Selected Creditor and Tax Issues for Estates, Especially Financially Stressed Estates

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If a decedent or the decedent's estate has little in assets or net assets, is subject to substantial claims, or could have more debts or adverse claims than assets, or if any of the above come to apply during administration, special problems will challenge the family, the personal representative, and their advisors. Also, in almost every estate, some creditor issues will arise.

The author practices in Utah which, along with many other states, has adopted a version of the Uniform Probate Code, thus this outline will focus largely on the provisions of the Uniform Probate Code (the "UPC"), using Utah law ("UCA" is the Utah Code Annotated) as an example, and will contrast those provision to the non-Uniform law of other states. The reader should bear in mind the need to consult the applicable local version of the Uniform Probate Code in the states which have adopted it, because each state has its own variations, particularly on time and dollar elements, homestead, family allowance, and exempt property rules, spousal protection rules, and so on.

1. **Claims Against Decedent**. The persons interested in the estate will first want to determine the claims against the decedent. The family will generally make an informal review of the situation. If assets are insufficient even to pay funeral and administration expenses, nothing further may be done beyond arranging for indigent funeral services through the county.

a. Who Administers. If, however, there may be sufficient assets to cover family allowances, homestead, or exempt property, the family members will need to choose whether to initiate further proceedings and take responsibility for winding up decedent's affairs, or to allow creditors to do so, if they will. Family members will have priority to appointment a personal representative if they choose to assert it; otherwise, creditors have a right to initiate proceedings 45 days after death and seek an appointment of a personal representative to administer the estate. UCA § 75-3-203. If the estate appears to be sufficient to cover exemptions and costs of administration, but not to cover anticipated unsecured claims, a creditor may object to the appointment of a family member and the court may appoint someone else. UCA § 75-3-203(2).

i. Other Jurisdictions. There may be proceedings in more than one jurisdiction depending on the situs of property, potentially with different personal representatives in each.

ii. Special Administrators. Usually a personal representative is appointed right away; however, sometimes a special administrator is needed first. The special administrator is appointed in such cases as when there is a need to get into a safe deposit box to obtain the original will, there is a dispute over who should be the general personal representative, or there is need for immediate action to obtain or protect an asset. The special administrator's job, when appointed in informal proceedings, is mostly to protect the estate: "to collect and manage the assets of the estate, to preserve them, to account therefor and to deliver them to the general personal representative upon his qualification." The special administrator has the power of a personal representative necessary to do this. UCA § 75-3-616. However, if appointed in formal proceedings (notice and a hearing, UCA § 75-3-614(1)(b)) the special administrator has the power of a general personal representative except as limited by the court. UCA § 75-3-616. So what the special administrator can do is somewhat different based on how it was appointed. In emergencies the appointment may be without notice. UCA § 75-3-614(1)(b). The appointment may be temporary or for particular acts only or as otherwise specified by the court. UCA § 75-3-617.

b. General Process. The general steps involved for whoever accepts the responsibility of serving as a personal representative will include determining the claimants with allowable claims, the value of their claims, and the priority category to which they belong, determining the available assets of the probate estate and whether nonprobate assets are available to pay claims and administrative expenses and the value of such assets, collecting the assets and reducing them to cash, obtaining contribution where appropriate, and paying allowed claims in priority order.

i. Small Estate Affidavit. The process of settling the estate may include the use by a family member of the small estate affidavit process to collect personal property assets of less than $100,000 and up to four registered vehicles; this procedure is not available for estates holding real property interests. UCA § 75-3-1201. The person using this process would take the property subject to all claims and would informally account to and pay claimants. This process only makes sense where the assets are clearly determinable, and the claims are very limited in number and clearly determinable. See also UCA § 75-3-901 which provides, among other things, that successors without an administration take subject to claims and charges incident to any administration which may eventually occur.

(1) Who Should be Considered to Act. Naturally the family will want someone of integrity to collect the assets. If the person collecting the asset fails to split it, he or she would be liable to those entitled. It may be a good idea that the person using the affidavit be the person named as personal representative in a will (if there is one) because that shows the decedent's confidence in that person. The person has no authority as personal representative until appointed by a court (if this becomes necessary) but, once appointed, the powers, to the extent of acts beneficial to the estate,

relate back in time prior to appointment. UCA § 75-3-701, second sentence. This is nice in case there ever is a probate and appointment proceeding.

(2) Shares. The family can, and should, apply the will even in a small estate affidavit proceeding. The will even if not probated is evidence of title to the extent of actual possession. UCA § 75-3-103. Thus, the title passing to the takers under the terms of the non-probated will is protected. If the terms of the will are not followed the small estate proceeding likely will not work, because the person whose share would be less due to the failure to follow the will can seek probate of the will for 3 years after death and obtain the difference that way, and the cost savings of the affidavit process are lost.

ii. Appointment Proceeding. More often, the person seeking to take responsibility for settling the estate would obtain a court appointment as personal representative. See UCA § 75-3-103. To deal with creditor matters, such an appointment is necessary; creditor proceedings may not be revived or commenced before the appointment of a personal representative. UCA § 75-3-104. The person named as personal representative in a will has no authority as personal representative until appointed, but once appointed, the powers, to the extent of acts beneficial to the estate, relate back in time prior to appointment. UCA § 75-3-701, second sentence.

(1) Variety of Procedures. This appointment and administration proceeding may involve any of the processes and protections available under the probate code. The opening may be through informal or formal appointment procedures, with or without a probate of a will or a determination of heirs. UCA §§ 75-3-301 *et seq.* and 401 *et seq*. The personal representative may be bonded or unbonded and subject to supervised or unsupervised proceedings. UCA § 75-3-501 *et seq.* and 601 *et seq.* It may close the estate informally with an accounting, or with appropriate consents without an accounting, or may close formally with a judicial discharge. UCA § 75-3-1001 *et seq.* There is also a special insolvency closing procedure by affidavit without notice to creditors where the estate less liens and encumbrances does not exceed homestead, exempt property, family allowance, expenses of administration, funeral expense, and medical expenses of the last illness. UCA §§ 75-3-1203 and 1204.

(2) Creditor Protection. In financially troubled estates, claimants may be inclined to seek a bond by the personal representative (UCA § 75-3-605, where claim exceeds $5,000), supervised administration (UCA § 75-3-501 *et seq.*, used where required by will or where necessary; see UCA § 75-3-502), or some other form of protection.

(a) Bond. Unless the personal representative has a strong personal financial statement, a bond may not be obtainable at all. Either another personal representative must be found or some other relief crafted to replace the bond. An escrow could be agreed upon or the court could order restrictions on asset

disposition. See UCA §§ 75-3-505 (interim orders), 75-3-607 (orders restraining the personal representative), and 75-1-302(2) (broad jurisdictional grant).

(b) Supervised Administration. Supervised administration means that the court must adjudicate testacy if not already done (UCA § 75-3-502), that the court supervises administration to the extent the court deems necessary (UCA § 75-3-501), and that the personal representative may not make distribution without prior order of the court (UCA § 75-3-504). Otherwise the duties and powers of the personal representative remain the same. UCA § 75-3-501. Any interested party, whether a beneficiary or creditor or even a personal representative, may request such administration. UCA § 75-3-501.

(3) Informal or Formal Proceedings. A formal probate proceeding is one which is opened requesting relief from the court in formal proceedings, i.e. "proceedings conducted before a judge with notice to interested persons." UCA § 75-1-201(18). This is opposed to informal proceedings which are those "conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative." UCA § 75-1-201(23). The term proceeding "includes action at law and suit in equity." UCA § 75-1-201(38).

(a) Informal Proceedings. There are two types of informal proceedings; they are, under the definition, only for asking a "registrar for probate of a will or appointment of a personal representative." The reason there are only two is that these specific matters are for action by a court functionary not exercising the full judicial power of a judge. In an informal application, the registrar is the judge acting as a registrar rather than as a judge – see definition of registrar at UCA § 75-1-201(43) "the official of the court designated to perform the functions of registrar as provided in Section 75-1-307", which section specifies the judge to perform as registrar. The registrar's functions are to review the informal application for completeness and to issue an informal probate or appointment, which is a non-adjudicative determination. UCA §§ 75-3-301 to 311 (informal probate and appointment proceedings). The registrar may also issue a closing certificate after the termination of appointment (one year after the closing statement affidavit; UCA § 75-3-1003(2)) if no action is then pending, in order to discharge liens securing fiduciary performance, but the certificate does not itself preclude action against the personal representative or surety. UCA §§ 75-3-1007. Informal appointments and probates operate until the court, acting with true judicial authority as judge, in formal proceedings, finds that there is no will, there is a valid later will, or the appointment was erroneous, as the case may be. Closing the estate by a closing statement affidavit (UCA § 75-3-1003) may be either with an accounting or without (if waived; UCA § 75-3-1003(3)), this is generally referred to as an "informal closing." Formal closings may be used with informally opened estates, and often are.

(b) Formal Proceedings. The probate code provides for a continuous administration during which separate proceedings requesting

separate orders from the court will come up as needed. Under this regime, there may be very little or often (as in the case of an informal opening and an informal closing) nothing to come before the judge. (This pattern may be modified by court order in a supervised proceeding; for example, some matters, such as distribution, may be required to come before the judge.) Formal proceedings are of many types, and can include disputes involving creditor claims, family allowance, title, the spousal elective share, personal representative accountings, breach of fiduciary duty, or any number of things limited only by the causes of action available.

(c) Formal Testacy and Appointment Proceedings. There is a real difference between a formal probate proceeding and a formal testacy proceeding. Only one type of formal proceeding is a formal testacy proceeding. "A formal testacy proceeding is litigation to determine whether a decedent left a valid will." UCA § 75-3-401(1). The testacy proceeding is governed by UCA §§ 75-3-401 – 413. Formal testacy proceedings require notice to interested persons and published notice as well. UCA § 75-3-403. (The provision of UCA § 75-3-105(1) that persons with notice are bound even if not all entitled were given notice and the provision of UCA § 75-3-1001(2) allowing a final formal order to cure a lack of notice, reduce the risk that notice was not properly given.)

Formal appointment proceedings are governed by UCA § 75-3-414. Such an appointment proceeding may involve a formal testacy proceeding if, for example, there is a challenge to the will under which an appointment is sought. If there is no such challenge, there may well be no formal testacy proceeding. Indeed, there may be no testacy proceeding at all where the will is admitted by all to be the valid will. If there is a request by anyone with an interest that the will everyone admits to be valid be formally determined to be valid, then there would be a formal testacy proceeding, but it would be uncontested and result in an order of the judge, as judge rather than as registrar, and would thus become res judicata unless timely appealed. Where the validity of the will is not the basis for a challenge to appointment of a personal representative, the action relating to the appointment is not a formal testacy proceeding. Thus, even if there is a formal proceeding to obtain a judicial order probating the will (with res judicata effect), it is unrelated and is a wholly separate proceeding from an appointment proceeding based on matters not involving the validity of the will.

In probate matters, each proceeding before the court is independent of any other proceeding involving the same estate. UCA § 75-3-106(1)(a). A formal order of settlement of the estate may be obtained under UCA §§ 75-3-1001 and 1002. A formal opening does not require a formal closing, however.

(d) Will Probate Time Limit. Whether in formal or informal proceedings a will can only be presented for probate within three years of death. UCA § 75-3-107(1). This is a statute of repose, not of limitations and thus

is not subject to equitable tolling. *In re Estate of Vern C. Strand*, 362 P.3d 739 (Ut. App. 2015). After this time the estate is deemed to have passed by intestate succession.

c. Predeath Claims Process in Proceedings. After appointment, the personal representative will publish notice to creditors, give actual notice to known creditors, and proceed through the normal claims filing process to determine the validity and allowability of claims, the value of them, and whether they have been timely submitted. UCA § 75-3-801 *et seq.*

i. What Are Claims. Claims against the decedent may be of any type.

(1) Tax Claims. Some tax claims will have priority even if no tax claim is filed under the probate claims process, so the personal representative will want to look into past tax filings (or failures to file) and current filing obligations and tax liabilities of the decedent and the estate and risks personal liability if it fails to do so. These tax liabilities may include state or federal income taxes, sales taxes, withholding and payroll taxes, inheritance, estate, gift, and generation-skipping taxes, and excise taxes of various kinds.

(2) Other Claims. Claims are broadly defined and include obligations due or not yet due, liquidated or contingent, and so on. UCA §§ 75-1-201(6) and 75-3-803(1). Some matters beyond run-of-the-mill credit card, utilities, and loans which could constitute claims include, decedent's guarantees of others' obligations, deficiencies on secured obligations, tort claims (these can be hard to value and could take a long time to litigate; also, the defense may be controlled by an insurance carrier), back child support or divorce obligations, obligations under marital agreements to pass property, reimbursement claims with respect to state or federal benefit programs, and so on.

(3) Claims Not Yet Due. Even though a claim may not yet be due or may be contingent or unliquidated, it still must be timely asserted, but it can be paid at present value or an agreed value or may be subject to some trust or security arrangement for future payment. UCA § 75-3-810(2). However, if the claim becomes due or certain before distribution and is allowed or established, it is paid in the normal way along with claims of the same class. UCA § 75-3-810(1).

(4) Claims Subject to Special Limitations Periods. The claims subject to the short limitations or nonclaims periods in probate matters do not include a claim for specific performance, but refers to debts or demands against the decedent which might have been enforced in his lifetime, by personal actions for the recovery of money; and upon which only a money judgment could have been rendered. *In re Estate of Sharp*, 537 P.2d 1034, 1037 (Utah 1975); *Bradshaw v. McBride*, 649 P.2d 74, 77 (Utah 1982); *Torgerson v. Talbot*, 414 P.3d 504 (Ut. App. 2017).

ii. Medicaid Benefit Recovery. Medicaid claims are special. The assets of the estate generally will be subject to a statutory requirement to repay Medicaid benefits. See UCA § 26-19-1, et seq., and 42 USC § 1396p(b)(1) (this statutory recovery is exclusive: "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual. . . may be made, except [as specifically provided in that subsection]").

