomy in accepting or rejecting medical treatment, which right includes the making of medical treatment decisions through an appointed agent under a medical durable power of attorney.

(2) The general assembly does not intend to encourage or discourage any particular medical treatment or to interfere with or affect any method of religious or spiritual healing otherwise permitted by law.

(3) The general assembly does not intend that this part 5 be construed to restrict any other manner in which a person may make advance medical directives.

(4) Nothing in this part 5 shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this part 5 be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this part 5.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4.

ANNOTATION

Law reviews. For article, "Placement on a Secure Unit by Surrogate Decision-Makers", see 34 Colo. Law. 49 (Oct. 2005). For article, "Respecting and Responding to End-of-Life Choices", see 34 Colo. Law. 57 (Oct. 2005).

15-14-505. Definitions.

As used in sections 15-14-503 to 15-14-509, unless the context otherwise requires:

(1) "Adult" means any person eighteen years of age or older.

(2) "Advance medical directive" means any written instructions concerning the making of medical treatment decisions on behalf of the person who has provided the instructions. An advance medical directive includes a medical durable power of attorney executed pursuant to section 15-14-506, a declaration executed pursuant to the "Colorado Medical Treatment Decision Act", article 18 of this title, a power of attorney granting medical treatment authority executed

prior to July 1, 1992, pursuant to section 15-14-501, and a declaration executed pursuant to article 18.6 of this title.

(3) "Artificial nourishment and hydration" means any medical procedure whereby nourishment or hydration is supplied through a tube inserted into a person's nose, mouth, stomach, or intestines or nutrients or fluids are injected intravenously into a person's bloodstream.

(4) "Decisional capacity" means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health-care benefit decision.

(4.7) "Health-care benefit decision" means any decision or action related to the application, enrollment, disenrollment, appeal, or other function necessary for private or public health-care benefits that does not conflict with any known preference of the individual.

(5) "Health-care facility" means any hospital, hospice, nursing facility, care center, dialysis treatment facility, assisted living facility, any entity that provides home and community-based services, home health-care agency, or any other facility administering or contracting to administer medical treatment, and which is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment.

(6) "Health-care provider" means any physician or any other individual who administers medical treatment to persons and who is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment or who is employed by or acting for such authorized person. Health-care provider includes a health maintenance organization licensed and conducting business in this state.

(7) "Medical treatment" means the provision, withholding, or withdrawal of any health care, medical procedure, including artificially provided nourishment and hydration, surgery, cardiopulmonary resuscitation, or service to maintain, diagnose, treat, or provide for a patient's physical or mental health or personal care.

(8) "Physician or designee" means the treating physician or a health-care professional under the supervision of the treating physician.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4. **L. 2006:** (4) amended and (4.7) and (8) added, p. 841, § 2, effective May 4.

ANNOTATION

Decision to agree to arbitrate is not a "medical treatment decision" and as such not within the authority of a health care proxy. There exists a distinction between an

agreement to provide medical services, including an agreement to admit a patient to a health care facility, and an agreement to arbitrate a health care dispute. Lujan v. Life Care Ctrs. of Am., 222 P.3d 970 (Colo. App. 2009).

15-14-506. Medical durable power of attorney.

(1) The authority of an agent to act on behalf of the principal in consenting to or refusing medical treatment, including artificial nourishment and hydration, may be set forth in a medical durable power of attorney. A medical durable power of attorney may include any directive, condition, or limitation of an agent's authority.

(2) The agent shall act in accordance with the terms, directives, conditions, or limitations stated in the medical durable power of attorney, and in conformance with the principal's wishes that are known to the agent. If the medical durable power of attorney contains no directives, conditions, or limitations relating to the principal's medical condition, or if the principal's wishes are not otherwise known to the agent, the agent shall act in accordance with the best interests of the principal as determined by the agent.

(3) An agent appointed in a medical durable power of attorney may provide informed consent to or refusal of medical treatment on behalf of a principal who lacks decisional capacity and shall have the same power to make medical treatment decisions the principal would have if the principal did not lack such decisional capacity. An agent appointed in a medical durable power of attorney shall be considered a designated representative of the patient and shall have the same rights of access to the principal's medical records as the principal. In making medical treatment decisions on behalf of the principal, and subject to the terms of the medical durable power of attorney, the agent shall confer with the principal's attending physician concerning the principal's medical condition.

(3.5) Any medical durable power of attorney executed under sections 15-14-503 to 15-14-509 may also have a document with a written statement as provided in section 15-19-205 (b), or a statement in substantially similar form, indicating a decision regarding organ and tissue donation. The document shall be executed in accordance with the provisions of the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of this title 15. The written statement may be in the following form:

I hereby make an anatomical gift, to be effective upon my death, of:

A.____ Any needed organs/tissues

B.____ The following organs/tissues:

_____

Donor signature: _____

(4) (a) Nothing in this section or in a medical durable power of attorney shall be construed to abrogate or limit any rights of the principal, including the right to revoke an agent's authority or the right to consent to or refuse any proposed medical treatment, and no agent may consent to or refuse medical treatment for a principal over the principal's objection.

(b) Nothing in this article shall be construed to supersede any provision of article 1 of title 25, C.R.S., or article 10.5 or article 65 of title 27, C.R.S.

(5) (a) Nothing in this part 5 shall have the effect of modifying or changing the standards of the practice of medicine or medical ethics or protocols.

(b) Nothing in this part 5 or in a medical durable power of attorney shall be construed to compel or authorize a health-care provider or health-care facility to administer medical treatment that is otherwise illegal, medically inappropriate, or contrary to any federal or state law.

(c) Unless otherwise expressly provided in the medical durable power of attorney under which the principal appointed the principal's spouse as the agent, a subsequent divorce, dissolution of marriage, annulment of marriage, or legal separation between the principal and spouse appointed as agent automatically revokes such appointment. However, nothing in this paragraph (c) shall be construed to revoke any remaining provisions of the medical durable power of attorney.

(d) Unless otherwise specified in the medical durable power of attorney, if a principal revokes the appointment of an agent or the agent is unable or unwilling to serve, the appointment of the agent shall be revoked. However, nothing in this paragraph (d) shall be construed to revoke any remaining provisions of the medical durable power of attorney.

(6) (a) This part 5 shall apply to any medical durable power of attorney executed on or after July 1, 1992. Nothing in this part 5 shall be construed to modify or affect the terms of any durable power of attorney executed before such date and which grants medical treatment authority. Any such previously executed durable power of attorney may be amended to conform to the provisions of this part 5. In the event of a conflict between a medical durable power of attorney executed pursuant to this part 5 and a previously executed durable power of attorney, the provisions of the medical durable power of attorney executed pursuant to this part 5 shall prevail.

(b) Unless otherwise specified in a medical durable power of attorney, nothing in this part 5 shall be construed to modify or affect the terms of a declaration executed in accordance with the "Colorado Medical Treatment Decision Act", article 18 of this title.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4. **L. 98:** (3.5) added, p. 1171, § 5, effective June 1. **L. 2007:** (3.5) amended, p. 796, § 3, effective July 1. **L. 2010:** (4)(b) amended, (SB 10-175), ch. 188, p. 783, § 20, effective April 29. **L. 2017:** (3.5) amended, (SB 17-223), ch. 158, p. 558, § 6, effective August 9.

ANNOTATION

Law reviews. For article, "Surrogate Medical Decision-Making Under the Best Interests Standard", see 24 Colo. Law. 291 (1995). For article, "The Lawyer's Role in End-of-Life Planning Moving Beyond Advance Medical Directives", see 44 Colo. Law. 101 (July 2015).

15-14-507. Transfer of principal.

(1) A health-care provider or health-care facility shall provide notice to a principal and an agent of any policies based on moral convictions or religious beliefs of the health-care provider or health-care facility relative to the withholding or withdrawal of medical treatment. Notice shall be provided, when reasonably possible, prior to the provision of medical treatment or prior to or upon the admission of the principal to the health-care facility, or as soon as possible thereafter.

(2) A health-care provider or health-care facility shall provide for the prompt transfer of the principal to another health-care provider or health-care facility if such health-care provider or health-care facility wishes not to comply with an agent's medical treatment decision on the basis of policies based on moral convictions or religious beliefs.

(3) An agent may transfer the principal to the care of another health-care provider or health-care facility if an attending physician or health-care facility does not wish to comply with an agent's decision for any reason other than those described in subsection (1) of this section.

(4) The transfer of a principal to another health-care provider or health-care facility in accordance with the provisions of this section shall not constitute a violation of Title XIX of the federal "Social Security Act", 42 U.S.C., sec. 1395dd, regarding the transfer of patients.

(5) Nothing in this section shall relieve or exonerate an attending physician or health-care facility from the duty to provide for the care and comfort of the principal pending transfer pursuant to this section.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4.

15-14-508. Immunities.

(1) An agent or proxy-decision maker, as established in article 18.5 of this title, who acts in good faith in making medical treatment decisions on behalf of a principal pursuant to the terms of a medical durable power of attorney shall not be subject to civil or criminal liability therefor.

(2) Each health-care provider and health-care facility shall, in good faith, comply, in respective order, with the wishes of the principal, the terms of an advance medical directive, or the decision of an agent acting pursuant to an advance medical directive. A health-care provider or health-care facility which, in good faith, complies with the medical treatment decision of an agent acting in accordance with an advance medical directive shall not be subject to civil or criminal liability or regulatory sanction therefor.

(3) Good faith actions by any health-care provider or health-care facility in complying with a medical durable power of attorney or at the direction of a health-care agent of the principal which result in the death of the principal following trauma caused by a criminal act or criminal conduct, shall not affect the criminal prosecution of any person charged with the commission of a criminal act or conduct.

(4) Neither a medical durable power of attorney nor the failure of a person to execute one shall affect, impair, or modify any contract of life or health insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life or health insurance or any increase of a premium therefor.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4.

15-14-509. Interstate effect of medical durable power of attorney.

(1) Unless otherwise stated in a medical durable power of attorney, it shall be presumed that the principal intends to have a medical durable power of attorney executed pursuant to this part 5 recognized to the fullest extent possible by the courts of any other state.

(2) Unless otherwise provided therein, any medical durable power of attorney or similar instrument executed in another state shall be presumed to comply with the provisions of this part 5 and may, in good faith, be relied upon by a health-care provider or health-care facility in this state.

Source: L. 92: Entire section added, p. 1979, § 2, effective June 4.

PART 6

POWER OF ATTORNEY

Cross references: For provisions for a power of attorney granted by an individual, see the "Uniform Power of Attorney Act", part 7 of this article.

Law reviews: For article, "The Durable Power of Attorney: Defining the Agent's Duties", see 41 Colo. Law. 49 (May 2012).

15-14-601. Legislative declaration. (Repealed)

Source: L. 94: Entire part added, p. 1068, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 427, § 19, effective January 1, 2010.

Editor's note: The provisions of this section were relocated to § 15-14-500.3.

15-14-602. Definitions.

As used in this part 6:

(1) "Agency" means the relationship between the principal and the principal's agent.

(2) "Agency instrument" means the written power of attorney or other written instrument of agency governing the relationship between the principal and agent. An agency is subject to the provisions of this part 6 to the extent the agency relationship is established in writing and may be controlled by the principal, excluding agencies and powers for the benefit of the agent. This definition shall not apply to medical powers of attorney drafted pursuant to the "Colorado Patient Autonomy Act", sections 15-14-503 to 15-14-509, a power of attorney subject to the "Uniform Power of Attorney Act", part 7 of this article, or to any other power of attorney or instrument of agency granted by an individual.

(3) "Agent" means the attorney-in-fact or other person, including successors, who is authorized by the agency instrument to act for the principal.

(4) "Principal" means a corporation, trust, partnership, limited liability company, or other entity, including, but not limited to, an entity acting as trustee, personal representative, or other fiduciary, who signs a power of attorney or other instrument of agency granting powers to an agent.

(5) "Third party" means any person who is requested by an agent under an agency instrument to recognize the agent's authority to deal with the principal's property or who acts in good-faith reliance on a copy of the agency instrument. "Third party" includes an individual, corporation, trust, partnership, limited liability company, or other entity, as may be appropriate.

Source: L. 94: Entire part added, p. 1069, § 1, effective January 1, 1995. **L. 2009:** (2) and (4) amended, (HB 09-1198), ch. 106, p. 421, § 7, effective January 1, 2010.

ANNOTATION

Law reviews. For article, "Protecting Clients From Abuse and Identity Theft", see 34 Colo. Law. 43 (Oct. 2005). For article, "Placement on a Secure Unit by Surrogate Decision-Makers", see 34 Colo. Law. 49 (Oct. 2005).

15-14-603. Applicability.

(1) (a) The principal may specify in the agency instrument:

(I) The event upon which or time when the agency begins and terminates;

(II) The mode of revocation or amendment of the agency instrument; and

(III) The rights, powers, duties, limitations, immunities, and other terms applicable to the agent and to all third parties dealing with the agent.

(b) The provisions of the agency instrument control in the case of a conflict between the provisions of the agency instrument and the provisions of this part 6. In the agency instrument, the principal may authorize the agent to appoint a successor agent.

(2) (a) Except as otherwise provided in this part 6, on or after January 1, 1995:

(I) The provisions of this part 6 govern every agency instrument, whenever and wherever executed, and all acts of the agent, to the extent the provisions of this part 6 are not inconsistent with the agency instrument; and

(II) The provisions of this part 6 apply to all agency instruments exercised in Colorado and to all other agency instruments if the principal is a resident of Colorado at the time the agency

instrument is signed or at the time of exercise or if the agency instrument indicates that Colorado law is to apply.

(b) Repealed.

(3) (a) The authority of an attorney-in-fact or an agent to act on behalf of the principal may include, but is not limited to, the powers specified in sections 15-14-501 to 15-14-506.

(b) Repealed.

(4) Repealed.

Source: L. 94: Entire part added, p. 1070, § 1, effective January 1, 1995. **L. 98:** (3) amended, p. 1171, § 6, effective June 1. **L. 2007:** (3)(b) amended, p. 797, § 4, effective July 1. **L. 2009:** (2)(b), (3)(b), and (4) repealed, (HB 09-1198), ch. 106, p. 422, § 8, effective January 1, 2010.

15-14-604. Duration of agency - amendment and revocation - resignation of agent.

(1) (Deleted by amendment, L. 2009, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.)

(2) Any agency created by an agency instrument continues until the principal ceased to exist, regardless of the length of time that elapses, unless the agency instrument states an earlier termination date. The principal may amend or revoke the agency instrument at any time and in any manner that is communicated to the agent or to any other person who is related to the subject matter of the agency. Any agent who acts in good faith on behalf of the principal within the scope of an agency instrument is not liable for any acts that are no longer authorized by reason of an amendment or revocation of the agency instrument until the agent receives actual notice of the amendment or revocation. An agency may be temporarily continued under the conditions specified in section 15-14-607.

(3) (Deleted by amendment, L. 2009, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.)

(4) Any agent acting on behalf of a principal under an agency instrument has the right to resign under the terms and conditions stated in the agency instrument. If the agency instrument does not specify the terms and conditions of resignation, an agent may resign by notifying the principal, or the principal's receiver, custodian, trustee in bankruptcy, liquidating trustee, or similar representative if one has been appointed, in writing of the agent's resignation. The agent shall also notify in writing the successor agent, if any, and all reasonably ascertainable third parties who are affected by the resignation. In all cases, any party who receives notice of the resignation of an agent is bound by such notice.

Source: L. 94: Entire part added, p. 1071, § 1, effective January 1, 1995. **L. 2009:** Entire section amended, (HB 09-1198), ch. 106, p. 422, § 9, effective January 1, 2010.

15-14-605. Dissolution of marriage. (Repealed)

Source: L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 424, § 14, effective January 1, 2010.

15-14-606. Duty - standard of care - record keeping - exoneration.

Unless otherwise agreed by the principal and agent in the agency instrument, an agent is under no duty to exercise the powers granted by the agency or to assume control of or responsibility for any of the principal's property or affairs. Whenever the agent exercises the powers granted by the agency, the agent shall use due care to act in the best interests of the principal in accordance with the terms of the agency. Any agent who acts under an agency instrument shall be liable for any breach of legal duty owed by the agent to the principal under Colorado law. The agent shall keep a record of all receipts, disbursements, and significant actions taken under the agency. The agent shall not be liable for any loss due to the act or default of any other person.

Source: L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. **L. 2000:** Entire section amended, p. 1834, § 9, effective January 1, 2001. **L. 2009:** Entire section amended, (HB 09-1198), ch. 106, p. 423, § 10, effective January 1, 2010.

15-14-607. Reliance on an agency instrument.

(1) (a) Any third party who acts in good-faith reliance on an agency instrument that is duly notarized shall be fully protected and released to the same extent as if such third party dealt directly with the principal as a fully competent person. Upon demand of any third party, the agent shall furnish an affidavit that states that the agency instrument relied upon is a true copy of the agency instrument and that, to the best of the agent's knowledge, the principal is alive and the relevant powers of the agent have not been altered or terminated; however, any third party who acts in good-faith reliance on an agency instrument shall be protected regardless of whether such third party demands or receives an affidavit.

(b) (I) Any third party who deals with an agent may presume, in the absence of actual knowledge to the contrary, that:

(A) The agency instrument naming the agent was validly executed;

(B) The principal had authority to act at the time of execution; and

(C) At the time of reliance, the principal exists, the agency instrument and the relevant powers of the agent have not terminated or been amended, and the acts of the agent conform to the standards of this part 6.

(II) Any third party who relies on an agency instrument shall not be responsible for the proper application of any property delivered to or controlled by the agent or for questioning the authority of the agent.

(2) Any person to whom the agent, operating under a duly notarized agency instrument, communicates a direction that is in accordance with the terms of the agency instrument shall comply with such direction. Any person who arbitrarily or without reasonable cause fails to comply with such direction shall be subject to the costs, expenses, and reasonable attorney fees required to appoint a conservator for the principal, to obtain a declaratory judgment, or to obtain an order pursuant to section 15-14-412. This subsection (2) shall not apply to the sale, transfer, encumbrance, or conveyance of real property.

(3) Any third party that has reasonable cause to question the authenticity, validity, or authority of an agency instrument or agency may make prompt and reasonable inquiry of the agent, the principal, or other persons involved for additional information and may submit an interpleader action to the district court or the probate court of the county in which the principal resides by depositing any funds or other assets that may be affected by the agency instrument with the appropriate court. In such an interpleader action, if the court finds that the third party had reasonable cause to commence the action, the third party shall be entitled to all reasonable expenses and costs incurred by the third party in bringing the interpleader action.

(4) Any third party may require an agent to present, as proof of the agency, either the original agency instrument naming such agent or a facsimile thereof certified by a notary. The third party has discretion to determine whether the agent shall provide the original agency instrument or a certified facsimile.

Source: L. 94: Entire part added, p. 1072, § 1, effective January 1, 1995. **L. 95:** (2) and (4) amended, p. 362, § 17, effective July 1. **L. 2000:** (2) amended, p. 1834, § 10, effective January 1, 2001. **L. 2009:** (1)(b)(I) amended, (HB 09-1198), ch. 106, p. 423, § 11, effective January 1, 2010.

15-14-608. Preservation of estate plan and trusts. (Repealed)

Source: L. 94: Entire part added, p. 1073, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 424, § 15, effective January 1, 2010.

15-14-609. Agency - court relationship. (Repealed)

Source: L. 94: Entire part added, p. 1074, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 425, § 16, effective January 1, 2010.

15-14-610. Statutory form agent's affidavit regarding power of attorney. (Repealed)

Source: L. 94: Entire part added, p. 1075, § 1, effective January 1, 1995. **L. 2009:** Entire section repealed, (HB 09-1198), ch. 106, p. 426, § 17, effective January 1, 2010.

15-14-611. Applicability of part.

This part 6 does not in any way invalidate any agency or power of attorney executed or any act of any agent, guardian, or conservator done or affect any claim, right, or remedy that accrued prior to January 1, 1995.

Source: L. 94: Entire part added, p. 1076, § 1, effective January 1, 1995.

PART 7

UNIFORM POWER OF ATTORNEY ACT

Cross references: For provisions for a power of attorney executed by an entity, see part 6 of this article.

Law reviews: For article, "The Durable Power of Attorney: Defining the Agent's Duties", see 41 Colo. Law. 49 (May 2012); for article, "Don't Get Burned: Estate Tax Considerations for Certain ‘Hot Powers’ Under Colorado's Uniform Power of Attorney Act", see 52 Colo. Law. 42 (Nov. 2023).

PREFATORY NOTE

The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty- four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

(1) provide for confirmation that contingent powers are activated;

(2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;

(3) include a portability provision;

(4) require gift making authority to be expressly stated in the grant of authority;

(5) provide a default standard for fiduciary duties;

(6) permit the principal to alter the default fiduciary standard;

(7) require notice by an agent when the agent is no longer willing or able to act;

(8) include safeguards against abuse by the agent;

(9) include remedies and sanctions for abuse by the agent;

(10) protect the reliance of other persons on a power of attorney; and

(11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Subpart 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Subpart 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 15-14-719 and 15-14-720 of the Act address the problem of persons refusing to accept an agent's authority. Section 15-14-719 provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 15-14-720 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 15-14-720 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for

granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 15-14-724(1)), provisions that set out the agent's duties and liabilities (Sections 15-14-714 and 15-14-717) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 15-14-716). The following provides a brief overview of the entire Act.

Overview of the Uniform Power of Attorney Act

The Act consists of 4 Subparts. The basic substance of the Act is located in subparts 1 and 2. Subpart 3 contains the optional statutory form and Subpart 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

Subpart 1 — General Provisions and Definitions — Section 15-14-702 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The definition of "incapacity" is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of "attorney in fact." Section 15-14-703 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 15-14-704 that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 15-14-705 requires the principal's signature and provides that an acknowledged signature is presumed genuine. Section 15-14-706 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 15-14-707 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 15-14-708 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is

consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 15-14-709. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 15-14-709 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 15-14-709 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 15-14-710. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 15-14-711 through 15-14-718 address matters related to the agent, including default rules for coagents and successor agents (Section 15-14-711), reimbursement and compensation (Section 15-14-712), an agent's acceptance of appointment (Section 15-14-713), and the agent's duties (Section 15-14-714). Section 15-14-715 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 15-14-716 sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 15-14-717 addresses agent liability. An agent may resign by following the notice procedures described in Section 15-14-718.

Sections 15-14-719 and 15-14-720 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 15-14-719 protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Subject to

statutory exceptions, alternative Sections 15-14- 720 impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 15-14-721 through 15-14-723 address the relationship of the Act to other law. Section 15-14-721 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 15-14-722 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 15-14-723 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

Subpart 2 — Authority — The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 15-14-727 through 15-14-740 of the Act set forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal, pursuant to Section 15-14-702, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 15-14-702 further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Subpart 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Subpart 3. Section 15-14-726 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Subpart 2 also addresses concerns about authority that might be used to dissipate the principal's property or alter the principal's estate plan. Section 15-14-721(1) lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 15-14-724(2) contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

Subpart 3 — Statutory Forms — The optional form in Subpart 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 15-14-724(1) categories of specific

authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Subpart 3 also contains a sample agent certification form. **Subpart 4 — Miscellaneous Provisions —** The miscellaneous provisions in Article 4 clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

OFFICIAL GENERAL COMMENT

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 15-14-704 of this Subpart 1 reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 15-14-708 gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Subpart 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 15-14-714(1)), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 15-14-716), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 15-14-719). In contrast with the rules of general application in Subpart 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides,"or "except as otherwise provided in the power of attorney." These signals alert the draftsperson to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 15-14-709), coagents may exercise their authority independently (Section 15-14-711), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 15-14-712).

SUBPART 1

GENERAL PROVISIONS

15-14-701. Short title.

This part 7 may be cited as the "Uniform Power of Attorney Act".

Source: L. 2009: Entire part added, (HB 09-1198), ch.106, p. 384, § 1, effective April 9.

OFFICIAL COMMENT

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 15-14-704, a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

15-14-702. Definitions.

Except as otherwise provided under this part 7, and except as the context may otherwise require, in this part 7:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable", with respect to a power of attorney, means not terminated by the principal's incapacity.

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

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(b) Is:

(I) Missing;

(II) Detained, including incarcerated in a penal system; or

(III) Outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment", with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(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 sound, symbol, or process.

(13) "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.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 384, § 1, effective April 9. **L. 2011:** IP amended, (SB 11-083), ch. 101, p. 310, § 20, effective August 10.

OFFICIAL COMMENT

Although most of the definitions in Section 15-14-702 are self-explanatory, a few of the terms warrant further comment.

"Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment inability to manage property and business affairs rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of "power of attorney" clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words "power of attorney" are actually used in the grant.

"Presently exercisable general power of appointment" is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 15-14-734 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (see Section 15-14-734(2)(c)), and in Section 15-14-740 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (see Section 15-14-740(b)(1)). The term is also incorporated by reference when using the statutory form in Section 15-14-741 to grant authority with respect to "Estates, Trusts, and Other Beneficial Interests" or authority with respect to "Gifts." If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity,

Section 15-14-724(1)(g) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent's authority is necessarily limited by whatever terms govern the principal's ability to exercise the power.

15-14-703. Applicability.

(1) This part 7 applies to all powers of attorney except:

(a) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(b) A power to make health-care decisions;

(c) A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(d) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

(2) Notwithstanding subsection (1)(d) of this section, this part 7 applies to power of attorney forms created by the department of revenue under article 1, 3, 6, or 12 of title 42.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9. **L. 2025:** (2) added, (HB 25-1076), ch.16, p. 61, § 5, effective August 6.

Editor's note: Section 18 of chapter 16 (HB 25-1076), Session Laws of Colorado 2025, provides that the act changing this section applies to offenses committed or to the issuance, acceptance, or use of identification documents on or after August 6, 2025.

OFFICIAL COMMENT

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition

of a power of attorney. Section 15-14-703 lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1)(a) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. *See* Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1)(a), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. *See, e.g., Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (1)(b) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 15-14-714(2)(e) a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

Likewise, paragraph (1)(c) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to "exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . . ."(*see* paragraph (1)(e) of Section 15-14-732). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 15-14-732 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (1)(d) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (1)(b) and (1)(c), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (1)(g) of Section 15-14-726 that a grant of authority to an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 15-14-726, paragraph (1)(h), further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

15-14-704. Power of attorney is durable.

(1) A power of attorney created on and after January 1, 2010, is durable unless it expressly provides that it is terminated by the incapacity of the principal.

(2) A power of attorney existing on December 31, 2009, is durable only if on that day the power of attorney is durable under section 15-14-501 or 15-14-745 (2).

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

OFFICIAL COMMENT

Section 15-14-704 establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship. *See also* Section 15-14-707 Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

15-14-705. Execution of power of attorney.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney.

A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

OFFICIAL COMMENT

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 15-14-719 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 15-14-720 (Alternative A Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See* R.P.D., Annotation, *Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses usually sight or hearing of the individual who directed that another sign the individual's name. *See* Unif. Probate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature*, 57 A.L.R. 525 (1928).

15-14-706. Validity of power of attorney.

(1) A power of attorney executed in this state on or after January 1, 2010, is valid if its execution complies with section 15-14-705.

(2) A power of attorney executed in this state before January 1, 2010, is valid if its execution complied with the law of this state as it existed at the time of execution.

(2.5) It shall not be inferred from the portion of the definition of "incapacity" in section 15-14-702 (5)(b) that an individual who is either incarcerated in a penal system or otherwise detained or outside of the United States and unable to return lacks the capacity to execute a power of attorney as a consequence of such detention or inability to return.

(3) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(a) The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 15-14-707; or

(b) The requirements for a military power of attorney pursuant to 10 U.S.C. sec. 1044b, as amended.

(4) Except as otherwise provided by statute other than this part 7, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original. Nothing in this subsection (4) shall preclude a third party relying upon a power of attorney from requesting the original document.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 386, § 1, effective April 9.

OFFICIAL COMMENT

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 15-14-706 makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.*, Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, "some states require that the document of transfer be signed, sealed, attested, and acknowledged").

15-14-707. Meaning and effect of power of attorney.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 387, § 1, effective April 9.

OFFICIAL COMMENT

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 15-14-707 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (*see* Section 15-14-704), the authority of coagents (*see* Section 15-14-711) or the scope of specific authority such as the authority to make gifts (*see* Section 15-14-740). Section 15-14-707 clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 15-14-707 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and

intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.,* Section 15-14-741 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

15-14-708. Nomination of conservator or guardian - relation of agent to court-appointed fiduciary.

(1) In a power of attorney, a principal may nominate a conservator of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

(2) If, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 387, § 1, effective April 9.

OFFICIAL COMMENT

Section 15-14-708(2) is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 15-14-708(2) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. *See, e.g.,* 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code

Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75- 5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 15-14-708(2) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (*see* subsection (1)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

15-14-709. When power of attorney effective.

(1) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(2) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(3) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person

authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(a) A physician or licensed psychologist that the principal is incapacitated within the meaning of section 15-14-702 (5)(a); or

(b) An attorney-at-law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of section 15-14-702 (5)(b).

(4) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the federal "Health Insurance Portability and Accountability Act", sections 1171 to 1179 of the federal "Social Security Act", 42 U.S.C. sec. 1320d, as amended, and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 388, § 1, effective April 9.

OFFICIAL COMMENT

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney one that becomes effective at a future date or upon a future event or contingency the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (2)). Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (4) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 15-14-709 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 15-14-703 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,*

National Conference of Commissioners on Uniform State Laws, 6-7 (2002), http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (3)(a)), and incapacity based on the principal's unavailability (*i.e.*, the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (3)(b)). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 15-14-702(5)(b) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

15-14-710. Termination of power of attorney or agent's authority.

(1) A power of attorney terminates when:

(a) The principal dies;

(b) The principal becomes incapacitated, if the power of attorney is not durable;

(c) The principal revokes the power of attorney;

(d) The power of attorney provides that it terminates;

(e) The express purpose of the power of attorney is accomplished; or

(f) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(1.5) In the case of a power of attorney in existence on December 31, 2009, "incapacitated" shall mean an individual with an incapacity as specified in section 15-14-702 (5)(a) and not as specified in section 15-14-702 (5)(b) unless, on that date, this part 7 applies to the power of attorney as provided in section 15-14-745 (2).

(2) An agent's authority terminates when:

(a) The principal revokes the authority;

(b) The agent dies, becomes incapacitated, or resigns;

(c) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(d) The power of attorney terminates.

(3) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (2) of this section, notwithstanding a lapse of time since the execution of the power of attorney.

(4) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(5) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(6) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 388, § 1, effective April 9.

OFFICIAL COMMENT

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (1) and (2)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (3) and (6)) or the actions taken pursuant to the power of attorney (*see* subsections (4) and (5)).

Subsection (3) provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (6) clarifies

that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (4) and (5) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (*see* subsection (1)(a)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (4)). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 15-14-719(3) (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . . ."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (2)(c) which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (2)(c) is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

15-14-711. Coagents and successor agents.

(1) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(2) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(a) Has the same authority as that granted to the original agent; and

(b) May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(3) Except as otherwise provided in the power of attorney and subsection (4) of this section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(4) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection (4) is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 389, § 1, effective April 9.

OFFICIAL COMMENT

This section provides several default rules that merit careful consideration by the principal. Subsection (1) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name

one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 15-14-724(1)(e)).

Subsection (2) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (*see* Section 15-14-724(1)) may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (3) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (4) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (4) provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

15-14-712. Reimbursement and compensation of agent.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

OFFICIAL COMMENT

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including

limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

15-14-713. Agent's acceptance.

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

OFFICIAL COMMENT

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (*see* Section 15-14-714(1)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (*see* Section 15-14-718), which terminates the agency relationship (*see* Section 15-14-710(2)(b)).

15-14-714. Agent's duties.

(1) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(b) Act in good faith; and

(c) Act only within the scope of authority granted in the power of attorney.

(2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(a) Act loyally for the principal's benefit;

(b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(d) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(e) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(f) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(I) The value and nature of the principal's property;

(II) The principal's foreseeable obligations and need for maintenance;

(III) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(IV) Eligibility for a benefit, a program, or assistance under a statute or regulation.

(3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(4) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(5) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise,

the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(7) An agent that exercises authority provided in the power of attorney to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(8) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 390, § 1, effective April 9.

OFFICIAL COMMENT

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.*, Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section 15-14-714 clarifies agent duties by articulating minimum mandatory duties (subsection (1)) as well as default duties that can be modified or omitted by the principal (subsection (2)).

The mandatory duties acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent

with a policy preference for "substituted judgment" over "best interest" as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See* Wingspan The Second National Guardianship Conference, *Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (*see* Section 15-14-716).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (2)(a)) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (2)(b)).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (2)(e)) and the duty to preserve the principal's estate plan (subsection (2)(f)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (3)).

Subsection (4) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (4)

is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter's note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (5) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (*see* comment to Section 15-14-715).

Subsections (6) and (7) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (6) holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b) (2003)). Subsection (7) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003).

Subsection (8) codifies the agent's common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (8) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (2)(d) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's

fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 15-14-716 and Comment.

ANNOTATION

The question of "authorization" or "without authorization" as it relates to a charge of theft is not limited to whether or not defendant had broad general powers under the power of attorney. Rather, the jury must assess certain factual questions to determine if the authority element of theft has been satisfied. These questions include whether the defendant acted (1) in accordance with the victim's reasonable expectations and consistently with the victim's interests and intent; (2) in good faith; (3) loyally for the victim's benefit; and (4) with the care, competence, and diligence ordinarily exercised by agents in similar circumstances. People v. Stell, 2013 COA 149, 320 P.3d 382.

Requirement to act with care, competence, and diligence as stated in subsection (2)(c), where the agent is an attorney, imports the relevant standard of conduct from the Colorado rules of professional conduct. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

15-14-715. Exoneration of agent.

(1) Provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(a) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(b) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 392, § 1, effective April 9.

OFFICIAL COMMENT

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 15-14-702(4) (defining good faith for purposes of the Act as "honesty in fact"). Section 15-14-715 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

15-14-716. Judicial relief.

(1) The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

(a) The principal or the agent;

(b) A guardian, conservator, or other fiduciary acting for the principal;

(c) A person authorized to make health-care decisions for the principal;

(d) The principal's spouse, parent, or descendant;

(e) An individual who would qualify as a presumptive heir of the principal;

(f) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(g) A governmental agency having authority to protect the welfare of the principal;

(h) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(i) A person asked to accept the power of attorney.

(2) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 392, § 1, effective April 9. **L. 2011:** (1)(g) amended, (SB 11-083), ch. 101, p. 311, § 21, effective August 10.

OFFICIAL COMMENT

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (1) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (1)(h)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30- 5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (2) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 15-14-716 is Section 15-14-714(8) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial

privacy. *See* Section 15-14-714 Comment. Section 15-14-716 operates as a check-and-balance on the narrow scope of Section 15-14-714(8) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

ANNOTATION

Law reviews. "Practical Solutions to Elder Financial Abuse and Fiduciary Theft", see 41 Colo. Law. 61 (Dec. 2012).

15-14-717. Agent's liability.

(1) An agent that violates this part 7 is liable to the principal or the principal's successors in interest for the amount required to:

(a) Restore the value of the principal's property to what it would have been had the violation not occurred; and

(b) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

OFFICIAL COMMENT

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 15-14-723, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

15-14-718. Agent's resignation - notice.

(1) Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(a) To the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(b) If there is no person described in paragraph (a) of this subsection (1), to:

(I) The principal's caregiver;

(II) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(III) A governmental agency having authority to protect the welfare of the principal.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

OFFICIAL COMMENT

Section 15-14-718 provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1)(a) or (1)(b).

Paragraph (1)(a) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (1)(b). Paragraph (1)(b) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 15-14-714(1) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

15-14-719. Acceptance of and reliance upon acknowledged power of attorney.

(1) For purposes of this section and section 15-14-720, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(2) A person that in good faith accepts a purportedly acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under section 15-14-705 that the signature is genuine.

(3) A person that in good faith accepts a purportedly acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority.

(4) A person that is asked to accept an acknowledged power of attorney may request and rely upon, without further investigation, one or more of the following:

(a) An agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(b) An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; or

(c) An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(5) An English translation, an agent's certification, or an opinion of counsel requested under this section must be provided at the principal's expense.

(6) For purposes of this section and section 15-14-720, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 393, § 1, effective April 9.

OFFICIAL COMMENT

This section protects persons who in good faith accept an acknowledged power of attorney. Section 15-14-719 does not apply to unacknowledged powers of attorney. *See* Section 15-14-705 (providing that the signature on a power of attorney is

presumed genuine if acknowledged). Subsection (1) states that for purposes of this section and Section 15-14-720 "acknowledged" means "purportedly" verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. *See, e.g.,* Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (*see* Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), *available at* http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm.

Section 15-14-719 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority, unless the person has actual knowledge to the contrary (subsection (3)). Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (4) permits a person to request an agent's certification of any factual matter (*see* Section 15-14-742 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (6) for persons that conduct activities through employees. Subsection (6) states that for purposes of Sections 15-14-719 and 15-14-720, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

15-14-720. Liability for refusal to accept acknowledged power of attorney.

(1) Except as otherwise provided in subsection (2) of this section:

(a) A person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under section 15-14-719 (4) no later than seven business days after presentation of the power of attorney for acceptance.

(b) If a person requests a certification, a translation, or an opinion of counsel under section 15-14-719 (4), the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel.

(c) A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(2) A person is not required to accept an acknowledged power of attorney if:

(a) The person is not otherwise required to engage in a transaction with the principal in the same circumstances, including, without limitation, the circumstances set forth in paragraphs (a.3) and (a.5) of this subsection (2);

(a.3) The agent seeks to establish a customer relationship under the power of attorney and the principal is not currently a customer;

(a.5) The agent seeks services under the power of attorney that the person does not offer;

(b) Engaging in a transaction with the agent or the principal in the same circumstances or acceptance of the power of attorney in the same circumstances would be inconsistent with any federal or state law, rule, or regulation other than as set forth in this part 7;

(c) The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(d) A request for a certification, a translation, or an opinion of counsel under section 15-14-719 (4) is refused;

(e) The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under section 15-14-719 (4) has been requested or provided;

(f) The person makes, or has actual knowledge that another person has made, a report to a governmental agency having authority to protect the welfare of the principal stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent; or

(f.5) The person has an apprehension, formed in good faith, that the agent or person acting for or with the agent has acted or is acting, in any capacity, either unlawfully or not in good faith in dealing with the person and the person is investigating in good faith to determine whether the person may, based on the results of the investigation, form a good faith belief that the principal may be subject to financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(3) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

(a) A court order mandating acceptance of the power of attorney; and

(b) Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 394, § 1, effective April 9. **L. 2011:** (2)(f) amended, (SB 11-083), ch. 101, p. 311, § 22, effective August 10.

OFFICIAL COMMENT TO ALTERNATIVE A

As a complement to Section 15-14-719, Section 15-14-720 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 15-14-719, Section 15-14-720 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 15-14-720. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (2) of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (2) permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (2)(f)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (2) for refusing an acknowledged power of attorney, subsection (1) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 15-14-719. If a request under Section 15-14-719 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (1)(b)). Provided no basis exists for refusing the power of attorney, subsection (1)(c) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (3) of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 15-14-720 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for

unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

15-14-721. Principles of law and equity.

Unless displaced by a provision of this part 7, the principles of law and equity supplement this part 7.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 395, § 1, effective April 9.

OFFICIAL COMMENT

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See* Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, Southerland Statutory Construction § 52.5 (6th ed. 2000).

15-14-722. Laws applicable to financial institutions and entities.

This part 7 does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this part 7.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 395, § 1, effective April 9.

OFFICIAL COMMENT

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 15-14-722 provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 15-14-720, which provides, in pertinent part, that a person is not required to accept a power of attorney if, "the person is not otherwise required to engage in a transaction with the principal in the same circumstances," or "engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law."

15-14-723. Remedies under other law.

The remedies under this part 7 are not exclusive and do not abrogate any right or remedy under the law of this state other than this part 7.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 396, § 1, effective April 9.

OFFICIAL COMMENT

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (*see* Section 15-14-702(6) (defining "person" for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (*see* Subpart 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.*, Section 15-14-717 Comment.

SUBPART 2

AUTHORITY

OFFICIAL GENERAL COMMENT

Subpart 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 15-14-727 through 15-14-740 describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 15-14-741) or in an individually drafted power of attorney. Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 15-14-725). A principal may also modify any authority incorporated by reference (Section 15-14-725(3)). Section 15-14-726 supplements Sections 15-14-727 through 15-14-740 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 15-14-727 through 15-14-739 of Subpart 2 comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 15-14-740). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 15-14-724(1)). Express authorization for the acts listed in Section 15-14-724(1) is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 15-14-724(1) is to make clear that authority for these acts may not be inferred from a grant of general authority.

15-14-724. Authority that requires specific grant - grant of general authority.

(1) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(a) Create, amend, revoke, or terminate an inter vivos trust;

(b) Make a gift;

(c) Create or change rights of survivorship;

(d) Create or change a beneficiary designation;

(e) Delegate authority granted under the power of attorney;

(f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

(g) Exercise:

(I) A power held by the principal in a fiduciary capacity that the principal has the authority to delegate;

(II) A power to nominate, appoint, or remove a fiduciary or to consent, veto, or otherwise participate in the designation or changing of a fiduciary; or

(III) A power to direct a fiduciary in the exercise of a power of the fiduciary with respect to property subject to the fiduciary relationship, including, but not limited to, a power to direct investments, or to consent, veto, or otherwise participate in controlling the exercise of such a power.

(h) Disclaim or release property or a power of appointment;

(i) Except for the exercise of a general power of appointment for the benefit of the principal, to the extent that the agent is authorized as provided in section 15-14-734, or for the benefit of persons other than the principal, to the extent that the agent is authorized to make gifts as provided in section 15-14-740, exercise a power of appointment; or

(j) Except with respect to an entity owned solely by the principal, exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate.

(2) Notwithstanding a grant of authority to do an act described in subsection (1) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(3) Subject to subsections (1), (2), (4), and (5) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in sections 15-14-727 to 15-14-739.

(4) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 15-14-740.

(5) Subject to subsections (1), (2), and (4) of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(6) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(7) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 396, § 1, effective April 9. **L. 2014:** (1)(g)(I) amended, (HB 14-1322), ch. 296, p. 1236, § 8, effective August 6.

OFFICIAL COMMENT

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 15-14-724(1) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.,* Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (1) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (1) other than the making of gifts (*see* Section 217). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.*, N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 15-14-724(1), the Act contemplates that the

principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (1)(c)) or beneficiary designations (subsection (1)(d)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 15-14-724(1), but also whether to limit the scope of such actions.

Subsection (2) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependent of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (1), an agent is bound by the mandatory fiduciary duties set forth in Section 15-14-714(1) as well as the default duties that the principal has not modified. For a list of these default rules, see Section 15-14-741 Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. See Section 15-14-714 Comment.

Authority for acts and subject matters other than those listed in Section 15-14-724(1) may be granted either through incorporation by reference (*see* Section 15-14-725) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 15-14-727 through 15-14-739 (*see* subsection (3)).

ANNOTATION

Law reviews. For article, "Conservator-Created Wills: Issues in Litigation", see 44 Colo. Law. 53 (Aug. 2015).

15-14-725. Incorporation of authority - incorporation by reference.

(1) An agent has authority described in this part 7 if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in sections 15-14-727 to 15-14-740 or cites the section in which the authority is described.

(2) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in sections 15-14-727 to 15-14-740 or a citation to a section of sections 15-14-727 to 15-14-740 incorporates the entire section as if it were set out in full in the power of attorney.

(2.5) In addition to the incorporation of authority as provided in subsections (1) and (2) of this section, a writing or other record in existence when a power of attorney is executed may be incorporated by reference if the language of the power of attorney manifests this intent and describes the writing or other record sufficiently to permit its identification. A writing or other record so incorporated by reference is considered as set out in full in the power of attorney.

(3) A principal may modify authority or a writing or other record incorporated by reference.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 397, § 1, effective April 9.

OFFICIAL COMMENT

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 15-14-727 through 15-14-740, or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (3) provides that a principal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 15-14-741 uses the descriptive terms in Sections 15-14-727 through 15-14-740 to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

15-14-726. Construction of authority generally.

(1) Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in sections 15-14-727 to 15-14-740 or that grants to an agent authority to do all acts that a principal could do pursuant to section 15-14-724 (3), a principal authorizes the agent, with respect to that subject, to:

(a) Demand, receive, and obtain by litigation or otherwise money or another thing of value to which the principal is, may become, or claims to be entitled and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(b) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(c) Execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(e) Seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(f) Engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(g) Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(h) Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality on behalf of the principal;

(i) Access communications intended for and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(j) Do any lawful act with respect to the subject and all property related to the subject.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 398, § 1, effective April 9.

OFFICIAL COMMENT

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 15-14-727 through 15-14-740, unless this incidental authority is modified in the power of attorney. The actions authorized in Section 15-14-726 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 15-14-727 through 15-14-740. *See*

Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (1)(j), which states that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (1)(h) and (1)(i) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

15-14-727. Real property.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(a) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(c) Pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;

(e) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(I) Insuring against liability or casualty or other loss;

(II) Obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(III) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(IV) Purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(f) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(g) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(I) Selling or otherwise disposing of them;

(II) Exercising or selling an option, right of conversion, or similar right with respect to them; and

(III) Exercising any voting rights in person or by proxy;

(h) Change the form of title of an interest in or right incident to real property; and

(i) Dedicate to public use, with or without consideration, easements or other real property in which the principal has or claims to have an interest.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 399, § 1, effective April 9.

15-14-728. Tangible personal property.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(a) Demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(c) Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a security interest, lien, or other claim on behalf of the principal with respect to tangible personal property or an interest in tangible personal property;

(e) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(I) Insuring against liability or casualty or other loss;

(II) Obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(III) Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(IV) Moving the property from place to place;

(V) Storing the property for hire or on a gratuitous bailment; and

(VI) Using and making repairs, alterations, or improvements to the property; and

(f) Change the form of title of an interest in tangible personal property.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 400, § 1, effective April 9.

15-14-729. Stocks and bonds.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

(a) Buy, sell, and exchange stocks and bonds;

(b) Establish, continue, modify, or terminate an account with respect to stocks and bonds;

(c) Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(d) Receive certificates and other evidences of ownership with respect to stocks and bonds; and

(e) Exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

OFFICIAL COMMENT

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the wording is revised to reflect that "stocks and bonds" is now a defined term in the Act. *See* Section 15-14-702(14).

15-14-730. Commodities and options.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(b) Establish, continue, modify, and terminate option accounts.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

15-14-731. Banks and other financial institutions.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(c) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(d) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(e) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(f) Enter a safe deposit box or vault and withdraw or add to the contents;

(g) Borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(h) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order; transfer money; receive the cash or other proceeds of those transactions; and accept a draft drawn by a person upon the principal and pay it when due;

(i) Receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic or other negotiable or nonnegotiable instrument;

(j) Apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(k) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 401, § 1, effective April 9.

15-14-732. Operation of entity or business.

(1) Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(a) Operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(b) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(c) Enforce the terms of an ownership agreement;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(e) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(f) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(g) With respect to an entity or business owned solely by the principal:

(I) Continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(II) Determine:

(A) The location of its operation;

(B) The nature and extent of its business;

(C) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(D) The amount and types of insurance carried; and

(E) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(III) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(IV) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(h) Put additional capital into an entity or business in which the principal has an interest;

(i) Join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(j) Sell or liquidate all or part of an entity or business;

(k) Establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(l) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(m) Pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 402, § 1, effective April 9.

OFFICIAL COMMENT

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

15-14-733. Insurance and annuities.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(a) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, select the amount, type of insurance or annuity, and mode of payment, and designate a beneficiary that will be the estate of the principal;

(c) Pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(d) Apply for and receive a loan secured by a contract of insurance or annuity;

(e) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(f) Exercise an election;

(g) Exercise investment powers available under a contract of insurance or annuity;

(h) Change the manner of paying premiums on a contract of insurance or annuity;

(i) Change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(j) Apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(k) Collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(l) Select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(m) Pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 404, § 1, effective April 9.

OFFICIAL COMMENT

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 15-14-733 of this Act, an agent does not have authority to "create or change a beneficiary designation" unless that authority is specifically granted to the agent pursuant to Section 15-14-724(1). The authority granted under Paragraph (1)(b) of Section 15-14-733 is more limited, allowing an agent to only "procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents." A principal who grants authority to an agent under Section 15-14-733 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

15-14-734. Estates, trusts, and other beneficial interests.

(1) In this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled as a beneficiary to a share or payment.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(a) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(b) Demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(c) Exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(f) Conserve, invest, disburse, or use anything received for an authorized purpose; and

(g) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor.

(h) (Deleted by amendment, L. 2011, (SB 11-083), ch. 101, p. 306, § 14, effective August 10, 2011.)

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 405, § 1, effective April 9. **L. 2011:** (2)(f), (2)(g), and (2)(h) amended, (SB 11-083), ch. 101, p. 306, § 14, effective August 10.

OFFICIAL COMMENT

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (2)(c)). "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 15-14-702(8).

15-14-735. Claims and litigation.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(a) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(b) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(c) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(d) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(e) Submit to alternative dispute resolution, settle, and propose or accept a compromise;

(f) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(g) Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the principal in property or other thing of value;

(h) Pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(i) Receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 406, § 1, effective April 9.

15-14-736. Personal and family maintenance.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(a) Perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(I) The principal's children;

(II) Other individuals legally entitled to be supported by the principal; and

(III) The individuals whom the principal has customarily supported or indicated the intent to support;

(b) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(c) Provide living quarters for the individuals described in paragraph (a) of this subsection (1) by:

(I) Purchase, lease, or other contract; or

(II) Paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(d) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and career and technical education, and other current living costs for the individuals described in subsection (1)(a) of this section;

(e) Pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (a) of this subsection (1);

(f) Act as the principal's personal representative pursuant to the federal "Health Insurance Portability and Accountability Act", sections 1171 to 1179 of the federal "Social Security Act", 42 U.S.C. sec. 1320d, as amended, and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(g) Continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (a) of this subsection (1);

(h) Maintain credit and debit accounts for the convenience of the individuals described in paragraph (a) of this subsection (1) and open new accounts; and

(i) Continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(2) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this part 7.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 407, § 1, effective April 9. **L. 2017:** (1)(d) amended, (SB 17-294), ch. 264, p. 1391, § 31, effective May 25.

OFFICIAL COMMENT

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The first is clarification in subsection (1) of who qualifies to benefit from payments for personal and family maintenance. Paragraph (1)(a) states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 15-14-736 is the inclusion of paragraph (f) in subsection (1) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 15-14-736 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 15-14-703 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (2) which provides that authority under Section 15-14-736 is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 15-14-736 may in fact be subject to gift tax treatment, subsection (2) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 15-14-740. This is an important distinction because the Act requires a grant of specific authority under Section 15-14-724(1) to authorize gift making, and the default provisions of Section 15-14-740 limit the amounts of those gifts. The authority to make payments under Section 15-14-736 is not constrained by either of these provisions.

ANNOTATION

Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit. Defendant was convicted of second degree assault and causing serious bodily injury to an at-risk adult by criminal negligence when, despite defendant's medical training, defendant failed to respond to father's worsening condition, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. People v. Madison, 176 P.3d 793 (Colo. App. 2007) (decided under former § 15-1-1314).

15-14-737. Benefits from governmental programs or civil or military service.

(1) In this section, "benefits from governmental programs or civil or military service" means any benefit, program, or assistance provided under a statute or regulation including social security, medicare, and medicaid.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in section 15-14-736 (1)(a), and for shipment of their household effects;

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(c) Enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

(d) Prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(f) Receive the financial proceeds of a claim described in paragraph (d) of this subsection (2) and conserve, invest, disburse, or use for a lawful purpose anything so received.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 408, § 1, effective April 9.

15-14-738. Retirement plans.

(1) In this section, "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the federal "Internal Revenue Code of 1986", as amended:

(a) An individual retirement account under Internal Revenue Code section 408, 26 U.S.C. sec. 408, as amended;

(b) A Roth individual retirement account under Internal Revenue Code section 408A, 26 U.S.C. sec. 408A, as amended;

(c) A deemed individual retirement account under Internal Revenue Code section 408 (q), 26 U.S.C. sec. 408 (q), as amended;

(d) An annuity or mutual fund custodial account under Internal Revenue Code section 403 (b), 26 U.S.C. sec. 403 (b), as amended;

(e) A pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code section 401 (a), 26 U.S.C. sec. 401 (a), as amended;

(f) A plan under Internal Revenue Code section 457 (b), 26 U.S.C. sec. 457 (b), as amended; and

(g) A nonqualified deferred compensation plan under Internal Revenue Code section 409A, 26 U.S.C. sec. 409A, as amended.

(2) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(a) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(b) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(c) Establish a retirement plan in the principal's name and designate a beneficiary that will be the estate of the principal;

(d) Make contributions to a retirement plan;

(e) Exercise investment powers available under a retirement plan; and

(f) Borrow from, sell assets to, or purchase assets from a retirement plan.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 409, § 1, effective April 9.

OFFICIAL COMMENT

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the principal to be a beneficiary of a joint or survivor annuity (*see* Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 15-14-724(1).

15-14-739. Taxes.

(1) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, "Federal Insurance Contributions Act", and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code section 2032A, 26 U.S.C. sec. 2032A, as amended, closing agreements, and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty-five tax years;

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the internal revenue service or other taxing authority;

(c) Exercise any election available to the principal under federal, state, local, or foreign tax law; and

(d) Act for the principal in all tax matters for all periods before the internal revenue service, or other taxing authority.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 410, § 1, effective April 9.

15-14-740. Gifts.

(1) In this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the federal "Uniform Transfers to Minors Act", and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code section 529, 26 U.S.C. sec. 529, as amended.

(2) (a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(I) Make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section 2503 (b), 26 U.S.C. sec. 2503 (b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, 26 U.S.C. sec. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(II) Consent, pursuant to Internal Revenue Code section 2513, 26 U.S.C. sec. 2513, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(b) Paragraph (a) of this subsection (2) does not apply to, or affect by inference or otherwise, a power of attorney in existence on December 31, 2009, unless, on that date, this part 7 applies to the power of attorney as provided in section 15-14-745 (2).

(3) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

(a) The value and nature of the principal's property;

(b) The principal's foreseeable obligations and need for maintenance;

(c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(d) Eligibility for a benefit, a program, or assistance under a statute or regulation; and

(e) The principal's personal history of making or joining in making gifts.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 410, § 1, effective April 9. **L. 2011:** (2) amended, (SB 11-083), ch. 101, p. 311, § 23, effective August 10.

OFFICIAL COMMENT

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (*see* Section 15-14-724(1)(b); *see also* Section 15-14-741). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (1) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (1) provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (3) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (3) provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. *See* Section 15-14-714 Comment.

SUBPART 3

STATUTORY FORMS

OFFICIAL GENERAL COMMENT

Subpart 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 15-14-741). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the

promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state- sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Subpart 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 15-14- 742). Pursuant to Section 15-14-719, a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 15-14-742 is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (*e.g.*, the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

15-14-741. Statutory form - power of attorney.

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this part 7.

STATE OF COLORADO STATUTORY FORM

POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the special instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the special instructions. Coagents are not required to act together unless you include that requirement in the special instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the special instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I _____ (name of principal) name the following person as my agent:

Name of agent: _____

Agent's address: _____

Agent's telephone number: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent: _____

Successor agent's address: _____

Successor agent's telephone number: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

_____

Name of second successor agent: _____

Second successor agent's address: _____

Second successor agent's telephone number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All preceding subjects" instead of initialing each subject.)

(__) Real property

(__) Tangible personal property

(__) Stocks and bonds

(__) Commodities and options

(__) Banks and other financial institutions

(__) Operation of entity or business

(__) Insurance and annuities

(__) Estates, trusts, and other beneficial interests

(__) Claims and litigation

(__) Personal and family maintenance

(__) Benefits from governmental programs or civil or military service

(__) Retirement plans

(__) Taxes

(__) All preceding subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(__) Create, amend, revoke, or terminate an inter vivos trust

(__) Make a gift, subject to the limitations of the "Uniform Power of Attorney Act" set forth in section 15-14-740, Colorado Revised Statutes, and any special instructions in this power of attorney

(__) Create or change rights of survivorship

(__) Create or change a beneficiary designation

(__) Authorize another person to exercise the authority granted under this power of attorney

(__) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

(__) Exercise fiduciary powers that the principal has authority to delegate, including powers to participate in the designation or changing of a fiduciary and powers to participate in the direction of a fiduciary in the exercise of the fiduciary's powers

(__) Disclaim, refuse, or release an interest in property or a power of appointment

(__) Exercise a power of appointment other than: (1) The exercise of a general power of appointment for the benefit of the principal which may, if the subject of estates, trusts, and other beneficial interests is authorized above, be exercised as provided under the subject of estates, trusts, and other beneficial interests; or (2) the exercise of a general power of appointment for the benefit of persons other than the principal which may, if the making of a gift is specifically authorized above, be exercised under the specific authorization to make gifts

(__) Exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate excluding the exercise of such powers, rights, and authority with respect to an entity owned solely by the principal which may, if operation of entity or business is authorized above, be exercised as provided under the subject of operation of the entity or business

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the special instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

_____

_____

_____

_____

_____

_____

_____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the special instructions.

NOMINATION OF CONSERVATOR

OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:

_____

Nominee's address: _____

Nominee's telephone number: _____

Name of nominee for guardian of my person:

_____

Nominee's address: _____

Nominee's telephone number: _____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

_____ _____

Your signature Date

_____

Your name printed

_____

_____

Your address

_____

Your telephone number

State of _____

[County] of _____

This document was acknowledged before me on _____(Date)_____,

by _____(Name of principal)_____.

_____ (Seal, if any)

Signature of notary

My commission expires: _____

This document prepared by:

_____

_____

IMPORTANT INFORMATION FOR AGENT

Agent's duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;

(2) Act in good faith;

(3) Do nothing beyond the authority granted in this power of attorney; and

(4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's name) by (Your signature) as agent

Unless the special instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;

(2) Avoid conflicts that would impair your ability to act in the principal's best interest;

(3) Act with care, competence, and diligence;

(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and

(6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of agent's authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) Death of the principal;

(2) The principal's revocation of the power of attorney or your authority;

(3) The occurrence of a termination event stated in the power of attorney;

(4) The purpose of the power of attorney is fully accomplished; or

(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the special instructions in this power of attorney state that such an action will not terminate your authority.

Liability of agent

The meaning of the authority granted to you is defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes. If you violate the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 411, § 1, effective April 9. **L. 2011:** Entire section amended, (SB 11-083), ch. 101, p. 311, § 24, effective August 10.

OFFICIAL COMMENT

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 15-14-741 constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains

instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (*see* Section 15-14-708 and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 15-14-727 through 15-14-739 of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 15-14-724(1) requires an express grant of authority in a power of attorney. Subpart 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 15-14-740 unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 15-14-724(1) is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day- to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

(1) the power of attorney is durable (Section 15-14-704);

(2) the power of attorney is effective when executed (Section 15-14-709);

(3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 15-14-710(2)(c));

(4) lapse of time does not affect an agent's authority (Section 15-14-710(3));

(5) a successor agent has the same authority as the original agent (Section 15-14-711(2));

(6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 15-14-711(2));

(7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 15-14-712);

(8) an agent is entitled to reasonable compensation (Section 15-14-712);

(9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 15-14-713);

(10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 15-14-714);

(11) an agent must give notice of resignation as specified in Section 15-14-718; and

(12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 15-14-724(2)).

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

15-14-742. Certification.

The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF

POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of _____

County of _____

I, _____ (Name of agent), certify under penalty of perjury that _____ (Name of principal) granted me authority as an agent or successor agent in a power of attorney dated _____.

I further certify that to my knowledge:

(1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;

(2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____

_____

_____

_____

_____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

_____ _____

Agent signature Date

_____

Agent's name printed

_____

_____

Agent's address

_____

Agent's telephone number

This document was acknowledged before me on _____(Date)_____,

by _____(Name of agent)_____.

_____ (Seal, if any)

Signature of notary

My commission expires: _____

This document prepared by:

_____

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 417, § 1, effective April 9.

