



The Judiciary, State of Hawai‘i

**Testimony to the Thirty-Second Legislature
2023 Regular Session**

House Committee on Finance
Representative Kyle T. Yamashita, Chair
Representative Lisa Kitagawa, Vice Chair

Monday, April 3, 2023 at 2:30 p.m.
State Capitol, Conference Room 308
VIA VIDEOCONFERENCE

by:

Chief Judge R. Mark Browning, First Circuit
Chair, Committee on the Uniform Probate Code and Probate Court Practices Committee

Bill No. and Title: Senate Bill No. 483, S.D. 1, H.D. 1, Relating to the Uniform Probate Code.

Purpose: Updates the Uniform Probate Code.

Judiciary’s Position:

The Honorable R. Mark Browning, Chair of the Committee on the Uniform Probate Code and Probate Court Practices Committee (the “Probate Committee”)¹ submits this testimony in favor of Senate Bill No. 483, S.D. 1, H.D. 1 to enact updates to the Uniform Probate Code (“UPC”) in the State of Hawai‘i. To date, eighteen states have enacted the UPC, though many have enacted modified versions to incorporate practices and procedures that may be unique to their jurisdictions. Since 2018, members of the Probate Committee have reviewed the existing UPC as adopted in Hawai‘i (“Hawai‘i UPC”), recent revisions to the UPC by the Uniform Law Commission, the extensive commentaries to the UPC, and the changes to the UPC made by other

¹ The Probate Committee is chaired by the Honorable R. Mark Browning of the First Circuit Court and is comprised of judges for each of the other circuits (the Honorable Randal Valenciano, the Honorable Rhonda Loo, and the Honorable Henry Nakamoto) and attorney members Colin Goo, Rhonda Griswold, Frank Kanemitsu, Joy Miyasaki, Jeffrey Niebling, Raymond Okada, Rosemarie Sam, Douglas Smith, Carroll Taylor, and Eric Young.

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state legislatures and discussed and drafted recommended changes to the Hawai'i UPC consistent with changes made to the UPC or that otherwise will improve upon the current Hawai'i UPC. Senate Bill No. 483, S.D. 1, H.D. 1 is a product of the Probate Committee's work.

Purpose of the UPC:

The UPC is a codification of the law of probate, bringing together common law principles, restatement of law concepts, and various pre-existing statutes.

Background & Discussion:

The current Hawai'i UPC consists of six main Articles. While Article V of the UPC dealing with guardianship and conservatorships was updated in 2004, Articles I through IV remain largely unchanged since their enactment in 1996. The Uniform Law Commission regularly issues revisions to the UPC. The UPC also provides extensive commentary, which can be found at www.uniformlaws.org, regarding each section of the UPC and the rationale for each section. Senate Bill No. 483 seeks to make revisions in Articles I through IV of the Hawai'i UPC to be consistent with revisions made by the Uniform Law Commission, make technical amendments to improve clarity in the existing Hawai'i UPC, or to address concerns based on input from the courts and local practitioners to help improve the efficiency of the probate process. Attached to this testimony is a summary of the Probate Committee's proposed revisions to the Hawai'i UPC, with an explanation of the reason for each change.

The substantive changes in Senate Bill No. 483, S.D. 1, H.D. 1 include the addition of a new subpart that provides new rules defining a parent-child relationship for probate purposes and which address societal changes resulting from multiple parent families and advances in assisted reproductive technologies. Senate Bill No. 483, S.D. 1, H.D. 1 also adopts the Uniform Estate Tax Apportionment Act, which provides fair procedures for apportioning the burden of estate taxes among beneficiaries of a decedent's estate.

The Probate Committee respectfully asks this Committee to vote in favor of Senate Bill No. 483, S.D.1, H.D. 1. Thank you for your consideration and for the opportunity to testify on this measure.

COMMENTARY TO THE PROPOSED CHANGES TO THE UNIFORM PROBATE CODE

SECTION 2. A new subpart 2 is being added to Section 560 to adjust for societal changes in the reproductive process. New Section 2-A contains definitions of terms that are used in Subpart 2. New Section 2-B is an umbrella section declaring that, except as otherwise provided in Section 2-E(b) through (e), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-C continues the rule that, except as otherwise provided in Sections 2-F and 2-G, a parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status. Regarding adopted children, Section 2- D continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-E addresses the extent to which an adoption severs the parent-child relationship with the adoptee's genetic parents. Sections 2-F and 2-G provide rules addressing the existence of parent-child relationships resulting from assisted reproductive technologies in forming families. Section 2-H confirms that the new subpart does not affect the doctrine of equitable adoption.

