

2010 CHANGES TO THE UTAH PROBATE CODE

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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 adopted the Uniform Probate Code in 1975 and was one of only 16 states that adopted the original 1969 version of the code, though with many non-uniform provisions. 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.

Senator Lyle Hillyard, who serves on the National Conference of Commissioners, asked our Section to review the most recent proposed changes to the Uniform Probate Code promulgated in 2008, and to make recommendations. An ad hoc committee was formed to review the proposed amendments and consisted of the following individuals from our section: Jeff B. Skoubye, Steven J. Dixon, David M. Grant, Paul W. Hess, Craig E. Hughes, Joyce Maughan, Langdon T. Owen, Earl D. Tanner, Jr., and James F. Wood.

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 recommend 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 was 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 or possible contingency, 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 the theme should be accomplished by individuals in their own estate planning.

As a general rule, the recommendations of the committee did not revisit the public policy decision-making that was previously made by the legislature. Rather, the committee attempted to integrate the positive improvements contained in the 2008 amendments without changing the underlying public policy decisions previously made. Notwithstanding this, some members of the committee had 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 outline below, and may serve as a starting point for further discussion of changes in the future.

The legislature adopted, without significant alteration, the recommendation of the committee as Senate Bill 118, most of which was gleaned from the 2008 Proposed Amendments. A few cleanup proposals were also made to Senator Hillyard and were included in this bill, although not part of the 2008 Proposed Amendments. Two other 2010 bills, House Bill 355 and Senate Bill 121, effected the Utah Probate Code and will also be discussed in this outline. Complete copies of the enrolled bills can be found at <http://le.utah.gov/~2010/bills.htm> in various formats. The full text of the Proposed 2008 Amendments to the Uniform Probate Code can be found at <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.htm> (approximately 100 pages) and the entire Uniform Probate Code including the 2008 Amendments can be found at <http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.htm>. The reader is referred to the proposed amendments directly for comprehensive coverage of its provisions. To make cross referencing to the enrolled bills easier, I have retained the line numbering of the enrolled bills quoted below.

SENATE BILL 118

65 **75-1-110. Cost of living adjustment of certain dollar amounts.**

66 (1) In this section:

67 (a) "CPI" means the Consumer Price Index (Annual Average) for All Urban
68 Consumers (CPI-U), U.S. City Average, reported by the Bureau of Labor Statistics, United
69 States Department of Labor or its successor or, if the index is discontinued, an equivalent
70 index reported by a federal authority. If no such index is reported, the term means the
71 substitute index adopted by the Administrative Office of the Courts.

72 (b) "Reference base index" means the CPI for calendar year 2009.

73 (2) The dollar amounts stated in Subsection 75-2-202(2) and Sections 75-2-102,
74 75-2-402, 75-2-403, and 75-2-405 apply to the estate of a decedent who died in or after 2010,
75 but for the estate of a decedent who died after 2011, these dollar amounts shall be increased or
76 decreased if the CPI for the calendar year immediately preceding the year of death exceeds or
77 is less than the reference base index. The amount of any increase or decrease is computed by
78 multiplying each dollar amount by the percentage by which the CPI for the calendar year
79 immediately preceding the year of death exceeds or is less than the reference base index. If
80 any increase or decrease produced by the computation is not a multiple of \$100, the increase
81 or decrease is rounded down, if an increase, or up, if a decrease, to the next multiple of \$100,
82 but for the purpose of Section 75-2-405, the periodic installment amount is the lump sum
83 amount divided by 12. If the CPI for 2009 is changed by the Bureau of Labor Statistics, the
84 reference base index shall be revised using the rebasing factor reported by the Bureau of Labor
85 Statistics, or other comparable data if a rebasing factor is not reported.

86 (3) Before February 1, 2011, and before February 1 of each succeeding year, the
87 Administrative Office of the Courts shall publish a cumulative list, beginning with the dollar
88 amounts effective for the estate of a decedent who died in 2011, of each dollar amount as
89 increased or decreased under this section.

Comment

This automatic inflation adjustment was enacted to avoid the need for amendment to probate code amounts based solely on inflation. The administrative office of the courts will publish the

correct amounts for each section before February 1st of each year and such amounts will be effective for individuals that die within that calendar year.