OFFICIAL COMMENT

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 15-14-719.

SUBPART 4

MISCELLANEOUS PROVISIONS

15-14-743. Uniformity of application and construction.

In applying and construing this part 7, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9.

15-14-744. Relation to "Electronic Signatures in Global and National Commerce Act".

This part 7, modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede

section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9.

15-14-745. Effect on existing powers of attorney.

(1) Except as otherwise provided in this part 7, on January 1, 2010:

(a) This part 7 applies to a power of attorney created before, on, or after January 1, 2010;

(b) This part 7 applies to a judicial proceeding concerning a power of attorney commenced on or after January 1, 2010;

(c) This part 7 applies to a judicial proceeding concerning a power of attorney commenced before January 1, 2010, unless the court finds that application of a provision of this part 7 would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(d) An act done before January 1, 2010, is not affected by this part 7.

(2) (a) A power of attorney is durable as determined pursuant to section 15-14-704 (1) and is otherwise construed and applied in accordance with this part 7 prior to January 1, 2010, if the power of attorney:

(I) Is signed on or after the date this part 7 becomes law and before January 1, 2010;

(II) Is either:

(A) Substantially in the form set forth in section 15-14-741; or

(B) States that it is subject to the "Uniform Power of Attorney Act" or to this part 7.

(b) To the extent of any conflict between this subsection (2) and section 15-14-501, this subsection (2) shall control.

Source: L. 2009: Entire part added, (HB 09-1198), ch. 106, p. 418, § 1, effective April 9. **L. 2018:** (2)(b) amended, (HB 18-1375), ch. 274, p. 1697, § 12, effective May 29.

PART 8

SUPPORTED DECISION-MAKING AGREEMENTS FOR ADULTS WITH A DISABILITY

15-14-801. Legislative declaration.

(1) The general assembly finds and declares that:

(a) Guardianship constitutes one of the most restrictive options available to adults with disabilities and their families;

(b) Guardianship should be employed only when a less restrictive alternative would fail to meet the needs of the adult with a disability;

(c) Adults with disabilities are presumed competent and have the capacity to facilitate the exercise of decisions regarding their day-to-day health, safety, welfare, or financial affairs, unless otherwise determined through legal proceedings;

(d) Supported decision-making, as defined in section 15-14-802 (5), offers adults with disabilities a voluntary method of decision-making that, as appropriate, may also be used concurrently with, but subject to, an existing guardianship, conservatorship, or power of attorney;

(e) Supported decision-making facilitates adults with disabilities in maintaining decision-making authority over their own lives while also encouraging these adults to recognize, create, and maintain supportive communities, through supported decision-making teams, that can assist adults with disabilities in making informed decisions;

(f) Adults with disabilities should have access to opportunities to experience and practice decision-making skills;

(g) Adults with disabilities who do not have a court-appointed guardian or a court-appointed conservator have the right to independently make any decision without any member of the supportive community, regardless of having entered into a supported decision-making agreement; and

(h) Supported decision-making agreements do not:

(I) Create a fiduciary or contractual relationship between an adult with a disability and a member of the supportive community;

(II) Elevate a member of the supportive community to a person in a position of trust in regard to the adult with a disability based solely on the member of the supportive community's involvement in the supported decision-making agreement;

(III) Alter, diminish, or supersede the terms of a court-ordered guardianship or conservatorship. A guardian or conservator has the right, if authorized by the court, to determine if a ward or protected person may enter into or continue a supported decision-making agreement.

(IV) Authorize a member of the supportive community to obtain or use personal, financial, or confidential information of the adult with a disability for the member of the supportive community's own purpose or benefit, or for the purpose or benefit of a third-party; or

(V) Shield a member of the supportive community from criminal or civil liability for acts that would otherwise be subject to civil or criminal liability, notwithstanding section 15-14-806 (2); and

(i) In addition to supported decision-making, adults with disabilities should have a variety of formal and informal processes available to make decisions and express preferences of choices, including but not limited to medical and financial powers of attorney, guardianship, limited guardianship, conservatorship, special conservatorship, release of information forms, and representative payees.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 244, § 1, effective September 7.

15-14-802. Definitions.

As used in this part 8, unless the context otherwise requires:

(1) "Adult" means an individual who is eighteen years of age or older, or an emancipated minor.

(2) "Assist" means helping an adult with a disability weigh the pros and cons of a decision and understand the possible outcomes of making such a decision.

(3) "Disability" means a physical or mental impairment that substantially limits one or more major life activities or a record of such an impairment.

(4) "Member of the supportive community" means a person whom the adult has identified, whom the adult trusts to engage in the supported decision-making process, and who understands the adult's desires and personal values.

(5) "Supported decision-making" means a process in which an adult with a disability has made or is making decisions by using friends, family members, professionals, or other people the adult with a disability trusts to:

(a) Help understand the issues and choices;

(b) Answer questions;

(c) Provide explanations in a language the adult with a disability understands;

(d) Communicate the adult with a disability's decision to others, if necessary and if specifically requested by the adult with a disability; or

(e) Facilitate the exercise of decisions regarding the adult with a disability's day-to-day health, safety, welfare, or financial affairs.

(6) "Supported decision-making agreement" or "agreement" means a voluntary agreement entered into pursuant to this part 8 between an adult with a disability and one or more members of the adult with a disability's supportive community.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 246, § 1, effective September 7.

15-14-803. Supported decision-making agreement - term.

(1) An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with one or more members of the supportive community. The supported decision-making agreement does not adversely affect the decision-making authority granted to a court-appointed guardian or court-appointed conservator. Under the agreement, the adult with a disability may request the member of the supportive community to do any or all of the following:

(a) Provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability;

(b) Pursuant to section 15-14-804 and at the specific request of the adult with a disability, assist the adult with a disability in accessing, collecting, obtaining, and understanding information that is relevant to a given life decision from any person, including but not limited to medical, psychological, financial, educational, occupational, and social decisions; treatment records; how and in what relationships the adult with a disability chooses to engage; and information about how a supportive community is chosen; or

(c) Assist the adult with a disability in communicating the adult's decisions to appropriate persons when expressly requested by the adult with a disability.

(2) A member of the supportive community shall not be entitled to compensation or other consideration, in cash or in kind, for assistance provided to the adult with a disability for the purposes of a supportive decision-making agreement.

(3) (a) The supported decision-making agreement is effective until terminated by either the adult with a disability or the member of the supportive community, or by the terms of the

agreement. Any party may choose to terminate the agreement at any point by providing written or verbal notice of the termination to all parties to the supported decision-making agreement.

(b) The supported decision-making agreement is automatically terminated if:

(I) After investigating a member of the supportive community for mistreatment, as defined in section 18-6.5-102 (10.5), adult protective services finds that the adult with a disability has been mistreated by the member of the supportive community; or

(II) The member of the supportive community is:

(A) Substantiated in a case of mistreatment of the adult with a disability, any other person with a disability, or any at-risk person, as defined in section 18-6.5-102 (4.5);

(B) Convicted of a crime against an at-risk person pursuant to section 18-6.5-103, or otherwise intentionally caused physical harm to another;

(C) Convicted of a financial crime; or

(D) Found to have committed theft pursuant to section 18-4-405.

(4) A supported decision-making agreement cannot be used as evidence of incapacity of the adult with a disability.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 246, § 1, effective September 7.

15-14-804. Access to personal information.

(1) The member of the supportive community may only assist the adult with a disability in accessing, collecting, or obtaining information that is relevant to a decision made pursuant to the supported decision-making agreement and only when such assistance is specifically requested by the adult with a disability.

(2) If the member of the supportive community assists the adult with a disability in accessing, collecting, or obtaining financial or personal information, the member of the supportive community shall keep the information confidential, as requested by the adult with a disability.

(3) A member of the supportive community who obtains information pursuant to this section may only use such information for the specific purposes requested by the adult with a disability and any misuse of the information may be subject to criminal and civil liability.

(4) The existence of a supported decision-making agreement does not preclude an adult with a disability from seeking personal information on their own without the assistance of the member of the supportive community.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 248, § 1, effective September 7.

15-14-805. Agreement requirements - signature - witnesses or notary public.

(1) A supported decision-making agreement may be in any form but is valid only if it contains, at a minimum, the following:

(a) The name of the adult with a disability;

(b) The name, address, phone number, and email address of the member of the supportive community, if applicable;

(c) A list of decisions the adult with a disability requests the member of the supportive community to advise the adult with a disability on;

(d) A description of the member of the supportive community's agreement terms, including, at a minimum, the agreement term to:

(I) Provide information as requested by the adult with a disability;

(II) Respect that the final and ultimate decision is the adult with the disability's and not the member of the supportive community's;

(III) Not coerce or manipulate the adult with the disability into making any decision; and

(IV) Provide the most up-to-date and relevant information to the adult with the disability based on all the available and known information the member of the supportive community has.

(e) A notice that any mandatory reporter, as described in section 18-6.5-108, who is relying on the supported decision-making agreement and has cause to believe that the adult with a disability is being mistreated, as defined in section 18-6.5-102 (10.5), by the member of the supportive community, shall report the alleged mistreatment to adult protective services; and

(f) The day, month, and year the agreement was entered into.

(2) A supported decision-making agreement must be signed voluntarily, without coercion or undue influence, by the adult with a disability and each member of the supportive community in the presence of two or more attesting and disinterested witnesses who are eighteen years of age or older, or a notary public.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 248, § 1, effective September 7.

15-14-806. Reliance on agreement - limitation of liability.

(1) A person who receives the original or a copy of the supported decision-making agreement shall rely on the agreement and its authority to assist as presented.

(2) A person is not subject to criminal or civil liability and does not engage in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement and its authority to assist as presented.

Source: L. 2021: Entire part added, (SB 21-075), ch. 61, p. 249, § 1, effective September 7.

ARTICLE 14.5

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

PART 1
GENERAL PROVISIONS

15-14.5-101. Short title.

15-14.5-102. Definitions.

15-14.5-103. International application of article.

15-14.5-104. Communication between courts.

15-14.5-105. Cooperation between courts.

15-14.5-106. Taking testimony in another state.

PART 2
JURISDICTION

15-14.5-201. Definitions - significant connection factors.

15-14.5-202. Exclusive basis.

15-14.5-203. Jurisdiction.

15-14.5-204. Special jurisdiction.

15-14.5-205. Exclusive and continuing jurisdiction.

15-14.5-206. Appropriate forum.

15-14.5-207. Jurisdiction declined by reason of conduct.

15-14.5-208. Notice of proceeding.

15-14.5-209. Proceedings in more than one state.

PART 3
TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

15-14.5-301. Transfer of guardianship or conservatorship to another state.

15-14.5-302. Accepting guardianship or conservatorship

transferred from another state.

PART 4
REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

15-14.5-401. Registration of guardianship orders.

15-14.5-402. Registration of protective orders.

15-14.5-403. Effect of registration.

PART 5
MISCELLANEOUS PROVISIONS

15-14.5-501. Uniformity of application and construction.

15-14.5-502. Relation to electronic signatures in global and national commerce act.

15-14.5-503. Transitional provision.

PART 1

GENERAL PROVISIONS

15-14.5-101. Short title.

This article may be cited as the "Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act".

Source: L. 2008: Entire article added, p. 787, § 1, effective May 14.

15-14.5-102. Definitions.

In this article:

(1) "Adult" means an individual who has attained eighteen years of age.

(2) "Conservator" means a person appointed by the court to administer the property of an adult, including a person appointed under section 15-14-401.

(3) "Guardian" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under section 15-14-301.

(4) "Guardianship order" means an order appointing a guardian.

(5) "Guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

(6) "Incapacitated person" means an adult for whom a guardian has been appointed.

(7) "Party" means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.

(8) "Person," except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) "Protected person" means an adult for whom a protective order has been issued.

(10) "Protective order" means an order appointing a conservator or other order related to management of an adult's property.

(11) "Protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued.

(12) "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.

(13) "Respondent" means an adult for whom a protective order or the appointment of a guardian is sought.

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

Source: L. 2008: Entire article added, p. 787, § 1, effective May 14.

15-14.5-103. International application of article.

A court of this state may treat a foreign country as if it were a state for the purpose of applying this part 1 and parts 2, 3, and 5 of this article.

Source: L. 2008: Entire article added, p. 788, § 1, effective May 14.

15-14.5-104. Communication between courts.

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (2) of this section, the court shall

make a record of the communication. The record may be limited to the fact that the communication occurred.

(2) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

Source: L. 2008: Entire article added, p. 788, § 1, effective May 14.

15-14.5-105. Cooperation between courts.

(1) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

(a) Hold an evidentiary hearing;

(b) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(c) Order that an evaluation or assessment be made of the respondent;

(d) Order any appropriate investigation of a person involved in a proceeding;

(e) Forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (a) of this subsection (1) or any other proceeding, any evidence otherwise produced under paragraph (b) of this subsection (1), and any evaluation or assessment prepared in compliance with an order under paragraph (c) or (d) of this subsection (1);

(f) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;

(g) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 CFR 164.504, as amended.

(2) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (1) of this section, a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

Source: L. 2008: Entire article added, p. 789, § 1, effective May 14.

15-14.5-106. Taking testimony in another state.

(1) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(2) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

Source: L. 2008: Entire article added, p. 789, § 1, effective May 14.

PART 2

JURISDICTION

Law reviews: For article, "Multi-State Issues When Appointing Guardians for Minors", see 43 Colo. Law. 65 (Nov. 2014).

15-14.5-201. Definitions - significant connection factors.

(1) In this part 2:

(a) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

(b) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(c) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(2) In determining under sections 15-14.5-203 and 15-14.5-301(5) whether a respondent has a significant connection with a particular state, the court shall consider:

(a) The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(b) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(c) The location of the respondent's property; and

(d) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

Source: L. 2008: Entire article added, p. 790, § 1, effective May 14.

15-14.5-202. Exclusive basis.

This part 2 provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

Source: L. 2008: Entire article added, p. 790, § 1, effective May 14.

15-14.5-203. Jurisdiction.

(1) A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(a) This state is the respondent's home state;

(b) On the date the petition is filed, this state is a significant-connection state and:

(I) The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(II) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(A) A petition for an appointment or order is not filed in the respondent's home state;

(B) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(C) The court in this state concludes that it is an appropriate forum under the factors set forth in section 15-14.5-206;

(c) This state does not have jurisdiction under either paragraph (a) or (b) of this subsection (1), the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(d) The requirements for special jurisdiction under section 15-14.5-204 are met.

Source: L. 2008: Entire article added, p. 791, § 1, effective May 14.

15-14.5-204. Special jurisdiction.

(1) A court of this state lacking jurisdiction under section 15-14.5-203 has special jurisdiction to do any of the following:

(a) Appoint a guardian in an emergency for a term not exceeding sixty days for a respondent who is physically present in this state;

(b) Issue a protective order with respect to real or tangible personal property located in this state;

(c) Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to section 15-14.5-301.

(2) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

Source: L. 2008: Entire article added, p. 791, § 1, effective May 14.

15-14.5-205. Exclusive and continuing jurisdiction.

Except as otherwise provided in section 15-14.5-204, a court that has appointed a guardian or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

Source: L. 2008: Entire article added, p. 792, § 1, effective May 14.

15-14.5-206. Appropriate forum.

(1) A court of this state having jurisdiction under section 15-14.5-203 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1) of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(3) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(a) Any expressed preference of the respondent;

(b) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

(c) The length of time the respondent was physically present in or was a legal resident of this or another state;

(d) The distance of the respondent from the court in each state;

(e) The financial circumstances of the respondent's estate;

(f) The nature and location of the evidence;

(g) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(h) The familiarity of the court of each state with the facts and issues in the proceeding; and

(i) If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

Source: L. 2008: Entire article added, p. 793, § 1, effective May 14.

ANNOTATION

A court is not required to transfer a guardianship proceeding to the foreign jurisdiction when authorizing a guardian to move a ward's dwelling place to another state or foreign country. Articles 14 and 14.5 of this title contemplate that the court may retain jurisdiction over the guardianship proceeding, even if it has authorized the guardian to move the ward's dwelling place. Nothing in the statute indicates that a state cannot maintain jurisdiction if the ward's dwelling place is moved out of the state and the language in subsection (1) regarding deferring to another appropriate forum is permissive. In Interest of Diaz, 2024 COA 101, 560 P.3d 434.

15-14.5-207. Jurisdiction declined by reason of conduct.

(1) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(a) Decline to exercise jurisdiction;

(b) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(c) Continue to exercise jurisdiction after considering:

(I) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(II) Whether it is a more appropriate forum than the court of any other state under the factors set forth in section 15-14.5-206 (3); and

(III) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 15-14.5-203.

(2) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable

conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this article.

Source: L. 2008: Entire article added, p. 793, § 1, effective May 14.

15-14.5-208. Notice of proceeding.

If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

Source: L. 2008: Entire article added, p. 793, § 1, effective May 14.

15-14.5-209. Proceedings in more than one state.

(1) Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under section 15-14.5-204 (1)(a) or (1)(b), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(a) If the court in this state has jurisdiction under section 15-14.5-203, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to section 15-14.5-203 before the appointment or issuance of the order.

(b) If the court in this state does not have jurisdiction under section 15-14.5-203, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

Source: L. 2008: Entire article added, p. 793, § 1, effective May 14.

PART 3

TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

15-14.5-301. Transfer of guardianship or conservatorship to another state.

(1) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(2) Notice of a petition under subsection (1) of this section must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(a) The incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(c) Plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(5) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(a) The protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in section 15-14.5-201 (2);

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(c) Adequate arrangements will be made for management of the protected person's property.

(6) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(a) A provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section 15-14.5-302; and

(b) The documents required to terminate a guardianship or conservatorship in this state.

Source: L. 2008: Entire article added, p. 794, § 1, effective May 14.

15-14.5-302. Accepting guardianship or conservatorship transferred from another state.

(1) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to section 15-14.5-301, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(2) Notice of a petition under subsection (1) of this section must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition filed under subsection (1) of this section unless:

(a) An objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(b) The guardian or conservator is ineligible for appointment in this state.

(5) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section 15-14.5-301 transferring the proceeding to this state.

(6) Not later than ninety days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(7) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(8) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under article 14 of this title if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

Source: L. 2008: Entire article added, p. 795, § 1, effective May 14.

PART 4

REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

15-14.5-401. Registration of guardianship orders.

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

Source: L. 2008: Entire article added, p. 796, § 1, effective May 14.

15-14.5-402. Registration of protective orders.

If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

Source: L. 2008: Entire article added, p. 796, § 1, effective May 14.

15-14.5-403. Effect of registration.

(1) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(2) A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

Source: L. 2008: Entire article added, p. 796, § 1, effective May 14.

PART 5

MISCELLANEOUS PROVISIONS

15-14.5-501. Uniformity of application and construction.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2008: Entire article added, p. 797, § 1, effective May 14.

15-14.5-502. Relation to electronic signatures in global and national commerce act.

This article modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2008: Entire article added, p. 797, § 1, effective May 14.

15-14.5-503. Transitional provision.

(1) This article applies to guardianship and protective proceedings begun on or after May 14, 2008.

(2) Parts 1, 3, and 4 of this article and sections 15-14.5-501 and 15-14.5-502 apply to proceedings begun before May 14, 2008, regardless of whether a guardianship or protective order has been issued.

Source: L. 2008: Entire article added, p. 797, § 1, effective May 14.

ARTICLE 15

Nonprobate Transfers on Death

PART 1
PROVISIONS RELATING TO EFFECT OF DEATH

15-15-101. Nonprobate transfers on death.

15-15-102. Will not to affect joint tenancy in real property or personalty.

15-15-103. Liability of nonprobate transferees for creditor claims and statutory allowances.

15-15-104. Payment of designated benefits to charitable organizations - timeline - affidavits - conditional requirements prohibited - enforcement - definitions.

PART 2
MULTIPLE-PERSON ACCOUNTS

SUBPART 1
DEFINITIONS AND GENERAL PROVISIONS

15-15-201. Definitions.

15-15-202. Limitation on scope of part.

15-15-203. Types of account; existing accounts.

15-15-204. Forms.

15-15-205. Designation of agent.

15-15-206. Applicability of part.

SUBPART 2
OWNERSHIP AS BETWEEN PARTIES AND OTHERS

15-15-211. Ownership during lifetime.

15-15-212. Rights at death.

15-15-213. Alteration of rights.

15-15-214. Accounts and transfers nontestamentary.

15-15-215. Rights of creditors and others. (Repealed)

15-15-216. Community property and tenancy by the entireties.

SUBPART 3
PROTECTION OF FINANCIAL INSTITUTIONS

15-15-221. Authority of financial institution.

15-15-222. Payment on multiple-party account.

15-15-223. Payment on POD designation.

15-15-224. Payment to designated agent.

15-15-225. Payment to minor.

15-15-226. Discharge.

15-15-227. Set-off.

PART 3
UNIFORM TOD SECURITY REGISTRATION ACT

15-15-301. Definitions.

15-15-302. Registration in beneficiary form; sole or joint tenancy ownership.

15-15-303. Registration in beneficiary form; applicable law.

15-15-304. Origination of registration in beneficiary form.

15-15-305. Form of registration in beneficiary form.

15-15-306. Effect of registration in beneficiary form.

15-15-307. Ownership on death of owner.

15-15-308. Protection of registering entity.

15-15-309. Nontestamentary transfer on death.

15-15-310. Terms, conditions, and forms for registration.

15-15-311. Application of part.

PART 4
TRANSFER OF REAL PROPERTY EFFECTIVE ON DEATH

15-15-401. Definitions.

15-15-402. Real property - beneficiary deed.

15-15-403. Medicaid eligibility exclusion.

15-15-404. Form of beneficiary deed - recording.

15-15-405. Revocation - change - revocation by will prohibited.

15-15-406. Acknowledgment.

15-15-407. Vesting of ownership in grantee-beneficiary.

15-15-408. Joint tenancy - definitions.

15-15-409. Rights of creditors and others. (Repealed)

15-15-410. Purchaser from grantee-beneficiary protected.

15-15-411. Limitations on actions and proceedings against grantee-beneficiaries.
15-15-412. Nontestamentary disposition.
15-15-413. Proof of death.
15-15-414. Disclaimer.
15-15-415. Applicability.

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

15-15-101. Nonprobate transfers on death.

(1) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection (1) includes a written provision that:

(a) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(b) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(c) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(1.5) A conveyance or deed of gift described in subsection (1) of this section that relates to an interest in real property may be created pursuant to part 4 of this article and, if so created, shall be subject to the rights of third parties described in part 4 of this article.

(2) Under the provisions of subsection (1) of this section, it is permissible to designate as a beneficiary, payee, or owner a trustee named in an inter vivos or testamentary trust in existence at the date of such designation. It is not necessary to the validity of any such trust that there be in existence a trust corpus other than the right to receive the benefits or to exercise the rights resulting from such a designation. It is also permissible to designate as a beneficiary, payee, or owner a trustee named in, or ascertainable under, the will of the designator. The benefits or rights resulting from such a designation shall be payable or transferable to the trustee upon admission of the will to probate if a testamentary trustee is the designated payee or transferee, subject to the right of the payer to impose requirements and take actions as may a personal representative

acting under section 15-12-913. A trustee shall not be disqualified to receive such benefits or rights merely because the trust under which he was to act or is acting fails to come into existence or has been distributed in part or whole, but such a trustee shall receive and distribute the proceeds in accord with the terms of such trust.

(3) If a trustee is designated pursuant to subsection (2) of this section and no qualified trustee makes claim to the benefits or rights resulting from such a designation within one year after the death of the designator, or if evidence satisfactory to the person obligated to make the payment or transfer is furnished within such one-year period that there is or will be no trustee to receive the proceeds, payment or transfer shall be made to the personal representative of the designator, unless otherwise provided by such designation or other controlling agreement made during the lifetime of the designator.

(4) The payment of the benefits due or a transfer of the rights given under a designation pursuant to subsection (2) or (3) of this section and the receipt for such payment or transfer executed by the trustee or other authorized payee thereof shall constitute a full discharge and acquittance of the person obligated to make the payment or transfer.

(5) Payment of the benefits due or the transfer of the rights given in accordance with a designation under the provisions of subsection (2) of this section shall not cause such benefits or rights to be included in the property administered as part of the designator's estate under this code or to be subject to the claims of his or her creditors, except as provided in part 2 of article 11 of this title and in section 15-15-103.

(6) Except as otherwise provided in part 2 of article 11 of this title and in section 15-15-103, the express provisions of the trust agreement, declaration of trust, or testamentary trust shall control and regulate the extent to which the benefits or rights payable or transferable under such a designation shall be subject to the debts of the designator if paid or transferred under the provisions of subsection (2) of this section.

(7) Repealed.

Source: L. 90: Entire article R&RE, p. 908, § 1, effective July 1. **L. 2004:** (1.5) added, p. 734, § 3, effective August 4. **L. 2006:** (5) and (6) amended and (7) repealed, pp. 390, 391, §§ 18, 19, 20, effective July 1 **L. 2014:** (5) and (6) amended, (HB 14-1322), ch. 296, p. 1241, § 15, effective August 6.

Editor's note: This section is similar to former § 15-15-201 as it existed prior to 1990.

ANNOTATION

Law reviews. For note on the utility of testamentary and inter vivos life insurance trusts, see 32 Rocky Mt. L. Rev. 382 (1960). For article, "An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust", see 43 Den. L.J. 296 (1966).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

This section is not intended to expand the means by which a testamentary power of appointment may be exercised, nor does it obviate the requirement that a testamentary instrument be probated. The statute merely makes it clear that the exercise of a power of appointment in a will does not make the transfer testamentary, nor does it make the transferred asset a part of the probate estate. In re Estate of Scott, 77 P.3d 906 (Colo. App. 2003).

When the trust instrument provides that a power of appointment may only be exercised in a will, the instrument exercising the power must satisfy the statutes relating to wills and be probated in order to exercise and implement the power of appointment. In re Estate of Scott, 77 P.3d 906 (Colo. App. 2003).

Reservations by settlor of inter vivos trust do not render trust testamentary. Where the settlor of an inter vivos trust reserves to himself the income of the trust estate and the right to change or revoke the trust and the right to disapprove certain investments, such reservations do not render the trust testamentary. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

So that settlor obtains advantages of a will without the necessity of making one. Where the property involved in a trust is assigned, transferred, and set over to a trustee and remains in the name of the trustee, the interest of a settlor therein passes to the trustee in presenti and while the settlor remains alive the transfer is inter vivos and not testamentary. Hence, if an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

An inter vivos trust does not become testamentary when a pour-over is made into it; therefore, the instrument creating the trust need not be executed with the formality of a will. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

To create a valid "pour-over" provision, it is only necessary that a trust be evidenced by a written instrument; that a trust be in existence at the time the will is executed; and that a trust be capable of being identified with reasonable certainty. In re Estate of Allen, 28 Colo. App. 574, 475 P.2d 629 (1970); In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

This section removes certain conceptual difficulties which arise from the application of either of the doctrines of incorporation by reference or the doctrine of facts of independent significance, and, second, it validates testamentary dispositions of

property to existing trusts. In re Estate of Allen, 28 Colo. App. 574, 475 P.2d 629 (1970).

Clear, explicit, definite, unequivocal, and unambiguous language, or conduct is required to establish an express or voluntary trust. Because the parties to a savings and loan account failed to meet these requirements, they did not establish that a valid inter-vivos testamentary trust was created. Goemmer v. Hartman, 791 P.2d 1238 (Colo. App. 1990).

The essential requirements of a gift inter-vivos are a clear and unmistakable intention to make a gift, and a complete parting of possession and surrender by the donor of all control and dominion over the same to the donee. Goemmer v. Hartman, 791 P.2d 1238 (Colo. App. 1990).

Applied in Ayres v. King, 643 P.2d 788 (Colo. App. 1981).

15-15-102. Will not to affect joint tenancy in real property or personalty.

No will or other testamentary disposition or testamentary provision of one of the owners in joint tenancy of real or personal property or of an interest in real or personal property shall destroy or affect the joint tenancy or prevent the entire title and interest owned by the joint tenants from becoming vested upon his death in the joint tenants who shall have survived him. Upon the death of an owner in joint tenancy of real or personal property or of an interest in real or personal property, leaving surviving him coowners under such joint tenancy, all of the interest and title which, immediately before such death was owned by all of the joint tenants under such joint tenancy, shall become vested in the survivors of such joint tenants in spite of and without regard to the provisions of a will of the joint tenant so dying or the admission to probate of such will and without regard to whether such will was executed before or after the creation of the joint tenancy.

Source: L. 90: Entire article R&RE, p. 909, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-202 as it existed prior to 1990.

ANNOTATION

Joint tenancy statute had no bearing on wife's obligations under mutual wills executed by her and her husband. Statute provides that the making of a will does not destroy an existing joint tenancy and the property held in joint tenancy shall pass to the surviving joint tenant by operation of law, the probated will notwithstanding.

Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

15-15-103. Liability of nonprobate transferees for creditor claims and statutory allowances.

(1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), as used in this section, "nonprobate transfer" means a valid transfer effective at death by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

(b) This section shall not apply to:

(I) A survivorship interest in joint tenancy real estate; and

(II) Property transferred by the exercise or default in the exercise of a power of appointment, including a power of withdrawal, created by a person other than the transferor; and

(III) Proceeds transferred pursuant to a beneficiary designation under a life insurance, accident insurance, or annuity policy contract; and

(IV) Property or funds held in or payable from a pension or retirement plan, individual retirement account, deferred compensation plan, internal revenue code section 529 plan, or other similar arrangement.

(2) Except as otherwise provided by paragraph (b) of subsection (1) of this section, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(3) Nonprobate transferees are liable for the insufficiency described in subsection (2) of this section in the following order of priority:

(a) A transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;

(b) The trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other acts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(c) Other nonprobate transferees, in proportion to the values received.

(4) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devisees under that will.

(5) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another instrument, the provision of the later instrument shall prevail.

(6) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.

(7) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the decedent's surviving spouse or a child of the decedent, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(8) A proceeding under this section shall be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty-three days after final allowance of the claim.

(9) Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(a) Payment or delivery of assets by a financial institution, registrar, or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(b) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary, to the extent of the distribution received, becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

(10) The receipt of funds derived from nonprobate transferees by a person as provided in this section in satisfaction of such person's claim for a debt or statutory allowances does not constitute the receipt of nonprobate property by such person for purposes of this section or part 2 of article 11 of this title.

(11) In the event of any conflict in the provisions of this section with the provisions of parts 2 and 4 of article 11 of this title, the provisions of this section shall control.

Source: L. 2006: Entire section added, p. 388, § 17, effective July 1. **L. 2012:** (8) amended, (SB 12-175), ch. 208, p. 841, § 55, effective July 1.

15-15-104. Payment of designated benefits to charitable organizations - timeline - affidavits - conditional requirements prohibited - enforcement - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Benefits" means:

(I) Proceeds payable upon death pursuant to an annuity or insurance policy;

(II) A savings or checking account with a payable-upon-death designation;

(III) A security registered in beneficiary form with a payable-upon-death designation; or

(IV) Proceeds payable upon death pursuant to a pension or a profit-sharing, a retirement, or other employment-related benefit plan.

(b) "Charitable organization" has the meaning set forth in section 39-26-102 (2.5).

(c) "Covered entity" means:

(I) A bank, as defined in section 11-51-201 (1);

(II) A broker-dealer, as defined in section 11-51-201 (2);

(III) A depository institution, as defined in section 11-51-201 (5);

(IV) A credit union, as defined in section 11-30-101 (1)(a); or

(V) A financial or institutional investor, as defined in section 11-51-201 (6).

(d) "Designated benefits" means benefits that are designated to be transferred to a charitable organization upon the death of an individual.

(e) "IRS" means the federal internal revenue service.

(2) (a) Unless a court has ordered otherwise, and except as may be provided otherwise by federal law and by subsection (2)(c) of this section, a covered entity that holds designated benefits shall pay the designated benefits to the charitable organization not later than sixty calendar days after the charitable organization submits to the covered entity an affidavit that attests to the death of the donor and includes the following information:

(I) The donor's name and last-known address;

(II) A general description of the designated benefits;

(III) The charitable organization's name, address, telephone number, and internet website address, if any;

(IV) A copy of the charitable organization's IRS determination letter;

(V) A copy of the charitable organization's IRS form W-9, signed by a duly authorized representative of the charitable organization;

(VI) A request that the designated benefits be paid or transferred to the charitable organization in accordance with this section, including instructions on where and how to remit payment;

(VII) A copy of the death certificate; except that, if the covered entity has already received notice of the donor's death, this requirement does not apply;

(VIII) A statement that the information provided in the affidavit is true and correct;

(IX) A signature from a duly authorized representative of the charitable organization;

(X) A copy of the charitable organization's corporate resolutions certifying that the signatory of the affidavit is authorized to act on behalf of the charitable organization; and

(XI) A waiver signed by a duly authorized representative of the charitable organization stating that the charitable organization acknowledges and agrees to the following:

(A) The designated benefits may concern creditor claims against the donor's probate estate and statutory allowances to the donor's spouse and children, for which claims and allowances the charitable organization may be liable if the donor's estate is insufficient to satisfy those claims and allowances, unless the designated benefits are specifically excepted under section 15-15-103 (1)(b);

(B) The designated benefits may concern the unsatisfied balance of a surviving spouse's elective-share or supplemental elective-share claim under section 15-11-209 (3), for which claim the charitable organization may be liable if the donor's estate is insufficient to pay such claim; and

(C) A proceeding under section 15-15-103 must be commenced within the time frame described in section 15-15-103 (8), and a surviving spouse must file an election for an elective-share claim within the time limits set forth in section 15-11-211.

(b) If an individual who is the signatory of an affidavit described in subsection (2)(a) of this section submits the affidavit to a covered entity in person, the covered entity may require the

individual to present a valid, government-issued form of identification that identifies the individual as the signatory of the affidavit.

(c) If a covered entity that holds designated benefits is unable to pay the designated benefits to a charitable organization as required by subsection (2)(a) of this section because federal law requires the covered entity to take certain actions or satisfy certain criteria in order to pay the designated benefits, the covered entity shall take such actions or satisfy such criteria and comply with subsection (2)(a) of this section not less than one hundred twenty days after the charitable organization submits to the covered entity an affidavit that satisfies the requirements of subsection (2)(a) of this section.

(3) If a charitable organization receives designated benefits for which the charitable organization is liable under section 15-15-103 or 15-11-209, the charitable organization shall return to the donor's estate a portion or all of the designated benefits in order to satisfy the allowed claims, statutory allowances, or unsatisfied balance of the elective-share or supplemental elective-share claim within sixty days after receiving written notice from the personal representative of the donor's estate. If the charitable organization fails to comply with the provisions of this subsection (3), the charitable organization shall pay statutory interest, as described in section 5-12-102, to the donor's estate for each day the unreturned amount remains outstanding. Moreover, the charitable organization may be subject to one or more of the following:

(a) An action to avoid the initial payout to the extent necessary to satisfy the allowed claims, statutory allowances, or unsatisfied balance of the elective-share or supplemental elective-share claim;

(b) An injunction against the charitable organization's disposition of the designated benefits, or any portion thereof, or any asset or property of the charitable organization;

(c) An attachment or other provisional or judicial remedy against the designated benefits or any other asset or property of the charitable organization; and

(d) Any other relief the court determines is appropriate, including the awarding of reasonable attorney fees.

(4) Upon the charitable organization's receipt of written notice of a potential unsatisfied claim, statutory allowance, or elective-share or supplemental elective-share claim from the personal representative of the donor's estate, the charitable organization shall hold the designated benefits received, or the portion thereof needed to cover the pending claim, statutory allowance, or elective-share or supplemental elective-share claim, in a constructive trust pending the determination of the claim, statutory allowance, or elective-share or supplemental elective-share claim.

(5) A covered entity that holds designated benefits shall not:

(a) Require the charitable organization to establish an account with the covered entity as a condition of receiving the designated benefits; or

(b) Require an individual employed by, or serving on the board of, the charitable organization to submit any personal information, including a social security number, a driver's license number, or personal financial information, as a condition of receiving designated benefits, except as required by subsection (2) of this section.

(6) This section may be enforced by any of the following entities, as appropriate:

(a) The division of banking created in section 11-102-101;

(b) The financial services board created in section 11-44-101.6; or

(c) The division of securities created in section 11-51-701, pursuant to its authority under part 4 of article 51 of title 11.

Source: L. 2026: Entire section added, (SB 26-118), ch. 52, p. 222, § 1, effective August 12.

Editor's note: Section 2(2) of chapter 52 (SB 26-118), Session Laws of Colorado 2026, provides that the act adding this section applies to conduct occurring on or after August 12, 2026.

PART 2

MULTIPLE-PERSON ACCOUNTS

SUBPART 1

DEFINITIONS AND GENERAL PROVISIONS

15-15-201. Definitions.

In this part 2:

(1) "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account.

(2) "Agent" means a person authorized to make account transactions for a party.

(3) "Beneficiary" means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

(4) "Financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(5) "Multiple-party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.

(6) "Party" means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(7) "Payment" of sums on deposit includes withdrawal, payment to a party or third person pursuant to check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(8) "POD designation" means the designation of (i) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

(9) "Receive", as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(10) "Request" means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of this part 2, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment.

(11) "Sums on deposit" means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party.

(12) "Terms of the account" includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

Source: L. 90: Entire article R&RE, p. 910, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-101 as it existed prior to 1990.

ANNOTATION

Decedent was not a "party" to a joint account with the surviving parties, nor was a joint account created, under this section where the account card did not name the decedent as a "party". Goemmer v. Hartman, 791 P.2d 1238 (Colo. App. 1990) (decided under former § 15-15-101 as it existed prior to the 1990 repeal and reenactment of this article).

15-15-202. Limitation on scope of part.

This part 2 does not apply to (i) an account established for a partnership, joint venture, or other organization for a business purpose, (ii) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or (iii) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

Source: L. 90: Entire article R&RE, p. 911, § 1, effective July 1.

15-15-203. Types of account; existing accounts.

(1) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to section 15-15-212 (3), either a single-party account or a multiple-party account may have a POD designation, an agency designation, or both.

(2) An account established before, on, or after July 1, 1990, whether in the form prescribed in section 15-15-204 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this part 2, and is governed by this part 2.

Source: L. 90: Entire article R&RE, p. 911, § 1, effective July 1.

15-15-204. Forms.

(1) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this part 2 applicable to an account of that type:

UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One Or More Parties]:

_____

_____

OWNERSHIP [Select One And Initial]:

_____ SINGLE-PARTY ACCOUNT

_____ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

_____ SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

_____ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

_____ _____

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties.

_____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

_____ _____

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

_____ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

_____ _____

[Select One And Initial]:

_____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

_____AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

(2) A contract of deposit that does not contain provisions in substantially the form provided in subsection (1) is governed by the provisions of this part 2 applicable to the type of account that most nearly conforms to the depositor's intent.

Source: L. 90: Entire article R&RE, p. 911, § 1, effective July 1.

15-15-205. Designation of agent.

(1) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

(2) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

(3) Death of the sole party or last surviving party terminates the authority of an agent.

Source: L. 90: Entire article R&RE, p. 912, § 1, effective July 1.

15-15-206. Applicability of part.

The provisions of sections 15-15-211 to 15-15-216 (subpart 2) concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. Sections 15-15-221 to 15-15-227 (subpart 3) governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Source: L. 90: Entire article R&RE, p. 913, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-102 as it existed prior to 1990.

SUBPART 2

OWNERSHIP AS BETWEEN PARTIES AND OTHERS

15-15-211. Ownership during lifetime.

(1) In this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(2) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(3) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(4) An agent in an account with an agency designation has no beneficial right to sums on deposit.

Source: L. 90: Entire article R&RE, p. 913, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-103 as it existed prior to 1990.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provision similar to this section.

Clear and convincing evidence is required to rebut the presumption that, as between parties married to each other, the net contribution of each is an equal amount. Harvey v. Harvey, 841 P.2d 375 (Colo. App. 1992).

Changing accounts from multi-party to sole accounts before divorce did not affect the other spouse's rights since the accounts remained part of the marital estate and either party had a legal right to deplete the joint accounts. Estate of Westfall v. Westfall, 942 P.2d 1227 (Colo. App. 1996).

Applied in In re Estate of Beasley, 40 Colo. App. 347, 578 P.2d 662 (1978).

15-15-212. Rights at death.

(1) Except as otherwise provided in this section, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under section 15-15-211, and the right of survivorship continues between the surviving parties.

(2) In an account with a POD designation:

(a) On death of one of two or more parties, the rights in sums on deposit are governed by subsection (1).

(b) (I) On death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in such proportions as specified in the POD designation or, if the POD designation does not specify different proportions, in equal and undivided shares; and there is no right of survivorship in the event of death of a beneficiary thereafter.

(II) If there are two or more beneficiaries, and if any beneficiary fails to survive the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiaries in proportion to their respective interests as beneficiaries under subparagraph (I) of this paragraph (b).

(III) If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(IV) Neither the provisions of section 15-11-706 nor the provisions of any other anti-lapse statute apply to the disposition of an account with a POD designation.

(3) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under section 15-15-211 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(4) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

(5) Sums remaining on deposit at the death of a party to a multiple-party account, which are not subject to a POD designation, belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention.

Source: L. 90: Entire article R&RE, p. 913, § 1, effective July 1. **L. 91:** (5) added, p. 1452, § 18, effective July 1. **L. 2013:** (2)(b) amended, (HB 13-1016), ch. 82, p. 265, § 1, effective March 29.

Editor's note: (1) This section is similar to former § 15-15-104 as it existed prior to 1990.

(2) Section 2 of chapter 82, Session Laws of Colorado 2013, provides that the act amending subsection (2)(b) applies to all accounts with a pay-on-death designation, whether created before, on, or after March 29, 2013.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provision similar to this section.

When a payable on death account is subject to a pledge agreement, and the account holder dies, the account holder's

personal representative has authority over the account only as to the amount secured by the pledge agreement. In re Estate of Treviño, 2020 COA 125, 474 P.3d 223.

The survivorship provisions of this section were not applicable since the execution of the power of attorney rendered the decedent the agent of the surviving parties rather than a party to a joint account. Goemmer v. Hartman, 791 P.2d 1238 (Colo. App. 1990).

Applied in In re Estate of Beasley, 40 Colo. App. 347, 578 P.2d 662 (1978).

15-15-213. Alteration of rights.

(1) Rights at death under section 15-15-212 are determined by the type of account at the death of a party. The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party's lifetime.

(2) A right of survivorship arising from the express terms of the account, section 15-15-212, or a POD designation, may not be altered by will.

Source: L. 90: Entire article R&RE, p. 914, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-105 as it existed prior to 1990.

15-15-214. Accounts and transfers nontestamentary.

Except as provided in part 2 of article 11 of this title (elective share of surviving spouse), a transfer resulting from the application of section 15-15-212 is effective by reason of the terms of the account involved and this part 2 and is not testamentary or subject to articles 10 to 13 of this title (estate administration).

Source: L. 90: Entire article R&RE, p. 914, § 1, effective July 1. **L. 2006:** Entire section amended, p. 391, § 22, effective July 1.

Editor's note: This section is similar to former § 15-15-106 as it existed prior to 1990.

15-15-215. Rights of creditors and others. (Repealed)

Source: L. 90: Entire article R&RE, p. 914, § 1, effective July 1. **L. 2006:** Entire section repealed, p. 391, § 21, effective July 1.

Editor's note: This section was similar to former § 15-15-107 as it existed prior to 1990.

15-15-216. Community property and tenancy by the entireties.

(1) A deposit of community property in an account does not alter the community character of the property or community rights in the property, but a right of survivorship between parties married to each other arising from the express terms of the account or section 15-15-212 may not be altered by will.

(2) This part 2 does not affect the law governing tenancy by the entireties.

Source: L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

SUBPART 3

PROTECTION OF FINANCIAL INSTITUTIONS

15-15-221. Authority of financial institution.

A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

Source: L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-108 as it existed prior to 1990.

ANNOTATION

Section does not address circumstances in which the financial institution knows, without need for further inquiry, the source of funds deposited. When a financial institution has actual knowledge that an account holder is a fiduciary and not a beneficial owner of account assets, neither this section nor § 15-15-222 relieves the financial institution of duties imposed by the Uniform Probate Code, the Uniform Commercial Code, or the Uniform Fiduciary Law. Bryant v. Cmty. Choice Credit Union, 160 P.3d 266 (Colo. App. 2007).

15-15-222. Payment on multiple-party account.

A financial institution, on request, may pay sums on deposit in a multiple-party account to:

(1) One or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party; or

(2) The personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under section 15-15-212.

Source: L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-109 as it existed prior to 1990.

ANNOTATION

Section does not address the duties of a financial institution that obtains a pledge of account funds for security for the personal debt of a person named on the account who it knows has access only as a fiduciary and not as a beneficial owner of account assets. When a financial institution has actual knowledge that an account holder is a fiduciary and not a beneficial owner of account assets, neither this section nor § 15-15-221 relieves the financial institution of duties imposed by the Uniform Probate Code, the Uniform Commercial Code, or the Uniform Fiduciary Law. Bryant v. Cmty. Choice Credit Union, 160 P.3d 266 (Colo. App. 2007).

15-15-223. Payment on POD designation.

A financial institution, on request, may pay sums on deposit in an account with a POD designation to:

(1) One or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party;

(2) The beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or

(3) The personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.

Source: L. 90: Entire article R&RE, p. 915, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-110 as it existed prior to 1990.

15-15-224. Payment to designated agent.

A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

Source: L. 90: Entire article R&RE, p. 916, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-111 as it existed prior to 1990.

15-15-225. Payment to minor.

If a financial institution is required or permitted to make payment pursuant to this part 2 to a minor designated as a beneficiary, payment may be made pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, C.R.S.

Source: L. 90: Entire article R&RE, p. 916, § 1, effective July 1.

15-15-226. Discharge.

(1) Payment made pursuant to this part 2 in accordance with the type of account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(2) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse, or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(3) A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(4) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

Source: L. 90: Entire article R&RE, p. 916, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-112 as it existed prior to 1990.

15-15-227. Set-off.

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to

which the party is, or immediately before death was, beneficially entitled under section 15-15-211 or, in the absence of proof of that proportion, an equal share with all parties.

Source: L. 90: Entire article R&RE, p. 916, § 1, effective July 1.

Editor's note: This section is similar to former § 15-15-113 as it existed prior to 1990.

PART 3

UNIFORM TOD SECURITY REGISTRATION ACT

15-15-301. Definitions.

In this part 3:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register", including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account, including but not limited to an account held on the books of the registering entity, showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker, bank, or trust company maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(5) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; (ii) an investment management or custody account with a trust company or a trust division of a bank with trust powers, including the securities in the account, a cash balance in the account, and cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death; or (iii) a cash balance or

other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

Source: L. 90: Entire article R&RE, p. 917, § 1, effective July 1. **L. 2003:** (2) and (3) amended, p. 2111, § 5, effective May 22. **L. 2004:** (5) amended, p. 1535, § 2, effective August 4.

15-15-302. Registration in beneficiary form; sole or joint tenancy ownership.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

Source: L. 90: Entire article R&RE, p. 917, § 1, effective July 1.

15-15-303. Registration in beneficiary form; applicable law.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

Source: L. 90: Entire article R&RE, p. 917, § 1, effective July 1.

15-15-304. Origination of registration in beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

Source: L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

15-15-305. Form of registration in beneficiary form.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner and before the name of a beneficiary.

Source: L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

15-15-306. Effect of registration in beneficiary form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

Source: L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

15-15-307. Ownership on death of owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

Source: L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

15-15-308. Protection of registering entity.

(1) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the

owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part 3.

(2) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part 3.

(3) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with section 15-15-307 and does so in good faith reliance (i) on the registration, (ii) on this part 3, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part 3 do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part 3.

(4) The protection provided by this part 3 to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

Source: L. 90: Entire article R&RE, p. 918, § 1, effective July 1.

15-15-309. Nontestamentary transfer on death.

(1) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part 3 and is not testamentary.

(2) Repealed.

Source: L. 90: Entire article R&RE, p. 919, § 1, effective July 1. **L. 2006:** (2) repealed, p. 391, § 23, effective July 1.

15-15-310. Terms, conditions, and forms for registration.

(1) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form,

and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes". This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(2) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(a) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(b) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(c) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown, JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown or John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

Source: L. 90: Entire article R&RE, p. 919, § 1, effective July 1. **L. 99:** (1) amended, p. 622, § 18, effective August 4.

15-15-311. Application of part.

This part 3 applies to registrations of securities in beneficiary form made before or after July 1, 1990, by decedents dying on or after July 1, 1990.

Source: L. 90: Entire article R&RE, p. 919, § 1, effective July 1.

PART 4

TRANSFER OF REAL PROPERTY EFFECTIVE ON DEATH

Law reviews: For article, "Beneficiary Deeds in Colorado Part I: Overview of Legislation", see 34 Colo. Law. 79 (June 2005); for article, "Beneficiary Deeds in Colorado Part II: Practical Applications", see 34 Colo. Law. 103 (June 2005); for article, "Practical Considerations in the Use of Colorado Beneficiary Deeds", see 44 Colo. Law. 41 (Jan. 2015); for article, "Beneficiary Deeds in Colorado–20 Years Later", see 54 Colo. Law. 32 (Mar. 2025).

15-15-401. Definitions.

As used in this part 4, unless the context otherwise requires:

(1) "Beneficiary deed" means a deed, subject to revocation by the owner, which conveys an interest in real property and which contains language that the conveyance is to be effective upon the death of the owner and which may be in substantially the form described in section 15-15-404.

(2) "Deed" means any instrument of conveyance of real property.

(3) "Grantee-beneficiary" means one or more persons or entities capable of holding title to real property designated in a beneficiary deed to receive an interest in real property upon the death of the owner. "Grantee-beneficiary" includes, but is not limited to, a successor grantee-beneficiary.

(4) "Owner" means the grantor of a beneficiary deed.

(5) "Successor grantee-beneficiary" means the person or entity designated in a beneficiary deed to receive an interest in the property if the primary grantee-beneficiary does not survive the owner.

(6) (a) "Transfer", when used as a verb, means to convey.

(b) "Transfer", when used as a noun, means a conveyance.

Source: L. 2004: Entire part added, p. 727, § 1, effective August 4.

ANNOTATION

"Owner" of property and grantor of deed must be a natural person and not an entity. Beneficiary deeds executed by decedent to transfer property from trust were

invalid as a matter of law. Fischbach v. Holzberlein, 215 P.3d 407 (Colo. App. 2009).

15-15-402. Real property - beneficiary deed.

(1) In addition to any method allowed by law to effect a transfer at death, title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner's death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The transfer by a beneficiary deed shall be effective only upon the death of the owner. A beneficiary deed need not be supported by consideration.

(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property without the joinder, signature, consent, or agreement of, or notice to, the grantee-beneficiary for any purpose.

Source: L. 2004: Entire part added, p. 728, § 1, effective August 4.

15-15-403. Medicaid eligibility exclusion.

No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402 (1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 25.5-4-302 (6), C.R.S., and applicable rules.

Source: L. 2004: Entire part added, p. 728, § 1, effective August 4. **L. 2006:** Entire section amended, p. 2004, § 55, effective July 1.

15-15-404. Form of beneficiary deed - recording.

(1) An owner may transfer an interest in real property effective on the death of the owner by executing a beneficiary deed that contains the words "conveys on death" or "transfers on death" or otherwise indicates the transfer is to be effective on the death of the owner and recording the beneficiary deed prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. A beneficiary deed may be in substantially the following form:

BENEFICIARY DEED

(§§ 15-15-401, et seq., Colorado Revised Statutes)

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

(Name of grantor) _____, as grantor, designates (Name of grantee-beneficiary) _____ as grantee-beneficiary whose address is _____ (Note to Assessor and Treasurer: This address is for identification purposes only, all notices and tax statements should continue to be sent to grantor.)

(Optional) [or if grantee-beneficiary fails to survive grantor, grantor designates (Name of successor grantee-beneficiary) _____, as successor grantee-beneficiary whose address is

_____] and grantor transfers, sells, and conveys on grantor's death to the grantee-beneficiary, the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

THIS BENEFICIARY DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF THE GRANTOR. IT REVOKES ALL PRIOR BENEFICIARY DEEDS BY THIS GRANTOR FOR THIS REAL PROPERTY EVEN IF THIS BENEFICIARY DEED FAILS TO CONVEY ALL OF THE GRANTOR'S INTEREST IN THIS REAL PROPERTY.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY DISQUALIFY THE GRANTOR FROM BEING DETERMINED ELIGIBLE FOR, OR FROM

RECEIVING, MEDICAID UNDER TITLE 25.5, COLORADO REVISED STATUTES.

WARNING: EXECUTION OF THIS BENEFICIARY DEED MAY NOT AVOID PROBATE.

Executed this_____.

(Date)

_____

(Grantor)

(2) Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.

Source: L. 2004: Entire part added, p. 728, § 1, effective August 4. **L. 2018:** (1) amended, (HB 18-1375), ch. 274, p.1697, § 13, effective May 29.

15-15-405. Revocation - change - revocation by will prohibited.

(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner in the office of the clerk and recorder in the county where the real property is located. The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective. A revocation may be in substantially the following form:

REVOCATION OF BENEFICIARY DEED

(§§ 15-15-401, et seq., Colorado Revised Statutes)

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

_____, as grantor, hereby

(Name of grantor)

REVOKES all beneficiary deeds concerning the following described real property located in the County of _____, State of Colorado:

(insert legal description here)

Known and numbered as _____

Executed this _____.

(Date)

_____

(Grantor)

(2) A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner's interest in the described real property. The joinder, signature, consent, or agreement of, or notice to, either the original or new grantee-beneficiary is not required for the change to be effective.

(3) The most recently executed beneficiary deed or revocation of all beneficiary deeds or revocations that have been recorded prior to the owner's death shall control regardless of the order of recording.

(4) A beneficiary deed that complies with the requirements of this part 4 may not be revoked, altered, or amended by the provisions of the will of the owner.

Source: L. 2004: Entire part added, p. 729, § 1, effective August 4.

15-15-406. Acknowledgment.

A beneficiary deed or revocation of a beneficiary deed shall be subject to the requirements of section 38-35-109 (2), C.R.S., and may be acknowledged in accordance with section 38-35-101, C.R.S.

Source: L. 2004: Entire part added, p. 730, § 1, effective August 4.

15-15-407. Vesting of ownership in grantee-beneficiary.

(1) Title to the interest in real property transferred by a beneficiary deed shall vest in the designated grantee-beneficiary only on the death of the owner.

(2) A grantee-beneficiary of a beneficiary deed takes title to the owner's interest in the real property conveyed by the beneficiary deed at the death of the owner subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests, affecting title to the property, whether created before or after the recording of the beneficiary deed, or to which the owner was subject during the owner's lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust, or other lien. The grantee-beneficiary also takes title subject to any interest in the property of which the grantee-beneficiary has either actual or constructive notice.

(3) (a) A person having an interest described in subsection (2) of this section whose interest is not recorded in the records of the office of the clerk and recorder of the county in which the property is located at the time of the death of the owner, shall record evidence or a notice of the interest in the property not later than four months after the death of the owner. The notice shall name the person asserting the interest, describe the real property, and describe the nature of the interest asserted.

(b) Failure to record evidence or notice of interest in the property described in subsection (2) of this section within four months after the death of the owner shall forever bar the person from asserting an interest in the property as against all persons who do not have notice of the interest. A person who, without notice, obtains an interest in the property acquired by the grantee-beneficiary shall take the interest free from all persons who have not recorded their notice of interest in the property or evidence of their interest prior to the expiration of the four-month period.

(4) The interest of the grantee-beneficiary shall be subject to any claim of the department of health care policy and financing for recovery of medical assistance payments pursuant to section 25.5-4-301 or 25.5-4-302, C.R.S., which shall be enforced in accordance with section 15-15-103.

(5) The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries.

Source: L. 2004: Entire part added, p. 730, § 1, effective August 4. **L. 2006:** (4) amended, p. 2004, § 56, effective July 1. **L. 2007:** (4) amended, p. 2028, § 31, effective June 1.

ANNOTATION

Section unambiguously provides that a grantee-beneficiary takes title to the property subject to interests that are recorded or that the grantee-beneficiary has notice of prior to decedent's death or within four months after decedent's death. Argo v. Hemphill, 2022 COA 104, 521 P.3d 1080.

15-15-408. Joint tenancy - definitions.

(1) A joint tenant of an interest in real property may use the procedures described in this part 4 to transfer his or her interest effective upon the death of such joint tenant. However, title to the interest shall vest in the designated grantee-beneficiary only if the joint tenant-grantor is the last to die of all of the joint tenants of such interest. If a joint tenant-grantor is not the last joint tenant to die, the beneficiary deed shall not be effective, and the beneficiary deed shall not make the grantee-beneficiary an owner in joint tenancy with the surviving joint tenant or tenants. A beneficiary deed shall not sever a joint tenancy.

(2) As used in this section, "joint tenant" means a person who owns an interest in real property as a joint tenant with right of survivorship.

Source: L. 2004: Entire part added, p. 731, § 1, effective August 4.

15-15-409. Rights of creditors and others. (Repealed)

Source: L. 2004: Entire part added, p. 731, § 1, effective August 4. **L. 2006:** Entire section repealed, p. 393, § 29, effective July 1.

15-15-410. Purchaser from grantee-beneficiary protected.

(1) Subject to the rights of claimants under section 15-15-407 (2), if the property acquired by a grantee-beneficiary or a security interest therein is acquired for value and without notice by a purchaser from, or lender to, a grantee-beneficiary, the purchaser or lender shall take title free of rights of an interested person in the deceased owner's estate and shall not incur personal liability to the estate or to any interested person.

(2) For purposes of this section, any recorded instrument evidencing a transfer to a purchaser from, or lender to, a grantee-beneficiary on which a state documentary fee is noted pursuant to section 39-13-103, C.R.S., shall be prima facie evidence that the transfer was made for value.

Any such sale or loan by the grantee-beneficiary shall not relieve the grantee-beneficiary of the obligation to the personal representative of the deceased owner's estate under section 15-15-103.

Source: L. 2004: Entire part added, p. 732, § 1, effective August 4. **L. 2007:** (2) amended, p. 2028, § 32, effective June 1.

15-15-411. Limitations on actions and proceedings against grantee-beneficiaries.

(1) Unless previously adjudicated or otherwise barred, the claim of a claimant to recover from a grantee-beneficiary who is liable to pay the claim, and the right of an heir or devisee or of a personal representative acting on behalf of an heir or devisee, to recover property from a grantee-beneficiary or the value thereof from a grantee-beneficiary is forever barred as follows:

(a) A claim by a creditor of the owner is forever barred at one year after the owner's death.

(b) Any other claimant or an heir or devisee is forever barred at the earlier of the following:

(I) Three years after the owner's death; or

(II) One year after the time of recording the proof of death of the owner in the office of the clerk and recorder in the county in which the legal property is located.

(2) Nothing in this section shall be construed to bar an action to recover property or value received as the result of fraud.

Source: L. 2004: Entire part added, p. 733, § 1, effective August 4.

15-15-412. Nontestamentary disposition.

A beneficiary deed shall not be construed to be a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of the code governing wills.

Source: L. 2004: Entire part added, p. 733, § 1, effective August 4. **L. 2019:** Entire section amended, (SB 19-241), ch. 390, p. 3464, § 10, effective August 2.

15-15-413. Proof of death.

Proof of the death of the owner or a grantee-beneficiary shall be established in the same manner as for proving the death of a joint tenant.

Source: L. 2004: Entire part added, p. 733, § 1, effective August 4.

15-15-414. Disclaimer.

A grantee-beneficiary may refuse to accept all or any part of the real property interest described in a beneficiary deed. A grantee-beneficiary may disclaim all or any part of the real property interest described in a beneficiary deed by any method provided by law. If a grantee-beneficiary refuses to accept or disclaims any real property interest, the grantee-beneficiary shall have no liability by reason of being designated as a grantee-beneficiary under this part 4.

Source: L. 2004: Entire part added, p. 733, § 1, effective August 4.

15-15-415. Applicability.

The provisions of this part 4 shall apply to beneficiary deeds executed by owners who die on or after August 4, 2004.

Source: L. 2004: Entire part added, p. 733, § 1, effective August 4.

