

PROBATE CODE AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kelly B. Miles

Senate Sponsor: Ann Millner

LONG TITLE

General Description:

This bill modifies the Utah Uniform Probate Code.

Highlighted Provisions:

This bill:

- ▶ excludes specific claims in intestacy cases under certain circumstances;
- ▶ addresses when a person refuses to accept the authority of a guardian;
- ▶ provides for a court to rescind or modify an order or issue a temporary order;
- ▶ addresses when a conservator may use the assets of the estate;
- ▶ modifies the provision regarding creation of power of appointment; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

75-3-107, as last amended by Laws of Utah 2014, Chapter 142

75-5-312, as last amended by Laws of Utah 2017, Chapter 403

75-5-312.5, as enacted by Laws of Utah 2016, Chapter 293

75-5-424, as last amended by Laws of Utah 2017, Chapters 181 and 403

75-10-201, as enacted by Laws of Utah 2017, Chapter 125

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

31 Section 1. Section **75-3-107** is amended to read:

32 **75-3-107. Probate and testacy proceedings -- Ultimate time limit -- Presumption**
33 **and order of intestacy.**

34 (1) ~~[Nō]~~ An informal probate proceeding or formal testacy proceeding, other than a
35 proceeding to probate a will previously probated at the testator's domicile, may not be
36 commenced more than three years after the decedent's death, except:

37 (a) ~~[If]~~ if a previous proceeding was dismissed because of doubt about the fact of the
38 decedent's death, appropriate probate or testacy proceedings may be maintained at any time
39 thereafter upon a finding that the decedent's death occurred prior to the initiation of the
40 previous proceeding and the applicant or petitioner has not delayed unduly in initiating the
41 subsequent proceeding~~[-];~~;

42 (b) ~~[Appropriate]~~ appropriate probate or testacy proceedings may be maintained in
43 relation to the estate of an absent, disappeared, or missing person for whose estate a
44 conservator has been appointed, at any time within three years after the conservator becomes
45 able to establish the death of the protected person~~[-];~~ or

46 (c) ~~[A]~~ a proceeding to contest an informally probated will and to secure appointment
47 of the person with legal priority for appointment in the event the contest is successful, may be
48 commenced within the later of 12 months from the informal probate or three years from the
49 decedent's death.

50 (2) The limitations provided in Subsection (1) do not apply to proceedings to construe
51 probated wills or determine heirs of an intestate. In cases under Subsection (1)(a) or (b), the
52 date on which a testacy proceeding is properly commenced shall be ~~[deemed]~~ considered to be
53 the date of the decedent's death for purposes of other limitations provisions of this title which
54 relate to the date of death.

55 (3) If no will is probated within three years from death, the presumption of intestacy is
56 final and the court shall upon filing a proper petition enter an order to that effect.

57 (4) Notwithstanding the time restriction in Subsection (1), the court has continuing

58 jurisdiction to:

- 59 (a) determine what property was owned by the decedent at the time of death; and
- 60 (b) appoint, formally or informally, a personal representative or special administrator to
- 61 administer the decedent's estate[-], except the following may not be presented against the
- 62 estate:

- 63 (i) a homestead allowance;
- 64 (ii) exempt property;
- 65 (iii) a family allowance;
- 66 (iv) a support allowance;
- 67 (v) an elective share of the surviving spouse; and
- 68 (vi) a claim other than expenses of administration.

69 Section 2. Section **75-5-312** is amended to read:

70 **75-5-312. General powers and duties of guardian -- Penalties.**

71 (1) A guardian of an incapacitated person has only the powers, rights, and duties
72 respecting the ward granted in the order of appointment under Section [75-5-304](#).

73 (2) Except as provided in Subsection (4), a guardian has the same powers, rights, and
74 duties respecting the ward that a parent has respecting the parent's unemancipated minor child.

75 (3) In particular, and without qualifying [~~the foregoing~~] Subsections (1) and (2), a
76 guardian has the following powers and duties, except as modified by order of the court:

77 (a) To the extent that it is consistent with the terms of any order by a court of
78 competent jurisdiction relating to detention or commitment of the ward, the guardian is entitled
79 to custody of the person of the ward and may establish the ward's place of abode within or
80 without this state.

81 (b) If entitled to custody of the ward the guardian shall provide for the care, comfort,
82 and maintenance of the ward and, whenever appropriate, arrange for the ward's training and
83 education. Without regard to custodial rights of the ward's person, the guardian shall take
84 reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and
85 commence protective proceedings if other property of the ward is in need of protection.