In reviewing this section in preparation for this presentation, it appears that the proposed uniform provisions contain an ambiguity that will need to be corrected in the 2011 legislative session. The law seems to state in subpart (2) that the stated statutory amounts will apply for both 2010 and 2011, and that adjustments will occur only for years thereafter, while subpart (3) states that the inflation adjustment will apply for 2011 as well. The wording in subpart (2) should be amended to read “. . . apply to the estate of a decedent who died in 2010, but for the estate of a decedent who died in or after 2011, . . . ” thus clarifying the correct applicable amounts.

90 Section 3. Section **75-1-201** is amended to read:
91 **75-1-201. General definitions.**

...

220 (42) "Record" means information that is inscribed on a tangible medium or that is
221 stored in an electronic or other medium and is retrievable in perceivable form.

...

233 (46) "Sign" means, with present intent to authenticate or adopt a record other than a
234 will:
235 (a) to execute or adopt a tangible symbol; or
236 (b) to attach to or logically associate with the record an electronic symbol, sound, or
237 process.

Comment

The inclusion of the two additional definitions, Record and Sign, was intended to make the code consistent with the use of electronic signatures and records.

279 Section 4. Section **75-1-403** is amended to read:
280 **75-1-403. Pleadings -- Notice.**

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

284 (1) Interests to be affected shall be described in pleadings which give reasonable
285 information to owners by name or class, by reference to the instrument creating the interests,
286 or in any other appropriate manner.

287 (2) Notice is required as follows:

288 [~~2~~] (a) Notice as prescribed by Section 75-1-401 shall be given to every interested
289 person. Notice may be given both to a person and to another who may bind him.

290 (b) Whenever notice to a person is required or permitted under this chapter, notice to

291 another person who may represent and bind the person represented under this section
292 constitutes notice to the person represented.
293 (3) Persons are bound by orders binding others in the following cases:
294 (a) To the extent there is no conflict of interest between the holder of a general
295 testamentary power of appointment and the persons represented with respect to a particular
296 question or dispute, the holder may represent and bind persons whose interests, as permissible
297 appointees, takers in default, or otherwise, are subject to the power.
298 (b) To the extent there is no conflict of interest between the representative and the
299 person represented with respect to a particular question or dispute:
300 (i) a conservator may represent and bind the person whose estate he controls;
301 (ii) a guardian may represent and bind the ward if no conservator of the ward's estate
302 has been appointed;
303 (iii) an agent having authority to do so may represent and bind the principal;
304 (iv) a trustee may represent and bind the beneficiaries of the trust;
305 (v) a personal representative of a decedent's estate may represent and bind persons
306 interested in the estate; and
307 (vi) if no conservator or guardian has been appointed, a parent may represent and bind
308 the parent's minor or unborn child.
309 (c) Unless otherwise represented, a minor, incapacitated or unborn person, or a person
310 whose identity or location is unknown and not reasonably ascertainable, may be represented
311 and bound by another person having a substantially identical interest with respect to the
312 particular question or dispute, but only to the extent there is no conflict of interest between the
313 representative and the person represented.
314 (4) Even if there is representation under this section, if the court determines that
315 representation of the interest might otherwise be inadequate, the court may appoint a guardian
316 ad litem to represent the interest of, and approve an agreement on behalf of, a minor,
317 incapacitated or unborn person, or a person whose identity or location is unknown.
318 (5) If not precluded by conflict of interest, a guardian ad litem may be appointed to
319 represent several persons or interests. In approving an agreement, a guardian ad litem may
320 consider the general family benefit accruing to the living members of the family of the person
321 represented.
322 (6) Whenever consent may be given by a person pursuant to this chapter, the consent
323 of a person who may represent and bind the person represented under this section is the
324 consent of, and is binding on, the person represented unless the person represented objects to
325 the representation before the consent would otherwise become effective.

Comment

This section was not included in the 2008 Proposed Amendment but was recommended by the committee to Senator Hillyard as a corrective matter. A member of our section, Charles M. Bennett, describes the reasoning for the amendment as follows:

“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.”

