

UNIFORM PROBATE CODE AMENDMENTS

1999 GENERAL SESSION

STATE OF UTAH

Sponsor: John L. Valentine

AN ACT RELATING TO THE UNIFORM PROBATE CODE; AMENDING DEFINITIONS; MODIFYING PROVISIONS REGARDING ELECTIVE SHARES, DECEDENT'S NET PROBATE ESTATE, EXCLUSIONS, VALUATION, AND OVERLAPPING APPLICATION; CLARIFYING TYPES OF PROCEEDINGS; AND MAKING TECHNICAL CORRECTIONS.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

75-1-201, as repealed and reenacted by Chapter 39, Laws of Utah 1998

75-1-403, as last amended by Chapter 30, Laws of Utah 1992

75-2-202, as repealed and reenacted by Chapter 39, Laws of Utah 1998

75-2-204, as repealed and reenacted by Chapter 39, Laws of Utah 1998

75-2-208, as enacted by Chapter 39, Laws of Utah 1998

75-2-209, as enacted by Chapter 39, Laws of Utah 1998

75-5-401, as last amended by Chapter 104, Laws of Utah 1988

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **75-1-201** is amended to read:

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:

(1) "Agent" includes 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 a natural death act.

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under Title 75, Chapter 3, Part 3, Informal Probate and Appointment Proceedings.

(3) "Beneficiary," as it relates to trust beneficiaries, 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," refers to 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; 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.

(4) "Beneficiary designation" refers 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.

(5) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(6) "Claims," in respect to 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. "Claims" does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(7) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(8) "Court" means any of the courts of record in this state having jurisdiction in matters relating to the affairs of decedents.

(9) "Descendant" of an individual means all of his descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this title.

(10) "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.

(11) "Devisee" means any person designated in a will to receive a devise. For the purposes of Title 75, Chapter 3, Probate of Wills and Administration, 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.

(12) "Disability" means cause for a protective order as described by Section 75-5-401.

(13) "Distributee" means any person who has received property of a decedent from his 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 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 purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(14) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration.

(15) "Exempt property" means that property of a decedent's estate which is described in Section 75-2-403.

(16) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(17) "Foreign personal representative" means a personal representative of another jurisdiction.

(18) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(19) "Governing instrument" means 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.

(20) "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.

(21) "Heirs," except as controlled by Section 75-2-711, means persons, including the surviving spouse and state, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person" means ~~[an individual described in Section 75-5-303]~~ any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

(23) "Informal proceedings" mean those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

(24) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

(25) "Issue" of a person means descendant as defined in Subsection (9).

(26) "Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes coowners 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 coownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(27) "Lease" includes an oil, gas, or other mineral lease.

(28) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) "Minor" means a person who is under ~~[21]~~ 18 years of age.

(30) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as security.

(31) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(32) "Organization" includes a corporation, limited liability company, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(33) "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.

(34) "Payor" 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.

(35) "Person" means an individual or an organization.

(36) (a) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(b) "General personal representative" excludes special administrator.

(37) "Petition" means a written request to the court for an order after notice.

(38) "Proceeding" includes action at law and suit in equity.

(39) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(40) "Protected person" [~~is as defined in Section 75-5-401~~] means a person for whom a conservator has been appointed. A "minor protected person" means a minor for whom a conservator has been appointed because of minority.

(41) "Protective proceeding" means a proceeding described in Section 75-5-401.

(42) "Registrar" refers to the official of the court designated to perform the functions of

registrar as provided in Section 75-1-307.

(43) "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, and, in general, any interest or instrument commonly known as a security, or 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 foregoing.

(44) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(45) "Special administrator" means a personal representative as described in Sections 75-3-614 through 75-3-618.

(46) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(47) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(48) "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this title.

(49) "Supervised administration" refers to the proceedings described in Title 75, Chapter 3, Part 5, Supervised Administration.

(50) "Survive," except for purposes of Part 3 of Article VI, Uniform TOD Security Registration Act, means that an individual has neither predeceased an event, including the death of another individual, nor is considered to have predeceased an event under Section 75-2-104 or 75-2-702. The term includes its derivatives, such as "survives," "survived," "survivor," and "surviving."

(51) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(52) "Testator" includes an individual of either sex.

(53) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. The term 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. The term excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Title 75, Chapter 6, Nonprobate Transfers, custodial arrangements pursuant to any Uniform Transfers To Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, preneed funeral plans under Title 58, Chapter 58, Preneed Funeral Arrangement Act, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(54) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by the court.

(55) "Ward" means [an individual described in Section 75-5-303] a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

(56) "Will" includes codicil and any testamentary instrument which 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.

Section 2. Section **75-1-403** is amended to read:

75-1-403. Pleadings -- When parties bound by others -- Notice.