SECTION 3. Insert a title and designates existing Sections 560:2-101 to 560:2-114 as subpart A.

SECTION 4: Adds two new sections that were added to the UPC in 2008 and are based on similar provisions in the Uniform Trust Code. The sections authorize the court to reform governing instruments to correct for mistakes consistent with the transferor's intent or to modify the instrument to achieve the transferor's tax objectives.

SECTION 5. A new subpart, the Uniform Estate Tax Apportionment Act (UETAA), is added to Chapter 560. The UETAA provides that the decedent's expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent's tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent's direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The UETAA also provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary.

SECTION 6. The amendment to Section 560:1-201 adds two new definitions for "record" and "sign" in the general definition section of the UPC and amends the current definitions of "beneficiary" and "issue" to adjust for changes in Hawaii laws and for further clarity.

SECTION 7. The amendment to Section 560:1-401 reduces the number of times the publication of a notice is required from three to two. With the advent of online search engine technology, the Probate Committee believes that the need to publish a notice three times is no

longer warranted and may unnecessarily increase the costs to probate an estate. The Probate Committee noted that other states have similarly reduced the number of required publications.

SECTION 8. The amendment to Section 506:1-403 restyles the section for additional clarity.

SECTION 9. The amendment to Section 506:2-102 adjusts the statutory share of a surviving spouse or reciprocal beneficiary for inflation, which was last updated when enacted in 1996.

SECTION 10. The amendment to Section 560:2-103 amends the provisions dealing with the shares of heirs other than a surviving spouse or reciprocal beneficiary, to adjust for societal changes recognizing that decedents now may have more than two parents or two sets of grandparents. Consistent with the 2008 changes to the UPC, the revised language also permits a decedent's stepchildren and their descendants to inherit in situations where there is no surviving spouse or reciprocal beneficiary, descendants, parents, grandparents or descendants of parents or grandparents.

SECTION 11. The amendment to Section 560:2-104 clarifies that the requirement of survival by 120 hours applies to heirs who are born before the intestate's death and addresses the inheritance rights of children born after the death of a decedent, through natural or assisted reproduction methods.

SECTION 12. The amendment to Section 560:2-106 includes language to adjust for societal changes as it relates to parents and grandparents similar to Section 560:2-103 (SECTION 10 above).

SECTION 13. The amendment to Section 560:2-107 removes the use of the term "halfblood" in favor of more acceptable language.

SECTION 14. The amendment to Section 560:2-108 deletes the section as the issue of afterborn heirs was addressed with the amendment to Section 560:2-104.

SECTION 15. The amendment to Section 560:2-113 was amended for clarity.

SECTION 16. Section 560:2-114 is amended to delete the language dealing with the parent-child relationship when a child is adopted and adds language to provide rules for when a parent may be barred from inheriting from a child.

SECTIONS 17. The elective share provision in Section 560:2-202 is restyled to provide that a surviving spouse or reciprocal beneficiary may elect to take an elective share equal to fifty percent of the marital-property share of the augmented estate. The determination of the marital-property share is moved to Section 560:2-203. The amendment also revises the minimum supplemental amount available to a surviving spouse or reciprocal beneficiary from \$50,000 to \$90,000 to adjust for inflation.

SECTION 18. Section 560:2-203 is amended to include the determination of the marital property share formerly in Section 560:2-202 and adjust the provision dealing with gift made within two years of death for inflation.

SECTION 19. Subsection (3)(C) of Section 560:2-205 is amended to adjust the amount of gifts that are exempted from the elective share from \$20,000 to \$32,000 to adjust for inflation.

SECTION 20. Section 560:2-209 is restyled consistent with the changes to 560:2-202, 2203 and 2-205.

SECTION 21. Section 560:2-212 is restyled to be consistent with the changes to 560:209.

