Articles II and III of the Uniform Probate Code As Enacted in Utah

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Articles II and III of The Uniform Probate Code
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Comment

The Uniform Probate Code (UPC) is the result of 7 years’ work¹ by some of the most experienced probate attorneys in the country.² In 1969, the UPC was approved by both the American Bar Association and the National Conference of Commissioners on Uniform State Laws, who had jointly directed the creation of the UPC.³ In using the UPC, state legislatures are now able to make large-scale improvements in their probate law that would be extremely difficult to make if undertaken piecemeal. By adopting the UPC in 1975,⁴ Utah joined the small number of states⁵ that have availed themselves of the advantages of the UPC. Although the Utah version of the UPC, the Utah Uniform Probate Code (UUPC),⁶ greatly improves and modernizes Utah’s probate law, it embodies many departures from the UPC.

The objectives of the UPC are to simplify and clarify inheritance laws and related matters, to give effect to the intent of the decedent, and to provide versatility and efficiency in distributing the decedent’s estate.⁷ Simplicity and clarity in the law are promoted both by modifying traditional common law approaches and by making uniform the laws of the various jurisdictions. Uniformity, then, is an important policy of the UPC. It appears,

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² 8 UNIFORM LAWS ANN. 282-85 (1972).
³ Id. at 281 (historical note).
⁴ The Utah Uniform Probate Code was passed by the Utah legislature on March 13, 1975, to become effective July 1, 1977. Utah Uniform Probate Code ch. 150, § 75. [1975] Utah Laws 714.
⁵ The states that have adopted the UPC in some form are, with their effective dates: Alaska (January 1, 1973); Arizona (January 1, 1974); Colorado (July 1, 1974); Florida (July 1, 1975); Idaho (July 1, 1972); Minnesota (August 1, 1975); Montana (July 1, 1975); Nebraska (July 1, 1977); New Mexico (July 1, 1976); North Dakota (July 1, 1975); and South Dakota (July 1, 1975). 8 UNIFORM LAWS ANN. 54 (Supp. 1975); N.M. STAT. ANN. § 32A-1-101, note (Supp. 1975).
however, that the aim of the UPC to achieve national uniformity of probate law\textsuperscript{8} will not be completely achieved. Unlike the Uniform Commercial Code, which was drafted to make the law conform to existing business practices and customs,\textsuperscript{9} the UPC attempts to simplify many aspects of probate law by changing traditional practices. As a result, the UPC has met resistance; the states that have considered it have either adopted it with many changes or have refused to adopt it at all.\textsuperscript{10}

The draftsmen recognized that on some issues deviation from the UPC format might be justified by the particular needs of a jurisdiction.\textsuperscript{11} Two studies, one by the Utah State Bar Association and the other by the Utah legislature, were conducted to determine if the UPC would meet the needs of Utah residents and to formulate any necessary modifications. Working from both studies and with the aid of independent counsel, the Government Operations Committee of the Legislative Council drafted the U UPC. The original U UPC draft modified 90 of the 310 UPC sections, eliminated 6, and added 12 new sections.\textsuperscript{12} The U UPC was further amended while before the Utah legislature. Despite these changes, the U UPC, although not perfectly uniform with the UPC, retains much of the versatility and simplicity of the UPC policies and format.

This comment will compare the material differences between articles II and III of the U UPC and the corresponding sections of the UPC. The comparison will follow the organization of the UPC so that the reader can more easily locate material in which he may have a particular interest.\textsuperscript{13}

\begin{thebibliography}{13}
\bibitem{8} UPC §1-102(5); U UPC § 75-1-102(5).
\bibitem{11} All bracketed language of the UPC was intended to be only suggestive, optional, or easily omitted. UPC § 2-803, Comment; see, e.g., UPC § 2-102, -102A, -401A, -903.
\bibitem{13} UPC art. II, pt. 7, dealing with contractual arrangements relating to death, and pt. 9, pertaining to the custody or deposit of wills, have been enacted in Utah without substantial change. Therefore, they are not treated by this comment. The same is true of art. III, pts. 2, 4, 5, 11.
\end{thebibliography}
Article II, dealing with intestate succession and wills, and article III, dealing with probate of wills and administration, contain the heart of the UPC. Ideally, alterations embodied in the UUPC should not frustrate the policies of the UPC; rather, they should promote the UPC policies of simplifying and clarifying probate law, giving effect to the intent of a decedent, and promoting speed and efficiency in distributing the estate of a decedent. Of course, changes suited to the particular needs of Utah residents are encouraged; alterations that unjustifiably perpetuate traditional approaches taken by previous law, however, are disapproved.

I. ARTICLE II—INTESTATE SUCCESSION AND WILLS

In several significant areas of article II, the UUPC has followed prior Utah law rather than adopting the approach of the UPC. The motive for adhering to prior Utah law, however, generally seems to be that of maintaining the status quo rather than a legitimate desire to improve the UPC or adapt it to meet the needs of Utah residents.

A. Part 1—Intestate Succession

Part 1 contains the rules that govern succession to the estate of a decedent who has not executed a will or whose will has been held invalid. This part, more than any other, adheres to prior Utah law.

Section 2-103(1) of the UPC allocates the portion of the intestate estate not taken by a spouse

to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation . . . .\textsuperscript{14}

Under this section the children of the decedent take equally; any deceased child's issue take his share by representation. Representation is defined by section 2-106:

If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of

\textsuperscript{14} UPC § 2-103(1).
each deceased person in the same degree being divided among his issue in the same manner.\textsuperscript{15}

Thus, the approach of the UPC is to make the initial division of an estate in the decedent's first descending generation containing a living heir. For example, if all children of an intestate predecease him, his grandchildren take his estate in equal shares rather than dividing the estate at the level of the deceased children and giving each grandchild his share of the deceased child's share. Then, at the level of initial distribution, any deceased heir's share will be apportioned among his issue by representation. The UPC approach gives the issue in the first generation with a survivor equal shares, rejecting the position that the principal division of an estate should be in the first generation regardless of whether it contains a living member.

The UUPC, rather than accepting the UPC approach, has adopted the prior Utah descent provisions.\textsuperscript{16} Section 2-103(a) of the UUPC distributes the estate not taken by a spouse "to the issue of the decedent by representation." UUPC section 2-106 then defines representation:

\begin{quote}
If representation is called for by this code, the descendant or descendants of any deceased heir take the same share or right in the estate of another person that his parent would have taken if living.\textsuperscript{17}
\end{quote}

The result is that the UUPC first divides the estate into as many shares as there are living children of the intestate and deceased children of the intestate with living issue. This division is made even if all the intestate's children have predeceased him, giving individual grandchildren unequal shares when the deceased children's families vary in size.

There is no clear reason to reject the UPC approach in favor of one that discriminates between members of the same generation. Any desire a decedent may have had to give equally to the ancestors of the first living generation is most likely gone when those ancestors are deceased. Moreover, awarding unequal shares to members of the first surviving generation could promote disharmony among family members.

