



The Judiciary, State of Hawai‘i

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

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Friday, February 10, 2023 at 9:35 a.m.
State Capitol, Conference Room 016
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, 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 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 state legislatures and

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.

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 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 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 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. 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 increases 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 "half-blood" 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, 2-203 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.

SB-483

Submitted on: 2/7/2023 6:27:20 PM

Testimony for JDC on 2/10/2023 9:35:00 AM

Submitted By	Organization	Testifier Position	Testify
Elizabeth Kent	Testifying for Commission to Promote Uniform Laws	Support	Remotely Via Zoom

Comments:

Aloha,

Thank you for the opportunity to testify in support of this bill, regarding the Uniform Probate Code. I support the intent of this bill and updating the probate code. There are still issues that the Commission to Promote Uniform Laws is researching and I look forward to working with this Committee, the Judiciary, and other stakeholders in the future.

I urge you to pass this bill out of this Committee.

Respectfully,

Elizabeth Kent