

ISBA 2008 PROBATE/TRUST LAW SECTION LEGISLATIVE PROPOSALS

A. Conservatorship Bonds

§633.175 – Waiver of bond by court *shall be amended as follows:*

The court, for good cause shown, may exempt any fiduciary from giving bond, if the court finds that the interests of creditors and distributees will not thereby be prejudiced. However, the court, except as provided in section 633.172, subsection 2, shall not exempt a conservator from giving bond in a conservatorship with total assets of more than ~~ten~~ twenty-five thousand dollars, excluding real property, unless it is a voluntary conservatorship in which the petitioner is eighteen years of age or older and has waived bond in the petition.

COMMENT: The conservatorship bond threshold in this section should have been changed when the threshold was raised to \$25,000 on related subjects, including Uniform Transfers to Minors accounts (Chapter 565B), procedures in lieu of conservatorships (§633.574), and distributing decedents' assets by affidavit (§633.356). The thresholds should be the same in all these sections.

B. Surviving Spouse Elections

§633.241 – Time for election to receive life estate in homestead *shall be amended as follows:*

If the surviving spouse does not make an election to receive the life estate in the homestead and file it with the clerk within four months from the date of ~~second publication of notice to creditors~~ service of notice under Section 633.237, it shall be conclusively presumed that the surviving spouse waives the right to make the election. The court on application may, prior to the expiration of the period of four months, for cause shown, enter an order extending the time for making the election.

§633.374 – Allowance to surviving spouse *shall be amended as follows:*

If the estate personal representative is not the decedent's spouse, the personal representative shall cause written notice concerning support to be mailed to the surviving spouse pursuant to Section 633.40, subsection 5. Said notice shall inform said surviving spouse of his/her right to apply, **within four months of service of said notice**, for support for a period of twelve months following the death of the decedent, and for support of the decedent's dependents who reside with said spouse for the same period of time.

The court shall, upon application, set off and order paid to the surviving spouse, as part of the costs of administration, sufficient of the decedent's property as it deems reasonable for the proper support of the surviving spouse for the period of twelve months following the death of the decedent. When said application is not made by the personal representative, notice of hearing upon the application shall be given to the personal representative. The court shall take into consideration the station in life of the surviving spouse and the assets and condition of the estate. The allowance shall also include such additional amounts as the court deems reasonable for the proper support, during such period, of dependents of the decedent who reside with the surviving

spouse. Such allowance to the surviving spouse shall not abate upon the death or remarriage of such spouse. If no application for support has been filed within four months following service of said notice by or for the surviving spouse and/or dependents of the decedent residing with the surviving spouse, said surviving spouse and/or dependents shall be deemed to have waived the right to apply for support during administration of the estate.

COMMENT: These amendments are needed to clarify how a surviving spouse must serve notice of his/her decision to take an elective share of the decedent's estate (including a life estate in the homestead), and require personal representatives to notify the decedent's surviving spouse of the right to apply for a support allowance for himself/herself and the decedent's dependents who reside with the surviving spouse.

C. Trust Ownership of Real Estate

§614.14 – Real estate interested transferred by trustee shall be amended to add the following new subsection 7:

7. An interest in real estate currently or previously held of record by a trust shall be deemed to be held of record by the trustee of such trust.

COMMENT: This change is needed to clarify for title examiners that they need not secure curative documents where real estate ownership has been titled in the name of the trust instead of the trustee's name. .

D. Revocable Trust Contests

§633A.3108 – Limitation on contest of revocable trust shall be amended as follows:

Unless notice is given as provided in section 633A.3109, following provisions shall apply:

1. Unless previously barred by adjudication, consent, or other limitation, a proceeding to contest the validity of a revocable trust must be brought no later than one year following the death of the settlor.

2. Unless the trustee is a party to a pending proceeding contesting its validity, on or after the date six months following the death of the settlor, the trustee of a revocable trust may assume the trust's validity and proceed to distribute the trust property in accordance with the terms of the trust, without liability for so doing. Liability for an improper distribution in such a case is solely on the beneficiaries.

COMMENT: Adding the underlined phrase clarifies the date on which the trustee can proceed with trust administration on the assumption that the trust is valid and distributions can be made in keeping with the trust's provisions.