86 (c) A guardian may give any consents or approvals that may be necessary to enable the
87 ward to receive medical or other professional care, counsel, treatment, or service.

88 (d) A guardian may not unreasonably restrict visitation with the ward by family,
89 relatives, or friends.

90 (e) If no conservator for the estate of the ward has been appointed, the guardian may:

91 (i) institute proceedings to compel any person under a duty to support the ward or to
92 pay sums for the welfare of the ward to perform that duty;

93 (ii) compel the production of the ward's estate documents, including the ward's will,
94 trust, power of attorney, and any advance health care directive; and

95 (iii) receive money and tangible property deliverable to the ward and apply the money
96 and property for support, care, and education of the ward[;];

97 (A) but the guardian may not use funds from the ward's estate for room and board
98 which the guardian, the guardian's spouse, parent, or child have furnished the ward unless a
99 charge for the service is approved by order of the court made upon notice to at least one adult
100 relative in the nearest degree of kinship to the ward in which there is an adult[~~The~~]; and

101 (B) the guardian shall exercise care to conserve any excess for the ward's needs.

102 (f) (i) A guardian is required to report the condition of the ward and of the estate which
103 has been subject to the guardian's possession or control, as required by the court or court rule.

104 (ii) A guardian is required to immediately notify all interested persons if the guardian
105 reasonably believes that the ward's death is likely to occur within the next 30 days, based on:

106 (A) the guardian's own observations; or

107 (B) information from the ward's physician or other medical care providers.

108 (iii) A guardian is required to immediately notify all interested persons of the ward's
109 death.

110 (iv) Unless emergency conditions exist, a guardian is required to file with the court a
111 notice of the guardian's intent to move the ward and to serve the notice on all interested persons
112 at least 10 days before the move. The guardian shall take reasonable steps to notify all
113 interested persons and to file the notice with the court as soon as practicable following the

114 earlier of the move or the date when the guardian's intention to move the ward is made known
115 to the ward, the ward's care giver, or any other third party.

116 (v) (A) If no conservator for the estate of the ward has been appointed, the guardian
117 shall, for all estates in excess of \$50,000, excluding the residence owned by the ward, send a
118 report with a full accounting to the court on an annual basis.

119 (B) For estates less than \$50,000, excluding the residence owned by the ward, the
120 guardian shall fill out an informal annual report and mail the report to the court.

121 (C) A report under Subsection (3)(f)(v)(A) or (B) shall include a statement of assets at
122 the beginning and end of the reporting year, income received during the year, disbursements for
123 the support of the ward, and other expenses incurred by the estate. The guardian shall also
124 report the physical conditions of the ward, the place of residence, and a list of others living in
125 the same household. The court may require additional information.

126 (D) The forms for both the informal report for estates under \$50,000, excluding the
127 residence owned by the ward, and the full accounting report for larger estates shall be approved
128 by the Judicial Council.

129 (E) An annual report shall be examined and approved by the court.

130 (F) If the ward's income is limited to a federal or state program requiring an annual
131 accounting report, a copy of that report may be submitted to the court in lieu of the required
132 annual report.

133 (vi) Corporate fiduciaries are not required to petition the court, but shall submit their
134 internal report annually to the court. The report shall be examined and approved by the court.

135 (vii) The guardian shall also render an annual accounting of the status of the person to
136 the court which shall be included in the petition or the informal annual report as required under
137 this Subsection (3)(f). If a fee is paid for an accounting of an estate, [~~no fee shall~~] a fee may not
138 be charged for an accounting of the status of a person.

139 (viii) If a guardian:

140 (A) makes a substantial misstatement on filings of annual reports;

141 (B) is guilty of gross impropriety in handling the property of the ward; or

142 (C) willfully fails to file the report required by this ~~[subsection]~~ Subsection (3)(f), after
143 receiving written notice from the court of the failure to file and after a grace period of two
144 months has elapsed, the court may impose a penalty in an amount not to exceed \$5,000.

145 (ix) The court may also order restitution of funds misappropriated from the estate of a
146 ward. The penalty shall be paid by the guardian and may not be paid by the estate.

147 ~~[(ix)]~~ (x) The provisions and penalties in this Subsection (3)(f) governing annual
148 reports do not apply if the guardian or a coguardian is the parent of the ward.

149 ~~[(ix)]~~ (xi) For the purposes of Subsections (3)(f)(i), (ii), (iii), and (iv), "interested
150 persons" means those persons required to receive notice in guardianship proceedings as set
151 forth in Section [75-5-309](#).