326 Section 5. Section **75-2-102** is amended to read:

327 **75-2-102. Intestate share of spouse.**

328 (1) The intestate share of a decedent's surviving spouse is:

329 (a) the entire intestate estate if:

330 (i) no descendant of the decedent survives the decedent; or

331 (ii) all of the decedent's surviving descendants are also descendants of the surviving
332 spouse;

333 (b) the first [~~\$50,000~~] \$75,000, plus 1/2 of any balance of the intestate estate, if one or
334 more of the decedent's surviving descendants are not descendants of the surviving spouse.

335 (2) For purposes of Subsection (1)(b), if the intestate estate passes to both the
336 decedent's surviving spouse and to other heirs, then any nonprobate transfer, as defined in
337 Section 75-2-206, received by the surviving spouse is [~~chargeable against the intestate share of~~
338 ~~the surviving spouse~~] added to the probate estate in calculating the intestate heirs' shares and
339 is conclusively treated as an advancement under Section 75-2-109 in determining the spouse's
340 share.

Comment

The committee recommended 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 strategy should

be retained in intestacy, though it should be adjusted to use the hotchpot method, thus avoiding the unlikely result that the spouse actually named to receive an asset through a beneficiary designation or other nonprobate transfer would actually receive less than would be received under intestacy alone had the asset been part of the intestate estate. The modification proposed above reflects this change.

341 Section 6. Section **75-2-103** is amended to read:

342 **75-2-103. Share of heirs other than surviving spouse.**

343 (1) Any part of the intestate estate not passing to ~~the~~ a decedent's surviving spouse
344 under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in
345 the following order to the individuals ~~designated below~~ who survive the decedent:

346 (a) to the decedent's descendants per capita at each generation as defined in
347 Subsection 75-2-106(2);

348 (b) if there is no surviving descendant, to the decedent's parents equally if both
349 survive, or to the surviving parent if only one survives;

350 (c) if there is no surviving descendant or parent, to the descendants of the decedent's
351 parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);

352 (d) if there is no surviving descendant, parent, or descendant of a parent, but the
353 decedent is survived on both the paternal and maternal sides by one or more grandparents or
354 descendants of grandparents[-];

355 (i) half ~~[of the estate passes]~~ to the decedent's paternal grandparents equally if both
356 survive, or to the surviving paternal grandparent if only one survives, or to the descendants of
357 the decedent's paternal grandparents or either of them if both are deceased, the descendants
358 taking per capita at each generation as defined in Subsection 75-2-106(3); and ~~[the other]~~

359 (ii) half ~~[passes]~~ to the decedent's maternal ~~[relatives in the same manner; but]~~
360 grandparents equally if both survive, to the surviving maternal grandparent if only one
361 survives, or to the descendants of the decedent's maternal grandparents or either of them if
362 both are deceased, the descendants taking per capita at each generation as defined in
363 Subsection 75-2-106(3);

364 (e) if there is no surviving ~~[grandparent]~~ descendant, parent, or descendant of a
365 ~~[grandparent on either the paternal or]~~ parent, but the decedent is survived by one or more
366 grandparents or descendants of grandparents on the paternal but not the maternal side, ~~[the~~
367 entire estate passes] or on the maternal but not the paternal side, to the decedent's relatives on
368 the ~~[other]~~ side with one or more surviving members in the same manner as the half[-]
369 described in Subsection (1)(d);

370 (f) if there is no taker under Subsection (1)(a), (b), (c), (d), or (e), but the decedent
371 has:

372 (i) one deceased spouse who has one or more descendants who survive the decedent,
373 the estate or part of the estate passes to that spouse's descendants who survive the decedent,
374 the descendants taking per capita at each generation as defined in Subsection 75-2-106(4); or

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

378 (2) For purposes of Subsections (1)(a), (b), (c), ~~[and]~~ (d), (e), and (f) any nonprobate
379 transfer, as defined in Section 75-2-205, received by an heir is ~~[chargeable against the intestate~~
380 share of such heir] added to the probate estate in calculating the intestate heirs' shares and is

381 conclusively treated as an advancement under Section 75-2-109 to the heir in determining the
382 heir's share.