(1) Lien. The state may file a claim against the estate or may impose a lien on the property of the Medicaid beneficiary. 42 USC § 1396p(a) and (b). These lien provisions apply only to *rightfully* received nursing home care benefits (not other benefits). In Utah, the lien applies to the very broadly defined "estate" of the benefit recipient and to any trust or which he or she was the grantor and a beneficiary. UCA § 26-19-13.5(2). Utah defines "estate" very broadly; it includes the probate estate (UCA § 75-2-201), the augmented estate (UCA § 75-2-203), and any other property in which the decedent held an interest at death, including joint tenancies, life estates, living trusts, survivorships, etc. UCA § 26-19-2(4) (definition of "estate"). The right to recover rightfully provided benefits is said to be a lien against the estate as so defined. UCA § 26-19-13.5(2). The application, priority, and procedure with respect to various assets subject to the lien which may be in third party hands is not detailed in this statute. (Note: Utah asset protection trusts also may be subject to the lien and recovery provisions. See UCA §§ 25-6-501 et seq.) A suit and judgment are required for *wrongfully* received benefits. See UCA § 26-19-13.7.

Although the lien can apply during the Medicaid recipient's life, it will not be enforced against a home until sale of the home (42 USC § 1396p(b)(1)(A)) or death of the recipient, where none of the recipient's spouse, blind or disabled child under age 21, or sibling with an equity interest in the home residing there for a year before (as to lien imposition) or continuously from (as to lien or foreclosure), the time the recipient was institutionalized. See 42 USC §§ 1396p(a)(2) (no lien attaches while specified persons reside in home) and 1396p(b)(2) (no enforcement of lien while the specified persons reside in home). States are required to institute procedures for hardship waivers. 42 USC § 1396p(b)(3).

Even without a lien, a claim against the estate of the recipient may be made, however. The lien in Utah has the same priority as medical expenses of the last illness as provided in UCA § 75-3-805, and is perfected by filing a notice in court as for a creditor's claim. UCA § 26-19-13.5(3).

(2) Claim Against Estate. The state, even without a lien, may recover against the estate of a deceased Medicaid recipient for the amount of benefits paid for services when the recipient was over age 55 for long term care, home or community based services, related hospital care, and drugs. 1396p(b)(1)(B). Although the claim is generally limited to the probate estate (42 USC § 1396p(b)(4)(A)), some states have allowed claims against transferees (*Bucholtz v. Belshe*, 114 F.3d 924 (9th Cir. 1997)

(tenancy in common and community property); *In re Estate of Serovy*, 711 N.W.2d 290 (Iowa 2006) (joint tenancy property)), while other courts have resisted such attempts (*County of Morrison v. Litke*, 558 N.W.3d 16 (Minn. App. 1997); *Hines v. Dept. of Public Aid*, 831 N.E. 2d 641 (Ill. App. 2005) *aff'd* 850 N.E.2d 138 (Ill. 2006) (joint tenancy)).

However, states may expand their definition of estate to include other property passing at death. 42 USC 1396p(b)(4)(b); see, e.g., *In re Estate of Gullberg*, 652 N.W. 2d 709 (Minn. App. 2002) (allowed claims under state statute against surviving spouse's estate up to value of marital or jointly held property at death of first spouse to die). Utah law allows recovery against the estate (which is very broadly defined as described above) or any trust of which the benefit recipient was the grantor and a beneficiary. UCA § 26-19-13.5(1).

The claim against the estate cannot be enforced if the recipient is survived by a spouse or blind or disabled child under age 21, or in cases of undue hardship. 42 USC § 1396p(b)(2) and (3); UCA § 26-19-13.5(1). One court has held the failure to inform the estate of the undue hardship exception may result in denial of the state's claim. See *Schiola Est. v. Colo. Dept. of Health Care Policy and Fin*., 51 P.3d 1080 (Colo. 2002).

(3) Settlement Limitations and Subrogation. Where the state has provided medical benefits, there may well be limits on settlements or recoveries from third parties (insurers, tort defendants, etc.) intended to protect state subrogation. See UCA §§ 26-19-4.5 (assignment of rights and benefits by operation of law), -4.7 (health insurer duties, - 5 and -6 (liens on proceeds and actions against third parties), -7 (requirements for notice to state from the benefit recipient of claims and settlements), -8 through -9.7 (miscellaneous claim related provisions), -19 (direct negotiation by state and direct payment to state).

iii. Notice to Present Claims. The statute calls for the personal representative to publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing the personal representative's appointment and address and notifying creditors of the estate to present their claims within three months after the date of the first publication of the notice or be forever barred. UCA § 75-3-801(1). However, the personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within 90 days from the published notice if given or within 60 days from the mailing or other delivery of the notice, whichever is later, or be forever barred. UCA § 75-3-801(2).

(1) Due Process. Such individualized notice is required by due process in order to bar known claims. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988); *Matter of Estate of Anderson*, 821 P.2d 1169 (Ut. 1991).

(2) Liability for Notice. Although the statute says that notice "shall" be published, it nevertheless goes on to provide that "The personal representative shall not be liable to any creditor or to any successor of the decedent for

giving or failing to give notice under this section." UCA § 75-3-801(3). This provision does not say that a transferee will not be responsible to the creditor, however. Presumably, this matter is resolved by the one year of death limitation of UCA § 75-3-803(1)(a).

iv. Limitations Periods. The personal representative needs to consider the special and quite short probate limitations periods as well as the normally applicable limitations periods.

(1) Nonclaims Statute. The short probate limitations bar period is known as the nonclaims statute. It is actually a jurisdictional bar not subject to the tolling of a normal statute of limitations (*e.g.*, during minority). See *In re Estate of Ostler*, 227 P.3d 242 (Ut. 2009) (wrongful death action of minor barred against estate of pilot of airplane). It provides that for claims against the estate arising prior to death, such claims are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates set forth in UCA § 75-3-803(1):

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801 (1) for all claims barred by publication.

UCA § 75-3-803(2) also provides, for multijurisdictional estates, that in all events, claims barred by the nonclaims statute at the decedent's domicile are also barred in this state.

A judgment entered after the bar date may be voidable in that case on jurisdictional grounds, but will not be so void as to allow a collateral attack on the judgment in a separate proceeding. To be void the court must not have any jurisdiction to consider the type of matter, and district courts clearly have jurisdiction over probate matters. *Nebeker v. Summit County*, 338 P. 3d 203 (Ut. App. 2014) (subsequent negligence case was not proper for collateral attack on judgment in probate case; sheriff had negligently failed to properly serve writ which would have preserved property, and county defended on ground the judgment was void for want of jurisdiction under the nonclaims statute citing *Ostler*).

(2) Normal Limitations. The effect of normal limitations periods is provided in UCA § 75-3-802 which gives a short extension to normal limitations periods which have not expired at the time of death. The commentary to the Uniform Probate Code (UPC) describes the general effect of this section:

> This section means that [three] months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies

> also that after the expiration of [three] months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of Section 3-803 have not been triggered. Uniform Law Comments to UPC § 3-802.

v. Presentation of Claims. Pursuant to UCA § 75-3-804(1)(a), the claimant may deliver or mail to the personal representative, or the personal representative's attorney of record, a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on either the receipt of the written statement of claim by the personal representative or the personal representative's attorney of record, or the filing of the claim with the court, whichever occurs first. UCA § 75-3-804(1)(a). The claimant may also sue the personal representative in a court of competent jurisdiction, if action is timely brought within the claims period. UCA § 75-3-804(1)(b).

(1) General Effect. The commentary to the UPC states that

> The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706. Uniform Law Comments to UPC § 3-804.

(2) Limitations Effect. However, under UCA § 75-3-802, the filing of a claim is, for limitations purposes, the equivalent of commencement of a proceeding on the claim.

(3) Specificity Required. As stated in the case of *In re Estate of Uzelac*, 114 P.3d 1164 (Ut. App. 2005),

> the written statement of claim must at least describe "the general nature of the obligation," as measured by the "notice pleading standard" under Rule 8 of the Utah Rules of Civil Procedure. *Quinn v. Quinn*, 772 P.2d 979, 980 (Ut. App. 1989) (quotations omitted) (citing *Dementas v. Estate of Tallas*, 764 P.2d 628, 630 (Ut. App. 1988)). Merely providing the PR with a copy of the Agreement, which all parties have always agreed is binding, without explaining how the Agreement had been breached or the amount she [decedent's wife] was claiming as a creditor under the Agreement, does not begin to satisfy the requirements of notice pleading.

(4) Pending Case. No claim needs to be presented with respect to matters in proceedings against the decedent at death. UCA § 75-3-805. However, as noted below in section 3 relating to litigation issues, the substitution of parties' rules under applicable rules of procedure would apply. See Ut. Rul. Civ. Proc. 17, 25.

vi. Allowance of Claims. Claims not disallowed in 60 days are assumed allowed, but the personal representative is free to change an allowance to a disallowance. UCA § 75-3-806. This prevents unnecessary lawsuits by claimants unsure where they stand–their claims are basically allowed unless they are notified otherwise. But since the personal representative can change the allowance, no harm is created by the assumption.

(1) Claims Filed with Court. The personal representative may not know of the claim if it is filed directly with the court. Naturally, before paying claims and distributing assets, the court records should be checked.

(2) Allowance by Court. Either the personal representative or the claimant may ask the court to determine the allowance of a claim. UCA § 75-3-806(2).

vii. Disallowance of Claims. The claimant must commence a proceeding within 60 days after the mailing of notice of disallowance. UCA § 75-3-804(2). However, the personal representative or court may allow additional time with respect to contingent or unliquidated claims, but not beyond the expiration of any limitations period.

viii. Stay of Claims. Unsecured claims must be presented through the probate administration process after a personal representative has been appointed. UCA § 75-3-104. Creditors may seek such an appointment 45 days after decedent's death. UCA § 75-3-203(1)(f). Secured creditors may enforce claims against security, but any deficiency must be brought through the claims process. UCA § 75-3-104. Also, executions and levies on judgments against the decedent or personal representative are prohibited. UCA § 75-3-812. However, this Section does not prevent security interest or lien enforcement, presumably including judgment liens. With respect to taxes, in a bankruptcy or receivership or other case in which a court holds custody to assets, the Service is restricted from levying on assets in the custody of the court until a levy would not interfere with the work of the court or the court consents; this policy presumably also would apply to assets subject to probate administration. See Regs. § 301.6331-1(a)(3); *U.S. v. Augspurger*, 452 F. Supp. 659 (DC NY1978) (property levied on before death was not in the custody of the probate court).

ix. Payment of Claims. After the earliest time under UCA § 75-3-803, the personal representative is to commence paying allowed claims in priority

order (see UCA § 75-3-805), taking into account family allowances and exemptions. UCA § 75-3-807(1).

(1) Informal Payment. Claims which are owing and not barred but have not been formally presented may still be paid, but if another creditor with an allowed claim is injured, the personal representative becomes personally liable for negligence or willful fault or for failure to obtain security for refund of an early payment. UCA § 75-3-807(2).

(2) Interest. Allowed claims continue to bear interest at the contract rate where there is a contract. Otherwise, unless otherwise provided in a judgment, they bear interest at the legal rate (see UCA § 15-1-1(2) - 10% per year) starting six months after decedent's death. UCA § 75-3-806(4). See, however, *Fuller v. Bohne*, 392 P.3d 898 (Ut. App. 2017) (tort like claims accrue prejudgment interest at the lesser judgment rate).

(3) Interest on Pecuniary Devises. Similarly, a pecuniary devise bears interest one year after the first appointment of a personal representative until paid. UCA § 75-3-904. UCA § 15-1-1 provides that the legal rate is 10% per annum.

Does this same rule apply to trusts? For example, could UCA § 75-7-111 which applies to trusts the rules of construction applicable to wills and other governing instruments, act to make 75-3-904 apply to trust pecuniary gifts? UCA § 75-3-904 is not a rule of construction; it is in a part of the probate code dealing with rights on distribution, not with the construction of instruments. Thus, UCA § 75-7-111 would not bring UCA § 75-3-904 into effect for trusts. However, UCA § 15-1-1 could well apply by its own terms independently of UCA § 75-7-111. The rate might not be 10% if the matter is treated as relating to a tort type proceeding (e.g., breach of fiduciary duty) under *Fuller v. Bohne*, 392 P.3d 898 (Ut. App. 2017). However, where a pecuniary devise is payable, the argument for the UCA § 15-1-1 rate becomes stronger because the obligation is much more like a debt, at least after a reasonable time has gone by. A reasonable time is not necessarily a year, but a year's time frame, by analogy, would be a good starting point for determining the reasonableness of the time.

(4) Deductions. Note that uncertain or contingent claims are (with some exceptions) generally deductible for estate tax purposes under IRC § 2053 only when they are actually paid. See Regs. § 20.2053-1 effective for decedents dying after October 19, 2009. A protective claim for refund filed before the tax refund limitations period expires may be needed to protect the deduction.