In formal proceedings involving intervivos or testamentary trusts or 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 other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(a) Orders binding the sole holder or all co-holders 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. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(c) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(a) Notice as prescribed by Section 75-1-401 shall be given to every interested person or to one who can bind an interested person as described in Subsection (2)(a) or (2)(b). Notice may be given both to a person and to another who may bind him.

(b) Notice is given to unborn or unascertained persons, who are not represented under Subsection (2)(a) or (2)(b), by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. 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.

Section 3. Section **75-2-202** is amended to read:

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 [~~Section 75-2-207,~~] Subsection 75-2-209(1)(a), 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, the surviving spouse is entitled to a supplemental elective-share amount equal to \$25,000, 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. [~~Any nonprobate transfer, as provided in Section 75-2-206, received by the surviving spouse is also chargeable against 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.

Section 4. Section **75-2-204** is amended to read:

75-2-204. Decedent's net probate estate.

[~~The~~] Unless excluded under Section 75-2-208, the value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims.

Section 5. Section **75-2-208** is amended to read:

75-2-208. Exclusions, valuation, and overlapping application.

(1) The value of any separate property of the decedent or the decedent's surviving spouse is excluded from the augmented estate even if it otherwise would be included in the augmented estate

under Sections 75-2-204, 75-2-205, 75-2-206, and 75-2-207. Property is separate property if:

(a) owned at the date of the most recent marriage of the decedent and the decedent's surviving spouse;

(b) acquired by gift or disposition at death from a person other than the decedent or the decedent's surviving spouse;

(c) acquired in exchange for or with the proceeds of other separate property;

(d) designated as separate property by written waiver under Section 75-2-213; or

(e) acquired as a recovery for personal injury but only to the extent attributable to expenses paid or otherwise satisfied from separate property.

(2) Income attributable to investment, rental, licensing or other use of separate property during the most recent marriage of the decedent and the decedent's surviving spouse is separate property.

(3) Appreciation in the value of separate property during the most recent marriage of the decedent and the decedent's surviving spouse is separate property.

(4) Except as provided in this Subsection (4), any increase in the value of separate property due to improvements to or the reduction in debt owed against separate property during the most recent marriage of the decedent and the decedent's surviving spouse is separate property. An amount equal to any payment for improvements to or the reduction in debt owed against separate property of the decedent made during the most recent marriage of the decedent and the decedent's surviving spouse from the joint or commingled funds of the decedent and the decedent's surviving spouse, or from the separate property of the surviving spouse, shall not be separate property to the extent of the amount actually paid for the improvements or the amount actually paid for the reduction in debt, including principal, interest, and other payments under the note, owed against separate property. The amount that is determined not to be separate property may not exceed the value of the separate property.

(5) All property of the decedent or the decedent's surviving spouse, whether or not commingled, is rebuttably presumed not to be separate property. [~~Separate property that has been commingled with other property that is not separate property shall be rebuttably presumed not to be~~

~~separate property unless it can be shown what percentage or amount of the commingled property came from separate property, in which case the amount or percentage of commingled property will remain separate property. Property held by the decedent and the decedent's surviving spouse as joint tenants at the date of the decedent's death shall not be separate property.]~~

(6) The value of any property is excluded from the decedent's nonprobate transfers to others:

- (a) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or
- (b) if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse.

(7) The value of property:

(a) included in the augmented estate under Section 75-2-205, 75-2-206, or 75-2-207 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.

(8) In case of overlapping application to the same property of the section or subsections of Section 75-2-205, 75-2-206, or 75-2-207, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

Section 6. Section **75-2-209** is amended to read:

75-2-209. Sources from which elective share payable -- Elective share amount -- Unsatisfied balance.

(1) 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:

(a) amounts included in the augmented estate under Section 75-2-204 [which] that pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the

augmented estate under Section 75-2-206;

(b) amounts included in the augmented estate under Section 75-2-207; [and]

(c) the [aggregate] value at the decedent's death of the decedent's separate property, as defined in Section 75-2-208, that passes or has passed from the decedent to the decedent's surviving spouse by reason of the decedent's death, whether by testate or intestate succession or by nonprobate transfer [~~under Section 75-2-206 that are not included in the augmented estate~~] at the decedent's death; and

(d) the surviving spouse's homestead allowance, exempt property, and family allowance, if any.

(2) If, after the application of Subsection (1), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under Subsection 75-2-205(3)(a) or (c), are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's 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 equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(3) If, after the application of Subsections (1) and (2), 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 equitably apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

Section 7. Section **75-5-401** is amended to read:

75-5-401. Protective proceedings.

(1) Upon petition and after notice and hearing in accordance with the provisions of this part,

the court may appoint a conservator or make other protective order for cause as follows:

(a) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by minority, or that funds are needed for the minor's support and education and protection is necessary or desirable to obtain or provide funds.

(b) The provisions of Subsection (1) (a) may be applied to a person beyond minority up to age 21 under special circumstances as determined by the court.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that the person:

(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.