

2014 Legislative Amendments:

Relevant Bills that did NOT pass:

HB 162: Asset Protection Trust Amendments

HB 208: Domestic Asset Protection Trust Amendments

HB 174: Uniform Powers of Appointment Act

Relevant Bill that Passed:

HB 265 - Amendments to the Probate Code

New Issues for the 2015 Legislative Session

April 17, 2014
12:00 p.m. - 1:00 p.m.
Utah State Bar

CLE Presenter:

Michael A. Jensen
KIRTON McCONKIE
50 East South Temple, Suite 400
Salt Lake City UT 84111
801-239-3142
majensen@kmclaw.com

Short Bio of Michael A. Jensen

Mike Jensen is an Elder Law Attorney.

After a 20-year business career in Massachusetts, New York, and New Jersey, Mike enrolled at the Boston College Law School. After earning his law degree *cum laude* in 1995 he began his solo law practice here in Salt Lake City. Prior to that, he earned his M.B.A. degree from the Harvard Business School, and before that received his B.S. degree in Physics and Math *cum laude* at the University of Utah.

Mike has successfully argued on Elder Law and other issues before the Utah Supreme Court and the Utah Court of Appeals. He is currently President of the Utah Aging Alliance and a past President and member of the Board of the Alzheimer's Association.

Mike left his solo practice in early 2012 and became a shareholder of Kirton McConkie where his practice focuses on probate and trust litigation as well as contested guardianships and conservatorships.

For the past three years, Mike has been the Chair of the Legislative Committee for the Estate Planning Section and the Elder Law Section, and during each of the past three Legislative Sessions a substantial number of amendments to the Utah Probate Code were enacted directly from the efforts of the Committee.

ASSET PROTECTION TRUST AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Earl D. Tanner

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts the Asset Protection Trust Act and adds new provisions relating to registration, limits on protected amounts, and child support, alimony, and domestic property.

Highlighted Provisions:

This bill:

- ▶ creates the Asset Protection Trust Act;
- ▶ defines terms;
- ▶ requires registration of the trust with the Department of Commerce;
- ▶ limits protected trust assets to \$250,000;
- ▶ provides a special exemption for child support, alimony, and property division; and
- ▶ creates an exemption for Medicaid reimbursement.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

75-2-205, as last amended by Laws of Utah 2003, Second Special Session, Chapter 3

75-7-107, as renumbered and amended by Laws of Utah 2004, Chapter 89



28 75-7-301, as repealed and reenacted by Laws of Utah 2004, Chapter 89

29 75-7-501, as repealed and reenacted by Laws of Utah 2004, Chapter 89

30 75-7-505, as enacted by Laws of Utah 2004, Chapter 89

31 75-7-816, as enacted by Laws of Utah 2004, Chapter 89

32 ENACTS:

33 25-6-201, Utah Code Annotated 1953

34 25-6-202, Utah Code Annotated 1953

35 25-6-203, Utah Code Annotated 1953

36 25-6-204, Utah Code Annotated 1953

37 25-6-205, Utah Code Annotated 1953

38 25-6-206, Utah Code Annotated 1953

39 25-6-207, Utah Code Annotated 1953

40 REPEALS:

41 25-6-14, as repealed and reenacted by Laws of Utah 2013, Chapter 284



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

44 Section 1. Section 25-6-201 is enacted to read:

Part 2. Asset Protection Trust Act

25-6-201. Title.

47 This part is known as the "Asset Protection Trust Act."

48 Section 2. Section 25-6-202 is enacted to read:

25-6-202. Definitions.

50 As used in this chapter:

51 (1) "Creditor" means:

52 (a) a creditor or other claimant of the settlor existing when the trust is created; or

53 (b) a person who subsequently becomes a creditor, including, whether or not the claim

54 is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,

55 disputed, undisputed, legal, equitable, secured, or unsecured:

56 (i) who holds or seeks to enforce a judgment entered by a court or other body having

57 adjudicative authority; or

58 (ii) who has a right to payment.

DOMESTIC ASSET PROTECTION TRUST AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends provisions related to domestic asset protection trusts.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ delineates provisions regarding real property transferred to the trust;
- ▶ clarifies a settlor-trustee's role in determining discretionary distributions;
- ▶ makes clarifying changes to claims for relief for fraudulent transfers; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

25-6-14, as repealed and reenacted by Laws of Utah 2013, Chapter 284

59-10-202, as last amended by Laws of Utah 2010, Chapter 6

75-7-816, as enacted by Laws of Utah 2004, Chapter 89

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



1 **DOMESTIC ASSET PROTECTION TRUST AMENDMENTS**

2 2013 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Derek E. Brown**

5 Senate Sponsor: John L. Valentine

7 **LONG TITLE**

8 **General Description:**

9 This bill creates a domestic Asset Protection Trust statute.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ provides a framework for an Asset Protection Trust in this state;
- 14 ▶ requires that the majority of the assets be in this state;
- 15 ▶ excludes the trust assets from the settlor's estate for federal estate tax purposes;
- 16 ▶ establishes a two year statute of limitations for bringing a fraudulent transfer claim;

17 and

- 18 ▶ requires notification to a child support judgment holder before a distribution is

19 made.

20 **Money Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 None

24 **Utah Code Sections Affected:**

25 **REPEALS AND REENACTS:**

26 **25-6-14**, as last amended by Laws of Utah 2004, Chapter 89

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

29 Section 1. Section **25-6-14** is repealed and reenacted to read:

UNIFORM POWERS OF APPOINTMENT ACT

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill modifies provisions related to powers of appointment.

Highlighted Provisions:

This bill:

- ▶ addresses exercise of power of appointment;
- ▶ addresses compliance with specific reference requirements;
- ▶ enacts the Uniform Powers of Appointment Act, including:
 - general provisions, such as definitions, governing law, and the relationship of common law and principles of equity;
 - providing for the creation, revocation, and amendment of the power of appointment;
 - addressing the exercise of a power of appointment;
 - addressing disclaimer or release and the contract to appoint or not appoint;
 - addressing the rights of a powerholder's creditors in appointive property; and
 - including miscellaneous provisions; and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

⌚→ [None] This bill takes effect on May 12, 2015. ←⌚

H.B. 174



75-2-704. Power of appointment -- Meaning of specific reference requirement.