A further deficiency in the operation of UUPC section 2-103(a) arises since that section does not expressly provide for

\textsuperscript{15} UPC § 2-106.
\textsuperscript{16} Utah Code Ann. § 74-4-23 (1953).
\textsuperscript{17} UUPC § 75-2-106.
equal division of the estate to the issue or the representatives of deceased issue of the same degree of relation to the intestate, as do both the UPC\textsuperscript{18} and prior Utah law.\textsuperscript{19} Rather, UUPC section 2-103(a) directs only that the issue take by representation. This statutory deficiency creates a problem in light of Utah case law that holds succession to be "purely a matter of statutory regulation."\textsuperscript{20} The case law does not provide that persons who take by representation must take equally. Thus, it is not clear that the intestate's estate is to be divided equally either among the issue and representatives of deceased issue at the first generation of distribution or among those taking any deceased issue's share by representation. This departure from the UPC, also a departure from Utah's prior position, is unjustified because it leaves the law ambiguous.

Taken together, Utah's deviations from the UPC in sections 2-103(a) and 2-106 introduce another ambiguity. UUPC section 2-103(a) gives the part of the estate not passing to the spouse "[t]o the issue of the decedent by representation."\textsuperscript{21} Under UUPC section 2-106, representation gives "the descendant or descendants of any deceased heir . . . the same share or right in the estate of another person that his parent would have taken if living."\textsuperscript{22} By the literal terms of these statutes, then, a child of the intestate would not be able to take a share of the estate since the intestate is not an heir of his own estate. Such a result, certainly not intended by the Utah legislature, would probably be avoided by the courts through the application of common law principles.\textsuperscript{23} It is unfortunate, however, that in such a common situation as distribution of an intestate estate to children of the decedent, the courts of Utah will have to look outside the code for the control-

\textsuperscript{18} UPC § 2-103(a).
\textsuperscript{19} Utah Code Ann. § 74-4-5(2) (Supp. 1975) states, in pertinent part:

If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation. For purposes of this subsection, issue shall include adopted children.

(emphasis added).

\textsuperscript{20} In re Yonk's Estate, 115 Utah 292, 295, 204 P.2d 452, 454 (1949).
\textsuperscript{21} UUPC § 75-2-103(a).
\textsuperscript{22} UUPC § 75-2-106 (emphasis added).
\textsuperscript{23} By using the term "representation" to describe the distribution system by which the children of an intestate receive their intestate share, however, Utah courts must ignore the traditional view that the term connotes taking the share of an immediate ancestor who would have inherited if he had lived. See Black's Law Dictionary 1465 (4th ed. rev. 1968).
ling principle, especially since the code was intended to be a comprehensive treatment of probate problems.

Section 2-103 of the UPC limits intestate succession to the decedent’s grandparents and their descendants, eliminating more remote relatives. Section 2-105 causes the estate to escheat if no grandparents or lineal descendants of grandparents are alive to take by intestacy. The UUPC, adhering to former Utah law, rejects the UPC approach by allowing any kin, however remote, to take by intestacy. The UPC system reflects the modern thinking that if the intestate had disposed of his property by will, he probably would not have included among his devisees the more remote relatives who take by intestate succession under many statutes now in existence. In addition, the UPC approach of limiting the relatives who may take a share of the estate is based on its policy to streamline and simplify probate. The increased costs of litigation and the delays caused by seeking out remote heirs or examining spurious claims inherent in the Utah system are avoided by the UPC approach. Furthermore, it is doubtful whether the Utah alteration better effectuates the decedent’s intent than does the UPC. Especially in light of the added burden on administration caused by the UUPC approach, decedents likely would prefer escheat for the benefit of the public or, under the UUPC, for the state school system over intestate succession to remote relatives.

Section 2-110 of the UPC, governing advancements, requires a contemporaneous writing by the intestate or a written acknowledgment by the heir if an inter vivos gift to the heir is to be considered part of the heir’s share of the estate. In contrast, the UUPC does not require that the decedent’s writing be contemporaneous with the gift. The recipient of such a gift, therefore, cannot be certain if it constitutes an advancement until the death of the donor. Further, since the donor may change the character of the gift until death, claims of undue influence may be more frequent. The simplicity and certainty of requiring the writing to be contemporaneous with the gift seem preferable, especially since

24. UPC § 2-103, Comment.
25. UTAH CODE ANN. § 74-4-5(6) (1953).
26. UUPC § 75-2-103(e).
27. UPC § 2-103, Comment; Rollison, supra note 7, at 428-29.
28. See note 7 and accompanying text supra.
29. See Rollison, supra note 7, at 429.
30. UUPC § 75-2-105 earmarks escheated intestate estates for the benefit of the state school fund.
the donor can still change the effect of the writing by executing a subsequent will.

The UPC also provides that the advancement does not reduce the shares of the recipient’s issue, should the recipient predecease the intestate, unless the writing states otherwise. The UUPC takes the opposite approach, presuming that the advancement reduces the share to be distributed to the recipient’s issue unless the writing provides otherwise. The succeeding language of the UUPC makes it clear that the Utah change was intentional. It does not, however, explain the contradictory positions taken with respect to the heir and his issue. Under the Utah approach, if the heir survives the intestate, the heir’s issue stand to eventually receive both the value of the gift to the heir and the full intestate share received by the heir. If the heir predeceases the intestate, however, the heir’s issue will receive only the intestate share of the heir reduced by the value of the gift. Why the UUPC takes the position that a lifetime gift to an heir is presumed not to be an advancement, but such a gift is treated as if it were an advancement to the issue of the heir if the heir predeceases the intestate, is not clear.

B. Part 2—Elective Share of Surviving Spouse

Both codes provide that the elective share of the surviving spouse shall be one-third of the augmented estate as defined in section 2-202. The augmented estate concept is designed to protect both the estate and the surviving spouse by ensuring the surviving spouse a fair share, but only a fair share, of the decedent’s property. This is accomplished by adding to the probate estate of the decedent: (1) certain property that he has transferred to persons other than the surviving spouse during the marriage, to the extent that he received less than full consideration; (2) the value of the surviving spouse’s property derived from the intestate for less than full consideration; and (3) any transfers of such property made by the spouse during the marriage for less than full consideration.

31. UPC § 2-110.
32. UUPC § 75-2-110.
33. The last sentence of UUPC § 75-2-110 states: “If the amount of the advancement exceeds the share of the heir receiving the same, he is not required, however, to refund any part of the advancement.”
34. UPC § 2-202(1).
35. UPC § 2-202(2).
The UUPC, however, adds a new subsection to the definition of the augmented estate that substantially restricts the category of property includable in the augmented estate:

The augmented estate includes only property and transfers thereof acquired by the deceased spouse during marriage to the surviving spouse other than by gift, devise or descent or the increase, rents, issues and profits from this property and on property owned prior to marriage.36

There might be some justification for this alteration. Since the UPC exempts from the augmented estate property acquired before marriage by the surviving spouse, it does not seem inconsistent to exempt all property that comes as a windfall to the marriage. On the other hand, by exempting the rents and profits derived from pre-marriage property from the augmented estate, the UUPC may substantially reduce the amount available to a surviving spouse taking the elective share. Since the rents and profits on such property were earned during the marriage, it is reasonable to include them in the augmented estate for the purpose of computing the elective share. Although the impact of this section will not affect all estates equally, it is clear that in many situations it will reduce the advantages of the elective share remedy.