ARTICLE 16

Trust Administration

PART 1
TRUST REGISTRATION

15-16-101 to

15-16-106. (Repealed)

PART 2
JURISDICTION OF COURT CONCERNING TRUSTS

15-16-201 to

15-16-207. (Repealed)

PART 3
DUTIES AND LIABILITIES OF TRUSTEES

15-16-301 to 15-16-308. (Repealed)

PART 4
CONSOLIDATION AND DIVISION OF TRUSTS

15-16-401 to 15-16-402. (Repealed)

PART 5
INSURABLE INTEREST OF TRUSTEE

15-16-501 to 15-16-503. (Repealed)

PART 6
LIFE INSURANCE POLICY OWNED BY A TRUSTEE

15-16-601 to 15-16-602. (Repealed)

PART 7
REVOCABLE TRUSTS

15-16-701 to 15-16-705. (Repealed)

PART 8
COLORADO UNIFORM DIRECTED TRUST ACT

15-16-801. Short title.

15-16-802. Definitions.

15-16-803. Application - principal place of administration.

15-16-804. Common law and principles of equity.

15-16-805. Exclusions - definition.

15-16-806. Powers of trust director.

15-16-807. Limitations on powers of trust director.

15-16-808. Duty and liability of trust director.

15-16-809. Duty and liability of directed trustee.

15-16-810. Duty to provide information to trust director or trustee.

15-16-811. No duty to monitor, inform, or advise.

15-16-812. Application to cotrustee.

15-16-813. Limitations of action against trust director.

15-16-814. Defenses in action against trust director.

15-16-815. Jurisdiction over trust director.

15-16-816. Office of trust director.

15-16-817. Uniformity of application and construction.

15-16-818. Relation to electronic signatures in global and national commerce act.

PART 9
COLORADO UNIFORM TRUST DECANTING ACT

15-16-901. Short title.

15-16-902. Definitions.

15-16-903. Scope - definitions.
15-16-904. Fiduciary duty.
15-16-905. Application - governing law.
15-16-906. Reasonable reliance.
15-16-907. Notice - exercise of decanting power.
15-16-908. Representation.
15-16-909. Court involvement.
15-16-910. Formalities.
15-16-911. Decanting power under expanded distributive discretion - definitions.
15-16-912. Decanting power under limited distributive discretion - definitions.
15-16-913. Trust for beneficiary with disability - definitions.
15-16-914. Protection of charitable interest - definitions.
15-16-915. Trust limitation on decanting.
15-16-916. Change in compensation.
15-16-917. Relief from liability and indemnification.
15-16-918. Removal or replacement of authorized fiduciary.
15-16-919. Tax-related limitations - definitions.
15-16-920. Duration of second trust.
15-16-921. Need to distribute not required.
15-16-922. Saving provision.
15-16-923. Trust for care of animal - definitions.
15-16-924. Terms of second trust.
15-16-925. Settlor.
15-16-926. Later-discovered property.
15-16-927. Obligations.
15-16-928. Uniformity of application and construction.
15-16-929. Relation to electronic signatures in global and national commerce act.
15-16-930. Severability.
15-16-931. (Reserved)

PART 1

TRUST REGISTRATION

15-16-101 to 15-16-106. (Repealed)

Editor's note: Section 15-16-106 provided for the repeal of part 1, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

15-16-201 to 15-16-207. (Repealed)

Editor's note: Section 15-16-207 provided for the repeal of part 2, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

15-16-301 to 15-16-308. (Repealed)

Editor's note: Section 15-16-308 provided for the repeal of part 3, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 4

CONSOLIDATION AND DIVISION OF TRUSTS

15-16-401 to 15-16-402. (Repealed)

Editor's note: Section 15-16-402 provided for the repeal of part 4, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 5

INSURABLE INTEREST OF TRUSTEE

15-16-501 to 15-16-503. (Repealed)

Editor's note: Section 15-16-503 provided for the repeal of part 5, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 6

LIFE INSURANCE POLICY OWNED BY A TRUSTEE

15-16-601 to 15-16-602. (Repealed)

Editor's note: Section 15-16-602 provided for the repeal of part 6, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 7

REVOCABLE TRUSTS

15-16-701 to 15-16-705. (Repealed)

Editor's note: Section 15-16-705 provided for the repeal of part 7, effective January 1, 2019. (See L. 2018, pp. 1192, 1194.)

PART 8

COLORADO UNIFORM DIRECTED TRUST ACT

Editor's note: This part 8 was added in 2014. It was repealed and reenacted in 2019, resulting in the addition, relocation, or elimination of sections as well as subject matter. For amendments to this part 8 prior to 2019, consult the 2018 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

Cross references: For official comments relating to this part 8, search "Uniform Directed Trust Act" at www.uniformlaws.org.

Law reviews: For article, "Estate Planning with Directed Trusts under the Colorado Uniform Directed Trust Act", see 48 Colo. Law. 50 (Nov. 2019).

15-16-801. Short title.

This short title of this part 8 is the "Colorado Uniform Directed Trust Act".

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 166, § 1, effective August 2.

15-16-802. Definitions.

As used in this part 8, unless the context otherwise requires:

(1) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this part 8, or law of this state other than this part 8 pertaining to trusts.

(2) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(3) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

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

(5) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in section 15-16-805 (2).

(6) "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, each person is a settlor of the portion 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.

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(8) "Terms of a trust" means:

(a) Except as otherwise provided in subsection (8)(b) of this section, the manifestation of the settlor's intent regarding a trust's provisions as:

(I) Expressed in the trust instrument; or

(II) As may be established by other evidence in a judicial proceeding; or

(b) The trust's provisions as established, determined, or amended by:

(I) A trustee or trust director in accordance with applicable law;

(II) Court order;

(III) A nonjudicial settlement agreement; or

(IV) By alternative dispute resolution.

(9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(10) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

(11) "Willful misconduct" means intentional wrongdoing and not mere negligence, gross negligence, or recklessness.

(12) "Wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 166, § 1, effective August 2.

15-16-803. Application - principal place of administration.

(1) This part 8 applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(a) If the trust was created before August 2, 2019, this part 8, as amended in 2019, applies only to a decision or action occurring on or after August 2, 2019.

(b) If the principal place of administration of the trust is changed to this state on or after August 2, 2019, this part 8 applies only to a decision or action occurring on or after the date of the change.

(2) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust that designate the principal place of administration of the trust are valid and controlling if:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction;

(b) A trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction;

(c) All or part of the administration occurs in the designated jurisdiction; or

(d) The trust is duly registered with a court in the designated jurisdiction.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 168, § 1, effective August 2.

15-16-804. Common law and principles of equity.

The common law and principles of equity supplement this part 8, except to the extent modified by this part 8 or law of this state other than this part 8.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 168, § 1, effective August 2.

15-16-805. Exclusions - definition.

(1) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(2) This act does not apply to a:

(a) Power of appointment;

(b) Power to appoint or remove a trustee or trust director;

(c) Power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(d) Power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(I) The beneficiary; or

(II) Another beneficiary represented by the beneficiary under sections 15-5-301 to 15-5-305 with respect to the exercise or nonexercise of the power;

(e) Power over a trust if:

(I) The terms of the trust provide that the power is held in a nonfiduciary capacity; and

(II) The power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the federal "Internal Revenue Code of 1986", as amended, and regulations issued thereunder, as amended; or

(f) A power under section 15-5-409.5 (1)(d) to enforce the intended use of the principal and income of a trust authorized by section 15-5-408 for the care of designated domestic or pet animals and the animals' offspring in gestation, if the power is held by a person having custody of an animal for which care is provided by the trust or by a remainder beneficiary of the trust, unless the terms of the trust specifically provide that the power held by the custodian or remainder beneficiary is subject to this part 8.

(3) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property that is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 168, § 1, effective August 2.

15-16-806. Powers of trust director.

(1) Subject to section 15-16-807, the terms of a trust may grant a power of direction to a trust director.

(2) Unless the terms of a trust provide otherwise:

(a) A trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (1) of this section; and

(b) Trust directors with joint powers must act by majority decision.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 169, § 1, effective August 2.

15-16-807. Limitations on powers of trust director.

(1) A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction regarding:

(a) A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of medicaid law in section 1917 of the federal "Social Security

Act", 42 U.S.C. sec. 1396p (d)(4)(A), as amended, and regulations issued thereunder, as amended; and

(b) A charitable interest in the trust, including notice regarding the interest to the attorney general.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 169, § 1, effective August 2.

15-16-808. Duty and liability of trust director.

(1) Subject to subsection (2) of this section, with respect to a power of direction or a further power under section 15-16-806 (2)(a):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(I) If the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(II) If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(b) The terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part 8 to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this part 8.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 170, § 1, effective August 2.

15-16-809. Duty and liability of directed trustee.

(1) Subject to subsection (2) of this section, a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under section 15-16-806 (2)(a), and the trustee is not liable for the action.

(2) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under section 15-16-806 (2)(a) to the extent that by complying the trustee would engage in willful misconduct.

(3) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(a) The breach involved the trustee's or other director's willful misconduct;

(b) The release was induced by improper conduct of the trustee or other director in procuring the release; or

(c) At the time of the release, the director did not know the material facts relating to the breach.

(4) A directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions.

(5) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 170, § 1, effective August 2.

ANNOTATION

Law reviews. For article, "Class Action Liability for Trustees after Banks v. Northern Trust", see 50 Colo. Law. 38 (Dec. 2021).

15-16-810. Duty to provide information to trust director or trustee.

(1) Subject to section 15-16-811, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(a) The powers or duties of the trustee; and

(b) The powers or duties of the director.

(2) Subject to section 15-16-811, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(a) The powers or duties of the director; and

(b) The powers or duties of the trustee or other director.

(3) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(4) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

(5) A trustee shall provide a copy of the terms of the trust to a trust director.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 171, § 1, effective August 2.

15-16-811. No duty to monitor, inform, or advise.

(1) Unless the terms of a trust provide otherwise:

(a) A trustee does not have a duty to:

(I) Monitor a trust director; or

(II) Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(b) By taking an action described in subsection (1)(a) of this section, a trustee does not assume a duty excluded by subsection (1)(a) of this section.

(2) Unless the terms of a trust provide otherwise:

(a) A trust director does not have a duty to:

(I) Monitor a trustee or another trust director; or

(II) Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(b) By taking an action described in subsection (2)(a) of this section, a trust director does not assume the duty excluded by subsection (2)(a) of this section.

(3) Unless the terms of a trust provide otherwise, section 15-5-1012 does not apply to a trust director.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 171, § 1, effective August 2.

15-16-812. Application to cotrustee.

The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under sections 15-16-809 to 15-16-811.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 172, § 1, effective August 2.

15-16-813. Limitations of action against trust director.

(1) An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust as prescribed by section 15-5-1005.

(2) A report or accounting has the same effect on the limitations period for an action against the director that the report or accounting would have if the director were a trustee as prescribed by section 15-5-1005.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 172, § 1, effective August 2.

15-16-814. Defenses in action against trust director.

In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 172, § 1, effective August 2.

15-16-815. Jurisdiction over trust director.

(1) By accepting appointment as a trust director of a trust subject to this part 8, the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.

(2) This section does not preclude other methods of obtaining jurisdiction over a trust director.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 172, § 1, effective August 2.

15-16-816. Office of trust director.

(1) Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:

(a) Acceptance under section 15-5-701;

(b) Giving of bond to secure performance under section 15-5-702;

(c) Reasonable compensation under sections 15-5-1004, 15-10-501 (3), and 15-10-601;

(d) Resignation under section 15-5-705;

(e) Removal under section 15-5-706;

(f) Vacancy and appointment of successor under section 15-5-704; and

(g) The right to petition the court for instructions under section 15-5-201 (3).

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 173, § 1, effective August 2.

15-16-817. 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.

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 173, § 1, effective August 2.

15-16-818. Relation to electronic signatures in global and national commerce act.

This part 8 modifies, limits, or supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2019: Entire part R&RE, (SB 19-105), ch. 51, p. 173, § 1, effective August 2.

PART 9

COLORADO UNIFORM TRUST DECANTING ACT

Law reviews: For article, "Modifying Irrevocable Trusts under the New Colorado Uniform Trust Decanting Act", see 45 Colo. Law. 55 (Nov. 2016); for article, "Is the Irrevocable Trust Really Irrevocable?" see 47 Colo. Law. 56 (Oct. 2018); for article, "Decanting in Connection with Divorce: A Case Study", see 48 Colo. Law. 62 (Oct. 2019).

PREFATORY NOTE

The Uniform Trust Decanting Act is promulgated in the midst of a rising tide of state decanting statutes. These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances. A decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust. While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor's intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies. While decanting may be permitted in some situations under common law in some states, in many states it is unclear whether common law decanting is permitted, and if it is, the circumstances in which it is permitted and the parameters within which it may be exercised.

Need for Uniformity. Trusts may be governed by the laws of different states for purposes of validity, meaning and effect, and administration. The place of administration of a trust may move from state to state. It often may be difficult to determine the state in which a trust is administered if a trust has co-trustees domiciled in different states or has a corporate trustee that performs different trust functions in different states. As a result it may sometimes be unclear whether a particular state's decanting statute applies to a trust and sometimes more than one state's decanting statute may apply to a trust. A uniform statute can eliminate conflicts between different state statutes. It can also protect a trustee who decants under one state's statute when more than one state's statute might apply and protect a trustee who reasonably relies on a prior decanting.

Currently there is limited guidance on the income, gift, and generation-skipping transfer ("GST") tax implications of decanting. A uniform statute also may provide common ground for the promulgation of tax guidance.

What Trusts May Be Decanted. Generally, the Uniform Trust Decanting Act permits decanting of an irrevocable, express trust in which the terms of the trust grant the trustee or another fiduciary the discretionary power to make principal distributions. See Section 15-16-903 and Section 15-16-902(3) (defining "authorized fiduciary"). The act does not apply to revocable trusts unless they are revocable by the settlor only with the consent of the trustee or an adverse party. Section 15-16-903(1). The act does not apply to wholly charitable trusts. Section 15-16-903(2). With one exception, if no fiduciary has discretion to distribute principal, the act does not apply unless the court appoints a special fiduciary and authorizes the special fiduciary to exercise the decanting power. See Section 15-16-909. The exception is that a fiduciary who is responsible for making trust distributions may decant a trust to create a special-needs trust even if the fiduciary does not have discretion over principal if the decanting will further the purposes of the first trust.

Who May Decant. As discussed below, the decanting power is a fiduciary power, and thus must be entrusted to one of the fiduciaries of the first trust. The act entrusts the "authorized 2 fiduciary" with the decanting power. The "authorized fiduciary" generally is the fiduciary who has discretion to distribute principal, although a more expansive definition is needed in the case of a special-needs trust. Generally, the authorized fiduciary will be the trustee. Where there is a divided trusteeship that gives the power to make or direct principal distributions to another fiduciary, such as a distribution director, such other fiduciary will be the authorized fiduciary.

Discretion Over Principal. Except in the case of special-needs trusts, the decanting power is granted only to an authorized fiduciary who by definition must have the discretion to distribute principal. The extent of the decanting authority depends upon the extent of the discretion granted to the trustee to distribute principal. When the authorized fiduciary has "limited distribution discretion" that is constrained by an ascertainable or reasonably definite standard, the interests of each beneficiary in the second trust must be substantially similar to such beneficiary's interests in the first trust. Thus when the authorized fiduciary has limited distributive discretion, an exercise of the decanting power generally can modify administrative, but not dispositive, trust provisions. When the authorized fiduciary has "expanded distributive discretion," the authorized fiduciary may exercise the decanting power to modify beneficial interests, subject to restrictions to protect interests that are current, noncontingent rights or vested remainder interests, to protect qualification for tax benefits and to protect charitable interests.

Sometimes a trust may have two or more authorized fiduciaries, some of whom have limited distributive discretion and some of

whom have expanded distributive discretion. The authorized fiduciaries with limited distributive discretion may exercise the decanting power under Section 15-16-912 and the authorized fiduciaries with expanded distributive discretion may exercise the decanting power under Section 15-16-911.

Fiduciary Power. The Uniform Trust Decanting Act does not impose any duty on the authorized fiduciary to exercise the decanting power, but if the authorized fiduciary does exercise that power, the power must be exercised in accordance with the fiduciary duties of the authorized fiduciary. See Section 15-16-904. A fiduciary must administer a trust in good faith, in accordance with its terms (subject to the decanting power) and purposes, and in the interests of the beneficiaries. An exercise of decanting power must be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to better effectuate the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances at the time of decanting.

As a fiduciary power, the decanting power may be exercised without consent or approval of the beneficiaries or the court, except in the case of a few specific modifications that may benefit the fiduciary personally. Nonetheless, qualified beneficiaries are entitled to notice and may petition the court if they believe the authorized fiduciary has breached its fiduciary duty. Further, the authorized fiduciary, another fiduciary, a beneficiary, the settlor or, in the case of a trust with a charitable interest, the Attorney General or other official who may enforce the charitable interest, may petition the court for instructions, appointment of a special fiduciary who may exercise the decanting power, approval of an exercise of decanting power, a determination that the authorized fiduciary breached its fiduciary duties, a determination that the savings provisions in Section 15-16-922 apply or a determination that the attempted decanting is invalid.

Decanting Procedure. Initially, the power to decant was often considered a derivative of 3 the power to make a discretionary distribution to a beneficiary. Under this construct the decanting power was exercised by making a distribution from one trust to another, and a second trust, separate and distinct from the first trust, was required.

The Uniform Trust Decanting Act views the decanting power as a power to modify the first trust, either by changing the terms of the first trust or by distributing property from the first trust to a second trust. While the act generally modulates the extent of the authorized fiduciary's power to decant according to the degree of discretion granted to the authorized fiduciary over principal, the power to decant is distinct from the power to distribute.

Thus the authorized fiduciary may exercise the decanting power by modifying the first trust, in which case the "second trust" is merely the modified first trust. The decanting instrument can, when appropriate, merely identify the specific provisions in the first trust that are to be modified and set forth the modified provisions, much like an amendment to a revocable trust. If the

decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust as a new trust or treat the second trust as a continuation of the first trust. If the second trust is treated as a continuation of the first trust, there should be no need to transfer or retitle the trust property. Further, subject to future tax guidance, if the second trust is a continuation of the first trust, there may be no need to treat the first trust as having terminated for income tax purposes and no need to obtain a new tax identification number.

Innovations. The Uniform Trust Decanting Act contains a number of innovations, in addition to borrowing concepts from existing state decanting statutes.

The act, like some state statutes, intentionally applies broadly to trusts that have their principal place of administration in the state, trusts that are governed by the law of the state for administration and trusts that are governed by the law of the state for purposes of construction or determining meaning or effect. See Section 15-16-905. By casting a wide net for applicability, questions about whether a state's uniform statute applies to a particular trust may be minimized.

Further, the act permits a trustee to reasonably rely on a prior decanting under the law of the enacting state or a different state. See Section 15-16-906.

The Uniform Trust Decanting Act also addresses in detail the extent to which charitable interests may be modified by decanting. The act does not permit decanting of wholly charitable trusts. See Section 15-16-903. With respect to charitable interests within trusts, the act protects any charitable deduction that may have been taken. See Section 15-16-919(2)(b). The act also balances protecting the settlor's charitable intent with the need to permit decanting of trusts that include contingent charitable interests. If the first trust contains a charitable interest, the second trust cannot diminish the charitable interest, change an identified charitable organization or change the charitable purpose. To ensure that these protections are respected, the Attorney General must receive notice of any decanting of a trust with a charitable interest. Further, the act prohibits changing the governing law of trusts containing determinable charitable interests without court approval if the Attorney General objects. See Section 15-16-914.

The act also delineates the role of the court in greater detail than in existing state statutes. See Section 15-16-909. While decanting generally does not require court approval, the authorized fiduciary may wish to seek instructions or approval from the court to confirm that the decanting is not an abuse of discretion. A fiduciary may also wish to seek court instructions as to the effect of a prior decanting, particularly if the prior decanting may be in some way flawed. A few state statutes permit a special fiduciary to be appointed to exercise decanting power where the statute does not permit the acting trustee to decant. The act borrows the concept of a special fiduciary but does not restrict its use to cases in which the acting trustee is not permitted to decant.

The Uniform Trust Decanting Act provides a remedy for an imperfect attempted decanting, to avoid the uncertainty that would exist if an attempted decanting is later discovered to have failed to fully comply with the decanting statute. Section 15-16-922 of the act essentially reads out of the second-trust instrument any impermissible provision and reads into the second-trust instrument any required provision. This gives authorized fiduciaries exercising decanting power greater comfort that their intent will be implemented and not subject to challenge for an inadvertent misstep or technicality.

The act borrows from some of the state statutes a provision that deals with the disposition of later discovered property. See Section 15-16-926. This provision ensures that if property was not retitled at the time of the decanting, it will be owned by the trust that most likely was intended to receive it. The act also includes a provision that recognizes that the liabilities of the first trust pass with the trust property to the second trust. See Section 15-16-927.

Overview of the Act. Sections 15-16-901 through 15-16-906 of the act deal with the scope and application of the act, fiduciary duty and definitions. Section 15-16-901 names the act. Section 15-16-902 contains definitions. Definitions of terms used only in one Section are found within that Section. Section 15-16-903 addresses the types of trusts to which the act applies (or does not apply) and Section 15- 16-905 describes the connections to the adopting state that are sufficient for a trust to utilize the act. Section 15-16-904 addresses fiduciary duty in exercising or not exercising the decanting power. Section 15-16-906 addresses reliance on prior decantings, including decantings performed under other states' laws.

Sections 15-16-907 through 15-16-910 of the act deal with the procedures for exercising the decanting power. Section 15-16-907 sets forth the notice requirements for decanting. Section 15-16-908 is an optional provision dealing with representation of beneficiaries, including the representation of certain charitable interests by the state's Attorney General or other appropriate official. Section 15-16-909 describes the authority of the court with respect to decanting. Section 15-16-910 describes the formalities for decanting.

Sections 15-16-911 through 15-16-923 contain the heart of the decanting power and describe what modifications can be made by decanting. Section 15-16-911 delineates the decanting power when the authorized fiduciary has expanded distributive discretion and Section 15-16-912 delineates the decanting power when the authorized fiduciary has limited distributive discretion.

Section 15-16-913 contains special rules to facilitate decanting into a special-needs trust for a beneficiary with a disability. The Uniform Trust Decanting Act permits a trust to be decanted to modify the interest of the beneficiary with a disability even if the trustee does not have expanded distributive discretion. When a trust has a beneficiary with a disability, it may not be in the beneficiary's interest to make mandatory distributions to the beneficiary. Further, it may be in the beneficiary's interest to restructure the trust as a special-needs trust

so that the trust does not adversely affect the beneficiary's qualification for governmental benefits. This carries out the settlor's probable intent if the settlor had known of the beneficiary's disability.

Section 15-16-914 provides special rules to protect charitable interests.

Sections 15-16-915 through 15-16-920 generally provide limitations on the exercise of the decanting power. Section 15-16-915 addresses how express restrictions contained within the first-trust instrument may limit the decanting power. Sections 15-16-916, 15-16-917, and 15-16-918 impose limitations on an authorized fiduciary exercising the decanting power in ways that might be considered self-dealing. Section 15-16-916 restricts decanting to increase the authorized fiduciary's compensation. Section 15-16-917 restricts decanting to increase the authorized fiduciary's protection from liability. Section 15-16-918 restricts the modification or elimination of a provision permitting a person to remove or replace the authorized fiduciary. Section 15-16-919 imposes limitations on the decanting power that may be necessary to avoid disqualifying a trust for a particular tax benefit. Section 15-16-920 addresses limits on the duration of a trust, such as the rule against perpetuities.

Section 15-16-921 makes clear that even though the extent of the authorized fiduciary's power to decant is generally determined based upon the degree of discretion over principal distributions, the authorized fiduciary may exercise the decanting power even if the authorized fiduciary would not have made a discretionary distribution at such time.

Section 15-16-922 contains the remediation provision that is intended to salvage imperfect decantings. Section 15-16-923 authorizes under certain circumstances decanting of trusts for the care of a nonhuman animal.

Sections 15-16-924 through 15-16-932 contain miscellaneous provisions. These provisions include Section 15-16-925, which recognizes that when a trust has been decanted it may no longer be obvious who is the settlor for different purposes and addresses who should be treated as the settlor for different purposes. Section 15-16-926 provides a default rule for determining whether the first trust or second trust owns later-discovered property. Section 15-16-927 makes clear that liabilities of the first trust are also liabilities of the second trust to the extent it received property from the first trust.

15-16-901. Short title.

The short title of this part 9 is the "Colorado Uniform Trust Decanting Act".

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 869, § 1, effective August 10.

15-16-902. Definitions.

As used in this part 9, unless the context otherwise requires:

(1) "Appointive property" means the property or property interest subject to a power of appointment.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. sec. 2041 (b)(1)(A), as amended, or 26 U.S.C. sec. 2514 (c)(1), as amended, and any applicable regulations.

(3) "Authorized fiduciary" means:

(a) A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;

(b) A special fiduciary appointed under section 15-16-909; or

(c) A special-needs fiduciary under section 15-16-913.

(4) "Beneficiary" means a person that:

(a) Has a present or future, vested or contingent, beneficial interest in a trust;

(b) Holds a power of appointment over trust property; or

(c) Is an identified charitable organization that will or may receive distributions under the terms of the trust.

(5) "Charitable interest" means an interest in a trust which:

(a) Is held by an identified charitable organization and makes the organization a qualified beneficiary;

(b) Benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(c) Is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(6) "Charitable organization" means:

(a) A person, other than an individual, organized and operated exclusively for charitable purposes; or

(b) A government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

(7) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose, the achievement of which is beneficial to the community.

(8) "Court" means the court in this state having jurisdiction in matters relating to trusts.

(9) "Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(10) "Decanting power" or "the decanting power" means the power of an authorized fiduciary under this part 9 to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

(11) "Expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(12) "First trust" means a trust over which an authorized fiduciary may exercise the decanting power.

(13) "First-trust instrument" means the trust instrument for a first trust.

(14) "General power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(15) "Jurisdiction", with respect to a geographic area, includes a state or country.

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

(17) "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.

(18) "Powerholder" means a person in which a donor creates a power of appointment.

(19) "Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. The term:

(a) Includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(I) The occurrence of the specified event;

(II) The satisfaction of the ascertainable standard; or

(III) The passage of the specified time; and

(b) Does not include a power exercisable only at the powerholder's death.

(20) "Qualified beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) of this subsection (20) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(21) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. sec. 674 (b)(5)(A), as amended, and any applicable regulations.

(22) "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.

(23) "Second trust" means:

(a) A first trust after modification under this part 9; or

(b) A trust to which a distribution of property from a first trust is or may be made under this part 9.

(24) "Second-trust instrument" means the trust instrument for a second trust.

(25) "Settlor", except as otherwise provided in section 15-16-925, 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, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

(26) "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.

(27) "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.

(28) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

(29) "Trust instrument" means a record executed by the settlor to create a trust or by any person to create a second trust which contains some or all of the terms of the trust, including any amendments.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 869, § 1, effective August 10.

COMMENT

Appointive Property. The definition of "appointive property" is identical to the definition in Section 102(2) of the Uniform Powers of Appointment Act.

Ascertainable Standard. The definition of "ascertainable standard" is similar to the definition found in Section 103(2) of the Uniform Trust Code, but also includes the regulations to the cited sections of the Internal Revenue Code.

A power that is limited to health, education, support or maintenance is limited to an ascertainable standard. Treas. Reg. § 25.2514-1(c)(2). Other powers limited to an ascertainable standard include "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in the beneficiary's accustomed manner of living," "education, including college and professional education" and "medical, dental, hospital and nursing expenses and expenses of invalidism." A power to make distributions for comfort, welfare, happiness or best interests is not limited to an ascertainable standard. In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust other income or resources before the power can be exercised.

The entire context of the document should be considered in determining whether the standard is ascertainable. For example, if the trust instrument provides that the determination of the trustee is conclusive with respect to the exercise of the standard, the power is not ascertainable.

A power to make distributions "as the trustee deems advisable" or in the trustee's "sole and absolute discretion" without further limitation is not subject to an ascertainable standard.

The term is also construed by case law regarding Internal Revenue Code Sections 2036 and 2038.

Authorized Fiduciary. The definition of "authorized fiduciary" includes only a person acting in a fiduciary capacity. Only a fiduciary, subject to fiduciary duties, should

have the power to decant. A distribution director who is not a fiduciary should not have the power to decant.

The definition excludes a settlor acting as a trustee. If a settlor is a trustee of an irrevocable trust, gift and estate tax problems could result if the settlor had a decanting power. The definition does not exclude a beneficiary who is acting as a trustee (an "interested trustee") because the act only permits a trustee with expanded distributive discretion to decant in a manner that would change beneficial interests. Typically trusts will not give an interested trustee unascertainable discretion over discretionary distributions because such discretion would create gift and estate tax issues. In the unusual event that a trust does give an interested trustee unascertainable discretion, the trustee will incur the tax effects of holding a general power of appointment whether or not the trustee also has a decanting power.

If the discretion to distribute or to direct the trustee to distribute is held jointly by two or more trustees or other fiduciaries, the "authorized fiduciary" is such trustees or other fiduciaries collectively. If the authorized fiduciary is comprised of two or more fiduciaries, the trust instrument or state law will generally provide whether they must act unanimously or whether they may act by majority or some other percentage vote. For example, Section 703(a) of the Uniform Trust Code provides that trustees who are unable to reach unanimous decision may act by majority decision.

The term also includes a special fiduciary appointed by the court under Section 9, who may exercise the decanting power. The term also includes a special-needs fiduciary under Section 15-16-913 even if such fiduciary does not have discretion to distribute principal of the first trust.

Beneficiary. The definition of "beneficiary" in Section 15-16-902(4)(a) and (b) is substantially similar to the definition found in Section 103(3) of the Uniform Trust Code. Section 15-16-902(4)(c) adds as a beneficiary a charitable organization identified to receive distributions from a trust. *Cf.* Uniform Trust Code § 110(a) and § 405(a). Thus an identified charitable organization has the rights of a beneficiary under this act. Absent Section 15-16-902(4)(c) such charities would not be considered beneficiaries. Because a charitable interest is not created to benefit ascertainable charitable organizations but to benefit the community at large, persons receiving distributions from a charitable interest are not beneficiaries as that term is defined in the Uniform Trust Code. *See* Uniform Trust Code § 103, Comment.

In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. A potential appointee of a power of appointment is not a beneficiary unless a

presently exercisable power of appointment has been exercised in favor of such appointee. A person who merely incidentally benefits from the trust is not a beneficiary. *See* Restatement Third of Trusts § 48.

While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, powerholders are classified as beneficiaries under the Uniform Trust Code. Powerholders are included on the principle that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and the Uniform Trust Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

Charitable Interest. The term "charitable interest" includes an interest held by a charitable organization that makes the charitable organization a qualified beneficiary. Section 15-16-902(5). See Section 15-16-902(4)(c) defining the term "beneficiary" to include an identified charitable organization that may or will receive distributions under the terms of a trust. See Section 15-16-902(20) defining a qualified beneficiary.

For example, a trust might provide for a certain amount to be distributed annually to Gentoos Need You, a charitable organization, and permit the trustee to make discretionary distributions of principal to the settlor's descendants. Upon the death of the settlor's last surviving child, $100,000 is to be paid to Gentoos Need You and the remainder to trusts for the settlor's grandchildren. The annuity interest and the remainder interest held by Gentoos Need You are both charitable interests because they are held by an identified charitable organization and make the organization a qualified beneficiary.

The term "charitable interest" also includes an interest that can benefit only charitable organizations and that, if held by an identified charitable organization, would make the charitable organization a qualified beneficiary. Section 15-16-902(5)(b). For example, if the trustee is to distribute $50,000 from the trust each year for ten years to one or more charitable organizations selected by the trustee that protect Antarctica and its wildlife, the trustee also has discretion to distribute income and principal to individual beneficiaries, and at the end of ten years the trustee is to distribute the remainder to the settlor's descendants, the $50,000 annuity is a charitable interest because it may be distributed only to charitable organizations.

As another example, if the trustee may make discretionary principal distributions to the settlor's spouse, and upon the spouse's death is to distribute one-half of the principal to charitable organizations that protect the Arctic and its wildlife, and the other one-half to the settlor's descendants, there is a charitable interest in one-half of the remainder.

The term "charitable interest" also includes an interest devoted solely to charitable purposes, even if the charitable purposes may be carried out directly by the trust rather than through distributions to charitable organizations. Section 15-16-

902(5)(c). The act, however, does not apply to a wholly charitable trust. See Section 15-16-903(2).

The term does not include contingent, successor charitable interests that are not equivalent to the interests held by qualified beneficiaries. For example, if a trust permits distributions to Child A, and upon Child A's death the trust distributes to Child A's descendants, or if none, to the settlor's descendants, or if none, to the Manatee Preservation Fund, a charitable organization, and Child A or the settlor has one or more descendants living, the interest of the Manatee Preservation Fund does not make it a qualified beneficiary and therefore its interest is not a charitable interest.

Charitable Organization. The definition of "charitable organization" is based on the definition of "institution" in the Uniform Prudent Management of Institutional Funds Act (Section 2(4)), except that it excludes trusts.

Charitable Purpose. The definition of "charitable purpose" is similar to the definition in Section 405 of the Uniform Trust Code. The definition of "charitable purpose" follows that of Section 28 of the Restatement Third of Trusts and Section 2(1) of the Uniform Prudent Management of Institutional Funds Act. This definition derives from common law and ultimately the English Statute of Charitable Uses, enacted in 1601. A charitable purpose is a nonprofit purpose (and not a purpose for private benefit) that benefits an indefinite class of the public.

The definition includes purposes "beneficial to the community" because that concept is part of the traditional definition of charitable purposes. The definition means purposes considered charitable and not merely beneficial. Many activities and organizations, such as social welfare organizations, cooperative associations, and business entities, benefit the community. Nonetheless, these organizations and the activities they carry on are not charitable within the meaning of the act because their earnings inure to the benefit of private persons such as members or shareholders. *Attorney General v. Weymouth Agricultural & Industrial Society*, 400 Mass. 475, 479, 509 N.E.2d 1193, 1195 (1987). The definition of charitable has long been limited to those beneficial purposes that fit within one of the other categories of charitable, for example educational, relating to the relief of poverty, or providing some general good such as improvement of the environment. By using the standard definition, the act intends to include the case law that has developed around the term "charitable" in trust law. See the comment to Section 2(2) of the Model Protection of Charitable Assets Act.

Court. The term "court" means the court having jurisdiction in matters related to trusts. The definition should be revised by the enacting state as appropriate.

Current Beneficiary. The term "current beneficiary" means a beneficiary who is currently a distributee or permissible distributee of income or principal. A current beneficiary is a qualified beneficiary described in Section 15-16-902(20)(a). A

mere holder of a power of appointment is not a current beneficiary unless the power is a presently exercisable general power of appointment. The term does not include the objects of an unexercised inter vivos power of appointment.

Decanting Power or The Decanting Power. The term "decanting power" or "the decanting power" means the power granted in this act to the authorized fiduciary (see Section 15-16-902(3)) to distribute all or part of the property of the first trust to a second trust or, alternatively, to modify the terms of the first trust to create the second trust. The term does not include any similar power that may be granted under the terms of the trust instrument or pursuant to common law.

If the terms of the first trust are modified, it is not necessary to treat the second trust as a newly created, separate trust, thus avoiding the need to transfer title of the property of the first trust to the second trust. If all of the property of the first trust is distributed pursuant to an exercise of the decanting power to a separate second trust, then the first trust would terminate. The termination of the first trust may impose certain duties on the trustee such as providing reports to the beneficiaries and filing final income tax returns.

Expanded Distributive Discretion. "Expanded distributive discretion" is any discretion that is not limited to an ascertainable standard (see Section 15-16-902(2)) as used in Internal Revenue Code Section 2514(c)(1) or to a reasonably definite standard (see Section 15-16-902(21)) as used in Internal Revenue Code Section 674(b)(5)(A). The tax terms are used here, one from gift tax rules and one from income tax rules, because the definitions of these tax terms are generally clearer than the definitions of nontax terms sometimes used to describe different types of trustee discretion.

First Trust. The terms "first trust" and "second trust" (Section 15-16- 902(23)) are relative to the particular exercise of the decanting power. Thus when the decanting power is exercised over Trust A to make a distribution to Trust B, Trust A is the first trust and Trust B is the second trust with respect to such exercise of the decanting power. If the decanting power is later exercised over Trust B to make a distribution to Trust C, then Trust B would be the first trust and Trust C the second trust with respect to such exercise of the decanting power.

First-Trust Instrument. See Section 15-16-902(12) for the definition of "first trust" and Section 15-16-902(29) for the definition of "trust instrument."

General Power of Appointment. The definition of "general power of appointment" is identical to the definition in Section 102(6) of the Uniform Powers of Appointment Act.

Jurisdiction. The definition of "jurisdiction" is virtually identical to the definition in Section 103(9) of the Uniform Trust Code.

Person. The definition of "person" is identical to the definition of "person" in Section 102(12) of the Uniform Powers of Appointment Act. With one exception, this

is the standard definition approved by the Uniform Law Commission. The exception is that the word "trust" has been added to the definition of "person." Trust law in the United States is moving in the direction of viewing the trust as an entity, see Restatement Third of Trusts introductory note to Chapter 21, but does not yet do so. This definition differs slightly in wording, but not in substance, from the definition of "person" used in Section 103(10) of the Uniform Trust Code. The Uniform Trust Code defines "person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity."

Power of Appointment. The definition of "power of appointment" is identical to the definition in Section 102(13) of the Uniform Powers of Appointment Act.

Powerholder. The definition of "powerholder" is identical to the definition in Section 102(14) of the Uniform Powers of Appointment Act.

Presently Exercisable Power of Appointment. The definition of "presently exercisable power of appointment" is substantially similar to the definition in Section 102(15) of the Uniform Powers of Appointment Act.

Qualified Beneficiary. The definition of "qualified beneficiary" is substantially the same as the definition in Section 103(13) of the Uniform Trust Code. Note, however, that the expanded definition of "beneficiary" in Section 15-16-902(4) includes charitable organizations identified to receive distributions in charitable trusts. Such charitable organizations would be entitled to notice of an exercise of the decanting power under Section 15-16-907.

The qualified beneficiaries consist of the current beneficiaries (see Section 15-16-902(9)) and the presumptive remainder beneficiaries (see Section 15-16-911(1)(b)).

The holder of a presently exercisable general power of appointment is a qualified beneficiary. A person who would have a presently exercisable general power of appointment if the trust terminated on that date or if the interests of the current beneficiaries terminated on that date without causing the trust to terminate is also a qualified beneficiary. The term does not include the holder of a testamentary general power of appointment or the holder of a nongeneral limited power of appointment. Nor does the term include the objects of an unexercised inter vivos power of appointment.

When a trust has distributees or permissible distributees of trust income or principal who are in more than one generation of the descendants of a person and the trust continues after the deaths of the members of the most senior generation who are included among such distributees, Section 15-16-902(20)(b) should be construed to include the distributees or permissible distributees after the interests of the most senior generation of such distributees terminate and Section 15-16-902(20)(c) would not ordinarily be applicable if there are any current

beneficiaries who are not members of the most senior generation. Assume a trust permits discretionary distributions to any of A's descendants, and only terminates if A has no living descendants, in which case it is distributed to B, and A's now living descendants are Child 1, Child 2, Grandchild 1A and Grandchild 1B. The presumptive remainder beneficiaries are Grandchild 1A and Grandchild 1B pursuant to Section 15-16-902(20)(b), and Section 15-16-902(20)(c) should not apply to cause B to be a presumptive remainder beneficiary. On the other hand, if A's then living descendants were limited to Child 1 and Child 2, then B would be the presumptive remainder beneficiary under Section 15-16-902(20)(c), because there is no presumptive remainder beneficiary under Section 15-16-902(20)(b).

Reasonably Definite Standard. "Reasonably definite standard" is defined in Treasury Regulations Section 1.674(b)-1(b)(5). "Reasonably definite standard" includes an ascertainable standard but may also include standards that would not be considered ascertainable standards. A power to distribute principal for the education, support, maintenance, or health of the beneficiary; for the beneficiary's reasonable support and comfort; or to enable the beneficiary to maintain the beneficiary's accustomed standard of living; or to meet an emergency; would be a reasonably definite standard. A power to distribute principal for the pleasure, desire, or happiness of a beneficiary is not a reasonably definite standard. A power to make distributions "as the trustee deems advisable" or in the trustee's "sole and absolute discretion" without further limitation is not a reasonably definite standard. A reasonably definite standard need not require consideration of the needs and circumstances of the beneficiary.

The entire context of a provision of a trust instrument granting a power should be considered in determining whether there is a reasonably definite standard. For example, if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of a power, the power is not limited by a reasonably definite standard. The fact, however, that the governing instrument is phrased in discretionary terms is not in itself an indication that no reasonably definite standard exists.

Internal Revenue Code Section 674(d) uses the term "reasonably definite external standard." The term "reasonably definite external standard" appears to have the same meaning as "reasonably definite standard." See Treas. Reg. § 1.674(d)-1. The term is also construed by case law regarding Internal Revenue Code Sections 2036 and 2038.

Record. The definition of "record" is identical to the definition in Section 102(16) of the Uniform Powers of Appointment Act. This is a standard definition approved by the Uniform Law Commission.

Second Trust. The definition of "second trust" includes (1) an irrevocable trust already in existence, whether created by the settlor of the first trust or a different settlor, (2) a "restatement" of the first trust which could be executed by the authorized fiduciary or another person as the nominal

grantor, (3) the first trust as modified to create the second trust, or (4) a new trust executed by the authorized fiduciary or another person as the nominal settlor for the purpose of decanting. A decanting that is implemented by "restating" or modifying the first trust presumably would not require the issuance of a new tax identification number or the retitling of property or a final income tax return for the trust. A decanting that distributes the property of the first trust to another trust presumably would require that the property be retitled. Further, if the first trust was terminated by reason of the decanting, a final income tax return for the first trust would be required.

Second-Trust Instrument. See Section 15-16-902(23) for the definition of "second trust" and Section 15-16-902(29) for the definition of "trust instrument."

Settlor. The definition of "settlor" generally follows the definition in Section 103(15) of the Uniform Trust Code, but is modified by Section 25 of this act to address the issue of who is the settlor of the second trust after the exercise of the decanting power. When more than one person signs the trust instrument or funds a trust, generally the person funding the trust will be the settlor. *See* comments to Section 103 of the Uniform Trust Code. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *Id.* A "settlor" includes a testator who creates a testamentary trust.

Sign. The definition of "sign" is the same definition used in Section 2(8) of the Uniform Premarital and Marital Agreements Act.

State. The definition of "state" is virtually identical to the definition in Section 103(17) of the Uniform Trust Code except that it omits the sentence including certain Indian tribes or bands.

Terms of the Trust. The definition of "terms of the trust" is similar to the definition in Section 103(18) of the Uniform Trust Code, including the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument as may be established by other evidence admissible in a judicial proceeding. The definition in Section 2(28) expands on the definition in the Uniform Trust Code by providing that the terms of the trust may also be established by court order or nonjudicial settlement agreement.

Trust Instrument. The definition of "trust instrument" is substantially similar to the definition in Section 103(19) of the Uniform Trust Code, except that it expressly includes any second trust and clarifies that the trust instrument may only contain some of the terms of the trust. The Uniform Trust Code definition is expanded to make clear that where the second trust is a trust created by the trustee for the purpose of decanting, such instrument is considered to be an "instrument" even though the trustee is not considered to be the settlor of the second trust for all purposes. See Section 15-16-925. Other terms of the trust may be established by other evidence that would be admissible in a judicial proceeding, or by

court order or nonjudicial settlement agreement. See Section 15-16-902(28). If the second trust is created for purposes of decanting, the second-trust instrument may be executed by the authorized fiduciary or another person as the nominal settlor.

15-16-903. Scope - definitions.

(1) Except as otherwise provided in subsections (2) and (3) of this section, this part 9 applies to an express trust that is:

(a) Irrevocable; or

(b) Revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(2) This part 9 does not apply to a trust held solely for charitable purposes.

(3) Subject to section 15-16-915, a trust instrument may restrict or prohibit exercise of the decanting power.

(4) This part 9 does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this part 9, common law, a court order, or a nonjudicial settlement agreement.

(5) This part 9 does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

(6) (a) Neither this part 9 nor an exercise of the decanting power described in this part 9 affects:

(I) The determination whether a beneficial interest in a first trust or second trust is property or an asset of a spouse for purposes of distribution of property under section 14-10-113, C.R.S.; or

(II) The power of a divorce court to fashion remedies between the parties in an action under title 14, C.R.S.

(b) Nothing in this subsection (6) expands or limits the power of a divorce court in law or equity over a first trust or a second trust or any trustee thereof.

(c) As used in this subsection (6), unless the context requires otherwise, "divorce court" means a court in this state having jurisdiction over matters brought pursuant to title 14, C.R.S.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 873, § 1, effective August 10.

COMMENT

The Uniform Trust Decanting Act applies to all express trusts that are irrevocable or that are revocable by the settlor only with the consent of the trustee or a person holding an adverse interest. The act does not apply to a trust revocable by the settlor without the consent of the trustee or a person holding an adverse interest, even if the settlor is incapacitated and thus unable to exercise the power to amend or revoke. Thus the act does not apply to a revocable trust as that term is defined in Section 103(14) of the Uniform Trust Code.

Section 5-411(a)(4) of the Uniform Guardianship and Protective Proceedings Act allows a conservator to amend (and revoke) the terms of a protected person's revocable trust. Section 201(a)(1) of the Uniform Power of Attorney Act allows a settlor to grant a power to amend or revoke to an agent. Accordingly, while the settlor is alive, there are uniform rules for modifying a revocable trust. States that have not adopted these uniform rules may have other provisions for modification of a revocable trust when the settlor is incapacitated.

The act does not permit decanting a trust held solely for charitable purposes (a "wholly charitable trust"). Section 15-16-903(2). A private foundation structured as a trust would be a wholly charitable trust that could not be decanted pursuant to the act.

A wholly charitable trust is subject to different public policy concerns than a private trust. Private trusts have identifiable beneficiaries who may enforce their interests in the trust. Charitable trusts have as beneficiaries the community as a whole or charitable organizations, and enforcement may be left to the state's Attorney General or another official. Further, charitable trusts often have particular charitable purposes, and conditions or restrictions on the use of the trust assets. Settlors of wholly charitable trusts often have particularly strong interests in seeing that these purposes, conditions and restrictions are not changed. Special legal doctrines, such as *cy pres*, are available when it becomes unlawful, impossible, or impracticable to carry out the purposes of a wholly charitable trust.

If an irrevocable trust that has noncharitable beneficiaries will in the future be used to fund a wholly charitable trust, the decanting power may be exercised over the irrevocable trust, subject to Section 15-16-914, but the decanting may not change the terms of the wholly charitable trust.

To the extent a conservation easement or other restricted gift is considered to be an express trust, such an interest would be a wholly charitable trust that could not be decanted pursuant to the act.

While a split interest trust such as a charitable remainder trust or charitable lead trust would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute

principal to a current beneficiary and therefore there would not be an authorized fiduciary (see Section 15-16-902(3)) who would have authority to exercise the decanting power under Section 15-16-911 or Section 15-16-912.

If an authorized fiduciary has discretion to distribute principal of a trust that is not a wholly charitable trust but that contains a charitable interest (see Section 15-16-902(5)), the charitable interest may not be diminished, the charitable purpose set forth in the first trust may not be changed and any conditions or restrictions on the charitable interest may not be changed. See Section 15-16-914(3).

The Uniform Trust Decanting Act is not the exclusive way to decant a trust and is not the exclusive way to modify a trust. The terms of the trust instrument may grant a fiduciary or other person the power to modify the trust. This act does not supplant any authority granted under such a trust provision. Any such authority granted under the trust instrument does not affect the application of this act unless the trust instrument imposes an express restriction on the exercise of the decanting power under this act or other state statute authorizing a fiduciary to decant. See Section 15-16-915(2).

A decanting statute of another state may apply to a trust and, even if this act could also apply to the trust, this act does not supplant the right of a trustee to decant under the statute of such other state. Thus in some situations a fiduciary may have the option of decanting under this act or the decanting statute of another state.

Common law in some states may permit a trustee to decant. This act does not supplant any right to decant under common law. Thus in some cases a fiduciary may have the option of decanting under this act or under common law. Section 111 of the Uniform Trust Code and statutes in many states permit certain matters regarding a trust to be resolved by a nonjudicial settlement agreement among the interested persons. Those statutes generally permit certain beneficiaries of a trust to approve an exercise of a power by a trustee and thus would permit certain beneficiaries to approve an exercise of the decanting power. In some cases the modification made by an exercise of the decanting power could also have been made by a virtual representation agreement, and in those cases an exercise of the decanting power sometimes might be combined with a nonjudicial settlement agreement. Generally, the nonjudicial settlement agreement would prevent any subsequent challenges to the decanting. The tax consequences of having the beneficiaries consent to the nonjudicial settlement agreement should be considered.

COLORADO COMMENT

15-16-904. Fiduciary duty.

(1) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(2) This part 9 does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this part 9.

(3) Except as otherwise provided in a first-trust instrument, for purposes of this part 9 the terms of the first trust are deemed to include the decanting power.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 874, § 1, effective August 10.

COMMENT

Except as noted below, in exercising the decanting power, the authorized fiduciary is subject to the same fiduciary duties as in exercising any other discretionary power. For example, Section 801 of the Uniform Trust Code provides that the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. Section 814(a) of the Uniform Trust Code provides that a trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Section 76 of the Restatement Third of Trusts provides that a trustee has a duty to administer the trust diligently and in good faith, in accordance with the terms of the trust and applicable law.

An exercise of the decanting power must be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to better effectuate the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances in place at the time of the decanting. The settlor's purposes generally include efficient administration of the trust. The settlor's purposes may also include achieving certain tax objectives or generally minimizing overall tax liabilities. The settlor's purposes often include avoiding fruitless, needless dissipation of the trust assets should a beneficiary develop dependencies such as substance abuse or gambling, have creditor problems, or otherwise be unfit to prudently manage assets that might be distributed from the trust.

The exercise of the decanting power need not be in accord with the literal terms of the first-trust instrument because decanting by definition is a modification of the terms of the first trust. Therefore Section 15-16-904(3) provides that the terms of the first trust shall be deemed to include the decanting power for purposes of determining the fiduciary duties of the authorized fiduciary. Nonetheless, the other

terms of the first trust may provide insight into the purposes of the first trust and the settlor's probable intent under current circumstances.

Section 802 of the Uniform Trust Code and Section 78 of the Restatement Third of Trusts impose a duty of loyalty on the trustee. Thus in exercising a decanting power the trustee cannot place the trustee's own interests over those of the beneficiaries. For example, an authorized fiduciary may breach its fiduciary duties if the authorized fiduciary decants to permit self-dealing. While Sections 15-16-916, 15-16-917 and 15-16-918 expressly prohibit making certain changes that benefit the authorized fiduciary and are not likely to be in the beneficiaries' interests, these sections do not include all of the changes that may be breaches of the authorized fiduciary's fiduciary duties.

Section 803 of the Uniform Trust Code and Section 79 of the Restatement Third of Trusts impose a duty to treat the beneficiaries impartially. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust.

Section 804 of the Uniform Trust Code imposes a duty to administer the trust as a prudent person would and to exercise reasonable care, skill and caution. *See also* Restatement Third of Trusts: Prudent Investor Rule § 90 (2007).

Decanting may be appropriate in many situations in which judicial modification would be appropriate such as (1) when modification, because of circumstances not anticipated by the settlor, would further the purposes of the trust (see Uniform Trust Code § 412(a) and Restatement Third of Trusts § 66); (2) when continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration (see Uniform Trust Code § 412(b)); (3) to replace the trustee if the value of the trust is insufficient to justify the costs of administration with the current trustee (see Uniform Trust Code § 414(b)); (4) to correct mistakes (see Uniform Trust Code § 415); (5) to achieve the settlor's tax objectives (see Uniform Trust Code § 416); and (6) to combine or divide trusts (see Uniform Trust Code § 417 and Restatement Third of Trusts § 68).

The Uniform Trust Decanting Act does not impose a duty on the authorized fiduciary to decant. To impose a duty on the authorized fiduciary to consider whether any possible decanting could improve the administration of the trust or further the trust purposes would create unfair risks and burdens for fiduciaries and also might, in some situations, present impartiality issues. A trustee cannot possibly consider all the possible ways in which a trust could be improved by decanting. While this act does not create a presumption in favor of the terms of the first trust, an authorized fiduciary generally should not be penalized for not modifying the terms of the trust.

There may be, however, circumstances in which the authorized fiduciary or trustee has a duty under general trust law to seek a deviation from the terms of the trust even if the authorized fiduciary or trustee does not

have a duty to exercise a decanting power. Subsection 66(2) of the Restatement Third of Trusts provides:

> (2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

While subsection 66(2) is literally limited to deviations involving administrative provisions, Comment e to subsection 66(2) extends the trustee's duty to distribution provisions when the trustee is actually aware that a purpose of the settlor would be jeopardized by adhering to the existing provision regarding distributions.

The Reporter's Note to Comment e to subsection 66(2) of the Restatement Third of Trusts notes that the situations that might result in a duty to seek a deviation if the trustee has actual knowledge of the circumstances include extraordinary needs of the life beneficiary or irresponsibility of a potential distributee. *See* Illustration 2 in the Comments on subsection 66(1) of the Restatement Third of Trusts and the last paragraph of the Reporter's Note to Comment b to Section 66 of the Restatement Third of Trusts. In the Reporter's Notes to Comment b of Section 66 of the Restatement Third of Trusts, the Reporter notes that there may be a duty to seek deviation when there would be substantial distributions to beneficiaries who are legally competent to manage funds but practically at serious risk of squandering those distributions due, for example, to substance addiction or gambling. Although the Uniform Trust Decanting Act does not impose a duty to decant, an exercise of the decanting power would usually be an appropriate exercise of the authorized fiduciary's discretion in such circumstances. *See also* Restatement Third of Trusts § 87.

Where the trustee has a duty to seek a deviation and the appropriate deviation could be achieved by an exercise of the decanting power, the trustee could fulfill such duty by an exercise of the decanting power rather than seeking a judicial deviation.

15-16-905. Application - governing law.

(1) This part 9 applies to a trust created before, on, or after August 10, 2016, which:

(a) Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state; or

(b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:

(I) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;

(II) Construction of terms of the trust; or

(III) Determining the meaning or effect of terms of the trust.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 874, § 1, effective August 10.

COMMENT

Because the authorized fiduciary by decanting is exercising a power over the first trust, the requirements in Section 15-16-905 apply to the first trust. It is irrelevant whether the second trust is governed by the law of the state or administered in the state.

The laws of different states may govern a trust for purposes of determining its validity, for purposes of construing the trust and for purposes of administration of the trust. The determination of the state law that governs for these purposes is also dependent upon whether the trust property consists of movables or land and whether the trust was created by a will or by an inter vivos instrument. *See* Restatement Second of Conflict of Laws §§ 267-279; Uniform Trust Code § 107; *see also* Uniform Probate Code § 2-703.

To provide greater certainty about whether the act applies to a trust, Section 15-16- 905(2) provides that the act applies to a trust that by its terms provides that it is governed by the law of the enacting state, without further inquiry as to whether the law of the enacting state actually applies. The act also applies where the law of the enacting state in fact governs administration of the trust, construction of the terms of the trust, or determination of the meaning or effect of terms of the trust, whether or not the trust instrument expressly so states.

Decanting is considered an administrative power because it deals with the powers of the trustee. *See* Comment a to the Restatement Second Conflict of Laws § 271 (testamentary trusts) and Comment a to § 272 (inter vivos trusts). Decanting, however, can alter the beneficial interests of a trust. In order to avoid having different rules for the application of the act depending upon whether the exercise of the decanting power changes administrative provision or beneficial interests, and the difficulty of drawing a distinct line between modifications that are administrative in nature and modifications that change beneficial interests, the act is intended to have broad application.

This act applies if the law of the state governs for purposes of any one or more of administration, meaning or effect. "Meaning and effect" are the terms used in the Uniform Trust Code (see Section 107). "Construction" is the term used in the Restatement Second of Conflicts.

This act also applies if the trust instrument states that the law of the state governs for purposes of any one or more of administration, meaning or effect without the necessity of establishing that the law of the state in fact governs for such purpose.

Alternatively, it is sufficient if the trust has its principal place of administration in the state. See Section 108 of the Uniform Trust Code with respect to the principal place of administration of a trust. While a change of principal place of administration will usually change the law governing the administration of the trust, that is not the result under all circumstances. To avoid the difficulties of determining whether the law governing administration has changed when the principal place of administration has changed, the act applies to any trust with a principal place of administration in the state, regardless of what state law governs its administration and meaning and effect.

15-16-906. Reasonable reliance.

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this part 9, law of this state other than this part 9, or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 874, § 1, effective August 10.

COMMENT

A trustee should be able to administer a trust with some dispatch and without concern that reliance on a prior decanting is misplaced. This section allows a trustee, other fiduciary or other person to reasonably rely on the validity of a prior decanting, whether that decanting was performed under the act or under other law of the state or another jurisdiction. Thus this section relieves a trustee or other fiduciary from any duty it might otherwise have to determine definitively the validity of a prior decanting.

The person's reliance on the validity of a prior decanting must be reasonable. Thus a fiduciary must still review the facts of the prior decanting, whether it appears to be in compliance with the statute or other law under which the decanting was performed, and whether the law under which the decanting was performed appears to be applicable to the trust. If the second trust contains provisions that clearly are prohibited by the applicable decanting law, or fails to contain provisions that are clearly required by the applicable decanting law, reliance would not be reasonable.

When trusts have changed jurisdictions, it may be difficult to determine what law governs the administration of the trust. When trusts have multiple trustees, or a

trustee conducts different trust functions in different places, it may be difficult to determine where the trust is administered. Thus it may be difficult in some cases to confirm with certainty which state decanting law applied to a prior attempted decanting. In some instances more than one state's decanting law may appear to apply, creating further uncertainty if the prior attempted decanting did not comply with all of the potentially applicable statutes. Section 15-16-906 protects a trustee or other person who makes a reasonable determination about which state decanting law applied to a prior decanting.

Ordinarily, a trustee or other person relying on a prior decanting need not independently verify compliance with every procedural rule of the decanting law. For example, ordinarily, the person relying on the prior decanting need not verify that every person required by the statute to receive notice in fact received notice. If such person knew, however, that the decanting law required notice and that no notice was given, reliance would not be reasonable.

This section does not validate any or all attempted decantings. Even if a trustee or other person may reasonably rely on a prior decanting, an interested person may still have the ability to challenge the decanting as invalid.

There may be times when the trustee or other person has sufficient questions about a prior attempted decanting that additional action is required to determine whether the prior attempted decanting was valid, in whole or in part, and to clarify the operating terms of the trust. In some cases the authorized fiduciary might use a new, properly implemented decanting to clarify the terms of the trust prospectively. In other cases a nonjudicial settlement agreement between the trustee and interested parties might be used to conform the effective terms of the trust. In some cases the trustee or other person might petition the court to determine the effective terms of the trust.

15-16-907. Notice - exercise of decanting power.

(1) In this section, a notice period begins on the day notice is given under subsection (3) of this section and ends sixty-two days after the day notice is given.

(2) Except as otherwise provided in this part 9, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(3) Except as otherwise provided in subsection (6) of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty-three days before the exercise to:

(a) Each settlor of the first trust, if living or then in existence;

(b) Each qualified beneficiary of the first trust;

(c) Each holder of a presently exercisable power of appointment over any part or all of the first trust;

(d) Each person that currently has the right to remove or replace the authorized fiduciary;

(e) Each other fiduciary of the first trust;

(f) Each fiduciary of the second trust; and

(g) The attorney general, if section 15-16-914 (2) applies.

(4) An authorized fiduciary is not required to give notice under subsection (3) of this section to a qualified beneficiary who is a minor and has no representative or to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(5) A notice under subsection (3) of this section must:

(a) Specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(b) Specify the proposed effective date for exercise of the power;

(c) Include a copy of the first-trust instrument; and

(d) Include a copy of all second-trust instruments.