Comment

Most of the proposed changes to this section are stylistic and make the section easier to read and understand. However, Subsection (f) 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.

In addition, Subsection (2) was amended to adjust the offset for nonprobate transfers to use the hotchpot method, thus avoiding the unlikely result that the heir actually named to receive an asset through a beneficiary designation or other nonprobate transfer would actually receive less than would be received under intestacy alone had the asset been part of the intestate estate.

383 Section 7. Section **75-2-104** is amended to read:

384 **75-2-104. Requirement of survival by 120 hours -- Individual in gestation.**

385 ~~[An individual]~~ (1) For purposes of intestate succession, homestead allowance, and
386 exempt property, and except as otherwise provided in Subsection (2), the following rules
387 apply:

388 (a) An individual born before a decedent's death who fails to survive the decedent by
389 120 hours is considered to have predeceased the decedent ~~[for purposes of homestead~~
390 ~~allowance, exempt property, and intestate succession, and the decedent's heirs are determined~~
391 ~~accordingly]~~. If it is not established by clear and convincing evidence that an individual ~~[who~~
392 ~~would otherwise be an heir]~~ born before the decedent's death survived the decedent by 120
393 hours, it is considered that the individual failed to survive for the required period. ~~[This~~
394 ~~section is not to be applied if]~~

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

399 (2) This section does not apply if its application would [result in a taking of intestate
400 estate by] cause the estate to pass to the state under Section 75-2-105.

Comment

The 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.

401 Section 8. Section **75-2-106** is amended to read:

402 **75-2-106. Definitions -- Per capita at each generation -- Terms in governing**
403 **instruments.**

404 (1) As used in this section:

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

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

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

413 (i) surviving descendants in the generation nearest to the decedent which contains one
414 or more surviving descendants; and

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

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

418 (c) The remaining shares, if any, are combined and then divided in the same manner
419 among the surviving descendants of the deceased descendants as if the surviving descendants
420 who were allocated a share and their surviving descendants had predeceased the decedent.

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

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

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

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

432 (c) The remaining shares, if any, are combined and then divided in the same manner
433 among the surviving descendants of the deceased descendants as if the surviving descendants
434 who were allocated a share and their surviving descendants had predeceased the decedent.

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

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

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

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

443 (c) The remaining shares, if any, are combined and then divided in the same manner
444 among the surviving descendants of the deceased descendants as if the surviving descendants
445 who were allocated a share and their surviving descendants had predeceased the decedent.

446 [~~4~~] (5) Any reference to this section found in a governing instrument for the
447 definitions of "per stirpes," "by representation," or "by right of representation" shall be
448 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 including step children as potential heirs, as noted above. The committee discussed that a revision of this section to simplify the language by providing a more general definition of per capita at each generation could simplify the language of this section significantly.

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

This section is current Utah law and was not changed by the Bill. The 2008 Proposed Amendments do not contain any change to the language of the Uniform Code with respect to this Section 75-2-109, 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

This is current Utah law and was not changed by the Bill. 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 the UPA, and the committee felt it to be cleaner and more consistent to continue to allow the UPA 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 was 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, and that the code should match what most people would expect. However, in conformity with the committee's intent not to revisit the underlying policy decisions of the code, the committee made no recommendation for a change in this provision at this time.

449 Section 9. Section **75-2-202** is amended to read:

450 **75-2-202. Elective share -- Supplemental elective share amount -- Effect of**
451 **election on statutory benefits -- Nondomiciliary.**

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

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

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

466 (4) The right, if any, of the surviving spouse of a decedent who dies domiciled outside

467 Utah to take an elective share in property in Utah is governed by the law of the decedent's
468 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 effectively 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 our mandate and what could be timely accomplished, and the only actual change adopted was the increase in the Supplemental Elective Share amount.