Section 2-205 of the UUPC allows the surviving spouse a longer period to petition for the elective share than is allowed by the corresponding section of the UPC. The UPC allows the surviving spouse 6 months following the publication of notice to creditors to take the elective share. In most cases, this confines the election to the period preceding the final probate of the will. In contrast, the UUPC allows the election to be made within 1 year after the date of death or within 6 months following the probate of the decedent's will, whichever expires last.37 The longer time period is unnecessary. A surviving spouse has sufficient time under the limit established by the UPC to determine the advantage of taking under the will as opposed to electing one-third of the augmented estate. Although the UUPC extension allows the spouse to "wait and see" how the economy affects the various assets of the estate, an election after final probate could generate considerable expense, thereby reducing the estate further. The objective of the UPC to minimize legal costs and streamline pro-

36. UUPC § 75-2-202(2).
37. UUPC § 75-2-205(1).
bate is hindered by extending the time available for election. Section 2-206(b) of the UPC requires that if the will has clearly provided gifts in lieu of the spouse’s homestead allowance, exempt property allowance, or family allowance, the spouse is not entitled to these allowances unless the related gifts under the will are renounced. The UUPC eliminates this restriction, allowing the spouse these statutory benefits regardless of whether or not the spouse renounces any gifts in the will. The elective share, the homestead allowance, and other statutory benefits are limits on a testator’s power to disinherit his spouse and children, and on creditors’ power to reach the estate in satisfaction of their claims. When the testator wishes to disinherit the spouse, UPC section 2-206(b) gives as much effect to the testor’s intent to disinherit as public policy allows. The statutory limitations, however, are unnecessary to the extent that the spouse and children have been provided for in the will. Although a spouse can always frustrate the decedent’s intent by taking an elective share, there appears to be no sound reason to permit the spouse to take property that exceeds both the testator’s intent and the statutory protections. Such is the effect of the UUPC modification.

C. Part 3—Spouse and Children Unprovided for in Wills

Part 3 gives the spouse and children omitted from the will the same share they would have received had the decedent died intestate unless either the will indicates that the omission was intentional or other requirements are met. These other requirements are the same for the omitted spouse in both codes, but are different for the omitted children. Section 2-303(2) of the UUPC, in conformity with the UPC, requires that to disinherit any child, it is necessary (1) that it appear from the will that the omission was intentional; (2) that the bulk of the estate be given to the surviving parent of the omitted child; or (3) that inter vivos gifts have been given in lieu of a testamentary provision. The UPC provides that the section applies only to children born or adopted after the execution of the will; the UUPC, however, contains no such restriction. The UUPC, then, requires the testator to satisfy one of the above requirements in order to disinherit even children born or adopted before the execution of the will.

38. UUPC § 75-2-206.
39. UPC § 2-301; UUPC § 75-2-301.
40. UPC § 2-302(a); UUPC § 75-2-302(1).
41. UUPC §§ 75-2-302(1)(a) to (c).
The UPC provision is based on the presumption that if the testator failed to mention a child born or adopted prior to the execution of the will, he intended to disinherit him. This presumption seems consonant with the intent of the testator. If the testator failed to mention a living child in his will, it is likely that he intended to disinherit him. The UUPC approach, however, may be justifiable as insurance against an unintentional omission by the testator.

Compounding the problems of section 2-302, the UUPC adds that if the issue of a deceased child of the testator are not provided for in the will and the omission does not fit within the exceptions of section 2-302, such issue of the deceased child take the intestate share of the deceased child despite their omission from the will. This addition requires the testator to anticipate in his estate plan the death of each child if he intends to disinherit the child's issue. It also creates an ambiguity. A literal interpretation of language of UUPC section 2-302 would allow the issue of a deceased child not only an intestate share of the estate if they were pretermitted from the will, but also their shares of the deceased child's testamentary gifts if he were not pretermitted. In all probability the drafters of the UUPC did not intend this result. Consequently, an amendment is necessary to make the right of a deceased child's issue to take an intestate share under this section dependent upon the pretermission of the deceased child.

D. Part 4—Exempt Property and Allowances

Part 4 of the UPC describes certain rights to which a surviving spouse and children of a decedent are entitled that are superior to claims against the estate. It provides that the homestead allowance, exempt property allowance, and family allowance have priority over all other claims against the estate. If the estate

42. This result is specifically allowed by the antilapse provisions of the UUPC:

If a devisee who is an heir of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

UUPC § 75-2-605.
43. UPC § 2-401.
44. UPC § 2-402.
45. UPC § 2-403.
is insufficient to satisfy all three allowances, it is applied first to the homestead allowance, then to the family allowance, and finally to the exempt property allowance.\textsuperscript{46}

The UUPC makes two significant changes in this part by incorporating the homestead allowance as defined by prior Utah law,\textsuperscript{47} and by providing that reasonable funeral expenses take priority over all claims except the homestead allowance.\textsuperscript{48} The Utah homestead provisions require that the decedent have a real property interest from which the allowance can be satisfied. If he has no real property, the surviving spouse may claim no homestead allowance.\textsuperscript{49} In contrast, the UPC recognizes that since ownership of land is not as universal as it once was, it is necessary to allow a cash equivalent of the homestead allowance in order to adequately protect some surviving spouses. Thus, Utah's adherence to the traditional approach fails to protect the survivors of Utah residents who have no interest in real property. Giving priority to funeral bills over claims of other creditors and the rights of the surviving spouse and children is inconsistent with the UPC approach that treats creditors equally and guarantees at least part of the estate to the widow and children.

\textbf{E. Part 5—Wills}

The UPC policy of providing flexibility and simplicity is evidenced in part 5, which governs the rules for the execution and construction of wills. By adhering to prior law, however, Utah has retained much of the rigidity the UPC attempts to avoid. For example, section 2-502 of both codes requires the witnesses to a will to: (1) observe the signing of the will by the testator; (2) re-

\begin{itemize}
\item \textsuperscript{46} UPC §§ 2-402, -403.
\item \textsuperscript{47} Utah Code Ann. § 28-1-1 (Supp. 1975) provides the homestead allowance in Utah:
\begin{quote}
A homestead consisting of lands, appurtenances and improvements, which lands may be in one or more localities, not exceeding in value with the appurtenances and improvements thereon the sum of $4,000 for the head of the family, and the further sum of $1,500 for the spouse, and $600 for each other members of the family, shall be exempt from judgment lien and from execution or forced sale, except upon the following obligations: (1) taxes accruing and levied thereon; (2) judgments obtained on debts secured by lawful mortgage on the premises and on debts created for the purchase price thereof; and (3) judgments obtained by an appropriate party on debts created by failure to provide support or maintenance for dependent children.
\end{quote}
\item \textsuperscript{48} See UUPC §§ 75-2-401 to -403.
\end{itemize}
ceive acknowledgment by the testator that the signature on the will is his; or (3) receive an acknowledgment by the testator that the will is his.\textsuperscript{50} The U UPC further requires that "[t]he signing by the witnesses must be in the testator's presence and in the presence of each other."\textsuperscript{51} This is the traditional rule in Utah.\textsuperscript{52} Unfortunately, its reenactment frustrates the UPC attempt to simplify the process of execution by allowing each signature to a will to be an isolated event.