SECTION 22. Amends Section 560:2-302 to change “the other” parent to “another” parent to address circumstances where child may have more than two parents.

SECTION 23. Amends the homestead allowance amount in Section 560:2-402 from \$15,000 to \$30,000 to adjust for inflation.

SECTION 24. Amends the exempt property allowance amount in Section 560:2-403 from \$10,000 to \$20,000 to adjust for inflation.

SECTION 25. Amends the amount of the family allowance in Section 560:2-405 that a Personal Representative may disburse without court approval from \$18,000 to \$36,000 to adjust for inflation.

SECTION 26. Amends the language in Section 560:2-514 for clarification in regards to will contracts.

SECTION 27. Revises definitions consistent with changes to the UPC in the anti-lapse provisions in Section 560:2-603 consistent with earlier changes and adds clarifying language.

SECTION 28. Adds two new paragraphs (5) and (6) to Section 560:2-606 consistent with changes to the UPC to allow a substitute gift of a replacement property where specifically devised property was sold by a decedent prior to death or a pecuniary substitute gift where it can be established that ademption of the gift would not be consistent with the decedent’s testamentary plan.

SECTION 29. Amends Section 560:2-608 dealing with the exercise of power of appointments in wills with clarifying language.

SECTION 30. Adopts changes to language in Section 560:2-704 in 2014 UPC Amendments to conform it to Section 304 of the Uniform Powers of Appointment Act (not yet adopted in Hawaii).

SECTION 31. Amends Section 560:2-706 to adopt technical amendments made to the UPC in 2008 that added definitions of “descendant of a grandparent” and “descendants” as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The two new definitions resolve

questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

SECTION 32. Amends Section 560:2-707 to adopt technical amendments made to the UPC in 2008 that added a definition of “descendants” as used in subsections (b)(1) and (2) and clarified subsection (b)(4). The new definition resolves questions of status previously unanswered. The technical amendment of subsection (b)(4) makes that subsection easier to understand but does not change its substance.

SECTION 33. Amends Section 560:2-804 to replace term “husband and wife” with “marriage” to reflect the adoption of same sex marriage since the section enactment in 1996 and to correct the reference to parent-child relationships due to addition of new Subpart 2.

SECTION 34. Amends Section 560:3-108 based on concerns and feedback from estate and trust practitioners to provide clarity as to the time limit within which a probate proceedings may be conducted and under what circumstances a proceeding may be brought informally.

SECTION 35. Amends paragraph (c) of Section 560:2-203 to resolve existing ambiguity as to the priority of one who is nominated to act as Personal Representative. The added language clarifies that the person who is nominated to act as Personal Representative shall have the same authority as the person who nominates him or her.

SECTION 36. Amends paragraph (a)(1) of Section 560:3-301 to clarify that an applicant in an informal proceeding may list his or her residence, business or mailing address in the application. Also amends paragraph (a)(2)(A) to require that an application for informal probate include the terms “filed, deposited or lodged” consistent with the changes made in 560:3-303 below (SECTION 34).

SECTION 37. Amends Section 560:3-303 to add a new paragraph (f) which will permit an authenticated copy of a will that has been filed, deposited or lodged in another jurisdiction to submitted for probated. The additional language provides an applicant with an additional means of filing a will where the original jurisdiction in which it was filed will not issue an authenticated copy.

SECTION 38. Amends Section 560:3-406, which applies to contested cases in which the proper execution of a will is at issue. Adopts the changes made to the UPC in 2008. Paragraph (1) provides that a will that is self-proved pursuant to Section 2-504 satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit. Paragraph (1) does not preclude evidence of undue influence, lack of testamentary capacity, revocation or any relevant evidence that the testator was unaware of the contents of the document. Paragraph (2) provides that if the will is witnessed pursuant to Section 2-502(a)(3), but not self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

SECTION 39. Section 560:3-605 is amended to adjust the interest a person or creditor must have in an estate to file a demand for bond from \$1,000 to \$10,000 to adjust for inflation.

SECTION 40. Amends Section 560:3-703 to add language relieving a Personal Representative of liability when distributing an estate without knowledge of the possibility of a posthumous pregnancy.

SECTION 41. Amends Section 560:3-720 to conform with its companion provision in the Uniform Trust Code.