E. Charitable Trusts – Donor Standing

§633A.5104 – Interested persons – proceedings shall be amended as follows:

The settlor (or if the settlor is deceased or not competent, the settlor's designee named or designated pursuant to section 633A.5106), the trustee, the Attorney General, and any charitable entity or other person with a special interest in the trust shall be interested persons in a proceeding involving a charitable trust.

§633A.5106 – Settlor may enforce charitable trust; designation of person by settlor. [New Section]

A settlor may maintain an action to enforce a charitable trust established by the settlor and, in addition, may designate, either in the agreement establishing the trust or in a written statement signed by the settlor and delivered to the trustee, a person or persons, by name or by description, whether or not born at the time of such designation, to enforce the charitable trust if the settlor is deceased or not competent.

COMMENT: This proposal is based on the growing recognition that oversight by the Attorney General is often not an adequate enforcement mechanism for charitable trusts. In many cases, enforcement of the donor's intent is only possible when the donor deals directly with the institution (with the threat of withholding future contributions available). The donor is already an interested person under the Trust Code. This proposal gives the donor the right to designate who will have standing to enforce the charitable trust.

An example of this problem is Smithers v. St. Luke's – Roosevelt Hospital Center, 723 N.Y.S.2d 426 (App. Div 2001), where a recovering alcoholic gave \$10,000,000 over a period of years to the hospital for the purpose of establishing an alcohol treatment center with a very specific treatment program requiring a separate facility. For years, the hospital had been secretly misappropriating donor's gifts, adding these gifts to the hospital's general fund. After the donor's death, the hospital abandoned the separate facility and otherwise refused to comply with donor's restrictions. Donor's widow, as special administratrix of his estate, repeatedly demanded that the hospital observe donor's restrictions, demanded an accounting (which revealed the misappropriations), and finally sued the hospital. Despite arguments by the Attorney General and the hospital that the widow had no standing, the court held that the widow had standing to enforce the restrictions in her role as special administratrix, noting "The donor of a charitable gift is in a better position than the Attorney General to be vigilant, and, if he or she is so inclined, to enforce his or her own intent" and "...the circumstances of this case demonstrate the need for co-existent standing for the Attorney General and the donor."

F. Repeal Iowa Estate Tax [Iowa Code Chapter 451]

Chapter 451 of the Iowa Code implements the Iowa Estate Tax, often referred to as our "pickup tax". Iowa Code §451.13 specifically states "this chapter shall become void and of no effect in respect to the estates of persons who die after the effective date of the repeal of the federal estate tax act, or of the provisions thereof providing for a credit of taxes paid to several states of the United States..." Because the Internal Revenue Code has been amended to repeal the State Death Tax Credit, Chapter 451 has effectively been repealed by its own terms and should be removed from the Iowa Code in its entirety.

G. Pretermitted Heirs

§633.267 – Children born or adopted after execution of will *shall be amended as follows:*

√ **If** a testator fails to provide in the testator’s will for any of the testator’s children born to or adopted by the testator after the execution of the testator’s last will, such child, whether born before or after the testator’s death, shall receive a share in the estate of the testator equal in value to that which the child would have received under section 633.211, 633.212, or 633.219, whichever section or sections are applicable, if the testator had died intestate, unless it appears from the will that such omission was intentional.

Deleted: When

Deleted: making

§633A.3106 – Children born or adopted after execution of a revocable trust *shall be amended as follows:*

When a settlor fails to provide in a revocable trust for any of the settlor’s children born to or adopted by the settlor after the execution of the trust or its last amendment, such child, whether born before or after the settlor’s death, shall receive a share of the trust equal in value to that which the child would have received under section 633.211, 633.212, or 633.219, whichever is applicable, as if the settlor had died intestate, unless it appears from the terms of the trust or decedent’s will that such omission was intentional.

Deleted: making

COMMENT: These changes are needed to maintain consistency between the probate and trust codes on the subject of shares inherited by after-born children under wills and revocable trusts; to clarify what date to use for determining which heirs are pretermitted; and to provide the same share to pretermitted heirs as those born before execution of the will/trust unless it appears from the terms of the document that the omission was intentional.

H. Creditor’s Rights, Spendthrift Trusts, and Discretionary Trusts

§633A.2301 – Rights of beneficiary, creditor, assignee. *[Replace existing §2301]*

To the extent a beneficiary’s interest is not subject to a spendthrift provision, and subject to sections 633A.2305 and 633A.2306, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by levy, attachment, or execution of present or future distributions to or for the benefit of the beneficiary or other means.