The UPC approach is superior. Where the witnesses know that the will is the testator's, as they must under the requirements of section 2-502, the fact that they do not sign the will in the presence of the testator or in the presence of each other should not invalidate the will. Situations such as the illness of the testator may well indicate that the prudent course of action would be to allow mere formalities to be completed in a method more suitable to the circumstance—that is, out of his presence. The little additional protection from fraud that these formalities provide fails to justify the frustration of the testator's wishes when the will is held invalid because of a mere defective formality in execution. It is even questionable whether this formality will prevent fraud since those who perpetrate fraud would be careful to comply with the technical formalities of will execution.\textsuperscript{53}

Section 2-505 of the U UPC is more restrictive than its UPC counterpart as to who may qualify as a witness to a will. The UPC states that "[a]ny person generally competent to be a witness may act as a witness to a will."\textsuperscript{54} It expressly rejects any penalties for the use of an interested witness.\textsuperscript{55} The U UPC, on the other hand, requires that a witness be 18 years of age or older\textsuperscript{56} and provides that a witness who is a beneficiary of the will is limited in the amount he may take under the will to the equivalent of his intestate share.\textsuperscript{57} The UPC approach is more consistent with the policies of promoting simplicity and giving effect to the testator's intent. Although it would be rare that an attorney would use a person under the age of 18 or an interested party as a witness, such practices occasionally occur either out of necessity or igno-

\textsuperscript{50} UPC § 2-502; U UPC § 75-2-502.
\textsuperscript{51} U UPC § 75-2-502.
\textsuperscript{52} Utah Code Ann. § 74-1-5 (1953).
\textsuperscript{53} UPC § 2-505, Comment.
\textsuperscript{54} UPC § 2-505.
\textsuperscript{55} UPC § 2-505(b).
\textsuperscript{56} U UPC § 75-2-505(1).
\textsuperscript{57} U UPC § 75-2-505(2).
rance. These UUPC restrictions on the competency of witnesses fail to materially reduce the possibility of fraud and may unnecessarily invalidate wills.

Another important difference between the UUPC and the UPC is the approach taken toward holographic wills. UUPC section 2-503, again incorporating prior Utah law, states that "[a] will . . . is valid as a holographic will, whether or not witnessed, if the signature and the provisions are in the handwriting of the testator." The UPC, however, requires only that the "material" provisions be in the handwriting of the testator. Under the UPC's requirement that only the material provisions and the signature be in the testator's handwriting, a judge can ignore nondispositive printed, stamped, or typed language in the document, and permit the use of some will forms. The UUPC again adopts an inflexible approach that burdens both testator and judiciary. Invalidating a holographic will for such a minor detail as having the date or introductory language printed, stamped, or typed is unnecessarily harsh.

As a precautionary feature, UUPC section 2-503 adds that if several holographic wills with "conflicting provisions" exist, a proferred will, to be valid, "must be dated or circumstances exist that establish which will was last executed." This addition appears to add little to the UPC since any time more than one will is offered as controlling the disposition of a testator's property, evidence must be adduced as to which is valid. This feature of UUPC section 2-503 should not be read to preclude courts from giving effect to all offered wills to the extent that their provisions are not inconsistent when no will can be proven to have been the last executed.

UUPC section 2-508, in addition to making divorce effective as a revocation of the disposition in a prior will to the divorced spouse (as does the UPC), also makes the divorce effective as a revocation of dispositions to the issue of the divorced spouse who are not also issue of the testator. This addition appears consistent with the policy of the UPC to give effect to the intent of the decedent and thus represents an improvement on the UPC.

58. See note 53 and accompanying text supra.
60. UUPC § 75-2-503.
61. UPC § 2-503, Comment.
62. UUPC § 75-2-503.
UUPC section 2-508 also defines divorce to include an interlocutory decree entered by a court.64 Possible ambiguities are thus avoided, and the intent of the testator is more probably fulfilled. Consequently, Utah's alterations of section 2-508 are more compatible with the policies of the UPC than is the UPC itself.

UPC section 2-513 allows a will to refer to a separate writing listing dispositions of tangible personal property not disposed of in the will. Since the list may be altered by the testator without the formalities of will execution, expense and other problems associated with the amendment of a will can be avoided. The UUPC adopts this provision, but modifies it slightly by requiring that if several such lists containing conflicting provisions exist, "the writing to be given effect must be dated or circumstances exist that establish which writing is the most recent."65 As discussed previously, since the court must determine this issue using the same type of evidence under the UPC,66 Utah's change adds little.

F. Part 6—Rules of Construction

Both the UPC and the UUPC provide that, absent a contrary express provision in the will, if a devisee fails to survive the testator by 120 hours, he is deemed to have predeceased the testator.67 The effect of this provision is to avoid double taxation of the estate and to ensure that the testator's property descends through the testator rather than through the devisee. The UUPC adds a presumption that a devisee failed to survive the testator if it cannot be proven that he survived by 120 hours.68 This is merely an incorporation of the concept of the Simultaneous Death Act,69 which presumes survival where the time of death is uncertain. The UUPC concept dovetails nicely with the 120-hour approach of the UPC, and is compatible with UPC policies.

UPC section 2-602 allows the testator to choose the law applicable to any provision of the will unless the effect would be contrary to the public policy of the jurisdiction deciding the issue. The UUPC, by requiring further that the designated law not conflict with the provisions of the spouse's elective share or the statu-

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64. The section provides, in pertinent part: "For purposes of this section, divorce or annulment has reference to the interlocutory decree entered by the court . . . .” UUPC § 75-2-508.
65. UUPC § 75-2-513.
66. See note 62 and accompanying text supra.
67. UPC § 2-601; UUPC § 75-2-601.
68. UUPC § 75-2-601(2).
69. 8 UNIFORM LAWS ANN. 605 (1972). See note 79 and accompanying text infra.
tory benefits of part 4, only makes express what could have been accomplished under the original UPC section. If Utah public policy with respect to the treatment of the surviving spouse is reflected by the rules governing the elective share and other benefits, then foreign law chosen by the testator could not preempt the statutory provisions even in the absence of Utah’s express modification to the UPC.

Section 2-611 of the UUPC omits the following italicized language from the UPC:

Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationship for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.71

Omission of this language permits an illegitimate child to claim a share of the estate even though the child was never recognized or supported by the decedent. As a result, Utah’s version may encourage litigation. The lighter burden of proof required by Utah may encourage bona fide illegitimate children, usually prone to challenge distributions that ignore them, to claim against the will, and may even encourage imposters to make such claims. The danger of increased litigation, however, is arguably outweighed by the sound policy of placing illegitimate children on equal footing with legitimate children for the purposes of class gifts, as has been done by the UPC in intestacy questions.73

UPC section 2-612 provides that gifts transferred to a devisee during the lifetime of the testator are applied toward satisfaction of his devise (ademption) only if the will so states in a contemporaneous writing or the devisee acknowledges the same in writing. The UUPC, however, does not require that a writing by the testator be contemporaneous with the gift. In Utah, a testator may make an inter vivos gift and then, at any time before his death, decide that it is in satisfaction of the devise. While certainly a more flexible approach, this modification has undesirable effects. Transfers originally made as gifts, later to be transformed into

70. UUPC § 75-2-602.
71. UPC § 2-611.
72. See, e.g., In re Newell’s Estate, 78 Utah 463, 5 P.2d 230 (1931).
satisfaction of a devise, could be a source of dissatisfaction leading to litigation among the beneficiaries. The same result may be obtained under the UPC, however, if the testator complies with the formalities necessary to change his will. It is thought that the added required formalities are necessary to prevent changes motivated by a mere whim of the testator or by undue influence.

G. Part 8—General Provisions

Part 8 governs, among other things, the renunciation of a testamentary gift. The UUPC renumbers the sections that follow the renunciation rules and adds a new section. The purpose of Utah's added section (UUPC section 2-802) is to allow persons to disclaim transfers of a nontestamentary nature, thus expanding the group of interests that may be renounced. The section provides added flexibility in tax and estate planning by allowing a donee to renounce nontestamentary gifts that might have adverse tax effects on him or that might run counter to the decedent's wishes for some reason. Gifts made within 9 months of the decedent's death may figure significantly in the recipient's estate plan or the decedent's estate plan even though nontestamentary in nature. Nevertheless, the inclusion of renunciation provisions for nontestamentary transfers in the probate code seems out of place.

