

Heart of America Fellows Institute

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Probate and Trust Codes, Required Notices, and Creditor
Claims

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Topics to Be Addressed

- We will address the following 4 topics:
 - What are the UPC and UTC and why are these Codes relevant for non-uniform states?
 - What are typical notice issues in estate administration?
 - What are typical notice issues in trust administration?
 - What is law on creditor claims against a decedent?

I. The UPC/UTC

Uniform Laws

- Drafted by state-affiliated organization known as the Uniform Law Commission, which was created in 1891.
- Commissioners, who are all attorneys, are appointed by each state.
- Draft what are in essence model acts for states to consider.
- Even when widely enacted, uniform acts are rarely uniform in all details.

Uniform Probate Code (UPC)

- UPC completed in 1969 but draws from earlier 1946 Model Probate Code.
- Covers intestacy, wills and elective share among other topics.
- Not enacted in full in any HOA state but all states have cherry-picked.
- Missouri has enacted more UPC provisions than the others. Iowa and Missouri also enacted substantial portions of the Model Probate Code.
- When drafting legislation, UPC is almost always the starting point. UPC has been enacted in full in about 20 states.

Uniform Trust Code (UTC)

- Completed in 2000, the UTC has been enacted in 30+ states and counting.
- Among HOA states, UTC has been enacted in Arkansas, Kansas, and Missouri although much of the Iowa Trust Code is based on an early draft of the UTC.

II. Other Uniform Acts

Other Uniform Acts

- Ten are listed in the outline. Here are my top six:
 - Directed Trust Act (2017)-supplements, does not supplant UTC
 - Revised Fiduciary Access to Digital Assets (RUFADAA 2015)-enacted in Arkansas, Iowa, Kansas, and Missouri
 - Powers of Appointment (2013)-enacted in Missouri
 - Principal and Income (1997)-enacted in all HOA states
 - Prudent Investor (1994)-enacted in all HOA states
 - Trust Decanting (2015)-supplements, does not supplant UTC

III. Estate Administration

Notice Issues in Estate Administration

- When must notice be given of estate opening
- Who must receive notice of estate opening?
- What about intermediate actions, such as sale of assets?
- Who must receive notice of estate closing?
- What happens if notice is not given?

When Must Notice Be Given

- States divide into two big camps (1) prior notice must be given of hearing to open estate; (2) estate may be opened without notice but notice must then be given within some set period, such as 30 days, after opening of the estate.
- The UPC and some states provide a choice. An estate may be opened “formally,” that is, with prior notice to interested persons, or “informally,” with notice given after estate opening.

Who Must Receive Notice

- Always the devisees under the current will and the heirs.
- But as discussed 3 slides below giving notice only to devisees and heirs may not foreclose rights of others with an interest, such as devisees under prior wills.

Notice During Administration

- Local statute must be consulted and requirements will vary depending on type of administration and extent of powers granted to personal representative in will.
- Types of administration:
 - *Supervised*-under UPC, court approval, with notice, required for all sales and distributions
 - *Independent*-estate may proceed without court intervention unless requested by interested person
 - *Small Estates*-either affidavit by beneficiary or one-shot court order or certificate by clerk.

Notice on Estate Closing

- Under UPC, estates may be closed either *formally* or *informally*.
- Formal closing requires an accounting, a court hearing, and prior notice to interested persons.
- Informal closing involves filing of closing statement with court reciting everything has been done. Closing statement and relevant attachments must be sent to interested persons. Right to object terminates some set period, such as 6 months, following filing of closing statement.
- Most states following formal-informal distinction. Estates under supervised administration must be closed formally. Under independent administration, there is usually a choice between a formal or informal closing.

What if Notice Isn't Given

- There is a large body of law on notice to creditors, but much less law on failure to notify heirs or devisees under prior wills.
- Principal issue is whether unnotified heirs and devisees under prior wills may contest will following expiration of will contest period. A typical will contest period is 6 months following first publication of notice to creditors.
- Based on caselaw emanating from *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), there is caselaw support for the position that a contest by a known or reasonably ascertainable heir or devisee under a prior will is barred only by an actual notice.

IV. Trust Administration

Notice Issues in Trust Administration

- What is meant by “qualified beneficiary”?
- What is the default rule for notice under the UTC?
- To what extent can an otherwise required notice be waived in the terms of the trust?
- How are concepts of representation helpful in achieving finality?

What is a Qualified Beneficiary

- Moving from narrowest to broadest and simplifying a bit, the UTC refers to (1) “current distributees,” which includes those who might receive a current distribution, (2) “qualified beneficiaries,” which adds in those who would receive a distribution if an interest in the trust or the trust itself terminates on the date in question, and (2) “all” beneficiaries, which adds in remote remainder interests.
- Current distributees have the greatest right to notice, qualified beneficiaries are next, and “all” beneficiaries are at the bottom.

What is the Default Rule Under UTC

- The primary provision is Section 813. Current distributees are entitled to a copy of the annual report. Qualified beneficiaries must be kept “reasonably” informed about trust administration and are entitled to notice of a trustee’s acceptance of office and certain other specified actions. But “all” beneficiaries may request information and have a right to a trustee response.
- Notice requirements are found in several other UTC provisions:
 - 108(d)-transfer of principal place of administration
 - 414(a)-small trust termination
 - 417-combination and division of trusts
 - 705-trustee resignation
 - 817-proposed plan of distribution.