(6) The decanting power may be exercised before expiration of the notice period under subsection (1) of this section if all persons entitled to receive notice waive the period in a signed record.

(7) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under section 15-16-909 asserting that:

(a) An attempted exercise of the decanting power is ineffective because it did not comply with this part 9 or was an abuse of discretion or breach of fiduciary duty; or

(b) Section 15-16-922 applies to the exercise of the decanting power.

(8) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (3) of this section if the authorized fiduciary acted with reasonable care to comply with subsection (3) of this section.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 874, § 1, effective August 10.

COMMENT

Generally a trustee is not required to provide notice to beneficiaries prior to exercising a discretionary power. This section is not intended to change the law in this regard except with respect to exercises of the decanting power. Because qualified beneficiaries are entitled to know the terms of the trust, they should receive notice of any change in the terms of the trust. Requiring prior notice seems reasonable, in light of the significant trust modifications that can be made by decanting, and practical, in that it helps determine if any settlor, fiduciary or beneficiary has an objection to or may challenge the decanting. Any person entitled to notice under Section 15-16-907(3) may petition the court under Section 15-16-909 for a determination of whether the proposed or attempted exercise of the decanting power is an abuse of discretion or does not otherwise comply with the act.

If a qualified beneficiary is a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation principles of applicable state law may be employed. Under state law, an emancipated minor presumably may represent himself or herself.

Notice must be given to (a) each settlor of the first trust (see Section 15-16-902(25)); (b) all qualified beneficiaries (see Section 15-16-902(20)); (c) each holder of a presently exercisable power of appointment, whether or not such holder is a qualified beneficiary; (d) any person who may remove or replace the authorized fiduciary; (e) all other fiduciaries of the first trust; (f) all fiduciaries of the second trust or trusts; and (g) the Attorney General (or other official with enforcement authority over charitable interests) if there is a determinable charitable interest (see Section 15-16-914(1)(a)). If the authorized fiduciary is comprised of more than one fiduciary, notice should be given to any person who may remove or replace any of such fiduciaries. The term "replace" refers to the power to both remove and designate a successor for the authorized fiduciary, and does not refer to the power merely to designate a successor when a vacancy occurs.

Other notice provisions under state law may also apply to a decanting. Under Section 813(a) of the Uniform Trust Code, a trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. An exercise of the decanting power is a material fact. If the second trust is newly created for purposes of decanting, state law may require notice of the creation of the trust to certain beneficiaries. For example, Section 813 of the Uniform Trust Code requires a trustee, within 60 days after accepting a trusteeship, to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number. In addition, if the exercise of the decanting power results in a distribution of property, the distribution would be considered a disbursement that should be reported on the accounting of the first trust. If the exercise of the decanting power results in the termination of the first trust, state law or the trust instrument may require a final accounting.

Subsection (3)(g) entitles the Attorney General to notice of an exercise of the decanting power with respect to a trust containing a determinable charitable interest. See Section 15-16-914(1)(a).

Subsection (4) provides that notice need not be given to a person who is not known to the fiduciary or who is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence. An analogous term, "reasonable care," is used in Section 1007 of the Uniform Trust Code. Section 1007 provides that a trustee who has exercised reasonable care to ascertain the happening of an event that affects the administration of a trust is not liable for a loss resulting from the trustee's lack of knowledge.

Although the act does not limit the amount of time that may pass between the giving of notice and the exercise of the decanting power, if the exercise of the power does not occur within a reasonable period of time from the proposed effective date set forth in the notice, a new notice should be given with a new notice period. Further, the authorized fiduciary's duties to keep beneficiaries and interested persons informed about the trust may require the authorized fiduciary to inform such persons if the decanting is not completed as proposed or when the decanting has been completed.

If after notice is given and before the decanting power is exercised, relevant facts change in a manner that entitles an additional person to receive notice, unless such additional person can be represented by another person who has already received notice, notice should be provided to such additional person. A new notice period should begin to run, unless such additional person waives the notice period.

Subsection (5) describes the items that must be included in the notice. Subsection (1)(a) requires that the notice specify the manner in which the authorized fiduciary intends to exercise the decanting power. Depending upon the circumstances, the authorized fiduciary might describe the modifications being made, provide a comparison of the first trust and the second trust or, where the second trust is extensively different than the first trust, refer the notice recipient to the trust instruments. As a best practice, it is desirable to tell each notice recipient in which capacity he or she is receiving the notice. For example, a notice might state: "You are receiving this notice because you are the settlor of Trust XYZ" or "You are receiving this notice because you are a qualified beneficiary of Trust XYZ." In the case of notice to an Attorney General, it is a best practice to indicate where in the instruments the determinable charitable interest may be found and whether the second trust will be administered under the law of a different state (see Section 15-16-914(5)).

Although under Section 15-16-907(8) an exercise of the decanting power will not be ineffective because of the failure to provide the required notice to one or more persons, provided that the authorized fiduciary acted with reasonable care, the act does not override the court's ability to address breaches of fiduciary duty and to fashion appropriate remedies.

15-16-908. Representation.

(1) Notice to a person with authority to represent and bind another person under a first-trust instrument or this part 9 has the same effect as notice given directly to the person represented.

(2) Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or this part 9 is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(3) A person with authority to represent and bind another person under a first-trust instrument or this part 9 may file an application under section 15-16-909 on behalf of the person represented.

(4) A settlor may not represent or bind a beneficiary under this part 9.

(5) To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to an exercise of the decanting power, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

(6) To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to an exercise of the decanting power:

(a) A conservator may represent and bind the protected person's estate;

(b) A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;

(c) An agent having authority to act with respect to the principal's beneficial interest in the trust may represent and bind the principal;

(d) The trustee of a trust that is a beneficiary of the first trust may represent and bind the beneficiaries of that trust, and the trustee of a trust that is a beneficiary of the second trust may represent and bind the beneficiaries of that trust;

(e) A personal representative of a decedent's estate may represent and bind interested persons with respect to the estate; and

(f) A parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

(7) Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to an exercise of the

decanting power, but only to the extent there is no conflict of interest between the representative and the person represented.

(8) If section 15-16-909 is invoked and the court determines that an interest is not represented under this part 9, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

(9) A representative may act on behalf of the individual represented with respect to an exercise of the decanting power regardless of whether a judicial proceeding concerning the exercise of the decanting power is pending.

(10) In making decisions, a representative may consider general benefit accruing to the living members of the represented individual's family.

(11) The authority to represent and bind another person under this section applies to the results of the exercise of the decanting power under this part 9, including but not limited to trust division, modification, or reformation, regardless of any other law of the state.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 876, § 1, effective August 10.

COMMENT

Subsection (1) provides that the first-trust instrument or general rules in the state's trust code or other law determine who may receive notice of an exercise of the decanting power on behalf of a minor beneficiary or an incapacitated beneficiary, settlor, holder of a presently exercisable power of appointment or person with the right to remove or replace the authorized fiduciary. It is similar to Section 301(a) of the Uniform Trust Code except that it expressly recognizes that if the first-trust instrument authorizes certain persons to receive notice on behalf of incapacitated beneficiaries or other persons, such rules should also apply for purposes of notice under Section 15-16-907.

Subsection (2) provides that the first-trust instrument or general rules in the state's trust code or other law determine who may waive the notice period under Section 15-16-907 or consent to certain modifications under Section 15-16-916 and Section 15-16-918. It is similar to Section 301(b) of the Uniform Trust Code except that it expressly recognizes that if the first-trust instrument authorizes certain persons to consent on behalf of minor or incapacitated persons, such rules should also apply for purposes of waiving the notice period under Section 15-

16-907 or consenting to modifications under Section 15-16-916 or Section 15-16-918.

Subsection (3) makes clear that a person who represents another may file a court petition under Section 15-16-909 on behalf of the person represented. This includes the Attorney General or other official with enforcement authority over charitable interests. See Section 15-16-902(5) for the definition of "charitable interest." Subsection (4) prohibits a settlor from representing a beneficiary. Subsection (4) is similar to optional subsection (d) of Section 301 of the Uniform Trust Code, which was added to the Uniform Trust Code because of a concern that allowing a settlor to represent a beneficiary could cause the trust to be included in the settlor's estate.

COLORADO COMMENT

15-16-909. Court involvement.

(1) On application of an authorized fiduciary, a person entitled to notice under section 15-16-907 (3), a beneficiary, or with respect to a charitable interest the attorney general or other person that has standing to enforce the charitable interest, the court may:

(a) Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this part 9 and consistent with the fiduciary duties of the authorized fiduciary;

(b) Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this part 9 and to exercise the decanting power;

(c) Approve an exercise of the decanting power;

(d) Determine that a proposed or attempted exercise of the decanting power is ineffective because:

(I) After applying section 15-16-922, the proposed or attempted exercise does not or did not comply with this part 9; or

(II) The proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(e) Determine the extent to which section 15-16-922 applies to a prior exercise of the decanting power;

(f) Provide instructions to the trustee regarding the application of section 15-16-922 to a prior exercise of the decanting power; or

(g) Order other relief to carry out the purposes of this part 9.

(2) On application of an authorized fiduciary, the court may approve:

(a) An increase in the fiduciary's compensation under section 15-16-916; or

(b) A modification under section 15-16-918 of a provision granting a person the right to remove or replace the fiduciary.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 877, § 1, effective August 10.

COMMENT

Decanting by definition is an exercise of fiduciary discretion and is not an alternative basis for a court modification of the trust.

The decanting power, however, is a very broad discretionary power. Therefore, Section 15-16-909 provides that the authorized fiduciary, any person who would be entitled to notice of the exercise of the decanting power, any beneficiary or the Attorney General or other official who has enforcement authority over a charitable interest in the first trust, may petition the court for certain purposes with respect to a prior decanting or a proposed decanting. The persons who receive notice under Section 15-16-907 and who could petition the court include the settlor, the holder of a presently exercisable power of appointment over the first trust, each person who has a right to remove or replace the authorized fiduciary and each fiduciary of the first and second trusts.

A successor beneficiary, even though such beneficiary is not entitled to notice under Section 15-16-907, could petition the court under Section 15-16-909. Even though the Attorney General is entitled to notice under Section 15-16-907 only if there is a *determinable* charitable interest, the Attorney General may petition the court under Section 15-16-909 with respect to any charitable interest.

Any such person may request instructions with respect to whether a proposed decanting complies with the act and is consistent with the fiduciary duties of the authorized fiduciary. Section 15-16-909(1)(a). The authorized fiduciary need not have provided notice of a proposed decanting or even be the person proposing the decanting in order for the court to provide instructions. Such an instruction, however, would not create in the authorized fiduciary a duty to decant.

While generally the authorized fiduciary should decide whether or not to exercise the decanting power, and may seek instructions from the court when in doubt as to whether the proposed exercise is permitted and consistent with the authorized fiduciary's fiduciary duties, there may be times when the exercise of the decanting power is appropriate but the authorized fiduciary cannot or should not be the person to exercise the power. Under such circumstances the court may appoint a special fiduciary to determine if the decanting power should be exercised and, if

so, to exercise the power. Section 15-16-909(1)(b). The terms of the appointment may limit the special fiduciary's power to determine whether a proposed exercise is appropriate or may grant the special fiduciary broader power to determine the scope of a decanting. The term of appointment may also limit the period of time during which the special fiduciary may act. For example, assume a trust permits discretionary principal distributions to the settlor's descendants subject to an ascertainable standard if a beneficiary is acting as trustee and subject to expanded discretion if a disinterested person is acting as trustee. If a beneficiary is acting as trustee and believes that an exercise of the decanting power under Section 15-16-911 may be appropriate, the trustee could request that the court appoint a disinterested person as special fiduciary to determine whether the decanting power should be exercised and, if so, to exercise the power. As another example, if the authorized fiduciary is a beneficiary of the first trust and it is appropriate to create a special-needs trust for another beneficiary, but the decanting might incidentally increase the authorized fiduciary's interest in the trust, it may be advisable for the authorized fiduciary to request under subsection (1)(b) the appointment of a special fiduciary to decide whether to exercise the decanting power.

The special fiduciary essentially temporarily steps into the office of the trustee or other fiduciary who has the power to make trust distributions (the "distribution fiduciary"). If the special fiduciary, if acting as the distribution fiduciary, would have expanded distributive discretion, the court may authorize the special fiduciary to exercise the decanting power under Section 15-16-911. If the special fiduciary, if acting as the distribution fiduciary, would have limited distributive discretion, the court may authorize the special fiduciary to exercise the decanting power under Section 15-16-912. If the distribution fiduciary has no discretion to distribute principal, then the special fiduciary could not exercise the decanting power under Section 15-16-911 or 15-16-912, but could exercise the decanting power under Section 15-16-913.

For example, assume A is acting as trustee of a trust that is required to distribute income to A and upon A's death distributes to A's descendants. A special fiduciary cannot exercise the decanting power under Section 15-16-911 or Section 15-16-912 because the special fiduciary, if acting as trustee, has no distributive discretion over principal.

Now assume that the trust also provides that if a person who is not a beneficiary is acting as trustee, such trustee may make discretionary distributions of principal to A for A's health care. A special fiduciary who is not a beneficiary could be appointed and granted the authority to exercise the decanting power under Section 15-16-912.

Alternatively, assume that the trust provides that if a person who is not a beneficiary is acting as trustee, such trustee may make discretionary distributions of principal to A for A's best interests. A special fiduciary who is not a beneficiary could be appointed and granted the authority to exercise the decanting power under Section 15-16-911.

Any person described in Section 15-16-909(1) may request that the court approve an exercise of the decanting power. Such approval should be granted if the decanting complies with this act and is not an abuse of the trustee's discretion.

A petition to the court may also request that the court determine whether an attempted decanting is ineffective because it did not comply with the act. The court may also determine whether the remedial provisions of Section 15-16-922 apply to an attempted decanting and how such remedial provisions modify the second-trust instrument. If a trust has been administered after an attempted decanting under the assumed terms of the second-trust instrument, but after applying Section 15-16-922 should have been administered on different terms, the court may also instruct the fiduciary on the corrective action that should be taken.

For example, if an attempted decanting eliminated a noncontingent right to mandatory income distributions, and several years after the attempted decanting the income beneficiary of the first trust petitioned the court to apply Section 15-16-922 to the attempted decanting, the court might declare that the second trust must grant the income beneficiary such beneficiary's mandatory income interest and might order a makeup distribution to the income beneficiary for the period the income was not paid.

In addition, certain changes in a decanting require either approval by certain persons or court approval. Under Section 15-16-916, certain increases in the compensation of the authorized fiduciary require either the consent of all qualified beneficiaries or court approval. Under Section 15-16-918, modification of a power to remove or replace an authorized fiduciary requires the consent of the person holding such power (and, in some cases, consent of the qualified beneficiaries) or court approval.

The court may, but need not, take any of the actions described in Section 15-16-909.

15-16-910. Formalities.

An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by section 15-16-907, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 878, § 1, effective August 10.

COMMENT

Once the authorized fiduciary has provided the requisite notice of a proposed decanting under Section 15-16-907 and the notice period has either passed or been waived as provided in Section 15-16-907(6), then on or about the proposed effective date for the exercise of the decanting power the authorized fiduciary may effectuate the decanting by a signed record. The notice (a) includes copies of the first-trust instrument and the second-trust instrument, (b) specifies the manner in which the decanting power would be exercised, including which property of the first trust is being distributed to each of the second trusts and which property, if any, remains in the first trust, and (c) specifies the proposed effective date for the decanting. In the case of an exercise of the decanting power that is structured as a modification of the first trust, the signed record required by Section 15-16-910 may be the same instrument setting forth the terms of the modified trust. Where the decanting is structured as a distribution to a separate second trust, generally the signed record required by Section 15-16-910 will be a separate instrument from the second-trust instrument.

The decanting power can be exercised by either an actual distribution of property to one or more second trusts or by modifying the terms of the first trust to create the second trust with or without an actual distribution of property. If the decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust created by such modification as a new trust, in which case the property of the first trust would need to be transferred to the second trust, or alternatively treat the second trust as a continuation of the first trust, in which case the property of the first trust would not need to be retitled.

Other actions may be required to formally complete the transfer of property from the first trust to the second trust, such as retitling accounts, executing deeds, and signing assignments.

15-16-911. Decanting power under expanded distributive discretion - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(b) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(c) "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(d) "Vested interest" means:

(I) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(II) A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(III) A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(IV) A presently exercisable general power of appointment; or

(V) A right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(2) Subject to subsection (3) of this section and section 15-16-914, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(3) Subject to section 15-16-913, in an exercise of the decanting power under this section, a second trust may not:

(a) Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (4) of this section;

(b) Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (4) of this section; or

(c) Reduce or eliminate a vested interest.

(4) Subject to section 15-16-914 and paragraph (c) of subsection (3) of this section, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(a) Retain a power of appointment granted in the first trust;

(b) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(c) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(d) Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(5) A power of appointment described in paragraph (a), (b), (c), or (d) of subsection (4) of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

(6) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 878, § 1, effective August 10.

COMMENT

Noncontingent Right. The term "noncontingent right" describes interests that are certain to occur. A right is not noncontingent if it is subject to the occurrence of a specified event that is not certain to occur. For example, if A's children who survive A are to receive trust assets upon A's death, the rights of A's children are not noncontingent, because each must survive A to take and they may not survive A. The rights of A's children are not noncontingent regardless of whether the requirement of survival is expressed as a condition precedent or a condition subsequent. Thus the result is the same if the gift upon A's death is to A's children in equal shares, but if any child predeceases A such child's share shall be distributed to such child's descendants in shares per stirpes.

A right also is not a noncontingent right if it is subject to the exercise of discretion. Thus if a trustee has discretion to make distributions to A and A's descendants for their support and health care, the interests of A and A's descendants are not noncontingent. The result is the same even if the trust directs the trustee to make distributions to A and A's descendants for their support and health care because the timing and amount of the distributions are subject to the trustee's discretion.

A right also is not noncontingent if a person has discretion to distribute the property subject to the interest to any person other than the beneficiary or the beneficiary's estate. Thus if a trust provides that all income shall be distributed annually to A, but gives the trustee discretion to

distribute principal to B for B's support and medical care, A's right is not noncontingent.

A current mandatory right to receive income, an annuity or a unitrust payment where the trustee has no discretion to make distributions to others is a noncontingent right.

Presumptive Remainder Beneficiary. "Presumptive remainder beneficiary" means a qualified beneficiary (see Section 15-16-902(20)) other than a current beneficiary (see Section 15-16-902(9)). The presumptive remainder beneficiaries might be termed the first-line remainder beneficiaries. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a current beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will often be the death or deaths of the current beneficiaries. A person who would have a presently exercisable general power of appointment if the trust terminated on that date or if the interests of the current beneficiaries terminated on that date without causing the trust to terminate is a presumptive remainder beneficiary.

Presumptive remainder beneficiaries can include takers in default of the exercise of a power of appointment. The term may sometimes include the persons entitled to receive the trust property pursuant to the irrevocable exercise of an inter vivos power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Successor Beneficiary. The term "successor beneficiary" means a beneficiary who has a future beneficial interest in a trust, vested or contingent, including a person who may become a beneficiary in the future by reason of inclusion in a class, other than a beneficiary who is a qualified beneficiary. Thus it includes beneficiaries who might be termed "second line" or more remote remainder beneficiaries. It also includes unborn or unascertained beneficiaries who are beneficiaries by reason of being members of a class. It does not include, however, a person who is merely a holder of a power of appointment but not otherwise a beneficiary.

Vested Interest. "Vested interest" includes a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power. Section 15-16-911(1)(d)(I). For example, if the trustee is required to distribute the trust principal to A when A attains age 30 if A is then living, and A has attained age 30 but the trustee has not yet made the distribution, A's right to receive the trust principal is a right to a mandatory distribution that is a noncontingent right. If A is age 29, however, A's right is not a noncontingent right because A must survive to age 30.

The right to a mandatory distribution does not include a right to a distribution pursuant to a standard or a right to a distribution in the discretion of a fiduciary. Thus a right to receive distributions for "support and health care," or for "best interests" would not be a

mandatory distribution right for purposes of Section 15-16-911.

"Vested interest" also includes a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust properties. Section 15-16-911(1)(d)(II). Thus if A is currently entitled to all trust income payable annually, and the trustee has no discretion to not pay the income to A and no discretion to distribute principal to anyone other than A, A's right to income is a vested interest. A's right to income is a vested interest even if the trustee has discretion to distribute principal to A. The result is the same if instead of an income right, A has the right to receive a specified dollar amount or a percentage of value of trust assets. A's right is a vested interest even if the right will cease upon some future event, such as A's death or a particular date, so long as the future event is not an exercise of fiduciary discretion. A specified dollar amount includes a dollar amount that is dependent upon factors other than fiduciary discretion or specific events not certain to occur, such as the inflation rate. A "vested interest" includes a current right to a unitrust distribution based on the value of certain or all trust assets.

A fiduciary's power to make equitable adjustments to income or principal, whether granted under the trust instrument or state law, does not make an income interest not mandatory or not noncontingent. A fiduciary's power to exclude certain assets in determining a unitrust distribution to attain an equitable result, whether granted under the trust instrument or state law, does not make a unitrust interest not mandatory or not noncontingent. For example, a beneficiary's current right to receive an annual distribution equal to 4% of the value of the trust principal is a vested interest even if the fiduciary has a right to exclude from the value of trust principal non-income producing assets.

Even if all conditions to such right have been met, the decanting may eliminate current mandatory rights to income, annuity or unitrust distributions that have come into effect with respect to a beneficiary if the authorized fiduciary has discretion to make principal distributions to another beneficiary. For example, if the first trust provides for mandatory income distributions to A, but permits the authorized fiduciary to make discretionary principal distributions to A, B or C for their best interests, the decanting may eliminate A's mandatory income interest. In such case the first trust indirectly gave the authorized fiduciary the ability to reduce or eliminate A's income interest by making discretionary principal distributions to B or C.

A right to receive mandatory payments less frequently than annually is not a vested interest. For example, a right to receive 5% of the trust value every fifth year is not a vested interest, except with respect to any amounts currently payable. As another example, a right to receive distributions of one-third of the trust principal at ages 30, 35 and 40 is not a vested interest if the beneficiary has not attained age 30. If the beneficiary is age 30 but the trustee has not yet distributed the one-third payable at age

30, the beneficiary's right to that one-third is a vested interest, but the beneficiary's right to receive distributions at ages 35 and 40 is not a vested interest.

"Vested interest" also includes a current and noncontingent right, annually or more frequently, to *withdraw* income, a specified dollar amount, or a percentage of value of some or all of the trust property. Section 15-16-911(1)(d)(III). Thus, for example, it makes no difference whether the trustee is required to distribute income annually or whether the beneficiary may withdraw income annually. As another example, if B has a current right to withdraw annually the greater of $5,000 or 5% of the trust value each year, B's right is a vested interest. If B's right to withdraw did not begin until B attained age 25 and B has not attained age 25, B's right would not be a vested interest.

"Vested interest" also includes a presently exercisable general power of appointment. A power of appointment is presently exercisable if it is exercisable at the time in question. Typically, a presently exercisable power of appointment is exercisable at the time in question during the powerholder's life and also at the powerholder's death, e.g., by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power.

A power to withdraw from a trust is a power of appointment. *See* Restatement Third of Trusts § 56 comment b. Thus if a beneficiary has already attained an age at which the beneficiary can withdraw all or a portion of the trust, the second trust may not modify or eliminate that right of withdrawal. If a Crummey withdrawal power is still in effect with respect to a prior contribution to the trust, the second trust cannot modify or eliminate the Crummey withdrawal right.

For example, if the trustee may make discretionary distributions to C and C's descendants, C has a right to withdraw one-half of trust principal after attaining age 28, and C has attained age 28, C's right is a vested interest under Section 15-16-911(1)(d)(IV) even if the trustee has power to distribute trust principal to anyone other than C.

"Vested interest" also includes a right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur. Thus if the trustee is to distribute income to F, and upon F's death is to distribute the principal to G or G's estate, G's interest is a vested interest. G would not have a vested interest if the trustee had discretion to distribute principal to F or if G was required to survive F to take the remainder interest. Thus the right of a person to receive the trust property upon the termination of such trust if such person is then living would not be a vested interest. Any interest with a condition is not a vested interest, regardless of whether the condition is a condition precedent or condition subsequent. For example, A does not have a vested interest if upon termination the trust property passes to A or A's estate, provided that A is then married or was married at the time of A's prior death.

Expanded Distributive Discretion Decanting. Under Section 15-16-911 an authorized fiduciary who has expanded

distributive discretion to distribute all or part of the principal of a trust to one or more of the current beneficiaries may exercise the decanting power over the principal subject to such expanded distributive discretion.

"Expanded distributive discretion" is defined in Section 15-16-902(11). When a trustee is granted expanded distributive discretion, that is an indication that the settlor intended to rely on the trustee's judgment and discretion in making distributions. The settlor's faith in the trustee's judgment supports the assumption that the settlor would trust the trustee's judgment in making modifications to the trust instrument in light of changed circumstances including the beneficiary's circumstances and changes in tax and other laws.

The decanting power, like most discretionary distribution powers, can be exercised over all or part of the first trust. If it is exercised over only part of the first trust, the second trust would need to be a separate trust and could not be a continuation of the first trust. If the decanting power is exercised to distribute property of the first trust to more than one second trusts, then the second trusts (or at least all but one of the second trusts) would need to be separate trusts and could not be a continuation of the first trust.

If the authorized fiduciary has expanded discretion over only part of the first trust, the authorized fiduciary may exercise the decanting power under this section only over such part. See Section 15-16-911(6). With respect to the remainder of the trust, the authorized fiduciary may have the ability to decant under Section 15-16-912 or Section 15-16-913.

The second trust may contain any terms permissible for a trust subject only to the restrictions found in the act. Thus subject to subsections (3) and (6) of Section 15-16-911 and the other restrictions in Sections 15-16-914 through 15-16-920 and subject to the fiduciary duty in Section 15-16-904(1), the second trust may (1) eliminate (but not add) one or more current beneficiaries; (2) make a current beneficiary a presumptive remainder beneficiary or a successor beneficiary; (3) eliminate (but not add) one or more presumptive remainder and successor beneficiaries; (4) make a presumptive remainder beneficiary a successor beneficiary, or vice versa; (5) alter or eliminate rights that are not vested interests; (6) change the standard for distributions; (7) add or eliminate a spendthrift provision; (8) extend the duration of a trust (subject to Section 15-16-920); (9) change the jurisdiction of the trust and the law governing the administration of the trust (subject to Section 15-16-914(5)); (10) eliminate, modify or add powers of appointment; (11) change the trustee or trustee succession provisions; (12) change the powers of the trustee; (13) change administrative provisions of the trust; (14) add investment advisors, trust protectors or other fiduciaries; (15) divide a trust into more than one trust; and (16) consolidate trusts. The foregoing list merely provides examples and is not exhaustive.

The second trust, however, cannot make a remainder beneficiary a current beneficiary. This prohibition on accelerating a remainder

interest is included to avoid any argument under Internal Revenue Code Section 674 that the mere existence of a power to make a remainder beneficiary a current beneficiary causes the trust to be a grantor trust, whether or not the decanting power is ever exercised in such manner.

Section 15-16-911(3)(c) prohibits the second trust from reducing or eliminating a vested interest. A vested interest is not reduced, however, just because other changes made as a result of a decanting may have incidental effects on the interest. For example, a modification of the fiduciary's investment powers or the manner of determining the fiduciary's compensation may have incidental effects on a beneficiary's interest, but such modifications do not reduce a vested interest.

The restrictions in Section 15-16-911(3)(c) do not apply to a decanting under Section 15-16-913. Section 15-16-913(3)(b).

Subsections (4) and (5) permit the second trust to retain or omit a power of appointment included in the first trust, or to create powers of appointment in one or more current beneficiaries of the first trust. For example, if the first trust permits the authorized fiduciary to make discretionary distributions of income or principal to the settlor's child A, and upon A's death the remainder is allocated for the settlor's descendants per stirpes, to be held in further trust for each such descendant, the second trust could grant A a lifetime and/or testamentary power, general or nongeneral. The second trust could grant A a lifetime power to appoint to A's descendants, spouse and charitable organizations and a testamentary power to appoint to A's estate or to the creditors of A's estate. The second trust also could provide that each descendant of the settlor for whom a trust is established at A's death will have an inter vivos or a testamentary, general or limited, power of appointment. The second trust could even give A's now living children, D and E, powers of appointment that they may exercise in their Wills, but that will only take effect upon A's death or, if later, their deaths.

Subsection (5) makes clear that persons who are not otherwise beneficiaries of the first trust may be permissible appointees of a power of appointment granted to a current beneficiary.

Sometimes state law may provide more than one method for making the same modification to a trust. For example, a combination of trusts or a division of a trust that would be permitted under Section 417 of the Uniform Trust Code may also be accomplished under this act through decanting. When a desired modification could be accomplished by decanting or by another method, the trustee may select either method.

15-16-912. Decanting power under limited distributive discretion - definitions.

(1) As used in this section, unless the context otherwise requires, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(2) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(3) Under this section and subject to section 15-16-914, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(4) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(a) The distribution is applied for the benefit of the beneficiary;

(b) The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under other law of this state; or

(c) The distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

(5) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 880, § 1, effective August 10.

COMMENT

Limited Distributive Discretion. "Limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard. Section 15-16-912(1). "Ascertainable standard" is defined in Section 15-16-902(2). "Reasonably definite standard" is defined in Section 15-16-902(21). "Limited distributive discretion" and "expanded distributive discretion" (see Section 15-16-902(11)) are mutually exclusive terms. An authorized fiduciary who has expanded distributive discretion over principal may decant under Section 15-

16-911. An authorized fiduciary who has limited distributive discretion over principal may decant under Section 15-16-912. An authorized fiduciary who has no distributive discretion over principal, even if the authorized fiduciary has distributive discretion over income, may not decant under the act except as provided in Section 15-16-913.

Substantially Similar Beneficial Interests. When the authorized fiduciary has limited distributive discretion over principal, the authorized fiduciary may exercise the decanting power to effect modifications in administrative provisions, including trustee succession provisions, but may not materially change the dispositive provisions of the trust. This section requires the beneficial provisions of the second trust to be substantially the same as in the first trust, because the settlor did not choose to give the authorized fiduciary expanded discretion. Thus, for example, if a trust provides for principal distributions subject to an ascertainable standard to the settlor's child, and upon the child's death the remainder is to be distributed to Charitable Organization A, the decanting power cannot be exercised in a manner that substantially changes the interests of the child or of Charitable Organization A. Nonetheless, the settlor did entrust the authorized fiduciary with some discretion over principal distributions indicating some confidence in the trustee's judgment, justifying a limited decanting power in these situations.

"Substantially similar" means that there is no material change in a beneficiary's beneficial interests except as provided in subsection (d). A distribution standard that was more restrictive or more expansive would not be substantially similar. Thus if the first trust permitted distributions for support, health care and education, the beneficial interests would not be substantially similar if the second trust permitted distributions only for support and health care. If the first trust, however, permitted distributions for education without elaboration with respect to what was included within the term, the second trust might define education to include college, graduate school and vocational schools if otherwise consistent with applicable law.

If the first trust requires that a trust be distributed at age 35, a second trust that permits the beneficiary to withdraw any part or all of the trust at any time after age 35 would be substantially similar. A second trust that delayed the distribution to age 40 would not be substantially similar.

Changes to a fiduciary's administrative powers or investment powers, changes in a fiduciary, or changes in jurisdiction or the state law governing the administration of the trust, are not material changes in a beneficiary's beneficial interests, even though such changes may have incidental effects on the beneficial interests. For example, changing the trustee from one person to another could impact how the trustee exercises discretionary distribution authority, but is not a material change because the trustee's discretion is subject to the same standard and the trustee is subject to fiduciary duties.

Section 15-16-912(4), which permits distributions to be made for the benefit of

the beneficiary instead of directly to such beneficiary, in part reflects existing law and in part expands existing law. Section 816(21) of the Uniform Trust Code permits a trustee to pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary, applying it for the beneficiary's benefit, paying it to certain other persons on behalf of such beneficiary, or managing it as a separate fund on the beneficiary's behalf subject to the beneficiary's continuing right to withdraw the distribution. Section 15-16-912(4)(a) permits an amount distributable to a beneficiary to be applied for the beneficiary's benefit, but does not require that the beneficiary be under a legal disability or incapacitated. Section 15-16-912(4)(b) permits an amount distributable to a beneficiary who is under a legal disability or whom the trustee reasonably believes is incapacitated to be paid as permitted under the state's trust code. Under the Uniform Trust Code, as noted above, the trustee may pay such amount to certain other persons such as a conservator or guardian on behalf of the beneficiary. Section 15-16-912(4)(c) recognizes that the first- trust instrument may contain certain provisions authorizing the trustee to pay amounts distributable to beneficiaries to certain persons on their behalf or in certain ways. If the second-trust instrument also contains the same provisions, they are another permissible way to make distributions to a beneficiary because they were authorized by the settlor.

For example, if a trust requires that all income be distributed to A and permits the trustee to distribute principal to A for A's support, the trustee may decant the trust to require that all trust income be held in an accumulated income fund under the trust agreement, which permits A to withdraw the accumulated income fund at any time and permits the trustee to use the accumulated income fund to directly pay A's expenses. This might be helpful, for example, if A was incapacitated, incarcerated or uninterested in managing the funds herself or himself.

Section 15-16-912 is intended to permit a severance of a trust if the beneficial interests in the second trust, in the aggregate, are substantially similar to the beneficial interests in the first trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal discretionary interests would usually be considered to be substantially similar. For example, if a testamentary trust created by A provides for discretionary distributions of income and principal to A's children for support, education and health care and A has three living children (B, C and D), the authorized fiduciary may exercise the decanting power under Section 15-16-912 to sever the trust into three equal trusts, one for each of B, C and D. The beneficial interest of each child in the second trusts is different because before the severance each child could conceivably receive discretionary distributions of more than one-third of the first trust and after the severance each child may only receive distributions from such child's second trust (one- third of the first trust). A child's interest would usually be considered substantially similar, however, because the loss of the possibility of receiving distributions of more than one-third of the first trust is offset by the fact that

after the severance the other children may not receive discretionary distributions from such child's second trust. A child's interest after severance might not be considered substantially similar, however, if the first-trust instrument made clear that B's health care needs should be given priority and it seemed likely that B's health care needs would exceed one-third of the principal of the first trust.

15-16-913. Trust for beneficiary with disability - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated an incapacitated person.

(b) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(c) "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

(I) A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(II) If no trustee or fiduciary has discretion under subparagraph (I) of this paragraph (c), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(III) If no trustee or fiduciary has discretion under subparagraph (I) or (II) of this paragraph (c), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(d) "Special-needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(2) A special-needs fiduciary may exercise the decanting power described in section 15-16-911 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(a) A second trust is a special-needs trust that benefits the beneficiary with a disability; and

(b) The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(3) In an exercise of the decanting power under this section, the following rules apply:

(a) Notwithstanding section 15-16-911 (3)(b), the interest in the second trust of a beneficiary with a disability may:

(I) Be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. sec. 1396p (d)(4)(C), as amended; or

(II) Contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. sec. 1396p (d)(4)(A), as amended.

(b) Section 15-16-911 (3)(c) does not apply to the interests of the beneficiary with a disability.

(c) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 881, § 1, effective August 10. **L. 2017:** IP(3)(a) amended, (SB 17-294), ch. 264, p. 1392, § 32, effective May 25.

Editor's note: In 2016, subsection (1)(d) was numbered as (1)(c)(IV) in SB 16-085 but was renumbered on revision in 2018 to conform to statutory format.

COMMENT

Section 15-16-913 permits an authorized fiduciary to exercise the decanting power over a trust that has a beneficiary with a disability to create a special-needs trust that governmental benefits programs may not consider a "resource" for purposes of the eligibility of the beneficiary with a disability for those benefits. Many governmental benefit programs restrict eligibility for those programs to only persons of limited resources. These resources may include any assets from which the beneficiary with a disability has the right to compel a distribution or a withdrawal. Special-needs trusts are drafted so as to limit the distribution rights of the beneficiary with a disability and thus better permit the beneficiary with a disability to qualify for governmental benefits. Under Section 15-16-913 the authorized fiduciary may modify the dispositive provisions for the beneficiary with a disability even if the authorized fiduciary has no discretion to make distributions or only discretion over income.

Beneficiary with a Disability. "Beneficiary with a disability" means a

beneficiary who the special-needs fiduciary believes may qualify for governmental benefits based on disability. Section 15-16-913(1)(a). The beneficiary need not be adjudicated incompetent or totally incapacitated. The beneficiary need not be currently receiving governmental benefits based on disability. Nor need it be certain that the beneficiary would qualify for such benefits but for the terms of the first trust. The special-needs fiduciary need only have a reasonable belief that the decanting may permit the beneficiary to qualify for such benefits. The governmental benefits must be ones, however, that are based on disability and not merely on financial need. Thus a decanting intended to permit a beneficiary with no disability to qualify for a needs-based college scholarship is not permitted under Section 15-16-913.

Governmental Benefits. "Governmental benefits" means financial aid or services from a state, federal or other public agency. Section 15-16-913(1)(b). It does not include benefits from a private entity.

Special-Needs Fiduciary. Because the term "authorized fiduciary" is limited to a fiduciary who has the power to make discretionary distributions of principal and Section 15-16-913 is intended to permit a fiduciary to decant even if the fiduciary does not have discretion over principal, Section 15-16-913 uses the separate term "special-needs fiduciary" to identify the fiduciary who has the power to decant. If there is no fiduciary who has discretion over principal, the special-needs fiduciary is the fiduciary with discretion over income, or if none, the fiduciary who is directed to make distributions. Section 15-16-913(1)(c).

Special-Needs Trust. "Special-needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits based on disability. Section 15-16-913(1)(d).

Furtherance of Purposes of Trust. The exercise of the decanting power must be in furtherance of the purposes of the first trust. Section 15-16-913(2)(b). Thus the decanting must effectuate better the settlor's broader purposes. In most cases, if the first trust did not anticipate the beneficiary's disability and the settlor's broader purpose was to provide for the beneficiary's support, a decanting that would permit the beneficiary with a disability to qualify for governmental benefits while still being eligible to receive discretionary distributions from the trust would further the purposes of the trust.

For example, assume the first trust was created and funded by A, requires all income to be distributed to the beneficiary after age 21, permits the trustee to distribute principal to the beneficiary pursuant to an ascertainable standard for the beneficiary's support, permits the beneficiary to withdraw the trust principal at age 30, grants the beneficiary a testamentary general power of appointment, and upon the beneficiary's death distributes any unappointed property per stirpes to A's descendants then living. If the beneficiary is age 25 and is disabled, the authorized fiduciary may exercise the decanting power to distribute the principal of the first trust to a trust that provides only

for distributions to the beneficiary in the trustee's absolute discretion and upon the beneficiary's death distributes the remaining trust assets per stirpes to A's descendants then living. The exercise of the decanting power may eliminate the beneficiary's right to income, the beneficiary's prospective right to withdraw the trust at age 30 and the beneficiary's power of appointment. The second trust may not, however, change the remainder beneficiaries. Section 15-16-913(3)(c).

The result is the same if the beneficiary is age 31 and thus has a right to withdraw the trust assets, because Section 15-16-913(3)(b) provides that Section 15-16-911(3)(c) does not apply to the interest of the beneficiary with a disability.

If in the above example the trustee had no discretion to distribute principal, but was either required to distribute income or had discretion to distribute income for A's support, the authorized fiduciary could still decant to a special-needs trust. The trustee would be considered the special-needs fiduciary under Section 15-16-913(1)(c).

The decanting, however, must further the purposes of the first trust. Section 15-16-913(2)(b). For example, if a trust was created solely for the purpose of funding college education for the settlor's grandchildren, the authorized fiduciary may not decant to pay for the support of a grandchild who is a beneficiary with a disability. Conceivably, however, a trust for the education at all levels of the settlor's grandchildren might be decanted to a trust that permits distributions to a grandchild who is a beneficiary with a disability for such grandchild's occupational therapy and vocational training.

Pooled or Payback Trust. The second trust may be a pooled trust or a payback trust. Section 15-16-913(3)(a). For example, assume a trust was funded by the beneficiary, directly or indirectly, and provides for distributions of income to the beneficiary until age 30 and then provides for the remainder of the trust to be distributed to the beneficiary. The beneficiary is age 28. The authorized fiduciary may exercise the decanting power, and the second trust may be a "pooled trust" or a payback trust. Section 15-16-913(3)(a). The act does not require that the second trust be a "pooled trust" or a payback trust, but other state law may impose such a requirement.

Other Beneficial Interests Must Be Substantially Similar. Section 15-16-913(3)(c) generally requires that any beneficial interests of beneficiaries other than the beneficiary with a disability be substantially similar to their interests in the first trust except to the extent they are affected by changes to the interest of the beneficiary with a disability. The beneficiary's disability justifies permitting a modification of the interest of the beneficiary with a disability even when the trustee has limited or no discretion, but does not justify otherwise changing the interests of other beneficiaries. The modifications to the interest of the beneficiary with a disability, however, might affect the amount or timing of the other beneficiaries' interests.

Thus if the first trust has more than one current beneficiary, one of whom is a

beneficiary with a disability, the special-needs fiduciary may decant under Section 15-16-911 as if the special-needs fiduciary had expanded discretion to distribute principal to the beneficiary with a disability, but may not alter the interests of the other beneficiaries except to the extent they are affected by the changes to the interest of the beneficiary with a disability. For example, assume the first trust was created and funded by A, continues for the rule against perpetuities period, requires that income be distributed per stirpes to A's descendants, and permits discretionary distributions of principal to A's descendants pursuant to an ascertainable standard. The exercise of the decanting power might, for example, distribute part of the principal of the first trust to a special-needs trust solely for the benefit of the beneficiary with a disability (the "Special-Needs Trust") and distribute the remaining principal to a trust solely for the benefit of the nondisabled beneficiaries (the "Non-Special-Needs Trust"), the terms of which are otherwise identical to the terms of the first trust. The Special-Needs Trust might give the trustee absolute discretion to make distributions to the beneficiary with a disability. Upon the death of the beneficiary with a disability, however, the remaining assets of the Special-Needs Trust must be distributed to the Non-Special-Needs Trust, because the decanting cannot change the interests of the non-disabled beneficiaries, except to the extent they are affected by the changes to the interest of the beneficiary with a disability. The non-disabled beneficiaries' remainder interests may be affected, for example, because the trustee of the Special-Needs Trust may make distributions to the beneficiary with a disability in the trustee's absolute discretion and is not limited by an ascertainable standard. The Non- Special-Needs Trust must have the same terms as the first trust, except that it may modify or eliminate the interest of the beneficiary with a disability. So, for example, the Non- Special-Needs Trust might provide that no distributions would be made to the beneficiary with a disability unless the Special-Needs Trust was exhausted.

15-16-914. Protection of charitable interest - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and which is unconditional or will be held solely for charitable purposes.

(b) "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the federal "Internal Revenue Code of 1986", as amended, on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(2) If a first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(3) If a first trust contains a charitable interest, the second trust or trusts may not:

(a) Diminish the charitable interest;

(b) Diminish the interest of an identified charitable organization that holds the charitable interest;

(c) Alter any charitable purpose stated in the first-trust instrument; or

(d) Alter any condition or restriction related to the charitable interest.

(4) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (3) of this section.

(5) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection (3) of this section must be administered under the law of this state unless:

(a) The attorney general, after receiving notice under section 15-16-907, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(b) The attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

(c) The court approves the exercise of the decanting power.

(6) This part 9 does not limit the powers and duties of the attorney general under law of this state other than this part 9.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 882, § 1, effective August 10.

COMMENT

The Uniform Trust Decanting Act does not permit the decanting of a trust held solely for charitable purposes (a "wholly charitable trust"). See Section 15-16-903(2). While a split interest trust such as a charitable remainder trust or a charitable lead trust is not a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would be no authorized fiduciary (see Section 15-16-902(3)) who

would have authority to exercise the decanting power under Section 15-16-911 or Section 15-16-912.

Other trusts that could be decanted under Sections 15-16-911, 15-16-912 or 15-16-913, however, may contain charitable interests. Section 15-16-914 imposes special protections for charitable interests. When a charitable interest is a "determinable charitable interest," Section 15-16-914 gives the Attorney General (or other official with enforcement authority over charitable interests) the rights of a qualified beneficiary and restricts the ability to decant to change the law governing the trust's administration. Generally, a determinable charitable interest is a charitable interest not subject to fiduciary discretion or any significant contingencies.

Determinable Charitable Interest. An interest must meet three requirements to be a determinable charitable interest. Section 15-16-914(1)(a). First, the interest must be a charitable interest. See Section 15-16-902(5). Determinable charitable interests are a subset of charitable interests. Thus a remote contingent interest cannot be a determinable charitable interest.

Second, a determinable interest must be a right to a mandatory distribution. A mandatory distribution is a right that is not subject to the exercise of discretion. The mandatory distribution may be a right to income, principal or both. A mandatory distribution may be a right to a current distribution, for example, where a charitable organization is entitled to a certain portion of trust principal on a date that has already occurred and the distribution has not yet been made. A mandatory distribution also includes a right to periodic distributions of income, a specific dollar amount or a percentage of value of some or all of the trust property. A mandatory distribution also includes a right to receive an ascertainable part of the trust property currently or on the occurrence of a specified event or after the passage of a specified time.

This requirement would be met, for example, if a trust required the trustee to distribute to charitable organizations or for charitable purposes one-half of the trust's net income annually or, alternatively, one percent of the value of the trust's assets annually. It would also be met if the trustee was required to distribute ten percent of the trust principal to charitable organizations or for charitable purposes ten years after the settlor's death or alternatively upon the death of the settlor's surviving spouse. This requirement would not be met if the charitable distribution was subject to the trustee's discretion.

A mandatory distribution would also include a right of withdrawal held by a charitable organization.

The third and final requirement for a determinable charitable interest is that the charitable interest either must be unconditional or must in all events be held for charitable purposes. Unconditional generally means not subject to the occurrence of a specified event that may not occur. For example, assume the trustee is to distribute $100,000 annually to the Ornithology Institute, a charitable organization, but only if it uses the funds to search for the ivory billed woodpecker, and

if it does not so use the funds, to Resurrect Extinct Species, a charitable organization, but only if it uses the funds to recreate the ivory billed woodpecker from genetic material, and if it does not so use the funds, to Woods for Woodpeckers, a charitable organization. The individual interests of Ornithology Institute, Resurrect Extinct Species, and Woods for Woodpeckers are each conditional. The charitable interest to receive $100,000 annually, in the aggregate, meets the third requirement because in all events it will be held for charitable purposes for one of the three charitable organizations.

A charitable interest is conditional (i.e., not an unconditional interest) if the trustee has discretion to make or not make the distribution. For example, if the trustee has discretion to make distributions of income to Manors for Meerkats, a charitable organization, the charitable interest is not unconditional. The charitable interest would not be a determinable charitable interest unless it would in all events be held for charitable purposes. For example, if the trustee was required to distribute all income annually to Manors for Meerkats or to such other charitable organization as the trustee selected for the benefit of wildlife of the Kalahari Desert, the charitable interest is determinable even though the interest of Manors for Meerkats is not unconditional.

A charitable interest, however, would not be conditional merely because the trustee's exercise of discretion in favor of other beneficiaries could affect the charitable interest. For example, if the trustee is required to distribute $200,000 annually to Lonely George Research Fund and has discretion to distribute principal to the settlor's children, the charitable interest is unconditional because so long as there are sufficient funds in the trust the charitable distribution must be made. As another example, assume the trustee had discretion to distribute income and principal to the settlor's children, and upon the death of the surviving child the remainder was to be distributed to Gone with the Wolves, a charitable organization. The interest of Gone with the Wolves is a determinable charitable interest, even though it may be reduced, or even eliminated, by the trustee's exercise of discretion in favor of the settlor's children.

An interest held by a charitable organization is not conditional merely because it is subject to the requirement that the organization be in existence at the time the distribution is to be made. Further, an interest held by a charitable organization is not conditional merely because the organization must qualify as a charitable organization under a particular provision of the Internal Revenue Code, if the organization so qualifies on the date of determination.

For example, assume a trust provides for distributions for the education of the settlor's children and upon the youngest living child attaining age 28 distributes to Whale Whisperers, if it is then in existence and contributions to it qualify for a federal income tax charitable deduction. The interest of Whale Whisperers is unconditional if at the time of the determination Whale Whisperers is in existence and contributions to it qualify for the federal income tax deduction.

Attorney General Rights. Subsection (2) provides that if the first trust contains a determinable charitable interest, the Attorney General (or other official with enforcement authority over charitable interests) may represent the interest and has all the rights of a qualified beneficiary. The Attorney General is entitled to notice under Section 15-16-907(3)(g). The Attorney General may petition the court under Section 15-16-909, consent to a change in the compensation of an authorized fiduciary under Section 15-16- 916 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 15-16-918.

If the decanting changes the jurisdiction of a trust containing a determinable charitable interest, the Attorney General may block the decanting by objecting, even without petitioning the court, unless the court approves the decanting. Section 15-16-914(5).

If the determinable charitable interest is held by an identified charitable organization, the organization is a qualified beneficiary, has the rights of a qualified beneficiary and may represent and bind itself. In such a case, either the Attorney General or the organization could consent to a change in the compensation of an authorized fiduciary under Section 15-16-916 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 15-16-918. If one of the Attorney General or the organization consented, but the other affirmatively objected, the other could petition the court under Section 15-16-909 for a determination.

Preservation of Charitable Interests. Although Section 15-16-914(2) gives the Attorney General the rights of a qualified beneficiary only when a charitable interest is determinable, Section 15-16-914(3) applies to all charitable interests whether or not determinable. If the first trust contains a charitable interest, whether or not determinable, the second trust may not diminish such interest. Section 15-16-914(3)(a). If the interest is held by an identified charitable organization, the second trust may not change the organization. Section 15-16-914(3)(b). If the first-trust instrument sets forth a particular charitable purpose, the second trust may not change the charitable purpose. Section 15-16-914(3)(c). If the first trust imposes certain conditions or restrictions on the charitable gift, the second trust cannot change the conditions or restrictions. Section 15-16-914(3)(d).

If a charitable trust indicates a particular charitable purpose, the exercise of the decanting power may not change the charitable purpose. Section 15-16-914(3)(c). Thus if the first trust provides that upon A's death the remainder will be paid to Companion Animals for the benefit and protection of dogs, the second trust may not change the purpose of the charitable gift to the benefit of cats. As another example, if the first trust provides that upon A's death the remainder will be distributed to such charities as the trustee selects for the purpose of preserving habitat for blue footed boobies, the second trust cannot change the

charitable purpose to the protection of polar bears.

If an authorized fiduciary has limited discretion to distribute principal and exercises the decanting power under Section 15-16-912, Section 15-16-912(3) requires that the second trusts must grant each beneficiary of the first trust, including charitable organizations, beneficial interests that are substantially similar to such beneficiary's interests in the first trust. If the first trust contains a charitable interest that is not held by an identified charitable organization, Section 15-16-912(3) does not apply but Section 15-16-914(3) requires that the second trust may not diminish the charitable interest and that any stated charitable purpose must remain the same.

For example, assume a trust permits discretionary income and principal distributions to the settlor's children for their support and health care, requires that the trustee distribute $25,000 each year to one or more charitable organizations selected by the trustee for the purpose of caring for stray, neglected and abused large dogs, gives the trustee discretion to make additional distributions to charitable organizations for the same purpose, and upon the death of the settlor's last surviving child the principal is to be distributed to charitable organizations selected by the trustee for the same purpose. The trustee has limited discretion to distribute principal and therefore may decant under Section 15-16-912, but not Section 15-16-911. The exercise of the decanting power may change administrative provisions and trustee provisions, but may not alter the beneficial interests of the children. Because the charitable interests are not held by an identified charitable organization, they are not subject to Section 15-16-912(3). Section 15-16-914(3), however, requires that the second trust not diminish the charitable interests to the $25,000 annual distributions, to receive discretionary distributions and to the remainder interest. In addition, Section 15-16-914(3) requires that the charitable purpose remain the same. Thus the second trust could not change the charitable purpose to supporting dog parks for small dogs.

If the trust was as described above except that the trustee had discretion to make distributions to the children for their best interests, the trustee could exercise the decanting power under Section 15-16-911. Thus the trustee could eliminate or reduce the interest of one or more of the settlor's children. The decanting could not, however, diminish the charitable interests because Section 15-16-914(3) requires that the charitable interest not be diminished. The trustee could not, for example, grant a power of appointment to a child because such a power would diminish the charitable interests.

If a trust gave the trustee expanded discretion to make distributions to the settlor's children for best interests, and upon the death of the surviving child provided for the remaining assets to be distributed to Howl at the Moon, a charitable organization for the peaceful co-existence of wolves and humans, the authorized fiduciary could not exercise the decanting power to provide that each child would receive an equal share of the trust assets when the youngest child attained age 25, because that would diminish

the charitable interest. The authorized fiduciary also could not exercise the decanting power to change the charitable remainder beneficiary from Howl at the Moon to another charitable organization. By contrast, the authorized fiduciary could exercise the decanting power to provide that when the youngest child attained age 25 the trust would be distributed to Howl at the Moon, because that would enhance the charitable interest.

Subsection (3)(d) prohibits altering any condition or restriction related to the charitable interest. For example, if the first trust requires that the trustee consult with certain persons before making distributions or provide reports to certain persons, or gives enforcement rights to certain persons to ensure the charitable purpose is fulfilled, the second trust may not change such provisions.

Some state Attorneys General (or other officials charged with protecting charitable interests) may be concerned that trusts with charitable interests will be moved out of their jurisdiction by decanting. Section 15-16-914(5) addresses this concern by requiring that the second trust be administered under the law of the enacting state unless the court approved the decanting or the Attorney General either approved the decanting or, after receiving notice, failed to object within the notice period.

Subsection (6) makes clear that the Uniform Trust Decanting Act does not limit the powers and duties of the Attorney General under other law of the state, whether statutory or common law. For example, other law of the state may give the Attorney General the right to sue for breach of fiduciary duties with respect to charitable interests.

15-16-915. Trust limitation on decanting.

(1) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

(a) The decanting power; or

(b) A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(2) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

(a) The decanting power; or

(b) A power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(3) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(4) Subject to subsections (1) and (2) of this section, an authorized fiduciary may exercise the decanting power under this part 9 even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

(5) If a first-trust instrument contains an express prohibition described in subsection (1) of this section or an express restriction described in subsection (2) of this section, the provision must be included in the second-trust instrument.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 883, § 1, effective August 10.

COMMENT

A trust instrument may expressly preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. See Section 15-16-915(1). The exercise of a decanting power, however, is not prohibited by a statement that the trust is irrevocable or unamendable, or by a spendthrift provision. See Section 15-16-915(3). In order to preclude the exercise of the decanting power, the first-trust instrument must expressly refer to the act or to a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust. For example, assume a first-trust instrument states: "There shall always be a trustee who is an attorney or accountant." That sentence alone would not prohibit the exercise of the decanting power to eliminate that requirement. If the first-trust instrument, however, also stated that "this provision may not be modified by the exercise of any decanting power," then the exercise of the decanting power to modify that provision would be prohibited by Section 15-16-915(1).

Any restriction in the first-trust instrument that expressly applies to decanting is honored. Thus, for example, a restriction in the first-trust instrument that requires court approval of any decanting that accelerates the distribution of trust assets would be enforced. As another example, a restriction requiring approval of any decanting by a particular third party would also be enforced.

An irrevocable trust may provide in the trust instrument a mechanism for modifying the trust, for example, by granting a trust protector the power to modify the trust. The fact that a trust instrument provides such a mechanism for modification does not preclude the application of this act. Any

requirements or restrictions contained in the trust instrument for such modification mechanism do not apply to an exercise of a decanting power under this act unless such requirements or restrictions expressly apply to an exercise of a decanting power under this act or a similar state statute.

If the first-trust instrument contains a restriction on decanting, the provision must be included in the second-trust instrument. Section 15-16-915(5). This provision is intended to prevent serial decanting in which the first decanting removes the restriction on changing a particular provision in the first-trust instrument, and the second decanting then changes such provision.

15-16-916. Change in compensation.

(1) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(a) All qualified beneficiaries of the second trust consent to the increase in a signed record; or

(b) The increase is approved by the court.

(2) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the laws of this state unless:

(a) All qualified beneficiaries of the second trust consent to the increase in a signed record; or

(b) The increase is approved by the court.

(3) A change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (1) and (2) of this section.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 884, § 1, effective August 10.

COMMENT

An exercise of the decanting power generally is an action taken by the authorized fiduciary that does not require beneficiary consent or court approval. The purpose of requiring beneficiary consent or court approval to a change in the

compensation of the authorized fiduciary is to place a check on an authorized fiduciary increasing its own compensation by decanting. In this context it does not seem necessary to require the consent of all beneficiaries. Obtaining the consent of qualified beneficiaries, who would generally be immediately impacted by a change in compensation, should be sufficient.

If the first-trust instrument specifies the authorized fiduciary's compensation, the decanting may not increase the fiduciary's compensation without either the consent of all qualified beneficiaries of the second trust or court approval. Section 15-16-916(1). This subsection applies whether the increase in compensation would result from omitting the provision in the trust instrument specifying compensation, modifying such provision or replacing such provision with a different provision. If it is unclear whether a change in method of calculating compensation would result in an increase, either court approval or consent of all qualified beneficiaries should be obtained.

If the first-trust instrument does not specify the authorized fiduciary's compensation, the decanting may not increase the compensation above the compensation permitted in the trust code of the enacting state without either the consent of all qualified beneficiaries or court approval. Section 15-16-916(2).

Section 15-16-916 expressly does not prohibit an increase in compensation arising incidentally because of other changes made by the exercise of the decanting power. For example, any increase in the compensation of the authorized fiduciary because the second trust may last longer than the first trust is incidental. Also incidental are any increases in compensation that may arise because the second trust may have a greater value in the future than the first trust would have had, for example, because property is retained in the trust longer or smaller distributions are made. Other incidental increases in the compensation of the authorized fiduciary may occur because of changes in investments, changes in the law governing the administration of the trust, changes in the identity of the authorized fiduciary, or changes in the duties of the authorized fiduciary.

In many cases the consideration of a proposed decanting or the implementation of a decanting is fairly seen as an exercise of a discretionary fiduciary power that does not warrant any additional compensation for the authorized fiduciary. In some cases, however, the authorized fiduciary may be required to spend an extraordinary amount of time in evaluating a potential exercise of the decanting power, particularly when an exercise of the power is suggested by a beneficiary, or in exercising the decanting power. In such cases, and regardless of whether the authorized fiduciary ultimately exercises the decanting power, the authorized fiduciary may be entitled to additional compensation under the trust instrument or under state law. See Section 708 of the Uniform Trust Code. In the absence of explicit authority on the appropriate amount of any such compensation, such compensation should be reasonable considering the relevant factors, including the time devoted to the decanting and the degree of difficulty. *See* Restatement

Third of Trusts Section 38 comment c. The authorized fiduciary may also be entitled to have reasonable expenses related to evaluating a potential exercise of the decanting power or in exercising the decanting power paid from the first trust. See Section 709 of the Uniform Trust Code.

15-16-917. Relief from liability and indemnification.

(1) Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

(2) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(3) A second-trust instrument may not reduce fiduciary liability in the aggregate.

(4) Subject to subsection (3) of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this part 9.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 884, § 1, effective August 10.

OFFICIAL COMMENT

An authorized fiduciary should not be permitted to decant in order to insert in the second-trust instrument a provision directly exculpating the authorized fiduciary or indemnifying the authorized fiduciary except to the extent such provision was contained in the first-trust instrument or applicable law would have provided such exculpation or indemnification. Nonetheless, decanting may appropriately reduce the authorized fiduciary's liability indirectly. For example, if the second trust is subject to the law of a different state, the law governing the second trust may provide additional protection to the authorized fiduciary.

The terms of the second trust may reduce an authorized fiduciary's liability indirectly, for example, by modifying the rules for approving accounts or expressly permitting the retention of certain property. While such provisions may not violate Section 15-16-916, they could under certain circumstances violate the authorized fiduciary's general fiduciary duties. For example, while it may

be appropriate in the second trust to expressly permit the retention of a residence used by a current beneficiary of the trust, it may not be appropriate to permit the retention of all of the current trust property without any liability.

