

**Report of the Ad Hoc Committee of
the Estate Planning Section of the Utah Bar
Regarding the 2008 Proposed Amendments to the
Uniform Probate Code**

Submitted to the Estate Planning Section by
Senator Lyle Hillyard
for Review and Comment

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BACKGROUND

The Uniform Probate Code was promulgated in 1969 by the National Conference of Commissioners on Uniform State Laws in conjunction with the Real Property, Probate and Trust Law Section of the American Bar Association. Utah was one of only 16 states that adopted the original 1969 version of the code. Since its adoption, numerous nonuniform changes have been made to Utah's version of the statute based on public policy considerations addressed in the Utah Legislature. The Uniform Probate Code itself has also been revised several times, creating an even larger gap between Utah's adopted statute and the Uniform Law.

This committee was requested to review the most recent proposed changes to the Uniform Probate Code promulgated in 2008. The review and comparison of these changes to Utah's provisions was significantly complicated by the fact that Utah's provisions are not congruent with either the originally promulgated Uniform Probate Code or the amendments that have followed thereafter. The committee struggled with whether to address only the proposed amendment's changes from the existing Uniform Law, and to ignore differences that were actually introduced by Utah's legislature or prior amendments to the Uniform Law, or to address any difference from Utah's existing law in total. Though the committee discussed the changes in total, the end result of the committee's deliberations was to adopt only changes from Existing Uniform Law and not changes previously introduced by the Utah Legislature or the National Conference. A more comprehensive review of Utah's Probate Code and whether the code should be brought more fully in line with the Uniform Law will have to be left for another committee to address.

The committee began its review of the proposed amendments with the agreement that the probate code should provide a general distribution methodology for those who do not provide for their own estate planning. That it should not attempt to be a comprehensive estate plan handling every intricacy, but only a default providing what most people would likely want in a particular given situation. In light of this, the provisions of the code should not be overly complex. They should be simple to understand and administer, and provide bright lines whenever possible avoiding expensive litigation or difficult factual inquiries. Variations from that theme should be accomplished by individuals in their own estate planning.

As a general rule, the recommendations of the committee do not revisit the public policy decision-making that was previously made by the legislature. Rather, the committee has attempted to integrate the positive improvements contained in the 2008 amendments without changing the underlying public policy decisions. Notwithstanding this, some members of the committee have very strong feelings about the need to revisit the underlying public policy decisions in certain areas of the code. These public policy areas will be noted in the comments to our proposal below.

What follows is a proposal, in redline format, for amendment to the Utah Uniform Probate Code gleaned from the proposed 2008 Uniform Probate Code Amendments. Comments regarding each proposed amendment follow each section, however these comments will not give a comprehensive outline of the differences between the 2008 amendments and the proposals contained here. The reader is referred to the proposed amendments directly for comprehensive coverage of its provisions.

75-1-110. COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR AMOUNTS.

(a) In this section:

- (1) "CPI" means the Consumer Price Index (Annual Average) for All Urban Consumers (CPI-U): U.S. City Average — All items, reported by the Bureau of Labor Statistics, United States Department of Labor or its successor 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 [insert appropriate state agency]; and**
- (2) "Reference base index" means the CPI for calendar year 2009.**

(b) The dollar amounts stated in Sections 75-2-102, 75-2-202(2), 75-2-402, 75-2-403, and 75-2-405 apply to the estate of a decedent who died in 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 any increase or decrease produced by the computation is not a multiple of \$100, the increase or decrease is rounded down, if an increase, or up, if a decrease, to the next multiple of \$100, but for the purpose of Section 2-405, the periodic installment amount is the lump-sum amount divided by 12. If the CPI for 2009 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.

(c) Before February 1, 2011, and before February 1 of each succeeding year, the [insert appropriate state agency] shall publish a cumulative list, beginning with the dollar amounts effective for the estate of a decedent who died in 2011, of each dollar amount as increased or decreased under this section.

Comment

The committee agreed with the inclusion of an automatic adjustment for inflation as provided in this section. An automatic inflation adjustment avoids the need for constant statutory revision of figures and amounts set forth in the statute.

75-1-201. General Definitions. Subject to additional definitions contained in the subsequent chapters that are applicable to specific chapters, parts, or sections, and unless the context otherwise requires, in this code:

* * *

(42) "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) "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.