If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

28 **Utah Code Sections Affected:**

29 AMENDS:

30 **75-2-608**, as repealed and reenacted by Laws of Utah 1998, Chapter 39

31 REPEALS AND REENACTS:

32 **75-2-704**, as enacted by Laws of Utah 1998, Chapter 39

33 ENACTS:

34 **75-9-101**, Utah Code Annotated 1953

35 **75-9-102**, Utah Code Annotated 1953

36 **75-9-103**, Utah Code Annotated 1953

37 **75-9-104**, Utah Code Annotated 1953

38 **75-9-201**, Utah Code Annotated 1953

39 **75-9-202**, Utah Code Annotated 1953

40 **75-9-203**, Utah Code Annotated 1953

41 **75-9-204**, Utah Code Annotated 1953

42 **75-9-205**, Utah Code Annotated 1953

43 **75-9-206**, Utah Code Annotated 1953

44 **75-9-301**, Utah Code Annotated 1953

45 **75-9-302**, Utah Code Annotated 1953

46 **75-9-303**, Utah Code Annotated 1953

47 **75-9-304**, Utah Code Annotated 1953

48 **75-9-305**, Utah Code Annotated 1953

49 **75-9-306**, Utah Code Annotated 1953

50 **75-9-307**, Utah Code Annotated 1953

51 **75-9-308**, Utah Code Annotated 1953

52 **75-9-309**, Utah Code Annotated 1953

53 **75-9-310**, Utah Code Annotated 1953

54 **75-9-311**, Utah Code Annotated 1953

55 **75-9-312**, Utah Code Annotated 1953

56 **75-9-313**, Utah Code Annotated 1953

57 **75-9-314**, Utah Code Annotated 1953

58 **75-9-401**, Utah Code Annotated 1953

- 59 [75-9-402](#), Utah Code Annotated 1953
- 60 [75-9-403](#), Utah Code Annotated 1953
- 61 [75-9-404](#), Utah Code Annotated 1953
- 62 [75-9-405](#), Utah Code Annotated 1953
- 63 [75-9-406](#), Utah Code Annotated 1953
- 64 [75-9-407](#), Utah Code Annotated 1953
- 65 [75-9-501](#), Utah Code Annotated 1953
- 66 [75-9-502](#), Utah Code Annotated 1953
- 67 [75-9-503](#), Utah Code Annotated 1953
- 68 [75-9-504](#), Utah Code Annotated 1953
- 69 [75-9-601](#), Utah Code Annotated 1953
- 70 [75-9-602](#), Utah Code Annotated 1953
- 71 [75-9-603](#), Utah Code Annotated 1953



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

74 Section 1. Section [75-2-608](#) is amended to read:

75 **[75-2-608. Exercise of power of appointment.](#)**

76 In the absence of a requirement that a power of appointment be exercised by a
77 reference, or by an express or specific reference, to the power, a general residuary clause in a
78 will, or a will making general disposition of all of the testator's property, expresses an intention
79 to exercise a power of appointment held by the testator only if:

80 (1) the power is a general power exercisable in favor of the powerholder's estate and
81 the creating instrument does not contain [a] an effective gift if the power is not exercised; or

82 (2) the testator's will manifests an intention to include the property subject to the
83 power.

84 Section 2. Section [75-2-704](#) is repealed and reenacted to read:

85 **[75-2-704. Power of appointment -- Compliance with specific reference](#)**
86 **requirement.**

87 A powerholder's substantial compliance with a formal requirement of appointment
88 imposed in a governing instrument by the donor, including a requirement that the instrument
89 exercising the power of appointment make reference or specific reference to the power, is

90 sufficient if:

91 (1) the powerholder knows of and intends to exercise the power; and

92 (2) the powerholder's manner of attempted exercise does not impair a material purpose
93 of the donor imposing the requirement.

94 Section 3. Section **75-9-101** is enacted to read:

95 **CHAPTER 9. UNIFORM POWERS OF APPOINTMENT ACT**

96 **Part 1. General Provisions**

97 **75-9-101. Title.**

98 This chapter is known as the "Uniform Powers of Appointment Act."

99 Section 4. Section **75-9-102** is enacted to read:

100 **75-9-102. Definitions.**

101 As used in this chapter:

102 (1) "Appointee" means a person to which a powerholder makes an appointment of
103 appointive property.

104 (2) "Appointive property" means the property or property interest subject to a power of
105 appointment.

106 (3) "Blanket-exercise clause" means a clause in an instrument that exercises a power of
107 appointment and is not a specific-exercise clause. The term includes a clause that:

108 (a) expressly uses the words "any power" in exercising any power of appointment the
109 powerholder has;

110 (b) expressly uses the words "any property" in appointing any property over which the
111 powerholder has a power of appointment; or

112 (c) disposes of all property subject to disposition by the powerholder.

113 (4) "Donor" means a person that creates a power of appointment.

114 (5) "Exclusionary power of appointment" means a power of appointment exercisable in
115 favor of any one or more of the permissible appointees to the exclusion of the other permissible
116 appointees.

117 (6) "General power of appointment" means a power of appointment exercisable in
118 favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor
119 of the powerholder's estate.

120 (7) "Gift-in-default clause" means a clause identifying a taker in default of

121 appointment.

122 (8) "Impermissible appointee" means a person that is not a permissible appointee.

123 (9) "Instrument" means a record.

124 (10) "Nongeneral power of appointment" means a power of appointment that is not a
125 general power of appointment.

126 (11) "Permissible appointee" means a person in whose favor a powerholder may
127 exercise a power of appointment.

128 (12) "Person" means an individual, estate, trust, business or nonprofit entity, public
129 corporation, government or governmental subdivision, agency, or instrumentality, or other
130 legal entity.

131 (13) "Powerholder" means a person in whom a donor creates a power of appointment.

132 (14) "Power of appointment" means a power that enables a powerholder acting in a
133 nonfiduciary capacity to designate a recipient of an ownership interest in, or another power of
134 appointment over, the appointive property. The term does not include a power of attorney.

135 (15) "Presently exercisable power of appointment" means a power of appointment
136 exercisable by the powerholder at a relevant time. The term:

137 (a) includes a power of appointment not exercisable until the occurrence of a specified
138 event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

139 (i) the occurrence of the specified event;

140 (ii) the satisfaction of the ascertainable standard; or

141 (iii) the passage of the specified time; and

142 (b) does not include a power exercisable only at the powerholder's death.

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

145 (17) "Specific-exercise clause" means a clause in an instrument that specifically refers
146 to and exercises a particular power of appointment.

147 (18) "Taker in default of appointment" means a person that takes all or part of the
148 appointive property to the extent the powerholder does not effectively exercise the power of
149 appointment.

150 (19) "Terms of the instrument" means the manifestation of the intent of the maker of
151 the instrument regarding the instrument's provisions as expressed in the instrument or as may

152 be established by other evidence that would be admissible in a legal proceeding.

153 Section 5. Section **75-9-103** is enacted to read:

154 **75-9-103. Governing law.**

155 Unless the terms of the instrument creating a power of appointment manifest a contrary
156 intent:

157 (1) the creation, revocation, or amendment of the power is governed by the law of the
158 donor's domicile at the relevant time; and

159 (2) the exercise, release, or disclaimer of the power, or the revocation or amendment of
160 the exercise, release, or disclaimer of the power, is governed by the law of the powerholder's
161 domicile at the relevant time.

162 Section 6. Section **75-9-104** is enacted to read:

163 **75-9-104. Common law and principles of equity.**

164 The common law and principles of equity supplement this chapter, except to the extent
165 modified by this chapter or laws of this state other than this chapter.

166 Section 7. Section **75-9-201** is enacted to read:

167 **Part 2. Creation, Revocation, and Amendment of Power of Appointment**

168 **75-9-201. Creation of power of appointment.**

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

170 (a) the instrument creating the power:

171 (i) is valid under applicable law; and

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

173 and

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

177 (2) Subsection (1)(a)(ii) does not apply to the creation of a power of appointment by
178 the exercise of a power of appointment.

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

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

182 Section 8. Section **75-9-202** is enacted to read:

183 **75-9-202. Nontransferability.**

184 A powerholder may not transfer a power of appointment. If a powerholder dies without
185 exercising or releasing a power, the power lapses.

186 Section 9. Section **75-9-203** is enacted to read:

187 **75-9-203. Presumption of unlimited authority.**

188 Subject to Section **75-9-205**, and unless the terms of the instrument creating a power of
189 appointment manifest a contrary intent, the power is:

190 (1) presently exercisable;

191 (2) exclusionary; and

192 (3) except as otherwise provided in Section **75-9-204**, general.

193 Section 10. Section **75-9-204** is enacted to read:

194 **75-9-204. Exception to presumption of unlimited authority.**

195 Unless the terms of the instrument creating a power of appointment manifest a contrary
196 intent, the power is nongeneral if:

197 (1) the power is exercisable only at the powerholder's death; and

198 (2) the permissible appointees of the power are a defined and limited class that does
199 not include the powerholder's estate, the powerholder's creditors, or the creditors of the
200 powerholder's estate.

