
Judiciary Committee

HB 2236

Title: An act relating to the disposition of certain assets.

Brief Description: Disposing of certain assets.

Sponsors: Representatives Goodman and Lantz.

Brief Summary of Bill

- Adopts the 1991 version of the Uniform Simultaneous Death Act, including a 120 hour rule for determining survivorship under instruments or laws that transfer title to property based on priority of death.
- Clarifies various definitions for purposes of probate and trust law, including that a child who was conceived before, but born after, the death of a parent is the surviving issue of the parent.
- Makes various changes with respect to nonprobate assets, the use of separate lists of property in connection with revocable trusts, statutes of limitation in will challenges, and the award of attorney's fees in trust and estate disputes.

Hearing Date: 2/26/07

Staff: Bill Perry (786-7123).

Background:

The probate and trust law affects the distribution of property through intestate succession or under various legal instruments such as wills or trusts.

Uniform Simultaneous Death Act.

The operation of various laws or legal instruments may depend on the order in which two or more people die. If the death of two or more such persons is apparently simultaneous, such as in an automobile accident, the Uniform Simultaneous Death Act (USDA) may apply. The USDA provides generally that if there is not sufficient evidence that the persons died other than

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simultaneously, each person will be deemed to have survived the others for purposes of determining property title or distribution. The effect of the USDA can be to avoid having property go through two or more estates. The USDA does not override express provisions in an instrument that provide for some other rule in determining order of death.

Representation, Posthumous Children, and Surviving Spouses.

Various terms are used throughout the probate and trust laws. Some are defined and some are not.

"Representation" is a method of distributing property to persons based on their degree of kinship to the "intestate." An intestate is a person who has died without a will.

A "posthumous child" is one born after the death of a parent. The law provides that such a child is among those entitled to share in the parent's estate. At the time the definition of a posthumous child was enacted, the possibility of a child being conceived, as well as born, after the death of a parent was probably not considered. Medical science has now made it possible for a child to be conceived long after a child's parent has died.

There is currently no statutory definition of a "surviving spouse" that applies to the probate and trust laws. However, the term is used in dozens of statutes that control the distribution of assets, impose responsibilities, and confer rights under those laws.

Nonprobate Assets.

Certain assets may pass to a beneficiary under a written instrument other than a will and outside of the probate process. Examples of nonprobate assets are payable-on-death life insurance policies, employee benefit plans, annuities, certain trusts, and certain bank or security accounts. If a married couple are divorced, the law operates to revoke a designation of a spouse as the beneficiary of a nonprobate asset unless a contrary intent has been expressed or a court has ordered otherwise. This revocation provision applies only to marriage dissolutions obtained in this state.

Tangible Personal Property Lists for Gifts under a Will.

A will may reference and incorporate a separate list of gifts of tangible personal property. As long as the list is not inconsistent with the will and identifies the gifts and their recipients with reasonable certainty, the list is given effect as though it were part of the will. The list may be changed by the testator at any time without having to redo the will. In case of inconsistencies between versions of a list, the latest list controls.

Commencing a Will Contest.

A person wishing to contest a will must appear and petition the court within four months of the probate of the will. Court rules and statutes provide that a lawsuit may be commenced either by filing a petition with the court or by service of summons on another party. A statute of limitations is tolled by the earlier of the filing of the petition or the service of summons.

Award of Attorneys' Fees in Dispute Resolution Actions.

Under the Trust and Estate Dispute Resolution Act (TEDRA), the court has discretion to award costs and reasonable attorneys' fees to any party from another party, or from the assets of the trust or estate, or from a nonprobate asset that is subject to the action.

Bar Section Recommendations.

The Real Property, Probate and Trust Section of the state bar is recommending several changes to the probate and trust law in the areas discussed above.

Summary of Bill:

Uniform Simultaneous Death Act.

The 1940 version of the USDA is replaced with the 1991 version.

The general rule in a simultaneous death situation is that a person is deemed to have died first if it is not established by clear and convincing evidence that he or she survived the other relevant person or persons by 120 hours. The general rule is applicable if any of the following depend on one person surviving another:

- the devolution of property;
- the right to elect an interest in property; or
- the right to exempt property, a homestead, or a family allowance.

The rule is not to be used if it would result in the state taking intestate property.

A 120 hour rule is also specifically applied to any governing instrument that relates to an individual surviving an event and to the survivorship rights of a co-owner.

For purposes of the USDA, death occurs as determined by an attending physician, or a county coroner or medical officer. Death certificates or government records or reports are prima facie evidence that a person is dead or missing. If a person is missing for seven years without explanation after diligent search or inquiry, the person is presumed to have died at the end of the seven year period.

The 120 hour rule does not apply if there is a contradictory governing instrument, if application would invalidate a nonvested interest or a power of appointment under the rule against perpetuities, or if application would cause failure or duplication of a disposition.

Payors given immunity from liability for a good faith payment to a person not entitled under the USDA if the payment is made before notice of a challenge under the USDA. Likewise, a person who buys property for value and without notice is not liable and need not return the property.

Representation, Posthumous Children, and Surviving Spouses.

The definition of "representation" is changed to cover distributions based on degrees of kinship to any "decedent," not just decedents who die intestate.

A "posthumous child" is defined as one conceived before, but born after, the death of a parent.

A "surviving spouse" is defined to exclude a decedent's spouse if the marriage has been dissolved or invalidated, unless there has been a subsequent remarriage. A decree of separation is not a dissolution or invalidation unless the decree has terminated the husband and wife status.

Nonprobate Assets.

The termination of a spousal beneficiary designation in a nonprobate asset instrument upon a marriage dissolution is no longer restricted to dissolution decrees from courts of "this state."

The definition of "nonprobate asset" is expended to include certain brokerage accounts, contracts, and other written instruments that may provide for the nonprobate transfer of property, such as

insurance policies, employment contracts, mortgages, bonds, promissory notes, and retirement accounts.

Tangible Personal Property Lists for Gifts under a Will.

Separate lists designating recipients of tangible personal property may be used in conjunction with irrevocable trusts, as well as with wills.

Commencing a Will Contest.

The four month period for contesting a will is tolled by the filing of a petition with the court. However, the action is deemed not to have been commenced, and the period of limitation not tolled, if the petitioner does not personally serve the personal representative of the estate within 90 days of the filing.

Award of Attorneys' Fees in Dispute Resolution Actions.

In order to award costs and attorneys' fees, a court need not find that the litigation has benefited the trust or estate involved.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.