§633A.2302 – Spendthrift protection recognized. *[Replace existing §2302]*

Except as otherwise provided in section 633A.2303:

1. A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust”, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer, assignment and encumbrance of the beneficiary’s interest.

2. A beneficiary may not transfer, assign or encumber an interest in a trust in violation of a valid spendthrift provision, and a creditor or assignee of the beneficiary of a spendthrift trust may not reach the interest of the beneficiary or a distribution by the trustee before its receipt by the beneficiary.

§633A.2303 – Spendthrift trusts for the benefit of settlor. [Replace existing §2303]

A term of a trust prohibiting an involuntary transfer of a beneficiary's interest shall be invalid as against claims by any creditors of the beneficiary if the beneficiary is the settlor.

§633A.2304 – Amount reachable by creditors or transferees of settlor. [New section]

1. If a settlor is a beneficiary of a trust created by the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit.

2. In the case of a trust with multiple settlors, the amount the creditors or transferees of a particular settlor may reach shall not exceed the portion of the Trust attributable to that settlor's contribution.

3. The assets of an irrevocable trust shall not become subject to the claims of creditors of the settlor of a trust solely due to a provision in the trust that allows a trustee of the trust to reimburse the settlor for income taxes payable on the income of the trust. This subsection shall not limit the rights of the creditor of the settlor to assert a claim against the assets of the trust due to the retention or grant of any rights to the settlor under the trust instrument or any other beneficial interest of the settlor other than as specifically set forth in this subsection.

§633A.2305 – Discretionary Trusts; effect of standard. [New section]

Whether or not a trust contains a spendthrift provision, a creditor or assignee of the beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

1. The discretion is expressed in the form of a standard of distribution; or,

2. The trustee has abused its discretion.

§633A.2306 – Court prohibited from exercising trustee's discretion. [New section]

If a trustee has discretion as to payments to a beneficiary, and refuses to make payments or exercise its discretion, the court shall neither order the trustee to exercise its discretion, nor order payment from any such trust, if any such payment would inure, directly or indirectly, to the benefit of a creditor of the beneficiary.

§633A.2307 – Overdue distribution. [New section]

1. A creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the required distribution date.

2. For the purposes of this section, "mandatory distribution" means a distribution required by the express terms of the trust of any of the following:

a. All of the income, net income, or principal of the trust.

b. A fraction or percentage of the income or principal of the trust.

c. A specific dollar amount from the trust.

3. A distribution that is subject to a condition shall not be considered a mandatory distribution.

4. If a creditor or assignee of a beneficiary is permitted to reach a mandatory distribution under this section, the sole remedy of the creditor or assignee shall be to apply to the court having jurisdiction of the trust after a reasonable period of time has expired, for a judgment

ordering the trustee to pay to the creditor or the assignee a sum of money equal to the lesser of the amount of the debt or assignment, or the amount of the mandatory distribution described in subsection two. No other remedy, including but not limited to attachment or garnishment of any interest is in the trust, recovery of court costs or attorney fees, or placing a lien of any type on any trust, property or on the interest of any beneficiary in the trust, shall be permitted or ordered by any court. Any writing signed by the beneficiary, allowing any remedy other than payment of the mandatory distribution not made to the beneficiary within a reasonable time after required distribution date, shall be void and shall not be enforced by any court.

NOTE: The Code Editor is directed to change the designation of part 3 of Subchapter II of the Iowa Trust Code from “Spendthrift Protection” to “Creditor’s Rights, Spendthrift Trusts, and Discretionary Trusts.”

COMMENT: Originally, §§633A.2301 - .2303 were devoted exclusively to spendthrift trusts. Over the years, provisions have been added pertaining to overdue distributions and discretionary trusts, raising questions about which provisions applied to spendthrift trusts, discretionary trusts, and overdue applications. §633A.2301 is new, and intended only as a general statement regarding creditors’ rights and does not substantively change any existing rights. §633A.2302(1) is the same as current §633A.2301 with the addition of “assignment and encumbrance.” §633A.2302(2) is new and derived from the Uniform Trust Code §502(c), and becomes necessary with the addition of §633A.2307 for mandatory distributions. §633A.2303 and §633A.2304 simply re-number current §633A.2302 and §633A.2303. §633A.2305 is same as current §633A.2301(4) and makes it clear that this rule applies both to spendthrift and discretionary trusts. §633A.2306 is new, and incorporates the common law rule prohibiting courts from ordering payments to creditors when the trustee refuses to make payments from the trust. §633A.2307 is the same as current §§633A.2301(2) and (3).