The UUPC requires that such renunciations of nontestamental gifts be filed within 9 months after the transfer is made or 9 months after a person first learns of his interest in the gift or right. The renunciation rule for testamentary gifts, UUPC section 2-801, increases the period for renouncing a testamentary gift from 6 months, as provided by the UPC, to 9 months following the death of the testator or the ascertainment by the beneficiary. The reasons for allowing this extended time period are not clear. Since Utah's extension further delays the probate process, however, the approach of the UPC seems preferable.

74. UPC § 2-801; UUPC § 75-2-801.
75. The UUPC added § 75-2-802 (nontestamental transfers), placing it after the renunciation rules in UPC § 2-801 and before the rules governing the effect of divorce in § 2-802 (UUPC § 75-2-803).
76. This section is substantially the same as the Uniform Disclaimer of Transfers Under Nontestamental Instruments Act. 8 UNIFORM LAWS ANN. 23 (Supp. 1975).
77. See generally Howe, Renunciation by the Heir, Devisee, or Legatee, 42 KY. L.J. 605 (1954).
78. UUPC § 75-2-802(2)(a).

All of UUPC part 10 is an addition to the UPC. It incorporates the Uniform Simultaneous Death Act\textsuperscript{79} into Utah's comprehensive treatment of probate problems. In general, its provisions provide the presumptions that control when the simultaneous deaths of two persons leave the passage of property uncertain. If the order of death cannot be ascertained, the distributor is deemed to have survived the prospective distributee. The effect of the law can be avoided by an expression of contrary intent in the will.\textsuperscript{80}

UUPC section 2-1002 introduces an ambiguity that may cause problems in the event of the simultaneous deaths of testator and beneficiary. Section 2-601(2), as previously mentioned,\textsuperscript{81} creates the presumption that the beneficiary failed to survive the testator by 120 hours if it cannot be proven that the beneficiary survived by 120 hours. On the other hand, section 2-1002 presumes that if there is no evidence that the beneficiary survived, he is deemed to have predeceased the testator. Thus, the cases covered by section 2-1002 are, for all practical purposes, subsumed within section 2-601(2). Section 2-1002 would be necessary only in the rare instance that the testator expressly rejected the 120-hour survival requirement of section 2-601(1). In that case, the presumption of section 2-601(2) would not be sufficient to make a determination as to who died first, and the presumption of section 2-1002 would be needed. The two sections must be read as independent of each other, however, if double taxation and double administration of the same assets are to be avoided where the beneficiary dies less than 120 hours after the testator.

II. Article III—Probate of Wills and Administration

Article III, the administrative and procedural core of the Uniform Probate Code, provides a flexible system for administering estates.\textsuperscript{82} It presumes that the judicial role in probate administration should be passive until an interested person invokes the

\textsuperscript{80} UUPC § 75-2-1006.
\textsuperscript{81} See note 70 and accompanying text supra.
court’s jurisdiction to resolve a problem. Although the UUPC generally adopts the approach of the UPC, chapter III of the UUPC substantively differs from article III of the UPC in approximately 30 areas. Although most of the changes are minor, some are substantial.

A. Part 1—General Provisions

UUPC section 3-105 embodies the first deviation from UPC article III. Although section 3-106 has been deleted by the UUPC, most of its principles have been incorporated into UUPC section 3-105. Section 3-105 of the UPC provides that the court has exclusive jurisdiction in formal proceedings to administer and distribute the estate. The court has concurrent jurisdiction of any other action in which the estate (through a personal representative) may be a party, including actions to determine title to property alleged to belong to the estate, and of any action in which property distributed by a personal representative is sought by creditors or other successors. UPC section 3-105 was designed to give the probate court "unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent’s estate and of the claims against it." Utah omits the exclusive/concurrent jurisdiction distinction of UPC section 3-105, as suggested by the comment to UPC section 3-106, which provides an alternative provision for states having a single court of general jurisdiction. The term "court" is defined in UUPC section 1-201 as the district court. A Utah district court is a court of general jurisdiction; hence, the court indicated by the UUPC would have the requisite jurisdiction to dispose of all matters relating to a decedent’s estate.

A second difference is found by comparing the statutes of limitation provided for probate proceedings. Both the UPC and the UUPC establish a 3-year statute of limitations. The UUPC,

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84. For example, under UUPC § 75-3-914, unclaimed assets escheat to the state school fund. The UPC provided that the funds would be distributed to the "state escheat fund"; however, the National Conference bracketed the term, indicating that deviation would be acceptable. UPC § 3-914 & Comment.

85. UPC § 3-105, Comment.

86. UTAH CODE ANN. § 78-3-4 (1953).

87. UUPC § 75-3-107(1); UPC § 3-108.
however, provides a significant exception to the rule. U UPC section 3-107(d) states that an appointment proceeding, but not a formal testacy proceeding, may be commenced after the statute of limitations has expired if a personal representative has not been previously appointed. A personal representative appointed under this exception is then given the power to possess assets to the extent necessary to confirm title in the rightful successors, but claims other than administrative expenses may not be presented against the estate.88 Thus, one who holds estate assets that have been distributed without the appointment of a personal representative can never be sure that his title to the assets is secure. At any time, regardless of the 3-year statute of limitations, a personal representative could be appointed. The personal representative could then repossess and redistribute the estate assets. Hence, in Utah the 3-year statute of limitations provides complete protection for only those estates in which a personal representative has been appointed. This deviation is contrary to the UPC's policy of allowing estates to be informally settled without probate where the successors so choose,89 and cannot be justified in light of the perpetual uncertainties that it creates.

The last change contained in part 1 of the U UPC is found in section 3-109. Utah added this section to provide that where two or more unprobated estates have the same heirs, the court may grant letters of administration permitting joint administration of both estates.90 Although the UPC does not contain a comparable section, there is nothing in the code preventing the joint administration of separate estates. In any event, the Utah clarification is consistent with the UPC policy of simplifying and speeding the probate process.

B. Part 3—Informal Probate and Appointment Proceedings

Informal probate and appointment proceedings are commenced by filing an application requesting the probate of a will or the appointment of a personal representative. Both the U UPC and the UPC require that notice of the application be given to any interested person demanding it.91 The UPC also requires that 120 hours elapse after death before the registrar92 may issue a written

88. U UPC § 75-3-107(1)(d).
89. U UPC art. III, General Comment.
90. U UPC § 75-3-109 is identical to UTAH CODE ANN. § 75-4-6 (1953).
91. U UPC § 75-3-204; UPC § 3-204.
92. The U UPC defines the registrar as the district judge. U UPC § 75-1-201(36). The
statement of informal probate or appointment.93 The UUPC, however, eliminates the requirement that 120 hours elapse and substitutes a notice requirement.94 Pursuant to UUPC section 3-310, the clerk of the court must provide notice by mail to each heir or devisee 10 days prior to issuing the written statement of informal probate or appointment. This is a departure from the UPC, whose roots stem from non-notice English ecclesiastical law.95 Non-notice probate, which assumes that death itself is sufficient notice to heirs and devisees that they should act to protect their interests in an estate, has worked well in New Jersey, Pennsylvania, and Delaware for over 150 years.96

Although the Utah notice-by-mail requirement on its face does not substantially increase the burden on a personal representative and does increase the likelihood that heirs and devisees will be able to protect their interests, UUPC sections 3-306(2) and 3-310(2) exhibit serious deficiencies. The sections fail to state what, if any, notice should be provided if the identity or address of an heir is unknown. UUPC section 1-401 states that when notice is required and the identity or address of a person is not known, notice by publication must be provided. Sections 3-306(2) and 3-310(2) fail, however, to indicate whether section 1-401 is applicable or what procedure should be followed in such circumstances. Thus, under the UUPC, it is theoretically impossible to have an informal appointment proceeding if less than all the heirs and their addresses are identifiable. This represents a substantial departure from the UPC position that informal appointment should ordinarily be available and that notice should seldom be required.97 Further, the delays inherent in identifying and locating heirs so that notice can be mailed to them are incompatible with the UPC policy of speed and efficiency in distributing the estate.