Comment

The committee agreed with the inclusion of the two additional definitions clarifying the definition of Record and Sign.

75-2-102. Intestate share of spouse.

- (1) The intestate share of a decedent's surviving spouse is:
 - (a) the entire intestate estate if:
 - (i) no descendant of the decedent survives the decedent; or
 - (ii) all of the decedent's surviving descendants are also descendants of the surviving spouse;
 - (b) the first ~~\$50,000~~\$75,000, plus 1/2 of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.
- (2) For purposes of Subsection (1)(b), if the intestate estate passes to both the decedent's surviving spouse and to other heirs, then any nonprobate transfer, as defined in Section 75-2-206, received by the surviving spouse is chargeable against the intestate share of the surviving spouse.

Comment

The committee agreed with the need for an increase in the intestate share of a spouse where there are children of the decedent that are not the children of the surviving spouse. The amount proposed above by the committee is loosely based on inflation since 1988 when this section was last repealed and re-enacted. The committee did not attempt to follow the much larger amount currently contained in the Uniform Probate Code of \$150,000. Nor did the committee feel a need to follow the Uniform Probate Code's four tier approach that Utah has never adopted.

Specific mention should be made of subpart (2) of this section. The Utah Legislature has, throughout the probate code, provided that amounts received in intestacy will be offset by a non-probate transfers received. The consensus of the committee was that this offset provision should be retained in intestacy.

75-2-103. Share of heirs other than surviving spouse.

- (1) Any part of the intestate estate not passing to ~~the~~a decedent's surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals ~~designated below~~ who survive the decedent:
 - (a) to the decedent's descendants per capita at each generation as defined in Subsection 75-2-106(2);
 - (b) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;
 - (c) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);
 - (d) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents;
 - (i) ~~half of the estate passes~~ to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3); and ~~the other~~
 - (ii) ~~half passes~~ to the decedent's maternal relatives in the same manner; but grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are

deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3):

(e) if there is no surviving grandparent descendant, parent, or descendant of a grandparent on either the paternal or parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the entire estate passes maternal but not the paternal side to the decedent's relatives on the other side with one or more surviving members in the same manner as the half:

(2) For purposes of Subsections (a), (b), (c), and (d), any nonprobate transfer, described in paragraph (d).

(2) If there is no taker under subsection (1), but the decedent has:

(a) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants, the descendants taking per capita at each generation as defined in Section 75-2-205, received by an heir is chargeable against the intestate share of such heir. Subsection 75-2-106(4); or

(b) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants, the descendants taking per capita at each generation as defined in Subsection 75-2-106(4).

Comment

Most of the proposed changes to this section are stylistic and make the section easier to read and understand. However, subpart (2) adds additional intestate takers in default (step children) before the estate would escheat to the State. Subsection 75-2-106(4) had to be added to Utah's statute since Utah's default division methodology is Per Capita at Each Generation.

75-2-104. Requirement that heir survive decedent for 120 hours; of survival by 120 hours; individual in gestation.

(1) Requirement of Survival by 120 Hours; Individual in Gestation. For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (2), the following rules apply:

(a) An individual born before a decedent's death An individual who fails to survive the decedent by 120 hours is considered deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. ~~If~~ If it is not established by clear and convincing evidence that an individual who would otherwise be an heir born before the decedent's death survived the decedent by 120 hours, it is considered deemed that the individual failed to survive for the required period. ~~This section is not to be applied if~~

(b) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(2) Section Inapplicable If Estate Would Pass to State. This section does not apply if its application would result in a taking of intestate cause the estate by to pass to the state under Section 75-2-105.

Comment

The proposed changes to this section are stylistic and make the section easier to read, as

well as combining this Section with Section 75-2-108 on afterborn heirs. No substantive change to current Utah law is intended.

75-2-106. Definitions -- Per capita at each generation -- Terms in governing instruments.

(1) As used in this section:

(a) "Deceased descendant," "deceased parent," or "deceased grandparent" means a descendant, parent, or grandparent who either predeceased the decedent or is considered to have predeceased the decedent under Section 75-2-104.

(b) "Surviving descendant" means a descendant who neither predeceased the decedent nor is considered to have predeceased the decedent under Section 75-2-104.