I. Small Estates Amend sections 1, 2, and 5 of Chapter 635:

§635.1 – When Applicable shall be amended as follows:

When the gross value of the probate assets of a decedent subject to the jurisdiction of this state does not exceed one hundred thousand dollars, and upon a petition as provided in section 635.2 of an authorized petitioner in accordance with section 633.227, 633.228, or 633.290, the clerk shall issue letters of appointment for administration to the proposed personal representative named in the petition, if qualified to serve pursuant to section 633.63 or upon court order pursuant to section 633.64. Unless otherwise provided in this chapter, the provision of Chapter 633 apply to an estate probated pursuant to this chapter.

§635.2 – Petition Requirements shall be amended as follows:

The petition for administration of a small estate must contain the following:

1. The name, domicile, and date of death of the decedent.
2. The name and address of surviving spouse, if any, and the name and relationship of each beneficiary in a testate estate or known heirs in an intestate estate.
3. Whether the decedent died intestate or testate, and, if testate, the date the will was executed.
4. A statement that the probate property of the decedent subject to the jurisdiction of this state does not have an aggregate gross value of more than the amount permitted under the provisions of section 635.1, and the approximate amount of personal property and income for the purposes of setting a bond.
5. The name and address of the proposed personal representative.

§635.5 – Closing by Sworn Statement subsections 2 and 5 shall be amended as follows:

2. If no actions or proceedings involving the estate are pending in the court thirty days after notice of the closing statement is filed, the estate shall close and the personal representative shall be discharged after distribution and the earlier of a statement of disbursement of assets has been filed with the clerk, or an additional thirty days.

4. If a closing statement is not filed within twelve months of the date of issuance of a letter of appointment, an interlocutory report shall be filed within such time period. Such a report shall be provided to all interested parties at least once every six months until the closing statement has been filed unless excused by the court for good cause shown. The provisions of section 633.473 requiring final settlement within three years shall apply to estates probated pursuant to this chapter. A closing statement filed under this section has the same effect as a final settlement of the estate under chapter 633.

COMMENT: These changes are needed to clarify when a fiduciary is qualified to serve, facilitate appropriate bonding and identify non-spouse beneficiaries when small estates are opened; to implement the intended final distribution requirements; and to limit the length of administration to the same three year period as regular estates under chapter 633.

J. Total Return Unitrusts Under Principal & Income Act:

§637.609 – Unitrust amount shall be repealed in its entirety.

COMMENT: This section is not needed to maintain qualification of any trust for marital deduction or compliance with generation skipping transfer tax statutes and rules.

K. Real Estate Interest Transferred By Trustee

Amend Code Section 614.14 as follows:

1. If an interest in real estate is held of record by a trustee, a bona fide purchaser acquires all rights in the real estate which the trustee and the beneficiaries of the trust had and any rights of persons claiming by, through or under them, free of any adverse claim **including, without limitation, claims arising under section 561.13 or claims to an interest in real estate arising under Section 633.238.**
2. No Changes- Same text as current Code.
3. No Changes- Same text as current Code.
4. No Changes- Same text as current Code.
5.
 - a. A person holding an adverse claim arising or existing prior to January 1, **2009**, by reason of a transfer of an interest in real estate by a trustee, or a purported trustee, shall not file an action to enforce such claim after December 31, **2010**, at law or in equity, in any court to recover or establish any interest in or claim to such real estate, legal or equitable, against the holder of the record title to the real estate. Deleted: 1992,
 - b. An action based upon an adverse claim arising on or after January 1, **2009**, by reason of a transfer of an interest in real estate by a trustee, or a purported trustee, shall not be maintained either at law or in equity, in any court to recover or establish any interest in or claim to such real estate, legal or equitable, against the holder of the record title to the real estate, legal or equitable, more than one year after the date of recording of the instrument from which such claim may arise. Deleted: 1993,
6. This section shall not be construed to limit any personal action against the trustee or purported trustee. Deleted: 1992,

COMMENT: The amendments to Code Section 614.14 address an issue raised by the decision in the Sieh Case, 713 N.W. 2d 194 (Iowa 2006). The amendments clarify that real estate conveyed to a revocable trust and subsequently sold or mortgaged by the trustee does not require a follow-up deed from the individual grantor and spouse.