Three remedies to this problem are possible. First, Utah could amend sections 3-306(2) and 3-310(2) to require notice by

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93. UPC § 3-302.
94. UUPC § 75-3-302 makes the 10-day notice requirement of § 75-3-306 a prerequisite to issuing the statement of informal probate. UUPC §§ 75-3-307 and 75-3-310 apply the identical notice requirements to informal appointment proceedings.
95. Straus, supra note 83, at 871; see Fratcher, Estate Planning and Administration Under the Uniform Probate Code, 110 TRUSTS & ESTATES 5, 9 (1971).
96. Straus, supra note 83, at 871.
97. See UPC §§ 3-301, -307 to -309, art. III, General Comment. See generally Peterson, supra note 82, at 296.
mail only to *known* heirs at their last known addresses. Second, Utah could amend the sections to incorporate by reference the notice provisions of section 1-401.\(^98\) If that were done, however, the procedures for informal and formal appointment would be very similar.\(^99\) Hence, an attorney would always seek a formal appointment with its concomitant judicial protection.\(^100\) Finally, Utah could bring the UUPC into conformity with the UPC by eliminating the requirement of notice by mail.

C. *Part 6—Personal Representative: Appointment, Control and Termination of Authority*

Both the UPC and the UUPC provide that prior to receiving letters of administration, the personal representative must qualify by filing with the court "any required bond and a statement of acceptance of the duties of office."\(^101\) The UPC generally rejects the notion that bond should be required of a personal representative unless excused by will.\(^102\) Instead, to protect against mismanagement of the estate by a personal representative, the UPC provides that interested persons may: (1) make demand prior to notice of informal proceedings;\(^103\) (2) contest a requested appointment by use of a formal proceeding seeking the appointment of another person as personal representative;\(^104\) (3) block informal administration by filing a formal petition with the court;\(^105\) (4) seek to have a restraining order entered against the personal representative;\(^106\) or (5) demand that the personal representative post bond.\(^107\)

Despite these UPC protections against mismanagement of the estate, Utah competely rejects the UPC's policy that bond ordinarily should not be required. UUPC section 3-603 requires bond unless: (1) it is waived by the will; (2) all the heirs file a

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98. It should be noted that UUPC § 75-1-401 embodies several changes from the provisions of the corresponding UPC section.
99. Both would require that a petition be submitted to a district court judge. UUPC §§ 75-3-301, -201(36), -402. Both would also require that the § 1-401 notice requirements be met. UUPC §§ 75-3-310, -403.
100. See UUPC §§ 75-3-412, -414.
101. UPC § 3-601.
102. Id. § 3-603, Comment.
103. Id. § 3-204.
104. Id. §§ 3-401, -603, Comment.
105. Id. §§ 3-105, -603, Comment.
106. Id. § 3-607.
107. Id. § 3-605. To be eligible for this remedy, an interested person must have at least a $1,000 interest in the estate.
written waiver; or (3) the court, acting on a petition for waiver accompanying informal or formal appointment, determines that bond is not necessary. The Utah section further provides that if no bond is initially required because all of the heirs have waived the requirement and it is later determined that other persons will be heirs, the personal representative must post bond unless he secures the additional waivers.

While it is possible that a court may be willing to waive bond when requested to do so by the personal representative, the UUPC bond requirement has little merit. The Utah change reflects the attitude that the traditional requirement of bond should be preserved. The UPC safeguards surrounding the appointment of a personal representative, such as the rights of interested parties to challenge the appointment and request that bond be filed, seem more than adequate to protect interested parties without eliminating the UPC presumption that no bond is needed.

The UUPC also differs from the UPC in the amount of bond required. The UPC provides for bond, when required, equal in amount to the estimated value of the decedent’s personal estate plus the income expected from the personal and real property during the next year.\(^\text{108}\) In contrast, the UUPC requires bond equal in amount to the value of the decedent’s personal property \textit{and real estate} plus the income expected during the next year from real and personal property, but permits such amount to be reduced by the amount of secured claims against the property.\(^\text{109}\) This change, even coupled with the Utah presumption requiring bond, causes no significant additional burden to the personal representative,\(^\text{110}\) and provides added protection to interested parties. Although real estate cannot be disposed of in fraudulent transactions as easily as other types of assets, a bond will protect rightful distributees should the personal representative transfer the property to a bona fide purchaser for value. Therefore, although the change is inconsistent with the UPC’s policy of simplicity and efficiency,\(^\text{111}\) the added measure of protection it affords may make it justifiable.

Utah also alters the UPC prerequisite that an interested per-

\(^{108}\) UPC § 3-604.
\(^{109}\) UUPC § 75-3-604.
\(^{110}\) Bond is available for about $4 per $1,000 of bond desired. \textit{Western Surety Company, Bond Rate Manual}, at Jud-5 (Jan. 1975). Further, outstanding mortgages on the real property reduce the amount of bond necessary.
\(^{111}\) See generally Robertson, \textit{supra} note 83, at 7; Straus, \textit{supra} note 83, at 871-72.
son or creditor have a $1,000 interest in the estate before he can demand bond. The UUPC requires a $5,000 interest. Utah's inclusion of this section is puzzling. The section provides that if bond has been excused under sections 3-603 or 3-604, even a $5,000 interest will not qualify a party to demand bond. Since Utah starts with the presumption that bond is required unless excused, inclusion of a provision whereby interested parties can require the posting of bond unless the personal representative is excused is unnecessary. Only if Utah were to adopt the UPC presumption of not requiring bond would section 3-605 be necessary.

UPC section 3-607(a), allowing any interested person to petition the court for an order restraining a personal representative from taking action that would unreasonably jeopardize the interest of the applicant, has been retained in the UUPC. Utah has, however, added a clause that authorizes the court to order any person suspected of concealment or embezzlement to appear and account for such matters under oath. It is not clear whether the clause applies only to personal representatives, or to persons in general. This addition, although not suggested by the UPC, is compatible with the goal of streamlining the disposition of a decedent's estate. Utah courts can take jurisdiction of the few cases in which the questions of concealment or embezzlement arise and expedite the disposition process by determining whether the estate has been properly distributed.