(5) Allowances and Exemptions. A family allowance (up to $1,500 a month, $18,000 lump sum for 2009 and earlier, $2,250 and $27,000 respectively for 2010, indexed after that) for a year may be set and paid by the personal representative without court approval; this benefits the surviving spouse or supported

minor children not residing with the surviving spouse), homestead ($15,000 for 2009 and earlier, $22,500 for 2010 and indexed after that; this benefits the surviving spouse, and if none, minor children or other dependent children), and exempt property (assets up to $10,000 for 2009 and earlier, $15,000 for 2010 and indexed after that; this benefits the surviving spouse and if none, children even if adults), in that order, as priority amounts from the decedent's estate. UCA § 75-2-401 *et seq*.; indexing at UCA § 75-1-110 (for amounts, see http://www.utcourts.gov/legal/price_index.html).

x. Reporting to Creditors. Beneficiaries should have more rights to information than do creditors. The personal representative acts for the beneficiaries' benefit but is generally opposed to the interests of the creditors. However, the creditors can enforce their claims and require that they be paid in priority order (UCA § 75-3-807) and thus the personal representative has some duty toward them; but ordinarily creditors are entitled to payment of their claims from available funds (UCA § 75-3-807), not to full information about the internal affairs of the estate. Under UCA § 75-3-705 an inventory must be supplied to interested persons who request it (including creditors; see UCA § 75-1-201(24)). No further reporting is statutorily required by a personal representative to creditors other than under UCA § 75-3-707 a supplement to the inventory (stating as of date of death assets and values) may be required. If an accounting is filed with the court, creditors will be able to see it, but if just provided to beneficiaries and not filed, there is no reason creditors should be automatically able to see the accounting. Unless there is some reason to believe they will not be paid in full, there is no reason creditors should be entitled to further information. Presumably, if not paid in full, creditors could request what assets are available and what other creditors have allowed claims since this information would affect their priority to payment; there is no statutory provision directly about this information, but it makes sense they could request such information to assure proper payment under the statutory priorities. Creditors who have cause to believe they are being abused could request bond under UCA § 75-3-605, or could under UCA § 75-3-502 seek supervised administration the order for which could include broader reporting if required by the court. Or they could under UCA § 75-3-1001 request an order for complete settlement of the estate, and again this might trigger broader information reporting. If a creditor has cause to believe the personal representative is breaching its duties in a way prejudicial to the creditor's right to recover in full (for example, dissipating assets, making wrongful distributions, failing to seek recovery of assets needed to get the creditor paid (see UCA §§ 75-3-709, 75-6-107, 75-7-505) it could bring a proceeding for removal of the personal representative, for restraining the personal representative, for personal liability, or for other relief, and this could lead to a discovery request under the Utah Rules of Civil Procedure for more information relevant to the performance of the personal representative. See UCA §§ 75-3-105, 75-3-607, 75-3-611.

d. Postdeath Claims Against the Estate. Claims arising after death are subject to special procedures under the Probate Code. There is no publication or

providing of notice as with predeath claims, but there are rather short limitations periods which apply.

i. Limitations - Generally. The limitations periods for claims arising after death against the estate are, under UCA § 75-3-803(3):

> (a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or
>
> (b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a) [which is one year after the decedent's death].

ii. Limitations - Special Situations. However, UCA § 75-3-803(4) provides that:

> Nothing in this section affects or prevents:
>
> (a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;
>
> (b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or
>
> (c) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

The liability insurance exception to the time limitation on claims against a decedent's estate which arose before decedent's death does not permit a claimant to sue a tortfeasor decedent directly, rather appointment of a personal representative is still necessary. *Berneau v. Martino*, 223 P.3d 1128 (Utah 2009). After all, courts are not supernatural and, as stated in *Berneau*, "Courts do not have personal jurisdiction over deceased persons. *Ramirez v. Lembcke*, 191 Or. App. 70, 80 P.3d 510, 512 (Or.Ct.App.2003)."

iii. Policy Regarding Limitations. The policy of the short limitations period is described in the commentary to the UPC:

> Sub-paragraph (b) [to 3-803(3) relating to claims arising at or after death] was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under Section 3-808 a personal

representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Uniform Law Comments to UPC § 3-803.

e. Effect of Limitations. The UPC commentary provides a helpful analysis of the effect of the time limitation for claims.

i. One-year Period. The commentary states with respect to the one-year period (applicable to predeath and postdeath claims unless a shorter limitation applies):

> The Joint Editorial Board recognized that the new bar running one year after death may be used by some sets of successors to avoid payment of claims against their decedents of which they are aware. Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed to be unlikely, however, for unpaid creditors of a decedent are interested persons (Section 1-201(20) [UCA § 75-1-201(24)]) who are qualified to force the opening of an estate for purposes of presenting and enforcing claims. Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small. Uniform Law Comments to UPC § 3-803.

ii. Nonclaims Period. The commentary also describes the effect of the nonclaims period.

> Note, too, that if there is no publication of notice as provided in Section 3-801(a), the giving of actual notice to known creditors establishes separate, 60 days from time of notice, non-claim periods for those so notified. The failure to publish also means that no general non-claim period, other than the one year period running from death, will be working for the estate. If an actual notice to a creditor is given before notice by publication is given, a question arises as to whether the 60 day period from actual notice, or the longer, [90 days] from publication applies. Subsections 3-801(a) and (b), which are pulled into Section 3-803(a)(2) by reference, make no distinction between actual notices given before publication and those given after publication. Hence, it would seem that the later time bar would control in either case. Uniform Law Comments to UPC § 3-803.

f. No Administration. If there is no administration of an estate, successors take subject to all charges incident to a possible future administration,

including claims of creditors and of spouse and children for allowances and of others as the result of abatement, retainer, advancement, and redemption. UCA § 75-3-901. Ultimately such claims are ordinarily barred three years after death. See UCA § 75-3-1006. However, in extraordinary circumstances, tolling may apply to allow the later appointment of a personal representative. *Berneau v. Martino*, 223 P.3d 1128 (Utah 2009) (decedent injured a motorist in an accident then died of unrelated causes; no administration or appointment within time limits, but tolling allowed a later appointment as necessary to pursue motorist's claim which was brought without knowledge of the death within normal tort limitation period). In the case *Nupetco Assocs., LLC v. Dimeo (In re Estate of Strand)*, 281 P.3d 268 (Ut. App. 2012) the Court of Appeals believed that the court's continuing authority in the determination of property rights in intestacy after the three years allowed the court to appoint a personal representative at least where "the probate court is unable or does not have sufficient information to effectuate the distribution of property." However, a full personal representative is not necessary for this function, as the parties themselves, and if necessary a special master or similar appointee, could and should fill the knowledge gap, as in any other quiet title or partition litigation.

i. Creditors. Creditors of decedent need to seek an appointment of a personal representative (UCA § 75-3-104) within the three years (with some exceptions) of decedent's death, the period generally allowed for appointment. UCA 75-3-107. Such an appointment with the issuance of letters is necessary for an administration in which claims may be presented. UCA § 75-3-103. The personal representative then asserts claims against successors to recover assets. Without an administration, a successor will not likely have clear title for at least these three years.

ii. Late Appointment and Late Claims. Does the provision allowing the court in its discretion to make an appointment of a personal representative after three years for a fully intestate estate (no will is probated) result in making later creditor claims possible? UCA § 75-3-107(4)(b) (discretionary appointment after three years). Appointing a personal representative with full power pulls in provisions allowing the PR to deal with claims, family allowance etc. Can claims be brought against the estate? Predeath claims presumably have already been barred under UCA § 75-3-803(1) against the estate and heirs (one year of death as to predeath claims). How about claims against heirs who are not distributees since they did not take from a personal representative (UCA § 75-1-201(13) (definition of "distributee")) and thus are not covered by the limitations on claims against distributees? Does the title of the heirs as tenants in common become questionable? To solve these questions, UCA § 75-3-107(4)(b) (amended in 2018) now provides that where there is a late appointed personal representative, the following may not be presented against the estate: (i) a homestead allowance; (ii) exempt property; (iii) a family allowance; (iv) a support allowance; (v) an elective share of the surviving spouse; and (vi) a claim other than expenses of administration.

iii. Use of Will as Evidence. However, under UCA § 75-3-102 a nonprobated will may be used as evidence of a devise (which may relate to real or personal property; see UCA § 75-1-201(10)) to prove title if there is no court proceeding relating to succession or administration and if the devisee possessed the property in accordance with the will or no one else claimed the property during the time for proceedings. *Ellsworth v. Huffstatler*, 385 P.3d 737, 742 (Ut. App. 2016).

An exercise by will of a power of appointment does not require the probate of a properly executed will unless the granting instrument requires this. UCA § 75-10-304(2).

iv. Determination of Heirs. After three years, it is generally too late to institute appointment proceedings whether formal or informal, and thus no administration is possible (absent a discretionary appointment under UCA § 75-3-107(3)(b) as described above). What remains is a determination of heirs. UCA § 75-3-107. The determination is a formal proceeding. It produces an order that there is no will (the presumption that there is none becomes final; this is true even under UCA § 75-3-107(3)(b) with a late appointed personal representative for an intestate estate), who the heirs are, and what the heirs shares of property are. The petition should specify the particular assets of substance and who gets what share of which of those assets. Real estate should be of particular concern and should be specified in the order by legal description to allow later recording of the order. (Bear in mind that real estate in other states will be governed by the intestacy law of the state in which it is located, not the state of decedent's domicile, and thus separate proceedings in that state may very well be required.) If the intestate shares are established in part by value (*e.g.*, where the surviving spouse is not the parent of all children of the decedent) where the heirs disagree as to whom particular items should pass (or in the event of other such disputes over assets), a partition under UCA § 75-3-911 may be necessary.

g. Administration, Distribution, and Closing. Where an administration occurs, distribution or closing triggers some additional rules.

i. Generally. Subject to the time limit rule of UCA § 75-3-1006 (described below) an unbarred claim may be prosecuted (including through a personal representative seeking recovery on behalf of the estate) against one or more distributees, with the distributees having rights of contribution against each other. UCA § 75-3-1004. The claim could also be brought by a creditor against a former personal representative under UCA § 75-3-1005. See also UCA § 75-3-104. Such contribution rights among distributees may be lost if notice to others is not provided. The distributees' liability would not extend to exempt property, homestead, or family allowances or beyond the value of the distribution at the time of distribution. If distributees are protected by an adjudication that what the distributees receive has been discharged of all creditor claims, the creditors should have no claim against them.

ii. Limitations. Closing the estate causes some special limitations to become effective.

(1) Against Personal Representative. Unless previously barred by adjudication and except as continued under a closing statement, claims for breach of fiduciary duty against the personal representative are barred after six months of the filing of the closing statement. UCA § 75-3-1005. There is, however, an exception under that Section for claims for fraud, misrepresentation, or inadequate disclosure relating to the settlement of the decedent's estate. Where the exception applies, the normal limitations periods would apply. For example, the limitations period for fraud in connection with a probate code proceeding (other than fraud against the decedent during life affecting disposition of the estate) is three years after discovery, but not exceeding five years after the fraud, for bringing action against persons not perpetrating the fraud (*e.g.*, against persons benefitting from the fraud, whether or not innocent, but not against a bona fide purchaser). UCA § 75-1-106. Similarly, if there is no closing of the estate, the normal limitations as to a fiduciary breach claim would apply to claims against a personal representative. The usual limitation period for breach of a fiduciary duty is four years. UCA § 78B-2-307(3) (formerly 78-12-25(3)); see also, *Jensen v. Allred*, 182 P.3d 337 (Ut. 2008) (generally discussing possible tolling for concealment by fiduciary).

(2) Against Distributees. Except for fraud, unless previously adjudicated or otherwise barred, claims by a claimant against a distributee who may be liable for a claim are barred one year from decedent's death, and claims by the personal representative or on behalf of creditors, heirs, or devisees who have rights to recover property improperly distributed or improperly paid to a claimant are barred at the later of three years from decedent's death or one year from distribution of the improperly distributed property. UCA § 75-3-1006. A distribution may be improper even if authorized at the time, e.g., under an informally probated will when a later probated will shows up. Bona fide purchasers are protected, but others who succeed to the asset are not protected and may be required to return it. UCA § 75-3-910; see also UCA § 75-1-106 (limitation for fraud 3 years from discovery but against a non-perpetrator, not more than 5 years after the fraud).

The wrongfully treated creditor, heirs, or devisees generally assert the claim for recovery by the estate through the personal representative, not directly against the recipient of the property (presumably if there is still a personal representative serving, i.e., before full final distribution and closing of the estate). UCA §§ 75-3-908 and 909. The personal representative will be liable for an erroneous distribution, except where acting in reliance on an assumption regarding testacy which has not been adjudicated. UCA § 75-3-703(2). The recovery by the personal representative from the distributee would include the improper distribution valued at distribution, plus its income since distribution, if the distributee still has the property, or if not, the income and gain received by the distributee. UCA § 75-3-909. Note that this is different from a claim by a creditor against the distributee where the measure of

recovery will not extend to family allowances, homestead, or exempt property or beyond the value received. See UCA § 75-3-1004. The same limitations discussed above, under UCA § 75-3-1006, apply here as well to recovery by the personal representative against distributees.

iii. Beneficiaries Not Located. The unclaimed property statute would apply to the shares of heirs or beneficiaries who can't be identified or who can't be located. UCA 67-4a-101 *et seq.*, particularly §§ 67-4a-103 and 209. These shares may need to be deposited with the state of Utah, or with a state in which an heir or beneficiary had a last known residence.

iv. Closing Orders. Subject to appeal (typically within 30 days of the order; see Ut. Rul. App. Proc. 4) and subject to vacation (under UCA §§ 75-3-412 or 75-3-413), a formal testacy order is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to whether there is a valid will or as to the determination of heirs. UCA § 75-3-412(1). Grounds for vacation of an order may be for a later will of which persons were unaware and were unaware of the proceeding and received no notice of the proceeding except by publication, or where an heir was omitted where persons were unaware of their relationship to decedent or of the decedent's death and were given no notice of the proceeding except by publication, or where the finding of death was not preceded by notice sent to the decedent's last known address and by a search under UCA § 75-3-403(2) (where there is doubt of the death; note that even with notice and search, if the person is not dead the person may be able to recover his or her property or its proceeds under UCA § 75-3-412(2)). UCA § 75-3-412(1). These timing rules apply:

(1) For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. UCA § 75-3-413. Otherwise, the petition to vacate under 75-3-412(1)(a) or (b) must be brought before the earlier of these times:

(2) If a personal representative was appointed, the petition to vacate is due before any order approving final distribution, or if closed by statement, six months after filing the closing statement. UCA § 75-3-412(3)(a). *In re Estate of Womack*, 2016 UT App 83, 372 P.3d 690 (Ut. App. 2016) (despite being captioned as a petition to interpret a prior closing order, the petition seeking additional wording in order construing will was subject to the six-month time limit on a petition to vacate).