469 Section 10. Section **75-2-402** is amended to read:

470 **75-2-402. Homestead allowance.**

471 A decedent's surviving spouse is entitled to a homestead allowance of [~~\$15,000~~]
472 \$22,500. If there is no surviving spouse, each minor child and each dependent child of the
473 decedent is entitled to a homestead allowance amounting to [~~\$15,000~~] \$22,500 divided by the
474 number of minor and dependent children of the decedent. The homestead allowance is exempt
475 from and has priority over all claims of the estate. Unless otherwise provided by the will or
476 governing instrument, the homestead allowance is chargeable against any benefit or share

477 passing to the surviving spouse, minor, or dependent child, by the will of the decedent, by
478 intestate succession, by way of elective share, and by way of nonprobate transfers as defined in
479 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, but in keeping with our decision not to entirely revisit the underlying public policy decisions of the code, no change was made to the offset provision.

480 Section 11. Section **75-2-403** is amended to read:

481 **75-2-403. Exempt property.**

482 In addition to the homestead allowance, the decedent's surviving spouse is entitled
483 from the estate to a value, not exceeding [~~\$10,000~~] \$15,000 in excess of any security interests
484 therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If
485 there is no surviving spouse, the decedent's children are entitled jointly to the same value. If
486 encumbered chattels are selected and the value in excess of security interests, plus that of other
487 exempt property, is less than [~~\$10,000~~] \$15,000, or if there is not [~~\$10,000~~] \$15,000 worth of
488 exempt property in the estate, the spouse or children are entitled to other assets of the estate, if
489 any, to the extent necessary to make up the [~~\$10,000~~] \$15,000 value. Rights to exempt
490 property and assets needed to make up a deficiency of exempt property have priority over all
491 claims against the estate, but the right to any assets to make up a deficiency of exempt
492 property abates as necessary to permit earlier payment of homestead allowance and family
493 allowance. Unless otherwise provided by the will or governing instrument, the exempt
494 property allowance is chargeable against any benefit or share passing to the surviving spouse,
495 if any, or if there is no surviving spouse, to the decedent's children, by the will of the decedent,
496 by intestate succession, by way of elective share, and by way of nonprobate transfers as
497 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. Again, the committee members' views diverged on whether the offset should be removed or retained, but in keeping with our decision not to entirely revisit the underlying public policy decisions of the code, no change was made to the offset provision.

498 Section 12. Section **75-2-405** is amended to read:

499 **75-2-405. Source, determination, and documentation.**

500 (1) If the estate is otherwise sufficient, property specifically devised may not be used
501 to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the
502 surviving spouse, guardians of minor children, or children who are adults may select property
503 of the estate as homestead allowance and exempt property. The personal representative may
504 make those selections if the surviving spouse, the children, or the guardians of the minor
505 children are unable or fail to do so within a reasonable time or there is no guardian of a minor
506 child. The personal representative may execute an instrument or deed of distribution to
507 establish the ownership of property taken as homestead allowance or exempt property. The
508 personal representative may determine the family allowance in a lump sum not exceeding
509 [~~\$18,000~~] \$27,000 or periodic installments not exceeding [~~\$1,500~~] \$2,250 per month for one
510 year, and may disburse funds of the estate in payment of the family allowance and any part of
511 the homestead allowance payable in cash. The personal representative or an interested person
512 aggrieved by any selection, determination, payment, proposed payment, or failure to act under
513 this section may petition the court for appropriate relief, which may include a family
514 allowance other than that which the personal representative determined or could have
515 determined.

516 (2) If the right to an elective share is exercised on behalf of a surviving spouse who is
517 an incapacitated person, the personal representative may add any unexpended portions payable
518 under the homestead allowance, exempt property, and family allowance to the trust established
519 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

This section is current Utah law and not part of the Bill. 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 was some concern in the committee, 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 removal of the witness requirement. I am unaware of any other state that has adopted a will execution provision doing away with witnesses entirely.

520 Section 13. Section **75-2-805** is enacted to read:

521 **75-2-805. Reformation to correct mistakes.**

522 The court may reform the terms of a governing instrument, even if unambiguous, to
523 conform the terms to the transferor's intention if it is proved by clear and convincing evidence
524 that the transferor's intent and the terms of the governing instrument were affected by a
525 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, Utah Code Ann. § 75-7-415, and coordinates the Probate Code with the Trust Code.