D. Part 7—Duties and Powers of the Personal Representatives

UUPC part 7 differs in two major ways from the UPC. First, it restricts the power of the personal representative to sell property, and second, it provides a maximum fee schedule for compensating personal representatives and attorneys. As to the first difference, UPC section 3-704 provides that except for supervised administrations, the personal representative shall, without judi-

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112. UPC § 3-605.
113. UUPC § 75-3-605.
114. UUPC § 75-3-605 indicates that: "the requirement [of bond] ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in §§ 75-3-603 or 75-3-604."
115. UUPC § 75-3-607(3).
116. Since the clause is placed in the section entitled "Order Restraining Personal Representative," it would seem that the remedy applies only against personal representatives. However, the clause states that any person suspected of having concealed, etc., would be ordered to appear. Hence the ambiguity.
cial supervision, proceed expeditiously with settlement and distribution of the estate. The corresponding Utah section creates an exception that prevents the personal representative from selling real property without court approval when an heir or interested person files a demand with the court.\textsuperscript{117} The court, however, may approve such a sale upon petition by the personal representative, if proper notice has been given and a hearing held.\textsuperscript{118}

This deviation, reflecting the approach of the previous Utah probate code,\textsuperscript{119} adds nothing but unneeded complexity to the UPC. An interested party challenging the distribution proposed by a personal representative under the UPC may do so by either contesting the appointment of the personal representative\textsuperscript{120} or petitioning the court for supervised administration of the estate.\textsuperscript{121} Further, the personal representative may be brought to account for any wrongdoing to interested persons.\textsuperscript{122} Any flexibility gained by the Utah approach is negligible since the UPC allows judicial supervision of a single asset, if required by conflicting interested parties,\textsuperscript{123} and provides that a personal representative may be restrained in order to prevent unreasonable risk to an interested party.\textsuperscript{124} Hence, Utah's additional requirement is excess baggage, adding little protection and increasing the likelihood of delays in administering the estate.

One of the major differences between the UPC and the UUPC is found in UUPC section 3-718, which provides for compensation of personal representatives and attorneys. In contrast to the UPC, which states that personal representatives are entitled to reasonable compensation for their services,\textsuperscript{125} the UUPC establishes a fee schedule of maximum permissible charges.\textsuperscript{126} The inherent danger of the UUPC fee schedule is that fees provided may come to be viewed as the norm, rather than the maximum. The maximum fee suggested by the UUPC is even more likely to be viewed as the standard fee, since prior Utah law provided a mandatory compensation schedule for personal repre-

\textsuperscript{117} UUPC §§ 75-3-704, -710(2).
\textsuperscript{118} UUPC § 75-3-710(3).
\textsuperscript{119} See Utah Code Ann. §§ 75-10-2 to -4 (1953).
\textsuperscript{120} UPC §§ 3-401, -603, Comment.
\textsuperscript{121} UPC § 3-502.
\textsuperscript{122} UPC § 3-703 states, in pertinent part, "A personal representative is a fiduciary who shall observe the standard of care applicable to trustees . . . ."
\textsuperscript{123} See generally UPC §§ 3-105, -603, Comment.
\textsuperscript{124} UPC § 3-607.
\textsuperscript{125} Id. § 3-719.
\textsuperscript{126} UUPC § 75-3-718.
sentatives. Similarly, since many Utah attorneys previously operated under a court-approved minimum fee schedule, there is a danger that the UUPC maximum schedule will be used in much the same way. Recently, the United States Supreme Court, in *Goldfarb v. Virginia State Bar*, struck down a real estate fee schedule as violative of section 1 of the Sherman Anti-Trust Act. The Court used an "effect on competition" test, stating:

The record . . . reveals a situation quite different from what would occur under a purely advisory fee schedule. Here a fixed, rigid price floor arose from respondent's activities: every lawyer who responded to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee.

If Utah lawyers and personal representatives rely heavily on the UUPC fee schedule, the practice proscribed in *Goldfarb* could develop in Utah. While there is some authority that an anticompetitive marketing program created by a state legislature does not violate the Sherman Act, this "state-action exemption" applies only to situations where the anticompetitive activity is compelled, not merely prompted "by direction of the state acting as sovereign." The UUPC fee schedule is not compulsory; hence, the legislative exception to the Sherman Act is not applicable.

Regardless of whether the UUPC fee schedule and its concomitant use violates the Sherman Act, the concept of such a

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128. The following fees previously were part of the rules of practice of the Third Judicial District, which includes Salt Lake City, Tooele, and Summit Counties:

   In decedent's estate, the following schedule of attorney's fees in a normal proceeding shall be allowed on the estate accounted for by the executor or administrator, as hereinafter defined:

   5\% on the first $20,000.00
   4\% on the next $40,000.00
   3\% on the next $140,000.00
   2\% on the next $550,000.00
   2\% on the next $750,000.00
   1\% on the balance

   Minimum fee $250.00

   [Utah Dist. Ct. R. 24 (Third Judicial District) (as of April 26, 1974)]. Subsequently a rule calling for a reasonable fee approved by the court was substituted. [Utah Dist. Ct. R. 4.7 (effective Jan. 1, 1976)].

131. 421 U.S. at 777.
133. 421 U.S. at 791.
schedule is alien to the intent and purpose of the UPC. Economy and efficiency of estate administration are not promoted by such schedules. More importantly, the enlightened view of probate fees is that they should reflect the complexity of the estate, the amount of time spent, and the degree of risk undertaken by the personal representative or attorney.\textsuperscript{134} Further, when the Utah legislature first considered the UUPC, the code did not contain a fee schedule.\textsuperscript{135} This suggests that the schedule is a concession to special interest groups rather than a rational departure from the UPC.

The Utah statute varies slightly from UPC section 3-705 by not requiring the personal representative to give notice of his appointment to heirs and devisees. This is of little practical significance since UUPC section 3-302 requires a person seeking the position of personal representative to give notice of his appointment.\textsuperscript{136} Further, an heir or interested person, pursuant to section 3-204, may demand notice of any probate proceeding.

Another Utah deviation from the UPC occurs in the provisions of UUPC section 3-709, "Power to Avoid Transfers."\textsuperscript{137} Both codes give the personal representative the power to recover property transferred by the decedent in a transaction that is void or voidable as against the rights of creditors.\textsuperscript{138} The UUPC, however, adds that the personal representative is not required to bring such an action unless requested to do so by creditors, who must then pay the cost of litigation. This requirement effectively places the burden of collection on the real party in interest, and is commendable because it treats creditors as they would have been treated had the decedent lived, \textit{i.e.}, the creditors would have been forced to file suit to void such a transfer and would have been required to pay the costs of litigation themselves. The UUPC recognizes that there is no good reason to relieve creditors of these responsibilities when the debtor dies.

\textbf{E. Part 8—Creditors' Claims}

There are essentially two differences between the UPC and the UUPC in part 8. First, if notice has been published, the

\begin{itemize}
\item \textsuperscript{135} See Giles & Miller, \textit{supra} note 12, at 8.
\item \textsuperscript{136} Note 91 and accompanying text \textit{supra}.
\item \textsuperscript{137} UUPC § 75-3-709; UPC 3-710.
\item \textsuperscript{138} See, \textit{e.g.}, \textit{Utah Code Ann.} § 25-1-3 et seq. (1953).
\end{itemize}
UUPC subjects claims against the estate, arising before or after the date of death, to a 3-month statute of limitations. The UPC provides 4 months. In addition, the personal representative may pay allowable claims against the estate beginning 3 months after death under the UUPC; he is obligated to wait 4 months under the UPC. The shorter statute of limitations and shorter waiting period before claims may be paid are minor changes. The second and more significant difference is found in section 3-805, "Priority of Claims." The UPC states that if the estate lacks sufficient assets to pay all claims, then claims should be paid in the following order:

(1) costs and expenses of administration; (2) reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him; (3) debts and taxes with preference under federal law or the laws of the state; (4) all other claims.