(2) (a) If, under Subsection 75-2-103(1)(a), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the decedent's descendants, the estate or part thereof 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.

(b) Each surviving descendant in the nearest generation is allocated one share.

(c) 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) (a) If, under Subsection 75-2-103(1)(c) or (d), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

(i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants; and

(ii) deceased descendants in the same generation who left surviving descendants, if any.

(b) Each surviving descendant in the nearest generation is allocated one share.

(c) 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.

(4) (a) If, under Subsection 75-2-103(1)(e), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the descendants of the decedent's deceased spouse, the estate or part thereof is divided into as many equal shares as there are:

(i) surviving descendants in the generation nearest the deceased spouse that contains one or more surviving descendants; and

(ii) deceased descendants in the same generation who left surviving descendants, if any.

(b) Each surviving descendant in the nearest generation is allocated one share.

(c) 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.

(4) Any reference to this section found in a governing instrument for the definitions of "per stirpes," "by representation," or "by right of representation" shall be considered a reference to Section 75-2-709.

Comment

The addition of Subpart (4) was necessary due to the changes to Section 75-2-103, as noted above. The committee believes that a revision of this section to simplify the language by providing a more general definition of per capita at each generation should be undertaken.

75-2-108. ~~[RESERVED] Afterborn heirs.~~

~~An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.~~

Comment

This section was combined into Section 75-2-104 and would now be a reserved section number for future use.

75-2-109. Advancements.

(1) If an individual dies intestate as to all or a portion of his 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:

(a) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement; or

(b) 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 purposes of Subsection (1), 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) (a) 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.

(b) If the amount of the advancement exceeds the share of the heir receiving the same, the heir is not required to refund any part of the advancement.

Comment

The 2008 Proposed Amendments do not contain any change to the language of the Uniform Code, only a change to the Comments due to the inflation adjustment. Utah's enactment is almost identical to the Uniform Code, with the exception of subpart 3(b) which does not exist in the Uniform Code. The committee felt that this subpart should remain.

75-2-114. Parent and child relationship.

(1) Except as provided in Subsections (2) and (3), for purposes of intestate succession by, through, or from a person, an individual is the child of the individual's natural parents, regardless of their marital status. The parent and child relationship may be established as provided in Title 78B, Chapter 15, Utah Uniform Parentage Act.

(2) An adopted individual is the child of the adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on:

- (a) the relationship between the child and that natural parent; or
 - (b) the right of the child or a descendant of the child to inherit from or through the other natural parent.
- (3) Inheritance from or through a child by either natural parent or his kindred is precluded unless that natural parent has openly treated the child as his, and has not refused to support the child.

Comment

The Proposed Amendments add a new Subpart 2 dealing with the establishment of a parent child relationship for purposes of intestacy. Utah's current provision above is very clean, easy to understand, and easy to administer. The Probate Code is intended to provide a basic simple will for individuals and is not intended to handle every possible contingency. Rather, individuals can and should overcome the default provisions of the code through their own estate planning when they have complex family situations. The more complex the family situation, the more likely any legislative "guess" at the wishes of the individual may be wrong and the more costly and complex we make it to navigate the system. Utah's current law relies upon the Utah Uniform Parentage Act, Utah Code Ann. § 78B-15-101 et seq. to define a parental relationship. Many of the provisions in the Proposed Amendments are already covered in this Act, and the committee felt it to be cleaner and more consistent to continue to allow the Utah Uniform Parentage Act to determine who is considered a parent rather than to muddy the water of the Probate Code with the provisions set forth in the Amendment.

There was some discussion in the committee about whether or not the provision of this Section allowing a child to inherit from their biological parent in spite of a step parent adoption should be revisited. It is the belief of the committee that most individuals would not anticipate a biological child would continue to inherit from a biological parent after being given up for adoption to a step parent. However, the committee makes no recommendation for a change in this provision.

75-2-202. Elective share -- Supplemental elective share amount -- Effect of election on statutory benefits -- Nondomiciliary.

(1) The surviving spouse of a decedent who dies domiciled in Utah has a right of election, under the limitations and conditions stated in this part, to take an elective-share amount equal to the value of 1/3 of the augmented estate.