SECTION 42. Amends Section 560:3-801 reduce the times a notice to creditor must be published from three to two. Change is consistent with the changes made to 560:1-401 above. With the advent of online search engine technology, the Probate Committee believes that the need to publish a notice three times is no longer warranted and may unnecessarily increases the costs to probate an estate. The Probate Committee noted that other states have similarly reduced the number of required publications.

SECTION 43. Amends Section 560:3-803 to change reference to sixty days after the “mailing or other delivery” of a notice of disallowance to sixty days after “service” of a notice of disallowance. Amendment is intended to address the issue raised in Ramos v. Estate of Elsenbach and clarify that the two-day extension for mailing in Probate Rule 10(d) is intended to apply to notices of disallowance.

SECTION 44. Amends Section 560:3-806 to change the language that a Personal Representative may “mail” a notice to “serve” a notice. Amendment is intended to address the issue raised in Ramos v. Estate of Elsenbach discussed above.

SECTION 45. Amends Section 560:3-915, which allows for the personal representative to distribute funds for an heir or devisee under a disability other than minority, to that person’s attorney-in-fact or a spouse, reciprocal beneficiary, parent or other close relative with whom he or she resides. Amended the amount that may be distributed annually from \$10,000 to \$30,000 to adjust for inflation.

SECTION 46. A new subsection is added to Section 560:4-205, which deals with the powers of a domiciliary foreign personal representative, to clarify that the personal representative’s power to act in this state are subject to the limitations of his or her power in the domiciliary proceeding.

SECTION 47. Section 560:3-916, which dealt with apportionment of estate taxes, is repealed. Section 560:3-916 is replaced with a new subpart discussed above.

House Committee on Finance
Representative Kyle T. Yamashita, Chair
Representative Lisa Kitagawa, Vice Chair
Monday, April 3, 2023
2:30 P.M.
Conference Room 308

WRITTEN TESTIMONY ONLY

by Carolyn Nicol

Bill No. & Title:

**S.B. No. 483, S.D. 1, H.D. 1,
Relating to the Uniform Probate Code**

Chair Yamashita, Vice Chair Kitagawa and Members of the Finance Committee:

My name is Carolyn Nicol. I am a retired attorney and a current member of the Probate and Estate Planning Section of the Hawaii State Bar Association, commenting, in my individual capacity, on proposed amendments to HRS §§560:3-108, 3-303, and 3-720 in Sections 33, 36, and 40 of this measure, and related amendments to 3-301 in Section 35, and to 1-201 in Section 6.

Section 33 affects provisions that establish deadlines after which proceedings may not be commenced. **Section 35** pertains to provisions about the contents of applications in informal proceedings. **Section 36** affects the role of the registrar, as opposed to the judge, in deciding whether a will filed, but not probated, in another jurisdiction should be admitted to probate in Hawai'i. My familiarity with these provisions is based on past experience at First Circuit Court, where as registrar for several years, I reviewed applications for informal probate of wills and informal appointment of personal representatives.

HRS §560:3-108 and related provisions:

Position: Oppose (in part), suggest changes.

Section 33 (page 100, line 9 to page 104, line 18) proposes amendments to HRS §560:3-108, Probate, testacy and appointment proceedings; ultimate time limit.

The meaning of "informal probate or appointment proceeding" and "formal testacy or appointment proceeding" can be discerned from the table of contents to Article III and the names of parts and statutory sections it contains. In HRS §560:3-108(a), "No informal probate or appointment proceeding or formal testacy or appointment proceeding . . . ," (page 100 lines 12-14) refers to proceedings held pursuant to part 3 (Informal Probate and

Appointment Proceedings) and part 4 (Formal Testacy and Appointment Proceedings) of article III (Probate of Wills and Administration).

Terminology in HRS §560:3-108 properly treats "probate proceedings" separately from "appointment proceedings" and reflects the "Flexible System of Administration of Decedents' Estates" which the Uniform Law Commission's Uniform Probate Code Commentary ("General Comment") for Article III calls "the heart of the Uniform Probate Code." A copy of the General Comment is attached (**emphasis added**). Note the caution about variations in language in redrafting.