(3) Whether or not a personal representative has been appointed, the petition must be filed before the three year limit on original probate of a will expires under UCA § 75-3-107. UCA § 75-3-412(3)(b).

(4) In any event the petition must be brought twelve months after the entry of the order. UCA § 75-3-412(3)(c).

h. Obtaining Nonprobate Assets. The personal representative has some rights to obtain nonprobate assets to use to pay creditors and other matters such as family allowance, exempt property, and homestead; and creditors may have some direct rights, as well. The following are in addition to the ability of the personal representative to seek estate tax contribution reimbursement (discussed below) and the power under UCA § 75-3-709 to set aside voidable transfers, such as under the fraudulent transfer law.

i. Multiparty Accounts. Under UCA § 75-6-107, a multiparty financial account will not be effective against the estate of a deceased party as to sums needed to pay debts, taxes, expenses of administration, including statutory allowances for a surviving spouse, minor children, and dependent children. These are "accounts" as defined in UCA § 75-6-101(1) and relate to bank, credit union, or similar financial deposit accounts (*e.g.*, checking and saving accounts), held in joint, payable on death (P.O.D.), or trust "multiple-party" form as defined in UCA § 75-6-101(5). Other assets held in such a form of joint tenancy, P.O.D., etc. would not be covered by this provision. See the definition of "financial institution" in UCA § 75-6-101(3).

ii. Revocable Trust. Under UCA § 75-7-505(3), nonexempt property of a revocable trust of a decedent settlor is subject to claims of the decedent's creditors, costs of administration, funeral expenses, statutory allowances to a surviving spouse and children, to the extent the probate estate is inadequate.

(1) The revocable trust could give notice to creditors in manner quite similar to that of the personal representative in order to cut off claims of creditors of a deceased settlor of the trust against the assets of the trust. See UCA §§ 75-7-508 through 519.

(2) A notice by the trustee regarding claims by creditors against the settlor can cut off the claims against both the trust and the probate estate. UCA § 75-7-508(5). A probate notice is not explicitly stated to cut off claims against the trust under UCA § 75-3-801. It is important that the trust notice cut off estate creditor's too because a later probate estate could come into being, and this provision eliminates the argument that the creditor should get a second bite of the apple. However, without a probate estate, creditors of the decedent can't get at trust assets. See UCA § 75-7-505 (assets available where probate estate insufficient) and UCA § 75-3-104 and 103 (personal representative appointment needed for an administration in which claims can be brought and the personal representative asserts asset recovery issues). Thus, if there is a probate, the probate notice to creditors is sufficient to cover both, since the creditors of the decedent settlor, have no separate direct access to trust assets; if they are cut off from the estate, this should protect the trust, too, but if they file their claims on the estate, the

personal representative can to the extent the estate is not sufficient, seek access to the trust assets.

(3) Does it make a difference if the trustee of the revocable trust signed the agreement binding the trust directly? Trusts are now generally treated as a quasi-corporation for creditor matters and can have separate liabilities. See UCA § 75-7-1010. In such an event, the trust would not have the benefit of UCA § 75-7-508 (the notice provision) or of UCA § 75-7-509 (the one year of death trust limitation, similar to the one year of death probate limitation) at all because those sections deal with cutting off claims of the settlor's creditors not those of the trust itself. It is true that UCA § 75-7-508(5) says the notice is "valid against any creditor of the trust" and against any creditor of the estate of the settlor, but this is ambiguous. In the context of UCA § 75-7-508 et seq., all of which sections deal with settlor's creditors, this seems to mean "against any indirect claimant against the trust by reason of a claim against the settlor". It does not seem to affect direct claims on obligations incurred by the trust itself rather than through obligations of the deceased settlor. If both the settlor and the trust itself are obligated, the probate or the trust notice should cut off claims against the probate estate, leaving the trust creditor to look only to the trust assets themselves (which could be substantial, however, such as with a fully funded revocable trust).

iii. Retained General Powers of Appointment. UCA 75-7-505(2) allows creditors of an irrevocable trust (other than an asset protection trust) to reach the maximum amount the settlor could reach. Thus, as to a retained general power whether exercisable during life or at death by will, the creditors can reach that amount of assets whether or not the power is exercised. However, under UCA § 75-10-501, general powers created by the holder of the power are subject to creditor claims where the power has not been irrevocably exercised. The property is subject to the claims of the creditor of the holder if the power is exercisable during life, or to the claims of the creditors of the holder's estate if the power is exercisable at the holder's death and the holder's estate is insufficient to satisfy the claim. UCA § 75-10-501(4). (Special rules apply to inclusion of powers of appointment in the augmented estate for determining the spousal elective share; for that purpose, a retained (not granted) general power exercisable alone is included; general powers granted by a third person, or limited powers granted by a third person are not. See Uniform Probate Code Official Comment to 2-205, Example 1. Retained special powers may be included for this purpose as retained interests. See UCA § 75-2-205(2)(a) and (b).)

iv. Granted General Powers of Appointment.

(1) Former Law. As to a third party granted power of withdrawal (i.e., a general power), during the period the power may be exercised the holder is no longer (after the Uniform Powers of Appointment Act took effect in 2017) treated as the grantor of a revocable trust under former UCA § 75-7-505(2)(a) (see also the definition of a power of withdrawal in 75-7-103(1)(g) which includes most general

powers). Under former law, if the power was exercisable during life then, under former 7-505(1)(a), the holder's creditors could have reached the property subject to it whether or not exercised. If the power was exercisable only by will at death the creditors' rights were less clear. Looked at one way, although the holder is treated as a settlor of a revocable trust, the power of revocation dies with such a settlor, so there is no revocation right to trigger access by creditors. Another view could be that it is treated as a grant to a revocable trust just prior to death and thus the creditors could get access; this seems weak because the will can't speak until death. The former view is the better view. If that former view is the case, a granted general power that is unexercised should not create access by creditors after the death of the holder of the power. On the other hand, a power actually exercised at death remained an open issue because it could be treated as taking the property subject to the power and thus could subject it to creditors (the Second Restatement position). Restatement (Second), Property, § 13.4. The Restatement (Third) of Property § 22.3 would have even unexercised testamentary general powers subject to creditors of the power holder. The Restatement Second view seems the better view.

(2) Utah Uniform Powers of Appointment Act. Effective May 9, 2017 as to all powers whenever created (with an exception for judicial proceedings prior to that date where application would substantially interfere in the effective conduct of the proceeding or prejudice a party, and with an exception for actions done before that date) (UCA § 75-10-603), powers granted by a third person, whether or not a general power, do not subject the property to creditors of the donee (holder) of the power unless the power is exercised. UCA § 75-10-502(1). Creditor claims are governed by the law of the donor's domicile at the time of the creation of the power. UCA §§ 75-10-103(3) and 502(2). Powers of withdrawal from a trust are treated during the time the power may be exercised as a presently exercisable general power to the extent of the property subject to it. UCA § 75-10-503(1). The lapse, release, or waiver of the power of withdrawal is treated as a presently exercisable power only to the extent in excess of the greater of the amounts of the gift tax annual exclusion (IRC § 2514(e)), or the $5,000 or 5% exception to the general power of appointment rule (IRC § 2041(b)(2) or IRC § 2503(b)).

v. Securities in Beneficiary Form. UCA § 75-6-310(2) provides that the rules applicable to securities held in beneficiary form do not limit the rights of creditors of security owners against beneficiaries or transferees. The scope of this is not clear as to whether it might make passage on death subject to decedent's creditors where the probate estate is inadequate; the better view seems to be that it does not (but fraudulent transfer principles may apply).

vi. Nontestamentary Passage on Death. UCA § 75-6-201(2) provides that nothing in that section, which deals with provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, or any other form of written instrument effective as a contract, "limits the rights of creditors under other laws of this state." The scope of this

is unclear as to whether it may make passage on death subject to the creditors of decedent where the estate is inadequate; the better view seems to be that it alone does not (but fraudulent transfer principles may apply). However, if the right to name a beneficiary is treated as a retained general power of appointment, this provision would not stand alone and creditors could have the rights described above (at 1.h.iii.) relating to such powers. See, by way of analogy, UCA § 75-2-201(5) which, for purposes of determining the spousal elective share, includes as a general power a right to change a beneficiary designation. As to insurance proceeds, UCA § 78B-5-505(1)(a)(xii) exempts from execution by creditors the proceeds of life insurance on the decedent's life, provided the policy has been in existence for a continuous unexpired period of one year and is payable to the decedent's spouse or children or a trust of which they are the beneficiaries. This provision seems to imply that other proceeds (from a short term policy or payable to some other beneficiary) may be subject to creditors. But this could narrow the scope of creditor access if the right to change beneficiaries is treated as a retained general power.

vii. Beneficiary Changes by Will. UCA § 31A-22-413(1)(b) provides that UCA § 75-6-201(1)(c) applies to allow designations of beneficiaries of life insurance (or of a pension plan or note or various other instruments effective as contracts) by will or by separate writing. This might arguably bring the proceeds into the estate; if so, how the beneficiary designation is made (is it treated as a specific bequest?) could affect the priority of assets used to meet claims pursuant to the abatement rules discussed further below at 2. c. However, it could also be treated simply as if it were a life time beneficiary designation; this seems to be the intent of the statute which says the designation is "considered nontestamentary" and then says the designation in "the instrument or a separate writing, including a will" passes the property which is the subject of the instrument to the person designated.

viii. Real Property Joint Tenancy and General Creditors. The interest of a deceased joint tenant cannot be reached by his or her creditors after death, but his or her creditors can reach the interest in joint tenancy property during life. CJS Joint Tenancy §§ 2 and 37; Am. Jur. Cotenancy and Joint Ownership § 8; *Toma v. Toma*, 163 P.3d 540 (Okla. 2007). See UCA § 78B-5-512 (creditor right to levy on property right of a joint tenant, and to severance, partition, and sale). This is based on the theory that the surviving tenants already had the entire interest and the decedent's rights simply died with the decedent.

ix. Responsibility of Surviving Joint Tenants and Beneficiaries of Life Insurance for Income Taxes. With respect to income taxes, assuming no joint liability of a surviving spouse under a joint return, perhaps because the income was not subject to a joint return (unmarried joint tenants, for example) or arose after the decedent's death (in any event, the decedent's estate itself may be liable, subjecting to the tax the property of the estate or the property which may be reached by the personal representative to use to pay claims, such as joint bank accounts or revocable trusts), the time of assessment and application of the general tax lien makes a big difference for joint

tenants or insurance beneficiaries. If not yet assessed and no general tax lien has arisen, the surviving joint tenant or insurance beneficiary would not be a transferee subject to liability for income tax (a different rule applies for estate tax as discussed further below at 4.k.). *Tooley v. Com'r*, 121 F2d 350 (9th Cir. 1941); *Irvine v. Helvering*, 99 F2d 265 (8th Cir. 1938); *Fecarotta v. U. S.*, 154 F. Supp. 592 (D. Ariz. 1956); see also, *Com'r v. Stern*, 357 US 39 (1958) (state law governs beneficiary liability if no tax lien applies, and if life insurance proceeds are under state law exempt from creditors, the beneficiary is not a transferee liable for the tax). If the general tax lien has already arisen before death, joint interests are subject to it, so the joint interest would be subject to the decedent's tax liability (*Shaw v. U. S.*, 331 F.2d 493 (9th Cir. 1964)) and the lien may be foreclosed under IRC § 7403 ("any right, title or interest") against the entire property (*U.S. v. Kocher*, 468 F.2d 503 (2d Cir. 1972); *Washington v. U.S.*, 402 F.2d 3 (4th Cir. 1966); *U.S. v. Trilling*, 328 F.2d 699 (7th Cir. 1964)) and the value of the rights in the life policy before death would be subject to the lien (but not the full death benefit, because the excess over that value is not "property or rights to property" of the insured, to which a tax lien could have attached. *U. S. v. Bess*, 357 U.S. 51 (1958)).

i. Effect of Death on Guardians and Conservators and Agents. The death of the ward ends the guardian's authority but not the guardianship itself. UCA § 75-5-306. The guardian remains obligated for prior acts and to account for the ward's assets. The guardian must report to all to persons requesting notice who are not restricted from associating with the ward if the ward is expected to die in 30 days or if the ward does die. In addition to death, notification to such requesting persons must be made of admission of the ward to a hospital for more than 3 days, of admission to a hospice program, and of arrangements for the disposal of the ward's remains. UCA § 75-5-312(3)(f)(ii) and (iii).

On the death of the protected person, the conservator may account to the personal representative (or to the court) (UCA § 75-5-419; however, RJA 6-501(9)(A) appears to contemplate a final accounting always being filed with the court and served on interested persons). Moreover, if no one is appointed personal representative and no application is pending within 40 days of death, the conservator may apply for the powers of a personal representative; if the powers are granted the conservator's letters are endorsed to note that these powers and duties have been acquired. UCA § 75-5-425(5).

A power of attorney is automatically durable unless it expressly provides it terminates on the principal's incapacity. UCA § 75-9-104. A power would ordinarily terminate on the death of the principal. However, a power may remain effective until the agent, acting in good faith, has knowledge of the death of the principal. UCA §§ 75-9-110(1)(a) and (4).

2. **Claim Priorities and Personal Representative Responsibility**. Claims include predeath obligations and liabilities and those arising at or after death such as funeral or administrative claims but not estate or inheritance taxes. UCA § 75-1-201(6).