201 Section 11. Section **75-9-205** is enacted to read:

202 **75-9-205. Rules of classification.**

203 (1) In this section, "adverse party" means a person with a substantial beneficial interest
204 in property that would be affected adversely by a powerholder's exercise or nonexercise of a
205 power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the
206 powerholder, or a creditor of the powerholder's estate.

207 (2) If a powerholder may exercise a power of appointment only with the consent or
208 joinder of an adverse party, the power is nongeneral.

209 (3) If the permissible appointees of a power of appointment are not defined and
210 limited, the power is exclusionary.

211 Section 12. Section **75-9-206** is enacted to read:

212 **75-9-206. Power to revoke or amend.**

213 A donor may revoke or amend a power of appointment only to the extent that:

- 214 (1) the instrument creating the power is revocable by the donor; or
- 215 (2) the donor reserves a power of revocation or amendment in the instrument creating
- 216 the power of appointment.

217 Section 13. Section **75-9-301** is enacted to read:

218 **Part 3. Exercise of Power of Appointment**

219 **75-9-301. Requisites for exercise of power of appointment.**

220 A power of appointment is exercised only:

- 221 (1) if the instrument exercising the power is valid under applicable law;
- 222 (2) if the terms of the instrument exercising the power:
 - 223 (a) manifest the powerholder's intent to exercise the power; and
 - 224 (b) subject to Section **75-9-304**, satisfy the requirements of exercise, if any, imposed by
 - 225 the donor; and
 - 226 (3) to the extent the appointment is a permissible exercise of the power.

227 Section 14. Section **75-9-302** is enacted to read:

228 **75-9-302. Intent to exercise -- Determining intent from residuary clause.**

- 229 (1) As used in this section:
 - 230 (a) "Residuary clause" does not include a residuary clause containing a
 - 231 blanket-exercise clause or a specific-exercise clause.
 - 232 (b) "Will" includes a codicil and a testamentary instrument that revises another will.
 - 233 (2) A residuary clause in a powerholder's will, or a comparable clause in the
 - 234 powerholder's revocable trust, manifests the powerholder's intent to exercise a power of
 - 235 appointment only if:
 - 236 (a) the terms of the instrument containing the residuary clause do not manifest a
 - 237 contrary intent;
 - 238 (b) the power is a general power exercisable in favor of the powerholder's estate;
 - 239 (c) there is no gift-in-default clause or the clause is ineffective; and
 - 240 (d) the powerholder did not release the power.

241 Section 15. Section **75-9-303** is enacted to read:

242 **75-9-303. Intent to exercise -- After-acquired power.**

243 Unless the terms of the instrument exercising a power of appointment manifest a

244 contrary intent:

245 (1) except as otherwise provided in Subsection (2), a blanket-exercise clause extends to
246 a power acquired by the powerholder after executing the instrument containing the clause; and

247 (2) if the powerholder is also the donor of the power, the clause does not extend to the
248 power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

249 Section 16. Section **75-9-304** is enacted to read:

250 **75-9-304. Substantial compliance with donor-imposed formal requirement.**

251 A powerholder's substantial compliance with a formal requirement of appointment
252 imposed by the donor, including a requirement that the instrument exercising the power of
253 appointment make reference or specific reference to the power, is sufficient if:

254 (1) the powerholder knows of and intends to exercise the power; and

255 (2) the powerholder's manner of attempted exercise of the power does not impair a
256 material purpose of the donor in imposing the requirement.

257 Section 17. Section **75-9-305** is enacted to read:

258 **75-9-305. Permissible appointment.**

259 (1) A powerholder of a general power of appointment that permits appointment to the
260 powerholder or the powerholder's estate may make any appointment, including an appointment
261 in trust or creating a new power of appointment, that the powerholder could make in disposing
262 of the powerholder's own property.

263 (2) A powerholder of a general power of appointment that permits appointment only to
264 the creditors of the powerholder or of the powerholder's estate may appoint only to those
265 creditors.

266 (3) Unless the terms of the instrument creating a power of appointment manifest a
267 contrary intent, the powerholder of a nongeneral power may:

268 (a) make an appointment in any form, including an appointment in trust, in favor of a
269 permissible appointee;

270 (b) create a general power in a permissible appointee; or

271 (c) create a nongeneral power in any person appoint one or more of the permissible
272 appointees of the original nongeneral power.

273 Section 18. Section **75-9-306** is enacted to read:

274 **75-9-306. Appointment to deceased appointee or permissible appointee's**
275 **descendant.**

276 (1) Subject to Sections 75-2-603 and 75-2-604, an appointment to a deceased appointee
277 is ineffective.

278 (2) Unless the terms of the instrument creating a power of appointment manifest a
279 contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or
280 create a new power of appointment in, a descendant of a deceased permissible appointee
281 whether or not the descendant is described by the donor as a permissible appointee.

282 Section 19. Section 75-9-307 is enacted to read:

283 **75-9-307. Impermissible appointment.**

284 (1) Except as otherwise provided in Section 75-9-306, an exercise of a power of
285 appointment in favor of an impermissible appointee is ineffective.

286 (2) An exercise of a power of appointment in favor of a permissible appointee is
287 ineffective to the extent the appointment is a fraud on the power.

288 Section 20. Section 75-9-308 is enacted to read:

289 **75-9-308. Elective allocation doctrine.**

290 If a powerholder exercises a power of appointment in a disposition that also disposes of
291 property the powerholder owns, the owned property and the appointive property shall be
292 allocated in the permissible manner that best carries out the powerholder's intent.

293 Section 21. Section 75-9-309 is enacted to read:

294 **75-9-309. Capture doctrine -- Disposition of ineffectively appointed property**
295 **under general power.**

296 To the extent a powerholder of a general power of appointment, other than a power to
297 withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

298 (1) the gift-in-default clause controls the disposition of the ineffectively appointed
299 property; or

300 (2) if there is no gift-in-default clause or to the extent the clause is ineffective, the
301 ineffectively appointed property:

302 (a) passes to:

303 (i) the powerholder if the powerholder is a permissible appointee and is living; or

304 (ii) if the powerholder is an impermissible appointee or is deceased, the powerholder's
305 estate if the estate is a permissible appointee; or

306 (b) if there is no taker under Subsection (2)(a), passes under a reversionary interest to

307 the donor or the donor's transferee or successor in interest.

308 Section 22. Section **75-9-310** is enacted to read:

309 **75-9-310. Disposition of unappointed property under released or unexercised**
310 **general power.**

311 To the extent a powerholder releases or fails to exercise a general power of appointment
312 other than a power to withdraw property from, revoke, or amend a trust:

313 (1) the gift-in-default clause controls the disposition of the unappointed property; or

314 (2) if there is no gift-in-default clause or to the extent the clause is ineffective:

315 (a) except as otherwise provided in Subsection (2)(b), the unappointed property passes
316 to:

317 (i) the powerholder if the powerholder is a permissible appointee and is living; or

318 (ii) if the powerholder is an impermissible appointee or is deceased, the powerholder's
319 estate if the estate is a permissible appointee; or

320 (b) to the extent the powerholder released the power, or if there is no taker under
321 Subsection (2)(a), the unappointed property passes under a reversionary interest to the donor or
322 the donor's transferee or successor in interest.