Subsection (2) recognizes that the trustee of the first trust may be unwilling to distribute the assets of the first trust to the second trust unless the trustee is indemnified for any liability or claim that may become payable from the first trust after its assets are distributed. Subsection (2) is consistent with Section 15-16-927, which provides that decanting does not relieve the trust property from any liability that otherwise attaches to the trust property. The indemnification described in subsection (2) may be contained in the second-trust instrument or may be contained in the record exercising the decanting power.

An authorized fiduciary can decant to a trust that divides the trustee responsibilities (i.e., jobs) among various parties, but cannot eliminate the fiduciary duties that accompany those jobs. To the extent that the second trust assigns a fiduciary responsibility and the fiduciary duty that accompanies such responsibility to a particular fiduciary, the other fiduciaries may be relieved from liability for the actions of that particular fiduciary. For example, an investment advisor can be appointed and the authorized fiduciary can be relieved of fiduciary liability for the investment decisions to the extent permitted by the law of the enacting state so long as the investment advisor is acting in a fiduciary capacity and has fiduciary liability for the investment decisions. Section 15-16-917 (3), (4).

15-16-918. Removal or replacement of authorized fiduciary.

(1) An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

(a) The person holding the power consents to the modification in a signed record and the modification applies only to the person;

(b) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

(c) The court approves the modification and the modification grants a substantially similar power to another person.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 885, § 1, effective August 10.

COMMENT

Section 15-16-918 authorizes a modification of a trustee removal provision only with either court approval or the consent of the person currently holding the right to remove or replace the trustee. The power to remove a fiduciary is a power to remove the fiduciary without the fiduciary's consent regardless of whether the remover has the power to designate the successor fiduciary. The power to replace a fiduciary is the power to remove the fiduciary and to designate the successor for the fiduciary without the consent of the fiduciary.

Unless the qualified beneficiaries also consent to such change, the person currently holding the right to remove the authorized fiduciary may only consent to the modification of the right with respect to himself or herself and cannot consent to the modification of such right with respect to any successor remover. Section 15-16-918(1)(a). For example, if a trust provides that the authorized fiduciary may be removed by X (the "current remover"), so long as X is living and not incapacitated, and after X is deceased or incapacitated, by Y, X may consent to a modification that would permit the authorized fiduciary to be removed only by the joint agreement of X and Z and only with 90 days' prior notice, but such modification would not affect Y's power of removal after X is deceased or incapacitated unless Y also consents to the modification or unless the qualified beneficiaries consent to such change.

Alternatively, the removal power may be modified by the current remover and the qualified beneficiaries if the modification grants a substantially similar removal right to another person. Section 15-16-918(1)(b). In the previous example, X (the current remover) and the qualified beneficiaries could consent to a modification that would permit the authorized fiduciary to be removed by Z, or if Z were not willing and able to act, by W. Y, the successor remover named in the first-trust instrument, would not need to consent to such modification if X and the qualified beneficiaries consent to it.

Alternatively, the power to remove or replace the authorized fiduciary may be modified if the court approves the modification and the modification grants a substantially similar power to another person. Section 15-16-918(1)(c).

In the case of a modification with the consent of the qualified beneficiaries or with court approval, the modification must grant a substantially similar power to another person. A power to remove a fiduciary only for cause would not be substantially similar to a power to remove a fiduciary for any reason. A power to remove a fiduciary only after the fiduciary has attained age 75 or served for ten years is not substantially similar to a power to remove the fiduciary at any time. A power to replace a fiduciary is not substantially similar unless it contains substantially the same restrictions on who may serve as the replacement fiduciary. For example, a power to remove a fiduciary and replace the fiduciary with any person would not be substantially similar to a power to remove the fiduciary and replace the

fiduciary with a person who is not related or subordinate to the settlor.

In exercising the decanting power to designate a different person to remove and replace the trustee, the authorized trustee should be alert to the tax consequences if the person so designated is not independent for tax purposes.

15-16-919. Tax-related limitations - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. secs. 671-677, as amended, or 26 U.S.C. sec. 679, as amended.

(b) "Internal revenue code" means the federal "Internal Revenue Code of 1986", as amended.

(c) "Nongrantor trust" means a trust that is not a grantor trust.

(d) "Qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. sec. 401 (a)(9), as amended, and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. sec. 401 (a)(9) or the regulations.

(2) An exercise of the decanting power is subject to the following limitations:

(a) If a first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a marital deduction for purposes of the gift or estate tax under the internal revenue code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the internal revenue code or state law under which the transfer qualified.

(b) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the internal revenue code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the internal revenue code or state law under which the transfer qualified.

(c) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for the exclusion from the gift tax described in 26 U.S.C. sec. 2503 (b), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. sec. 2503 (b), as

amended. If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for the exclusion from the gift tax described in 26 U.S.C. sec. 2503 (b), as amended, by application of 26 U.S.C. sec. 2503 (c), as amended, the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. sec. 2503 (c), as amended.

(d) If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. sec. 1361, as amended, and the first trust is, or but for provisions of this part 9 other than this section would be, a permitted shareholder under any provision of 26 U.S.C. sec. 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. sec. 1361 (c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this part 9 other than this section would be, a qualified subchapter S trust within the meaning of 26 U.S.C. sec. 1361 (d), as amended, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter S trust.

(e) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. sec. 2642 (c), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. sec. 2642 (c), as amended.

(f) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. sec. 401 (a)(9), as amended, and any applicable regulations, or any similar requirements that refer to 26 U.S.C. sec. 401 (a)(9), as amended or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and section 15-16-922 applies to the separate share.

(g) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. sec. 672 (f)(2)(A), as amended, the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. sec. 672 (f)(2)(A), as amended.

(h) As used in this paragraph (h), unless the context requires otherwise, "tax benefit" means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (i) of this

subsection (2), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(I) The first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(II) The transfer of property held by the first trust or the first trust qualified, or but for provisions of this part 9 other than this section, would have qualified for the tax benefit.

(i) Subject to paragraph (d) of this subsection (2):

(I) Except as otherwise provided in paragraph (g) of this subsection (2), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(II) Except as otherwise provided in paragraph (j) of this subsection (2), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(j) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(I) The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(II) The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(A) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(B) The first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 885, § 1, effective August 10. **L. 2017:** (2)(j)(I) amended, (SB 17-124), ch. 88, p. 270, § 1, effective August 9.

COMMENT

Certain tax benefits granted under the Internal Revenue Code (the "Code") or state law are dependent upon a trust containing specific provisions. For example, a qualified terminable interest property ("QTIP") marital trust or general power of appointment marital trust requires that the surviving spouse be entitled for life to all income, and a general power of appointment marital trust also requires that the surviving

spouse have a general power of appointment exercisable alone and in all events. If a trustee had the power to decant the trust in a manner that deprived the surviving spouse of the requisite income interest, or in the case of a general power of appointment marital trust, the requisite general power of appointment, then arguably the trust would not qualify for the marital deduction from the inception of the trust. Similarly, it is important to ensure that charitable lead trusts and charitable remainder trusts cannot be modified in a way that arguably would prevent them from qualifying for the charitable deduction or that would reduce the amount of that deduction at their inception.

Grantor Trust. For purposes of this section, a grantor trust means a trust as to which a settlor of the first trust is considered the owner for income tax purposes under the Internal Revenue Code. Section 15-16-919(1)(a). The term does not include a trust over which someone other than the settlor (e.g., a beneficiary) is treated as the owner under Code section 678. A "nongrantor trust" is a trust that is not a grantor trust. Section 15-16-919(1)(c).

Marital Deduction. Subsection (2)(a) protects the marital deduction. For example, for property to qualify as qualified terminable interest property, the surviving spouse must have a qualifying income interest for life and a QTIP election must be made. Code § 2056(b)(7)(B)(i). The surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property payable annually or at more frequent intervals and no person has a power to appoint any part of the property to any person other than the surviving spouse. Code § 2056(b)(7)(B)(ii). If the first trust is a trust with respect to which a QTIP election was made, subsection (2)(a) prohibits decanting the property to a trust that does not give the surviving spouse a qualifying income interest for life. For example, if the trustee had expanded discretion to distribute principal to the surviving spouse, the trustee could not decant to give the surviving spouse a lifetime power of appointment in favor of descendants. In addition, both Section 15-16-911(3)(c) and Section 15-16-919(2)(a) would prohibit the trustee from decanting in a manner that would alter the surviving spouse's income interest.

As another example, assume the first trust qualified for the marital deduction under Code Section 2056(b)(5) because the surviving spouse is entitled for life to all the income, the surviving spouse has a testamentary power of appointment in favor of her estate, and no person has any power to appoint other than to the surviving spouse, and the trustee also has a power to make discretionary distributions to the surviving spouse subject to expanded discretion. Subsection (2)(a) prohibits decanting to a second trust that does not give the surviving spouse a right to all income or that gives any person a power to appoint to anyone other than the surviving spouse. Subsection (2)(a) also requires that the second trust qualify for the marital deduction under the same section of the Code, Section 2056(b)(5). It is not sufficient that the second trust qualify for the marital deduction under another section of the Code.

Although Code Section 2056(b)(5) requires that the trust give the surviving spouse a power to appoint to either herself or her estate, the second trust could give the surviving spouse a lifetime power to appoint to herself instead of a testamentary power in favor of her estate, or could expand her testamentary power to include persons other than her estate as potential appointees, because the second trust would still qualify for the marital deduction under Code Section 2056(b)(5). If the first trust, however, gave the surviving spouse a lifetime general power of appointment, the authorized fiduciary could not decant in a manner that eliminated such power of appointment. Section 15-16-911(3)(c).

Charitable Deduction. Section 15-16-919(2)(b) protects the charitable deduction. The act does not apply to wholly charitable trusts. Section 15-16-903(2). While a split interest trust such as a charitable remainder trust or charitable lead trust would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would not be an authorized fiduciary (see Section 15-16-902(3)) who would have authority to exercise the decanting power under Section 15-16-911 or Section 15-16-912. In the rare case in which a split interest charitable trust could be decanted, Section 15-16-919(2)(b) requires that the second trust qualify for the charitable deduction under the same provision of the Internal Revenue Code or state law.

Subject to the provisions of Section 15-16-914, Section 15-16-919(2)(b) does not prohibit the modification or omission of a future gift to a charitable organization even if such gift, if made, would result in a future charitable deduction.

Gift Tax Annual Exclusion. Code Section 2503(b) grants a gift tax annual exclusion for gifts of a "present interest." Present interests are often created in trusts by granting the beneficiary a Crummey right of withdrawal over contributions to the trust. If a trustee could decant in a manner that prematurely terminated a beneficiary's existing Crummey right of withdrawal over a prior contribution to the trust, then arguably the contribution would not qualify for the gift tax annual exclusion. The restriction in Section 15-16-911(3)(c) prohibiting the modification or elimination of a presently exercisable power of appointment also protects the annual exclusion for a prior gift to a Crummey trust.

Code Section 2503(c) provides another method for qualifying gifts to a trust for the gift tax annual exclusion. Code Section 2503(c) permits a gift tax annual exclusion for a gift to a trust for an individual under age 21 provided that the property and its income may be expended for the benefit of the donee before attaining age 21, to the extent not so expended passes to the donee upon attaining age 21, and, in the event of the donee's death, is payable to the estate of the donee or pursuant to a general power of appointment.

Assume, for example that the first trust permitted distributions of income and principal subject to expanded discretion to A, provided that the trust property should be

distributed to A at age 21 and directed that the trust be distributed to A's estate if A died prior to age 21. A is age 19. The authorized fiduciary could decant to a second trust that, instead of distributing the property to A at age 21, provided A a right to withdraw the trust property for 60 days and that, instead of distributing the property to A's estate, gave A a general testamentary power of appointment. Such a decanting is permitted because the second trust would still qualify under Code Section 2503(c). The authorized fiduciary could not decant to a trust that did not permit A to withdraw the assets until age 30 or that neither gave A a testamentary general power of appointment nor directed distribution of the property to A's estate.

S Corporation Stock. Under Code Section 1361, only certain types of trusts are permitted to own S corporation stock. If the first trust owns S corporation stock, the second trust must also qualify to own S corporation stock under Code Section 1361(c)(2). If the first trust qualifies because it is an electing small business trust (an "ESBT"), the second trust may either be an ESBT or qualify to hold S corporation stock because it is a grantor trust or a qualified subchapter S trust (a "QSST"). Similarly, if the first trust owns S corporation stock and is a grantor trust, the second trust may qualify to hold S corporation stock by being a grantor trust, an ESBT or a QSST.

Subsection (2)(d) imposes a more stringent rule if the first trust is a QSST. In order for a trust to qualify as a QSST, (a) the terms of the trust must require that during the life of the current income beneficiary there shall be only one income beneficiary and (b) all of the income must be distributed to such beneficiary. Code § 1361(d)(3). Thus it may be important that a trust intended to qualify as a QSST not be permitted to be decanted into a trust that would not qualify as a QSST. If the first trust owns S corporation stock and qualifies as an S corporation shareholder because it is a QSST, subsection (2)(d) requires that the second trust also be a QSST. If the first trust is a QSST, it is not sufficient that the second trust qualify to hold S corporation stock under another provision of the Code. If the authorized fiduciary had the power to modify a trust intended to qualify as a QSST to a trust that did not so qualify, the trust would not be a QSST from its inception.

GST *"Annual Exclusion" Gifts*. Code Section 2642(c) grants a zero inclusion ratio, essentially a "GST annual exclusion," to gifts that qualify for the gift tax annual exclusion but imposes two additional requirements for gifts to trusts. First, the trust must be only for a single individual and second, if the individual dies before the termination of the trust, the property of the trust must be included in the gross estate of such individual. Thus while gifts to trusts for multiple beneficiaries could qualify for the gift tax annual exclusion through the use of Crummey withdrawal rights, such gifts generally would not qualify for the GST annual exclusion. The Code Section 2642(c) restriction requiring a trust be for a single individual for such individual's life could be violated through decanting if the decanting permitted a remainder beneficiary to receive distributions prior to the individual's death. Section 15-16-919(2)(e) prohibits such a modification. The requirement that the trust

be included in the gross estate of the individual could perhaps be violated by decanting to a trust that was not includible in the beneficiary's gross estate. Section 15-16-919(2)(e) prohibits such a decanting.

Qualified Benefits. Complicated rules determine when the life expectancy of a trust beneficiary can be considered in determining the required minimum distribution rules when a trust is the beneficiary of a qualified retirement plan or IRA. These rules are found in Code Section 401(a)(9) and the corresponding regulations, and in other Code sections that refer to Section 401(a)(9). For example, with IRAs, Code Section 408(a)(6) states: "Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained."

Under the rules in Code Section 401(a)(9), only trusts with certain provisions and restrictions permit the life expectancy of the beneficiary to be used to determine required minimum distributions. If a trustee could decant to a trust that would not meet these requirements, then arguably the old trust would not qualify from the inception to use the life expectancy of the beneficiary.

Subsection (2)(f) applies not only to any trust that is currently the beneficiary of an individual retirement account ("IRA") or qualified benefit, but also to any successor trust. The need to apply subsection (2)(f) to successor trusts is demonstrated by the following example. Assume Trust A is the beneficiary of Parent's $100,000 IRA. Child is the current beneficiary of Trust A and upon Child's death the assets of Trust A will be distributed to Trusts X and Y for Child's children. Trust A is not a "conduit trust," but qualified to take IRA distributions over Child's life expectancy because Trust A, and Trusts X and Y, have only individuals as beneficiaries and all future beneficiaries must be younger than Child. If Trusts X and Y permitted the exercise of a decanting power in any way that could result in the addition of charities or individuals older than Child as beneficiaries or permissible appointees, Trust A would not have qualified to take IRA distributions over Child C's life expectancy. Therefore, the restrictions on decanting must apply to Trusts X and Y, as well as to Trust A. Trusts X and Y are indirect beneficiaries of the qualified benefit property.

If an attempted decanting violates subsection (2)(f), the qualified benefit property is deemed to be held as a separate share as of the date of the exercise of the decanting power. Holding the qualified benefit property as a separate share permits the remedial rules of Section 15-16-922 to apply only with respect to the qualified benefit property and its proceeds.

Foreign Grantor Trusts. Generally, the grantor trust rules apply only to a "grantor" who is a citizen or resident of the United States or a domestic corporation. An exception to this rule applies if (a) the foreign grantor has the power to revest title to the trust property in the grantor and such power is exercisable (1) solely by the grantor without the approval or consent of any other person or (2) with the consent of a

related or subordinate party who is subservient to the grantor, or (b) distributions may be made only to the grantor and the grantor's spouse during the life of the grantor. If a foreign trust qualifies as a grantor trust because of Code Section 672(f)(2)(A), subsection (2)(g) provides that the decanting power cannot be exercised to a second trust that does not meet the requirements of Code Section 672(f)(2)(A).

Catch-all. Subsection (2)(h) is a catch-all provision intended to preserve any tax benefits not specifically listed in Section 19 for which the first trust qualified if the first-trust instrument expressly indicates an intent to qualify for the tax benefit or is clearly designed to qualify for the tax benefit. Note that subsection (2)(h) does not address any tax benefits for which the trust may qualify in the future. For example, assume that the first trust was a credit shelter trust that was not subject to federal estate tax at the death of the first to die of a married couple because of the decedent's federal exclusion. Assume that an independent person may make discretionary distributions to the surviving spouse and descendants pursuant to expanded discretion. Also assume that the credit shelter trust was designed so that it would not be included in the surviving spouse's estate. The authorized fiduciary could decant and the second trust could grant the surviving spouse a general power of appointment that would cause inclusion in the surviving spouse's estate. Although the credit shelter trust was designed to be excluded from the surviving spouse's estate, such tax benefit is one that would occur, if at all, in the future at the surviving spouse's death; it is not a tax benefit claimed in the past. Therefore subsection (2)(h) does not prohibit such a modification. If the settlor's purposes include saving taxes, and causing inclusion in the spouse's estate may save more taxes by causing a basis adjustment at the surviving spouse's death even though the trust assets would then be included in the surviving spouse's estate, then such a decanting may be appropriate and is not prohibited by subsection (2)(h).

Grantor Trusts. Subsection (2)(i) expressly permits an exercise of the decanting power to change the income tax status of the trust from a grantor trust to a nongrantor trust or vice versa. Although, absent subsection (2)(i), grantor trust status generally might be viewed as a tax benefit of the first trust, grantor trust status is treated differently under the act because the grantor does not necessarily intend that the grantor trust status be maintained until the grantor's death and because other desirable modifications of the trust may result in a loss of grantor trust status.

An exercise of the decanting power may cause a nongrantor trust to become a grantor trust either as a primary purpose of the exercise of the decanting power or as an incidental consequence of other changes made by the decanting. Subsection (2)(i)(II). It would be fundamentally unfair, however, to permit a decanting to impose on the settlor liability for the second trust's income taxes if the settlor objected to such liability. Therefore subsection (2)(j)(II) permits the settlor to block the decanting by objection during the notice period unless the settlor has the power to cause the second trust to cease to be a grantor trust. The settlor

receives prior notice of the exercise of the decanting power under Section 15-16-907(3)(a).

Where the first trust is a grantor trust, often the settlor or another person has the power to cause the trust to cease to be a grantor trust. This power permits the settlor or someone acting on the settlor's behalf to relieve the settlor of the income tax liability for the trust. If the second trust is a grantor trust and does not contain the same provisions permitting the grantor trust treatment to be "turned off," the settlor may block the proposed decanting by objecting during the notice period. Subsection (2)(j)(I).

If a portion of a trust is a grantor trust and the remaining portion is a nongrantor trust, subsection (2)(j) applies to the portion that is a grantor trust.

15-16-920. Duration of second trust.

(1) Subject to subsection (2) of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

(2) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation which apply to property of the first trust.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 888, § 1, effective August 10.

COMMENT

To implement the public policy of the state law applicable to the first trust, subsection (2) requires that any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation period (collectively referred to as a "perpetuities rule") applicable to the first trust apply to the second trust to the extent its assets are attributed to the first trust. This rule is also supported by pragmatic considerations. An exercise of a decanting power could inadvertently violate a perpetuities rule applicable to the first trust if the second trust does not comply with the same perpetuities rule. Even in states that have abolished the maximum perpetuity rule, the state may still impose another perpetuities rule (e.g., a suspension-of-the-power-of-alienation rule), the first trust may still be subject to a rule against perpetuities under prior law or the first trust may be subject to a rule against perpetuities under the law of a different state. Further, if a trust is grandfathered from generation-skipping transfer ("GST") tax or has an inclusion ratio less than one, decanting to a trust that does not comply with the same rule against perpetuities period (or a federal rule against perpetuities

period) may have adverse GST consequences.

Thus if the first trust was created in a state with a traditional rule against perpetuities, the authorized fiduciary may not exercise the decanting power to change the governing law to a state with no rule against perpetuities and to eliminate the rule against perpetuities applicable to the first trust.

Where the maximum term of the first trust is measured by reference to lives in being on the date the first trust became irrevocable, Section 15-16-920 does not preclude the second trust from using an expanded class of measuring lives so long as the expanded class were in being on the date the first trust became irrevocable. For example, assume the first trust is subject to State A's trust duration rule, which is a traditional rule against perpetuities that requires that an interest in a trust vest within twenty-one years of the last to die of lives in being when the trust became irrevocable. The first trust contains a perpetuities savings clause that requires the trust to terminate twenty-one years after the death of the survivor of the settlor's descendants living when the first trust was created. The second trust may replace the perpetuities savings clause with a provision that requires the trust to terminate twenty-one years after the death of the survivor of the descendants of any grandparent of the settlor who were living when the first trust was created.

As another example, assume the first trust is subject to State A's trust duration rule, which is a traditional rule against perpetuities, but which permits a trust to opt out of the rule against perpetuities. The first trust does not opt out of the rule against perpetuities. The second trust may opt out of the rule against perpetuities if the first trust could have done so.

If the first trust and the state law applicable to the first trust permitted the springing of the "Delaware Tax Trap" of Code Section 2041(a)(3), the second trust may also permit the springing of the Delaware Tax Trap.

The second trust may terminate earlier than the trust duration rule applicable to the first trust would require. Assume Trust A and Trust B are both subject to State Z's trust duration rule, which is a traditional rule against perpetuities. Both trusts were created by the same settlor and contain a perpetuities savings clause that requires the termination of the trust twenty-one years after the death of the survivor of the settlor's descendants living on the date the trust was created. Trust A was created on June 6, 1966. Trust B was created May 5, 1955. Trust A may be decanted into Trust B because Trust B will terminate prior to the rule against perpetuities applicable to Trust A. Trust B may be decanted into Trust A if Trust A is modified to provide, or the decanting instrument provides, that the portion of Trust A attributable to the addition of the assets of Trust B must vest within the rule against perpetuities period applicable to Trust B. The trustee could segregate the assets Trust A receives from the decanting of Trust B. Alternatively, the trustee could determine the fractional share of the total assets attributable to Trust B, based upon values at the time of decanting, and such fractional share of Trust A will be subject to

the rule against perpetuities period applicable to Trust B.

If the authorized fiduciary attempts to decant Trust B into Trust A without providing either in Trust A or the decanting instrument that the portion of the trust attributable to Trust B must vest within the rule against perpetuities period applicable to Trust B, the decanting may still be valid. First, the statutes of State Z may contain a rule against perpetuities savings clause that will cause the trust to vest or terminate within the applicable rule against perpetuities period. Second, if there is no statutory savings clause, Section 15-16-922 of this act may apply to read into Trust A an appropriate savings clause with respect to the portion of the trust attributable to Trust B.

Section 15-16-920 does not address whether, if the decanting changes the place of administration for the trust or the law governing the trust, and the new jurisdiction has a more restrictive trust duration rule, the new jurisdiction may impose its maximum perpetuity, accumulation or suspension-of-the-power-of-alienation period on the second trust. The new jurisdiction may do so if the rule of the first jurisdiction is contrary to a strong public policy of the new jurisdiction. Thus if the first jurisdiction has no rule against perpetuities, and the second jurisdiction has a traditional rule against perpetuities, the second jurisdiction may but need not determine that its rule expresses a strong public policy against perpetual trusts.

Subsection (1) provides that, except as provided by subsection (2), the second trust may have a term that is the same as or different from the term of the first trust. Thus the term of the second trust may be longer than or shorter than the term of the first trust.

15-16-921. Need to distribute not required.

An authorized fiduciary may exercise the decanting power regardless of whether under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 888, § 1, effective August 10.

COMMENT

Although the decanting power under Sections 15-16-911 and 15-16-912 is premised on the authorized fiduciary's power to distribute principal of the first trust to one or more current beneficiaries, the authorized fiduciary may exercise the decanting power even if the authorized fiduciary would not have made a distribution of principal to a current beneficiary under the distribution standard of the first trust.

For example, assume a trust permits the trustee to distribute income and principal to S for S's support and health care, considering S's other resources, and that given S's other resources the trustee would not currently make a distribution to S. The trustee may still exercise the decanting power under Section 15-16-912.

Section 15-16-921, however, does not authorize an exercise of the decanting power under Sections 15-16-911 and 15-16-912 if the authorized fiduciary does not currently have a power to distribute principal. For example, if a trust permits income to be distributed to A, but does not permit principal distributions until A is age 25 or has a child, and A is age 21 and has no child, the trustee may not decant the trust under Section 15-16-911 or Section 15-16-912.

15-16-922. Saving provision.

(1) If exercise of the decanting power would be effective under this part 9 except that the second-trust instrument in part does not comply with this part 9, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(a) A provision in the second-trust instrument which is not permitted under this part 9 is void to the extent necessary to comply with this part 9.

(b) A provision required by this part 9 to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this part 9.

(2) If a trustee or other fiduciary of a second trust determines that subsection (1) of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 888, § 1, effective August 10.

COMMENT

In order to provide as much certainty as possible to the trustee and the beneficiaries with respect to the operative terms of a trust, an exercise of a decanting power should not be wholly invalid because the second-trust instrument in part violates this act. Section 15-16-922(1) modifies the second-trust instrument to delete impermissible provisions in the second-trust instrument and to insert required provisions in the second-trust instrument. For example, if the second trust sets forth an impermissible rule against perpetuities period (see Section 15-

16-920), the other modifications made by the decanting should be effective.

The remedial rules of Section 15-16-922 apply only to the least extent required to comply with this act. Thus if a provision in the second-trust instrument would be permissible with respect to some of the trust property but is impermissible with respect to other trust property, such provision will be void only as to the trust property with respect to which it is impermissible. Further, any modification to a provision of the second-trust instrument that is required by Section 15-16-922 should be the modification that implements the intended modifications to the greatest extent permitted under the act. Thus the authorized fiduciary's intent is relevant in determining how to apply the provisions of Section 15-16-922.

For example, assume a trust holds $500,000 of marketable assets and is the beneficiary of Grantor's $100,000 IRA. Grantor's Child is the sole current beneficiary of the trust. The trust is qualified to use Child's life expectancy in determining the distribution period for the IRA because the trust restricts all future beneficiaries, including appointees under any power of appointment and takers in default, to individuals younger than Child. The authorized fiduciary attempts to decant the trust to permit Child to appoint to her spouse. This is in violation of Section 15-16-919(2)(f) because if Child could appoint the IRA to a spouse who is older than Child, Trust would not have qualified to take IRA distributions over Child's life expectancy. Section 15- 16-919(2)(f) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 15-16-922 will void the power to appoint to a spouse only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, and only if the spouse is (or could be) older than Child, because that is the least intrusive remediation required to comply with Section 15-16-919(2)(f).

As another example, assume the authorized fiduciary attempts to decant a trust to permit Child to appoint to her sibling. If Child's sibling is older than Child, this is in violation of Section 15-16-919(2)(f) because if Child could appoint the IRA to her older sibling, the trust would not have qualified to take IRA distributions over Child's life expectancy. Section 15-16-919(2)(f) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 15-16-922 will void the power to appoint to a sibling only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, which are treated as a separate share, and only if the sibling is older than Child, because that is the least intrusive remediation required to comply with Section 15-16-919(2)(f).

As yet another example, assume the authorized fiduciary attempts to decant Trust to change (1) the successor fiduciaries, (2) the manner in which the first trust instrument directed that the authorized fiduciary be compensated, which will increase the authorized fiduciary's

compensation, and (3) the identity of the person who can remove the authorized fiduciary (the "Remover"). The authorized fiduciary obtains the written consent of the qualified beneficiaries of the second trust, but does not obtain consent of the Remover or approval by the court. The changes to the successor fiduciaries will be effective. The change to the authorized fiduciary's compensation will also be effective because the requirement in Section 15-16-916(1) or Section 15-16-916(2) was met. The change to the identity of the Remover will not be effective because the Remover named in the first trust instrument did not consent. See Section 15-16-918.

Section 15-16-922(2) provides that if the savings provision in Section 15-16-922(1) applies, the trustee or other fiduciary shall take corrective action consistent with the fiduciary's duties. When Section 15-16-922(1) applies, the copy of the second-trust instrument provided to qualified beneficiaries and other parties under Section 15-16-907 would not accurately state the terms of the second trust. A trustee or other fiduciary may have a duty to notify certain persons of the accurate terms of the second trust. See, for example, Section 813(a) of the Uniform Trust Code imposing a duty on the trustee to keep the qualified beneficiaries reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests.

Additional corrective action may be required, especially if distributions were made or not made in reliance on the assumed terms of the second-trust instrument and such terms are altered by Section 15-16-922(1).

Where a fiduciary is uncertain about whether corrective action should be taken, the fiduciary may apply to the court for instructions under Section 15-16-909.

15-16-923. Trust for care of animal - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals.

(b) "Protector" means a person listed under section 15-11-901 (3)(d) with authority to enforce the trust on behalf of the animal.

(2) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this part 9 if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

(3) A protector for an animal has the rights under this part 9 of a qualified beneficiary.

(4) Notwithstanding any other provision of this part 9, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 888, § 1, effective August 10.

COMMENT

Section 408 of the Uniform Trust Code permits a trust to be created for one or more animals who are alive during the settlor's lifetime. "Animal" is not defined in the Uniform Trust Code and thus is not defined in this act. It should be construed in its common usage as referring to a multicell living organism that feeds on organic matter, and that typically is motile at some point in its life and has sensory organs. It thus includes, for example, mammals, birds, reptiles, fish and insects. In this section, the term "animal" should be construed to mean nonhuman animals. The term includes, without limitation, pets and domesticated animals.

The Uniform Trust Code provides that an animal trust may be enforced by a person appointed in the terms of the trust or, if no such person is appointed, by a person appointed by the court. Subsection (1)(b) incorporates that concept in the definition of "protector."

One impediment to applying decanting to an animal trust is that animal trusts often do not technically have a beneficiary because the definition of "beneficiary" is restricted to a person who has a particular interest in the trust. The definition of the term "person" does not include a nonhuman animal. This impediment is resolved by treating the animal as if it were a person so that the animal trust does have a beneficiary for purposes of the decanting power. The extent of the decanting power would then depend upon the amount of discretion that the authorized fiduciary has to make distributions for the animal and to any other person. If the trustee has expanded discretion, then the decanting power could be exercised under Section 15-16-911. If the trustee only has limited discretion to make distributions to the animal, then the decanting power can be exercised under Section 15-16-912.

The second impediment to exercising a decanting power over an animal trust is identifying a person who can receive notice of the decanting on behalf of the animal and bring a court action with respect to the decanting if appropriate. This impediment is resolved because an animal trust will usually have a person who is designated to enforce the trust on behalf of the animal. Section 408(b) of the Uniform Trust Code provides that such a trust may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. Thus if an animal trust did not designate a person to enforce

the trust on behalf of the animal, the trustee could request that the court appoint such a person and then proceed with any exercise of the decanting power.

Section 408 of the Uniform Trust Code provides that the property of an animal trust may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Although Section 15-16-923 permits the decanting of an animal trust, it mirrors the requirement of the Uniform Trust Code that the property of the animal trust may be applied only to its intended use for the period of time the first trust was intended to benefit the animals (usually the lives of the animals). Therefore, the authorized fiduciary cannot, by decanting, reduce the value of the animal trust; such a power is reserved only to the court. Further, the authorized fiduciary cannot divert assets of the animal trust to other beneficiaries of the trust. Assume that Trust was established for the support of Double Trouble, a husky, after the death of Double Trouble's human companion. Trust directs that the Trust shall continue to maintain Double Trouble in her Alaskan house, which is owned by the Trust, under the care of Joan, a retired musher, and permits distributions of income and principal to maintain the house and for Double Trouble's best interests so long as Double Trouble is living. Upon the death of Double Trouble, Trust is distributed to the Husky Rescue Society, a charitable organization. Double Trouble is aging and the veterinarian advises a move to a warmer climate. The assets of the Trust are diminishing, and may not be sufficient to maintain the Alaskan house and pay for Double Trouble's care. Joan is aging too, and would prefer to care for Double Trouble in Joan's house in Hawaii. The authorized trustee may, with the consent of the protector, modify Trust to permit the sale of the Alaskan house and to permit Joan to care for Double Trouble in her Hawaii home. Notice of the decanting must be provided to the protector, the Husky Rescue Society and to the Attorney General (or other official with enforcement authority over charitable interests). The second trust, however, may not add Joan as a beneficiary because such a modification would not be permitted under Section 15-16-911. Nor may the decanting provide that one year after the move to Hawaii, one-half of the principal will be distributed to the Husky Rescue Society, because Section 15-16-923(4) requires that the trust property be applied only for its intended purpose (the care of Double Trouble) for the period the first trust benefitted the animal (the life of Double Trouble).

COLORADO COMMENT

15-16-924. Terms of second trust.

A reference in this title 15 to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 889, § 1, effective August 10.

15-16-925. Settlor.

(1) For purposes of law of this state other than this part 9, and subject to subsection (2) of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(2) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 889, § 1, effective August 10.

COMMENT

"Settlor" is defined in Section 15-16-902(25) as the person who creates or contributes property of the trust, except as provided in Section 15-16-925. The comments to Section 102 and Section 103 of the Uniform Trust Code generally consider the person who funded a trust as the settlor and would not treat as the settlor a nominal grantor, meaning a person who signs the trust instrument to create the trust but who does not contribute the property to the trust (except perhaps for nominal funding).

When a new trust instrument is created for purposes of serving as the second trust for a decanting, the second-trust instrument may be signed by the trustee of the first trust, a beneficiary, the settlor of the first trust, an attorney for the settlor, the trustee or a beneficiary of the first trust, or some other person. Under these circumstances, the creator of the second trust generally will not be the settlor of the second trust unless such person funded the first trust or is the authorized fiduciary exercising the decanting power.

For most purposes, when a trust is decanted the settlor of the first trust should be considered the settlor of the second trust to the extent of the decanting. If the second trust is a pre-existing trust funded by a different settlor, then the original settlor of the second trust would continue to be considered the settlor over the portion of the trust property attributable to that person's contribution and the original settlor of the first trust would be considered the settlor of the portion of the second trust property attributable to the decanting. This general rule of Section 15-16-925(1) would apply, for example, for purposes of determining who holds the rights granted to the settlor or who must consent when the settlor's consent is required for an action and for tax purposes. For example, under the Uniform

Trust Code this rule would apply for purposes of Section 113 (Insurable Interest), Section 301(d) (limiting the ability of a settlor to represent a beneficiary), Section 405(a) (enforcement of a charitable trust), Section 411 (modification of a trust with the settlor's intent), Section 505 (Creditor's Claims), Section 706(a) (request to remove a trustee), and Section 814 (limiting certain discretionary powers).

For purposes of determining the settlor's intent or purpose in creating a trust, or whether the settlor did not anticipate certain circumstances, it may sometimes be appropriate to consider the intent of the original settlor of the second trust. For example, if a decanting distribution is made to a pre-existing trust with property of its own, the intent of the original settlor of the second trust may be more relevant in construing, modifying or reforming the second-trust instrument after the decanting distribution. In such a case, the decanting distribution adopts the language of the second-trust instrument, which is most appropriately construed with respect to the intent of the creator of such trust. When a decanting distribution is made to a second trust created by the authorized fiduciary for the purposes of decanting, or when the decanting is a modification of the first trust, the intent of the authorized fiduciary may be most relevant in later construing the terms of the second trust, or at least the terms modified by the decanting. The intent of the settlor of the first trust may still be relevant, however, because the decanting would have been made to better carry out the purposes of the first trust. Further, to the extent the second trust does not modify the terms of the first trust, the intent of the settlor of the first trust would be relevant in construing such terms.

Section 15-16-925(2) would apply, under the Uniform Trust Code, with respect to Section 412 (Modification or Termination Because of Unanticipated Circumstances), Section 415 (Reformation to Correct Mistakes) and Section 416 (Modification to Achieve Settlor's Tax Objectives). For example, under Section 412 of the Uniform Trust Code, a court may make certain trust modifications if because of "circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." The modification, to the extent practicable, is to be made in "accordance with the settlor's probable intention." Thus where the authorized fiduciary of the first trust, or some other person, has created the second trust, the intent of the maker of the second trust may be relevant in determining, with respect to the second trust, what circumstances were not anticipated by the settlor and what would be the settlor's probable intent.

Section 15-16-925(2) may also apply in other contexts for determining the purposes and material purposes of the trust. The material purposes of the trust may, for example, be relevant in determining whether a nonjudicial settlement agreement is valid. Settlor intent is relevant in determining a trust's purposes and material purposes.

15-16-926. Later-discovered property.

(1) Except as otherwise provided in subsection (3) of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(2) Except as otherwise provided in subsection (3) of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(3) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 889, § 1, effective August 10.

COMMENT

If the decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust created by such modification as a new trust, in which case the property of the first trust would need to be transferred to the second trust, or alternatively treat the second trust as a continuation of the first trust, in which case the property of the first trust would not need to be retitled. When the second trust is a continuation of the first trust, any property owned by the first trust is still owned by the trust after the decanting, even if the authorized fiduciary is not aware of such property at the time of the decanting.

When the decanting power is exercised by distributing property of the first trust to a separate second trust, regardless of whether the terms of such second trust are set forth in an entirely separate trust instrument or a modification of the first-trust instrument, the property of the first trust needs to be transferred to the second trust(s). Inevitably, there will be cases where the trustee fails to transfer all of the property to the second trust. The trustee can protect against this possibility by, in the exercise of the decanting power, making a global assignment of all trust property to the second trust. When the property of the first trust is being divided among more than one second trusts or not all of the property of the first trust is being decanted, it is more complicated, but still possible, to specify in the exercise of the decanting power how later-discovered property should be allocated.

Section 15-16-926(3) explicitly permits an authorized fiduciary to provide, in an exercise of the decanting power or by the

terms of a second trust, for disposition of later- discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power. For example, if an authorized fiduciary exercises the decanting power over a trust to create a special-needs trust for the settlor's child J and to create a separate trust for the settlor's other children, the exercise of the decanting power might state that the trust for J will be funded with marketable securities and cash with a value of $1,000,000 and that all other property, including later- discovered property, will be distributed to and owned by the trust for the other children. Assume the trust for J is then funded with $1,000,000 of marketable securities and all other property then known to the trustee is assigned to the trust for the other children. If subsequently other trust assets are discovered, it would be clear that they belong to the trust for the other children and not the trust for J.

The trustee in transferring title to the first trust's property pursuant to a decanting may also take the precaution of executing a global assignment of all property not otherwise expressly transferred to the appropriate second trusts.

Section 15-16-926(1) and (2) specify default rules when later-discovered property and property paid to or acquired by the first trust after the exercise of the decanting power is not expressly allocated to a particular trust by the exercise, by the second-trust instrument or by an assignment.

Subsection (1) provides that if the decanting intended to distribute all of the principal of the first trust to one or more second trusts, then the property is part of the second trust or trusts. When there is more than one second trusts, the exercise of the decanting power might specify their respective interests in the property of the first trust or if it does not, the second trusts may need to reach agreement about their respective ownership interests.

Subsection (2) provides that if the decanting was not intended to distribute all of the principal of the first trust to one or more second trusts, such property remains part of the first trust.

15-16-927. Obligations.

A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 889, § 1, effective August 10.

COMMENT

It would be inequitable to permit a second trust to evade liabilities incurred by the trustee of the first trust to the extent the creditor would have been entitled to satisfaction out of the trust property. Section 15-16-927 provides that a debt, liability or other obligation of the first trust against property of a first trust is enforceable to the same extent against such property when held by the second trust. Section 15-16-927 may apply to contractual claims, obligations arising from ownership or control of trust property and to torts committed in the course of administering a trust. *Cf.* Uniform Trust Code § 1010(c).

The Restatement Second of Trusts provides various situations in which a person to whom the trustee has incurred a liability in the course of the administration of a trust can by a proceeding in equity reach trust property and apply it to the satisfaction of such person's claim. *See* Restatement Second of Trusts § 267. Section 268 of the Restatement Second of Trusts provides that the creditor can reach trust property to the extent the creditor cannot obtain satisfaction of the claim out of the trustee's individual property to the extent the trustee is entitled to exoneration out of the trust estate. Section 269 of the Restatement Second of Trusts provides that a creditor who cannot obtain satisfaction out of the trustee's individual property can by a proceeding in equity reach trust property to the extent the trust estate has benefitted. Section 270 of the Restatement Second of Trusts permits the creditor to reach trust property if by the terms of the trust the settlor manifested an intention to confer such a power on the creditor. Section 271 of the Restatement Second of Trusts permits a creditor to reach trust property on a contractual claim if the contract provides that the trustee shall not be personally liable upon the contract and the contract was properly made by the trustee in the administration of the trust. Section 271A of the Restatement Second of Trusts permits a creditor to obtain satisfaction out of the trust estate if it is equitable to permit him to do so.

For example, assume Chicago Bank makes a loan to the trustee of First Trust, secured by First Trust's holdings of Fuchsia Corp. stock. The loan provides that trustee is not personally liable. The trustee decants First Trust and distributes all of its assets to Second Trust. Chicago Bank may enforce the loan against the property of Second Trust, including the Fuchsia Corp. stock, to the same extent it could have enforced the loan against the property of First Trust. If Second Trust also owns property not attributed to the decanting, Section 15-16-927 does not expose such property to Chicago Bank's claim.

Assume instead that the trustee of First Trust decanted and distributed all of the Fuchsia Corp. stock to Second Trust, and distributed all of the other assets of First Trust to Third Trust. Chicago Bank may enforce the loan against the Fuchsia Corp. stock held by Second Trust to the same extent it could have enforced the loan against the Fuchsia Corp. stock when it was held by First Trust. If prior to the decanting Chicago Bank could have enforced the loan against the property of First Trust other than the Fuchsia Corp. stock to the extent the

value of the Fuchsia Corp. stock was insufficient to satisfy the loan, after the decanting Chicago Bank may enforce the loan, to the extent the Fuchsia Corp. stock is insufficient to satisfy the loan, against the other property of Second Trust and Third Trust to the extent it was attributable to the property of First Trust.

Section 15-16-927 only applies to a debt, liability or other obligation that is in existence and enforceable against the property of the first trust at the time of the decanting.

Section 15-16-927 is not intended to impede an authorized fiduciary from exercising the decanting power in a manner that may protect the property of the second trust from debts, liabilities or obligations of the settlor or a beneficiary to a greater extent than the property of the first trust would have been protected from such debts, liabilities or obligations. For example, a decanting may add a spendthrift provision to a trust. As another example, a decanting under Section 15-16-911 could postpone or eliminate a prospective withdrawal right of a beneficiary or eliminate a general power of appointment that is not presently exercisable.

15-16-928. 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.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 890, § 1, effective August 10.

15-16-929. Relation to electronic signatures in global and national commerce act.

This part 9 modifies, limits, or supersedes the "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 890, § 1, effective August 10.

15-16-930. Severability.

If any provision of this part 9 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part 9 which can be given

effect without the invalid provision or application, and to this end the provisions of this part 9 are severable.

Source: L. 2016: Entire part added, (SB 16-085), ch. 228, p. 890, § 1, effective August 10.

15-16-931. (Reserved)

ARTICLE 17

Effective Date - Transition

15-17-101. Time of taking effect - provisions for transition.

15-17-102. Effective date - applicability for reenactment of article 11. (Repealed)

15-17-103. Effective date - applicability of repealed and reenacted parts 1 to 4 of article 14 of this title.

15-17-101. Time of taking effect - provisions for transition.

(1) This code takes effect on July 1, 1974.

(2) Except as provided elsewhere in this code, including but not limited to sections 15-11-601, 15-11-701, 15-11-1106, and 15-17-103, on the effective date of this code or of any amendment to this code:

(a) The code or the amendment applies to governing instruments executed by decedents dying thereafter;

(b) The code or the amendment applies to any proceedings in court then pending or thereafter commenced, regardless of the time of the death of decedent, except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code or any amendment to this code;

(c) Every personal representative or other fiduciary holding an appointment on July 1, 1974, or before the effective date of an amendment to this code continues, to hold the appointment but has only the powers conferred by this code and by any amendment to this code and is subject to the duties imposed by this code and by any amendment to this code with respect to any act occurring or done thereafter;

(d) An act done before July 1, 1974, or before the effective date of an amendment to this code, in any proceeding is not impaired by this code or by any amendment to this code. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before July 1, 1974, or before the effective date of an amendment to this code, the provisions of that statute shall remain in force with respect to that right;

(e) Any rule of construction or presumption provided in this code or in any amendment to this code applies to governing instruments executed before July 1, 1974, or before the effective date of an amendment to this code, unless there is a clear indication of a contrary intent;

(f) No provision of this code or of any amendment to this code shall apply retroactively if the court determines that such application would cause the provisions to be retrospective in its operation in violation of section 11 of article II of the state constitution; and

(g) The law in effect at the time of death identifies the heirs and determines the shares under intestacy in accordance with sections 15-11-101 to 15-11-103.

Source: L. 73: R&RE, p. 1645, § 1. **C.R.S. 1963:** § 153-8-101. **L. 75:** (2)(b) and (2)(c) amended, p. 606, § 61, effective July 1. **L. 2013:** Entire section amended, (SB 13-077), ch. 190, p. 779, § 14, effective August 7. **L. 2018:** IP(2) amended, (SB 18-180), ch. 169, p. 1194, § 15, effective January 1, 2019.

ANNOTATION

Legislative intent. This section evidences the intent of the general assembly to preserve prior existing rights and to preclude disruption of such rights due to the change in the law effected by the Colorado probate code. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Subsection (2)(a) trumps (2)(b) to the extent that they conflict. Subsection (2)(a) pertains only to proceedings involving governing instruments; by contrast, subsection (2)(b) has no such limitation. Thus, subsection (2)(a) is more specific. In re Estate of Ramstetter, 2016 COA 81, 411 P.3d 1043.

New probate code inapplicable to will automatically revoked by statute. Where decedent's will was automatically revoked by operation of statute that was in effect as the time of decedent's marriage, the new probate code did not apply to will of decedent even though he died after 1974. Phillips v. Liechty, 674 P.2d 1001 (Colo. App. 1983).

Election of the surviving spouse to one-half of the augmented estate was disallowed insofar as it would affect assets transferred to a revocable inter vivos trust prior to July 1, 1974, the effective date of the Colorado probate code. In re Estate of

Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

The probate court properly refused to apply the augmented estate provisions of § 15-11-202 to joint tenancies where the joint tenancies vested prior to the effective date of the Colorado probate code. Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977), aff'd, 194 Colo. 505, 574 P.2d 500 (1978).

Applied in Price v. Sommermeyer, 195 Colo. 285, 577 P.2d 752 (1978); In re Estate of Beasley, 40 Colo. App. 347, 578 P.2d 662 (1978); In re Estate of Daigle, 634 P.2d 71 (Colo. 1981); Lopata v. Metzel, 641 P.2d 952 (Colo. 1982).

15-17-102. Effective date - applicability for reenactment of article 11. (Repealed)

Source: L. 94: Entire section added, p. 1039, § 14, effective July 1, 1995. **L. 2013:** Entire section repealed, (SB 13-077), ch. 190, p. 780, § 15, effective August 7.

15-17-103. Effective date - applicability of repealed and reenacted parts 1 to 4 of article 14 of this title.

(1) Parts 1 to 4 of article 14 of this title, as repealed and reenacted effective January 1, 2001, shall apply to any and all estates, trusts, or protective proceedings whether created or filed prior to or on or after said date.

(2) In circumstances where the terms of an instrument creating an estate or trust created prior to January 1, 2001, or in cases where court orders have been issued prior to January 1, 2001, which are contrary to, or inconsistent with, the law or procedure set forth in parts 1 to 4 of article 14 of this title, as repealed and reenacted effective January 1, 2001, the court orders or terms of the instrument will control unless and until the court issues subsequent orders as authorized under said parts 1 to 4.

Source: L. 2001: Entire section added, p. 889, § 10, effective June 1.

DECLARATIONS - FUTURE HEALTH CARE TREATMENT

ARTICLE 18

Colorado Medical Treatment Decision Act

15-18-101. Short title.
15-18-102. Legislative declaration.

15-18-103. Definitions.
15-18-104. Declaration as to medical treatment.
15-18-105. Inability of declarant to sign.
15-18-106. Witnessed or notarized declaration.
15-18-107. Withdrawal - withholding of life-sustaining procedures.
15-18-108. Determination of validity.
15-18-109. Revocation of declaration.
15-18-110. Liability.
15-18-111. Determination of suicide or homicide - effect of declaration on insurance.
15-18-112. Application of article.
15-18-113. Penalties - refusal - transfer.

15-18-101. Short title.

This article shall be known and may be cited as the "Colorado Medical Treatment Decision Act".

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 375, § 1, effective August 11.

15-18-102. Legislative declaration.

(1) The general assembly hereby finds, determines, and declares that:

(a) Colorado law has traditionally recognized the right of an adult to accept or reject medical or surgical treatment;

(b) Recent advances in medical science have made it possible to prolong the dying process through the use of medical or surgical procedures;

(c) The use of such medical or surgical procedures increasingly involves patients who have a terminal condition or are in a persistent vegetative state, and lack decisional capacity to accept or reject medical or surgical treatment;

(d) The traditional right to accept or reject medical or surgical treatment should be available to an adult while he or she has decisional capacity, notwithstanding the fact that such medical or surgical treatment may be offered or applied when he or she has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment;

(e) This article affirms the traditional right to accept or reject medical or surgical treatment, and creates a procedure by which an adult with decisional capacity may make such decisions in advance of medical need;

(f) It is the intent of the general assembly that nothing in this article shall have the effect of modifying or changing currently practiced medical ethics or protocol with respect to any patient in the absence of a declaration as provided for in section 15-18-104;

(g) It is the intent of the general assembly that nothing in this article shall require any adult to execute a declaration.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 375, § 1, effective August 11.

15-18-103. Definitions.

As used in this article 18, unless the context otherwise requires:

(1) "Adult" means any person eighteen years of age or older.

(2) "Advanced practice registered nurse" means a nurse who is included in the advanced practice registry pursuant to section 12-255-111.

(3) "Artificial nutrition and hydration" means:

(a) Nutrition or hydration supplied through a tube inserted into the stomach or intestines; or

(b) Nutrients or fluids injected intravenously into the bloodstream.

(4) "Attending physician" means the physician, whether selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient.

(5) "Court" means the district court of the county in which a declarant having a terminal condition or in a persistent vegetative state is located at the time of commencement of a proceeding pursuant to this article or, if in the city and county of Denver, the probate court.

(6) "Decisional capacity" means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health-care benefit decision.

(7) "Declarant" means an adult possessing decisional capacity who executes a declaration.

(8) "Declaration" means a written document voluntarily executed by a declarant in accordance with the requirements of section 15-18-104.

(9) "Hospital" means an institution holding a license or certificate of compliance as a hospital issued by the department of public health and environment and includes hospitals operated by the federal government in Colorado.

(10) "Life-sustaining procedure" means any medical procedure or intervention that, if administered to a qualified patient, would serve only to prolong the dying process, and shall not include any medical procedure or intervention for nourishment of the qualified patient or considered necessary by the attending physician or advanced practice registered nurse to provide comfort or alleviate pain.

(11) "Persistent vegetative state" is defined by reference to the criteria and definitions employed by prevailing community medical standards of practice.

(12) "Physician" means a person duly licensed under the provisions of article 240 of title 12.

(13) "Qualified patient" means a patient who has executed a declaration in accordance with this article and who has been certified by his or her attending physician and one other physician to have a terminal condition or be in a persistent vegetative state.

(14) "Terminal condition" means an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to prolong the dying process.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 376, § 1, effective August 11. **L. 2019:** IP, (2), and (12) amended, (HB 19-1172), ch. 136, p. 1670, § 81, effective October 1.

15-18-104. Declaration as to medical treatment.

(1) Any adult with decisional capacity may execute a declaration directing that life-sustaining procedures be withheld or withdrawn if, at some future time, he or she has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment. It shall be the responsibility of the declarant or someone acting for the declarant to provide the declaration to the attending physician or advanced practice registered nurse for entry in the declarant's medical record.

(2) Repealed.

(3) (a) A declaration may contain separate written statements regarding the declarant's preference concerning life-sustaining procedures and artificial nutrition and hydration if the declarant has a terminal condition or is in a persistent vegetative state.

(b) The declarant may provide in his or her declaration one of the following actions:

(I) That artificial nutrition and hydration not be continued;

(II) That artificial nutrition and hydration be continued for a specified period; or

(III) That artificial nutrition and hydration be continued.

(4) Notwithstanding the provisions of subsection (3) of this section and section 15-18-103 (10), when an attending physician or advanced practice registered nurse has determined that pain results from a discontinuance of artificial nutrition and hydration, the physician or advanced practice registered nurse may order that artificial nutrition and hydration be continued to the extent necessary to provide comfort and alleviate pain.

(5) A declaration executed in accordance with section 15-18-106 by any adult with decisional capacity is legally effective for the purposes of this article 18.

(6) A declaration executed pursuant to this article may include a document with a written statement as provided in section 15-19-205 (a), or a written statement in substantially similar form, indicating a decision regarding organ and tissue donation. The document shall be executed in accordance with the provisions of the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of this title 15.

(7) A declaration executed pursuant to this article may be combined with a medical power of attorney to create a single document. Such a document shall comply with all requirements of this title and in accordance with the provisions of the "Colorado Patient Autonomy Act", sections 15-14-503 to 15-14-509.

(8) A declaration executed pursuant to this article may include a written statement in which the declarant designates individuals with whom the declarant's attending physician, any other treating physician, or another medical professional may speak concerning the declarant's medical condition prior to a final determination as to the withholding or withdrawal of life-sustaining procedures, including artificial nutrition and hydration. The designation of such individuals in the document shall be considered to be consistent with the privacy requirements of the federal "Health Insurance Portability and Accountability Act of 1996", 42 U.S.C. sec. 1320d to 1320d-8, as amended, referred to in this section as "HIPAA", regarding waiver of confidentiality.

(9) A declaration executed pursuant to this article may include a written statement providing individual medical directives from the declarant to the attending physician or any other treating medical personnel.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 377, § 1, effective August 11. **L. 2011:** (7) amended, (SB 11-083), ch. 101, p. 317, § 26, effective August 10. **L. 2017:** (6) amended, (SB 17-223), ch. 158, p. 558, § 7, effective August 9. **L. 2021:** (5) amended, (SB 21-

195), ch. 115, p. 447, § 2, effective May 7; (2) repealed, (SB 21-193), ch. 433, p. 2859, § 2, effective September 7.

ANNOTATION

Law reviews. For article, "Anticipating Disabilities: Voluntary Planning Opportunities in Colorado", see 17 Colo. Law. 437 (1988). For article, "The Lawyer's Role in End-of-Life Planning Moving Beyond Advance Medical Directives", see 44 Colo. Law. 101 (July 2015).

The state's living will statute requires that two physicians must certify as to a patient's incapacitation for a period of seven consecutive days before such patient's declaration regarding medical treatment can be given effect. Living Will Ctr. v. NBC Subsidiary, 857 P.2d 514 (Colo. App. 1993) (decided prior to 2010 repeal and reenactment).

15-18-105. Inability of declarant to sign.

(1) In the event that the declarant is physically unable to sign the declaration, it may be signed by some other person in the declarant's presence and at the declarant's direction. The other person shall not be:

(a) The attending physician or any other physician;

(b) An employee of the attending physician or health-care facility in which the declarant is a patient;

(c) A person who has a claim against any portion of the estate of the declarant at his or her death at the time the declaration is signed; or

(d) A person who knows or believes that he or she is entitled to any portion of the estate of the declarant upon the declarant's death either as a beneficiary of a will in existence at the time the declaration is signed or as an heir at law.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11.

15-18-106. Witnessed or notarized declaration.

(1) Except as otherwise provided in section 15-18-105, a declaration must be:

(a) Signed by the declarant in the presence of two witnesses; or

(b) Signed by the declarant and acknowledged before a notary public or other individual authorized by law to take acknowledgments, unless a court determines that this subsection (1)(b) should not apply to the declaration in the interest of justice.

(2) For the purposes of this section, a person specified in section 15-18-105 shall not be a witness, notary public, or other individual authorized by law to take acknowledgments.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11. **L. 2021:** Entire section amended, (SB 21-195), ch. 115, p. 447, § 1, effective May 7.

15-18-107. Withdrawal - withholding of life-sustaining procedures.

In the event that an attending physician is presented with an unrevoked declaration executed by a declarant whom the physician believes has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment, the attending physician shall order the declarant to be examined by one other physician. If both physicians find that the declarant has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment, they shall certify such fact in writing and enter such in the qualified patient's medical record of the hospital in which the withholding or withdrawal of life-sustaining procedures or artificial nutrition and hydration may occur, together with a copy of the declaration. If the attending physician has actual knowledge of the whereabouts of either the qualified patient's agent under a medical power of attorney or, without regard to order, the patient's spouse, a person designated under the "Colorado Designated Beneficiary Agreement Act", as described in article 22 of this title, any of his or her adult children, a parent, sibling, or any other person designated in writing by the qualified patient, the attending physician shall immediately make a reasonable effort to notify at least one of said persons that a certificate has been signed. If no action to challenge the validity of a declaration has been filed within forty-eight hours after the certification is made by the physicians, the attending physician shall then withdraw or withhold all life-sustaining procedures or artificial nutrition and hydration pursuant to the terms of the declaration.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 379, § 1, effective August 11.

15-18-108. Determination of validity.

(1) Any person who is the parent, adult child, spouse, designated beneficiary under the "Colorado Designated Beneficiary Agreement Act", article 22 of this title, or attorney-in-fact under a durable power of attorney of the qualified patient may challenge the validity of a declaration in the appropriate court of the county in which the qualified patient is located. Upon the filing of a petition to challenge the validity of a declaration and notification to the attending physician, a temporary restraining order shall be issued until a final determination as to validity is made.

(2) (a) In proceedings pursuant to this section, the court shall appoint a guardian ad litem for the qualified patient, and the guardian ad litem shall take such actions as he or she deems necessary and prudent in the best interests of the qualified patient and shall present to the court a report of his or her actions, findings, conclusions, and recommendations.

(b) (I) Unless the court, for good cause shown, provides for a different method or time of notice, the petitioner, at least seven days prior to the hearing, shall cause notice of the time and place of hearing to be given as follows:

(A) To the qualified patient's guardian or conservator, if any, and the court-appointed guardian ad litem; and

(B) To the qualified patient's spouse or beneficiary under the "Colorado Designated Beneficiary Agreement Act", article 22 of this title, if the identity and whereabouts of such person is known to the petitioner, or otherwise to an adult child or parent of the qualified patient.

(II) Notice as required in this paragraph (b) shall be made in accordance with the Colorado rules of civil procedure.

(c) The court may require evidence, including independent medical evidence, as it deems necessary.

(3) Upon a determination of the validity of the declaration, the court shall enter any appropriate order.

(4) If the court determines that any proceedings pursuant to this section or any pleadings filed in such proceedings were brought, defended, or filed in bad faith, the court may assess the fees and costs, including reasonable attorney fees, incurred by the affected parties in responding to the proceedings or pleadings, against a party that brought or defended the proceedings or filed the pleadings in bad faith. Nothing in this section is intended to limit any other remedy, sanction, or surcharge provided by law.

(5) Any declaration executed in compliance with the requirements of Colorado law in effect at the time the declaration was made shall continue to be an effective declaration after August 11, 2010.