(2) If the sum of the amounts described in Subsection 75-2-209(1), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under Subsections 75-2-209(2) and (3) is less than ~~\$25,000~~75,000, the surviving spouse is entitled to a supplemental elective-share amount equal to ~~\$25,000~~75,000, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Subsections 75-2-209(2) and (3).

(3) If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are charged against, and are not in addition to, the elective-share and supplemental elective-share amounts.

(4) The right, if any, of the surviving spouse of a decedent who dies domiciled outside Utah to take an elective share in property in Utah is governed by the law of the decedent's domicile at death.

Comment

The 2008 Proposed Amendments' only change to the Uniform Probate Code is to increase the supplemental elective share amount from \$50,000 to \$75,000. Utah currently has a supplemental elective share amount of \$25,000. The committee agreed that this should be increased to \$75,000. However, it should be clearly understood that the Utah Elective Share Provision is not uniform with the Uniform Probate Code provision.

The Uniform Probate Code operates under the partnership theory of marriage. For Elective Share purposes, the Uniform Probate Code provides a vesting schedule of 15 years after which all property of the couple is considered the property of the marital partnership, and is subject to division equally between them. Until full vesting, only a percentage of the assets are subject to the election. Under this methodology, tracing requirements are avoided completely and it is very simple to administer and calculate.

Utah's elective share provision provides that a surviving spouse may elect against the estate of the decedent a one third share of the augmented estate. The augmented estate is essentially calculated by determining which assets are marital assets and which assets are separate assets. Marital assets are considered part of the augmented estate while separate assets are not. This creates a significant tracing burden in the calculation of the augmented estate. In addition, Utah's law provides that assets passing to the surviving spouse by homestead allowance, exempt property, and family allowance are charged against, and are not in addition to the elective share. The effect of the Utah Elective Share provision is to allow spouse's to exclude one another from inheritance as long as they keep their property separate and traceable.

The committee uniformly agreed that the Utah provision is very difficult to understand and administer. The views of the committee diverged significantly on whether the provisions were unfair to a surviving spouse, and if so, what should be done. One committee member suggested the adoption of community property. Another, an adoption of the Uniform Probate Code Provisions as they stand. One suggested the adoption of the Uniform Probate Code provisions with a slower vesting schedule or even a vesting schedule that ended at one third rather than one half. In the end the committee determined that a rewriting of the Elective Share provision was beyond the scope of what could be timely accomplished, and the only actual change adopted was the increase in the Supplemental Elective Share amount. It is the committee's recommendation that either this committee continue working on this issue, or that another committee be formed to consider in depth a revision to the elective share.

75-2-402. Homestead allowance.

A decedent's surviving spouse is entitled to a homestead allowance of ~~\$15,000~~\$22,500. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to ~~\$15,000~~\$22,500 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims of the estate. Unless otherwise provided by the will or governing instrument, the homestead allowance is chargeable against any benefit or share passing to the

surviving spouse, minor, or dependent child, by the will of the decedent, by intestate succession, by way of elective share, and by way of nonprobate transfers as defined in Sections 75-2-205 and 75-2-206.

Comment

The committee agreed that the inflation adjusted amount of the homestead allowance should be adopted. The Utah provision diverges from the Uniform law in the offset of the Homestead allowance by amounts passing by will, intestate succession, elective share, and non probate transfers. The Uniform law provides the Homestead allowance in addition to these items. The committee agreed that if the amount of the Homestead allowance was actually sufficient to provide for its intended purpose, that the offsets should apply. Committee member views diverged on whether the offset should be removed or retained.

75-2-403. Exempt property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$~~10,000~~15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than \$~~10,000~~15,000, or if there is not \$~~10,000~~15,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$~~10,000~~15,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. Unless otherwise provided by the will or governing instrument, the exempt property allowance is chargeable against any benefit or share passing to the surviving spouse, if any, or if there is no surviving spouse, to the decedent's children, by the will of the decedent, by intestate succession, by way of elective share, and by way of nonprobate transfers as defined in Sections 75-2-205 and 75-2-206.

Comment

The committee agreed that the inflation adjusted amount of the Exempt property provision should be adopted. The Utah provision diverges from the Uniform law in the offset of Exempt property by amounts passing by will, intestate succession, elective share, and nonprobate transfer. The Uniform law provides the Exempt property in addition to these items. Committee member views diverged on whether the offset should be removed or retained.

