

The Law and You Fixes Needed for Utah's Probate Code

Utah's Probate Code encompasses laws that govern many aspects of our estates, during and after our lives end.

For example, the Probate Code deals commonly with Wills and Trusts. But it also deals with guardianships and conservatorships. And, it also governs multiple-party accounts.

Since my law practice is substantially devoted to issues arising under the Probate Code, I have observed over the years several defects in the laws. These defects, I suggest, should be fixed by our Legislature.

I will enumerate and describe the problems as I see them.

First, unintended consequences arise with multiple-party accounts, or often referred to as "joint accounts." These may be checking or savings accounts at a bank, credit union, or some other financial institution where funds are on deposit. They may also include certificates of deposit commonly used to receive higher interest rates.

A joint account belongs, during the lifetime of all persons named on the account, to the named persons in proportion to the net contributions made by each of them. However, upon the death of the primary contributor to the account,

the surviving person on the account may claim to the entire account, regardless of how the estate is to be distributed through a Will or a Trust to other members of the family.

The "fix" for this problem is to simply make the presumption that the account is NOT intended for the surviving account holder, but is intended for the decedent's estate. A contrary intention is easily achieved by adding a pay-on-death ("POD") beneficiary to the account.

Second, there is presently no provision in the Code for a court-appointed guardian to have his or her expenses paid from the estate of the person for whom the guardianship is established. Therefore, a guardian who hires an accountant or an attorney is not expressly authorized by the Code to be reimbursed from the estate.

While it is commonly accepted by the courts that such expenses are justified, it should be formally codified by our Legislature to avoid unnecessary disputes and costly court battles. Interestingly, the Code does provide that court-appointed conservators may hire professionals to assist them and be paid from the estate.

Third, there is no provision in the guardianship statute that provides for the payment of attorney fees for the petitioner

who initiates a guardianship proceeding when the proceeding results in a guardian being appointed. The Code does provide that the fees for the attorney who represents the alleged incapacitated person be paid from the estate.

There are at least eight states whose appellate courts have ruled on this issue in favor of having the estate pay the legal fees necessary to establish a guardianship. Like Utah, three of these states have enacted the Uniform Probate Code. That is, those sates use the same Probate Code as Utah, and their courts have ruled in support of paying fees from the estate. Utah should do likewise.

Adding a provision in Utah's Probate Code for such fees would avoid substantial legal battles and would allow the Legislature to fashion a remedy rather than have the courts do so.

Equally important, such a provision would allow financially strapped children or other family members to initiate guardianship proceedings for the protection of incapacitated persons. As it is now, the fee issue is a major deterrent to providing the necessary protection for an incapacitated person.

However, to deter frivolous or unwarranted court proceedings, such a provision would not permit fees to be paid for petitioners who fail to convince the court that the person is incapacitated.

So, if there really is no need for a

guardian or a conservator, the law would not allow for payment of attorney fees. The law would only allow for legal fees to be paid if the proceeding actually results in protecting the incapacitated person by appointing a guardian and/or a conservator.

The only way these "fixes" will be made to our Probate Code is for the Legislature to act. The Legislature generally acts only when constituents ask them. So, please contact your Representative and Senator and ask them to initiate these fixes to the Probate Code. That's way it will happen, and probably the only way that it will happen.