(6) Any declaration executed in compliance with the laws of the state in which the declaration was executed shall be considered effective for use within the state of Colorado to the extent that such declaration does not violate any laws of the state of Colorado.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 380, § 1, effective August 11. **L. 2012:** IP(2)(b)(I) amended, (SB 12-175), ch. 208, p. 842, § 56, effective July 1.

15-18-109. Revocation of declaration.

A declaration may be revoked by the declarant orally, in writing, or by burning, tearing, canceling, obliterating, or destroying said declaration.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

15-18-110. Liability.

(1) With respect to any declaration that appears on its face to have been executed in accordance with the requirements of this article:

(a) Any physician or advanced practice registered nurse may act in compliance with such declaration in the absence of actual notice of revocation, fraud, misrepresentation, or improper execution;

(b) A physician who signs a certificate withholding or withdrawing life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor;

(c) A hospital or person acting under the direction of a physician and participating in the withholding or withdrawal of life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor; and

(d) An advanced practice registered nurse who withholds or withdraws life-sustaining procedures in compliance with a declaration shall not be subject to civil liability, criminal penalty, or licensing sanctions therefor.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

Cross references: For other circumstances under which physicians are not subject to civil or criminal liability, see §§ 13-21-108 and 13-22-106.

15-18-111. Determination of suicide or homicide - effect of declaration on insurance.

The withholding or withdrawal of life-sustaining procedures from a qualified patient pursuant to this article shall not, for any purpose, constitute a suicide or a homicide. The existence of a declaration shall not affect, impair, or modify any contract of life insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life insurance or any increase of the premium therefor. No insurer or provider of health care shall require any person to execute a declaration as a condition of being insured for or receiving health-care services, nor shall the failure to execute a declaration be the basis for any increased or additional premium for a contract or policy for medical or health insurance.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

15-18-112. Application of article.

(1) Nothing in this article shall be construed as altering or amending the standards of the practice of medicine or nursing or establishing any presumption, absent a valid declaration, nor as condoning, authorizing, or approving euthanasia or mercy killing, nor as permitting any affirmative or deliberate act or omission to end life, except to permit natural death as provided in this article. Nothing in this article shall require the provision or continuation of medical treatment contrary to the standards of the practice of medicine.

(2) A diagnosis of persistent vegetative state shall be performed by a qualified medical professional according to standards of the practice of medicine. Nothing in this article shall be interpreted to define "persistent vegetative state" in contradiction of standards of the practice of medicine.

(3) In the event of any conflict between the provisions of this article, or a declaration executed under this article, and the provisions of section 15-14-501, the provisions of this article and the declaration shall prevail.

(4) Notwithstanding the provisions of subsection (3) of this section, a declarant may include within the declaration or within any power of attorney executed by the declarant a written

statement to the effect that the agent under power of attorney may override the provisions of the declaration.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 381, § 1, effective August 11.

15-18-113. Penalties - refusal - transfer.

(1) A person who willfully conceals, defaces, damages, or destroys a declaration of another person, without the knowledge and consent of the declarant, commits a class 2 misdemeanor and shall be punished as provided in section 18-1.3-501.

(2) A person who falsifies or forges a declaration of another person commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

(3) If a person falsifies or forges a declaration of another person and the terms of the declaration are carried out, resulting in the death of the purported declarant, the person commits a class 2 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

(4) A person who willfully withholds information concerning the revocation of a declaration of another person commits a class 2 misdemeanor and shall be punished as provided in section 18-1.3-501.

(5) An attending physician or advanced practice registered nurse who refuses to comply with the terms of a declaration valid on its face shall transfer the care of the declarant to another physician or advanced practice registered nurse who is willing to comply with the declaration. Refusal of an attending physician or advanced practice registered nurse to comply with a declaration and failure to transfer the care of the declarant to another physician or advanced practice registered nurse shall constitute unprofessional conduct as defined in section 12-240-121 or grounds for discipline pursuant to section 12-255-120.

Source: L. 2010: Entire article R&RE, (HB 10-1025), ch. 113, p. 382, § 1, effective August 11; (5) amended, (HB 10-1422), ch. 419, p. 2126, § 189, effective August 11. **L. 2019:** (5) amended, (HB 19-1172), ch. 136, p. 1670, § 82, effective October 1. **L. 2021:** (1) and (4) amended, (SB 21-271), ch. 462, p. 3159, § 162, effective March 1, 2022.

ARTICLE 18.5

Proxy and Surrogate Decision-makers for Medical Treatment and Health-Care Benefit Decisions

15-18.5-101. Legislative declaration - construction of statute.

15-18.5-102. Definitions applicable to medical durable power of attorney - applicability.

15-18.5-103. Proxy decision-makers for medical treatment authorized - definitions.

15-18.5-104. Surrogate decision-makers for health-care benefits.

15-18.5-105. Statutory form for certificate of appointment of surrogate decision-makers for health-care benefits.

15-18.5-101. Legislative declaration - construction of statute.

(1) The general assembly hereby finds, determines, and declares that:

(a) All adult persons have a fundamental right to make their own medical treatment and health-care benefit decisions, including decisions regarding medical treatment, artificial nourishment and hydration, and private or public health-care benefits;

(b) The lack of decisional capacity to provide informed consent to or refusal of medical treatment should not preclude such decisions from being made on behalf of a person who lacks such decisional capacity and who has no known advance medical directive, or whose wishes are not otherwise known; and

(c) The enactment of legislation to authorize proxy decision-makers to make medical treatment decisions and surrogate decision-makers to make health-care benefit decisions on behalf of persons lacking the decisional capacity to provide informed consent to or refusal of medical treatment is appropriate.

(2) The general assembly does not intend to encourage or discourage any particular medical treatment or to interfere with or affect any method of religious or spiritual healing otherwise permitted by law.

(3) Nothing in this article shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this article be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this article.

Source: L. 92: Entire article added, p. 1984, § 3, effective June 4. **L. 2006:** (1)(a) and (1)(c) amended, p. 841, § 3, effective May 4.

15-18.5-102. Definitions applicable to medical durable power of attorney - applicability.

(1) The definitions set forth in section 15-14-505 shall apply to the provisions of this article.

(2) The provisions of sections 15-14-506 to 15-14-509 shall apply to this article. In addition, proxy decision-makers, surrogate decision-makers for health-care benefits, health-care providers, and health-care facilities shall be subject to the provisions of this article.

Source: L. 92: Entire article added, p. 1985, § 3, effective June 4. **L. 2006:** (2) amended, p. 841, § 4, effective May 4.

15-18.5-103. Proxy decision-makers for medical treatment authorized - definitions.

(1) A health-care provider or health-care facility may rely, in good faith, upon the medical treatment decision of a proxy decision-maker selected in accordance with subsection (4) of this section if an adult patient's attending physician determines that such patient lacks the decisional capacity to provide informed consent to or refusal of medical treatment and no guardian with medical decision-making authority, agent appointed in a medical durable power of attorney, person with the right to act as a proxy decision-maker in a designated beneficiary agreement made pursuant to article 22 of this title, or other known person has the legal authority to provide such consent or refusal on the patient's behalf.

(1.5) As used in this section:

(a) "Interested person" means a patient's spouse, either parent of the patient, any adult child, sibling, or grandchild of the patient, or any close friend of the patient.

(b) "Proxy decision-maker" does not mean the attending physician.

(2) The determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment may be made by a court or the attending physician, and the determination shall be documented in such patient's medical record. The determination may also be made by an advanced practice registered nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically. The advanced practice registered nurse shall document in the patient's record the name of the physician with whom the advanced practice registered nurse collaborated. The attending physician shall make specific findings regarding the cause, nature, and projected duration of the patient's lack of decisional capacity, which findings shall be included in the patient's medical record.

(3) Upon a determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment, the attending physician, the advanced practice registered nurse, or such physician's or nurse's designee, shall make reasonable efforts to notify the patient of the patient's lack of decisional capacity. In addition, the attending physician, or such physician's designee, shall make reasonable efforts to locate as many interested persons as practicable, and the attending physician or advanced practice registered nurse may rely on such individuals to notify other family members or interested persons. Upon locating an interested person, the attending physician, advanced practice registered nurse, or such physician's or nurse's designee, shall inform such person of the patient's lack of decisional capacity and that a proxy decision-maker should be selected for the patient.

(4) (a) Interested persons who are informed of the patient's lack of decisional capacity shall make reasonable efforts to reach a consensus as to who among them shall make medical treatment decisions on behalf of the patient. The person selected to act as the patient's proxy decision-maker should be the person who has a close relationship with the patient and who is most likely to be currently informed of the patient's wishes regarding medical treatment decisions. If any of the interested persons disagrees with the selection or the decision of the proxy decision-maker or, if, after reasonable efforts, the interested persons are unable to reach a consensus as to who should act as the proxy decision-maker, then any of the interested persons may seek guardianship of the patient by initiating guardianship proceedings pursuant to part 3 of article 14 of this title. Only said interested persons may initiate such proceedings with regard to the patient.

(b) Nothing in this section precludes any interested person from initiating a guardianship proceeding pursuant to part 3 of article 14 of this title for any reason any time after said persons have conformed with paragraph (a) of this subsection (4).

(c) (I) An attending physician may designate another willing physician to make health-care treatment decisions as a patient's proxy decision-maker if:

(A) After making reasonable efforts, the attending physician or his or her designee cannot locate any interested persons, or no interested person is willing and able to serve as proxy decision-maker;

(B) The attending physician has obtained an independent determination of the patient's lack of decisional capacity by another physician; by an advanced practice registered nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically; or by a court;

(C) The attending physician or his or her designee has consulted with and obtained a consensus on the proxy designation with the medical ethics committee of the health-care facility where the patient is receiving care; and

(D) The identity of the physician designated as proxy decision-maker is documented in the medical record.

(II) For the purposes of subsections (4)(c)(I)(C), (4)(c)(V)(B), and (4)(c)(V)(C) of this section, if the health-care facility does not have a medical ethics committee, the facility shall refer the attending physician or his or her designee to a medical ethics committee at another health-care facility.

(III) The authority of the proxy decision-maker terminates in the event that:

(A) An interested person is willing to serve as proxy decision-maker;

(B) A guardian is appointed;

(C) The patient regains decisional capacity;

(D) The proxy decision-maker decides to no longer serve as the patient's proxy decision-maker; or

(E) The patient is transferred or discharged from the facility, if any, where the patient is receiving care, unless the proxy decision-maker expresses his or her intention to continue to serve as proxy decision-maker.

(IV) If the authority of a proxy decision-maker terminates for one of the reasons described in subparagraph (III) of this paragraph (c), the attending physician shall document the reason in the patient's medical record.

(V) The attending physician and the proxy decision-maker shall adhere to the following guidelines for proxy decision-making:

(A) For routine treatments and procedures that are low-risk and within broadly accepted standards of medical practice, the attending physician may make health-care treatment decisions;

(B) For treatments that otherwise require a written, informed consent, such as treatments involving anesthesia, treatments involving a significant risk of complication, or invasive procedures, the attending physician shall obtain the written consent of the proxy decision-maker and a consensus with the medical ethics committee;

(C) For end-of-life treatment that is nonbeneficial and involves withholding or withdrawing specific medical treatments, the attending physician shall obtain an independent concurring opinion from a physician other than the proxy decision-maker, and obtain a consensus with the medical ethics committee.

(5) When an attending physician determines that an adult patient lacks decisional capacity, the attending physician or another health-care provider shall make reasonable efforts to advise the patient of such determination, of the identity of the proxy decision-maker, and of the patient's right to object, pursuant to section 15-14-506 (4)(a).

(6) (a) Artificial nourishment and hydration may be withheld or withdrawn from a patient upon a decision of a proxy only when the attending physician and a second independent physician trained in neurology or neurosurgery certify in the patient's medical record that the provision or continuation of artificial nourishment or hydration is merely prolonging the act of dying and is unlikely to result in the restoration of the patient to independent neurological functioning.

(b) (I) Nothing in this article may be construed as condoning, authorizing, or approving euthanasia or mercy killing.

(II) Nothing in this article may be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this article.

(6.5) The assistance of a health-care facility's medical ethics committee shall be provided upon the request of a proxy decision-maker or any other interested person whenever the proxy decision-maker is considering or has made a decision to withhold or withdraw medical treatment. If there is no medical ethics committee for a health-care facility, such facility may provide an outside referral for such assistance or consultation.

(7) If any interested person or the guardian or the attending physician believes the patient has regained decisional capacity, then the attending physician shall reexamine the patient and determine whether the patient has regained such decisional capacity and shall enter the decision and the basis therefore into the patient's medical record and shall notify the patient, the proxy decision-maker, and the person who initiated the redetermination of decisional capacity.

(8) Except for a court acting on its own motion, a governmental entity, including the state department of human services and the county departments of human or social services, may not petition the court as an interested person pursuant to part 3 of article 14 of this title 15. In addition, nothing in this article 18.5 authorizes the county director of any county department of human or social services, or designee of such director, to petition the court pursuant to section 26-3.1-104 in regard to any patient subject to the provisions of this article 18.5.

(9) (a) Any attending physician, health-care provider, or health-care facility that makes reasonable attempts to locate and communicate with a proxy decision-maker shall not be subject to civil or criminal liability or regulatory sanction therefor.

(b) A physician acting in good faith as a proxy decision-maker in accordance with paragraph (c) of subsection (4) of this section is not subject to civil or criminal liability or regulatory sanction for acting as a proxy decision-maker. An attending physician or his or her designee remains responsible for his or her negligent acts or omissions in rendering care to an unrepresented patient.

Source: L. 92: Entire article added, p. 1985, § 3, effective June 4. **L. 94:** (8) amended, p. 2647, § 115, effective July 1. **L. 2008:** (2) and (3) amended, p. 125, § 5, effective January 1, 2009. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 446, § 13, effective July 1. **L. 2010:** (1) amended, (SB 10-199), ch. 374, p. 1753, § 20, effective July 1. **L. 2016:** (1.5) added and (3), (4), (6), (6.5), (7), and (9) amended, (HB 16-1101), ch. 170, p. 537, § 1, effective August 10. **L. 2017:** (4)(c)(II) amended, (SB 17-294), ch. 264, p. 1392, § 33, effective May 25. **L. 2018:** (8) amended, (SB 18-092), ch. 38, p. 404, § 20, effective August 8.

Cross references: (1) For the legislative declaration contained in the 1994 act amending subsection (8), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration in SB 18-092, see section 1 of chapter 38, Session Laws of Colorado 2018.

(2) For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

ANNOTATION

Law reviews. For article, "The Lawyer's Role in End-of-Life Planning Moving Beyond Advance Medical Directives", see 44 Colo. Law. 101 (July 2015).

Decision to agree to arbitrate is not a "medical treatment decision" and as such not within the authority of a health care proxy. There exists a distinction between an agreement to provide medical services, including an agreement to admit a patient to a health care facility, and an agreement to arbitrate a health care dispute. Lujan v. Life Care Ctrs. of Am., 222 P.3d 970 (Colo. App. 2009).

Subsection (8) does not preclude a governmental entity acting as a guardian from executing a cardiopulmonary resuscitation directive. People ex rel. Yeager, 93 P.3d 589 (Colo. App. 2004).

15-18.5-104. Surrogate decision-makers for health-care benefits.

(1) A proxy decision-maker for medical treatment selected in accordance with section 15-18.5-103 or a person with the right to act as a surrogate decision-maker in a designated beneficiary agreement made pursuant to article 22 of this title shall have authority to make health-care benefit decisions on behalf of an adult patient and may be known additionally as a surrogate decision-maker for health-care benefits.

(2) A court or the attending physician may make the determination that a person lacks the decisional capacity to make health-care benefit decisions. The determination shall be documented in such patient's medical record. The determination may also be made by an

advanced practice registered nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically. The advanced practice registered nurse shall document in the patient's record the name of the physician with whom the advanced practice registered nurse collaborated. The attending physician or nurse shall make specific findings regarding the cause, nature, and projected duration of the person's lack of decisional capacity regarding health-care benefit decisions. Such determination and findings shall be documented in the person's medical record.

(3) Upon a determination that an adult patient lacks decisional capacity to make health-care benefit decisions, the attending physician, advanced practice registered nurse, or the physician's or nurse's designee shall make reasonable efforts to notify the patient of the patient's lack of decisional capacity. In addition, the attending physician or advanced practice registered nurse or the physician's or nurse's designee shall make reasonable efforts to locate as many interested persons as defined in this subsection (3) as practicable, and the attending physician or advanced practice registered nurse may rely on such individuals to notify other family members or interested persons. For the purposes of this section, "interested persons" means the patient's spouse; either parent of the patient; any adult child, sibling, or grandchild of the patient; or any close friend of the patient. Upon locating an interested person, the attending physician or advanced practice registered nurse or the physician's or nurse's designee shall inform such person of the patient's lack of decisional capacity and determine whether such interested person is available, willing, and has the capability to act as a surrogate decision-maker for health-care benefits for the patient.

(4) If a proxy decision-maker for medical treatment or an interested person, as defined in subsection (3) of this section, is unavailable, unwilling, or does not have the capability to make a health-care benefit decision on behalf of a person lacking the decisional capacity to make a health-care benefit decision pursuant to this section, then the attending physician or his or her designee may appoint a surrogate decision-maker for health-care benefits as described in subsection (5) of this section.

(5) The surrogate decision-maker for health-care benefits appointed by an attending physician or his or her designee may be a private individual or an individual acting on behalf of an organization, including an employee of the organization, willing to voluntarily assume the fiduciary responsibility to make health-care benefit decisions in the best interests of the person who lacks the decisional capacity to make health-care benefit decisions. The appointed surrogate decision-maker for health-care benefits shall be free of conflicts specified in subsection (9) of this section.

(6) Community and charitable organizations may provide volunteers or employees to serve as surrogate decision-makers for health-care benefits. The division of insurance, established in section 10-1-103, C.R.S., shall be available to provide assistance to surrogate decision-makers for health-care benefits regarding medicare benefits. A physician or his or her designee may

contact nonprofit entities that serve the elderly or disability communities for assistance in locating an appropriate surrogate decision-maker for health-care benefits.

(7) After a physician or his or her designee locates an individual willing to act as the surrogate decision-maker for health-care benefits pursuant to subsection (3) of this section, the physician shall certify the appointment in writing on the form set forth in section 15-18.5-105.

(8) If the surrogate decision-maker for health-care benefits, a proxy decision-maker for medical treatment, an interested person, the person's guardian, or the attending physician believes the patient has regained decisional capacity, then the attending physician shall reexamine the patient and determine whether or not the patient has regained such decisional capacity and shall enter the decision and the basis therefor into the patient's medical record and shall notify the patient, the surrogate decision-maker for health-care benefits, and the person who initiated the redetermination of decisional capacity.

(9) A surrogate decision-maker for health-care benefits may not be an employee, a contractor, or an official representative of, or receive any remuneration of any kind from, a health-care provider, medical benefit provider, pharmaceutical company, pharmacy benefit management company, pharmacy, or any person or entity engaged in the sale of insurance.

(10) A surrogate decision-maker for health-care benefits shall have access to all necessary information, including but not limited to:

(a) Personal health information as defined by the federal "Health Insurance Portability and Accountability Act of 1996", 42 U.S.C. sec. 1320d-7 (a)(2); and

(b) Financial information needed to make appropriate health-care benefit decisions; except that any bank, trust company, savings and loan association, credit union, or insurance company regulated under any laws of this state or the United States and any officer, employee, agent, or affiliate of any of the foregoing entities shall be exempt from any requirement to provide financial information to a surrogate decision-maker under the provisions of this section.

(11) A surrogate decision-maker for health-care benefits shall make decisions that are in the best interests of the person on whose behalf the decisions are made.

(12) Any entity, including a financial entity, that relies in good faith on a certificate of appointment of a surrogate decision-maker for health-care benefits received directly from the attending physician or his or her designee shall be immune from liability for actions taken on the basis of said certificate.

(13) A surrogate decision-maker for health-care benefits shall be immune from liability for decisions made in good faith.

(14) An attending physician, health-care provider, or health-care facility that acts in substantial compliance with this section shall not be subject to civil or criminal liability or

regulatory sanction relating to the selection or actions of a surrogate decision-maker for health-care benefits.

(15) Nothing in this section shall be construed as requiring a surrogate decision-maker for health-care benefits to make a decision or from prohibiting an individual from consulting another person or entity to obtain assistance in making a health-care benefit decision.

Source: L. 2006: Entire section added, p. 841, § 5, effective May 4. **L. 2008:** (2) and (3) amended, p. 125, § 6, effective January 1, 2009. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 446, § 14, effective July 1. **L. 2010:** (1) amended, (SB 10-199), ch. 374, p. 1754, § 21, effective July 1.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

ANNOTATION

Decision to agree to arbitrate is not a "medical treatment decision" and as such not within the authority of a health care proxy. There exists a distinction between an agreement to provide medical services, including an agreement to admit a patient to a health care facility, and an agreement to arbitrate a health care dispute. Lujan v. Life Care Ctrs. of Am., 222 P.3d 970 (Colo. App. 2009).

15-18.5-105. Statutory form for certificate of appointment of surrogate decision-makers for health-care benefits.

The following statutory form for certificate of appointment of surrogate decision-maker for health-care benefits is legally sufficient:

CERTIFICATE OF APPOINTMENT OF A SURROGATE

DECISION-MAKER FOR HEALTH-CARE BENEFITS

(1) I, (name of attending physician), the attending physician, certify that (name of person for whom decisions are being made) lacks the decisional capacity to make health-care benefit decisions. I further certify that I have made the necessary documentation to the medical record.

(2) I, (name of attending physician), the attending physician or designee, hereby appoint (name of surrogate), (driver's license number or state ID number) as the surrogate decision-maker for health-care benefits on behalf of (name of person for whom decisions are being made), (address, city, state) pursuant to section 15-18.5-104, C.R.S.

(3) (Name of surrogate) shall have access to all necessary personal health information as defined by the federal Health Insurance Portability and Accountability Act and any financial information necessary to make appropriate health-care benefit decisions on behalf of (name of person for whom decisions are being made), as provided for in section 15-18.5-104, C.R.S. (Name of surrogate) shall make such decisions in the best interests of (name of person for whom decisions are being made).

Executed this _____ day of _____, ____.

_____

(Attending physician)

(Business address)

(Business phone)

(Business fax)

Source: L. 2006: Entire section added, p. 841, § 5, effective May 4.

ARTICLE 18.6

Directive Relating to Cardiopulmonary Resuscitation

15-18.6-101. Definitions.

15-18.6-102. CPR directives for CPR - who may execute.

15-18.6-103. CPR directive forms - duties of state board of health.

15-18.6-104. Duty to comply with CPR directive - immunity - effect on criminal charges against another person.

15-18.6-105. Effect of declaration after inpatient admission.

15-18.6-106. Effect of CPR directive - absence - on life or health insurance.

15-18.6-107. Revocation of CPR directive.

15-18.6-108. Effect of article on euthanasia - mercy killing - construction of statute.

15-18.6-101. Definitions.

As used in this article 18.6, unless the context otherwise requires:

(1) "Cardiopulmonary resuscitation" or "CPR" means measures to restore cardiac function or to support breathing in the event of cardiac or respiratory arrest or malfunction. "CPR" includes, but is not limited to, chest compression, delivering electric shock to the chest, or placing tubes in the airway to assist breathing.

(2) "CPR directive" means an advance medical directive pertaining to the administration of cardiopulmonary resuscitation.

(3) "Emergency medical service personnel" means an emergency medical service provider at any level who is certified or licensed by the department of public health and environment. "Emergency medical service personnel" includes an emergency medical responder registered by the department of public health and environment in accordance with section 25-3.5-1103.

Source: L. 92: Entire article added, p. 1988, § 3, effective June 4. **L. 94:** (3) amended, p. 2731, § 350, effective July 1. **L. 2002:** (3) amended, p. 1211, § 7, effective June 3. **L. 2012:** (3) amended, (HB 12-1059), ch. 271, p. 1433, § 9, effective July 1; (3) amended, (HB 12-1283), ch. 240, p. 1131, § 37, effective July 1. **L. 2019:** IP and (3) amended, (SB 19-242), ch. 396, p. 3526, § 8, effective May 31.

Editor's note: Amendments to subsection (3) by House Bill 12-1059 and House Bill 12-1283 were harmonized.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration in the 2012 act amending subsection (3), see section 1 of chapter 240, Session Laws of Colorado 2012.

15-18.6-102. CPR directives for CPR - who may execute.

Any adult over age eighteen who has the decisional capacity to provide informed consent to or refusal of medical treatment or any other person who is, pursuant to the laws of this state or any other state, authorized to make medical treatment decisions on behalf of an adult who lacks such decisional capacity, may execute a CPR directive. After a physician issues a "do not resuscitate" order for a minor child, and only then, may the parents of the minor, if married and living

together, the custodial parent or parent with decision-making responsibility for such a decision, or the legal guardian execute a CPR directive.

Source: L. 92: Entire article added, p. 1988, § 3, effective June 4. **L. 94:** Entire section amended, p. 1058, § 1, effective May 4. **L. 98:** Entire section amended, p. 1402, § 54, effective February 1, 1999.

ANNOTATION

Morgan county department of human services, acting as guardian, is a "person" authorized to execute a "do not resuscitate" order on behalf of an incapacitated person. People ex rel. Yeager, 93 P.3d 589 (Colo. App. 2004).

15-18.6-103. CPR directive forms - duties of state board of health.

(1) On or before January 1, 1993, the state board of health shall promulgate rules and protocols for the implementation of CPR directives by emergency medical service personnel. The protocols adopted by the board of health shall include uniform methods of identifying persons who have executed a CPR directive. Protocols adopted by the board of health shall include methods for rapid identification of persons who have executed a CPR directive, controlled distribution of the methods of identifying persons who have executed a CPR directive, and the information described in subsection (2) of this section. Nothing in this subsection (1) shall be construed to restrict any other manner in which a person may make a CPR directive.

(2) CPR directive protocols to be adopted by the state board shall require the following information concerning the person who is the subject of the CPR directive:

(a) The person's name, date of birth, and sex;

(b) The person's eye and hair color;

(c) The person's race or ethnic background;

(d) If applicable, the name of a hospice program in which the person is enrolled;

(e) The name, address, and telephone number of the person's attending physician;

(f) The person's signature or mark or, if applicable, the signature of a person authorized by this article to execute a CPR directive;

(g) The date on which the CPR directive form was signed;

(h) The person's directive concerning the administration of CPR, countersigned by the person's attending physician;

(i) The person's directive in the form of a document with a written statement as provided in section 15-19-205 (b), or a statement in substantially similar form, indicating a decision regarding tissue donation. The document shall be executed in accordance with the provisions of the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of this title 15. The written statement may be in the following form:

I hereby make an anatomical gift, to be effective upon my death, of:

A.___ Any needed tissues

B.___ The following tissues:

___ Skin

___ Cornea

___ Bone, related tissues, and tendons

Donor signature: _____

Source: L. 92: Entire article added, p. 1988, § 3, effective June 4. **L. 98:** (2) (i) added, p. 1172, § 8, effective June 1. **L. 2007:** (2)(i) amended, p. 797, § 6, effective July 1. **L. 2017:** (2)(i) amended, (SB 17-223), ch. 158, p. 558, § 8, effective August 9.

15-18.6-104. Duty to comply with CPR directive - immunity - effect on criminal charges against another person.

(1) Emergency medical service personnel, health-care providers, and health-care facilities shall comply with a person's CPR directive that is apparent and immediately available. Any emergency medical service personnel, health-care provider, health-care facility, or any other person who, in good faith, complies with a CPR directive shall not be subject to civil or criminal liability or regulatory sanction for such compliance.

(2) Compliance by emergency medical service personnel, health-care providers, or health-care facilities with a CPR directive shall not affect the criminal prosecution of any person otherwise charged with the commission of a criminal act.

(3) In the absence of a CPR directive, a person's consent to CPR shall be presumed.

Source: L. 92: Entire article added, p. 1989, § 3, effective June 4.

15-18.6-105. Effect of declaration after inpatient admission.

A CPR directive for any person who is admitted to a health-care facility shall be implemented as a physician's order concerning resuscitation as directed by the person in the CPR directive, pending further physicians' orders.

Source: L. 92: Entire article added, p. 1990, § 3, effective June 4.

15-18.6-106. Effect of CPR directive - absence - on life or health insurance.

Neither a CPR directive nor the failure of a person to execute one shall affect, impair, or modify any contract of life or health insurance or annuity or be the basis for any delay in issuing or refusing to issue an annuity or policy of life or health insurance or any increase of a premium therefor.

Source: L. 92: Entire article added, p. 1990, § 3, effective June 4.

15-18.6-107. Revocation of CPR directive.

A CPR directive may be revoked at any time by a person who is the subject of such directive or by the agent or proxy decision-maker for such person. However, only those CPR directives executed originally by a guardian, agent, or proxy decision-maker may be revoked by a guardian, agent, or proxy decision-maker.

Source: L. 92: Entire article added, p. 1990, § 3, effective June 4. **L. 94:** Entire section amended, p. 1058, § 2, effective May 4.

15-18.6-108. Effect of article on euthanasia - mercy killing - construction of statute.

Nothing in this article shall be construed as condoning, authorizing, or approving euthanasia or mercy killing. In addition, the general assembly does not intend that this article be construed as

permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this article.

Source: L. 92: Entire article added, p. 1990, § 3, effective June 4.

ARTICLE 18.7

Directives Concerning Orders for Scope of Treatment

PART 1
DIRECTIVES CONCERNING MEDICAL ORDERS FOR SCOPE OF TREATMENT

15-18.7-101. Legislative declaration.

15-18.7-102. Definitions.

15-18.7-103. Medical orders for scope of treatment forms - form contents.

15-18.7-104. Duty to comply with medical orders for scope of treatment form - immunity - effect on criminal charges against another person - transferability.

15-18.7-105. Moral convictions and religious beliefs - notice required - transfer of a patient.

15-18.7-106. Medical orders for scope of treatment form - who may consent.

15-18.7-107. Revision and revocation of a medical orders for scope of treatment form - duty to inform.

15-18.7-108. Medical orders for scope of treatment form not required for treatment.

15-18.7-109. Effect of a medical orders for scope of treatment form on life or health insurance.

15-18.7-110. Effect of article on existing advance medical directives.

PART 2
DIRECTIVES CONCERNING BEHAVIORAL HEALTH ORDERS FOR SCOPE OF TREATMENT

15-18.7-201. Definitions.

15-18.7-202. Behavioral health orders for scope of treatment - form contents - effect.

15-18.7-203. Amendment and revocation of a behavioral health orders for scope of treatment.

15-18.7-204. Effect of behavioral health orders for scope of treatment.

15-18.7-205. Duty to comply with behavioral health orders for scope of treatment - immunity - effect on criminal charges against another person - transferability.

15-18.7-206. Behavioral health orders for scope of treatment not required for treatment.

15-18.7-207. Effect of a behavioral health orders for scope of treatment on life or health insurance.

PART 1

DIRECTIVES CONCERNING MEDICAL ORDERS FOR SCOPE OF TREATMENT

15-18.7-101. Legislative declaration.

(1) The general assembly hereby finds that:

(a) Colorado law has traditionally recognized the right of an adult or his or her authorized surrogate decision-maker to accept or reject medical treatment and artificial nutrition or hydration;

(b) Each adult has the right to establish, in advance of the need for medical treatment, directives and instructions for the administration of medical treatment in the event the adult later lacks the decisional capacity to provide informed consent to, withdraw from, or refuse medical treatment;

(c) Current instruments for making advance medical directives are often underutilized, hampered by certain institutional barriers, and inconsistently interpreted and implemented; and

(d) The frail elderly, chronically or terminally ill, and nursing home resident population is in particular need of a consistent method for identifying and communicating critical treatment preferences that each sector of the health-care community will recognize and follow.

(2) The general assembly therefore concludes that it is in the best interests of the people of Colorado to adopt statutes providing for medical orders for scope of treatment. Consistent with the goal of enhancing patient-centered, compassionate care through methods to enhance continuity across health-care settings, medical orders for scope of treatment will provide a process for timely discussion between individuals and their health-care providers about choices to accept, withdraw, or refuse life-sustaining treatment and, through the use of standardized forms, will ensure those preferences are clearly and unequivocally documented.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1275, § 1, effective August 11.

15-18.7-102. Definitions.

As used in this part 1, unless the context otherwise requires:

(1) "Adult" means a person eighteen years of age or older.

(2) "Advance medical directive" means a written instruction concerning medical treatment decisions to be made on behalf of the adult who provided the instruction in the event that he or she becomes incapacitated. An advance medical directive includes, but need not be limited to:

(a) A medical durable power of attorney executed pursuant to section 15-14-506;

(b) A declaration executed pursuant to the "Colorado Medical Treatment Decision Act", article 18 of this title;

(c) A power of attorney granting medical treatment authority executed prior to July 1, 1992, pursuant to section 15-14-501, as it existed prior to that date; or

(d) A CPR directive or declaration executed pursuant to article 18.6 of this title.

(3) "Artificial nutrition or hydration" means:

(a) Nutrition or hydration supplied through a tube inserted into the stomach or intestines; or

(b) Nutrients or fluids injected intravenously into the bloodstream.

(4) "Authorized surrogate decision-maker" means a guardian appointed pursuant to article 14 of this title, an agent appointed pursuant to a medical durable power of attorney, a proxy decision-maker for medical treatment decisions appointed pursuant to article 18.5 of this title, or a similarly authorized surrogate, as defined by the laws of another state, who is authorized to make medical decisions for an individual who lacks decisional capacity.

(5) "Cardiopulmonary resuscitation" or "CPR" shall have the same meaning as set forth in section 15-18.6-101 (1).

(6) "CPR directive" shall have the same meaning as set forth in section 15-18.6-101 (2).

(7) "Decisional capacity" means the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health-care benefit decision.

(8) "Emergency medical service personnel" means an emergency medical service provider who is certified or licensed by the department of public health and environment, created and existing under section 25-1-102, or an emergency medical responder registered by the department of public health and environment in accordance with section 25-3.5-1103.

(9) "Health-care facility" means a hospital, a hospice inpatient residence, a nursing facility, a dialysis treatment facility, an assisted living residence, an entity that provides home- and community-based services, a hospice or home health-care agency, or another facility that provides or contracts to provide health-care services, which facility is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment.

(10) "Health-care provider" means:

(a) A physician or other individual who provides medical treatment to an adult and who is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment or who is employed by or acting for such an authorized person; or

(b) A health maintenance organization licensed and conducting business in this state.

(11) "Medical treatment" means the provision, withholding, or withdrawal of any:

(a) Health care;

(b) Medical procedure, including but not limited to surgery, CPR, and artificial nutrition or hydration; or

(c) Service to maintain, diagnose, treat, or provide for a patient's physical or mental health care.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1276, § 1, effective August 11. **L. 2012:** (8) amended, (HB 12-1059), ch. 271, p. 1433, § 10, effective July 1; (8) amended, (HB 12-1283), ch. 240, p. 1131, § 38, effective July 1. **L. 2019:** IP and (8) amended, (SB 19-242), ch. 396, p. 3526, § 9, effective May 31; IP amended, (HB 19-1044), ch. 60, p. 211, § 3, effective August 2.

Editor's note: (1) Amendments to subsection (8) by House Bill 12-1059 and House Bill 12-1283 were harmonized.

(2) The introductory portion to this section was amended in SB 19-242. Those amendments were superseded by the amendment of the introductory portion in HB 19-1044.

Cross references: For the legislative declaration in the 2012 act amending subsection (8), see section 1 of chapter 240, Session Laws of Colorado 2012. For the legislative declaration in HB 19-1044, see section 1 of chapter 60, Session Laws of Colorado 2019.

15-18.7-103. Medical orders for scope of treatment forms - form contents.

(1) A medical orders for scope of treatment form must include the following information concerning the adult whose medical treatment is the subject of the medical orders for scope of treatment form:

(a) The adult's name, date of birth, and sex;

(b) The adult's eye and hair color;

(c) The adult's race or ethnic background;

(d) If applicable, the name of the hospice program in which the adult is enrolled;

(e) The name, address, and telephone number of the adult's physician, advanced practice registered nurse, or physician assistant;

(f) The adult's signature or mark or, if applicable, the signature of the adult's authorized surrogate decision-maker;

(g) The date upon which the medical orders for scope of treatment form was signed;

(h) The adult's instructions concerning:

(I) The administration of CPR;

(II) Other medical interventions, including but not limited to consent to comfort measures only, transfer to a hospital, limited intervention, or full treatment; and

(III) Other treatment options;

(i) The signature of the adult's physician, advanced practice registered nurse, or physician assistant.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1278, § 1, effective August 11. **L. 2016:** (1)(e) and (1)(i) amended, (SB 16-158), ch. 204, p. 725, § 11, effective August 10. **L. 2023:** IP(1) and (1)(i) amended, (SB 23-083), ch. 114, p. 415, § 11, effective August 7.

Cross references: For the legislative declaration in SB 16-158, see section 1 of chapter 204, Session Laws of Colorado 2016.

15-18.7-104. Duty to comply with medical orders for scope of treatment form - immunity - effect on criminal charges against another person - transferability.

(1) (a) Except as provided in sections 15-18.7-105 and 15-18.7-107 (1), emergency medical service personnel, a health-care provider, or a health-care facility shall comply with an adult's executed medical orders for scope of treatment form that:

(I) Has been executed in this state or another state;

(II) Is apparent and immediately available; and

(III) Reasonably satisfies the requirements of a medical orders for scope of treatment form specified in section 15-18.7-103.

(b) The fact that the physician, advanced practice registered nurse, or physician assistant who signed an adult's medical orders for scope of treatment form does not have admitting privileges at the hospital or health-care facility where the adult is being treated does not remove the duty of emergency medical service personnel, a health-care provider, or a health-care facility to comply with the medical orders for scope of treatment form as required by paragraph (a) of this subsection (1).

(2) Emergency medical service personnel, a health-care provider, a health-care facility, or any other person who complies with a legally executed medical orders for scope of treatment form that is apparent and immediately available and that he or she believes to be the most current version of the form shall not be subject to civil or criminal liability or regulatory sanction for such compliance.

(3) Compliance by emergency medical service personnel, a health-care provider, or a health-care facility with an executed medical orders for scope of treatment form shall not affect the criminal prosecution of a person otherwise charged with the commission of a criminal act.

(4) In the absence of an executed medical orders for scope of treatment form declining CPR or a CPR directive, an adult's consent to CPR shall be presumed.

(5) An adult's physician, advanced practice registered nurse, or physician assistant may provide an oral confirmation to a health-care provider who shall annotate on the medical orders for scope of treatment form the time and date of the oral confirmation and the name and license number of the physician, advanced practice registered nurse, or physician assistant. The physician, advanced practice registered nurse, or physician assistant shall countersign the annotation of the oral confirmation on the medical orders for scope of treatment form within a time period that satisfies any applicable state law or within thirty days, whichever period is less, after providing the oral confirmation. The signature of the physician, advanced practice registered nurse, or physician assistant may be provided by photocopy, fax, or electronic means. A medical orders for scope of treatment form with annotated oral confirmation, and a photocopy,

fax, or other electronic reproduction of the form, shall be given the same force and effect as the original form signed by the physician, advanced practice registered nurse, or physician assistant.

(6) (a) Nothing in this part 1 shall be construed to modify or alter any generally accepted ethics, standards, protocols, or laws for the practice of medicine or nursing, including the provisions in section 15-18.6-108 concerning euthanasia and mercy killing.

(b) A medical orders for scope of treatment form shall not be construed to compel or authorize a health-care provider or health-care facility to administer medical treatment that is medically inappropriate or prohibited by state or federal law.

(7) If an adult who is known to have properly executed and signed a medical orders for scope of treatment form is transferred from one health-care facility or health-care provider to another, the transferring health-care facility or health-care provider shall communicate the existence of the form to the receiving health-care facility or health-care provider before the transfer. The transferring health-care facility or health-care provider shall ensure that the form or a copy of the form accompanies the adult upon admission to or discharge from a health-care facility.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1278, § 1, effective August 11. **L. 2016:** (1)(b) and (5) amended, (SB 16-158), ch. 204, p. 725, § 12, effective August 10. **L. 2019:** (6)(a) amended, (HB 19-1044), ch. 60, p. 211, § 4, effective August 2. **L. 2023:** (5) amended, (SB 23-083), ch. 114, p. 415, § 12, effective August 7.

Cross references: For the legislative declaration in SB 16-158, see section 1 of chapter 204, Session Laws of Colorado 2016. For the legislative declaration in HB 19-1044, see section 1 of chapter 60, Session Laws of Colorado 2019.

15-18.7-105. Moral convictions and religious beliefs - notice required - transfer of a patient.

(1) A health-care provider or health-care facility that provides care to an adult whom the health-care provider or health-care facility knows to have executed a medical orders for scope of treatment form shall provide notice to the adult or, if appropriate, to the authorized surrogate decision-maker of the adult, of any policies based on moral convictions or religious beliefs of the health-care provider or health-care facility relative to the withholding or withdrawal of medical treatment. The health-care provider or health-care facility shall provide the notice, when reasonably possible, prior to providing medical treatment or prior to or upon the admission of the adult to the health-care facility, or as soon as possible thereafter.

(2) A health-care provider or health-care facility shall provide for the prompt transfer of an adult who has executed a medical orders for scope of treatment form to another health-care provider or health-care facility if the transferring health-care provider or health-care facility chooses not to comply with the provisions of the form on the basis of policies based on moral convictions or religious beliefs.

(3) Nothing in this section shall relieve or exonerate an attending physician or health-care facility from the duty to provide for the care and comfort of an adult pending transfer pursuant to this section.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11.

15-18.7-106. Medical orders for scope of treatment form - who may consent.

(1) An adult who has decisional capacity may execute a medical orders for scope of treatment form.

(2) Except as provided in section 15-18.7-110 (3), the authorized surrogate decision-maker for an adult who lacks decisional capacity may execute a medical orders for scope of treatment form for said adult.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11.

15-18.7-107. Revision and revocation of a medical orders for scope of treatment form - duty to inform.

(1) (a) A health-care provider may revise the provisions of an adult's executed medical orders for scope of treatment form only if:

(I) (A) The adult's medical condition has changed since the adult or the adult's authorized surrogate decision-maker executed the form; or

(B) The provisions of the form are not, in the provider's independent medical judgment, medically appropriate;

(II) The provider consults with the adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker concerning the revision of the form; and

(III) The adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker consents to the revision of the provisions of the form.

(b) If a health-care provider revises an adult's executed medical orders for scope of treatment form pursuant to paragraph (a) of this subsection (1):

(I) The provider shall record the revisions on the form; and

(II) The provider and the adult or, if the adult lacks decisional capacity, the adult's authorized surrogate decision-maker, shall sign and date the form.

(2) An adult who has decisional capacity and has executed a medical orders for scope of treatment form may revoke his or her consent to all or part of the form at any time and in any manner that clearly communicates an intent to revoke all or part of the form.

(3) Except as provided in section 15-18.7-110 (3), the authorized surrogate decision-maker for an adult who lacks decisional capacity may revoke the adult's previously executed medical orders for scope of treatment form.

(4) Emergency medical service personnel, a health-care provider, or an authorized surrogate decision-maker who becomes aware of the revocation of a medical orders for scope of treatment form shall promptly communicate the fact of the revocation to a physician, advanced practice registered nurse, or physician assistant who is providing care to the adult who is the subject of the form.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1280, § 1, effective August 11. **L. 2016:** (4) amended, (SB 16-158), ch. 204, p. 726, § 13, effective August 10.

Cross references: For the legislative declaration in SB 16-158, see section 1 of chapter 204, Session Laws of Colorado 2016.

15-18.7-108. Medical orders for scope of treatment form not required for treatment.

A health-care facility shall not require a person to have executed a medical orders for scope of treatment form as a condition of being admitted to, or receiving medical treatment from, the health-care facility.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1281, § 1, effective August 11.

15-18.7-109. Effect of a medical orders for scope of treatment form on life or health insurance.

An insurer may not refuse to insure, refuse to continue to insure, or limit the amount, extent, or kind of coverage available for life insurance, health insurance, or within an annuity to an individual, or charge an individual a different rate for the same coverage, solely because such individual executed a medical orders for scope of treatment form or has not executed a medical orders for scope of treatment form. With respect to all other conditions, persons who have executed a medical orders for scope of treatment form must be subject to the same standards of sound actuarial principles or actual or reasonably anticipated experience as are persons who have not executed a medical orders for scope of treatment form.

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1281, § 1, effective August 11. **L. 2019:** Entire section amended, (HB 19-1044), ch. 60, p. 211, § 5, effective August 2.

Cross references: For the legislative declaration in HB 19-1044, see section 1 of chapter 60, Session Laws of Colorado 2019.

15-18.7-110. Effect of article on existing advance medical directives.

(1) In executing a medical orders for scope of treatment form, an adult, or the adult's authorized surrogate decision-maker, and the physician, advanced practice registered nurse, or physician assistant who signs the form shall make a good-faith effort to locate and incorporate, as appropriate and desired, treatment preferences documented in the adult's previously executed advance medical directives, if any.

(2) Except as otherwise provided in paragraph (a) of subsection (3) of this section, in case of a conflict between a medical orders for scope of treatment form and an adult's advance medical directives, the document most recently executed shall take precedence for the medical decision or treatment preference at issue. Medical decisions and treatment preferences documented in an adult's advance medical directives or asserted by an authorized surrogate decision-maker on the adult's behalf, but not specifically addressed in a more recently executed medical orders for scope of treatment form, shall not be affected by the medical orders for scope of treatment form.

(3) Notwithstanding the provisions of subsection (1) of this section:

(a) An authorized surrogate decision-maker or a physician, advanced practice registered nurse, or physician assistant may not revoke or alter an adult's previously executed advance

medical directive regarding provision of artificial nutrition or hydration if the directive is documented in a declaration executed by the adult pursuant to the "Colorado Medical Treatment Decision Act", article 18 of this title.

(b) An authorized surrogate decision-maker may not revoke a preexisting CPR directive unless it was originally executed by an authorized surrogate decision-maker.

(c) An authorized surrogate decision-maker who is a proxy decision-maker pursuant to article 18.5 of this title may authorize the withdrawal of artificial nutrition or hydration only in accordance with section 15-18.5-103 (6).

Source: L. 2010: Entire article added, (HB 10-1122), ch. 279, p. 1282, § 1, effective August 11. **L. 2016:** (1) and (3)(a) amended, (SB 16-158), ch. 204, p. 726, § 14, effective August 10.

Cross references: For the legislative declaration in SB 16-158, see section 1 of chapter 204, Session Laws of Colorado 2016.

PART 2

DIRECTIVES CONCERNING BEHAVIORAL HEALTH ORDERS FOR SCOPE OF TREATMENT

Cross references: For the legislative declaration in HB 19-1044, see section 1 of chapter 60, Session Laws of Colorado 2019.

15-18.7-201. Definitions.

As used in this part 2, unless the context otherwise requires:

(1) "Adult" means a person eighteen years of age or older.

(2) "Agent" means a person eighteen years of age or older who is authorized by an adult to make decisions concerning behavioral health treatment, medication, and alternative treatment for the adult to the extent authorized by the adult.

(3) "Behavioral health" has the same meaning as set forth in section 27-60-100.3 (1).

(4) "Behavioral health orders for scope of treatment", "behavioral health orders form", or "psychiatric advance directive" means a written instruction, created pursuant to section 15-18.7-

202, concerning behavioral health treatment, medication, and alternative treatment decisions, preferences, and history to be made on behalf of the adult who provided the instruction.

(5) "Behavioral health treatment" means the provision, withholding, or withdrawal of any behavioral health:

(a) Examination;

(b) Service;

(c) Procedure; or

(d) Medication.

(6) "Disinterested witness" means an adult other than a spouse, partner in a civil union, domestic partner, romantic partner, child, parent, sibling, grandchild, grandparent, health-care provider, person who at the time of the adult's signature has a claim against any portion of the adult's estate at the time of the adult's death, or person who knows or believes that he or she has an entitlement to any portion of the adult's estate at the time of the adult's death either as a beneficiary of a will that exists at the time of the adult's signature or as an heir at law, who can attest that the adult executing the behavioral health orders form was of sound mind and free of coercion when he or she signed the behavioral health orders form.

(7) "Emergency medical service personnel" means:

(a) An emergency medical service provider who is certified or licensed by the department of public health and environment, created and existing pursuant to section 25-1-102;

(b) An emergency medical responder or a registered emergency medical responder, as defined in section 25-3.5-1102 (1) and (3);

(c) A crisis response system contractor, as defined in section 27-60-100.3 (4).

(8) "Health-care facility" means:

(a) A hospital;

(b) A hospice inpatient residence;

(c) A nursing facility;

(d) A dialysis treatment facility;

(e) An assisted living residence;

(f) An entity that provides home-based and community-based services;

(g) A hospice or home health-care agency;

(h) The Colorado mental health institute at Fort Logan;

(i) The Colorado mental health institute at Pueblo; or

(j) Another facility that provides or contracts to provide health-care services, which facility is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment.

(9) "Health-care provider" means:

(a) A physician or other individual who provides medical treatment to an adult and who is licensed, certified, or otherwise authorized or permitted by law to provide medical treatment or who is employed by or acting for such an authorized person;

(b) A professional person, as defined in section 27-65-102 (27);

(c) A mental health professional licensed, certified, or registered pursuant to article 245 of title 12; or

(d) Any other health-care provider regulated by the state when engaged in assisting consumers with behavioral health-care access and coverage issues.

(10) "Sound mind" means the ability to provide informed consent to or refusal of behavioral health treatment or the ability to make an informed behavioral health-care benefit decision.

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 204, § 2, effective August 2. **L. 2022:** (9)(b) amended, (HB 22-1256), ch. 451, p. 3226, § 21, effective August 10.

15-18.7-202. Behavioral health orders for scope of treatment - form contents - effect.

(1) A behavioral health orders form must include the following information concerning the adult whose behavioral health treatment, medication, and alternative treatment are the subject of the behavioral health orders form:

(a) The adult's name, date of birth, and gender;

(b) The adult's eye and hair color;

(c) The adult's race or ethnic background;

(d) The adult's instructions concerning behavioral health treatment;

(e) The adult's instructions concerning medication, including primary and alternative instructions;

(f) The adult's instructions concerning alternative treatment;

(g) The adult's instructions concerning appointing an agent or not appointing an agent. If the adult chooses to appoint an agent, he or she must include:

(I) The name, address, and telephone number of the agent; and

(II) The scope of the agent's authority when acting on behalf of the adult. The scope of the agent's authority must be either:

(A) The agent is limited to executing the adult's instructions detailed on the behavioral health orders form; or

(B) The agent has authority to make decisions concerning behavioral health treatment, medication, and alternative treatment on behalf of the adult.

(h) The adult's signature or mark, and the date that the adult signed the behavioral health orders form;

(i) Two disinterested witnesses' signatures or marks, and the date that the disinterested witnesses signed the behavioral health orders form;

(j) The agent's signature or mark, and the date that the agent signed the behavioral health orders form, if applicable;

(k) The name, address, and telephone number of the adult's health-care provider, if applicable; and

(l) The name of the health-care facility in which the adult is enrolled, if applicable.

(2) A behavioral health orders form is effective upon compliance with this section.

(3) A behavioral health orders form is effective for two years following the date that the adult signed the behavioral health orders form, unless the adult executes a new behavioral health orders form, or amends or revokes the behavioral health orders form, before the behavioral health orders form becomes ineffective.

(4) Nothing in this part 2 allows an adult to include in his or her behavioral health orders form an instruction that exempts the adult from an involuntary emergency procedure, certification, or commitment authorized pursuant to state law. Any instruction that attempts to exempt the adult from an involuntary emergency procedure, certification, or commitment authorized pursuant to state law is void.

(5) A behavioral health orders form may be admissible in a hearing pursuant to section 27-65-113 for the purpose of establishing the adult's behavioral health treatment, medication, and alternative treatment history, decisions, and preferences to be made on behalf of the adult during an involuntary emergency procedure, certification, or commitment authorized pursuant to state law.

(6) Nothing in this part 2 means that an adult who has executed a behavioral health orders form has waived the right to a hearing before the court or jury pursuant to section 27-65-113.

(7) Nothing in this part 2 means that an adult who has executed a behavioral health orders form has consented to a petition for involuntary administration of medication authority pursuant to section 27-65-113 (3).

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 206, § 2, effective August 2. **L. 2020:** (4) and (5) amended, (SB 20-136), ch. 70, p. 283, § 6, effective September 14. **L. 2022:** (5), (6), and (7) amended, (HB 22-1256), ch. 451, p. 3227, § 22, effective August 10. **L. 2026:** (7) amended, (SB 26-149), ch. 142, p. 793, § 38, effective May 21.

Cross references: For the legislative declaration in SB 20-136, see section 1 of chapter 70, Session Laws of Colorado 2020.

15-18.7-203. Amendment and revocation of a behavioral health orders for scope of treatment.

(1) The adult may amend or revoke all or part of his or her behavioral health orders form at any time.

(2) An amended behavioral health orders form is effective for two years following the date that the adult signed the amended behavioral health orders form, unless the adult executes a new behavioral health orders form, or amends or revokes the amended behavioral health orders form, before the amended behavioral health orders form becomes ineffective.

(3) In order to execute a valid amendment or revocation, the adult must:

(a) Execute a new behavioral health orders form; or

(b) Mark the existing behavioral health orders form in a manner that clearly communicates the intent to amend or revoke all or part of the behavioral health orders form.

(4) In order for the amendment or revocation to be valid, the amendment or revocation must include:

(a) The adult's signature or mark, and the date that the adult executed the new behavioral health orders form or amended or revoked the behavioral health orders form;

(b) Two disinterested witnesses' signatures or marks, and the date that the disinterested witnesses signed the new behavioral health orders form or the amended or revoked behavioral health orders form; and

(c) (I) Except as provided in subsection (4)(c)(II) of this section, the agent's signature or mark, and the date that the agent signed the new behavioral health orders form or the amended or revoked behavioral health orders form, if applicable.

(II) An agent's signature or mark must not be required for an amendment to be valid if the adult is amending the behavioral health orders form to remove the agent.

(5) Emergency medical service personnel, a health-care provider, or an agent who becomes aware of a new, amended, or revoked behavioral health orders form shall promptly communicate the fact to a health-care provider who is providing care to the adult who is the subject of the behavioral health orders form.

(6) A properly executed new, amended, or revoked behavioral health orders form controls over a previously executed behavioral health orders form.

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 207, § 2, effective August 2.

15-18.7-204. Effect of behavioral health orders for scope of treatment.

(1) In executing a behavioral health orders form, the adult, agent, and the health-care provider shall make a good-faith effort to locate and incorporate, as appropriate and desired, the behavioral health treatment, medication, and alternative treatment decisions, preferences, or history documented in the adult's behavioral health orders form.

(2) Except as otherwise provided in subsection (3)(a) of this section, in case of a conflict between a behavioral health orders form and an adult's advance medical directive, the document most recently executed controls for the behavioral health treatment, medication, or alternative treatment decision or preference at issue.

(3) Notwithstanding any provision of this part 2 to the contrary:

(a) An agent or health-care provider may not revoke or amend the adult's previously executed advance medical directive regarding provision of artificial nutrition or hydration if the directive is documented in a declaration executed by the adult pursuant to the "Colorado Medical Treatment Decision Act", article 18 of this title 15;

(b) An agent may not revoke a preexisting CPR directive unless it was originally executed by the agent;

(c) An agent who is a proxy decision-maker pursuant to article 18.5 of this title 15 may authorize the withdrawal of artificial nutrition or hydration only in accordance with section 15-18.5-103 (6).

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 208, § 2, effective August 2.

15-18.7-205. Duty to comply with behavioral health orders for scope of treatment - immunity - effect on criminal charges against another person - transferability.

(1) (a) Except as otherwise provided in this section, emergency medical service personnel, a health-care provider, or a health-care facility shall comply with an adult's executed behavioral health orders form that:

(I) Has been executed in this state or another state;

(II) Is apparent and immediately available; and

(III) Reasonably satisfies the requirements specified in section 15-18.7-202.

(b) The emergency medical service personnel, a health-care provider, or a health-care facility shall comply with the behavioral health orders form as required by subsection (1)(a) of this section unless the adult's instruction on the behavioral health orders form will cause substantial harm to the adult. If the adult's instruction on the behavioral health orders form will cause substantial harm to the adult, the emergency medical service personnel, health-care provider, or health-care facility shall make a good-faith effort to consult with the adult's agent, if applicable, and offer an alternative course of treatment.

(c) In case of a conflict between the adult's behavioral health orders form and the adult's request for behavioral health treatment, medication, or alternative treatment decision or preference, the behavioral health orders form controls for the behavioral health treatment, medication, or alternative treatment decision or preference at issue.

(2) Emergency medical service personnel, a health-care provider, a health-care facility, or any other person who complies with a legally executed behavioral health orders form that is apparent and immediately available and that he or she believes to be the most current version of the behavioral health orders form is not subject to civil or criminal liability or regulatory sanction for such compliance.

(3) Compliance by emergency medical service personnel, a health-care provider, or a health-care facility with an executed behavioral health orders form must not affect the criminal prosecution of a person otherwise charged with the commission of a criminal act.

(4) (a) Nothing in this part 2 modifies or alters any generally accepted ethics, standards, protocols, or laws for emergency medical service personnel, a health-care provider, or a health-care facility, including the provisions in section 15-18.6-108 concerning euthanasia and mercy killing.

(b) A behavioral health orders form does not compel or authorize emergency medical service personnel, a health-care provider, or a health-care facility to administer behavioral health treatment, medication, or alternative treatment that is prohibited by state or federal law.

(5) If the adult who is known to have properly executed and signed a behavioral health orders form is transferred from one health-care facility or health-care provider to another, the transferring health-care facility or health-care provider shall communicate the existence of the behavioral health orders form to the receiving health-care facility or health-care provider before the transfer. The transferring health-care facility or health-care provider shall ensure that the behavioral health orders form or a copy of the behavioral health orders form accompanies the adult upon admission to or discharge from a health-care facility.

(6) (a) Nothing in this part 2 allows an adult to include in his or her behavioral health orders form an instruction that exempts the adult from an involuntary emergency procedure or commitment authorized pursuant to state law. Any instruction that attempts to exempt the adult from an involuntary emergency procedure or commitment authorized pursuant to state law is void.

(b) Notwithstanding an instruction on an adult's behavioral health orders form that states to exempt the adult from an involuntary emergency procedure or commitment authorized pursuant to state law, any person authorized to perform an involuntary emergency procedure or commitment pursuant to state law and who complies with the requirements of an involuntary emergency procedure or commitment pursuant to state law is not subject to civil or criminal liability or regulatory sanction.

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 209, § 2, effective August 2.

15-18.7-206. Behavioral health orders for scope of treatment not required for treatment.

A health-care facility or a health-care provider shall not require an adult to have executed a behavioral health orders form as a condition of being admitted to, or receiving behavioral health treatment, medication, or alternative treatment from, the health-care facility or health-care provider.

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 210, § 2, effective August 2.

15-18.7-207. Effect of a behavioral health orders for scope of treatment on life or health insurance.

An insurer may not refuse to insure, refuse to continue to insure, or limit the amount, extent, or kind of coverage available for life insurance, health insurance, or within an annuity to an individual, or charge an individual a different rate for the same coverage, solely because such individual executed a behavioral health orders form or has not executed a behavioral health orders form. With respect to all other conditions, persons who have executed a behavioral health orders form must be subject to the same standards of sound actuarial principles or actual or reasonably anticipated experience as are persons who have not executed a behavioral health orders form.

Source: L. 2019: Entire part added, (HB 19-1044), ch. 60, p. 211, § 2, effective August 2.

HUMAN BODIES AFTER DEATH

ARTICLE 19

Treatment of Human Bodies After Death

PART 1
DISPOSITION OF LAST REMAINS

15-19-101. Short title.
15-19-102. Legislative declaration - construction.
15-19-103. Definitions.
15-19-104. Declaration of disposition of last remains.
15-19-105. Reliance - declarations.
15-19-106. Right of final disposition.
15-19-106.5. Disposition of abandoned cremated remains of veterans - liability - applicability - definitions.
15-19-107. Declaration of disposition of last remains.
15-19-108. Interstate effect of declaration.
15-19-109. Effect of criminal charges.
15-19-110. Natural reduction.