152 (g) If a conservator has been appointed:

153 (i) all of the ward's estate received by the guardian in excess of those funds expended
154 to meet current expenses for support, care, and education of the ward shall be paid to the
155 conservator for management as provided in this code; and

156 (ii) the guardian shall account to the conservator for funds expended.

157 (4) (a) A court may, in the order of appointment, place specific limitations on the
158 guardian's power.

159 (b) A guardian may not prohibit or place restrictions on association with a relative or
160 qualified acquaintance of an adult ward, unless permitted by court order under Section
161 [75-5-312.5](#).

162 (c) A guardian is not liable to a third person for acts of the guardian's ward solely by
163 reason of the relationship described in Subsection (2).

164 (5) Any guardian of one for whom a conservator also has been appointed shall control
165 the custody and care of the ward and is entitled to receive reasonable sums for services and for
166 room and board furnished to the ward as agreed upon between the guardian and the
167 conservator, if the amounts agreed upon are reasonable under the circumstances. The guardian
168 may request the conservator to expend the ward's estate by payment to third persons or
169 institutions for the ward's care and maintenance.

170 (6) A person who refuses to accept the authority of a guardian [~~with authority over~~
171 ~~financial decisions to transact business with the assets~~] of the protected person after receiving a
172 certified copy of letters of guardianship is liable for costs, expenses, attorney fees, and damages
173 if the court determines that the person did not act in good faith in refusing to accept the
174 authority of the guardian.

175 Section 3. Section **75-5-312.5** is amended to read:

176 **75-5-312.5. Association between an adult ward and a relative of the adult ward.**

177 (1) As used in this section:

178 (a) "Associate" or "association" means:

179 (i) visitation of an adult ward by a relative or qualified acquaintance; or

180 (ii) communication between an adult ward and a relative or qualified acquaintance in
181 any form, including by telephone, mail, or electronic communication.

182 (b) "Qualified acquaintance" means an individual, other than a relative of the adult
183 ward, who:

184 (i) has established a significant, mutual friendship with the adult ward; or

185 (ii) is clergy in the adult ward's religion or religious congregation.

186 (c) "Relative" means an adult ward's spouse, parent, step-parent, child, step-child,
187 sibling, step-sibling, half-sibling, grandparent, grandchild, uncle, aunt, nephew, niece, or first
188 cousin.

189 (2) (a) Except as otherwise provided by court order, a guardian may not restrict or
190 prohibit the right of an adult ward to associate with a relative or qualified acquaintance of the
191 adult ward.

192 (b) If an adult ward is unable to express consent to visitation by a relative or a qualified
193 acquaintance of the adult ward, the consent of the adult ward is presumed based on evidence of
194 a prior relationship between the adult ward and the relative or qualified acquaintance of the
195 adult ward.

196 (c) A guardian may not permit a relative or qualified acquaintance of an adult ward to
197 associate with the adult ward:

198 (i) if a court order prohibits the association;
199 (ii) in a manner prohibited by court order; or
200 (iii) if the adult ward expresses a desire to not associate with the relative or qualified
201 acquaintance.

202 (3) A guardian may, as part of the initial guardianship proceeding, petition the court to
203 issue an order:

204 (a) prohibiting or placing conditions on association between an adult ward and a
205 relative or qualified acquaintance of the adult ward; or

206 (b) granting the guardian the authority to prohibit or place conditions on association
207 between an adult ward and a relative or qualified acquaintance of the adult ward.

208 (4) A guardian may, at any time after the initial guardianship proceeding[5]:

209 (a) petition the court to issue an order described in Subsection (3) or to rescind or
210 modify an order described in Subsection (3); or

211 (b) petition, subject to notice, the court on an emergency basis to issue a temporary
212 order until further order of the court described in Subsection (3) or to rescind or modify an
213 order described in Subsection (3).

214 (5) An adult ward, a relative of an adult ward, or a qualified acquaintance of an adult
215 ward may, at any time after the initial guardianship proceeding, petition the court to rescind or
216 modify an order described in Subsection (3).

217 (6) If a guardian violates Subsection (2), the adult ward, a relative of the adult ward, or
218 a qualified acquaintance of the adult ward may do one or more of the following, as applicable:

219 (a) petition the court to issue an order to show cause why the guardian should not be
220 held in contempt of court;

221 (b) seek an injunction to enforce compliance by the guardian with the law and any
222 applicable court order; or

223 (c) petition the court to have the guardian removed as guardian of the adult ward.