GENERAL COMMENT

The provisions of this article describe the **Flexible System of Administration of Decedents' Estates**. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is **the heart of the Uniform Probate Code**.

. . . {S}ome states may see fit to reframe parts of this article to better accommodate local institutions. **Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the redrafting process:**

. . .
(2) Two methods of securing probate of wills which include non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

. . .
(5) Probate of a will by informal or formal proceedings or an adjudication of a intestacy may occur without any attendant requirement of appointment of a personal representative.

. . .
(7) Unless supervised administration is sought and ordered, persons interested in estates . . . may use an "in and out" relationship to the court so that any question or assumption relating to the estate . . . may be resolved or

established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

. . .

Overall, the system accepts the premise that the court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

General Comment on Article III, in "Final Act with Comments: Uniform Probate Code" (UPC_Final Act_2023feb27.pdf) at 325-27.

Section 6 of this measure proposes adding a definition of "probate proceeding" (page 33, line 20 to page 34, line 3) to address uncertainty as to its meaning in proposed new HRS §560:3-108(b) (on page 104, lines 4-10). But the **proposed new definition** in **Section 6** does not match the features of various proceedings as described in the General Comment, and **should be deleted**. New HRS §560:3-108(b) can refer to a "prior informal probate or appointment proceeding" and a "prior formal testacy or appointment proceeding" instead of a "prior probate proceeding."

In HRS §560:3-108(a)(1) and (2) (page 101, lines 1 and 7) "probate, appointment, or testacy proceedings" should not be shortened to "probate proceedings"; and the reference (page 104, line 14) to cases under subsection (a)(1) or (2) should continue to refer (lines 15-16) to the date on which a "testacy or appointment proceeding" (not "probate proceeding") is properly commenced.

HRS §560:3-108(a) acknowledges two proper exclusions from the five year time bar. HRS §560:3-303(d) allows probate of a will previously probated elsewhere to be granted "at any time." And a proceeding to appoint a successor must take place more than five years after the death of the decedent if the prior personal representative's appointment terminates more than five years after the decedent's death. The language on page 100, lines 14 to 19 (" . . . other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment may be commenced more than five years after the decedent's death") should not be deleted.

In HRS §560:3-108(a)(3) "formal probate" should not be inserted (on page 101 line 14) before "proceeding to contest an informally probated will and secure appointment of the person with legal priority" if the contest is successful. There being no informal way to contest an informal probate, "formal" is unnecessary. And adjudication of intestacy rather than "probate" of another will might be sought.

Recommendations related to HRS §560:3-108 and related provisions:

- **HRS §560:1-201**: Delete definition of "probate proceeding" on page 33 line 20 to page 34 line 2.

- **HRS §560:3-108**: Leave as is, unamended: page 100 line 12 to 18; page 101 lines 1, 7 and 14; and page 104 line 15.

- On page 104 lines 4 to 10, consider redrafting "unless there has been a prior probate proceeding concerning the decedent's estate. If there has been a prior probate proceeding . . ." in **new** HRS §560:3-108(b) as "unless there has been a prior informal probate or appointment proceeding or a prior formal testacy or appointment proceeding concerning the decedent's estate, in which case . . ."

- **HRS §560:3-301(a)(1)(F)**: Leave as is, unamended: page 107, lines 4-5.

HRS §560:3-303 and conforming amendment.

Page 112, Line 19 to Page 113, Line 3; Page 107, Lines 18-20.

Position: **Oppose.**

Section 36 of this bill proposes changes to HRS §560:3-303, Informal probate; proof and findings required. **Section 35** proposes changes to §560:3-301(a)(2)(A), within HRS §560:3-301, Informal probate or appointment proceedings; application; contents. Both changes are inappropriate.

As stated in the Uniform Law Commission's Comment to Section 3-303 of the Uniform Probate Code, a copy of which is attached:

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed.

Section 3-303 Comment, in "Final Act with Comments: Uniform Probate Code" (UPC_Final Act_2023feb27.pdf) at 349.

Proposed new HRS §560:3-303(f) (on page 112, line 19 to page 113, line 3) would allow informal probate of a will that has been "filed, deposited, or lodged in another jurisdiction, but not probated":

(f) A will that has been filed, deposited, or lodged in another jurisdiction, but not probated, may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will or a copy of the will and a statement from its legal custodian that the copy filed is a full, true, and correct copy of the original.