323 Section 23. Section **75-9-311** is enacted to read:

324 **75-9-311. Disposition of unappointed property under released or unexercised**
325 **nongeneral power.**

326 To the extent a powerholder releases, ineffectively exercises, or fails to exercise a
327 nongeneral power of appointment:

328 (1) the gift-in-default clause controls the disposition of the unappointed property; or

329 (2) if there is no gift-in-default clause or to the extent the clause is ineffective, the
330 unappointed property:

331 (a) passes to the permissible appointees if:

332 (i) the permissible appointees are defined and limited; and

333 (ii) the terms of the instrument creating the power do not manifest a contrary intent; or

334 (b) if there is no taker under Subsection (2)(a), passes under a reversionary interest to
335 the donor or the donor's transferee or successor in interest.

336 Section 24. Section **75-9-312** is enacted to read:

337 **75-9-312. Disposition of unappointed property if partial appointment to taker in**

338 **default.**

339 Unless the terms of the instrument creating or exercising a power of appointment
340 manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in
341 default of appointment, the taker in default of appointment may share fully in unappointed
342 property.

343 Section 25. Section **75-9-313** is enacted to read:

344 **75-9-313. Appointment to taker in default.**

345 If a powerholder makes an appointment to a taker in default of appointment and the
346 appointee would have taken the property under a gift-in-default clause had the property not
347 been appointed, the power of appointment is considered not to have been exercised and the
348 appointee takes under the clause.

349 Section 26. Section **75-9-314** is enacted to read:

350 **75-9-314. Powerholder's authority to revoke or amend exercise.**

351 A powerholder may revoke or amend an exercise of a power of appointment only to the
352 extent that:

353 (1) the powerholder reserves a power of revocation or amendment in the instrument
354 exercising the power of appointment and, if the power is nongeneral, the terms of the
355 instrument creating the power of appointment do not prohibit the reservation; or

356 (2) the terms of the instrument creating the power of appointment provide that the
357 exercise is revocable or amendable.

358 Section 27. Section **75-9-401** is enacted to read:

359 **Part 4. Disclaimer or Release - Contract to Appoint or Not to Appoint.**

360 **75-9-401. Disclaimer.**

361 As provided by Section **75-2-801**:

362 (1) A powerholder may disclaim all or part of a power of appointment.

363 (2) A permissible appointee, an appointee, or a taker in default of appointment may
364 disclaim all or part of an interest in appointive property.

365 Section 28. Section **75-9-402** is enacted to read:

366 **75-9-402. Authority to release.**

367 A powerholder may release a power of appointment, in whole or in part, except to the
368 extent the terms of the instrument creating the power prevent the release.

369 Section 29. Section **75-9-403** is enacted to read:

370 **75-9-403. Method of release.**

371 A powerholder of a releasable power of appointment may release the power in whole or
372 in part:

373 (1) by substantial compliance with a method provided in the terms of the instrument
374 creating the power; or

375 (2) if the terms of the instrument creating the power do not provide a method or the
376 method provided in the terms of the instrument is not expressly made exclusive, by a record
377 manifesting the powerholder's intent by clear and convincing evidence.

378 Section 30. Section **75-9-404** is enacted to read:

379 **75-9-404. Revocation or amendment of release.**

380 A powerholder may revoke or amend a release of a power of appointment only to the
381 extent that:

382 (1) the instrument of release is revocable by the powerholder; or

383 (2) the powerholder reserves a power of revocation or amendment in the instrument of
384 release.

385 Section 31. Section **75-9-405** is enacted to read:

386 **75-9-405. Power to contract -- Presently exercisable power of appointment.**

387 A powerholder of a presently exercisable power of appointment may contract:

388 (1) not to exercise the power; or

389 (2) to exercise the power if the contract when made does not confer a benefit on an
390 impermissible appointee.

391 Section 32. Section **75-9-406** is enacted to read:

392 **75-9-406. Power to contract -- Power of appointment not presently exercisable.**

393 A powerholder of a power of appointment that is not presently exercisable may contract
394 to exercise or not to exercise the power only if the powerholder:

395 (1) is also the donor of the power; and

396 (2) has reserved the power in a revocable trust.

397 Section 33. Section **75-9-407** is enacted to read:

398 **75-9-407. Remedy for breach of contract to appoint or not to appoint.**

399 The remedy for a powerholder's breach of a contract to appoint or not to appoint

400 appointive property is limited to damages payable out of the appointive property or, if
401 appropriate, specific performance of the contract.

402 Section 34. Section **75-9-501** is enacted to read:

403 **Part 5. Rights of Powerholder's Creditors in Appointive Property**

404 **75-9-501. Creditor claim -- General power created by powerholder.**

405 (1) In this section, "power of appointment created by the powerholder" includes a
406 power of appointment created in a transfer by another person to the extent the powerholder
407 contributed value to the transfer.

408 (2) Appointive property subject to a general power of appointment created by the
409 powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate
410 to the extent provided in Title 25, Chapter 6, Uniform Fraudulent Transfer Act.

411 (3) Subject to Subsection (2), appointive property subject to a general power of
412 appointment created by the powerholder is not subject to a claim of a creditor of the
413 powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed
414 the property in favor of a person other than the powerholder or the powerholder's estate.

415 (4) Subject to Subsections (2) and (3), and notwithstanding the presence of a
416 spendthrift provision or whether the claim arose before or after the creation of the power of
417 appointment, appointive property subject to a general power of appointment created by the
418 powerholder is subject to a claim of a creditor of:

419 (a) the powerholder, to the same extent as if the powerholder owned the appointive
420 property, if the power is presently exercisable; and

421 (b) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim
422 and subject to the right of a decedent to direct the source from which liabilities are paid, if the
423 power is exercisable at the powerholder's death.

424 Section 35. Section **75-9-502** is enacted to read:

425 **75-9-502. Creditor claim -- General power not created by powerholder.**

426 (1) Except as otherwise provided in Subsection (2), appointive property subject to a
427 general power of appointment created by a person other than the powerholder is subject to a
428 claim of a creditor of:

429 (a) the powerholder, to the extent the powerholder's property is insufficient, if the
430 power is presently exercisable; and

431 (b) the powerholder's estate, to the extent the estate is insufficient, subject to the right
432 of a decedent to direct the source from which liabilities are paid.

433 (2) Subject to Subsection 75-9-504(3), a power of appointment created by a person
434 other than the powerholder which is subject to an ascertainable standard relating to an
435 individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Sec.
436 2041(b)(1)(A) or 26 U.S.C. Sec. 2514(c)(1), is treated for purposes of this part as a nongeneral
437 power.

438 Section 36. Section 75-9-503 is enacted to read:

439 **75-9-503. Power to withdraw.**

440 (1) For purposes of this part, and except as otherwise provided in Subsection (2), a
441 power to withdraw property from a trust is treated, during the time the power may be exercised,
442 as a presently exercisable general power of appointment to the extent of the property subject to
443 the power to withdraw.

444 (2) On the lapse, release, or waiver of a power to withdraw property from a trust, the
445 power is treated as a presently exercisable general power of appointment only to the extent the
446 value of the property affected by the lapse, release, or waiver exceeds the greater of the amount
447 specified in 26 U.S.C. Sec. 2041(b)(2) and 26 U.S.C. Sec. 2514(e) or the amount specified in
448 26 U.S.C. Sec. 2503(b).

449 Section 37. Section 75-9-504 is enacted to read:

450 **75-9-504. Creditor claim -- Nongeneral power.**

451 (1) Except as otherwise provided in Subsections (2) and (3), appointive property
452 subject to a nongeneral power of appointment is exempt from a claim of a creditor of the
453 powerholder or the powerholder's estate.

454 (2) Appointive property subject to a nongeneral power of appointment is subject to a
455 claim of a creditor of the powerholder or the powerholder's estate to the extent that the
456 powerholder owned the property and, reserving the nongeneral power, transferred the property
457 in violation of Title 25, Chapter 6, Uniform Fraudulent Transfer Act.