Once allowable claims have been determined, they need to be categorized, and if not all can be paid, payment priorities need to be determined. Some matters may have been due prior to death, or may become due at or after death through payable on death provisions in the obligation, or may arise after death. The priorities are listed at UCA § 75-3-805(1). Claims which are due receive no priority over claims not yet due. UCA § 75-3-805(2). Rather, each claim in a priority class is paid pro rata. The priority is subject to federal law as to the priority of claims of the United States (see 31 USC § 3713), but the priority under the probate code has been made generally consistent with the federal priority.

Also, the priority of claims is subject to the rules relating to homestead, exempt property, and family allowance. UCA § 75-2-401 *et seq.* As to these, federal priority may apply to state law exempt property and homestead but will not apply to reasonable family allowance, funeral, and administrative expenses. See GCM 38159 (1979) (family allowance), *In re Stiles' Estate*, 126 Misc. 715, 215 N.Y.S. 134 (N.Y. Surr. Ct. 1926) (funeral), *United States v. Printy (In re Estate of Funk),* 849 N.E.2d 366 (Ill. 2006) (administrative expenses, including legal fees). Dower and curtsey rights were allowed priority over tax claims by GCM 37983; but this would not apply to a spousal elective share which is subject to the claims of other creditors of the decedent. See also Rev. Rul. 79-399, 1979-2 CB 398 (A spouse's dower or curtesy interest or statutory right has priority over a federal tax lien that arises after the taxpayer's marriage, but before the taxpayer's death, from a tax liability accruing before the marriage if, under the state law, the spouse's interest cannot be defeated by the other spouse or by a lien in favor of the other spouse's creditors).

Secured claims are entitled to their perfected security interest in collateral in the priority provided for the type of security interest involved, such as trust deeds, mechanics liens, Uniform Commercial Code Article 9 security interests, tax liens, etc. See UCA §§ 75-3-803(4)(a) and 75-3-809.

Guarantees and other contingent or unliquidated claims are still claims. Such claims which may be due at a future time or be contingent or unliquidated but which become due or certain before the distribution of the estate, where the claim has been allowed or established by a proceeding, are paid in the same manner as presently due and absolute claims of the same class. UCA § 75-3-810. The court also has authority with claimant consent, to order that the claimant of a contingent claim may be paid the present or agreed value of the claim, taking any uncertainty into account, and also has authority to order an arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation, which may include creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise. UCA § 75-3-810.

a. List of Priority Order. The result may be summarized by this list of priorities for payment by the personal representative of unsecured claims and items where priority federal taxes apply:

family allowance;
reasonable funeral expenses;
costs and expenses of administration;
debts and taxes with priority under federal law;
homestead;
exempt property;
reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him, and medical assistance if Section 26-19-13.5 applies;
debts and taxes with preference under other laws of this state;
all other claims.

Where priority federal taxes do not apply, or have been paid, homestead and exempt property would jump to the top of the list just under family allowance.

Where there is a filed federal tax lien in place, it could give the tax claim priority over funeral and administrative expenses because the lien prevails over all other interests, except for the super priority creditors of purchasers, holders of security interests, mechanics lienors, and judgment lien creditors whose interests are fully perfected at the time of filing the tax lien notice. IRC § 6323; *Estate of Simmons*, 120 AFTR 2d ¶ 2017-5109 (DC IN 2017); *Estate of Friedman v. Cadle Co.*, 2009 WL 7271206 (DC CT 2009). However, under the Internal Revenue Manual (IRM) 5.5.2.4(3), the Service "may in its discretion not assert priority over reasonable administrative expenses of the estate." This leaves a potential personal representative faced with a filed notice of federal tax lien in a position of deciding to take on the responsibility at a time when the personal representative's ability to be paid is in question.

b. Failure to Follow Priority Order. If these priorities are not followed, the personal representative may well incur personal liability. 31 USC § 3713(b); UCA § 75-3-807(2). Also, if the personal representative does not timely pay taxes, and thus penalties and interest are incurred, it could be held liable to beneficiaries for breach of duty. UCA § 75-3-916(3)(d). The federal government may assert its claim against the personal representative under federal law. Persons with standing to assert a claim for damages (UCA § 75-3-711) for breach of duty against the personal representative are any interested persons, as broadly defined (UCA § 75-1-201(24)); this may include heirs, devisees, family (children or spouse), creditors, a co-personal representative (who will be duty bound to act to prevent breach of duty; see UCA § 75-3-703(1); see *Estate v. Rothko*, 372 N.E. 2d 291 (N.Y. 1977)), and a successor personal representative.

c. Effects on Benefits. Bequests are abated in a priority order in order to allow the payment of claims, expenses, and family allowance and exemptions. Unless otherwise provided by will or other dispositive instrument, the order of abatement

is provided by statute. UCA § 75-3-902 abates assets without preference between real or personal property, in this order (pro rata in each class):

probate property not disposed of by the will
residuary devises
general devises
specific devises

(There is a separate order of abatement for the spousal elective share; see UCA § 75-2-209.)

d. Access to Nonprobate Assets for Taxes. Also, the personal representative can seek contribution from nonprobate assets to pay death taxes. Recovery by the personal representative of apportioned taxes from others receiving taxable assets is provided in UCA § 75-3-916(4) and (7). Absent a direction in the will or dispositive instrument, taxes are allocated by federal law as to a few items (IRC §§ 2206 to 2207B) and as to all other items, by state law (UCA § 75-3-916); this allocation will affect the right to require contribution from a recipient. Generally, unless otherwise allocated in the will or other dispositive instrument, assets creating a tax burden may be required to contribute toward the payment of those taxes; assets passing subject to the marital deduction or charitable deduction or otherwise subject to favorable tax treatment generally will keep the benefit of the favorable treatment (but the assets may still be subject to the estate tax lien, as described below at 4.k).

e. Personal Liability. Absent a breach of duty (see UCA § 75-3-711 on breach), the personal representative does not become personally liable for estate obligations arising before death of the decedent or during administration, except where the personal representative contracted for such liability or was personally at fault. See UCA § 75-3-808.

i. Common Law. The UPC provides quite a different rule from the prior common law rule. The prior common law rule has been described this way:

> In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (*e.g.*, taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. Uniform Law Comments to UPC § 3-808.

ii. UPC Rule. The UPC rule is designed to make the estate a quasi-corporation. See official comment to the UPC § 3-808: "This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property." Query: could corporate style alter-ego and veil piercing analysis apply in appropriate cases?

3. **Some Estate Litigation Issues**. Financially-challenged estates are prone to litigation, and solvent estates can be lightning rods for disputes among potential beneficiaries. There are a number of unusual issues which can arise in these sorts of cases.

a. Notice and Virtual Representation in Proceedings. A probate administration is in the nature of an in rem proceeding. *Barrett v. Whitney*, 106 P.522 (Ut. 1909). Notice is typically given by mail. See UCA §§ 75-1-401, 75-1-403, and 75-1-311. Petitioners in formal or informal probate or appointment proceedings consent to personal jurisdiction in all matters arising under the probate code. UCA § 75-1-311. Appointed personal representatives similarly consent to jurisdiction. UCA § 75-3-602. Trustees submit to jurisdiction by administering a trust in Utah. UCA § 75-7-202.

Typically, probate petitions are not served like summons and complaints under URCP 4. Rather the procedures under UCA §§ 75-1-401 and 75-1-403 on notice is used. Because the trustee or personal representative has consented to jurisdiction by administering the trust in Utah or by accepting the court's appointment, personal service is not needed to provide personal jurisdiction. However, if a personal judgment for money damages against the trustee is sought in an initial petition, a summons and complaint should be served under URCP 4 because probate matters are typically in rem while damage actions are in personem. Once the issue is joined (i.e., the trustee objects to the petition and the matter becomes contested) the rules of procedure begin to apply, but generally not before that. URCP 81(b). The general reference in UCA § 75-7-109(3) of the trust code to giving judicial notice under the applicable rules of procedure seems to mean that UCA § 75-1-403 (which clearly refers to both inter vivos and testamentary trusts) applies. The purpose of UCA § 75-7-109 is to distinguish judicial notice from other notices relating to trusts, such as notices from a trustee to a beneficiary.

In some states, minors, incapacitated persons, unborn persons, unascertained or unknown persons, or persons who cannot be located, may be represented by another in the action against the personal representative, so long as there is no conflict of interest. Uniform Probate Code § 1-403. This may, under the circumstances, include (i) a conservator or if none, a guardian, or if none as to a minor, a parent, or (ii) virtual representation by someone with a substantially identical interest adequately representing the interest or a court-appointed guardian-ad-litem, or (iii) a personal representative of a deceased devisee, or a trustee with an interest, may represent their beneficiaries. This

representation will bind the represented person to the order which results from the proceeding. UCA § 75-1-403(3)-(6). For trust representation see UCA § 75-7-301.

Until 2010 the foregoing virtual representation provision did not apply in Utah, but parents, guardians ad litem, conservators, or other fiduciaries, then and now, could and can waive notice. UCA § 75-1-402. Notice is normally given by the clerk by mail 10 days before a hearing, and notice by publication is provided for in certain events. UCA § 75-1-401.

b. Attorney Client Privilege. Issues may arise in probate or related proceedings concerning the fiduciary's attorney-client privilege and its effect on discovery by beneficiaries. See *Riggs National Bank v. Zimmer,* 355 A.2d 709 (Del. Ch. 1976)) (trustee sued by beneficiary); *U. S. v. Mett*, 178 F.3d 1058 (9th Cir. 1999) (ERISA fiduciary obligations of an employer may cause exception to privilege); *Becker v. Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997) (ERISA fiduciary). See also *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) (refusing to make exception to privilege for health benefit administrative company which was an ERISA fiduciary, analyzing who the "real clients" for the advice would be, and noting the fiduciary exception does not apply equally to all the various types of fiduciaries). Some courts have refused to find a fiduciary exception to the privilege. See *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Wells Fargo Bank v. Superior Court*, 990 P.2d 591 (Cal. 2000); *Murphy v. Gormon*, 271 FRD 296 (D.N.M. 2010); *Barner v. Sheldon*, 678 A.2d 717 (N.J. Super. Ct. App. Div. 1996).

The privilege does not apply to claimants through the same deceased client. Ut. R. Evid. 504(d)(2). This is a general rule of long standing. *Webb v. Webb*, 209 P.2d 201 Ut. (1949); *Anderson v. Thomas*, 159 P.2d 142 (Ut. 1945); *In re Young's Estate*, 94 P. 731 (Ut. 1908).

A trust is an entity capable of entering into attorney-client relationship and holding the privilege, and the trust holds the privilege, rather than the trustee. *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058 (Ut. 2013). The trustee generally controls the privilege; however, a charitable trust before and after a major *cy pres* modification (from religious to secular) constituted separate clients so that counsel of the trust before modification could not disclose privileged information to the trustee of the modified trust. *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058 (Ut. 2013) (however, the strong dissent by Justice Durrant is noteworthy; this case has been limited to its facts on this point by a later case which seriously criticized its reasoning, *M.J. v. Wisan*, 371 P.3d 21 (Ut. 2016). The tension between the *Snow Christensen* and the *Wisan* cases reflects an issue of concern: should the privilege stop or should it be limited in some way where a trust is seriously changed, or its assets are decanted into other trusts, or sub-trusts are established, or the personal representative distributes property to a trustee?

c. Other Special Issues. Litigation over claims relating to estates may also bring into play some special rules and issues. As discussed further at f. below, there will be a need to change parties to prior cases involving decedent. See URCP 17(a) and 25. A stay of creditors' proceedings pending appointment of a personal representative arises at death. UCA § 75-3-104.

Some special evidentiary rules apply. For example, the dead man's statute (Ut. Rul. Evid. 601(c)(1)) allows decedent's statements to be used in evidence in a claim against the estate. The hearsay rule as applied to decedent's statements has some special exceptions. See Ut. Rul. Evid. 803(3) (then existing mental, emotional, or physical condition such as intent, but not belief of prior fact to prove the fact unless relating to execution, revocation, identification, or terms of declarant's will), 803(5) (recorded recollection), 803(6) (business records), 803(8) through (15) (certain family relationship and property records and information), 804 (exceptions where declarant is unavailable, *e.g.*, by reason of death, or where the statement is a dying declaration), 807 (other exceptions where sufficient trustworthiness exists)).

Issues may arise regarding the personal representative's counsel's duties to beneficiaries. See Rules of Prof. Conduct 1.13 (relating to organizations as clients).

The Utah Rules of Civil Procedure do not apply until subsequent to the joinder of issues in a contested proceeding (URCP 81(b)) or, absent contrary provisions, such rules apply in a formal proceeding (UCA § 75-1-304). Thus, rules of discovery, appeal, etc. then apply.

d. Federal Jurisdiction Issues. Most cases involving claims against estates are heard as part of probate proceedings, but such proceedings are not necessarily the exclusive method for resolving disputes which may affect an estate, and other courts may have jurisdiction over matters, whether arising before death or after death. However, there is general limitation on federal jurisdiction over probate matters. This jurisdictional exception, like the similar domestic relations exception, has been, according to the courts, linked to the Judiciary Act of 1789. This exception to jurisdiction, however, is not broadly construed and has been limited to probating or annulling a will, administering a decedent's estate, or an attempt to dispose of the property that is in the custody or control of a state probate court. See *Marshall v. Marshall*, 547 U.S. 293 (2006) (involving the celebrity known as Anna Nicole Smith who was the widow of J. Howard Marshall; the decedent's estate claimed for defamation against the bankruptcy estate of the surviving spouse, the bankruptcy estate counter claimed for tortious interference with a prospective gift and won; the probate exception to jurisdiction did not apply.) See also, *Jones v. Brennan*, 465 F. 3d 304 (7th Cir. 2006); *Gustafson v. zumBrunnen*, 546 F.3d 398 (7th Cir. 2008); *Lefkowitz v. Bank of New York*, 528 F. 3d 102 (2d Cir. 2007); *Wisecarver v. Moore*, 489 F. 3d 747 (6th Cir. 2007); *McAninch v. Wintermute*, 491 F. 3d 759 (8th Cir. 2007); *Three Keys Ltd. v. SR Utility Holding Co.*, 540 F.3d 220 (3d Cir. 2008).

