

**TRUST AND PROBATE LITIGATION: AVOIDING IT WHERE YOU CAN  
AND DEALING WITH IT WHEN YOU CAN'T**

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**1. Avoiding Probate/Trust Disputes**

a. *Most common causes of estate/trust disputes:*

- i. Lack of communication
  - 1. Failure/refusal of maker/trustor to communicate intentions
  - 2. Balance between disclosure and confidentiality
- ii. Last minute estate/trust changes
  - 1. Not inherently wrong, but often breeds suspicion
- iii. Capacity issues
- iv. Over-active elements in the family
- v. Elimination of child or spouse as heir or beneficiary
- vi. Lack of transparency post-death
  - 1. Refusal to disclose estate/trust materials
  - 2. Refusal to discuss assets or plans
- vii. Self-dealing or perceived self-dealing
- viii. Lack of understanding of the process
- ix. Heavy-handed PR or trustee

**2. Actions Counsel Can Take to Avoid or Minimize Disputes**

a. *Pre-death actions:*

- i. Encourage client to share plans with family members to the extent client is comfortable doing so
- ii. Understand client's reasons for plans and document client's rationale, particularly when the plan is unique or controversial
  - 1. Avoid getting too specific as that can create disputes over underlying facts
- iii. Carefully discuss possible areas of dispute and take actions to minimize those areas of dispute
  - 1. Help client consider family feelings post-death
  - 2. Help client realistically assess family circumstances
- iv. Be cautious about the level of family involvement
  - 1. Exclude potential heirs/beneficiaries from substantive discussions
    - a. Note this in meeting record
  - 2. Consider holding family meeting after planning has been completed to explain intentions
    - a. Not always helpful, but can be
  - 3. Warn client about children trying to push for estate/trust changes
    - a. Develop a plan with the client to respond to this

- v. Develop a plan to deal with the caretaker issue
  - 1. If child/family member is to be a caretaker, discuss a fair way to address compensation
    - a. Document arrangement
    - b. Include other family members in the discussion
  - 2. Third-party caretaker
    - a. Have a written agreement that clarifies role
    - b. Restrict the ability to sign checks, receive gifts, accept money, etc.
    - c. Have another person monitor the client's affairs
- vi. Encourage independent PR or trustee
  - 1. Second marriage situations (minimizes fights between spouse or children from first marriage)
  - 2. Strained relationships between children
- vii. Don't rely too much on standard will/trust provisions
  - 1. Need to customize language to avoid ambiguity
    - a. Example: be specific in how distributions should be made and when they should be made
  - 2. Make sure to remove unnecessary or irrelevant provisions
    - a. Create potential and unnecessary arguments
  - 3. Consider adding provisions to eliminate disputes
    - a. E.g., unitrust amount or minimum distribution for second spouse to avoid disputes about income/principal allocations
- viii. Take extra precaution where capacity may be an issue
  - 1. Meet more than once with client
  - 2. Exclude other family members when substantive matters are discussed
  - 3. Ask probing questions to ensure client's desires are understood
  - 4. Consider capacity evaluation at time of execution
  - 5. Consider recording pertinent aspects of meeting
  - 6. Don't be afraid to express your concerns with the client
  - 7. Keep good notes
- ix. Have a plan for dealing with personal property
  - 1. Frequently disputed issue because of emotional ties to heirlooms, etc.
  - 2. List can be good if updated properly
  - 3. Encourage client to communicate desires
- x. Help client to effect planning
  - 1. Encourage follow-through
  - 2. Encourage client to maintain careful documentation

*b. Post-death actions*

- i. Encourage transparency
  - 1. Encourage PR/trustee to share information, to hold a family meetings, to discuss estate/trust terms and process

- ii. Avoid perception that you are choosing sides
- iii. Help PR/trustee take prompt action to create inventory and to take control of assets
- iv. Help personal property to be divided promptly to avoid the disappearance or claimed taking of assets
- v. Help PR/trustee avoid delays – passage of time tends to create opportunities for in-fighting
- vi. Help PR/trustee fulfill duties, including to
  - 1. Comply with estate documentation
  - 2. Represent estate/trust interests, not faction of the family
  - 3. Create separate trust/estate accounts
  - 4. Circulate inventory and accounting
  - 5. Address debts and claims
- vii. Consider instruction letter to PR/trustee
- viii. Provide information to family as you are able to do so

*c. Resolving early disputes when they have arisen*

- i. Early identification of the true source of the dispute is critical
  - 1. Will help to focus resolution efforts
- ii. Re-establish communication
  - 1. Re-engage parties in discussions
  - 2. Consider an all-hands meeting—cathartic effect of open discussions involving family disputes
  - 3. Try to build consensus where possible to prevent the dispute from spreading
- iii. Ensure transparency
  - 1. Help parties understand that the exchange of information will not hurt position and will quell the dispute, while a lack of transparency will have the opposite effect.