526 Section 14. Section **75-2-806** is enacted to read:

527 **75-2-806. Modification to achieve transferor's tax objectives.**

528 To achieve the transferor's tax objectives, the court may modify the terms of a
529 governing instrument in a manner that is not contrary to the transferor's probable intention.
530 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, Utah Code Ann. § 75-7-416, and coordinates the Probate Code with the Trust Code.

531 Section 15. Section **75-7-814** is amended to read:
532 **75-7-814. Specific powers of trustee.**

...

640 (3) The trustee may exercise the powers set forth in this section and in the trust either
641 in the name of the trust or in the name of the trustee as trustee, specifically including the right
642 to take title, to encumber or convey assets, including real property, in the name of the trust.
643 This Subsection (3) applies to a trustee's exercise of trust powers. After May 11, 2010, for
644 recording purposes, the name of the trustee, the address of the trustee, and the name and date
645 of the trust, shall be included on all recorded documents affecting real property to which the
646 trust is a party in interest.

Comment

This section was not included in the 2008 Proposed Amendment but was included as a recommendation of the committee for change to the Utah Trust Code on the recommendation of Thomas Christensen, after review by the committee. It allows the transacting of trust business in the name of the trust. The requirement for trustee information necessary on title to real property is retained and correlated with Utah Code Ann. § 75-7-816.

Senate Bill 121

31 Section 1. Section **75-3-803** is amended to read:
32 **75-3-803. Limitations on presentation of claims.**

33 (1) All claims against a decedent's estate which arose before the death of the decedent,
34 including claims of the state and any subdivision of it, whether due or to become due, absolute
35 or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not
36 barred earlier by other statute of limitations, are barred against the estate, the personal
37 representative, and the heirs and devisees of the decedent, unless presented within the earlier
38 of the following dates:

39 (a) one year after the decedent's death; or

40 (b) within the time provided by Subsection 75-3-801(2) for creditors who are given
41 actual notice, and where notice is published, within the time provided in Subsection
42 75-3-801(1) for all claims barred by publication.

43 (2) In all events, claims barred by the nonclaim statute at the decedent's domicile are
44 also barred in this state.

45 (3) All claims against a decedent's estate which arise at or after the death of the
46 decedent, including claims of the state and any of its subdivisions, whether due or to become
47 due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal
48 basis are barred against the estate, the personal representative, and the heirs and devisees of
49 the decedent, unless presented as follows:

50 (a) a claim based on a contract with the personal representative within three months
51 after performance by the personal representative is due; or

52 (b) any other claim within the later of three months after it arises, or the time specified
53 in Subsection (1)(a).

54 (4) Nothing in this section affects or prevents:

- 55 (a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the
 56 estate;
- 57 (b) to the limits of the insurance protection only, any proceeding to establish liability
 58 of the decedent or the personal representative for which he is protected by liability insurance;
 59 or
- 60 (c) collection of compensation for services rendered and reimbursement for expenses
 61 advanced by the personal representative or by the attorney or accountant for the personal
 62 representative of the estate.
- 63 (5) If a personal representative has not been timely appointed in accordance with this
 64 chapter, one may be appointed for the limited purposes of Subsection (4)(b) for any claim
 65 timely brought against the decedent.

Comment

This amendment is intended to extend the time frame in which a personal representative may be appointed beyond the three year period provided for in Utah Code Ann. § 75-3-107, but only in the case where the decedent or the personal representative is protected by liability insurance. The example of this would be an automobile accident. Six months after an auto accident, one of the persons involved in the accident dies. A four year statute of limitation applies to the automobile accident, but only three years for appointment of a personal representative. This allows the appointment of the personal representative despite the three year limitation of 75-3-107, since the claim would not be barred to the extent of the insurance coverage.

66 Section 2. Section **75-3-917** is enacted to read:

67 **75-3-917. Certain formula clauses to be construed to refer to federal estate and**
 68 **generation-skipping transfer tax rules applicable to estates of decedents dying after**
 69 **December 31, 2009.**

70 (1) A will or trust of a decedent who dies after December 31, 2009 and before January
 71 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption,"
 72 "applicable exemption amount," "generation-skipping transfer tax exemption" or "GST
 73 exemption," or that measures a share of an estate or trust based on the amount that can pass
 74 free of federal estate or generation-skipping transfer taxes, or that is otherwise based on a
 75 similar provision of federal estate tax or generation-skipping transfer tax law, shall be
 76 considered to refer to the federal estate and generation-skipping transfer tax laws as they
 77 applied with respect to estates of decedents dying on December 31, 2009.