The wills, powers of attorney, health directives of persons in the military can be protected by federal law so they are valid in every state if executed as described in the federal rule even if there would be a basis for a challenge to the formality of execution under state law. 10 USC §§ 1044 et seq.; as to wills, see 10 USC § 1044d.

e. Claims of the Estate and Others. Utah has a survivorship statute for claims relating to injuries not resulting in death providing for passage of these claims to the estate. UCA § 78B-3-107 (formerly 78-11-12). The personal representative has the same standing to sue as had the decedent. UCA § 75-3-703(3).

Utah also has a wrongful death act providing for a new claim for the direct benefit of specified statutory beneficiaries (called "heirs" under the act, although this is a misnomer) rather than for the estate. UCA §§ 78B-3-102, 105, 106 (formerly 78-11-6, -6.5, and -7). The Personal Representative (including from February 7, 2008, a "presumptive personal representative" for this purpose under UCA § 78B-3-106.5) or the guardian serving prior to death may assert the wrongful death claim, but does so only for the benefit of the specified statutory beneficiaries. See, UCA § 78B-3-106 (formerly 78-11-7). A sole heir and personal representative can even sue herself in her individual capacity. *Bagley v. Bagley*, 387 P.3d 1000 (Ut. 2016). However, only one action is allowed. See, *Switzer v. Reynolds*, 606 P.2d 244 (Utah 1980) (one action); *Overturf v. Univ. of Ut. Med. Center*, 973 P.2d 413 (Utah 1999) (one action only, but a separate action is allowable against a tortfeasor who cooperates, colludes, and connives with an heir to exclude another heir from recovery).

There are also separate worker's compensation rules to deal with work place accident benefits under the Workers Compensation Act. This Act benefits only statutory "dependents." UCA §§ 34A-2-414 (death) and -423 (survivorship of injury claim). *Morrell v. J & M Constr. Co., Inc.*, 635 P.2d 88 (Utah 1981) (mother, who is not a statutory dependent under worker's compensation act, nevertheless may not bring wrongful death action against employer since workers' compensation act provided exclusive method of recovery).

Any recovery for the medical expenses arising from wrongful death or other claims may be subject to recovery by Medicare which as a secondary payer will claim subrogation rights where it has made conditional payments, and claim a super priority lien to aid its collection. See 42 CFR § 411.24, *U.S. v. Geier*, 816 F. Supp. 1332 (W.D. Wis. 1993). It may be important to have the wrongful death damages of the statutory plaintiffs kept quite separate from any claim of the estate for medical expenses, and the wrongful death plaintiffs may want to make very clear they are not claiming medical expenses. See *Denkas v. Shalala*, 943 F. Supp. 1073 (S.D. Iowa 1996); *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010); Galis and Keene, Protecting Your Client's Wrongful Death Settlement Proceeds from Medicare, The Brief, Fall 2013, Vol. 43, No. 1, p.10.

Subrogation claims of insurers generally are to be made in the name of the insured or injured person unless a statute authorizes direct claims in the name of the insurer (such as the workers' compensation act does), at least where the insurer has not already fully indemnified the insured so no recovery remains for the insured. The injury claim is treated as a single claim and defendants should not be made to defend multiple actions over the matter. *Wilson v. Educators Mutual Insurance*, 368 P.3d 471 (Ut. App. 2016) (construing UCA § 31A-21-108) (*cert. granted,* 379 P.3d 1182 (Table) (Ut. 2016))

f. Pending Claims. On the death of a party to existing litigation, the substitution of parties' rules under applicable rules of procedure would apply. See Ut. Rul. Civ. Proc. 17, 25. Absent a motion for substitution made within 90 days of suggestion of death on the record, the action will be dismissed as to the deceased party. Ut. Rul. Civ. Proc. 25(a)(1). See *Connelly v. Rathjen*, 547 P.2d 1336 (Ut. 1976) and *Stoddard v. Smith*, 27 P.3d 546 (Ut. 2001) ("A party filing a motion for substitution does not have to know the identity of the person who may be substituted when filing the motion. A party, such as the plaintiff in this case, may simply file a motion seeking to substitute the 'Personal Representative of the Estate of the Decedent' or 'John/Jane Doe.' Once the motion is made, the proper person to be substituted for the decedent may be ascertained in due course, by discovery if necessary.").

A lawyer has an ethical duty to inform the other side of the death of the lawyer's client because the attorney no longer represents the identified client and acting as if the attorney still did so is a deceitful misrepresentation. *In re Rosen*, 198 P.3d 116 (Colo. 2008) (en banc) (six month suspension); *Harris v. Jackson*, 192 S.W. 3d 297 (Ky. 2006) (bar ethics committee in error on this point, sanction avoided by reliance on ethics opinion). See Ut. Rul. Prof. Cond. 4.1. This is an exception to the general rule that a lawyer has no duty to inform opposition of relevant facts.

g. Arbitration and Mediation. Trust issues may be arbitrated by consent of the parties. UCA §§ 75-7-110, 75-7-814(w). Arbitration provisions contained in wills, trusts, powers of attorney, or other dispositive instruments will bind the beneficiaries and fiduciaries of the person executing the instrument containing the arbitration provision. UCA § 75-1-312. The American Arbitration Association has special rules for will and trust alternative dispute resolution. Wills and Trusts Arbitration Rules and Mediation Procedures Rules, Amended and Effective June 1, 2012. Utah courts regularly refer estate and trust disputes to mediation through the court annexed ADR (alternative dispute resolution) program. Rule 4-510.05 of the Rules of Judicial Administration. According to the Third District Court website: "The fees of the mediator are to be paid in advance. If a Personal Representative, Trustee, Guardian or Conservator with liquid assets is a party, the estate or trust will pay the mediator's fees. Otherwise, the earliest petitioner in the matter(s) referred to mediation will pay but is entitled to reimbursement from the estate or trust. Ultimate responsibility for reimbursing the mediator's fees is reserved for the court to determine absent agreement of the parties."

h. Separate proceedings. Generally, except in supervised administration, each proceeding before the court is independent of other proceedings relating to the same estate, and unless otherwise required for a particular proceeding, a petition is not defective for failure to raise all matters which might then be the subject of a final order. UCA §§ 75-3-105, 75-3-106. Petitions for formal orders can be combined with various requests for relief in a single proceeding if the orders sought may be finally granted without delay. UCA § 75-3-106(1)(b). While the mandatory counterclaim rule (URCP 13) may apply to probate type proceedings once a claim is raised and issues joined (see *Raile FamilyTrust v. Promax Dev. Corp*., 24 P.3d 980 (Ut. 2001) (claims in alleged trustee capacity should have been raised in earlier proceeding)), the court retains power to segregate proceedings. URCP 20. Appeals are subject to the otherwise applicable rules on appeals. UCA §§ 75-1-304, 75-1-308.

i. Fees. Legal fees are a significant issue in most litigation and court procedures. This issue has a strong equitable component in trust and estate cases generally missing in normal civil litigation.

i. General Procedure. In a typical probate case in which the matter is not actually litigated, there is generally no judgment for attorney fees unless a formal accounting is made and court approval sought. The attorney bills the fiduciary who then decides, in the first instance, if the fee is reasonable. If so, it may be paid; if not, the attorney may ask the court to approve the fee. Even if the fiduciary believes the fee is reasonable, other interested persons (family, creditors) may not agree and could ask the court to order the attorney or the fiduciary (or both) to repay part of the fee (if it had been paid), or to prevent its payment. It is not unusual for a fiduciary to ask for approval of paid or billed fees as part of an interim or final accounting. Even if approved on an interim basis, where continuing representation is involved, the court might retain the ability to adjust (e.g. by not approving additional fees, or by requesting a refund of prior paid fees) at the final accounting if the overall fee in the case is not reasonable; otherwise the interim approval may be final as to the matters considered. See UCA §§ 75-1-304, 75-1-308, 75-3-105, 75-3-106. Many times accountings are made and matters are closed relatively informally and no formal approval is requested. If formally approved (e.g., at the final accounting, or at the end of a proceeding or a final intermediate approval), this is a judgment and the matter becomes res judicata if not appealed timely. See UCA § 75-3-1001 on formal closings. Also, the same process applies to the determination of reasonable fees of the fiduciary. At least 10 days' notice of a hearing on a petition for, or objection to, legal fees or personal representative's fees must be given to all interested persons. UCA § 75-3-718(2). Where there is an objection, the court determines the reasonableness of the fees. UCA § 75-3-718(1).

Of course, if there is actual litigation (a formal proceeding), a judgment for fees could be entered. Often there is no serious challenge to fees, but if there is, the court will typically refer the matter to mediation before proceeding to litigation over the reasonableness of fees. The Utah Rules of Civil Procedure do not apply until subsequent

to the joinder of issues in a contested proceeding (UCA § 75-1-304; URCP 81(b)), but after that the rules do apply, including Rules 73 (attorney fees) and 54 (judgment and costs).

The factors for reasonable attorney fees are analyzed in the leading case, *Matter of Estate of Quinn*, 830 P.2d 282 (Utah App. 1992) which requires an analysis of different parts of the representation and substantial findings by the trial court. The *Quinn* case lays out a four part analysis that includes using the factors of Utah Rules of Professional Conduct Rule 1.5. See also the practical guidelines for determining reasonableness of fees set forth in *Dixie State Bank v. Bracken*, 764 P.2d 985 (Ut. 1988). These guidelines are: (i) What legal work was actually performed? (ii) How much of the work performed was reasonably necessary to adequately prosecute the matter? (iii) I the attorney's billing rate consistent with the rates customarily charged in the locality for similar services? (iv) Are there circumstances which require consideration of additional factors including those listed in the Code of Professional Responsibility?

ii. Fiduciary Indemnity. The rules for personal representatives and for trustees are generally similar. Although the trust code provides some additional guidance concerning trustees, the equitable considerations are the same for either sort of fiduciary, as is seen in such provisions as UCA §§ 75-3-703(1) (personal representative has the same standard of care as a trustee has), 75-3-710 (has power of absolute owner over title to property, but as a trustee), 75-3-711 (same liability for breach of fiduciary duty as a trustee has).

The base rule is that a trustee is entitled to indemnity out of the trust estate for expenses properly incurred in the administration of the trust. UCA § 75-7-709; Restatement 3d Trusts, § 38(2); Restatement 2d Trusts § 244 which Restatement section is cited in *Fisher v. Fisher*, 221 P.3d 845 (Ut. App. 2009) which also cites to the same effect *Sundquist v. Sundquist*, 639 P.2d 181 (Ut. 1981) which quotes *Walker v. Walker*, 404 P.2d 253 (Ut. 1965). The official comment to the Uniform Trust Code § 709 goes on to say:

> Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust.

Also, under UCA § 75-7-1004(2), "if a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees incurred". In Utah, at least for trustees, and possibly under equitable principles for personal representatives as well (see UCA § 75-1-103, principles of law and equity supplement probate code), such authorized expenses may be reimbursed with interest if appropriate (e.g., the trustee uses his or her own funds) and in unusual circumstances,

may even include expenses that were not properly incurred to the extent necessary to prevent unjust enrichment, such as where the expenses benefit the trust. UCA § 75-7-709 and Official Comment to Uniform Trust Code 7-709. The Official Comment to the Uniform Trust Code cites to the factors described in the Restatement 2d, Trusts, § 245 cmt. g (1959) for indemnity when expenses were not properly incurred: whether the trustee acted in bad faith, reasonably believed the expense was necessary for the presentation of the trust estate, the expense resulted in a benefit, and indemnity can be allowed without defeating or impairing the purposes of the trust.

A personal representative or a person nominated as one is entitled to fees in a proceeding even if unsuccessful, including in a will contest where the person was nominated as personal representative. UCA § 75-3-719. See *In re Estate of LeFevre*, 220 P.3d 476 (Ut. App. 2009) (this provision applies to allow fees to representatives and appointed persons, but not beneficiaries of a constructive trust). Other potential bases for a fee award were not discussed in the *LeFevre* case.

On the other hand, fees incurred primarily for the personal benefit of the fiduciary cannot be paid out of a trust estate. *First National Bank v. City of Larimore (In re Oliver)*, 540 N.W.2d 630 (N.D. 1995) (a personal representative challenged a living trust and lost but requested his legal fees be paid out of the trust; applying the Uniform Probate Code, the court refused, finding the primary purpose of the litigation was for the personal benefit of the personal representative where the will left the residue of the estate to a foundation which had been created by the personal representative and by which he was employed).

A trustee who commits self-dealing even in good faith and without malicious intent may not be entitled to have his legal fees paid by the trust. *Fisher v. Fisher*, 221 P.3d 845 (Ut. App. 2009) (trustee was sued in personal capacity for mistaken use of trust's ranch for personal cattle operation by trustee; also, in that case, under the equities of the situation, the challenging beneficiaries also were denied payment of their fees from the trust or the trustee, citing the footnote 5 in the *Hughes v. Cafferty* case, 89 P.3d 148 (Ut. 2004), about requiring more than mere negligence to make a trustee personally liable for fees).

iii. Fee Shifting. The court can enter a fee shifting award under several rules. Under UCA § 75-7-1004, relating to trusts, "the court may, as justice and equity may require, award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." See *Shurtliff v. United Effort Plan Trust*, 289 P.3d 408 (Ut. 2012) (applying UCA § 75-7-1004 to require, in justice and equity, the state to pay attorneys' fees of trustee).