Currently, the registrar must deny an application for informal probate of a will probated elsewhere unless an authenticated copy of the will *probated* in the other jurisdiction accompanies the application. HRS §560:3-303(b) and (d). A petition for probate of a will that was filed, deposited or lodged, but not probated, in another jurisdiction may properly be considered by a judge in a formal proceeding under HRS §560:3-402, Formal testacy or appointment proceedings; petition; contents. ("If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed or otherwise unavailable." §560:3-402(a)(3).) Proposed new HRS §560:3-303(f) should be rejected.

HRS §560:3-301(a)(2)(A) should **not** be amended as proposed on page 107 lines 17-20 in **Section 35** to allow informal probate of a will based on a statement in an application that an authenticated copy of "an original will probated, **filed, deposited, or lodged** in another jurisdiction" accompanies the application as opposed to an authenticated copy of "a will **probated** in another jurisdiction."

Recommendations as to HRS §560:3-303 and related provisions:

- **Section 36 should be deleted.**
- **Changes** to HRS §560:3-301(a)(2)(A) on page 107 lines 17-20 **should not be made.**

HRS §560:3-720.

Page 118, Lines 4 to 16

Section 40 of this bill proposes amendments to HRS §560:3-720, Expenses in estate litigation. My written testimony on S.B. No. 483, S.D. 1, submitted to the House Committee on Judiciary and Hawaiian Affairs on March 15, 2023, discusses concerns about

windfall scenarios described in Matter of the Estate of Camacho, 140 Hawai'i 404, 400 P.3d 605 (App. 2017) that the legislature should consider before deciding to delete words from HRS §560:3-720 that place reasonable limits on reimbursement of expenses out of estate assets ("necessary" and "incurred").

Conformity with the Uniform Law Commission's current version of 3-720, a copy of which is attached, is recommended:

SECTION 3-720. EXPENSES IN ESTATE LITIGATION. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.

Section 3-720 and Comment, in "Final Act with Comments: Uniform Probate Code" (UPC_Final Act_2023feb27.pdf) at 415.

Recommendation as to HRS §560:3-720:

- Conform to the Uniform Law Commission's uniform probate code companion.

Thank you for considering these comments:

Attachments:

Uniform Probate Code (1969) (Last Amended or Revised in 2019):

General Comment regarding Article III, at 325-27;

Section 3-303 and Comment, at 347-49;

Section 3-720 and Comment, at 415.

Source: "Final Act with Comments: Uniform Probate Code" (UPC_Final Act_2023feb27.pdf) from the National Conference of Commissioners on Uniform State Laws (www.uniformlaws.org).

UNIFORM PROBATE CODE (1969)
(Last Amended or Revised in 2019)

Drafted by the

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ON UNIFORM STATE LAWS

and by it

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February 27, 2023

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

The following free-standing Act is associated with Article III:

Revised Uniform Estate Tax Apportionment Act

Article III, Part 9A has also been adopted as the free-standing Revised Uniform Estate Tax Apportionment Act (2003).

GENERAL COMMENT

The provisions of this article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, *if* the following essential characteristics are carefully protected in the redrafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously

barred by non-claim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

SECTION 3-303. INFORMAL PROBATE; PROOF AND FINDINGS

REQUIRED.

(a) In an informal proceeding for original probate of a will, the Registrar shall determine whether:

- (1) the application is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of the applicant's knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed and apparently unrevoked will is in the Registrar's possession;

(6) any notice required by Section 3-204 has been given and that the application is not within Section 3-304; and

(7) it appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another [county] of this state or except as provided in subsection (d), if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503, or 2-506 have been met shall be probated without further proof. In other cases, the Registrar may assume execution if the will appears to have been properly executed, or the Registrar may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a), may be probated in this state upon receipt by the Registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal

custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

Comment

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with “pre-proved” wills in some states. If a will is “pre-proved” as provided in Article II, it will, of course, “appear” to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See Section 3-402. Under Section 3-401, pendency of formal testacy proceedings blocks informal probate or appointment proceedings.

SECTION 3-720. EXPENSES IN ESTATE LITIGATION. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.

Comment

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.