**3. Resolving disputes through mediation, settlements and the appointment of third-party administrators**

- a. Litigation is often not the best alternative for resolving trust and probate disputes*
  - i. Zero-sum game
  - ii. Almost always the most costly way to resolve estate/trust problems
  - iii. Court has limited remedies
    - 1. Parties can usually structure a better deal for themselves outside of court
- b. Mediation is required*
  - i. Increasingly difficult to avoid mediation
- c. Choose an experienced neutral who understands trust/probate issues*
  - i. Can help parties see the particular problems with their positions

1. Mediator without experience in trust/probate issues can be detrimental because he or she can perpetuate incorrect perceptions or misunderstandings
- d. *Creative settlements*
- i. Both the probate and trust codes contain provisions allowing parties (if all interested persons are involved) to settle disputes
    1. In some cases, settlements can even modify an estate or trust
  - ii. Settlements allow parties to include consideration that would otherwise be unavailable
  - iii. Settlements must be documented and approved by the court
    1. Required by code provisions
    2. Submitting matters for court approval will also bring finality
- e. *Appointing special administrators or fiduciaries to assist in resolving disputes*
- i. Probate code allows court to appoint special administrators to manage matters pending resolution of the estate dispute
  - ii. Trust code also allows appointment of special fiduciaries to perform the same or similar function.
  - iii. Particularly helpful where the dispute involves a challenge to a person's right to be appointed as or to continue serving as personal representative or trustee.

#### 4. Probate and Trust Suits

- a. *Standing of personal representatives and trustees to sue and be sued*
- i. **Utah Code Ann. § 75-3-703(3)**: “Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and courts of any other jurisdiction as his decedent had immediately prior to death.”
  - ii. **Utah Rule of Civil Procedure 25** (Substitution of Parties):
 

(a) Death: (a)(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. The moving party shall serve the motion and any notice of hearing on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.
  - iii. **Utah Code Ann. § 75-7-1001**:

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, or other means;
  - (d) order a trustee to account;
  - (e) appoint a special fiduciary to take possession of the trust property and administer the trust;
  - (f) suspend the trustee;
  - (g) remove the trustee as provided in Section 75-7-706;
  - (h) reduce or deny compensation to the trustee;
  - (i) subject to Section 75-7-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
  - (j) order any other appropriate relief.

*b. Personal Representatives/Trustee Duties*

i. Personal Representatives – Utah Code Ann. §75-3-703(1) & (2):

(1) A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-902. 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. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he 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 his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and

distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this code.

ii. Standard of care – Utah Code § 75-7-902:

1. Manage and invest “as a prudent investor would” under the circumstances
2. Exercise reasonable care, skill and caution
3. Investment and management decisions are evaluated in the context of the overall trust/estate strategy
4. Make a reasonable effort to verify facts relevant to the investment and management decisions

iii. Section 75-7-1010 (Limitations on personal liability of trustee):

1. 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. 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 in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.”
5. “In the absence of actual knowledge or information which would cause a reasonable trustee to inquire further, no trustee shall be liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. The provisions of this section shall not be construed to limit the fiduciary liability of any trustee for his own acts or omissions with respect to the trust estate.”

c. *Preserving Claims*

- i. Limitation on recovery of improper distributions to distributee - Utah Code Ann. § 75-3-909.

1. “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 to return 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 to return the value as of the date of disposition of the property improperly received and its income and gain received by him.”
- ii. Statutes of limitation on decedent's cause of action - Utah Code Ann. § 75-3-108.
  1. “No statute of limitation 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 12 months after death. A cause of action which, but for this section, would have been barred less than 12 months after death, is barred after 12 months unless tolled.”
- iii. Statutes of limitations on claims against an estate – Utah Code Ann. §§ 75-3-802 & 803.
  1. 802 - “Unless an estate is 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. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the three months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under Section 75-3-804 is equivalent to commencement of a proceeding on the claim.”
  2. 803 -
    - a. Statute of limitations vs. statute of repose
    - b. Claims that arose before death
      - i. Barred unless presented within the earlier of:
        1. One year after date of death

2. Within the time period provided for creditors who are given actual notice (60 days of mailing) or the time period after notice by publication (90 days after first publication)

c. Claims that arise after death

i. Barred unless presented:

1. For claims based on a contact with the PR, within 3 months after performance by the PR is due; or
2. Any other claim, within the later of three months after it arises, the date of actual or published notice, or 1 year after death.

iv. Limitations on claims against trustees – § 75-7-1005:

1. Beneficiary may not pursue a claim for breach of trust “more than six months after the date that the beneficiary or a person who may represent and bind the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.”
2. “If Subsection (1) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within one year after the first to occur of:
  - a. the removal, resignation, or death of the trustee;
  - b. the termination of the beneficiary's interest in the trust; or
  - c. the termination of the trust.
  - d. This section does not preclude an action to recover for fraud or misrepresentation related to the report.