224 (7) For a hearing on a petition filed under this section, a court:

225 (a) may appoint a court visitor to meet with the adult ward to determine the wishes of

226 the adult ward regarding association;

227 (b) shall give notice and an opportunity to be heard to the guardian, the adult ward, and
228 the relative or qualified acquaintance;

229 (c) shall preserve the right of the adult ward to be present at the hearing; and

230 (d) may order supervised visitation by the relative or qualified acquaintance before the
231 hearing.

232 (8) A court may not enter an order prohibiting or placing restrictions on association
233 between an adult ward and a relative or qualified acquaintance, unless the court finds by a
234 preponderance of the evidence that:

235 (a) the adult ward desires the prohibition or restriction;

236 (b) if the adult ward had the capacity to make a knowing and intelligent decision
237 regarding the association, the adult ward would prohibit the association or impose the
238 restriction; or

239 (c) the prohibition or restriction is the least restrictive means necessary to protect the
240 health or welfare of the adult ward.

241 (9) In making the determination described in Subsection (8), the court may consider
242 any relevant evidence, including:

243 (a) the wishes of the adult ward, expressed during or before the guardianship;

244 (b) the history of the relationship between the adult ward and the relative or qualified
245 acquaintance;

246 (c) any history of criminal activity, abuse, neglect, or violence by the relative or
247 qualified acquaintance; or

248 (d) whether a protective order was ever issued against the relative or qualified
249 acquaintance with respect to the adult ward.

250 (10) Except as provided in Subsection (11), the guardian shall have the burden of proof
251 when:

252 (a) seeking an order prohibiting association or placing restrictions on association with a
253 relative or qualified acquaintance of the adult ward;

254 (b) modifying an order to place additional prohibitions or restrictions on association
255 with a relative or qualified acquaintance of the adult ward; or

256 (c) opposing an action described in Subsection (6)(a) or (b).

257 (11) The relative or qualified acquaintance shall have the burden of proof if the relative
258 or qualified acquaintance is seeking to modify an order previously entered by a court under this
259 section.

260 (12) (a) If, in a proceeding under this section, the court finds that the petition was filed
261 frivolously or in bad faith, the court shall award attorney fees to a party opposing the petition.

262 (b) If, in a proceeding under this section, the court finds that the guardian is in
263 contempt of court or has acted frivolously or in bad faith in prohibiting or restricting
264 association, the court:

265 (i) may award attorney fees to the prevailing party; and

266 (ii) may impose a sanction, not to exceed \$1,000, against the guardian.

267 (c) A court shall prohibit attorney fees awarded under this section from being paid by
268 the adult ward or the adult ward's estate.

269 Section 4. Section **75-5-424** is amended to read:

270 **75-5-424. Powers of conservator in administration.**

271 (1) A conservator has all of the powers conferred in this chapter and any additional
272 powers conferred by law on trustees in this state. In addition, a conservator of the estate of an
273 unmarried minor as to whom no one has parental rights, has the duties and powers of a
274 guardian of a minor described in Section **75-5-209** until the minor attains majority or marries,
275 but the parental rights so conferred on a conservator do not preclude appointment of a guardian
276 as provided by Part 2, Guardians of Minors.

277 (2) (a) A conservator has the power to compel the production of the protected person's
278 estate documents, including the protected person's will, trust, power of attorney, and any
279 advance health care directives.

280 (b) If a guardian is also appointed for the ward, the conservator shall share with the
281 guardian the estate documents the conservator receives.

282 (3) A conservator has power without court authorization or confirmation to invest and
283 reinvest funds of the estate as would a trustee.

284 (4) A conservator, acting reasonably in efforts to accomplish the purpose for which the
285 conservator was appointed, may use the funds of the estate and act without court authorization
286 or confirmation, to:

287 (a) collect, hold, and retain assets of the estate, including land in another state, until, in
288 the conservator's judgment, disposition of the assets should be made, and the assets may be
289 retained even though they include an asset in which the conservator is personally interested;

290 (b) receive additions to the estate;

291 (c) continue or participate in the operation of any business or other enterprise;

292 (d) acquire an undivided interest in an estate asset in which the conservator, in any
293 fiduciary capacity, holds an undivided interest;

294 (e) invest and reinvest estate assets in accordance with Subsection (3);

295 (f) deposit estate funds in a bank including a bank operated by the conservator;