458 (3) If the initial gift in default of appointment is to the powerholder or the
459 powerholder's estate, a nongeneral power of appointment is treated for purposes of this part as
460 a general power.

461 Section 38. Section 75-9-601 is enacted to read:

462 **Part 6. Miscellaneous Provisions**

463 **75-9-601. Uniformity of application and construction.**

464 In applying and construing this uniform act, consideration shall be given to the need to
 465 promote uniformity of the law with respect to its subject matter among states that enact it.

466 Section 39. Section **75-9-602** is enacted to read:

467 **75-9-602. Relation to Electronic Signatures in Global and National Commerce**
 468 **Act.**

469 This chapter modifies, limits, or supersedes the Electronic Signatures in Global and
 470 National Commerce Act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or supersede
 471 Section 101(c) of that act, 15 U.S.C. Sec. 7001(c), or authorize electronic delivery of any of the
 472 notices described in Section 103(b) of that act, 15 U.S.C. Sec. 7003(b).

473 Section 40. Section **75-9-603** is enacted to read:

474 **75-9-603. Application to existing relationships.**

475 (1) Except as otherwise provided in this chapter, on and after May

475a Ĥ→ [13, 2014] 12, 2015 ←Ĥ :

476 (a) this chapter applies to a power of appointment created before, on, or after May Ĥ→ [13,
 477 2014] 12, 2015 ←Ĥ ;

478 (b) this chapter applies to a judicial proceeding concerning a power of appointment
 479 commenced on or after May Ĥ→ [13, 2014] 12, 2015 ←Ĥ ;

480 (c) this chapter applies to a judicial proceeding concerning a power of appointment
 481 commenced before May Ĥ→ [13, 2014] 12, 2015 ←Ĥ , unless the court finds that application
 481a of a particular

482 provision of this chapter would interfere substantially with the effective conduct of the judicial
 483 proceeding or prejudice a right of a party, in which case the particular provision of this chapter
 484 does not apply and the superseded law applies; and

485 (d) a rule of construction or presumption provided in this chapter applies to an
 486 instrument executed before May Ĥ→ [13, 2014] 12, 2015 ←Ĥ , unless there is a clear indication
 486a of a contrary intent
 487 in the terms of the instrument.

488 (2) Except as otherwise provided in Subsections (1)(a) through (d), an action done
 489 before May Ĥ→ [13, 2014] 12, 2015 ←Ĥ , is not affected by this chapter.

490 (3) If a right is acquired, extinguished, or barred on the expiration of a prescribed
 491 period that commenced under law of this state other than this chapter before May
 491a Ĥ→ [13, 2014] 12, 2015 ←Ĥ , the
 492 law continues to apply to the right.

492a Ĥ→ **Section 41. Effective Date.**

492b **This bill takes effect on May 12, 2015. ←Ĥ**

Legislative Review Note
as of 2-28-14 1:55 PM

Office of Legislative Research and General Counsel

PROBATE CODE AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill amends the Utah Uniform Probate Code.

Highlighted Provisions:

This bill:

- ▶ clarifies the parent and child relationship related to adoption;
- ▶ amends language related to the electronic filings of wills in court;
- ▶ provides for an emergency guardian or court appointed temporary guardian until further order of the court;
- ▶ allows a guardian to compel production of a ward's estate documents and advance health care directives;
- ▶ allows for a temporary conservator until further order of the court;
- ▶ provides for a conservator to compel production of a protected person's estate documents and advanced health care directives; and
- ▶ makes technical and clarifying changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

75-2-114, as last amended by Laws of Utah 2008, Chapter 3

75-3-107, as last amended by Laws of Utah 2013, Chapter 364

- 30 **75-3-301**, as last amended by Laws of Utah 2013, Chapter 364
- 31 **75-5-310**, as last amended by Laws of Utah 1979, Chapter 244
- 32 **75-5-312**, as last amended by Laws of Utah 2013, Chapter 364
- 33 **75-5-408**, as last amended by Laws of Utah 2012, Chapter 274
- 34 **75-5-415**, as last amended by Laws of Utah 2012, Chapter 274
- 35 **75-5-416**, as enacted by Laws of Utah 1975, Chapter 150
- 36 **75-5-424**, as last amended by Laws of Utah 2012, Chapter 274
- 37 **75-7-508**, as last amended by Laws of Utah 2009, Chapter 388

38 ENACTS:

39 **75-5-310.5**, Utah Code Annotated 1953



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

42 Section 1. Section **75-2-114** is amended to read:

43 **75-2-114. Parent and child relationship.**

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

48 (2) An adopted individual is the child of the adopting parent or parents and not of the
49 natural parents, but adoption of a child by the spouse of either natural parent has no effect on[~~:-]~~
50 the relationship between the child and that natural parent.

51 [~~(a) the relationship between the child and that natural parent; or]~~

52 [~~(b) the right of the child or a descendant of the child to inherit from or through the~~
53 ~~other natural parent.]~~

54 (3) Inheritance from or through a child by either natural parent or [~~his~~] the child's
55 kindred is precluded unless that natural parent has openly treated the child as [~~his~~] the natural
56 parent's, and has not refused to support the child.

57 Section 2. Section **75-3-107** is amended to read:

58 **75-3-107. Probate and testacy proceedings -- Ultimate time limit -- Presumption**
59 **and order of intestacy.**

60 (1) No informal probate proceeding or formal testacy proceeding, other than a
61 proceeding to probate a will previously probated at the testator's domicile [~~and appointment~~
62 ~~proceedings relating to an estate in which there has been a prior appointment~~], may be
63 commenced more than three years after the decedent's death, except:

64 (a) If a previous proceeding was dismissed because of doubt about the fact of the
65 decedent's death, appropriate probate[~~, appointment,~~] or testacy proceedings may be maintained
66 at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of
67 the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the
68 subsequent proceeding.

69 (b) Appropriate probate[~~, appointment,~~] or testacy proceedings may be maintained in
70 relation to the estate of an absent, disappeared, or missing person for whose estate a
71 conservator has been appointed, at any time within three years after the conservator becomes
72 able to establish the death of the protected person.

73 (c) A proceeding to contest an informally probated will and to secure appointment of
74 the person with legal priority for appointment in the event the contest is successful, may be
75 commenced within the later of 12 months from the informal probate or three years from the
76 decedent's death.

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

82 (3) If no will is probated within three years from death, the presumption of intestacy is
83 final and the court shall upon filing a proper petition enter an order to that effect. [~~The court~~
84 ~~also has continuing jurisdiction to:~~]

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

86 jurisdiction to:

- 87 (a) determine what property was owned by the decedent at the time of death; and
- 88 (b) appoint, formally or informally, a personal representative or special administrator to
- 89 administer the decedent's estate.

90 Section 3. Section **75-3-301** is amended to read:

91 **75-3-301. Informal probate or appointment proceedings -- Application --**
 92 **Contents.**

93 (1) Applications for informal probate or informal appointment shall be directed to the
 94 registrar, and verified by the applicant to be accurate and complete to the best of ~~[his]~~ the
 95 applicant's knowledge and belief as to the appropriate information required under this section.