d. *Causes of Action*

i. Declaratory Relief – Utah Code Ann. § 78B-6-401 & Utah Rule of Civil Procedure 57

1. Allows for the determination of any number of issues, such as disputed language in estate planning documents, propriety of distributions and other actions, ownership of property (quiet title

action can also be used for real property (see below)), and determination of heirs, etc.

ii. Quiet Title – Used to determine ownership of disputed real property

1. Decision is only binding on the parties to the suit
2. Deed contests

iii. Constructive Trust – Flexible remedy that can be used for multiple purposes

1. *Rawlings v. Rawlings*, 2010 UT 52; *Estate of Harold LeFevre v. Stout*, 2009 UT App 286; *Parks v. Zions First Nat'l Bank*, 673 P.2d 590 (Utah 1983); *Corporation of the President of the Church of Jesus Christ of Latter-day Saints v. Jolley*, 467 P.2d 984 (Utah 1970).
2. Used to give effect to an oral express trust or address unjust enrichment

iv. Breach of Fiduciary Duty

1. Default rule – Utah Code Ann. § 75-3-711. “If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his 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 75-3-712 and 75-3-713.”
  - a. Liability is personal unless estate documents dictate otherwise
2. Estate documents can modify the scope of the fiduciary duty and the extent of the potential liability

v. Will Contest

1. General Standard
  - a. Utah Code Ann. § 75-3-407(1): “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. Except in cases where a presumption is operable, parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. Where one or more presumptions are operable, the ultimate burden of persuasion shall be determined in accordance with the Utah Rules of Evidence.”

2. Incapacity –

- a. Must overcome presumption of competence – *In re Estate of Loupe*, 878 P.2d 1168, 1172 (Utah Ct. App. 1994)
- b. Three-part test for testamentary capacity – “(1) “identify the natural object of one’s bounty and recognize one’s relationship to them, (2) recall the nature and extent of one’s property, and (3) dispose of one’s property understandingly, according to a plan formed in one’s mind.” *Id.*
- c. Determination is as of the date of execution of the will – additional evidentiary hurdle

3. Undue Influence –

- a. “there must be an exhibition of more than influence or suggestions, there must be substantial proof of an overpowering of the testator’s volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desires of the person exercising the influence rather than that of the testator.” *Id.* (quoting *In re Lavelle’s Estate*, 248 P.2d 372, 375-76 (Utah 1952).
- b. Presumption of undue influence exists “where a confidential relationship exists between the testator and the beneficiary of the will.” *In re Estate of Inoupe*, 878 P.2d at 1174.
  - i. Confidential relationship is presumed in some circumstances (attorney/client etc.)

ii. Others are a question of fact

4. No-contest provisions – Utah Code Ann. § 75-3-905 (also § 75-2-515) renders such provisions unenforceable “if probable cause exists for instituting proceedings.”

- a. In other words, if there is a reasonable belief that facts exist that would form a basis to show a right to contest the will, a no-contest provision may be inapplicable.

vi. Reformation

1. Utah Code Ann. § 75-2-805. “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.

*e. Procedural Rules and Evidence*

i. Venue – Utah Code Ann. § 75-1-303.

1. Where proceeding could be maintained in more than one place, the court with the first proceeding 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.”

ii. Rules of Civil Procedure and Evidence Apply

1. Utah Code Ann. § 75-1-304. “Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this code.”

2. Attorney-client and work product privilege issues
  - a. Utah R. Evid. 504(d)(2) exception – “Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction”
3. Hearsay issues
  - a. No dead man’s statute in Utah
  - b. Replaced by Utah R. Evid. 601 – “In an action against the declarant’s estate, the declarant’s statement is admissible notwithstanding the hearsay rule if it was made at a time when the matter had been recently perceived by the declarant and while the declarant’s recollection was clear unless it was made under circumstances indicating its lack of trustworthiness.”

iii. Fees and expenses in estate litigation

1. Utah Code Ann. § 75-3-719. “If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate all necessary expenses and disbursements, including reasonable attorney fees incurred. This provision expressly applies in a will contest to any person nominated as a personal representative in a testamentary instrument submitted in good faith.”
2. Utah Code Ann. § 75-1-310. “When not otherwise prescribed in this code, the court, or the Supreme Court on appeal from the court, may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require.”
3. Utah Code Ann. § 75-7-1004:

Attorney's fees and costs.

(1) In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

- (2) If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees, incurred.

iv. Jury trial

1. Utah Code Ann. § 75-1-306.

- a. “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 statutory or constitutional right to trial by jury.”
- b. “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.”

# **Statutes and Cases**