75-2-405. Source, determination, and documentation.

(1) If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the 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 homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding \$~~18,000~~27,000

or periodic installments not exceeding \$~~1,500~~2,250 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. 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 include a family allowance other than that which the personal representative determined or could have determined.

(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 homestead allowance, exempt property, and family allowance to the trust established under Subsection 75-2-212(2).

Comment

The committee agreed that the inflation adjusted amount of the Family Allowance provision should be adopted.

75-2-502. Execution -- Witnessed wills -- Holographic wills.

(1) Except as provided in Subsection (2) and in Sections 75-2-503, 75-2-506, and 75-2-513, 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) signed by at least two individuals, each of whom signed within a reasonable time after he witnessed either the signing of the will as described in Subsection (1)(b) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with Subsection (1) 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 constitutes 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.

Comment

The 2008 Proposed Amendments provided for the execution of a will with a notary only, without any witnesses. Large amounts of assets are passed by documents without the formality of a will, such as living trusts and POD beneficiary designations. Utah already provides for the execution of wills with only one witness in addition to the notary. There is some concern, however, that a relaxation of the witnessing provisions on a will may create a greater likelihood of fraud. The committee determined that the current execution requirements should be retained, though there were some on the committee that felt comfortable with the proposed provisions enactment.

75-2-504. Self-proved will.

(1) A will 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, whether or not that officer is also a witness to the will, 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 18 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 each of us, in the presence and hearing 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 18 years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

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 _____.

(Signed) _____

(Official capacity of officer)

(2) An attested will 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:

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 presence and hearing of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time eighteen years or 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 _____.

(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.

(4) The notarization of will provisions of this section preempt conflicting provisions in other sections of the Utah Code whether the will was executed prior to or after July 1, 1998.

Comment

The changes required in the 2008 Proposed Amendments are unnecessary unless the revised will execution provisions of Section 75-2-502 are adopted. Since the committee determined not to adopt the execution changes, changes to this provision were deemed unnecessary.

75-2-601. Scope.

In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a will.

Comment

This provision is already Utah law. No change is necessary.

75-2-705. Class gifts construed to accord with intestate succession.

(1) Adopted individuals and individuals born out of wedlock, 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. Terms of relationship that do not differentiate relationships by blood from those by affinity, such as "uncles," "aunts," "nieces," or "nephews," are construed to exclude relatives by affinity. 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.

(2) In addition to the requirements of Subsection (1), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse.

(3) In addition to the requirements of Subsection (1), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

Comment

Since the committee determined that the parent-child relationship amendments should not be adopted, the changes set forth in this section under the 2008 Proposed Amendments were determined to be unnecessary.

75-2-805. Reformation to Correct Mistakes. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

Comment

This provision is essentially the same as the one found in the Utah Uniform Trust Code, and the committee agreed that this should be adopted to coordinate these statutes.

75-2-806. Modification to achieve transferor's tax objectives. To achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.

Comment

This provision is essentially the same as the one found in the Utah Uniform Trust Code, and the committee agreed that this should be adopted to coordinate these statutes.

75-3-406. Formal testacy proceedings -- Contested cases -- Testimony of attesting witnesses.

(1) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state, competent, and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(2) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

Comment

The changes required in the 2008 Proposed Amendments are unnecessary unless the revised will execution provisions of Section 75-2-502 are adopted. Since the committee determined not to adopt the execution changes, changes to this provision were deemed unnecessary as well.

75-1-403. Pleadings – Notice

In formal proceedings involving inter vivos or testamentary trusts, including proceedings to modify or terminate a trust, estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(1) 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 any other appropriate manner.

(2) ~~Notice as prescribed by Section 75-1-401 shall be given to every interested person. Notice may be given both to a person and to another who may bind him.~~ Persons are bound by orders binding others in the following cases:

(a) 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 a 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.

(b) To the extent there is no conflict of interest between the representative and the person represented with respect to a particular question or dispute:

(i) a conservator may represent and bind the person whose estate he controls;

(ii) a guardian may represent and bind the ward if no conservator of the ward's estate has been appointed;

(iii) an agent having authority to do so may represent and bind the principal;

(iv) a trustee may represent and bind the beneficiaries of the trust;

(v) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(vi) if no conservator or guardian has been appointed, a parent may represent and bind the parent's minor or unborn child.