78 (a) This provision may not apply with respect to a will or trust executed or amended
 79 after December 31, 2009, or that manifests an intent that a contrary rule shall apply if the
 80 decedent dies on a date on which there is no then-applicable federal estate or
 81 generation-skipping transfer tax.

82 (b) The reference to January 1, 2011 in Subsection (1) shall, if the federal estate and
 83 generation-skipping transfer tax becomes effective before that date, refer instead to the first
 84 date on which the tax becomes legally effective.

85 (2) A proceeding to determine whether the decedent intended that the references under
 86 Subsection (1) be construed with respect to the law as it existed after December 31, 2009, shall
 87 be filed within 12 months of the date of death of the testator or grantor. It may be filed by the
 88 personal representative or any affected beneficiary under the will or other instrument.

89 Section 3. **Retrospective operation.**
90 Section 73-3-917 of this bill has retrospective operation to January 1, 2010.

Comment

This savings clause amendment was proposed by our section, and added to Senator Valentine's bill by substitution. It is intended to provide a stopgap for this year in which there is no estate tax, and for which formula funding clauses in many of our trust plans are ill prepared. It essentially provides that such clauses will be interpreted and funded as though the decedent died on December 31, 2009. It does not apply to estate planning documents created or amended this year. Nor does it apply if the document manifests a contrary intention.

HOUSE BILL 355

24 Section 1. Section **75-5-206** is amended to read:

25 **75-5-206. Court appointment of guardian of minor -- Qualifications -- Priority**
26 **of minor's nominee.**

27 (1) (a) The court may appoint as guardian any person whose appointment would be in
28 the best interests of the minor.

29 (b) In determining the minor's best interests, the court may consider the minor's
30 physical, mental, moral, and emotional health needs.

31 (2) Except as provided in Subsection (3), the court shall appoint a person nominated
32 by the minor, if the minor is 14 years of age or older, unless the court finds the appointment
33 contrary to the best interests of the minor.

34 (3) The court may deny the appointment of a guardian for a minor of school age if it
35 finds that:

36 (a) if the minor is older than 11 years of age:

37 (i) the minor has not secured a certificate from the local police authority in the
38 jurisdiction where the minor has lived during the past two years stating that there have been no
39 criminal charges filed against the minor and the minor is not the subject of a criminal
40 investigation in that jurisdiction and given a copy of the certificate to the superintendent of the
41 school district in which the minor would attend school in Utah; or

42 (ii) a release has not been given by or on behalf of the minor to the superintendent of
43 the school district in which the minor would attend school in Utah within a reasonable time
44 prior to the guardianship hearing, allowing the superintendent full access to all criminal
45 records of the minor in those jurisdictions outside the state where the minor has resided during
46 the previous two years, which release remains part of the minor's school records together with
47 verification of residence for the previous two years, except that information disclosed in the
48 criminal records may not be made a part of the minor's school record;

49 (b) the school district has proven by a preponderance of the evidence that the primary
50 purpose for the guardianship is to avoid the payment of tuition, which a school district may
51 assess against a nonresident for attendance at a Utah public school; or

52 (c) after consideration of relevant evidence, including any presented by the school
53 district in which the petitioner resides, the minor's behavior indicates an ongoing
54 unwillingness to abide by applicable law or school rules.

55 (4) If a school district files an objection for reasons described in Subsection (3)(b), and

56 the court does not find in favor of the school district, the court may award the petitioner
57 attorney fees and costs if the court finds that the school district's arguments lack a reasonable
58 basis in law or fact.

Comment

Under current law, school districts can object to the appointment of a guardian on the basis that the primary purpose for the guardianship is to avoid out of state tuition. This amendment provides that if a school district objects on this basis, and the court finds that the school district's arguments lack a reasonable basis in fact, the court may award the petitioner attorneys fees and costs. This is an attempt to make sure the school districts have a reasonable basis for this objection.