The court may equitably deny attorneys' fees to all litigants under UCA § 75-7-1004. *Wilcock v. Wilcock*, 285 P.3d 815 (Ut. App. 2012) (trial court determined that "all

three siblings [are] equally responsible for the mayhem they have caused and the attorneys' fees they have incurred").

In addition to UCA §§ 75-7-1004 (statutory equitable power to allocate fees to appropriate parties), 75-7-709 (indemnification of trustees) and 75-3-719 (indemnification of personal representatives or nominees) discussed above, the Utah courts have recognized an inherent equitable power of the courts to award legal fees in equitable matters. In *Hughes v. Cafferty*, 89 P.3d 148 (Ut. 2004) an equitable fee award was made to beneficiary against trustees personally where the trustees improperly assumed the roles of trustees, excluded siblings from trust management, failed to regularly account, and paid themselves excessive and unauthorized fees; such an award is reviewed on the standard of abuse of discretion. The court stated in dictum at ftn. 5 that "In most cases, however, equity will require that a trustee possess a degree of culpability greater than mere negligence before the trustee is held personally liable for attorneys' fees". See *Fisher v. Fisher*, 221 P.3d 845 (Ut. App. 2009) (applying the ftn. 5 comment).

In some cases, a fiduciary may even be required to pay fees to beneficiaries where the fiduciary acts in bad faith, pursuant to Utah's bad faith attorneys' fees statute, UCA § 78B-5-825(1) (generally "the court shall award" fees where the action or defense is without merit and not brought or asserted in good faith). *Warner v. Warner*, 319 P.3d 711 (Ut. App. 2014). "The shall award" language of subsection (1) of UCA § 78B-5-825 is stronger than the "the court may … award" language of UCA § 75-7-1004; however, subsection (2) of UCA § 78B-5-825 provides the court an opportunity to state on the record a reason for denying fees under subsection (1), but this opportunity appears to be intended to be narrower than the broad equitable discretion under UCA § 75-7-1004 to award or not award fees.

j. Health Information. Access to health information about the decedent may be relevant in determining various matters, including whether medical claims are justly payable, the capacity of the decedent, whether the decedent was the victim of health care malpractice or of neglect or abuse, and so on. Under the Health Insurance Portability and Accountability Act of 1996, known as HIPAA, 42 USC § 1320d *et seq*, there are restrictions on access to private health information. State privacy law may apply as well. See, e.g., UCA §§ 78B-5-618 (patient and third party access to medical records) and 26-45-104 (genetic testing privacy). Under the HIPAA rules, the decedent's information continues to be subject to the restrictions on disclosure for 50 years. 45 CFR § 164.502(f). However, under these rules, a "personal representative" of an individual during the individual's life (a personal representative for this purpose is a person authorized by applicable law such as those with authority under a power of attorney or health directive or under an appointment as guardian or conservator) must be treated as the individual. 45 CFR § 164.502(g)(1) and (2). This, of course, changes on death. After death, the personal representative is the court appointed executor, administrator, or personal representative with authority. 45 CFR § 164.502(g)(4). In addition, during life the health care provider was authorized (not mandated) to share

certain directly relevant information with family members, relatives, close personal friends or others identified by the individual who are involved in the health care or the payment for such care, of the individual. 45 CFR § 164.510(b). This could, in the health care provider's professional judgment as to the best interests of the individual, extend to times when the individual is incapacitated and thus not available to give consent. 45 CFR § 164.510(b)(3). Similarly, on death, the provider may disclose directly relevant information to such persons involved in the individual's care or payment for care prior to death, unless a contrary preference known to the provider was expressed by the individual. 45 CFR § 164.510(b). There are also rules which allow in certain circumstances and under specified guidelines, disclosures to appropriate authorities or persons for certain particular purposes such as reporting abuse, neglect, or domestic violence (45 CFR § 164.512(c)), judicial or administrative proceedings (45 CFR § 164.512(e)), law enforcement (45 CFR § 164.510(f)), the duties of coroners and medical examiners (45 CFR § 164.512(g)(1)), the duties of funeral directors (45 CFR § 164.512(g)(2)), tissue donation (45 CFR § 164.510(h)), and workers compensation compliance (45 CFR § 164.512(l)).

k. Jury. Probate appointment and administration proceedings are equity cases and are not subject to trial by jury. 47 Am Jur.2d Jury § 48; *Farnsworth v. Hatch*, 151 P. 537 (Ut. 1915) (removal of executor). Further equity claims of various sorts do not enjoy a constitutional right to jury trial. For example, claims relating to quieting title without a dispute over possession may not be subject to jury trial (this can arise in a determination of heirs matter). See 47 Am Jur.2d, Jury § 57; *Hansen v. Stewart* 761 P.2d 14 (Ut. 1988). Similarly, claims for specific performance, reformation, and rescission may be equitable and thus not entitled to jury trial. See 47 Am Jul.2d § 51. Under statute, however, a formal testacy proceeding challenging the validity of the will is subject to jury trial (UCA § 75-1-306); see also *Johnson v. Johnson*, 337 P.2d 420 (Ut. 1959) (undue influence, duress, fraud, etc. to set aside documents during life not entitled to jury even if will contest after death could be tried to a jury since not appropriate to set aside a will during life of the testator). Claims for damages relating to tort or other legal rather than equitable matters would be subject to jury trial. The legal claims would be entitled to jury trial even if brought with equitable claims which are not subject to jury trial. *In re Estate of Grimm*, 784 P.2d 1238 (Ut. App. 1989). The court typically has discretion to try equitable and legal matters separately. 47 Am. Jur.2d, Jury § 36. If a jury sits in an equity matter, it is advisory only unless otherwise agreed by the parties. *Pierce v. Pierce*, 994 P.2d 193 (Ut. 2000); UCA § 75-1-306(2).

l. Special Burdens of Proof. Probate cases may have special burdens of proof associated with certain issues, particularly where there is a fiduciary or other confidential relationship. For example, capacity for the making of a beneficiary designation (or other similar dispositive instruments) is testamentary capacity, the capacity for making a will, which is somewhat lower than the capacity to conduct business generally. *Bergen v. Travelers Ins. Co. of Illinois*, 776 P.2d 659, 664 (Utah App. 1989); *Holman v. New York Life Ins. Co.*, No. 2:10-CV-490 TS, 2011 WL 1883198, at *4

(D. Utah May 17, 2011). The burden on the challenger is to show lack of capacity by preponderance of the evidence. *Matter of Estate of Kesler*, 702 P.2d 86, 88 (Ut. 1985). On the other hand, fraud, duress, and undue influence require proof by clear and convincing evidence, and in the case of a confidential relation the burden of persuasion can shift to the person with the confidential relation through the application of a presumption unless the presumption is overcome by a preponderance of the evidence that there is no such fraud or undue influence. *In re Swan's Estate*, 293 P.2d 682 (Ut. 1985). See further, Utah Rule of Evidence 301(a) relating to the effect of a presumption.

(1) Certain relationships are presumed to be confidential. See *Baker v. Pattee*, 684 P.2d 632 (Ut. 1984) and *Blodgett v. Martsch*, 590 P.2d 298 (Ut. 1978) (presumption of confidential relationship between parent and child and between trustee and cestui que trust); but see *In re Estate of Jones*, 759 P.2d 345 (Ut. App. 1988) *reversed on other grounds* (such presumption discussion in earlier cases was *obiter dictum*) and *Howard v. Manes*, 309 P.3d 279, (Ut. App. 2013) (denying the presumption based on familial relationship between parent and child). See *In re Estate of LeFevre*, 220 P.3d 476 (Ut. App. 2009) (confidential relationship giving rise to constructive trust from oral agreement between children of father and first wife and surviving second wife regarding creation of a trust relating to the use of father's home and its passage on second wife's death).

Further, as noted in a number of cases, unfairness can be presumed in a confidential relationship, such as a marital relationship, at least where there is an inequality in the relationship and the dominant party benefitted. See *Ashton v. Ashton*, 733 P.2d 148 (Ut. 1987) (confidential relationship between brothers required return of property*); In Re Hock's Estate*, 655 P.2d 1111 (Ut. 1982) (constructive trust for brother of decedent under Restatement of Restitution § 160); *Mattes v. Olearian*, 759 P.2d 1177 (Ut. App. 1988) (discusses confidential relationship between spouses, although parties in case found not to be common-law spouses); *Pierce v. Pierce*, 994 P.2d 193 (Ut. 2000) (high duty of spouses; there was a written agreement in this case); *Beesley v. Harris*, 883 P.2d 1343 (Ut. 1994) (fiduciary duty of good faith and fair dealing between spouses). See also *Meitke v. Meitke*, 101 N.E. 2d 571 (Ill. 1951) (right of one party to assume other party in confidential relationship will act in manner consistent with welfare of first party; constructive trust against wife for husband in half of family real estate where wife was responsible for family financial affairs and used husband's wages to buy, renovate, and manage real estate). Consider, for example, the case of *Parks v. Zions First National Bank*, 673 P.2d 590 (Ut. 1983), which involved a confidential relation between spouses. There a constructive trust (as described in the Restatement of Restitution § 160) in favor of a surviving husband was imposed against the wife's estate where the husband's earnings as sole wage earner and efforts in repairs and improvements had helped to accumulate real property, but the wife used a secret will to transfer the property to others.

4. **Tax Claims Issues**. Tax claims create special problems for a personal representative and the estate. A request by the fiduciary for transcripts may be made

using Form 4506-T; the request can be for returns (current and three prior years only), the taxpayer's account (for most returns), or for a combination of the two (current and three prior years only) and may be for verification of non-filing. Estate taxes in the U. S. are collected by tax liens and imposition of personal liability against transferees. The personal representative (or other fiduciary) also may become personally liable for federal taxes in some circumstances where other items are paid first leaving an insolvent estate. 31 USC § 3713(b). This provision is not specifically a tax provision but is a general provision to protect claims of the U. S., including tax claims. Similar liability may arise under state tax laws, as well.

a. Exceptions. There are exceptions to the priority created by section 3713(a) for family allowances and administrative expenses (such as "expenses incurred for the general welfare of creditors," "expenses incurred to collect and preserve assets," court costs, and funeral expenses). See Internal Revenue Manual, 34.4.1.7 (Aug. 11, 2004); *Estate of Jenner v. Com'r.*, 577 F.2d 1100, 1106 (7th Cir. 1978); *Schwartz v. Com'r*, 560 F.2d 311, 314 n. 7 (8th Cir. 1977); *Abrams v. United States*, 274 F.2d 8, 12 (8th Cir. 1960).

b. Tax Assessment and Discharge Requests. A state court probate discharge does not discharge federal tax obligations, but there are procedures available to obtain a discharge as to federal taxes for a personal representative.

i. Income and Gift Tax. A personal representative may want to consider requesting at an early time in the administration prompt assessment within 18 months rather than the usual three years (IRC § 6501(d)) as to decedent's income and gift taxes (not estate tax). Such a request for prompt assessment must be made as a separate document in a separate envelope with no other documents. Regs. § 301.6501(d)-1(b); Rev. Rul. 57-319, 1957-2 C.B. 855. This procedure applies to the executor, administrator, or other fiduciary representing the estate of the decedent. Regs. § 301.6501(d)-1(a). Presumably this includes anyone who may be responsible to file an income or gift tax return relating to the decedent (see letter i., at subpart ii. below). Form 4810 or a separate letter may be used. For income tax matters, partnership items of a partner arising in any partnership taxable year ending with or within any taxable year of the partner with respect to which a request for a prompt assessment of tax is filed are treated as nonpartnership items as of the date that the request is filed. Regs. §301.6231(c)-8.

A request for discharge of personal liability on such taxes can also be made. The discharge will be effective on payment of taxes, notice of which is given by the Service with nine months of the request, or will be effective if the Service fails to respond in the nine-month period. IRC § 6905. The discharge under IRC § 6905, which has its own definition of "executor," only applies to the court-appointed personal representative, not to a trustee of a revocable trust, even though the trustee may be responsible for the taxes in the absence of a court-appointed personal representative. IRC § 6905(b); Regs. §

301.6905-1(b). This discharge, if effective, covers 31 USC § 3713(b) personal liability, too.

Under IRC § 2661 the administrative provisions applicable to gift tax are applicable as well to the generation skipping tax.

These provisions do not protect against taxes for which a return has not been filed and do not protect estate property or transferees from later tax claims.

See Form 5495 relating to §§ 2204 (estate tax discharge) and 6905 (income and gift tax discharge) requests for discharge and Form 4810 relating to § 6501(d) request for prompt assessment.

ii. Estate Taxes. Also, as to estate taxes, a request may be made for early determination of estate tax (within nine months of return) and for discharge of personal liability; this request is made by letter. IRC § 2204(a); Regs. § 20.2204-1(a). Where the personal representative (executor) makes the request, then within nine months after receipt of the application or, if the application is made before the estate tax return is filed, within nine months after the return is filed, the Service is to notify the personal representative of the amount of tax. If the personal representative does not receive this notification, it is personally discharged at the end of the nine-months. The application doesn't shorten (or lengthen) the assessment period.

In addition to the personal representative (executor), this discharge can apply to any fiduciary, including a trustee, requesting it where the fiduciary may be personally responsible for the estate tax. IRC § 2204(b). Upon the later of the discharge of the personal representative from personal liability, or of the expiration of 6 months after the making of the application by the other fiduciary, the Service is to notify the requesting fiduciary (1) of the amount of the tax for which the fiduciary has been determined liable, or (2) that the fiduciary is not liable for any such tax. The discharge is effective on payment of the tax or posting of appropriate bonds relating to postponed tax under IRC §§ 6161, 6163, or 6166. The discharge covers transferee liability of the affected fiduciary, but not of other transferees. IRC §6324(a)(2).