96 (2) Every application for informal probate of a will or for informal appointment of a
 97 personal representative, other than a special or successor representative, shall contain the
 98 following:

- 99 (a) a statement of the interest of the applicant;
- 100 (b) the name and date of death of the decedent, ~~[his]~~ the decedent's age, the county and
- 101 state of ~~[his]~~ the decedent's domicile at the time of death, and the names and addresses of the
- 102 spouse, children, heirs, and devisees and the ages of any who are minors so far as known or
- 103 ascertainable with reasonable diligence by the applicant;
- 104 (c) if the decedent was not domiciled in the state at the time of ~~[his]~~ the decedent's
- 105 death, a statement showing venue;
- 106 (d) a statement identifying and indicating the address of any personal representative of
- 107 the decedent appointed in this state or elsewhere whose appointment has not been terminated;
- 108 and
- 109 (e) a statement indicating whether the applicant has received a demand for notice or is
- 110 aware of any demand for notice of any probate or appointment proceeding concerning the
- 111 decedent that may have been filed in this state or elsewhere~~[-and].~~

112 ~~[(f) that the time limit for informal probate or appointment as provided in this chapter~~
 113 ~~has not expired either because three years or less have passed since the decedent's death, or if~~

114 ~~more than three years from death have passed, that circumstances as described by Section~~
115 ~~75-3-107 authorizing tardy probate or appointment have occurred.]~~

116 (3) An application for informal probate of a will shall state the following in addition to
117 the statements required by Subsection (2):

118 (a) that the original of the decedent's last will [is]:

119 (i) is in the possession of the court;

120 (ii) was [~~presented to~~] filed with the [~~court for electronic storage and~~] court's electronic
121 filing system and is now in the possession of the applicant or the applicant's attorney; or

122 (iii) [~~accompanies the application, or that~~] is an authenticated copy of a will probated
123 in another jurisdiction accompanies the application[;] or was filed with the court's electronic
124 filing system and the authenticated copy is now in the possession of the applicant or the
125 applicant's attorney;

126 (b) that the applicant, to the best of [his] the applicant's knowledge, believes the will to
127 have been validly executed; [~~and~~]

128 (c) that after the exercise of reasonable diligence, the applicant is unaware of any
129 instrument revoking the will, and that the applicant believes that the instrument which is the
130 subject of the application is the decedent's last will[-]; and

131 (d) that the time limit for informal probate as provided in this chapter has not expired
132 either because three years or less have passed since the decedent's death, or if more than three
133 years have passed since the decedent's death, circumstances as described by Section 75-3-107
134 authorizing tardy probate have occurred.

135 (4) An application for informal appointment of a personal representative to administer
136 an estate under a will shall describe the will by date of execution and state the time and place of
137 probate or the pending application or petition for probate. The application for appointment
138 shall adopt the statements in the application or petition for probate, state the name, address and
139 priority for appointment of the person whose appointment is sought, state whether or not bond
140 is required, and, if required, unless specified by the will, state the estimated value of the
141 personal and real estate of the decedent and of the income expected from the personal and real

142 estate during the next year.

143 (5) An application for informal appointment of an administrator in intestacy shall state
144 in addition to the statements required by Subsection (2):

145 (a) That after the exercise of reasonable diligence, the applicant is unaware of any
146 unrevoked testamentary instrument relating to property having a situs in this state under
147 Section 75-1-301, or, a statement why any such instrument of which he may be aware is not
148 being probated;

149 (b) The priority of the person whose appointment is sought and the names of any other
150 persons having a prior or equal right to the appointment under Section 75-3-203;

151 (c) If bond is required, the estimated value of the personal and real estate of the
152 decedent and of the income expected from the personal and real estate during the next year.

153 (6) An application for appointment of a personal representative to succeed a personal
154 representative appointed under a different testacy status shall refer to the order in the most
155 recent testacy proceeding, state the name and address of the person whose appointment is
156 sought and of the person whose appointment will be terminated if the application is granted,
157 and describe the priority of the applicant.

158 (7) An application for appointment of a personal representative to succeed a personal
159 representative who has tendered a resignation as provided in Subsection 75-3-610(3), or whose
160 appointment has been terminated by death or removal, shall adopt the statements in the
161 application or petition which led to the appointment of the person being succeeded, except as
162 specifically changed or corrected, state the name and address of the person who seeks
163 appointment as successor, and describe the priority of the applicant.

164 Section 4. Section 75-5-310 is amended to read:

165 **75-5-310. Emergency guardians.**

166 (1) If an incapacitated person has no guardian and an emergency exists or if an
167 appointed guardian is not effectively performing ~~[his]~~ the guardian's duties and the court
168 further finds that the welfare of the incapacitated person requires immediate action, it may,
169 without notice, appoint an ~~[appropriate official as temporary]~~ emergency guardian for the

170 person for a specified period not to exceed 30 days pending notice and hearing.

171 (2) The court shall, in all cases in which [~~a temporary~~] an emergency guardian is
172 appointed, hold a hearing within [~~five~~] 14 days pursuant to Section 75-5-303. [~~Unless the~~
173 ~~allegedly incapacitated person has already obtained counsel, the court may appoint an~~
174 ~~appropriate official or attorney to represent that person in the proceeding. Until the full hearing~~
175 ~~and order of the court, the temporary guardian shall be charged with the care and custody of the~~
176 ~~ward and shall not permit the ward to be removed from this state. The authority of any~~
177 ~~permanent guardian previously appointed by the court is suspended so long as a temporary~~
178 ~~guardian has authority. A temporary guardian may be removed at any time, and shall obey such~~
179 ~~orders and make such reports as the court requires.]~~

180 Section 5. Section **75-5-310.5** is enacted to read:

181 **75-5-310.5. Temporary guardians.**

182 (1) If, after notice and hearing as required by Section 75-5-303, the court finds good
183 cause, the court may:

184 (a) appoint a temporary guardian;

185 (b) convert an emergency guardian to a temporary guardian if an emergency guardian
186 has been appointed under Section 75-5-310; or

187 (c) appoint a different person as temporary guardian to replace an emergency guardian
188 appointed under Section 75-5-310.

189 (2) Unless the allegedly incapacitated person has already obtained counsel in this
190 proceeding or an attorney has been already appointed for the person, the court shall appoint an
191 attorney to represent the person in the proceeding.

192 (3) Until a full hearing and further order of the court, the temporary guardian shall be
193 charged with the care and custody of the ward and may not permit the ward to be removed
194 from the state. The authority of any permanent guardian previously appointed by the court is
195 suspended so long as a temporary guardian has authority.

196 (4) A temporary guardian may be removed at any time, and shall obey all orders and
197 make any reports required by the court.

198 (5) A temporary guardian has all of the powers and duties of a permanent guardian as
199 set forth in Section 75-5-312.

200 Section 6. Section 75-5-312 is amended to read:

201 **75-5-312. General powers and duties of guardian -- Penalties.**

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

204 (2) Absent a specific limitation on the guardian's power in the order of appointment,
205 the guardian has the same powers, rights, and duties respecting the ward that a parent has
206 respecting the parent's unemancipated minor child except that a guardian is not liable to third
207 persons for acts of the ward solely by reason of the parental relationship. In particular, and
208 without qualifying the foregoing, a guardian has the following powers and duties, except as
209 modified by order of the court:

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

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

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

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

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

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

226 [(†)] (iii) receive money and tangible property deliverable to the ward and apply the
227 money and property for support, care, and education of the ward; but the guardian may not use
228 funds from the ward's estate for room and board which the guardian, the guardian's spouse,
229 parent, or child have furnished the ward unless a charge for the service is approved by order of
230 the court made upon notice to at least one adult relative in the nearest degree of kinship to the
231 ward in which there is an adult. The guardian [~~must~~] shall exercise care to conserve any excess
232 for the ward's needs.

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

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

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

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

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

241 (iv) Unless emergency conditions exist, a guardian is required to file with the court a
242 notice of the guardian's intent to move the ward and to serve the notice on all interested persons
243 at least 10 days before the move. The guardian shall take reasonable steps to notify all
244 interested persons and to file the notice with the court as soon as practicable following the
245 earlier of the move or the date when the guardian's intention to move the ward is made known
246 to the ward, the ward's care giver, or any other third party.