PART 2
REVISED UNIFORM ANATOMICAL GIFT ACT

15-19-201. Short title.
15-19-202. Definitions.
15-19-203. Applicability.
15-19-204. Who may make anatomical gift before donor's death.
15-19-205. Manner of making anatomical gift before donor's death.

15-19-206. Amending or revoking anatomical gift before donor's death.

15-19-207. Refusal to make anatomical gift - effect of refusal.

15-19-208. Preclusive effect of anatomical gift, amendment, or revocation.

15-19-209. Who may make anatomical gift of decedent's body or part.

15-19-210. Manner of making, amending, or revoking anatomical gift of decedent's body or part.

15-19-211. Persons that may receive anatomical gift - purpose of anatomical gift.

15-19-212. Search and notification. (Reserved)

15-19-213. Delivery of document of gift not required - right to examine.

15-19-214. Rights and duties of procurement organization and others.

15-19-215. Coordination of procurement and use.

15-19-216. Sale or purchase of parts prohibited.

15-19-217. Other prohibited acts.

15-19-218. Immunity.

15-19-219. Law governing validity - choice of law as to execution of document of gift - presumption of validity.

15-19-220. Donor registry.

15-19-221. Effect of anatomical gift on advance health-care directive - definitions.

15-19-222. Cooperation between coroner and procurement organization.

15-19-223. Facilitation of anatomical gift from decedent whose body is under jurisdiction of coroner.

15-19-224. Uniformity of application and construction.

15-19-225. Relation to "Electronic Signatures in Global and National Commerce Act".

PART 3
UNCLAIMED HUMAN BODIES

15-19-301. Board for distribution of unclaimed human bodies - rules.

15-19-302. Duty of public officers as to unclaimed bodies.

15-19-303. Claiming of body - publication of notice.

15-19-304. Disposition of all or any portion of body after death - nonliability.

15-19-305. Unlawful to hold autopsy.

15-19-306. Holding of body for twenty days.
15-19-307. Disposition of remains.
15-19-308. Expense to be borne by institutions.
15-19-309. Penalty.

PART 1

DISPOSITION OF LAST REMAINS

15-19-101. Short title.

The short title of this part 1 is the "Disposition of Last Remains Act".

Source: L. 2003: Entire article added, p. 1348, § 1, effective August 6. **L. 2017:** Entire section amended, (SB 17-223), ch. 158, p. 559, § 9, effective August 9.

15-19-102. Legislative declaration - construction.

(1) The general assembly finds and declares that:

(a) A competent adult individual has the right and power to direct the disposition of his or her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased's desires.

(b) A statute that determines priority of individuals to direct the disposition of a decedent's remains is necessary if the decedent fails to direct such disposition or fails to provide the resources necessary to carry out such disposition or if a dispute arises between interested persons regarding such disposition.

(c) The right to direct the disposition of one's remains must be stated in writing to better protect a third party who relies in good faith on such decisions.

(2) This part 1 shall be interpreted liberally to carry out a decedent's intent when not conflicting with this part 1.

(3) This part 1 shall not be construed to:

(a) Subject to section 15-19-104 (3), invalidate a declaration or a will, codicil, trust, power of appointment, or power of attorney;

(b) Invalidate any act of an agent, guardian, or conservator;

(c) Affect any claim, right, or remedy that accrued prior to August 6, 2003;

(d) Authorize or encourage acts that violate the constitution, statutes, rules, case law, or public policy of Colorado or the United States;

(e) Abridge contracts;

(f) Modify the standards, ethics, or protocols of the practice of medicine;

(g) Compel or authorize a health-care provider or health-care facility, as defined in section 15-14-505, to administer medical treatment that is medically inappropriate or contrary to federal or other Colorado law; or

(h) Permit or authorize euthanasia or an affirmative or deliberate act to end a person's life.

Source: L. 2003: Entire article added, p. 1348, § 1, effective August 6. **L. 2006:** (1)(b), (1)(c), and (3)(a) amended, p. 897, § 1, effective August 7. **L. 2017:** (2) and IP(3) amended, (SB 17-223), ch. 158, p. 559, § 10, effective August 9.

15-19-103. Definitions.

As used in this part 1, unless the context otherwise requires:

(1) "Adult" means a natural person eighteen years of age or older.

(2) "Declarant" means a competent adult who signs a declaration pursuant to the provisions of this part 1.

(3) "Declaration" means a written instrument directing the lawful disposition of the declarant's last remains and the ceremonies planned after a declarant's death, in accordance with this part 1. A declaration may be made within a will; prepaid funeral or final disposition contract; durable or medical power of attorney; a designated beneficiary agreement as described in article 22 of this title 15; a federal record of emergency data; or any other written document, including, but not limited to, a document governing the disposition of last remains under part 7 of article 11 of this title 15.

(3.5) "Federal record of emergency data" means the United States department of defense record of emergency data, DD form 93, or any successor form.

(4) "Interested person" means the deceased's spouse, parent, designated beneficiary, adult child, sibling, grandchild, and other person designated in a declaration.

(5) "Last remains" means the deceased's body or cremains after death.

(5.5) "Natural reduction" or "naturally reduce" has the meaning set forth in section 2-4-401 (6.9).

(6) (Deleted by amendment, L. 2006, p. 897, § 2, effective August 7, 2006.)

(7) (a) "Third party" means a person:

(I) Who is requested by a declaration to act in good faith in reliance upon the declaration;

(II) Who is asked to dispose of last remains by the person with priority to dispose of the decedent's last remains under section 15-19-106; or

(III) Who is delegated discretion over ceremonial or dispositional arrangements in a declaration.

(b) "Third party" includes, but is not limited to, a funeral director, mortuary science practitioner, mortuary, crematorium, or cemetery.

(8) (Deleted by amendment, L. 2006, p. 897, § 2, effective August 7, 2006.)

Source: L. 2003: Entire article added, p. 1349, § 1, effective August 6. **L. 2006:** (3), (4), (6), (7)(a)(I), (7)(a)(III), and (8) amended, p. 897, § 2, effective August 7. **L. 2009:** (3) and (4) amended, (HB 09-1260), ch. 107, p. 446, § 15, effective July 1; (7)(b) amended, (HB 09-1202), ch. 422, p. 2343, § 6, effective July 1. **L. 2010:** (3) amended and (3.5) added, (SB 10-047), ch. 166, p. 585, § 2, effective August 11. **L. 2017:** IP, (2), and (3) amended, (SB 17-223), ch. 158, p. 559, § 11, effective August 9. **L. 2021:** (3) amended and (5.5) added, (SB 21-006), ch. 123, p. 493, § 17, effective September 7.

Cross references: For the legislative declaration in the 2010 act amending subsection (3) and adding subsection (3.5), see section 1 of chapter 166, Session Laws of Colorado 2010.

15-19-104. Declaration of disposition of last remains.

(1) The declarant may specify, in a declaration, any one or more of the following:

(a) The disposition to be made of the declarant's last remains;

(b) The person appointed to direct the disposition of the declarant's last remains;

(c) The ceremonial arrangements to be performed after the declarant's death;

(d) The person appointed to direct the ceremonial arrangements after the declarant's death;

(e) The rights, limitations, immunities, and other terms of third parties dealing with the declaration.

(2) (Deleted by amendment, L. 2006, p. 898, § 3, effective August 7, 2006.)

(3) (a) (I) The provisions of the most recent declaration shall control over any other document regarding the disposition of the declarant's last remains.

(II) (A) Notwithstanding the provisions of subsection (3)(a)(I) of this section, if the declarant is a member of the United States armed forces or the United States reserve forces or a member of a state National Guard called into federal service and the declarant has executed a federal record of emergency data that is valid and enforceable at the time of the declarant's death, then the federal record of emergency data shall control over any other declaration concerning the person authorized to direct the disposition of the declarant's last remains, even if the federal record of emergency data was executed prior to the execution of the most recent declaration pursuant to this part 1. The person authorized to direct disposition of the decedent's last remains pursuant to the federal record of emergency data shall do so in accordance with the provisions for the disposition of the remains and the ceremonial arrangements made by the declarant in his or her most recent declaration concerning his or her disposition and ceremonial arrangements.

(B) For purposes of sub-subparagraph (A) of this subparagraph (II), a federal record of emergency data is valid and enforceable for any declarant who is a covered decedent at the time of his or her death, pursuant to 10 U.S.C. sec. 1481, or any successor section concerning recovery, care, and disposition of remains.

(b) This part 1 shall govern all current and prior declarations.

(c) If article 135 of title 12 conflicts with this part 1, this part 1 shall govern.

(4) (Deleted by amendment, L. 2006, p. 898, § 3, effective August 7, 2006.)

(5) A declaration shall be signed and dated by the declarant and may be notarized or witnessed in writing by at least one adult who confirms that he or she was present when the declarant signed the declaration.

Source: L. 2003: Entire article added, p. 1350, § 1, effective August 6. **L. 2006:** Entire section amended, p. 898, § 3, effective August 7. **L. 2010:** (3)(a) amended, (SB 10-047), ch. 166, p. 585, § 3, effective August 11. **L. 2017:** (3)(a)(II)(A), (3)(b), and (3)(c) amended, (SB 17-223), ch. 158, p. 559, § 12, effective August 9. **L. 2019:** (3)(c) amended, (HB 19-1172), ch. 136, p. 1670, § 83, effective October 1.

Cross references: For the legislative declaration in the 2010 act amending subsection (3)(a), see section 1 of chapter 166, Session Laws of Colorado 2010.

15-19-105. Reliance - declarations.

(1) (a) A third party who provides for the lawful disposition of a declarant's remains in reliance on a declaration that appears to be legally executed shall not be subject to civil liability or administrative discipline for such reliance.

(b) (I) A third party, when presented with a declaration, may presume in the absence of actual knowledge to the contrary:

(A) That the declaration was validly executed;

(B) That the declarant was competent when the instrument was executed; and

(C) That the declaration has not been revoked.

(II) A third party who provides for the lawful disposition of a declarant's remains in reliance on a declaration shall not be civilly or criminally liable for the proper application of property delivered or surrendered to comply with the declarant's instructions in the declaration.

(2) A declaration shall be binding on all persons with an interest in the disposition of the declarant's remains. Section 15-19-106 (1) shall not vest a right to control disposition or ceremonial arrangements that conflict with those made by a declaration. If the declaration conflicts with the directions of any other person, the declaration shall control, and a third party shall provide for the lawful disposition according to the declaration so long as:

(a) No challenge to the validity of the declaration exists under subsection (3) of this section; and

(b) The deceased provided the resources necessary to carry out the disposition.

(3) A challenge to the validity of the declaration or the competency of the declarant when the declaration was executed shall be resolved by the probate court. A third party who knows a declaration has been challenged shall not be liable for refusing to accept, inter, cremate, or otherwise dispose of a declarant's remains until the third party receives a court order or other reasonable confirmation that the challenge has been resolved or settled.

Source: L. 2003: Entire article added, p. 1351, § 1, effective August 6. **L. 2006:** Entire section amended, p. 899, § 4, effective August 7.

15-19-106. Right of final disposition.

(1) Subject to section 15-19-105 (2), the right to control disposition of the last remains or ceremonial arrangements of a decedent vests in and devolves upon the following persons, at the time of the decedent's death, in the following order:

(a) The decedent if acting through a declaration pursuant to section 15-19-104, subject to the provisions of section 15-19-104 (3)(a)(II);

(b) (I) Either the appointed personal representative or special administrator of the decedent's estate if such person has been appointed; or

(II) The nominee for appointment as personal representative under the decedent's will if a personal representative or special administrator has not been appointed;

(c) The surviving spouse of the decedent, if not legally separated from the decedent;

(c.5) A person with the right to direct the disposition of the decedent's last remains in a designated beneficiary agreement made pursuant to article 22 of this title;

(d) A majority of the surviving adult children of the decedent;

(e) A majority of the surviving parents or legal guardians of the decedent, who shall act in writing;

(f) A majority of the surviving adult siblings of the decedent;

(g) (Deleted by amendment, L. 2006, p. 900, § 5, effective August 7, 2006.)

(h) Any person who is willing to assume legal and financial responsibility for the final disposition of the decedent's last remains.

(2) (Deleted by amendment, L. 2006, p. 900, § 5, effective August 7, 2006.)

(3) Disputes among the persons listed under subsection (1) of this section shall be resolved by the probate court. A third party shall not be liable for refusing to accept the decedent's remains or dispose of the decedent's remains until the party receives a court order or other reasonable confirmation that the dispute has been resolved or settled.

(4) (a) If the person with the right to control disposition is unable or unwilling to make such disposition, or if the person's whereabouts cannot be reasonably ascertained, then that person's rights shall terminate and pass to the following, in the following order:

(I) The rest of the persons in the class with the same degree of relationship granting the same priority of control over the disposition pursuant to subsection (1) of this section;

(II) The next class of persons in the order listed in subsection (1) of this section if no one else with the same degree of relationship granting the same priority of control over the disposition of this section exists or possesses the right of final disposition pursuant to subsection (1) of this section.

(b) (I) The person with the right to control disposition shall be presumed to be unable or unwilling to provide for such disposition, or the person's whereabouts shall be presumed unknown, if the person has failed to make or appoint another person to make final arrangements

for the disposition of the decedent within five days after receiving notice of the decedent's death or within ten days after the decedent's death, whichever is earlier.

(II) Any member or veteran of the armed forces of the United States or of an organization supporting members or veterans of the armed forces of the United States shall have the right to access the human remains and records thereof in order to identify the remains if no person with the right of final disposition has provided for final disposition for at least one hundred eighty days after death. If the remains are those of a veteran of the armed forces of the United States, the person who possesses the remains shall make arrangements for the remains to be transferred to the closest United States military cemetery. This subparagraph (II) shall not be construed to authorize the exhumation of dead human bodies nor the possession of dead human bodies by any person seeking to identify the identity of the remains.

(c) If a person is unable or unwilling to make a disposition under this subsection (4), such person shall not be counted as a member of the class with the same degree of relationship granting the same priority of control over the disposition pursuant to subsection (1) of this section when determining the number that makes a majority of such class.

(5) If the persons enumerated in subsection (1) of this section are not willing or able to provide for the final disposition of a decedent's remains, or if the persons' whereabouts cannot be reasonably ascertained, then the public administrator responsible for the decedent's estate or the person who controls the final disposition of indigent people in the county in which the death occurred shall make arrangements for the final disposition of the decedent's remains.

(6) A third party who provides for the final disposition of a decedent's remains upon authorization from a person who claimed to have the right to control the final disposition shall be immune from civil liability and administrative discipline.

Source: L. 2003: Entire article added, p. 1351, § 1, effective August 6. **L. 2006:** Entire section amended, p. 900, § 5, effective August 7. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 447, § 16, effective July 1; (4)(b) amended, (HB 09-1058), ch. 241, p. 1093, § 1, effective August 5. **L. 2010:** (1)(c.5) amended, (SB10-199), ch. 374, p. 1754, § 22, effective July 1; (1)(a) amended, (SB 10-047), ch. 166, p. 586, § 4, effective August 11. **L. 2021:** (5) amended, (SB 21-006), ch. 123, p. 494, § 18, effective September 7.

Cross references: (1) For the legislative declaration in the 2010 act amending subsection (1)(a), see section 1 of chapter 166, Session Laws of Colorado 2010.

(2) For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

15-19-106.5. Disposition of abandoned cremated remains of veterans - liability - applicability - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Cremains facility" means a facility that may have unclaimed cremains of a veteran or qualified family member or any information related to unclaimed cremains, including but not limited to a mortuary, funeral home, cemetery, or coroner.

(b) "Cremated remains" or "cremains" has the same meaning set forth in section 12-135-102 (3).

(c) "Interment benefits" means any benefit that includes eligibility to be interred in a national cemetery under the control of the national cemetery administration or in any state veterans' cemetery.

(d) "Qualified family member" means a spouse or dependent of a veteran who is eligible for interment benefits.

(e) "State veterans' cemetery" means the Homelake military veterans cemetery established pursuant to section 26-12-205 and the western slope military veterans' cemetery established pursuant to section 28-5-708.

(f) "Status information" means a person's first name, last name, date of birth, date of death, and social security number.

(g) "Veteran" has the same meaning set forth in section 28-5-100.3.

(h) "Veterans' remains recovery organization" means an entity recognized and authorized by the United States veterans administration and the national personnel records center to verify and inter the unclaimed remains, including cremated remains, of United States military veterans and qualified family members.

(2) Notwithstanding section 15-19-106 (4)(b)(II), a veterans' remains recovery organization has the right to research, recover, and inter any unclaimed cremains of a veteran or qualified family member.

(3) (a) A veterans' remains recovery organization may contact any cremains facility that may have unclaimed veterans' or qualified family members' cremains. The veterans' remains recovery organization shall provide proper identifying documentation to the cremains facility.

(b) After receiving documentation identifying the organization as a veterans' remains recovery organization, a cremains facility shall provide all status information in the facility's possession to the organization.

(c) The veterans' remains recovery organization shall inventory any unclaimed cremains and any information related to the unclaimed cremains in order to identify any cremains of a veteran or qualified family member. The organization shall contact the national personnel records center to verify whether any of the unclaimed cremains are of a veteran who is eligible for interment benefits or qualified family member.

(4) If a veterans' remains recovery organization determines that unclaimed cremains are of a veteran who is eligible for interment benefits or other qualified family member, the organization shall issue the following notices, as applicable:

(a) If the veterans' remains recovery organization knows of a person described in section 15-19-106 (1)(a) to (1)(f) who has the right to take possession of the cremains, the organization shall send notice by mail to that person of that person's eligibility to take possession of the cremains; or

(b) If the veterans' remains recovery organization does not know of a person described in section 15-19-106 (1)(a) to (1)(f) who has the right to take possession of the cremains, the organization shall publish a notice in a newspaper of general circulation, published in the county in which the death occurred or the cremains are located, stating that the cremains are unclaimed and giving the name of the deceased if it is known.

(5) At least thirty days, but no later than forty-five days, after a notice has been issued pursuant to subsection (4) of this section, the cremains facility shall transfer any unclaimed cremains eligible for interment benefits to a national cemetery or state veterans' cemetery or to a veterans' remains recovery organization for interment in a national cemetery or state veterans' cemetery.

(6) A cremains facility or veterans' remains recovery organization is not subject to civil liability for release of any information or release of unclaimed cremains pursuant to this section, unless the facility or organization acts in bad faith or with malicious intent.

(7) This section applies only to cremains and does not apply to any other last remains, including dead human bodies.

Source: L. 2020: Entire section added, (HB 20-1051), ch. 46, p. 158, § 1, effective September 14.

15-19-107. Declaration of disposition of last remains.

(1) **Form.** The following statutory declaration of disposition of last remains is legally sufficient:

DECLARATION OF DISPOSITION OF LAST REMAINS

I, (name of declarant), being of sound mind and lawful age, hereby revoke all prior declarations concerning the disposition of my last remains and those provisions concerning disposition of my last remains found in a will, codicil, or power of attorney, and I declare and direct that after my death the following provisions be taken:

1. If permitted by law, my body shall be (initial ONE choice):

_____ Buried. I direct that my body be buried at _____ .

_____ Cremated. I direct that my cremated remains be disposed of as follows:

_____

_____ .

_____ Entombed. I direct that my body be entombed at _____ .

_____ Naturally reduced. I direct that my reduced remains be given final disposition as follows:

_____

_____ .

_____ Other. I direct that my body be disposed of as follows:

_____

_____ .

_____ Disposed of as (name of designee) shall decide in writing. If _____ is unwilling or unable to act, I nominate _____ as my alternate designee.

2. I request that the following ceremonial arrangements be made (initial desired choice or choices):

_____ I request _____ (name of designee) make all arrangements for any ceremonies, consistent with my directions set forth in this declaration. If _____ is unwilling or unable to act, I nominate _____ as my alternate designee.

_____ Funeral. I request the following arrangements for my funeral:

_____

_____ .

_____ Memorial Service. I request the following arrangements for my memorial service:

_____

_____ .

3. Special instructions. In addition to the instructions above, I request (on the following lines you may make special requests regarding ceremonies or lack of ceremonies):

_____

_____ .

I may revoke or amend this declaration in writing at any time. I agree that a third party who receives a copy of this declaration may act according to it. Revocation of this declaration is not effective as to a third party until the third party learns of my revocation. My estate shall indemnify any third party for costs incurred as a result of claims that arise against the third party because of good-faith reliance on this declaration.

I execute this declaration as my free and voluntary act, on _____, _____.

_____

(Declarant)

THE FOLLOWING SECTION REGARDING ORGAN AND TISSUE DONATION IS OPTIONAL. To make a donation, initial the option you select and sign below.

In the hope that I might help others, I hereby make an anatomical gift, to be effective upon my death, of:

A._____ Any needed organs/tissues

B._____ The following organs/tissues:

_____

_____

Donor signature: _____

Notarization optional:

STATE OF COLORADO)

) ss.

COUNTY OF _____)

Acknowledged before me by _____, Declarant, on _____, ___.

My commission expires: _____

[seal]

_____

Notary Public

(2) **Requirements.** The form set forth in subsection (1) of this section is not exclusive, and a person may use another form of declaration if the wording of the form complies substantially with subsection (1) of this section, the form is properly completed, and the form is in writing, dated, and signed by the declarant. A declaration may be witnessed or notarized by at least one person who attests that he or she was present when the document was signed by the declarant.

(3) A declaration may be revoked by the declarant in writing or by burning, tearing, canceling, obliterating, or destroying the declaration with the intent to revoke such declaration.

(4) (a) Unless otherwise expressly provided in a declaration, a subsequent divorce, dissolution of marriage, annulment of marriage, or legal separation between the declarant and spouse automatically revokes a delegation to the declarant's spouse to direct the disposition of the declarant's last remains or ceremonies after the declarant's death. This paragraph (a) shall not be construed to revoke the remaining provisions of the declaration.

(b) Unless otherwise specified in the declaration, if a declarant revokes a delegation to a person to direct the disposition of the declarant's last remains or ceremonies after the declarant's death, or if such person is unable or unwilling to serve, the nomination of such person shall be ineffective as to such person. If an alternate designee is not nominated by the declarant, section 15-19-106 shall govern. This paragraph (b) shall not be construed to revoke the remaining provisions of the declaration.

Source: L. 2003: Entire article added, p. 1352, § 1, effective August 6. **L. 2006:** Entire section amended, p. 902, § 6, effective August 7. **L. 2021:** (1) amended, (SB 21-006), ch. 123, p. 494, § 19, effective September 7.

15-19-108. Interstate effect of declaration.

(1) Unless otherwise stated in a declaration, it shall be presumed that the declarant intends to have his or her declaration executed pursuant to this part 1 and recognized to the fullest extent possible by other states.

(2) Unless otherwise provided in the declaration, a declaration or similar instrument executed in another state that complies with the requirements of this part 1 may, in good faith, be relied upon by a third party in this state if an action requested by the declarant does not violate any law of the federal government, Colorado, or a political subdivision.

Source: L. 2003: Entire article added, p. 1355, § 1, effective August 6. **L. 2006:** Entire section amended, p. 904, § 7, effective August 7. **L. 2017:** Entire section amended, (SB 17-223), ch. 158, p. 560, § 13, effective August 9.

15-19-109. Effect of criminal charges.

A person who has been arrested on suspicion of having committed, is charged with, or has been convicted of, any felony offense specified in part 1 of article 3 of title 18, C.R.S., involving the death of the deceased person, shall not direct the final disposition of the deceased person or arrange the ceremonies for the deceased person. If charges are not brought, charges are brought but dismissed, or the person charged is acquitted of the alleged crime before final disposition of the deceased person's body, this section shall not apply.

Source: L. 2009: Entire section added with relocations, (HB 09-1202), ch. 422, p. 2344, § 7, effective July 1.

Editor's note: This section is similar to former § 12-54-109 as it existed prior to 2009.

15-19-110. Natural reduction.

A person may use natural reduction for the final disposition of last remains or as a step in the final disposition of last remains.

Source: L. 2021: Entire section added, (SB 21-006), ch. 123, p. 489, § 3, effective September 7.

PART 2

REVISED UNIFORM ANATOMICAL GIFT ACT

Editor's note: This part 2 was added with relocations in 2017. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this part 2, see the comparative tables located in the back of the index.

15-19-201. Short title.

The short title of this part 2 is the "Revised Uniform Anatomical Gift Act".

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 538, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-101 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982). For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983). For article, "Organ Donation Update", see 13 Colo. Law. 612 (1984). For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985).

Applied in Lovato v. District Court, 198 Colo. 419, 601 P.2d 1072 (1979) (decided under former law).

15-19-202. Definitions.

In this part 2:

(1) "Adult" means an individual who is at least eighteen years of age.

(2) "Agent" means an individual:

(A) Authorized to make health-care decisions on the principal's behalf by a power of attorney for health care; or

(B) Expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal.

(3) "Anatomical gift" means a donation of all or part of a human body, to take effect after the donor's death, for the purpose of transplantation, therapy, research, or education.

(4) "Decedent" means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than this part 2, a fetus.

(5) "Disinterested witness" means a witness other than the spouse, child, parent, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift, or another adult who exhibited special care and concern for the individual. The term does not include a person to which an anatomical gift could pass under section 15-19-211.

(6) "Document of gift" means a donor card or other record used to make an anatomical gift. The term includes a statement or symbol on a driver's license, identification card, or donor registry.

(7) "Donor" means an individual whose body or part is the subject of an anatomical gift.

(8) "Donor registry" means a database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(9) "Driver's license" means a license or permit issued by the department of revenue to operate a vehicle, whether or not conditions are attached to the license or permit.

(10) "Eye bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes.

(11) "Guardian" means a person appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem.

(12) "Hospital" means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

(13) "Identification card" means an identification card issued by the department of revenue or the department's agent.

(14) "Know" means to have actual knowledge.

(15) "Minor" means an individual who is under eighteen years of age.

(16) "Organ procurement organization" means a person designated by the secretary of the United States department of health and human services as an organ procurement organization.

(17) "Parent" means a parent whose parental rights have not been terminated.

(18) "Part" means an organ, an eye, or tissue of a human being. The term does not include the whole body.

(19) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(20) "Physician" means an individual authorized to practice medicine or osteopathy under the law of any state.

(21) "Procurement organization" means an eye bank, organ procurement organization, or tissue bank.

(22) "Prospective donor" means an individual who is dead or near death and has been determined by a procurement organization to have a part that could be medically suitable for transplantation, therapy, research, or education. The term does not include an individual who has made a refusal.

(23) "Reasonably available" means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

(24) "Recipient" means an individual into whose body a decedent's part has been or is intended to be transplanted.

(25) "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.

(26) "Refusal" means a record created under section 15-19-207 that expressly states an intent to bar other persons from making an anatomical gift of an individual's body or part.

(27) "Sign" means, with the 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.

(28) "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.

(29) "Technician" means an individual determined to be qualified to remove or process parts by an appropriate organization that is licensed, accredited, or regulated under federal or state law. The term includes an enucleator.

(30) "Tissue" means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education.

(31) "Tissue bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue.

(32) "Transplant hospital" means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 538, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-102 as it existed prior to 2017.

15-19-203. Applicability.

This part 2 applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift, whenever made.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 541, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-103 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982). For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983). For article, "The Bequest of Life: Organ and Tissue Donation as Part of a Thorough Estate Plan," see 25 Colo. Law. 40 (Apr. 1996).

15-19-204. Who may make anatomical gift before donor's death.

Subject to section 15-19-208, an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided in section 15-19-205 by:

(1) The donor, if the donor is an adult or if the donor is a minor and is:

(A) Emancipated; or

(B) Authorized under state law to apply for a driver's license because the donor is at least sixteen years of age;

(2) An agent of the donor, unless the power of attorney for health care or other record prohibits the agent from making an anatomical gift;

(3) A parent of the donor, if the donor is an unemancipated minor; or

(4) The donor's guardian.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 541, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-104 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983).

15-19-205. Manner of making anatomical gift before donor's death.

(a) A donor may make an anatomical gift:

(1) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) In a will;

(3) During a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness; or

(4) As provided in subsection (b) of this section.

(b) A donor or other person authorized to make an anatomical gift under section 15-19-204 may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry. If the donor or other person is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and must:

(1) (A) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; or

(B) Be acknowledged before a notary public or other individual authorized by law to take acknowledgments, unless a court determines that this subsection (b)(1)(B) should not apply to the record in the interest of justice; and

(2) State that it has been signed and witnessed or acknowledged as provided in subsection (b)(1) of this section.

(c) Revocation, suspension, expiration, or cancellation of a driver's license or identification card upon which an anatomical gift is indicated does not invalidate the gift.

(d) An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 541, § 1, effective August 9. **L. 2021:** (b)(1) and (b)(2) amended, (SB 21-195), ch. 115, p. 448, § 3, effective May 7.

Editor's note: This section is similar to former § 12-34-105 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982).

15-19-206. Amending or revoking anatomical gift before donor's death.

(a) Subject to section 15-19-208, a donor or other person authorized to make an anatomical gift under section 15-19-204 may amend or revoke an anatomical gift by:

(1) A record signed by:

(A) The donor;

(B) The other person; or

(C) Subject to subsection (b) of this section, another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or

(2) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

(b) A record signed pursuant to subsection (a)(1)(C) of this section must:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) State that it has been signed and witnessed as provided in subsection (b)(1) of this section.

(c) Subject to section 15-19-208, a donor or other person authorized to make an anatomical gift under section 15-19-204 may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

(d) A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(e) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in subsection (a) of this section.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 542, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-106 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982).

15-19-207. Refusal to make anatomical gift - effect of refusal.

(a) An individual may refuse to make an anatomical gift of the individual's body or part by:

(1) A record signed by:

(A) The individual; or

(B) Subject to subsection (b) of this section, another individual acting at the direction of the individual if the individual is physically unable to sign;

(2) The individual's will, whether or not the will is admitted to probate or invalidated after the individual's death; or

(3) Any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(b) A record signed pursuant to subsection (a)(1)(B) of this section must:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual; and

(2) State that it has been signed and witnessed as provided in subsection (b)(1) of this section.

(c) An individual who has made a refusal may amend or revoke the refusal:

(1) In the manner provided in subsection (a) of this section for making a refusal;

(2) By subsequently making an anatomical gift pursuant to section 15-19-205 that is inconsistent with the refusal; or

(3) By destroying or canceling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal.

(d) Except as otherwise provided in section 15-19-208 (h), in the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all other persons from making an anatomical gift of the individual's body or part.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 543, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-107 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982).

15-19-208. Preclusive effect of anatomical gift, amendment, or revocation.

(a) Except as otherwise provided in subsection (g) of this section and subject to subsection (f) of this section, in the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor's body or part if the donor made an anatomical gift of the donor's body or part under section 15-19-205 or an amendment to an anatomical gift of the donor's body or part under section 15-19-206.

(b) A donor's revocation of an anatomical gift of the donor's body or part under section 15-19-206 is not a refusal and does not bar another person specified in section 15-19-204 or 15-19-209 from making an anatomical gift of the donor's body or part under section 15-19-205 or 15-19-210.

(c) If a person other than the donor makes an unrevoked anatomical gift of the donor's body or part under section 15-19-205 or an amendment to an anatomical gift of the donor's body or part under section 15-19-206, another person may not make, amend, or revoke the gift of the donor's body or part under section 15-19-210.

(d) A revocation of an anatomical gift of a donor's body or part under section 15-19-206 by a person other than the donor does not bar another person from making an anatomical gift of the body or part under section 15-19-205 or 15-19-210.

(e) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under section 15-19-204, an anatomical gift of a part is neither a refusal to give another part nor a limitation on the making of an anatomical gift of another part at a later time by the donor or another person.

(f) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under section 15-19-204, an anatomical gift of a part for one or more

of the purposes set forth in section 15-19-204 is not a limitation on the making of an anatomical gift of the part for any of the other purposes by the donor or any other person under section 15-19-205 or 15-19-210.

(g) If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part.

(h) If an unemancipated minor who signed a refusal dies, a parent of the minor who is reasonably available may revoke the minor's refusal.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 544, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-108 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982). For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983).

15-19-209. Who may make anatomical gift of decedent's body or part.

(a) Subject to subsections (b) and (c) of this section and unless barred by section 15-19-207 or 15-19-208, an anatomical gift of a decedent's body or part for purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed:

(1) An agent of the decedent at the time of death who could have made an anatomical gift under section 15-19-204 (2) immediately before the decedent's death;

(2) The spouse of the decedent;

(2.5) A person who is designated by the decedent as a designated beneficiary in a designated beneficiary agreement pursuant to article 22 of this title 15, with the right to be an agent to make, revoke, or object to anatomical gifts of the decedent;

(3) Adult children of the decedent;

(4) Parents of the decedent;

(5) Adult siblings of the decedent;

(6) Adult grandchildren of the decedent;

(7) Grandparents of the decedent;

(8) An adult who exhibited special care and concern for the decedent;

(9) The persons who were acting as the guardians of the person of the decedent at the time of death; and

(10) Any other person having the authority to dispose of the decedent's body.

(b) If there is more than one member of a class listed in subsection (a)(1), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(9) of this section entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to which the gift may pass under section 15-19-211 knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subsection (a) of this section is reasonably available to make or to object to the making of an anatomical gift.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 544, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-109 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982). For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983). For article, "The Bequest of Life: Organ and Tissue Donation as Part of a Thorough Estate Plan," see 25 Colo. Law. 40 (Apr. 1996).

15-19-210. Manner of making, amending, or revoking anatomical gift of decedent's body or part.

(a) A person authorized to make an anatomical gift under section 15-19-209 may make an anatomical gift by a document of gift signed by the person making the gift or by that person's

oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.

(b) Subject to subsection (c) of this section, an anatomical gift by a person authorized under section 15-19-209 may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. If more than one member of the prior class is reasonably available, the gift made by a person authorized under section 15-19-209 may be:

(1) Amended only if a majority of the reasonably available members agree to the amending of the gift; or

(2) Revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift.

(c) A revocation under subsection (b) of this section is effective only if, before an incision has been made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital, or physician or technician knows of the revocation.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 545, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-110 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Last Remains — Planning Aspects", see 11 Colo. Law. 2986 (1982).

15-19-211. Persons that may receive anatomical gift - purpose of anatomical gift.

(a) An anatomical gift may be made to the following persons named in the document of gift:

(1) A hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, for research or education;

(2) Subject to subsection (b) of this section, an individual designated by the person making the anatomical gift if the individual is the recipient of the part;

(3) An eye bank or tissue bank.

(b) If an anatomical gift to an individual under subsection (a)(2) of this section cannot be transplanted into the individual, the part passes in accordance with subsection (g) of this section in the absence of an express, contrary indication by the person making the anatomical gift.

(c) If an anatomical gift of one or more specific parts or of all parts is made in a document of gift that does not name a person described in subsection (a) of this section but identifies the purpose for which an anatomical gift may be used, the following rules apply:

(1) If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank.

(2) If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank.

(3) If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ.

(4) If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

(d) For the purpose of subsection (c) of this section, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift must be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education.

(e) If an anatomical gift of one or more specific parts is made in a document of gift that does not name a person described in subsection (a) of this section and does not identify the purpose of the gift, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this section.

(f) If a document of gift specifies only a general intent to make an anatomical gift by words such as "donor", "organ donor", or "body donor", or by a symbol or statement of similar import, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this section.

(g) For purposes of subsections (b), (e), and (f) of this section the following rules apply:

(1) If the part is an eye, the gift passes to the appropriate eye bank.

(2) If the part is tissue, the gift passes to the appropriate tissue bank.

(3) If the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ.

(h) An anatomical gift of an organ for transplantation or therapy, other than an anatomical gift under subsection (a)(2) of this section, passes to the organ procurement organization as custodian of the organ.

(i) If an anatomical gift does not pass pursuant to subsections (a) through (h) of this section or the decedent's body or part is not used for transplantation, therapy, research, or education, custody of the body or part passes to the person under obligation to dispose of the body or part.

(j) A person may not accept an anatomical gift if the person knows that the gift was not effectively made under section 15-19-205 or 15-19-210 or if the person knows that the decedent made a refusal under section 15-19-207 that was not revoked. For purposes of this subsection (j), if a person knows that an anatomical gift was made on a document of gift, the person is deemed to know of any amendment or revocation of the gift or any refusal to make an anatomical gift on the same document of gift.

(k) Except as otherwise provided in subsection (a)(2) of this section, nothing in this part 2 affects the allocation of organs for transplantation or therapy.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 546, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-111 as it existed prior to 2017.

15-19-212. Search and notification. (Reserved)

Editor's note: This section is similar to former § 12-34-112 as it existed prior to 2017.

15-19-213. Delivery of document of gift not required - right to examine.

(a) A document of gift need not be delivered during the donor's lifetime to be effective.

(b) Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass under section 15-19-211.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 547, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-113 as it existed prior to 2017.

15-19-214. Rights and duties of procurement organization and others.

(a) When a hospital refers an individual at or near death to a procurement organization, the organization shall make a reasonable search of the records of the department of revenue and any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift.

(b) A procurement organization must be allowed reasonable access to information in the records of the department of revenue to ascertain whether an individual at or near death is a donor.

(c) When a hospital refers an individual at or near death to a procurement organization, the organization may conduct any reasonable examination necessary to ensure the medical suitability of a part that is or could be the subject of an anatomical gift for transplantation, therapy, research, or education from a donor or a prospective donor. During the examination period, measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent.

(d) Unless prohibited by law other than this part 2, at any time after a donor's death, the person to which a part passes under section 15-19-211 may conduct any reasonable examination necessary to ensure the medical suitability of the body or part for its intended purpose.

(e) Unless prohibited by law other than this part 2, an examination under subsection (c) or (d) of this section may include an examination of all medical and dental records of the donor or prospective donor.

(f) Upon the death of a minor who was a donor or had signed a refusal, unless a procurement organization knows the minor is emancipated, the procurement organization shall conduct a reasonable search for the parents of the minor and provide the parents with an opportunity to revoke or amend the anatomical gift or revoke the refusal.

(g) Upon referral by a hospital under subsection (a) of this section, a procurement organization shall make a reasonable search for any person listed in section 15-19-209 having priority to make an anatomical gift on behalf of a prospective donor. If a procurement organization receives information that an anatomical gift to any other person was made, amended, or revoked, it shall promptly advise the other person of all relevant information.

(h) Subject to sections 15-19-211 (i) and 15-19-223, the rights of the person to which a part passes under section 15-19-211 are superior to the rights of all others with respect to the part. The person may accept or reject an anatomical gift in whole or in part. Subject to the terms of the document of gift and this part 2, a person that accepts an anatomical gift of an entire body may

allow any form of final disposition and use of remains in a funeral service. If the gift is of a part, the person to which the part passes under section 15-19-211, upon the death of the donor and before final disposition, shall cause the part to be removed without unnecessary mutilation.

(i) Neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent.

(j) A physician or technician may remove a donated part from the body of a donor that the physician or technician is qualified to remove.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 548 , § 1, effective August 9. **L. 2021:** (h) amended, (SB 21-006), ch. 123, p. 496, § 20, effective September 7.

Editor's note: This section is similar to former § 12-34-114 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983).

15-19-215. Coordination of procurement and use.

Each hospital in this state shall enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 549, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-115 as it existed prior to 2017.

15-19-216. Sale or purchase of parts prohibited.

(a) Except as otherwise provided in subsection (b) of this section, a person that knowingly acquires, receives, or otherwise transfers a part for valuable consideration for transplantation may be liable as specified in 42 U.S.C. sec. 274e.

(b) A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 549, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-116 as it existed prior to 2017.

15-19-217. Other prohibited acts.

A person that, in order to obtain a financial gain, intentionally falsifies, forges, conceals, defaces, or obliterates a document of gift, an amendment or revocation of a document of gift, or a refusal commits a class 2 misdemeanor as specified in section 18-1.3-501.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 549, § 1, effective August 9. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3160, § 163, effective March 1, 2022.

Editor's note: This section is similar to former § 12-34-117 as it existed prior to 2017.

15-19-218. Immunity.

(a) A person that acts in accordance with this part 2 or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this part 2, a person may rely upon representations of an individual listed in section 15-19-209

(a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(8) relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 549, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-118 as it existed prior to 2017.

15-19-219. Law governing validity - choice of law as to execution of document of gift - presumption of validity.

(a) A document of gift is valid if executed in accordance with:

(1) This part 2;

(2) The laws of the state or country where it was executed; or

(3) The laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence, or was a national at the time the document of gift was executed.

(b) If a document of gift is valid under this section, the law of this state governs the interpretation of the document of gift.

(c) A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed or was revoked.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 550, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-119 as it existed prior to 2017.

15-19-220. Donor registry.

(a) The department of revenue may establish or contract for the establishment of a donor registry.

(b) The department of revenue shall cooperate with a person that administers any donor registry that this state establishes, contracts for, or recognizes for the purpose of transferring to the donor registry all relevant information regarding a donor's making, amendment to, or revocation of an anatomical gift.

(c) A donor registry must:

(1) Allow a donor or other person authorized under section 15-19-204 to include on the donor registry a statement or symbol that the donor has made, amended, or revoked an anatomical gift;

(2) Be accessible to a procurement organization to allow it to obtain relevant information on the donor registry to determine, at or near death of the donor or a prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift; and

(3) Be accessible for purposes of subsection (c)(1) and (c)(2) of this section seven days a week on a twenty-four-hour basis.

(d) Personally identifiable information on a donor registry about a donor or prospective donor may not be used or disclosed without the express consent of the donor, prospective donor, or person that made the anatomical gift for any purpose other than to determine, at or near death of the donor or prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift.

(e) This section does not prohibit any person from creating or maintaining a donor registry that is not established by or under contract with the state. Any such registry must comply with subsections (c) and (d) of this section.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 550, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-120 as it existed prior to 2017.

15-19-221. Effect of anatomical gift on advance health-care directive - definitions.

(a) In this section:

(1) "Advance health-care directive" means a power of attorney for health care or a record signed or authorized by a prospective donor containing the prospective donor's direction concerning a health-care decision for the prospective donor.

(2) "Declaration" means a record signed by a prospective donor specifying the circumstances under which a life support system may be withheld or withdrawn from the prospective donor.

(3) "Health-care decision" means any decision regarding the health care of the prospective donor.

(b) If a prospective donor has a declaration or health-care directive, and the terms of the declaration or directive and the express or implied terms of a potential anatomical gift are in conflict with regard to the administration of measures necessary to ensure the medical suitability of a part for transplantation or therapy, the prospective donor's attending physician and prospective donor shall confer to resolve the conflict. If the prospective donor is incapable of resolving the conflict, an agent acting under the prospective donor's declaration or directive, or, if none or the agent is not reasonably available, another person authorized by law other than this article to make health-care decisions on behalf of the prospective donor, shall act for the donor to resolve the conflict. The conflict must be resolved as expeditiously as possible. Information relevant to the resolution of the conflict may be obtained from the appropriate procurement organization and any other person authorized to make an anatomical gift for the prospective donor under section 15-19-209. Before resolution of the conflict, measures necessary to ensure the medical suitability of the part may not be withheld or withdrawn from the prospective donor if withholding or withdrawing the measures is not contraindicated by appropriate end-of-life care.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 551, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-121 as it existed prior to 2017.

15-19-222. Cooperation between coroner and procurement organization.

(a) A coroner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation or therapy.

(b) Subject to section 15-19-223, if a coroner receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the jurisdiction of the coroner and a post-mortem examination is going to be performed, the coroner or designee shall make every reasonable effort to conduct a post-mortem examination of the body or the part in a manner and within a period compatible with its preservation for the purposes of the gift and the medicolegal death investigation.

(c) A part may not be removed from the body of a decedent under the jurisdiction of a coroner for transplantation, therapy, research, or education unless the part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the coroner may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection (c) does not preclude a coroner from performing the medicolegal investigation upon the body or parts of a decedent under the jurisdiction of the coroner.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 551, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-122 as it existed prior to 2017.

15-19-223. Facilitation of anatomical gift from decedent whose body is under jurisdiction of coroner.

(a) Upon request of a procurement organization, a coroner shall release to the procurement organization the name, contact information, and available medical and social history of a decedent whose body is under the jurisdiction of the coroner. If the decedent's body or part is medically suitable for transplantation or therapy, the coroner shall release post-mortem examination results to the procurement organization. The procurement organization may make a subsequent disclosure of the post-mortem examination results or other information received from the coroner only if relevant to transplantation or therapy.

(b) The coroner may conduct a medicolegal examination by reviewing all medical records, laboratory test results, X-rays, other diagnostic results, and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the coroner which the coroner determines may be relevant to the investigation.

(c) A person that has any information requested by a coroner pursuant to subsection (b) of this section shall provide that information as expeditiously as possible to allow the coroner to conduct the medicolegal investigation within a period compatible with the preservation of parts for the purpose of transplantation or therapy.

(d) If an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the coroner and a post-mortem examination is not required, or the coroner determines that a post-mortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the coroner and procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation or therapy.

(e) If an anatomical gift of a part from the decedent under the jurisdiction of the coroner has been or might be made, but the coroner initially believes that the recovery of the part could interfere with the post-mortem investigation into the decedent's cause or manner of death or preservation or collection of evidence, the coroner shall consult with the procurement organization or physician or technician designated by the procurement organization about the proposed recovery. The procurement organization shall obtain and provide the coroner with all available information which could relate to the cause or manner of the decedent's death. After consultation, the coroner may allow the recovery, or may deny or delay the recovery as provided in subsection (f), (g), or (h) of this section.

(f) The coroner, district attorney, and a procurement organization shall enter into an agreement establishing protocols and procedures governing the relations between them when an anatomical gift of a part from a decedent whose body is under the jurisdiction of the coroner has been or might be made but the coroner or the district attorney believes that the recovery of the part could interfere with the post-mortem investigation into the decedent's cause or manner of death or the documentation or preservation of evidence. Decisions regarding the recovery of the part from the decedent shall be made in accordance with the agreement. The coroner, district attorney, and procurement organization shall evaluate the effectiveness of the agreement at regular intervals but no less frequently than every two years.

(g) In the absence of an agreement as provided in subsection (f) of this section that establishes protocols and procedures governing the relations between the coroner, district attorney, and procurement organization when an anatomical gift of an organ from a decedent whose body is under the jurisdiction of the coroner has been or might be made, and following the consultation under subsection (e) of this section, if the coroner intends to deny recovery of the organ, the coroner or designee, at the request of the procurement organization, shall view the body either at the hospital or recovery location or by electronic means, prior to making a decision whether or not to allow the procurement organization to recover the organ. After viewing the body, the coroner or designee may allow recovery by the procurement organization to proceed, or, if the coroner or designee reasonably believes that the part may be involved in determining the decedent's cause or manner of death or preservation or collection of evidence, deny recovery by the procurement organization. The coroner or designee shall comply with all the requirements of this section in a manner and within a time period compatible with the preservation and purposes of the organ.

(h) In the absence of an agreement establishing protocols and procedures governing the relations between the coroner, district attorney, and procurement organization when an anatomical gift of an eye or tissues from a decedent whose body is under the jurisdiction of the coroner has been or might be made, and following the consultation under subsection (e) of this section, the coroner may allow, deny, or delay the recovery of the eye or tissues until after the collection of evidence or autopsy, in order to preserve and collect evidence, to maintain a proper chain-of-custody, or to allow an accurate determination of the decedent's cause of death. When a

determination to delay the recovery of the eye or tissues is made, every effort possible shall be made by the coroner to complete the collection of evidence or autopsy in a timely manner compatible with the preservation of the eye or tissues for the purpose of transplantation or therapy.

(i) If the coroner or designee denies or delays recovery under subsection (f), (g), or (h) of this section, the coroner or designee shall:

(1) State in a record the specific reasons for not allowing recovery of the part;

(2) Include the specific reasons in the records of the coroner; and

(3) Upon request by a procurement organization, provide a record within two weeks of the date of the request with the specific reasons for not allowing recovery of the part.

(j) If the coroner or designee allows recovery of a part, in addition to any information required pursuant to the protocol under subsection (f) of this section, the procurement organization shall cooperate with the coroner in any documentation of injuries and the preservation and collection of evidence prior to and during the recovery of the part and, upon the coroner's request, shall cause the physician or technician who removes the part to provide the coroner, as soon as practicable, with a record that includes: The names of all personnel participating in the removal of the part; a report documenting any internal or external injuries observed, any evidence observed, and describing the condition of the part; photographs or other documentation of evidence as identified in the protocol; and any other information and observations that would assist in the post mortem.

(k) If a coroner or designee is required to be present to view the body at the hospital or recovery location under subsection (g) of this section, upon request the procurement organization requesting the recovery of the part shall reimburse the coroner or designee for the reasonable additional cost of travel incurred in complying with subsection (g) of this section.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 552, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-123 as it existed prior to 2017.

15-19-224. Uniformity of application and construction.

In applying and construing this part 2, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 554, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-124 as it existed prior to 2017.

15-19-225. Relation to "Electronic Signatures in Global and National Commerce Act".

This part 2 modifies, limits, and supersedes the "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (a) of that act, 15 U.S.C. sec. 7001, or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 554, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-125 as it existed prior to 2017.

PART 3

UNCLAIMED HUMAN BODIES

Editor's note: This part 3 was added with relocations in 2017. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this part 3, see the comparative tables located in the back of the index.

Law reviews: For article, "Organ Donation Update", see 13 Colo. Law 612 (1984).

15-19-301. Board for distribution of unclaimed human bodies - rules.

(1) The deans and the heads of the departments of anatomy and surgery of the accredited medical and dental schools of this state are constituted a board for the distribution and delivery of unclaimed dead human bodies, described in this part 3, to and among such institutions that, under the provisions of this part 3, are entitled to distribution. The board has full power to

establish rules for its government, and to appoint and remove officers, and shall keep full and complete minutes of its transactions. Records shall also be kept, under its direction, of all bodies received and distributed by the board, and of the institutions to which the same may be distributed. The minutes and records shall be open at all times to the inspection of each member of the board and of any district attorney of any county within this state. The name of the board of distribution shall be the anatomical board of the state of Colorado, called, in this part 3, the "anatomical board". The anatomical board, in its discretion, may exempt any counties or other districts from the provisions of this part 3 for any calendar year by the rules of the board issued for that year.

(2) Repealed.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 554, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-201 as it existed prior to 2017.

15-19-302. Duty of public officers as to unclaimed bodies.

(1) All public officers, agents, and servants, and all officers, agents, and servants of every county, city, township, borough, district, and other municipality, and every almshouse, prison, morgue, hospital, or other municipal or other public institution, and all other persons having charge or control over unclaimed dead human bodies required to be buried at public expense shall use reasonable effort to ascertain if the deceased person has any relative, friend, or other representative who will assume charge of the body for burial at his or her expense. If the effort does not result in the discovery of a claimant within twenty-four hours after death, the officers, agents, or other persons shall immediately notify the anatomical board or such person as may from time to time be designated by the board as its duly authorized officer or agent, when such unclaimed body or bodies come into his or her possession, charge, or control. In any county that is entirely located more than one hundred fifty miles from any accredited medical or dental school, the minimum period of notification shall be extended to forty-eight hours. The officers, agents, or other persons, without fee or reward, shall deliver the unclaimed body to the anatomical board and permit the board or its agents to take and remove all the unclaimed bodies to be used for the advancement of medical and anatomical sciences.

(2) Notice shall be given to the anatomical board in all cases, but the body must not be delivered if any relative, by blood or marriage, has previously claimed the body for burial at the expense of the relative, in which case the body must be surrendered to the claimant for interment. Further, the body must not be delivered if any representative of a fraternal society of which the

deceased was a member, or a representative of any charitable organization, or if any friend of the deceased indigent person claims the body for burial prior to delivery to the board, with the burial at the expense of the fraternal society, charitable organization, or friend. In the case of death of any person whose body is required to be buried at public expense and the duly authorized officer or agent of the anatomical board deems the body unfit for anatomical purposes, he or she shall notify the board of county commissioners or agency in charge of indigent persons in the county in which the person dies, in writing, and the board of county commissioners or agency shall direct a person to take charge of the body of the deceased indigent person, and cause it to be buried, and draw warrants upon the treasurer of the county for the payment of expenses.

(3) Warrants for the payment of the expenses of the burial of any person whose body is required to be buried at public expense must not be drawn or paid except upon the certificate of the duly authorized officer or agent of the anatomical board to the effect that the unclaimed body is unfit for anatomical purposes due to decomposition or contagious disease, and that the provisions of this part 3 have been complied with. If, through the failure of any person to deliver the body of a deceased indigent person as required by this part 3, the unclaimed body is unfit for anatomical purposes, and is certified as unfit by the duly authorized officer or agent of the anatomical board, the body must be buried in accordance with the provisions of this part 3, and the person who failed to deliver the unclaimed body shall pay to the county treasurer the expenses incurred. Upon the refusal or failure of the person, on demand, to pay the expenses, the board of county commissioners, or such other agency as may be in charge of indigent persons in the county, may bring suit to recover the expenses, and the expenses may be recovered as debts collectible by law.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 554, § 1, effective August 9. **L. 2018:** (2) and (3) amended, (HB 18-1142), ch. 65, p. 617, § 2, effective August 8.

Editor's note: This section is similar to former § 12-34-202 as it existed prior to 2017.

Cross references: For the legislative declaration in HB 18-1142, see section 1 of chapter 65, Session Laws of Colorado 2018.

ANNOTATION

Law reviews. For article, "Disposition of Bodily Remains: Post-Death Aspects", see 12 Colo. Law. 439 (1983).

15-19-303. Claiming of body - publication of notice.

After an unclaimed body has been received by the anatomical board or its duly authorized agent, and has been preserved and stored, the body may be claimed within twenty days after death by relatives, friends, or fraternal or charitable organizations for burial or cremation at the expense of the claimant, and the body shall be surrendered to the claimant without charge of any character. During the twenty-day period the board shall publish at least two notices in a newspaper of general circulation, published in the county in which the death occurred or in which the body was first discovered, stating that the body is unclaimed and giving the name of the deceased if it is known. The notice shall be published in the name of the coroner of the county.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 555, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-203 as it existed prior to 2017.

15-19-304. Disposition of all or any portion of body after death - nonliability.

(1) A person has a right during his or her lifetime to provide for the disposition of all or any portion of his or her body upon his or her death.

(2) No cause of action for damages shall accrue to any person arising out of the removal of all or any portion of the body of any deceased person if the deceased person has, prior to the time of his or her death, executed a written consent to removal, and the person against whom the cause of action is alleged had no actual knowledge of any revocation of such consent.

(3) The anatomical board, or its duly authorized agent, is authorized to receive and distribute dead human bodies or parts thereof bequeathed or donated to it for the advancement of medical and anatomical sciences in the same manner as is now provided by law for the receipt and distribution of unclaimed dead human bodies; except that no publication of notice as required by section 15-19-303 shall be required.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 556, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-204 as it existed prior to 2017.

ANNOTATION

Law reviews. For article, "The Private Autopsy: Problems of Consent", see 41 Den. L. Ctr. J. 239 (1964). For article, "Organ Donation Update", see 13 Colo. Law. 612 (1984).

15-19-305. Unlawful to hold autopsy.

It is unlawful for any person to hold an autopsy on any dead human body mentioned in this part 3, except on the request of the district attorney of the district where the body is located, without the written, telegraphic, or telephonic consent of the secretary of the anatomical board, such telegraphic or telephonic consent to be verified by written consent.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 556, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-205 as it existed prior to 2017.

15-19-306. Holding of body for twenty days.

The anatomical board, or its duly authorized agent, shall take and receive any unclaimed bodies so delivered, and, after holding the bodies for a period of twenty days to determine if the bodies are claimed, shall distribute and deliver the unclaimed bodies on requisition to and among the institutions mentioned in this part 3, to be used for anatomical purposes as the institutions shall determine.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 556, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-206 as it existed prior to 2017.

15-19-307. Disposition of remains.

After the institutions to which the unclaimed bodies have been distributed by the anatomical board have completed the scientific study of the unclaimed bodies, the remains thereof shall in every case be disposed of by burial or cremation.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 556, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-207 as it existed prior to 2017.

15-19-308. Expense to be borne by institutions.

Neither the county, municipality, nor any officer, agent, or servant thereof shall incur any expense by reason of the delivery or distribution of any unclaimed body, but all the expenses thereof and of the anatomical board shall be borne by those institutions receiving the unclaimed bodies in the manner determined by the board.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 556, § 1, effective August 9.

Editor's note: This section is similar to former § 12-34-208 as it existed prior to 2017.

15-19-309. Penalty.

Any person having duties enjoined upon him or her by the provisions of this part 3 who neglects, refuses, or omits to perform the same as required in this part 3 commits a civil infraction.

Source: L. 2017: Entire part added with relocations, (SB 17-223), ch. 158, p. 557, § 1, effective August 9. **L. 2021:** Entire section amended, (SB 21-271), ch. 462, p. 3160, § 164, effective March 1, 2022.

Editor's note: This section is similar to former § 12-34-209 as it existed prior to 2017.

COMMUNITY PROPERTY RIGHTS

ARTICLE 20

Uniform Community Property Disposition at Death Act

15-20-101. Short title.
15-20-102. Definitions.
15-20-103. Included and excluded property.
15-20-104. Form of partition, reclassification, or waiver.
15-20-105. Community property presumption.
15-20-106. Disposition of property at death.
15-20-107. Other remedies available at death.
15-20-108. Right of surviving community property spouse.
15-20-109. Right of heir, devisee, or nonprobate transferee.
15-20-110. Protection of third person.
15-20-111. Principles of law and equity.
15-20-112. Uniformity of application and construction.
15-20-113. Saving provision.
15-20-114. Transitional provision.
15-20-115. Severability.
15-20-116. Effective date.

15-20-101. Short title.

This article 20 shall be known and may be cited as the "Uniform Community Property Disposition at Death Act", which is also referred to as "this act" or "act" within this article 20.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 101, § 1, effective July 1.

Editor's note: This section is similar to former § 15-20-101 as it existed prior to 2023.

ANNOTATION

Law reviews. For article, "Uniform State Laws of Interest to Colorado Probate Lawyers", see 14 Colo. Law. 1961 (1985). For article, "Planning for Community Property in Colorado", see 31 Colo. Law. 79 (June 2002). For article, "Joint Revocable Living Trusts: The Good, the Bad, and the Ugly", see 39 Colo. Law. 53 (Jan. 2010).

15-20-102. Definitions.

In this article 20:

(1) "Community property spouse" means an individual in a marriage or other relationship under which community property could be acquired during the existence of the relationship and that remains in existence at the time of death of either party to the relationship.

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

(3) "Jurisdiction" means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(4) "Partition" means to voluntarily divide property to which this act otherwise would apply.

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

(6) "Personal representative" means an executor, administrator, successor personal representative, special administrator, and other person that performs substantially the same function.

(7) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

(8) "Reclassify" means a change in the characterization or treatment of community property to property owned separately by a community property spouse.

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

(10) "Sign" means, with present intent to authenticate or adopt a record, to execute or adopt a tangible symbol or attach to or logically associate with the record an electronic symbol.

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

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 101, § 1, effective July 1.

15-20-103. Included and excluded property.

(1) Subject to subsection (3)(b) of this section, this act applies to the following property of a community property spouse, without regard to how the property is titled or held:

(a) If a decedent was domiciled in this state at the time of death:

(I) All or a proportionate part of each item of personal property, wherever located, that was community property under the law of the jurisdiction where the decedent or the surviving community property spouse was domiciled when the property:

(A) Was acquired; or

(B) After acquisition, became community property;

(II) Income, rent, profit, appreciation, or other increase derived from or traceable to property described in subsection (1)(a)(I) of this section; and

(III) Personal property traceable to property described in subsection (1)(a)(I) or (1)(a)(II) of this section; and

(b) Regardless of whether a decedent was domiciled in this state at the time of death:

(I) All or a proportionate part of each item of real property located in this state traceable to community property or acquired with community property under the law of the jurisdiction where the decedent or the surviving community property spouse was domiciled when the property:

(A) Was acquired; or

(B) After acquisition, became community property; and

(II) Income, rent, profit, appreciation, or other increase derived from or traceable to property described in subsection (1)(b)(I) of this section.