296 (g) acquire or dispose of an estate asset, including land in another state, for cash or on
297 credit, at public or private sale; and to manage, develop, improve, exchange, partition, change
298 the character of, or abandon an estate asset;

299 (h) make ordinary or extraordinary repairs or alterations in buildings or other
300 structures, demolish any improvements, and raze existing or erect new party walls or buildings;

301 (i) (A) subdivide, develop, or dedicate land to public use;

302 (B) make or obtain the vacation of plats and adjust boundaries;

303 (C) adjust differences in valuation on exchange or partition by giving or receiving
304 considerations; and

305 (D) dedicate easements to public use without consideration;

306 (j) enter for any purpose into a lease as lessor or lessee with or without option to
307 purchase or renew for a term within or extending beyond the term of the conservatorship;

308 (k) enter into a lease or arrangement for exploration and removal of minerals or other
309 natural resources or enter into a pooling or unitization agreement;

- 310 (l) grant an option involving disposition of an estate asset or take an option for the
311 acquisition of any asset;
- 312 (m) vote a security, in person or by general or limited proxy;
- 313 (n) pay calls, assessments, and any other sums chargeable or accruing against or on
314 account of securities;
- 315 (o) (i) sell or exercise stock subscription or conversion rights; and
316 (ii) consent, directly or through a committee or other agent, to the reorganization,
317 consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- 318 (p) hold a security in the name of a nominee or in other form without disclosure of the
319 conservatorship so that title to the security may pass by delivery, but the conservator is liable
320 for any act of the nominee in connection with the stock so held;
- 321 (q) insure the assets of the estate against damage or loss and the conservator against
322 liability with respect to third persons;
- 323 (r) (i) borrow money to be repaid from estate assets or otherwise; and
324 (ii) advance money for the protection of the estate or the protected person, and for all
325 expenses, losses, and liabilities sustained in the administration of the estate or because of the
326 holding or ownership of any estate assets, and the conservator has a lien on the estate as against
327 the protected person for advances so made;
- 328 (s) (i) pay or contest any claim;
329 (ii) settle a claim by or against the estate or the protected person by compromise,
330 arbitration, or otherwise; and
331 (iii) release, in whole or in part, any claim belonging to the estate to the extent that the
332 claim is uncollectible;
- 333 (t) pay taxes, assessments, compensation of the conservator, and other expenses
334 incurred in the collection, care, administration, and protection of the estate;
- 335 (u) allocate items of income or expense to either estate income or principal, as
336 provided by law, including creation of reserves out of income for depreciation, obsolescence,
337 or amortization, or for depletion in mineral or timber properties;

338 (v) pay any sum distributable to a protected person or dependent without liability to the
339 conservator, by paying the sum to the distributee or by paying the sum for the use of the
340 distributee either to the distributee's guardian, or if none, to a relative or other person with
341 custody of the person;

342 (w) (i) employ persons, including attorneys, auditors, investment advisors, or agents,
343 even though they are associated with the conservator, to advise or assist in the performance of
344 administrative duties;

345 (ii) act upon a recommendation made by a person listed in Subsection (4)(w)(i) without
346 independent investigation; and

347 (iii) instead of acting personally, employ one or more agents to perform any act of
348 administration, whether or not discretionary;

349 (x) prosecute or defend actions, claims, or proceedings in any jurisdiction for the
350 protection of estate assets and of the conservator in the performance of the conservator's duties;

351 (y) act as a qualified beneficiary of any trust in which the protected person is a
352 qualified beneficiary; and

353 (z) execute and deliver the instruments that will accomplish or facilitate the exercise of
354 the powers vested in the conservator.

355 Section 5. Section **75-10-201** is amended to read:

356 **75-10-201. Creation of power of appointment.**

357 (1) A power of appointment is created only if:

358 (a) the instrument creating the power[~~-(i)~~] is valid under applicable law; and

359 [~~(ii) except as otherwise provided in Subsection (2), transfers the appointive property;~~

360 ~~and]~~

361 (b) the terms of the instrument creating the power manifest the donor's intent to create
362 in a powerholder a power of appointment over the appointive property exercisable in favor of a
363 permissible appointee.

364 (2) [~~Subsection (1)(a)(ii) does not apply to the creation of a~~] A power of appointment
365 may be created by the exercise of a power of appointment.

366 (3) A power of appointment may not be created in a deceased individual.

367 (4) Subject to an applicable rule against perpetuities, a power of appointment may be
368 created in an unborn or unascertained powerholder.