247 (v) The guardian shall, for all estates in excess of \$50,000, excluding the residence
248 owned by the ward, send a report with a full accounting to the court on an annual basis. For
249 estates less than \$50,000, excluding the residence owned by the ward, the guardian shall fill out
250 an informal annual report and mail the report to the court. The report shall include the
251 following: a statement of assets at the beginning and end of the reporting year, income received
252 during the year, disbursements for the support of the ward, and other expenses incurred by the
253 estate. The guardian shall also report the physical conditions of the ward, the place of

254 residence, and a list of others living in the same household. The court may require additional
255 information. The forms for both the informal report for estates under \$50,000, excluding the
256 residence owned by the ward, and the full accounting report for larger estates shall be approved
257 by the Judicial Council. This annual report shall be examined and approved by the court. If
258 the ward's income is limited to a federal or state program requiring an annual accounting
259 report, a copy of that report may be submitted to the court in lieu of the required annual report.

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

262 (vii) The guardian shall also render an annual accounting of the status of the person to
263 the court which shall be included in the petition or the informal annual report as required under
264 Subsection (2)(e). If a fee is paid for an accounting of an estate, no fee shall be charged for an
265 accounting of the status of a person.

266 (viii) If a guardian:

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

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

269 (C) willfully fails to file the report required by this subsection, after receiving written
270 notice from the court of the failure to file and after a grace period of two months has elapsed,
271 the court may impose a penalty in an amount not to exceed \$5,000. The court may also order
272 restitution of funds misappropriated from the estate of a ward. The penalty shall be paid by the
273 guardian and may not be paid by the estate.

274 (ix) These provisions and penalties governing annual reports do not apply if the
275 guardian is the parent of the ward.

276 (x) For the purposes of Subsections (2)(e)(i), (ii), (iii), and (iv), "interested persons"
277 means those persons required to receive notice in guardianship proceedings as set forth in
278 Section [75-5-309](#).

279 (f) If a conservator has been appointed, all of the ward's estate received by the guardian
280 in excess of those funds expended to meet current expenses for support, care, and education of
281 the ward shall be paid to the conservator for management as provided in this code; and the

282 guardian shall account to the conservator for funds expended.

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

289 Section 7. Section **75-5-408** is amended to read:

290 **75-5-408. Permissible court orders.**

291 (1) The court has the following powers which may be exercised directly or through a
292 conservator in respect to the estate and affairs of protected persons:

293 (a) While a petition for appointment of a conservator or other protective order is
294 pending and after preliminary hearing and without notice to others, the court has power to
295 preserve and apply the property of the person to be protected as may be required for the
296 person's benefit or the benefit of the person's dependents.

297 (b) After hearing and upon determining that a basis for an appointment or other
298 protective order exists with respect to a minor without other disability, the court has all those
299 powers over the estate and affairs of the minor which are or might be necessary for the best
300 interests of the minor, the minor's family, and the members of the minor's household.

301 (c) After hearing and upon determining that a basis for an appointment or other
302 protective order exists with respect to a person for reasons other than minority, the court has,
303 for the benefit of the person and members of the person's household, all the powers over the
304 person's estate and affairs that the person could exercise if present and not under disability,
305 except the power to make a will. These powers include the power to:

306 (i) make gifts;

307 (ii) convey or release the person's contingent and expectant interests in property
308 including marital property rights and any right of survivorship incident to joint tenancy or
309 tenancy by the entirety;

310 (iii) exercise or release the person's powers as personal representative, custodian for
311 minors, conservator, or donee of a power of appointment;

312 (iv) enter into contracts;

313 (v) create revocable or irrevocable trusts of property of the estate that may extend
314 beyond the person's disability or life;

315 (vi) exercise options of the person with a disability to purchase securities or other
316 property;

317 (vii) exercise the person's rights to elect options and change beneficiaries under
318 insurance and annuity policies and to surrender the policies for their cash value;

319 (viii) exercise the person's right to an elective share in the estate of the person's
320 deceased spouse; and

321 (ix) renounce any interest by testate or intestate succession or by inter vivos transfer.

322 (d) The court may exercise, or direct the exercise of, its authority to exercise or release
323 powers of appointment of which the protected person is donee, to renounce interests, to make
324 gifts in trust or otherwise exceeding 20% of any year's income of the estate, or to change
325 beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing,
326 that it is in the best interests of the protected person, and that the person either is incapable of
327 consenting or has consented to the proposed exercise of power.

328 (2) An order made pursuant to this section determining that a basis for appointment of
329 a conservator or other protective order exists has no effect on the capacity of the protected
330 person.

331 (3) If the court elects to appoint a conservator under Subsection (1), the court may
332 appoint a temporary conservator to serve until further order of the court. A temporary
333 conservator, if appointed, has all of the powers and duties of a conservator as set forth in
334 Sections [75-5-417](#), [75-5-418](#), [75-5-419](#), and [75-5-424](#).

335 Section 8. Section **75-5-415** is amended to read:

336 **75-5-415. Death, resignation, or removal of conservator.**

337 (1) The court may remove a conservator for good cause, upon notice and hearing, or

338 accept the resignation of a conservator. After the death, resignation, or removal of a
339 conservator, the court may appoint another conservator. A conservator so appointed succeeds
340 to the title and powers of the preceding conservator.

341 (2) Before removing a conservator, accepting the resignation of a conservator, or
342 ordering that a protected person's incapacity has terminated, the court shall follow the same
343 procedures to safeguard the rights of the protected person as apply to a petition for appointment
344 of a conservator as provided in Section 75-5-407. The court is not required to appoint an
345 attorney to represent the ward if the case is uncontested and the protected person's capacity is
346 not at issue.

347 Section 9. Section **75-5-416** is amended to read:

348 **75-5-416. Petitions for orders subsequent to appointment.**

349 (1) Any person interested in the welfare of a person for whom a conservator has been
350 appointed may file a petition in the appointing court for an order:

- 351 (a) requiring bond or security or additional bond or security, or reducing bond;
352 (b) requiring an accounting for the administration of the [~~trust~~] conservatorship estate;
353 (c) directing distribution;
354 (d) removing the conservator and appointing a temporary or successor conservator; or
355 (e) granting other appropriate relief, including any relief available under Title 75,
356 Chapter 7, Utah Uniform Trust Code, if the protected person is a grantor, settlor, trustor, or
357 beneficiary of a trust.

358 (2) A conservator may petition the appointing court for instructions concerning [~~his~~]
359 the conservator's fiduciary responsibility.

360 (3) Upon notice and hearing the court may give appropriate instructions or make any
361 appropriate order.

362 Section 10. Section **75-5-424** is amended to read:

363 **75-5-424. Powers of conservator in administration.**

364 (1) A conservator has all of the powers conferred in this chapter and any additional
365 powers conferred by law on trustees in this state. In addition, a conservator of the estate of an

366 unmarried minor as to whom no one has parental rights, has the duties and powers of a
367 guardian of a minor described in Section 75-5-209 until the minor attains majority or marries,
368 but the parental rights so conferred on a conservator do not preclude appointment of a guardian
369 as provided by Part 2 of this chapter.

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

373 [~~(2)~~] (3) A conservator has power without court authorization or confirmation to invest
374 and reinvest funds of the estate as would a trustee.