(2) If community property spouses acquired community property by complying with the law of a jurisdiction that allows for creation of community property by transfer of property to a trust, this act applies to the property to the extent the property is held in the trust or characterized as community property by the terms of the trust or the law of the jurisdiction under which the trust was created.

(3) This act does not apply to property that:

(a) Community property spouses have partitioned or reclassified;

(b) Is the subject of a waiver of rights granted by this act; or

(c) Is acquired by spouses domiciled in this state that is not property identified in subsections (1) and (2) of this section.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 102, § 1, effective July 1. **L. 2026:** (1)(a)(III) amended and (1)(b) added, (HB 26-1189), ch. 47, p. 211, § 1, effective August 12.

15-20-104. Form of partition, reclassification, or waiver.

(1) Community property spouses domiciled in this state may partition or reclassify property to which this act would otherwise apply. The partition or reclassification must be in a record signed by community property spouses.

(2) A community property spouse domiciled in this state may waive a right granted by this act only by complying with the law of this state, including this state's choice-of-law rules, applicable to waiver of a spousal property right.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 103, § 1, effective July 1.

15-20-105. Community property presumption.

All property acquired by a community property spouse when domiciled in a jurisdiction where community property then could be acquired by the community property spouse by operation of law is presumed to be community property. This presumption may be rebutted by a preponderance of the evidence.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 103, § 1, effective July 1.

15-20-106. Disposition of property at death.

(1) One-half of the property to which this act applies belongs to the surviving community property spouse of a decedent and is not subject to disposition by the decedent at death or distribution under the laws of succession of this state as a result of the decedent's death.

(2) One-half of the property to which this act applies belongs to the decedent and is subject to disposition by the decedent at death.

(3) For purposes of calculating the augmented estate of the decedent and the elective-share right of the surviving community property spouse:

(a) Property under subsection (1) of this section is property of the surviving community property spouse; and

(b) Property under subsection (2) of this section is property of the decedent.

(4) Except for the purpose of calculating the augmented estate of the decedent and the elective share right of the surviving community property spouse pursuant to part 2 of article 11 of this title 15, this section does not apply to property transferred by right of survivorship or under a revocable trust or other nonprobate transfer.

(5) This section does not limit the right of a surviving community property spouse to the statutory allowances pursuant to sections 15-11-402, 15-11-403, and 15-11-404.

(6) If at death a decedent purports to transfer to a third person, property that, under this section, belongs to the surviving community property spouse and transfers other property to the surviving community property spouse, this section does not limit the authority of the court under other law of this state to require that the community property spouse elect between retaining the property transferred to the community property spouse or asserting rights under this act.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 103, § 1, effective July 1.

15-20-107. Other remedies available at death.

(1) Upon the death of a community property spouse, the surviving community property spouse or a personal representative, heir, or nonprobate transferee of the decedent may assert a right based on an act of:

(a) The surviving community spouse or decedent during the marriage or other relationship under which community property then could be acquired; or

(b) The decedent that takes effect at the death of the decedent.

(2) In determining a right pursuant to subsection (1)(a) of this section, and a corresponding remedy, the court:

(a) Shall apply equitable principles; and

(b) May consider the community property law of the jurisdiction where the decedent or surviving community property spouse was domiciled when property was acquired or enhanced.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 104, § 1, effective July 1.

15-20-108. Right of surviving community property spouse.

(1) The surviving community property spouse of the decedent may assert a claim for relief with respect to a right under this act in accordance with the following:

(a) In an action asserting a right in or to property, the surviving community property spouse must:

(I) Commence an action against an heir, devisee, or nonprobate transferee of the decedent that is in possession of the property not later than three years after the death of the decedent; or

(II) After the appointment of the personal representative of the decedent, send a demand in a record to the personal representative not later than the time periods set forth in section 15-12-803; and

(b) In an action other than an action pursuant to subsection (1)(a) of this section, the surviving community property spouse must:

(I) After the appointment of the personal representative of the decedent, send a demand in record to the personal representative not later than the time periods set forth in section 15-12-803; or

(II) If a personal representative is not appointed, commence an action not later than three years after the death of the decedent.

(2) Unless a timely demand is made under subsection (1)(a)(I) or (1)(b)(I) of this section, the personal representative may distribute the assets of the decedent's estate without personal liability for a community property spouse's claim under this act.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 104, § 1, effective July 1.

15-20-109. Right of heir, devisee, or nonprobate transferee.

(1) An heir, devisee, or nonprobate transferee of a deceased community property spouse may assert a claim for relief with respect to a right under this act pursuant to the following rules:

(a) In an action asserting a right in or to property, the heir, devisee, or nonprobate transferee must:

(I) Commence an action against the surviving community property spouse of the decedent who is in possession of the property, not later than three years after the death of the decedent; or

(II) Send a demand in a record to the personal representative, not later than the time periods set forth in section 15-12-803.

(b) In an action other than an action pursuant to subsection (1)(a) of this section, the heir, devisee, or nonprobate transferee must:

(I) Send a demand in a record to the personal representative, not later than the time periods set forth in section 15-12-803 after the appointment of the personal representative of the decedent; or

(II) If a personal representative is not appointed, commence the action not later than three years after the death of the decedent.

(2) Unless a timely demand is made under subsection (1)(a)(II) or (1)(b)(I) of this section, the personal representative may distribute the assets of the decedent's estate without personal liability for an heir's, devisee's, or nonprobate transferee's claim under this act.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 105, § 1, effective July 1.

15-20-110. Protection of third person.

(1) With respect to property to which this act applies, a person is not liable under this act to the extent the person:

(a) Transacts in good faith and for value:

(I) With a community property spouse;

(II) After the death of the decedent, with a surviving community property spouse, personal representative, heir, devisee, or nonprobate transferee of the decedent; or

(III) With a fiduciary acting on behalf of any such person, or a trustee of a trust holding community property; and

(b) Does not know or have reason to know that the other party to the transaction is exceeding or improperly exercising the party's authority.

(2) Good faith under subsection (1)(a) of this section does not require the person to inquire into the extent or propriety of the exercise of authority by the other party to the transaction.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-111. Principles of law and equity.

The principles of law and equity supplement this act except to the extent inconsistent with this act.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-112. Uniformity of application and construction.

In applying and construing this act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-113. Saving provision.

If a right with respect to property to which this act applies is acquired, extinguished, or barred on the expiration of a limitation period that began to run under another statute before July 1, 2023, that statute continues to apply to the right even if the statute has been repealed or superseded by this act.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-114. Transitional provision.

Except as provided in section 15-20-113, this act applies to a judicial proceeding with respect to property to which this act applies commenced on or after July 1, 2023, regardless of the date of death of the decedent.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-115. Severability.

If a provision of this act or its application to a person or circumstance is held invalid, the validity does not affect another provision or application that can be given effect without the invalid provision.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

15-20-116. Effective date.

This act takes effect July 1, 2023.

Source: L. 2023: Entire article R&RE, (SB 23-100), ch. 30, p. 106, § 1, effective July 1.

DESIGNATED BENEFICIARY AGREEMENTS

ARTICLE 22

Designated Beneficiary Agreements

15-22-101. Short title.
15-22-102. Legislative declaration.
15-22-103. Definitions.
15-22-104. Requirements for a valid designated beneficiary agreement.
15-22-105. Effects and applicability of a designated beneficiary agreement.
15-22-106. Statutory form of a designated beneficiary agreement.
15-22-107. Recording - duties of the county clerk and recorder - fee.
15-22-108. Designated beneficiary agreement - effect on other legal documents.
15-22-109. Affirmation of validity of designated beneficiary agreement.
15-22-110. Reliance - immunity.
15-22-111. Revocation of a designated beneficiary agreement.
15-22-112. Death of a designated beneficiary - effect on

designated beneficiary agreement.

15-22-101. Short title.

This article shall be known and may be cited as the "Colorado Designated Beneficiary Agreement Act".

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 428, § 1, effective July 1.

15-22-102. Legislative declaration.

(1) The general assembly finds and determines that:

(a) Not all Coloradans are adequately protected by the provisions of the "Colorado Probate Code", articles 10 to 17 of this title, and other provisions of Colorado law. Current state and federal laws present impediments and disincentives for people wishing to avail themselves of the protections of this title.

(b) Beyond legal impediments, people often fail to plan for their own mortality. Studies have found that significant numbers of Americans do not have a valid will, and even fewer have executed powers of attorney or other estate planning documents.

(c) A body of law has been enacted to operate by default in situations in which individuals do not prepare estate plans. However, failure to plan for disability, incapacity, or death places people at the mercy of state laws that may vest the power to act in such situations in persons other than those they would wish to have exercise those powers. Many lack access to legal services due to the expense of drafting legal instruments and the necessity to keep these documents current.

(d) The power of individuals to care for one another and take action to be personally responsible for themselves and their loved ones is of tremendous societal benefit, enabling self-determination and reducing reliance on public programs and services.

(2) Therefore, the general assembly declares that:

(a) The public policy of the state should encourage residents to execute appropriate legal documents to effectuate their wishes;

(b) The purposes of this article are to:

(I) Make existing laws relating to health care, medical emergencies, incapacity, death, and administration of decedent's estates available to more persons through a process of documenting designated beneficiary agreements; and

(II) Allow individuals to elect to have certain default provisions in state statutes provide rights, benefits, and protections to a designated beneficiary in situations in which no valid and enforceable estate planning documents exist.

(c) It is the intent of the general assembly that this article be liberally construed to give effect to the purposes stated in this article.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 428, § 1, effective July 1.

15-22-103. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Designated beneficiary" means a person who has entered into a designated beneficiary agreement pursuant to this article.

(2) "Designated beneficiary agreement" means an agreement that is entered into pursuant to this article by two people for the purpose of designating each person as the beneficiary of the other person and for the purpose of ensuring that each person has certain rights and financial protections based upon the designation.

(3) "Superseding legal document" means a legal document, regardless of the date of execution, that is valid and enforceable and conflicts with all or a portion of a designated beneficiary agreement and, therefore, causes the designated beneficiary agreement in whole or in part to be replaced or set aside. To the extent there is a conflict between a superseding legal document and a designated beneficiary agreement, the superseding legal document controls. A superseding legal document may include, but need not be limited to, any of the following:

(a) A will;

(b) A codicil;

(c) A power of attorney;

(d) A medical durable power of attorney;

(e) A trust instrument;

(f) A beneficiary designation in an insurance policy or policy of health-care coverage;

(g) A beneficiary designation in a retirement or pension plan;

(h) A beneficiary designation for a deposit or account, including but not limited to demand, savings, and time deposit accounts;

(i) A declaration as to medical treatment executed pursuant to article 18 of this title;

(j) A declaration as to disposition of last remains executed pursuant to article 19 of this title;

(k) A marriage license; or

(l) A civil union certificate.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 429, § 1, effective July 1. **L. 2013:** (3)(j) and (3)(k) amended and (3)(l) added, (SB 13-011), ch. 49, p. 166, § 22, effective May 1.

15-22-104. Requirements for a valid designated beneficiary agreement.

(1) A designated beneficiary agreement shall be legally recognized if:

(a) The parties to the designated beneficiary agreement satisfy all of the following criteria:

(I) Both are at least eighteen years of age;

(II) Both are competent to enter into a contract;

(III) Neither party is married to another person;

(III.5) Neither party is a party to a civil union;

(IV) Neither party is a party to another designated beneficiary agreement; and

(V) Both parties enter into the designated beneficiary agreement without force, fraud, or duress; and

(b) The agreement is in substantial compliance with the requirements set forth in this article. For purposes of this article, "substantial compliance" shall mean that the agreement includes the disclaimer contained in section 15-22-106, the instructions and headings about how to grant or withhold a right or protection, the statements about the effective date of the agreement and how to record the agreement, the signatures for the two parties, and the acknowledgments for the notary public.

(2) A designated beneficiary agreement is legally sufficient under this article if:

(a) The wording of the designated beneficiary agreement complies substantially with the standard form set forth in section 15-22-106 (1) and the form is in compliance with the requirements of section 30-10-406 (3), C.R.S.;

(b) The designated beneficiary agreement is properly completed and signed;

(c) The designated beneficiary agreement is acknowledged; and

(d) The designated beneficiary agreement is recorded with a county clerk and recorder as provided in section 15-22-107.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 430, § 1, effective July 1. **L. 2013:** (1)(a) amended, (SB 13-011), ch. 49, p. 167, § 23, effective May 1.

15-22-105. Effects and applicability of a designated beneficiary agreement.

(1) A person named as a designated beneficiary in a designated beneficiary agreement shall be entitled to exercise the rights and protections specified in the agreement by virtue of having been so named.

(2) A designated beneficiary agreement that is properly executed and recorded as provided in section 15-22-104 (2) shall be valid and legally enforceable in the absence of a superseding legal document that conflicts with the provisions specified in the designated beneficiary agreement.

(3) A designated beneficiary agreement shall entitle the parties to exercise the following rights and enjoy the following protections, unless specifically excluded from the designated beneficiary agreement:

(a) The right to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property as joint tenants with right of survivorship or as tenants in common;

(b) The right to be designated as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust for the purposes of a nonprobate transfer on death;

(c) For purposes of the following benefits, the right to be designated as a beneficiary and recognized as a dependent so long as notice is given in accordance with any applicable statute, rule, contract, policy, procedure, or other government document of the following benefits:

(I) Public employees' retirement systems pursuant to articles 51 to 54.6 of title 24, C.R.S.;

(II) Local government firefighter and police pensions;

(III) Insurance policies for life insurance coverage; and

(IV) Health insurance policies or health coverage if the employer of the designated beneficiary elects to provide coverage for designated beneficiaries as dependents;

(d) The right to petition for and have priority for appointment as a conservator, guardian, or personal representative for the other designated beneficiary;

(e) The right to visitation by the other designated beneficiary in a hospital, nursing home, hospice, or similar health-care facility in which a party to a designated beneficiary resides or is receiving care, including the right to initiate a formal complaint alleging a violation of the rights of nursing home patients specified in section 25-1-120, C.R.S.;

(f) The right to act as a proxy decision-maker or surrogate decision-maker to make medical treatment decisions for the other designated beneficiary as if selected pursuant to section 15-18.5-103 or 15-18.5-104;

(g) The right to receive notice of the withholding or withdrawal of life-sustaining procedures for the other designated beneficiary pursuant to section 15-18-107 and the right to challenge the validity of a declaration as to medical or surgical treatment of the other designated beneficiary pursuant to section 15-18-107;

(h) The right, with respect to the other designated beneficiary, to act as an agent and to make, revoke, or object to anatomical gifts pursuant to the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of this title 15;

(i) The right to inherit real or personal property from the other designated beneficiary through intestate succession;

(j) The right to have standing to receive benefits pursuant to the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., made on behalf of the other designated beneficiary;

(k) The right to have standing to sue for wrongful death on behalf of the other designated beneficiary; and

(l) The right to direct the disposition of the other designated beneficiary's last remains pursuant to article 19 of this title.

(4) This article shall not be construed to create any rights, protections, or responsibilities for designated beneficiaries that are not specifically enumerated in the designated beneficiary agreement as authorized in this article.

(5) Nothing in this article shall be construed to create evidence of a party's intent to form a common law marriage.

(6) Execution of a designated beneficiary agreement shall in no way impede the ability of individuals to make specific determinations as to any or all of the matters specified in this article by acting through superseding legal documents or other contracts or instruments.

(7) In the event that a superseding legal document is found to be invalid or unenforceable, the designated beneficiary agreement shall control despite the attempt to supersede its provisions.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 431, § 1, effective July 1. **L. 2017:** (3)(h) amended, (SB 17-223), ch. 158, p. 560, § 14, effective August 9.

Cross references: For provisions relating to coverage of a state employee's domestic partner as a dependent under a state employee group benefit plan, see § 24-50-603.

15-22-106. Statutory form of a designated beneficiary agreement.

(1) The following statutory form shall be the standard form for a designated beneficiary agreement:

DESIGNATED BENEFICIARY AGREEMENT

DISCLAIMER
Warning: While this document may indicate your wishes, certain additional documents may be needed to protect these rights. **This designated beneficiary agreement is operative in the absence of other estate planning documents and will be superseded and set aside to the extent it conflicts with valid instruments such as a will, power of attorney, or beneficiary designation on an insurance policy or pension plan. This designated beneficiary agreement is superseded by such other documents and does not cause any changes to be made to those documents or designations.** **The parties understand that executing and signing this agreement is not sufficient to designate the other party for purposes of any insurance policy, pension plan, payable upon death designation or manner in which title to**

**property is held and that additional action will be required to make or change
such designations. The parties understand that this designated beneficiary
agreement may be one component of estate planning instructions and that they
are encouraged to consult an attorney to ensure their estate planning wishes are
accomplished.**

We, _____, (insert full name and address) referred to as party A, and _____, (insert full name and address) referred to as party B, hereby designate each other as the other's designated beneficiary with the following rights and protections, granted or withheld as indicated by our initials:

TO GRANT ONE OR MORE OF THE RIGHTS OR PROTECTIONS SPECIFIED IN THIS FORM, INITIAL THE LINE TO THE LEFT OF EACH RIGHT OR PROTECTION YOU ARE GRANTING. TO WITHHOLD A RIGHT OR PROTECTION, INITIAL THE LINE TO THE RIGHT OF EACH RIGHT OR PROTECTION YOU ARE WITHHOLDING.

A DESIGNATED BENEFICIARY AGREEMENT SHALL BE PRESUMED TO GRANT ALL OF THE RIGHTS AND PROTECTIONS LISTED IN THIS FORM UNLESS THE PARTIES WITHHOLD A RIGHT OR PROTECTION IN THE MANNER SET FORTH IMMEDIATELY ABOVE.

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHHOLD A RIGHT OR PROTECTION INITIAL
PARTY A	PARTY B		PARTY A PARTY B
__	__	The right to acquire, hold	__ __

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHOLD A RIGHT OR PROTECTION INITIAL	
PARTY A	PARTY B		PARTY A	PARTY B
		title to, own jointly, or transfer inter vivos or at death real or personal property as a joint tenant with me with right of survivorship or as a tenant in common with me;		
__	__	The right to be designated by me as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust for the purposes of a nonprobate transfer on death;	__	__
__	__	The right to be designated by me as a beneficiary and	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHOLD A RIGHT OR PROTECTION INITIAL	
PARTY A	PARTY B		PARTY A	PARTY B
		recognized as a dependent in an insurance policy for life insurance;		
__	__	The right to be designated by me as a beneficiary and recognized as a dependent in a health insurance policy if my employer elects to provide health insurance coverage for designated beneficiaries;	__	__
__	__	The right to be designated by me as a beneficiary in a retirement or pension plan;	__	__
__	__	The right to petition for and have priority for appointment as a conservator,	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHOLD A RIGHT OR PROTECTION INITIAL	
PARTY A	PARTY B		PARTY A	PARTY B
		guardian, or personal representative for me;		
__	__	The right to visit me in a hospital, nursing home, hospice, or similar health care facility in which a party to a designated beneficiary agreement resides or is receiving care;	__	__
__	__	The right to initiate a formal complaint regarding alleged violations of my rights as a nursing home patient as provided in section 25-1-120, Colorado Revised	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHOLD A RIGHT OR PROTECTION INITIAL	
PARTY A	PARTY B		PARTY A	PARTY B
		Statutes;		
__	__	The right to act as a proxy decision-maker or surrogate decision-maker to make medical care decisions for me pursuant to section 15-18.5-103 or 15-18.5-104, Colorado Revised Statutes;	__	__
__	__	The right to notice of the withholding or withdrawal of life-sustaining procedures for me pursuant to section 15-18-107, Colorado Revised Statutes;	__	__
__	__	The right to challenge the	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL			TO WITHOLD A RIGHT OR PROTECTION INITIAL	
PARTY A	PARTY B		PARTY A	PARTY B
		validity of a declaration as to medical or surgical treatment of me pursuant to section 15-18-108, Colorado Revised Statutes;		
__	__	The right to act as my agent to make, revoke, or object to anatomical gifts involving my person pursuant to the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of title 15, Colorado Revised Statutes;	__	__
__	__	The right to inherit real or personal property from	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL PARTY A	PARTY B		TO WITHOLD A RIGHT OR PROTECTION INITIAL PARTY A	PARTY B
		me through intestate succession;		
__	__	The right to have standing to receive benefits pursuant to the "Workers' Compensation Act of Colorado", article 40 of title 8, Colorado Revised Statutes, in the event of my death on the job;	__	__
__	__	The right to have standing to sue for wrongful death in the event of my death; and	__	__
__	__	The right to direct the disposition of my last remains pursuant to article 19 of	__	__

TO GRANT A RIGHT OR PROTECTION INITIAL PARTY A PARTY B

TO WITHOLD A RIGHT OR PROTECTION INITIAL PARTY A PARTY B

title 15, Colorado Revised Statutes.

THIS DESIGNATED BENEFICIARY AGREEMENT IS EFFECTIVE WHEN RECEIVED FOR RECORDING BY THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH ONE OF THE DESIGNATED BENEFICIARIES RESIDES. THIS DESIGNATED BENEFICIARY AGREEMENT WILL CONTINUE IN EFFECT UNTIL ONE OF THE DESIGNATED BENEFICIARIES REVOKES THIS AGREEMENT BY RECORDING A REVOCATION OF DESIGNATED BENEFICIARY FORM WITH THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH THIS AGREEMENT WAS RECORDED OR UNTIL THIS AGREEMENT IS SUPERSEDED IN PART OR IN WHOLE BY A SUPERSEDING LEGAL DOCUMENT.

_____ _____

Signature of designated beneficiary Signature of designated beneficiary

STATE OF COLORADO

County of _____

This document was acknowledged before me on _____date

by

_____

My commission expires _____

[Seal] _____

Notary Public

(2) The instructions to each party regarding how to grant or withhold a right or protection by initialing and the words "Party A" and "Party B" shall appear at the top of each page of the statutory form above the columns for the initials of the designated beneficiaries.

(3) A designated beneficiary agreement shall be presumed to extend all of the rights and protections listed in the statutory form unless the parties to the agreement explicitly exclude a right or protection.

(4) A party to a designated beneficiary agreement may limit the scope of a designated beneficiary agreement by the terms of the agreement or by executing a superseding legal document that controls and supersedes part or all of the designated beneficiary agreement.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 433, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-199), ch. 374, p. 1754 § 23, effective July 1. **L. 2017:** (1) amended, (SB 17-223), ch. 158, p. 560, § 15, effective August 9.

Cross references: For provisions relating to the time of taking effect or the provisions for transition of this code, see § 15-17-101.

15-22-107. Recording - duties of the county clerk and recorder - fee.

(1) A signed and acknowledged designated beneficiary agreement shall be recorded with the county clerk and recorder in the county in which one of the parties resides. The designated beneficiary agreement shall be effective as of the date and time as received for recording by the county clerk and recorder. The county clerk and recorder shall assess a recording fee for recording the designated beneficiary agreement in that county, a fee for issuing two certified copies of the designated beneficiary agreement that indicate the date and time of recording with the county, and a fee for taking acknowledgments, if applicable, as provided in section 30-1-103, C.R.S. All fees collected by the county clerk and recorder shall be deposited in the county clerk's fee fund maintained as required in section 30-1-119, C.R.S. The county clerk and recorder may require the person recording the designated beneficiary agreement to indicate the mailing address to which the original document should be returned after recording.

(2) The clerk and recorder of the county is encouraged to make available copies of the statutory forms as prescribed in sections 15-22-106 and 15-22-111.

(3) The clerk and recorder of the county shall have the following duties:

(a) To indicate on the designated beneficiary agreement or a revocation of a designated beneficiary agreement the date and time that it is recorded with the clerk and recorder;

(b) To issue two certified copies of the recorded designated beneficiary agreement that indicate the date and time of the recording;

(c) To issue replacement certified copies of a designated beneficiary agreement or a revocation of a designated beneficiary agreement upon payment of a replacement fee.

(4) Designated beneficiary agreements and revocations of designated beneficiary agreements shall be considered open records for purposes of part 2 of article 72 of title 24, C.R.S.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 436, § 1, effective July 1.

15-22-108. Designated beneficiary agreement - effect on other legal documents.

Execution of a designated beneficiary agreement shall not constitute evidence of an intent to revoke a prior will or codicil nor shall it affect any beneficiary designation, transfer, or bequest contained in any other legal documents.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

15-22-109. Affirmation of validity of designated beneficiary agreement.

A person exercising rights or protections pursuant to a designated beneficiary agreement shall affirm the validity of a designated beneficiary agreement and disclose any knowledge of any superseding legal documents.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

15-22-110. Reliance - immunity.

A third party who acts in good faith reliance on the affirmation of the existence of a valid designated beneficiary agreement shall not be subject to civil liability or administrative discipline for such reliance.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1.

15-22-111. Revocation of a designated beneficiary agreement.

(1) A designated beneficiary agreement that has been recorded with a county clerk and recorder may be unilaterally revoked by either party to the agreement by recording a revocation with the clerk and recorder of the county in which the agreement was recorded. A revocation shall be dated, signed, and acknowledged. The revocation shall be effective on the date and time the revocation is received for recording by the county clerk and recorder. The clerk and recorder shall issue a certified copy to the party recording the revocation and shall mail a certified copy of the revocation to the last-known address of the other party to the designated beneficiary agreement.

(2) The county clerk and recorder shall assess fees, as provided in section 30-1-103, C.R.S., for recording a revocation agreement and issuing two certified copies of the revocation agreement, plus an additional amount to cover the cost of first-class postage for mailing a certified copy of the revoked designated beneficiary agreement to the other party. The fees collected by the clerk and recorder shall be deposited in the county clerk's fee fund maintained as required in section 30-1-119, C.R.S.

(3) A designated beneficiary agreement shall be deemed revoked upon the marriage or the civil union of either party. In the case of a common law marriage, a designated beneficiary agreement shall be deemed revoked as of the date the court determines that a valid common law marriage exists.

(4) The following statutory form shall be the standard form for a revocation of a designated beneficiary agreement:

REVOCATION

OF DESIGNATED BENEFICIARY AGREEMENT

I _____ (insert your full name), reside at _____ (insert your current address) and I entered into a designated beneficiary agreement on _____ (insert the date) with the following person _____ (insert the other person's name) whose last-known address is _____ in which I designated such person as a designated beneficiary. This designated beneficiary agreement was recorded on _____ (insert the date) in the county of _____. The indexing file number of the designated beneficiary agreement is _____. I hereby revoke that designated beneficiary agreement, effective on the date and time that this revocation is received for recording by the clerk and recorder of _____ county.

_____ _____

Name Date

STATE OF COLORADO

County of _____

This document was subscribed, sworn to, and acknowledged before me on _____ date by _____

My commission expires _____

[Seal]

_____

Notary Public

This revocation of beneficiary agreement was recorded in my office on _____, _____, at _____ o'clock, and, pursuant to section 15-22-111, Colorado Revised Statutes, I mailed a copy of this revocation of beneficiary agreement to _____ at the address contained in this revocation of beneficiary agreement.

Clerk and Recorder of

_____ County

By: _____

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 437, § 1, effective July 1. **L. 2013:** (3) amended, (SB 13-011), ch. 49, p. 167, § 25, effective May 1.

15-22-112. Death of a designated beneficiary - effect on designated beneficiary agreement.

(1) A designated beneficiary agreement is terminated upon the death of either of the parties to the designated beneficiary agreement; however, a right or power which a designated beneficiary agreement conferred upon a designated beneficiary survives the death of the other designated beneficiary.

(2) A party to a designated beneficiary agreement who survives a designated beneficiary may enter into a designated beneficiary agreement with a different person so long as it meets the requirements of this article.

Source: L. 2009: Entire article added, (HB 09-1260), ch. 107, p. 438, § 1, effective July 1.

ABANDONED ESTATE PLANNING DOCUMENTS

ARTICLE 23

Colorado Electronic Preservation of Abandoned Estate Planning Documents Act

15-23-101. Short title.
15-23-102. Legislative declaration.
15-23-103. Definitions.
15-23-104. Applicability.
15-23-105. Transfer of possession to creator.
15-23-106. Preservation of an abandoned original estate planning document after diligent search.
15-23-107. Privilege.
15-23-108. Exculpation of custodian.
15-23-109. Electronic conversion and filing.
15-23-110. Penalty of perjury.
15-23-111. Filing statement.
15-23-112. Reliance on filing statement.
15-23-113. Fees - disposition - appropriation - cash fund.
15-23-114. Duties of the state court administrator.
15-23-115. Destruction of original estate planning document.
15-23-116. Authenticity of electronic estate planning document.
15-23-117. Public record.
15-23-118. Access to filing statement.
15-23-119. Access to electronic estate planning document prior to notification of creator's death.
15-23-120. Access to electronic estate planning document after notification of creator's death - definitions.
15-23-121. Action to establish a claim.
15-23-122. Deletion of electronic estate planning documents and computer folders - error correction.

15-23-101. Short title.

The short title of this article 23 is the "Colorado Electronic Preservation of Abandoned Estate Planning Documents Act".

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2432, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-102. Legislative declaration.

(1) The general assembly finds and declares that:

(a) Abandoned original estate planning documents are in the custody of professionals who are unable to locate the creators of the documents;

(b) Creating a central repository for these documents would be in the best interests of the custodians and creators of these documents and the creators' representatives who may later be in need of the documents;

(c) The judicial department is an appropriate repository for the documents;

(d) Economics dictate and technology permits conversion of original estate planning documents into electronic versions of the originals as reliable substitutes for the originals; and

(e) Custodians are in the best position to certify the authenticity of original estate planning documents before their conversion to electronic format and filing with the judicial department.

(2) Therefore, the general assembly declares that:

(a) Public policy of this state should encourage a custodian of an abandoned original estate planning document to certify the document as such and, after making a good-faith effort to locate the creator of the document, convert it to an electronic format and file the electronic record of the document with the judicial department;

(b) The judicial department should maintain the electronic record of each document filed with it under this article 23 and furnish a certified copy thereof to individuals and entities reasonably entitled thereto upon proof of identity and entitlement;

(c) A certified copy of an electronic record maintained in the judicial department should be accorded the same status as the abandoned original estate planning document; and

(d) It is the intent of the general assembly that this article 23 be liberally construed to give effect to the purposes stated in this article 23.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2432, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-103. Definitions.

As used in this article 23, unless the context otherwise requires:

(1) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(2) "Certified by the state court administrator" means a record certified by the state court administrator as being a true copy of an electronic record maintained by the state court administrator.

(3) "Computer folder" means a directory identified under the name of a creator containing the creator's electronic documents and related electronic records that is established and maintained by the state court administrator pursuant to section 15-23-114 (3)(c).

(4) "Creator" means an individual who, either alone, with one or more other individuals, or through a fiduciary, has executed an original estate planning document, as defined in subsection (13) of this section, pursuant to the law of any jurisdiction.

(5) "Custodian" means any of the following that has sole possession and control of an original estate planning document of an individual:

(a) An attorney licensed or formerly licensed to practice in Colorado, the attorney's fiduciary, or an affiant of an affidavit of the deceased attorney's estate pursuant to part 12 of article 12 of this title 15;

(b) An entity providing legal services pursuant to rule 265 of the Colorado rules of civil procedure;

(c) A professional fiduciary appointed under an original estate planning document, the successor to the professional fiduciary, the professional fiduciary's or successor's fiduciary, or an affiant of an affidavit of the professional fiduciary's or successor's estate pursuant to part 12 of article 12 of this title 15;

(d) A financial institution providing fiduciary services;

(e) A financial institution or its subsidiary providing safe deposit box services; or

(f) An attorney appointed by the chief judge of a judicial district to inventory files of an attorney pursuant to rule 251.32 (h) of the Colorado rules of civil procedure.

(6) "Diligent search" means an attempt to locate and contact a creator by two or more of the following means:

(a) Searching a telephone directory covering at least the geographic area of the last physical address of the creator known to the custodian;

(b) Calling the creator at the last phone number of the creator known to the custodian;

(c) Sending an email to the last email address of the creator known to the custodian;

(d) Conducting an internet search for the creator; or

(e) Subject to applicable law other than this article 23, attempting to contact by any means described in this subsection (6):

(I) An heir of the creator;

(II) A fiduciary, devisee, or beneficiary designated in the creator's original document; or

(III) If applicable, another party to the document.

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

(8) "Electronic estate planning document" and "electronic document" mean the electronic record created from an original estate planning document.

(9) "Fiduciary" means an original, additional, or successor personal representative, conservator, agent, or trustee.

(10) "Filing statement" means information provided and declarations made by a custodian pursuant to section 15-23-111.

(11) "Financial institution" means a federal- or state-chartered commercial bank, savings and loan association, savings bank, trust company, or credit union.

(12) "Index of creator names" means the searchable database created by the state court administrator pursuant to section 15-23-114 (2).

(13) "Original estate planning document" and "original document" mean an original instrument in writing that is any will document, including, but not limited to wills, as defined in section 15-10-201 (59); codicils; holographic wills; documents purporting to be wills; instruments that revoke or revise a testamentary instrument; testamentary instruments that merely appoint a personal representative; other testamentary instruments, such as memoranda distributing tangible personal property, as described in section 15-11-513; and testamentary appointments of guardian as described in section 15-14-202 (1).

(14) "Professional fiduciary" means an individual or entity that is in the business of acting as a fiduciary.

(15) "Profile" means an electronic record created and maintained by the state court administrator pursuant to section 15-23-114 (3)(d) under the name of each creator for whom the state court administrator has received an electronic estate planning document.

(16) "Proof of identity" means any of the following:

(a) For an individual, a record of the individual's:

(I) Passport, driver's license, or government-issued non-driver identification card that is current or expired not more than one year before the time of presentation; or

(II) Other form of government identification that is current or has been expired for not more than one year before the time of presentation, contains the signature or a photograph of the individual, and is satisfactory to the state court administrator;

(b) For a court, a record of a certified court order;

(c) For an entity, a record of a writing stating that the individual making the request on behalf of the entity is an officer of the entity and proof of identity for the individual in the same manner as provided in subsection (16)(a) of this section; and

(d) For a government agency, a record of a writing stating that the individual making the request on behalf of the agency is a representative of the agency and proof of identity for the individual in the same manner as provided in subsection (16)(a) of this section.

(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) "State court administrator" means the state court administrator established pursuant to section 13-3-101.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2433, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-104. Applicability.

(1) Subject to subsection (2) of this section, this article 23 applies to an original estate planning document created before, on, or after January 1, 2023.

(2) This article 23 does not apply to an original estate planning document of a creator whose location is known to the custodian unless the creator fails to take possession of the document and the custodian has complied with the requirements of section 15-23-105.

(3) A custodian that complies with the provisions of this article 23 concerning an original estate planning document is not subject to the requirements of the "Unclaimed Property Act", article 13 of title 38, concerning that original document.

(4) Nothing in this article 23 abrogates the duties imposed by sections 15-10-111 and 15-11-516.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2436, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23). **L. 2020:** (1) amended, (HB 20-1368), ch. 293, p. 1441, § 1, effective July 13.

15-23-105. Transfer of possession to creator.

(1) Before filing an electronic estate planning document with the state court administrator as provided in this article 23, the custodian shall attempt to transfer possession of the original estate planning document to the creator after a diligent search.

(2) (a) If the attempt to transfer the original document to the creator after a diligent search is not successful, the custodian shall send a letter to the last mailing address of the creator known to the custodian by first-class mail or certified mail return receipt requested, notifying the creator that if the creator does not take possession of the original document within ninety days after the date of mailing, the custodian will file an electronic copy of the original document with the state court administrator and destroy the original document.

(b) In the case of an original document found in a safe deposit box, the custodian may send the letter required by this subsection (2) addressed to the creator "in care of" the lessee or lessees of the safe deposit box at the mailing address of the lessee or lessees last known to the custodian.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2436, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-106. Preservation of an abandoned original estate planning document after diligent search.

If the creator of an original estate planning document cannot be located or does not take possession of the original document as provided in section 15-23-105 and if the custodian is neither able nor required to transfer possession of the original document to someone other than the creator under applicable law other than this article 23, the original document is deemed abandoned for the purposes of this article 23, and the custodian may preserve the original document electronically as provided in this article 23.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2437, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-107. Privilege.

Subject to applicable law other than this article 23, if an original estate planning document is privileged pursuant to section 13-90-107 (1)(b), the corresponding electronic estate planning document filed with the state court administrator as provided in this article 23 remains privileged.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2437, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-108. Exculpation of custodian.

A custodian is not liable to a person for an action taken under this article 23 or for a failure to act as provided in this article 23 unless the action or failure to act is shown to have resulted from the custodian's bad faith, gross negligence, or intentional misconduct.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2437, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-109. Electronic conversion and filing.

(1) If the creator does not take possession of the original estate planning document within ninety days after the date of mailing the letter required in section 15-23-105 (2), the custodian may create an electronic estate planning document, which must be in color and in a format and using the technology prescribed by the state court administrator, and may file the electronic document with the state court administrator.

(2) As to each electronic estate planning document being filed, the custodian, or, if the custodian is an entity, an officer of the custodian, shall:

(a) Examine the original estate planning document;

(b) Based upon that examination, be satisfied that the document is an original estate planning document of the creator, as those terms are defined in section 15-23-103;

(c) Compare the electronic estate planning document with the original estate planning document; and

(d) Be satisfied that the electronic estate planning document is a true and correct copy of the original estate planning document.

(3) Notwithstanding any provision of this article 23 to the contrary, a custodian subject to the Colorado rules of professional conduct shall comply with the rules as they may relate to a filing pursuant to this article 23 prior to filing an electronic estate planning document with the state court administrator.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2437, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-110. Penalty of perjury.

The act of submitting a filing statement to the state court administrator pursuant to section 15-23-111 or submitting a request to the state court administrator pursuant to section 15-23-119, 15-23-120, or 15-23-122 constitutes the affirmation or acknowledgment of the submitter, under the penalty of perjury, that the filing statement or request is the submitter's act and deed, or that the submitter in good faith believes that the filing statement or request is the act and deed of the individual on whose behalf the submitter is acting; that the submitter and the individual on whose behalf the submitter is acting in good faith believes the information provided and declarations made in the filing statement or request are true; and that the filing statement or request complies with the requirements of this article 23.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2438, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-111. Filing statement.

(1) A custodian shall submit a filing statement for each electronic estate planning document for each creator submitted to the state court administrator pursuant to this article 23.

(2) A custodian shall provide the following information and make the following declarations on a filing statement form furnished by the state court administrator:

(a) A declaration that after attempting to transfer possession of the original estate planning document to its creator as provided in section 15-23-105:

(I) The custodian cannot locate the creator of the original document;

(II) The creator has not taken possession of the original document; or

(III) The custodian has neither been able nor required to transfer possession of the original document to someone other than the creator under applicable law other than this article 23;

(b) The name of the creator, last name first;

(c) All aliases of the creator, last name first, known to the custodian;

(d) The date of birth of the creator, if known to the custodian;

(e) Subject to subsection (3) of this section, the last mailing and physical addresses of the creator known to the custodian;

(f) Regarding the custodian:

(I) If the custodian is an individual, the name and address of the individual;

(II) If the custodian is an entity, the name and address of the entity, the name and position of the individual acting on behalf of the entity, and the individual's address if different than that of the entity;

(g) For the electronic estate planning document filed:

(I) The name and date of the electronic document;

(II) The category of the original document, as described in section 15-23-103 (13), that has been converted to an electronic document; and

(III) The number of pages of the electronic document;

(h) A declaration that the custodian, or if an entity, the officer of the custodian, submitting the filing statement has:

(I) Examined the original estate planning document;

(II) Based upon that examination, believes that the document is an original estate planning document of the creator, as those terms are defined in section 15-23-103;

(III) Compared the electronic estate planning document with the original estate planning document; and

(IV) Based upon that comparison, believes that the electronic estate planning document is a true and correct copy of the original estate planning document;

(i) (I) A declaration that, if the custodian is subject to the Colorado rules of professional conduct, the custodian has complied with the rules as they may relate to this filing;

(II) For the purpose of the declaration made pursuant to this subsection (2)(i), the state court administrator shall refer to the Colorado rules of professional conduct as the "Colorado Rules of Professional Conduct adopted by the Supreme Court of Colorado";

(j) A declaration that the custodian has complied with all applicable law other than this article 23; and

(k) A declaration that the act of submitting a filing statement to the state court administrator subjects the submitter and the individual on whose behalf the submitter is acting to the penalty of perjury, pursuant to section 15-23-110, for the information provided and declarations made in the filing statement, whether or not the individual is named in the filing statement as the one submitting the filing statement.

(3) In the case of an original estate planning document found in a safe deposit box, it is sufficient under subsection (2)(e) of this section to furnish the last mailing and physical addresses of the lessee or lessees of the safe deposit box known to the custodian.

(4) Information provided and declarations made in the filing statement are part of the profile for each creator.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2438, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-112. Reliance on filing statement.

The state court administrator may rely on information provided and declarations made in a filing statement and has no duty to make further inquiry.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2440, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-113. Fees - disposition - appropriation - cash fund.

(1) The state court administrator shall determine and collect fees to cover the associated costs for submitting the following:

(a) A filing statement, including the attached electronic estate planning document;

(b) A request for retrieval; and

(c) A request for deletion.

(2) The fees established pursuant to this section must be based on the actual cost of the submission.

(3) The state court administrator shall transmit fees collected pursuant to this section to the state treasurer, who shall credit them to the electronic preservation of abandoned estate planning documents cash fund created in subsection (4) of this section.

(4) The electronic preservation of abandoned estate planning documents cash fund, referred to in this subsection (4) as the "fund", is hereby created in the state treasury. The fund consists of money credited to the fund pursuant to subsection (3) of this section and any other money that the general assembly may appropriate or transfer to the fund. The state treasurer shall credit all interest and income derived from the deposit and investment of money in the fund to the fund. Subject to annual appropriation by the general assembly, the judicial department may expend money from the fund for the administration of this article 23.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2440, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-114. Duties of the state court administrator.

(1) The state court administrator shall provide the forms required to administer the provisions of this article 23.

(2) The state court administrator shall create an index of creator names that is a searchable database of all names, aliases, and last-known physical addresses of all creators for whom electronic estate planning documents are filed with the state court administrator as provided in this article 23.

(3) Upon receipt of a filing statement with an electronic estate planning document of a creator, the state court administrator shall:

(a) Provide the custodian with a date-stamped copy of the filing statement acknowledging receipt of the filing statement and the attached electronic estate planning document;

(b) Add to the index of creator names the name of each creator and the aliases of the creator cross-referenced to the creator's name, last name first, and the last-known physical address of the creator as set forth in the filing statement;

(c) Create and maintain a computer folder for each creator;

(d) Create a profile for each creator, which must be filed in the computer folder of each creator and which must contain the date of filing, information provided in the filing statement, and declarations made in the filing statement; and

(e) Create and maintain a separate electronic record of each electronic estate planning document filed for the creator identified in the filing statement and store the electronic record in a computer folder under the creator's name, last name first.

(4) (a) The state court administrator may enter into an interagency agreement with another state agency to maintain any computer folder or profile required by this article 23. Any computer folder or profile maintained pursuant to such an agreement is considered to be maintained by the state court administrator for the purposes of this article 23.

(b) An interagency agreement entered into pursuant to this subsection (4) must require any parties to the agreement to deliver any information or electronic record maintained by the department pursuant to the agreement to the state court administrator upon request.

(5) The state court administrator shall adopt standards and procedures for the implementation of this article 23.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2440, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-115. Destruction of original estate planning document.

Subject to applicable law other than this article 23, the custodian shall destroy the original estate planning document after complying with the provisions of this article 23 and receiving the date-stamped copy of the filing statement from the state court administrator pursuant to section 15-23-114 (3)(a).

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2441, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-116. Authenticity of electronic estate planning document.

An electronic estate planning document certified by the state court administrator that is made from an original estate planning document is deemed to be the original of the document for all purposes under Colorado law.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2441, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-117. Public record.

(1) The index of creator names created pursuant to section 15-23-114 (2) is a public record.

(2) A computer folder and its contents, including the creator's profile, filing statements, and electronic estate planning documents is not a public record and is not subject to any federal or state open records act or any request for public information under any federal, state, or local law.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2441, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-118. Access to filing statement.

The state court administrator shall provide an individual, entity, court, or government agency that is authorized to receive a copy of a filing statement pursuant to section 15-23-119 or 15-23-120, and that has provided proof of identity, access to any filing statement filed under any names or aliases that are the subject of an inquiry.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2442, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-119. Access to electronic estate planning document prior to notification of creator's death.

(1) Until notified of a creator's death as provided in section 15-23-120 (1)(b), the state court administrator may presume that the creator is living.

(2) When a creator is presumed living, the state court administrator shall deliver a copy of an electronic document certified by the state court administrator to any of the following individuals or entities upon request for a copy of the electronic estate planning document on a form furnished by the state court administrator and payment of a retrieval fee:

(a) The creator, upon presentation of proof of identity of the creator;

(b) An individual authorized to receive the copy of an electronic document in a writing signed by the creator and notarized, upon presentation of:

(I) A record of the writing; and

(II) Proof of identity of the authorized individual;

(c) An agent of the creator, upon presentation of:

(I) A record of the power of attorney;

(II) A record of the agent's certification as to the validity of the power of attorney and the agent's authority as provided in section 15-14-742; and

(III) Proof of identity of the agent;

(d) An individual or entity nominated or appointed as a fiduciary in the electronic document or appointed by a court, upon presentation of:

(I) A record of the original estate planning document or of the certified court order; and

(II) Proof of identity of the fiduciary;

(e) A court-appointed conservator for the creator, upon presentation of:

(I) A record of certified letters of conservatorship; and

(II) Proof of identity of the conservator; or

(f) An individual, entity, court, or government agency authorized to receive the copy of the electronic document as provided in an order entered by a court, upon presentation of:

(I) A record of the certified court order; and

(II) Proof of identity of the authorized individual, or of the individual acting on behalf of the authorized entity, court, or government agency.

(3) A request made pursuant to this section must be made on a form provided by the state court administrator that contains a declaration that the act of submitting the request to the state court administrator subjects the submitter and the individual on whose behalf the submitter is acting to the penalty of perjury pursuant to section 15-23-110 for the information provided and the declarations made in the request form, whether or not the individual is named in the request as the one submitting the request.

(4) The state court administrator shall file a request form submitted pursuant to subsection (2) of this section in the creator's computer folder.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2442, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-120. Access to electronic estate planning document after notification of creator's death - definitions.

(1) As used in this section, unless the context otherwise requires:

(a) "Authorized recipient" means:

(I) An individual or entity nominated or appointed as a fiduciary in an original estate planning document of a creator or appointed on behalf of the estate of a creator by a court, upon presentation of the following:

(A) A record of the original document or the certified court order; and

(B) Proof of the identity of the fiduciary;

(II) An individual or entity named as a devisee under a will document or beneficiary under a trust document, upon presentation of the following:

(A) A record of the will document or the trust document; and

(B) Proof of identity of the individual, or the individual acting on behalf of the entity, named as a devisee or beneficiary;

(III) A court-appointed fiduciary for an individual named as a devisee under a will document or beneficiary under a trust document upon presentation of the following:

(A) A record of the will document or the trust document;

(B) A record of certified letters of appointment of the fiduciary; and

(C) Proof of identity of the fiduciary; or

(IV) An individual, entity, court, or government agency authorized to receive a copy of any or all of the contents of a computer folder as provided in a court order, upon presentation of the following:

(A) Record of the certified court order; and

(B) Proof of identity of the authorized individual, or of the individual acting on behalf of the authorized entity, court, or government agency.

(b) "Notification of death" means presentation to the state court administrator of:

(I) A record of the creator's certified death certificate; or

(II) A record of the certified court order determining that a creator is deceased.

(2) Upon notification of death and a request for any or all of the contents of a computer folder by an authorized recipient on a form furnished by the state court administrator and payment of a retrieval fee, the state court administrator shall:

(a) Deliver a copy of the requested contents of the computer folder with each electronic estate planning document certified by the state court administrator to the authorized recipient;

(b) As to a will document of a creator, lodge a copy of the electronic estate planning document certified by the state court administrator as required by section 15-11-516; and

(c) File the request form in the creator's computer folder.

(3) A request made pursuant to this section must be made on a form provided by the state court administrator that contains a declaration that the act of submitting the request to the state court administrator subjects the submitter and the individual on whose behalf the submitter is acting to the penalty of perjury pursuant to section 15-23-110 for the information provided and the declarations made in the request form, whether or not the individual is named in the request as the one submitting the request.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2443, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-121. Action to establish a claim.

If an individual, entity, or government agency submits a request for retrieval of a copy of any or all of the contents of a computer folder as provided in this article 23 and the request is denied by the state court administrator or is not acted upon by the state court administrator within ninety days after its submission, the individual, entity, or government agency may file an action in the probate court of the city and county of Denver, naming the state court administrator as respondent, to retrieve a copy of any or all of the contents of the computer folder. The individual, entity, or government agency must file the action within ninety days after the date of the denial by the state court administrator or within one hundred eighty days after the date of the filing of the request for retrieval if the state court administrator has failed to act on it.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2445, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

15-23-122. Deletion of electronic estate planning documents and computer folders - error correction.

(1) (a) The state court administrator shall delete an electronic estate planning document filed pursuant to this article 23 upon presentation of:

(I) A request by a creator of the document on a notarized form furnished by the state court administrator;

(II) Proof of identity of the creator; and

(III) Payment of a deletion fee.

(b) The state court administrator shall file the request form in the creator's computer folder and shall maintain the folder for the period of time specified in subsection (4) of this section.

(c) Upon request for deletion pursuant to this subsection (1), the state court administrator shall delete the electronic document only from the computer folder of the creator who requests the deletion.

(2) A request pursuant to this section must be made on a form provided by the state court administrator that contains the declaration that the act of submitting the request to the state court administrator subjects the submitter and the individual on whose behalf the submitter is acting to the penalty of perjury pursuant to section 15-23-110 for the information provided and the declarations made on the request form, whether or not the individual is named in the request as the one submitting the request.

(3) The state court administrator may take such actions as the state court administrator deems necessary to correct any technological, typographical, or clerical error, and, at the state court administrator's discretion, he or she may delete a record that a custodian has filed in error.

(4) The state court administrator may delete a computer folder one hundred years after the date of the creation of the folder.

Source: L. 2019: Entire article added, (HB 19-1229), ch. 252, p. 2445, § 1, effective January 1, 2023 (see editor's note following the heading for this article 23).

NON-TESTAMENTARY ELECTRONIC ESTATE PLANNING DOCUMENTS

ARTICLE 24

Uniform Non-Testamentary Electronic Estate Planning Documents Act

PART 1
GENERAL PROVISIONS AND DEFINITIONS

15-24-101. Short title.

15-24-102. Definitions.

15-24-103. Construction.

PART 2
ELECTRONIC NON-TESTAMENTARY ESTATE PLANNING DOCUMENTS

15-24-201. Scope.

15-24-202. Principles of law and equity.

15-24-203. Use of electronic record or signature not required.

15-24-204. Recognition of electronic non-testamentary estate planning document and electronic signature.

15-24-205. Attribution and effect of electronic record and electronic signature.

15-24-206. Notarization and acknowledgment.

15-24-207. Witnessing and attestation.

15-24-208. Retention of electronic record - original.

15-24-209. Certification of paper copy.

15-24-210. Admissibility in evidence.

15-24-211. Protection of persons without knowledge of non-testamentary estate planning documents.

PART 3
(Reserved)

PART 4
MISCELLANEOUS PROVISIONS

15-24-401. Uniformity of application and construction.

15-24-402. Relation to electronic signatures in global and national commerce act.

15-24-403. Transitional provision.

PART 1

GENERAL PROVISIONS AND DEFINITIONS

15-24-101. Short title.

This article 24 may be cited as the "Uniform Non-Testamentary Electronic Estate Planning Documents Act".

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 679, § 1, effective January 1, 2025.

15-24-102. Definitions.

In this article 24:

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

(2) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(3) "Electronic signature" means an electronic symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(4) "Information" includes data, text, images, codes, computer programs, software, and databases.

(5) "Non-testamentary estate planning document" means a record relating to estate planning that is readable as text at the time of signing and is not a will or contained in a will. The term:

(a) In this article 24, is limited to a record that creates, exercises, modifies, releases, or revokes:

(I) A trust instrument;

(II) A trust power that under the terms of the trust requires a signed record;

(III) A certification of a trust pursuant to section 15-5-1013;

(IV) A power of attorney that is durable pursuant to the "Uniform Power of Attorney Act", part 7 of article 14 of this title 15;

(V) An agent's certification pursuant to section 15-14-719 of the validity of a power of attorney and the agent's authority;

(VI) A power of appointment;

(VII) An advance directive, including a health-care power of attorney, directive to physicians, natural death statement, living will, and medical or physician order for life-sustaining treatment;

(VIII) A record directing disposition of an individual's body after death;

(IX) A nomination of a guardian for the signing individual;

(X) A nomination of a guardian for a minor child or disabled adult child;

(XI) A mental health treatment declaration;

(XII) A disclaimer pursuant to the "Uniform Disclaimer of Property Interests Act", part 12 of article 11 of this title 15; and

(XIII) A separate writing or memorandum pursuant to section 15-11-513;

(b) Excludes all other non-testamentary estate planning documents, including:

(I) A deed of real property, including a beneficiary deed pursuant to part 4 of article 15 of this title 15;

(II) A certificate of title for a motor vehicle, watercraft, or aircraft; and

(III) Subject to section 15-24-201 (2)(b)(III), any record of a multiple-party agreement or other contractual arrangement not identified in subsection (5)(a) of this section.

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

(7) "Power of attorney" means a record that grants authority to an agent to act in place of the principal, even if the term is not used in the record.

(8) "Record" means information:

(a) Inscribed on a tangible medium; or

(b) Stored in an electronic or other medium and retrievable in perceivable form.

(9) "Security procedure" means a procedure to verify that an electronic signature, record, or performance is that of a specific person or to detect a change or error in an electronic record. The term includes a procedure that uses an algorithm, code, identifying word or number, encryption, or callback or other acknowledgment procedure.

(10) "Settlor" means a person, including a testator, that creates or contributes property to a trust.

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

(a) Execute or adopt a tangible symbol; or

(b) Attach to or logically associate with the record an electronic signature.

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

(13) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as:

(a) Expressed in the trust instrument; or

(b) May be established by other evidence in a judicial proceeding or in a nonjudicial settlement agreement pursuant to section 15-5-111 or by alternate dispute resolution pursuant to section 15-5-113.

(14) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments.

(15) "Will" includes a codicil and a 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.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 679, § 1, effective January 1, 2025.

15-24-103. Construction.

(1) This article 24 is designed to authorize estate planning documents to be in electronic form and electronically signed. This article 24 does not negate other state law requirements that must be satisfied to validate a non-testamentary estate planning document. Accordingly, this article 24 must be construed and applied to:

(a) Facilitate the creation of non-testamentary estate planning documents in electronic form and the electronic signing of such documents; and

(b) Be consistent with reasonable practices concerning electronic documents and signatures and continued expansion of those practices.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 682, § 1, effective January 1, 2025.

PART 2

ELECTRONIC NON-TESTAMENTARY ESTATE PLANNING DOCUMENTS

15-24-201. Scope.

(1) Except as provided in subsection (2) of this section, this article 24 applies to an electronic non-testamentary estate planning document and an electronic signature on a non-testamentary estate planning document.

(2) (a) This article 24 does not apply to a non-testamentary estate planning document if the document precludes use of an electronic record or electronic signature.

(b) This article 24 does not affect the validity of an electronic record or electronic signature that is valid pursuant to the:

(I) "Uniform Electronic Transactions Act", article 71.3 of title 24;

(II) "Uniform Electronic Wills Act", part 13 of article 11 of this title 15; or

(III) Terms of a record that evidences an agreement or other arrangement governing the transfer of property at a party's death.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 682, § 1, effective January 1, 2025.

15-24-202. Principles of law and equity.

The law of this state and principles of equity applicable to a non-testamentary estate planning document apply to an electronic non-testamentary estate planning document except as modified by this article 24.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 682, § 1, effective January 1, 2025.

15-24-203. Use of electronic record or signature not required.

(1) This article 24 does not require a non-testamentary estate planning document or signature on a non-testamentary estate planning document to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(2) A person is not required to have a non-testamentary estate planning document in electronic form or signed electronically even if the person previously created or signed a non-testamentary estate planning document by electronic means.

(3) A person may not waive the provisions of this section.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 683, § 1, effective January 1, 2025.

15-24-204. Recognition of electronic non-testamentary estate planning document and electronic signature.

(1) A non-testamentary estate planning document or a signature on a non-testamentary estate planning document may not be denied legal effect or enforceability solely because it is in electronic form.

(2) If another law of this state requires a non-testamentary estate planning document to be in writing, an electronic record of the document satisfies the requirement.

(3) If another law of this state requires a signature on a non-testamentary estate planning document, an electronic signature satisfies the requirement.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 683, § 1, effective January 1, 2025.

15-24-205. Attribution and effect of electronic record and electronic signature.

(1) An electronic non-testamentary estate planning document or electronic signature on an electronic non-testamentary estate planning document is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including by showing the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(2) The effect of attribution to a person pursuant to subsection (1) of this section of a document or signature is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption and as provided by other law.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 683, § 1, effective January 1, 2025.

15-24-206. Notarization and acknowledgment.

If another law of this state requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied with respect to an electronic non-testamentary estate planning document if an individual authorized to perform the notarization, acknowledgment, verification, or oath attaches or logically associates the individual's electronic signature on the document together with all other information required to be included under the other law.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 683, § 1, effective January 1, 2025.

15-24-207. Witnessing and attestation.

If another law of this state bases the validity of a non-testamentary estate planning document on whether it is signed, witnessed, or attested by another individual, the signature, witnessing, or attestation of that individual may be electronic.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 684, § 1, effective January 1, 2025.

15-24-208. Retention of electronic record - original.

(1) Except as provided in subsection (2) of this section, if another law of this state requires an electronic non-testamentary estate planning document to be retained, transmitted, copied, or filed, the requirement is satisfied by retaining, transmitting, copying, or filing an electronic record that:

(a) Accurately reflects the information in the document after it was first generated in final form as an electronic record or pursuant to section 15-24-209; and

(b) Remains accessible to the extent required by the other law.

(2) A requirement pursuant to subsection (1) of this section to retain a record does not apply to information the sole purpose of which is to enable the record to be sent, communicated, or received.

(3) A person may satisfy subsection (1) of this section by using the services of another person.

(4) If another law of this state requires a non-testamentary estate planning document to be presented or retained in its original form, or provides consequences if a non-testamentary estate planning document is not presented or retained in its original form, an electronic record retained in accordance with subsection (1) of this section satisfies the other law.

(5) This section does not preclude a governmental agency from specifying requirements for the retention of a record subject to the agency's jurisdiction in addition to those in this section. In this section, "governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 684, § 1, effective January 1, 2025.

15-24-209. Certification of paper copy.

An individual may create a certified paper copy of an electronic non-testamentary estate planning document by affirming under penalty of perjury that the paper copy is a complete and accurate copy of the document.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 684, § 1, effective January 1, 2025.

15-24-210. Admissibility in evidence.

Evidence relating to an electronic non-testamentary estate planning document or an electronic signature on the document may not be excluded in a proceeding solely because it is in electronic form.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 684, § 1, effective January 1, 2025.

15-24-211. Protection of persons without knowledge of non-testamentary estate planning documents.

If a person acting in good faith has no actual knowledge of an electronic non-testamentary estate planning document, then the person is not liable for acts performed in good faith and may presume that the document does not exist.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 685, § 1, effective January 1, 2025.

PART 3

(Reserved)

PART 4

MISCELLANEOUS PROVISIONS

15-24-401. Uniformity of application and construction.

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 685, § 1, effective January 1, 2025.

15-24-402. Relation to electronic signatures in global and national commerce act.

This article 24 modifies, limits, or supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., as amended, but does not modify, limit, or supersede 15 U.S.C. sec. 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. sec. 7003(b).

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 685, § 1, effective January 1, 2025.

15-24-403. Transitional provision.

(1) This article 24 applies to an electronic non-testamentary estate planning document created, signed, generated, sent, communicated, received, or stored before, on, or after January 1, 2025.

(2) This article 24 applies to the will of a decedent who dies on or after January 1, 2025.

Source: L. 2024: Entire article added, (HB 24-1248), ch. 154, p. 685, § 1, effective January 1, 2025.