(c) Unless otherwise represented, a minor, incapacitated or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented and bound by another person 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.

(3) Notice is required as follows:

(a) Notice as prescribed by Section 75-1-401 shall be given to every interested person. Notice may be given both to a person and to another who may bind him.

(b) Whenever notice to a person is required or permitted under this chapter, notice to another person who may represent and bind the person represented under this section constitutes notice to the person represented.

(4) Even if there is representation under this section, if the court determines that representation of the interest might otherwise be inadequate, the court may appoint a guardian ad litem to represent the interest of, and approve an agreement on behalf of, a minor, incapacitated or unborn person, or a person whose identity or location is unknown.

(5) If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests. In approving an agreement, a guardian ad litem may consider general family benefit accruing to the living members of the family of the person represented.

(6) Whenever consent may be given by a person pursuant to this chapter, the consent of a person who may represent and bind the person represented under this section is the consent of, and is binding on, the person represented unless the person represented objects to the representation before the consent would otherwise become effective.

Comment

This section was not included in the 2008 Proposed Amendment but has been included here as a recommendation of the committee for change. The remainder of this comment comes from Charles M. Bennett, an attorney at Blackburn and Stoll, LC:

This amendment restores this section to its form prior to amendment in 2004. Prior to the amendment, Utah's Section 75-1-403, like Uniform Probate Code Section 1-403, was a key wheel in the smooth operation of probate proceedings. The concept, referred to in scholarly circles as "virtual representation," makes the operation of probate matters more efficient by eliminating the need for court appointed guardians, conservators, or guardians ad litem for legally incompetent and unascertainable interested persons.

When this section was substantially amended in 2004, it was not because the legislature felt the provision was improvident. Rather, in adopting the Uniform Trust Code that year, the legislature felt this section duplicated the provisions of the Uniform Trust Code found at Sections 75-7-301

et seq. (2004).

While it is possible to read Section 75-7-301 *et seq.* as applying to probate proceedings as well as trust proceedings, it is more likely that a court would not do so. Title 75 is entitled “Uniform Trust Code” and Part 3 of Title 75 is entitled “Representation.” Thus, these provisions appear to be restricted to trust matters.

On the other hand, Section 75-1-403 states: “In formal proceedings involving inter vivos or testamentary trusts, including proceedings to modify or terminate a trust, estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply: . . .” Since Section 75-1-403 applies to both probate and trust proceedings, one would expect to find the specific provisions establishing virtual representation in Section 75-1-403. Rather than changing the Uniform Trust Code, this proposal simply returns Section 75-1-403 to its status prior to the 2004 amendment.

75-7-814. Specific powers of trustee.

- (1) Without limiting the authority conferred by Section 75-7-813, 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 from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates, 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 owner, 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 depository 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 of 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 governmental 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 which 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 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) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(s) pledge trust property to guarantee loans made by others to the beneficiary;

(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 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 under Title 75, Chapter 5a, Uniform Transfers to Minors Act;

(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 alternative 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 finalize the administration of the trust and distribute the trust property to the persons entitled to it.

(2) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.

(a) The trustee shall exercise reasonable care, skill, and caution in:

(i) selecting the agent;

(ii) establishing the scope and terms of the delegation consistent with the purposes of the trust; and

(iii) periodically reviewing the agent's actions to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent has 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 this Subsection (2) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(3) The trustee may exercise the powers set forth in this section and in the trust either in the name of the trust or in the name of the trustee as trustee, specifically including the right to take title to encumber or convey assets, including real property, in the name of the trust. This subsection applies to a trustee's exercise of trust powers both prior to and after the effective date of this subsection. After the effective date of this subsection, for recording purposes, the name and address of at least one trustee must be included on all recorded documents affecting real property to which the trust is a party in interest.

Comment

This section was not included in the 2008 Proposed Amendment but has been included here as a recommendation of the committee for change to the Utah Trust Code. It allows the transacting of trust business in the name of the trust and is primarily intended to deal with retirement plans established under a trust arrangement where the Trustee of the retirement plan trust could change on a regular basis.