375 [~~(3)~~] (4) A conservator, acting reasonably in efforts to accomplish the purpose for
376 which the conservator was appointed, may act without court authorization or confirmation, to:

377 (a) collect, hold, and retain assets of the estate, including land in another state, until, in
378 his judgment, disposition of the assets should be made, and the assets may be retained even
379 though they include an asset in which he is personally interested;

380 (b) receive additions to the estate;

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

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

384 (e) invest and reinvest estate assets in accordance with Subsection (2);

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

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

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

391 (i) subdivide, develop, or dedicate land to public use; make or obtain the vacation of
392 plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving
393 or receiving considerations; and dedicate easements to public use without consideration;

- 394 (j) enter for any purpose into a lease as lessor or lessee with or without option to
395 purchase or renew for a term within or extending beyond the term of the conservatorship;
- 396 (k) enter into a lease or arrangement for exploration and removal of minerals or other
397 natural resources or enter into a pooling or unitization agreement;
- 398 (l) grant an option involving disposition of an estate asset or take an option for the
399 acquisition of any asset;
- 400 (m) vote a security, in person or by general or limited proxy;
- 401 (n) pay calls, assessments, and any other sums chargeable or accruing against or on
402 account of securities;
- 403 (o) sell or exercise stock subscription or conversion rights; consent, directly or through
404 a committee or other agent, to the reorganization, consolidation, merger, dissolution, or
405 liquidation of a corporation or other business enterprise;
- 406 (p) hold a security in the name of a nominee or in other form without disclosure of the
407 conservatorship so that title to the security may pass by delivery, but the conservator is liable
408 for any act of the nominee in connection with the stock so held;
- 409 (q) insure the assets of the estate against damage or loss and the conservator against
410 liability with respect to third persons;
- 411 (r) borrow money to be repaid from estate assets or otherwise; and advance money for
412 the protection of the estate or the protected person, and for all expenses, losses, and liabilities
413 sustained in the administration of the estate or because of the holding or ownership of any
414 estate assets, and the conservator has a lien on the estate as against the protected person for
415 advances so made;
- 416 (s) pay or contest any claim; settle a claim by or against the estate or the protected
417 person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim
418 belonging to the estate to the extent that the claim is uncollectible;
- 419 (t) pay taxes, assessments, compensation of the conservator, and other expenses
420 incurred in the collection, care, administration, and protection of the estate;
- 421 (u) allocate items of income or expense to either estate income or principal, as

422 provided by law, including creation of reserves out of income for depreciation, obsolescence,
423 or amortization, or for depletion in mineral or timber properties;

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

428 (w) employ persons, including attorneys, auditors, investment advisors, or agents, even
429 though they are associated with the conservator, to advise or assist in the performance of
430 administrative duties; act upon their recommendation without independent investigation; and
431 instead of acting personally, employ one or more agents to perform any act of administration,
432 whether or not discretionary;

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

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

437 (z) execute and deliver all instruments which will accomplish or facilitate the exercise
438 of the powers vested in the conservator.

439 Section 11. Section **75-7-508** is amended to read:

440 **75-7-508. Notice to creditors.**

441 (1) (a) A trustee for an inter vivos revocable trust, upon the death of the settlor, may
442 publish a notice to creditors:

443 (i) once a week for three successive weeks in a newspaper of general circulation in the
444 county where the settlor resided at the time of death; and

445 (ii) in accordance with Section [45-1-101](#) for three weeks.

446 (b) The notice required by Subsection (1)(a) ~~must~~ shall:

447 (i) provide the trustee's name and address; and

448 (ii) notify creditors:

449 (A) of the deceased settlor; and

450 (B) to present their claims within three months after the date of the first publication of
451 the notice or be forever barred from presenting the claim.

452 (2) A trustee shall give written notice by mail or other delivery to any known creditor
453 of the deceased settlor, notifying the creditor to present his claim within 90 days from the
454 published notice if given as provided in Subsection (1) or within 60 days from the mailing or
455 other delivery of the notice, whichever is later, or be forever barred. Written notice shall be the
456 notice described in Subsection (1) or a similar notice.

457 (3) (a) If the deceased settlor received medical assistance, as defined in Section
458 26-19-2, at any time after the age of 55, the trustee for an inter vivos revocable trust, upon the
459 death of the settlor, shall mail or deliver written notice to the Director of the Office of
460 Recovery Services, on behalf of the Department of Health, to present any claim under Section
461 26-19-13.5 within 60 days from the mailing or other delivery of notice, whichever is later, or
462 be forever barred.

463 (b) If the trustee does not mail notice to the director of the Office of Recovery Services
464 on behalf of the department in accordance with Subsection (3)(a), the department shall have
465 one year from the death of the settlor to present its claim.

466 (4) The trustee [~~shall~~] is not [~~be~~] liable to any creditor or to any successor of the
467 deceased settlor for giving or failing to give notice under this section.

468 (5) The notice to creditors shall be valid against any creditor of the trust and also
469 against any creditor of the estate of the deceased settlor.

WHAT'S NEXT?

2014 Legislative Committee

Possible Issues to Tackle

POSSIBLE LEGISLATIVE ACTIONS FOR 2015 Legislative Session
As of April 17, 2014

Item	Legislative Code Section and Description
1	Clarify the guardian’s reporting duties when the guardian is a parent of the ward and when there are co-guardians who are closely related to the ward.
2	Should the reporting exception provided by 75-5-312(2)(e)(ix) extend to a grandparent, spouse or other family or co-guardians?
3	Correct 75-3-402(1)(c) by changing the word "not" to "now" re original will that is efiled (appears that it was a typo from 2013 amendments).
4	Consider implementing a Trust “Protector” provision - review Wyoming Code.
5	Review the conservatorship Code re role of conservator when the conservatee is a spouse and the conservator is NOT the spouse. That is, what financial control should the non-spouse conservator have over the estate of the spouse and his/her spouse? Also, consider a modification of 30-4-1(4), re Separate Maintenance actions to clarify that a spouse in a care facility is not deemed to be living separately for the purposes of separate maintenance and the “community spouse” should not be deemed to be a deserting spouse unless that spouse refuses to support the spouse in the care facility (this could also impact a claim for Medicaid assistance).
6	Consider the role of a guardian over financial affairs in a protective proceeding when a conservator is not appointed.
7	Consider the conflict between Guardian and health care agent. See and compare 75-5-312 and 75-2a-111 & 112.
8	Further work on 25-6-14, Domestic Asset Protection Trusts
9	Review and consider changes to 75-2-301 as suggested by a probate attorney to better protect the natural children in a second marriage situation where the children's father dies before the stepmother.

POSSIBLE LEGISLATIVE ACTIONS FOR 2015 Legislative Session
As of April 17, 2014

Item	Legislative Code Section and Description
10	Once again, review the issue of having a Transfer on Death Deeds added to Utah's Probate Code.
11	Review the 3-year rule for probating wills; change to 5 years? longer?
12	Consider implementing a new law that would disinherit any devisee who committed elder abuse of the decedent.
13	Examine the term "improper" as it is used in § 75-3-711 re the exercise of the personal representative's power in the administration of the estate.
14	Consider whether there is a reasonable fix to the issue of the multiple party account presumption in § 75-6-104(1).
15	Review 75-5-415(2) and 75-5-307(3) to exempt Respondent from the hearing when removing, accepting the resignation of, or replacing the current guardian or conservator if the case is uncontested and Respondent's capacity is not at issue.
16	Consider attempting to define "emergency" under 75-5-310 for emergency guardian appointment.
17	Clarify what is intended by "other persons entitled to it" under § 75-5-425(5)(a)(iii) in contrast to the personal representative.
18	Gun Trusts
19	Spousal elective share - clarify and/or rewrite?
20	Review gifts to care provider within 1 year of death; see Idaho Statute?
21	Consider clarifying law on guardian's authority to commence a divorce action for Respondent: if so, how and when?
22	Since petitioner's legal fees are paid from Respondent's estate if a guardian or conservator is appointed, should the legal fees of person opposing the petition be paid from Respondent's estate?