To What Extent Can Notice Requirements Be Waived

- UTC is primarily a default statute but certain mandatory rules are listed in Section 105(b).
- The UTC provisions placing limits on extent to which notice can be waived in the terms of the trust, Section 105(b)(8)-(9), were placed in brackets because of a lack of consensus on the waiver issue.
- States take a variety of approaches, including omitting Section 105(b)(8)-(9), thereby making notice optional at least in theory. Another approach is to allow settlor to designate surrogate to receive notice or request information on a beneficiary's behalf.

Judicial Response

- Even if statute allows for complete waiver of notice, courts may intervene. In *Wilson v. Wilson*, 690 SE2d 710, 711 (NC Ct App 2010), where the trust instrument totally dispensed with notice to beneficiaries, the court held that “the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.” The court added that “[a]ny notion of a trust without accountability is a contradiction in terms.” 690 SE2d at 715.

Concepts of Representation

- Achieving finality requires that all interested persons be at the table. But what if a trust beneficiary lacks capacity or is a minor or even unborn.
- Representation, when available, allows someone who is competent to represent and bind those who are not at the table.
- UTC Article 3 is a detailed statute on representation, dealing with representation by fiduciaries (agents under powers of attorney, conservators, etc.) as well as “virtual representation” where a beneficiary not at the table can be represented by another beneficiary with a similar interest.
- Under UTC, representor may receive notice and give a consent on behalf of person represented.
- Representation does not apply if there is a conflict of interest between the representor and the person represented with respect to the particular matter.

Non-Judicial Settlements

- Representation traditionally could be used only for judicially-approved settlements.
- UTC Section 111 extends the use of representation to non-judicial settlement agreements.
- Section 111(d) contains a non-exclusive list of matters for which a non-judicial settlement agreement may be used, including:
 - Interpretation/construction of trust terms
 - Approval of a trustee's report/accounting
 - Resignation or appointment of a trustee
 - Determination of a trustee's compensation
 - Transfer of principal place of administration
 - Liability of a trustee for actions taken relating to the trust.

V. Creditor Claims

Creditor Claim Issues

- We will address the following creditor claim issues:
 - What is a claim bar and when does it apply?
 - What is a self-executing statute of limitations?
 - Assuming the estate doesn't have enough, what creditors have priority for payment?
 - What are claims not due and contingent claims?
 - To what extent are non-probate assets subject to claims of decedent's creditors?
- Creditor claim provisions of the UPC have been widely enacted and will be used as a template.

Claim Bars

- To effectuate policy of expeditious administration of estate, claim bars require the filing of creditor claims promptly following the opening of the decedent's estate. A typical claim bar is six months following first publication of notice to creditors.
- But pursuant to *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the claims of creditors who were either known or reasonably ascertainable are barred only by an actual notice. Publication alone bars only the claims of creditors who are unknown.

Self-Executing Statute of Limitations

- *Pope* triggered the application of 14th Amendment due process because the publication of notice, a process that occurs as part of a judicial proceeding, constitutes “state action.”
- But a statute of limitations on creditor claims that commences at death is “self-executing” and does not raise constitutional concerns.
- Following *Pope*, numerous states enacted statutes barring creditor claims not filed within a set period following death, typically one year. These statutes have been universally upheld against constitutional challenge. Most of these statutes bar claims one year after death even if an estate has not been opened.

Creditor Priority

- If an estate is not sufficient to pay all creditors, UPC Section 3-805 provides that claims are to be paid in the following order of priority:
 - Costs and expenses of administration
 - Reasonable funeral expenses
 - Debts and expenses with preference under federal law
 - Medical and hospital expenses of last illness
 - Debts and expenses with preferences under other state law.
- In a potentially insolvent estate, personal representatives should wait out the claims period before making payment. Failure of the PR to follow the priority statute can result in personal liability.
- Secured creditors are exempt from claim bar and priority statute. Secured creditors are always entitled to foreclose on their security interests.

Claims Not Yet Due/Contingent Claims

- This somewhat obscure area of the law is best illustrated by example:
 - *Claim Not Yet Due*-Decedent, during life, purchased an item on an unsecured basis, with payment to be made within one year. Decedent dies one month after the date of purchase
 - *Contingent claim*-Mom guaranteed Son's student loan. Son dutifully made payments until one year after Mom's death and then went into default.
- States vary on extent to which claims not yet due/contingent claims are subject to creditor claim statutes. UPC covers both.
- Claims not yet due/contingent claims are often missed. If caught in time, settlement is best although an escrow arrangement is also possible.

Non-Probate Assets

- This could be its own lecture. Common law in this area is uncertain. UPC and a number of states have enacted statutes authorizing non-probate assets to be reached if probate estate insufficient.
- But certain assets may not be reachable. Topic best addressed one non-probate asset at a time:
 - Revocable trusts-per UTC Section 505(a)(3), trust can be reached
 - Joint tenancy-states vary on whether survivor can be held liable for debts of deceased joint tenant
 - Tenancy by the entirety-protected
 - Multiple-person bank accounts-generally liable to extent of decedent's contribution
 - Life insurance-usually exempt unless paid to the decedent's estate
 - Qualified plans-exempt under federal law
 - IRAs-governed by state law but usually exempt.