In contrast, the UUPC provides that claims are to be paid in the following order:

(a) Reasonable funeral expenses; (b) Costs and expenses of administration; (c) Debts and taxes with preference under federal law; (d) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him; (e) Debts and taxes with preference under laws of this state; (f) All other claims.

The practice of giving funeral expenses first priority in payment is a vestige of prior Utah law. The rationale for the other UUPC changes is not apparent.

Although the notice requirements of UPC section 3-801 were incorporated without change in the UUPC, they are worthy of comment. Utah, here, could profitably have deviated from the UPC approach in order to establish a more equitable system of notice to creditors. Section 3-801 of both the UPC and UUPC requires that notice be given to creditors if their claims are to be barred by the 3-month statute of limitations. Constructive notice by publication once each week for 3 consecutive weeks in a news-

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139. UUPC §§ 75-3-802-03; UPC §§ 3-802-03. Section 75-3-801 also reflects this change by requiring that notice indicate that creditors must present their claims within 3 months instead of 4.
140. UUPC § 75-3-807; UPC § 3-807.
141. UUPC § 75-3-805.
paper of "general circulation" is sufficient. In contrast, section 1-401, governing notice of hearing on a petition, section 3-204, relating to notice of any order or filing pertaining to property in which a person may have an interest, section 3-403, pertaining to notice of a hearing on formal testacy proceedings, and sections 3-1001 and 3-1002, dealing with notice on closing of the estate, require that actual notice be furnished to creditors. Section 3-801, while adequate for dealing with unidentified creditors, is unsatisfactory for dealing with identifiable creditors. Although notice must be published in a newspaper of general circulation, few of the newspapers that specialize in publishing such notices are widely read by the public. Thus, while the large businesses who routinely scrutinize such publications may be protected, small business creditors may miss their opportunity to make a claim. Further, creditors who receive payments at intervals of 3 months or more might have their claims barred without so much notice as a missed payment. Beneficiaries of the will or others interested in avoiding reduction in the size of the estate should not be permitted to cut off legitimate claims of known creditors in such a manner.

In order to remedy this deficiency, both the UPC and the UUPC should be amended to require actual notice to known creditors and publication in a newspaper of circulation broad enough to reasonably reach unknown creditors. The burden imposed by requiring actual notice by registered mail or some other means is no greater than that imposed by other sections of the UPC. Requiring notice to unknown creditors by publication in a newspaper calculated to reach most parties would grant such creditors a more reasonable opportunity to submit their claims. The burden imposed upon the estate to provide reasonable notice would be comparatively small.

F. Part 9—Special Provisions Relating to Distribution

Chapter 9 of the UUPC contains a handful of minor changes. For example, whereas UPC section 3-914 provides that unclaimed assets escheat to a state treasury fund, Utah allocates such amounts to the state school fund. Deviation on this point was encouraged, however, since the UPC provision is contained in brackets. Also, the UPC creates an 8-year statute of limitations

143. See, e.g., UPC §§ 1-401, 3-204, -403, -1001, -1002.
144. UUPC § 75-3-914. See note 84 supra.
in determining whether qualifying persons may reclaim assets that have escheated to the state.\textsuperscript{145} In contrast, Utah provides no statute of limitations in such cases.

Another minor difference is contained in UUPC section 3-916, "Apportionment of Estate Taxes." UPC section 3-916 defines "tax" as federal estate and state inheritance taxes. Utah uses the same definition, but adds that "tax" includes estate and other death taxes payable to the state. This change is insignificant since Utah currently does not impose an estate or other death tax in addition to the state inheritance tax.

\section*{G. Part 10—Closing Estates}

Both the UPC and the UUPC provide three methods for closing an estate. First, pursuant to section 3-1001, an estate may be closed by a formal adjudication after the requisite notice to all interested parties. Second, pursuant to section 3-1002, a testate estate may be closed in a formal proceeding with notice to the devisees. Res judicata protection is limited to the extent of the notice provided. Since only limited protection is available with section 3-1002, and the pleadings and proceeding required in a closing under sections 3-1002 and 3-1001 are substantially similar, the attorney for the estate will ordinarily proceed under section 3-1001.\textsuperscript{146} Under the third method, section 3-1003, both the UUPC and the UPC provide that an estate may be closed upon a verified statement by the personal representative. When this method is used, Utah provides for a 4-month notice period instead of 6 months.\textsuperscript{147} Hence, the estate may be closed within 4 months of notice of publication to creditors, instead of 6.

Unfortunately, Utah has added language to section 3-1003 that negates the advantages of the section. The purpose of the section is to provide a simple method of closing an estate when the personal representative does not anticipate an immediate need to protect himself from claims. The Utah change requires that all distributees of the estate consent in writing before the estate may be closed by a verified statement.\textsuperscript{148} Since the verified statement, when coupled with the consent requirement, requires nearly the same procedure as section 3-1002 and would provide

\begin{itemize}
\item \textsuperscript{145} UPC § 3-914(b).
\item \textsuperscript{146} Crapo, Account, Distribution and Closing of Estates, in IDAHO ESTATE ADMINISTRATION 359, 374 (P. Peterson ed. 1974).
\item \textsuperscript{147} UUPC § 75-3-1003.
\item \textsuperscript{148} UUPC § 75-3-1003(1).
\end{itemize}
essentially the same protection to the personal representative against claims by distributees who have consented, section 3-1003 becomes redundant. Utah's section 3-1003 adds nothing to that which can already be accomplished under section 3-1002. The flexibility provided by UPC section 3-1003, however, is forfeited by Utah.

Utah has also added that any accounting before closing the estate, required by sections 3-1001 through 3-1003, may be waived if all the distributees consent in writing. This modification of the UPC provides more flexibility. Distribution of the estate could be materially speeded under any of the pertinent sections if accounting requirements were waived. However, the provision is not consistent with the UPC approach of providing different methods of closing an estate, each with different degrees of protection for the personal representative and distributees. By waiving the accounting requirement, the effect of the three Utah sections becomes equivalent. Such an unstructured application of flexibility is undesirable given the availability of the orderly UPC approach.

H. Part 12—Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

In section 3-1201, both the UPC and the UUPC provide that an estate consisting only of personal property of limited value may be transferred to a successor without the need to appoint a personal representative. In addition to other requirements, the UPC limits the applicability of this section to estates having a net value of less than $5,000. In contrast, Utah permits application of the section to estates of up to $10,000. This change is compatible with the UPC since it permits a greater number of estates to be speedily and efficiently distributed.

III. Conclusion

The Utah legislature should be commended for adopting a probate code similar to the UPC. Generally, the UUPC promotes the UPC policy of providing a simplified, flexible method of administering estates. Many of the changes Utah has incorporated into the UUPC, however, are unfortunate. For the most part, they reflect Utah's unwillingness to move from its traditional approach to the more efficient approach of the UPC. In many in-

149. UPC §§ 3-1201(a)(2) to (4); UUPC §§ 3-1201(1)(b) to (d).
stances, Utah's revisions are unnecessary, suggesting a lack of understanding of the implications of the UPC system; in some, the work of special interest groups is apparent. It is hoped that the Utah legislature will take advantage of the time available before the UUPC becomes effective to review the wisdom of its deviations from the UPC and make the Utah probate system more harmonious with the policies pursued by the UPC.