This discharge, if effective, covers 31 USC § 3713(b) personal liability, as well. Later assessments or collection from transferees are not precluded, however, and the special estate tax lien (IRC §6324(a)(1)) will continue.

c. Payment Priority of Secured Claims. Claims secured by prior perfected security interests are not, in effect, subordinated to the federal government by reason of 31 USC § 3713 payment priority. Rather, the Federal Tax Lien Act of 1966 (IRC § 6321, *et seq.*) applies so that distribution to a creditor with a lien with priority over the government's lien will not create personal liability on the personal representative under 31 USC § 3713(b). *U.S. v. Romani Est.*, 523 US 517 (1998). See IRM 34.9.1.8 (3-17-99). Any payment on claims secured by creditor liens arising or perfected after death

will be subject to 31 USC § 3713(b) personal liability, unless those liens or interests in property (*e.g.*, of certain purchasers) have super priority under IRC § 6323(b). The special estate tax lien of IRC § 6324(a)(1) is subject to the liens or interests in property with super priority. Of course, the various conditions specified for super priority status must be met; some (but not all) are conditioned on not having actual notice of the special estate tax lien. The special estate tax lien arises at death and requires no assessment or notice, and continues for ten years unless divested under special rules.

d. Payments Triggering Personal Liability. Although 31 USC § 3713 refers to the payment of "debt," it applies as well to distributions which are not debts. *Want v. Com'r*, 280 F.2d 777 (2d Cir. 1960); *U.S. v. Coppola*, 85 F.3d 1015 (2d Cir. 1996); *Bank of the West v. Com'r*, 93 T.C. 462 (1989); Regs. §§ 20.2002-1, 25.2502-2.

e. Insolvency. 31 USC § 3713(a) and (b), although worded somewhat differently ((b) does not on its face require insolvency), are read together so that the government's priority and the personal representative's liability arise when the estate is insolvent or becomes insolvent by the payment to someone else. *King v. U.S.*, 379 US 329 (1964); *U.S. v. Lutz*, 295 F.2d 736 (5th Cir. 1961). Distributions or payments while the estate is and remains actually solvent do not give rise to personal liability. *Schwartz v. Com'r*, 560 F.2d 311 (8th Cir. 1977).

Insolvency is tested by the balance sheet test of liabilities exceeding assets. *Lakeshore Apts., Inc. v. US*, 351 F.2d 349 (9th Cir. 1965). Only assets in the possession or control of the fiduciary are taken into account on the asset side of the ledger. PLR 8843011. However, claims for contribution toward taxes or other obligations are treated as estate assets. *Schwartz v. Com'r*, *supra*; see also *Wingert v. President Directors & Co. of Hagerstown Bank*, 41 F.2d 660 (4th Cir. 1930); *Singer v. Com'r*, TC Memo 2016-48. This includes contribution or reimbursement claims under IRC §§ 2206-2207B (relating to tax apportionment to nonprobate assets), under state law tax apportionment statutes (see UCA § 75-3-916), and state laws requiring nonprobate assets to contribute to debt payment when the probate estate is inadequate (see UCA §§ 75-6-107 (multiple party accounts), 75-7-505(1)(c) (revocable trusts), 75-6-310(2) (securities), 75-6-201(2) (nontestamentary transfers at death), and 31A-22-413(1)(b) (beneficiary designations).

f. Claims of the United States. The government's claim may relate to taxes or other matters. For example, a claim to Veterans' excess benefit reimbursements is a claim of the United States. See *U.S. v. Boots*, 675 F. Supp. 550 (E.D. Mo. 1987). Its claim arises when the facts arise and no assessment is necessary as to tax claims. *Viles v. Com'r*, 233 F.2d 376 (6th Cir. 1956); Rev. Rul. 79-310, 1979-2 C.B. 404.

g. Fiduciary Knowledge. Although the statute is silent about the fiduciary's knowledge of the government's claim, it has long been interpreted to require that the fiduciary had some level of notice of the liability. *Want v. Com'r*, *supra*. However, actual notice is not required, rather, inquiry notice is sufficient, *i.e.*, notice of

facts sufficient to put a reasonably-prudent person on inquiry as to the existence of an unpaid claim of the United States. *New v. Com'r,* 48 T.C. 671 (1967); *Frost Est. v.Com'r,* T.C. Memo 1993-94; Rev. Rul. 66-43, 1966 - 1 C.B. 291. Usually, the notice requirement is met notwithstanding reliance on counsel. *Leigh v. Com'r,* 72 T.C. 1105 (1979); *U.S. v. Bartlett,* 89 AFTR 2d 2002-1049 (C.D. Ill.); but see *Little v. Com'r,* 113 T.C. 474 (1999) which, "in the unique circumstances" of that case, allowed a lack of notice of the claim defense based on erroneous and repeated advice of counsel. But see further, *US v. Marshall,* 771 F.3d 854 (5th Cir. 2015) (no advice of counsel defense is allowable, declining to follow *Little*).

The burden is on the fiduciary to demonstrate lack of notice of the claim at the time the payment is made. *McCourt v. Com'r,* 15 T.C. 734 (1950); *Johnson Est. v. Com'r*, T.C. Memo 1999-284; *Frost Est. v. Com'r*, T.C. Memo 1993-94.

h. Liability for Interest, Etc. The liability of the personal representative under 31 USC § 3713(b) will include the amount of the tax or other debt to the United States, plus interest or other additions, but only up to the amount of the value of the property distributed in violation of the statute, *i.e.*, "To the extent of the payment." This may include the full payment, not just the amount by which the estate became insolvent; the issue has yet to be decided. However, additional interest beyond the value of the payment likely will not be due. See *Singleton v. Com'r*, T.C. Memo 1996-249, *Johnson Est. v. Com'r, supra*, which refused to follow the reasoning of *Baptiste v. Com'r*, 29 F.3d 1533 (11th Cir. 1994) which had held a transferee personally liable under IRC § 6324(a)(2) for interest on estate tax where the tax and interest exceeded the value of the property received. The distinction was that the transferee had the use and benefit of the property, but the personal representative did not. (See also, k.ii. below.)

i. Assessment and Collection. The liability under 31 USC § 3713(b) as to tax claims may be assessed and collected as if it were a tax. IRC § 6901(a)(1)(B). Summary procedures under IRC § 6901 may be used to assess the liability, or an action may be brought in a U.S. District Court under IRC § 7402(a). If IRC § 6901 is used, the personal representative may challenge the liability in the U.S. Tax Court without paying it first. The use of IRC § 7402(a) cuts off the availability of the Tax Court, but defenses can be raised.

i. Tax Court. If IRC § 6901 is used, the personal representative must bring a separate Tax Court petition 90 days after notice of the fiduciary liability and cannot use a petition relating to the underlying tax assessment for this purpose. *Dupay Est. v. Com'r*, 48 T.C. 918 (1967). Also, a deficiency notice against the personal representative as to the underlying tax in the personal representative's fiduciary capacity is not sufficient to allow the Service to assert the personal liability in that proceeding. *McKnight Est. v. Com'r*, 8 T.C. 871 (1947).

ii. Burden of Proof. The Service takes the position that, unlike transferee cases, the personal representative will have the burden of proof. See IRM 35.4.23.8 (10-18-94) which cites *Bank of the West v. Com'r, supra*, and *McCourt v. Com'r, supra*.

j. Who Is Responsible. There are different definitions of who is responsible for various tax matters.

i. Estate Tax. In the absence of a court-appointed personal representative, the "executor" with respect to the estate tax (but not other taxes) will be anyone with actual or constructive possession of some part of the decedent's assets. IRC § 2203. This could include a trustee of a revocable trust (PLR 8335033), a joint tenant (*Guida Est. v. Com'r*, 69 T.C. 811 (1978)), or someone taking by fraud (*Allen v. Com'r*, T.C. Memo 1999-385); it also includes custodians of property and brokers with security interests in securities held as collateral, and debtors of the decedent. Regs. § 20.2203-1. (After 2009, this definition applied for general tax purposes, not just for estate tax purposes but under a sunset provision, ceased to apply after 2010. IRC § 7701(a)(47).) A similar requirement applies for Utah Inheritance Tax (really an estate tax) purposes. UCA § 159-11-105(1). Effective after July of 2015, a person responsible for filing an estate tax return must also file an information return to the Service and to each person acquiring any interest in property included in the decedent's gross estate a statement identifying the value of each interest in such property as reported on the estate tax return and such other information with respect to such interest as the Service may prescribe. It is due 30 days after the estate tax return is filed or is due whichever is earlier. IRC § 6035(a). The purpose is to establish the basis of the property in the hands of the recipients. (For statements relating to periods before February 29, 2016, the due date will be February 29, 2016. Notice 2015-57, 2015-36 IRB.)

(1) Fiduciary Duty. The obligation of the "executor" to pay estate tax is in a fiduciary capacity only under IRC § 2002, however, there is the potential for personal liability under 31 USC § 3713(b).

(2) Multiple Executors. The obligation to file the estate tax return falls on every statutory "executor" under IRC § 2203. If the "executor" cannot make a full return as to the gross estate, it must provide all the information it has as to any property and the persons with a legal or beneficial interest in it. Anyone with an interest must on notice from the Service make a return as to that part of the gross estate. IRC § 6018(b); Regs. § 20.6018-2. There is a penalty on the estate for failure to timely file without reasonable cause. IRC § 6651(a)(1).

(3) Discharge of Personal Representative by State Court. When the probate court discharges the appointed personal representative, persons in actual or constructive possession of property of the decedent may become statutory "executors."

A deficiency notice may properly be addressed to such a person, among other results. *Estate of Brandt v. Com'r*, 7 TCM 271 (1948).

ii. Income and Gift Tax. Income tax returns of the decedent are required of "the executor, administrator, or other person charged with the property of such decedent." IRC § 6012(b)(1). The same rule applies to Utah income tax returns. UCA § 59-10-504; see also penalty provisions UCA §§ 59-10-541 and 59-1-401. An ancillary personal representative has filing responsibility for the income received by it and the deductions attributable to that income; the domiciliary personal representative, however, reports all income of the entire estate. Regs. § 1.6012-3(a)(3). Unfiled gift tax returns of a decedent are required of the executor of the will or administrator of the estate; this appears to apply only where there has been a personal representative appointed in proceedings. Regs. § 25.6019-1(g). The regulation concerning gift tax is silent about the situation where there is an ancillary probate; presumably the duty would be with the domiciliary personal representative.

iii. Personal Liability. Being a statutory executor under IRC § 2203 (as to estate tax) is not determinative for personal liability under 31 USC § 3713(b); it is possible to be such a statutory executor and not have personal liability. See *Occidental Life Ins. Co. of Calif. v. Com'r*, 50 T.C. 726 (1968). However, Regs. § 20.2002-1 provides for personal liability for distributions to the extent of the payment or distribution; this, however, may not be in addition to 31 USC § 3713. For purposes of 31 USC § 3713(b) liability as to any tax claim or other claim of the United States, a person will be responsible who is given possession or control of assets of a debtor charged with the duty of applying it to pay the debts in accordance with creditor priority. See *King v. U.S.*, 379 U.S. 329 (1964). An appointed personal representative qualifies and so would a trustee of a revocable trust.

Personal liability for tax, interest, and penalties, is also imposed for Utah Inheritance Tax where distributions were made without payment of the tax; the liability is "to the extent of the value of that portion of the property that is, or has come into, the possession of that personal representative." UCA § 59-11-111(2). Unless a devisee pays the proportionate part of the tax to the personal representative, the property for that devise can be sold by the personal representative to obtain the tax due. UCA § 59-11-111(1). Also, the final accounting to the court must demonstrate payment. UCA § 59-11-112.

For Utah income tax, "liability for payment of the tax attaches to the executor or administrator up to his discharge. If the executor or administrator failed to file a return as required by law or failed to exercise due diligence in determining and satisfying the tax liability, the liability is not extinguished until the return is filed and paid." State Tax Com'n Rule R865-9I-20.

iv. Joint and Several. If there is more than one fiduciary, they are jointly and severally liable for the full liability under 31 USC § 3713(b). See *Baldwin v. Com'r*, 94 F.2d 355 (9th Cir. 1938).

k. Some Filing Requirements to Identify Fiduciary. It is important that the Service know who holds a fiduciary capacity. This helps in the enforcement of tax obligations, but keeping the Service correctly informed may prevent problems for a former fiduciary.

i. Start of Capacity. A personal representative or other fiduciary should file a Form 56 Notice of Fiduciary Capacity. IRC § 6903(a); Regs. § 301.6903-1(a); see also IRC § 7701(a)(6)) (definition of "fiduciary"). There is no particular penalty for a failure to do so, but until the Service knows of the fiduciary's existence, tax notices will go to the taxpayer's last-known address, including notice of a deficiency, which, if not responded to, will allow immediate assessment and block access to the Tax Court, and thus require payment of tax and suing for a refund to challenge the assessment.

ii. Termination of Capacity. Temporary regulations have eliminated a requirement for filing a second Form 56 on termination of fiduciary capacity (Regs. § 301.6903-1T(b)(2)), but IRC § 6903(a) provides that the fiduciary's duties and powers continue "until notice is given that the fiduciary capacity has terminated." Thus, it is probably a good practice to give the notice of termination with Form 56, anyway.

iii. Estate Tax Notice. An "executor," as defined for estate tax purposes (IRC § 2203), is required to give notice of this status. IRC § 6036. There is no special form, and it can be done by filing the estate tax return, and this method should also be sufficient for IRC § 6903 if a Form 56 has not been used. The penalty under IRC § 6036 for failure to give the notice for estate tax purposes is $500 plus costs of suit. IRC § 7769. Such and executor should also notify the Service when the fiduciary capacity ends. See *Estate of Sivyer v. Com'r*, 64 TC 581 (1975) (even though the executor had obtained a discharge, a deficiency notice sent to the executor was valid, because no notice terminating fiduciary capacity was filed).

l. Transferees and Tax Liens. The special estate tax lien of the Internal Revenue Code arises automatically at death, requires no notice to have priority over others (*Vohland v. Com'r*, 675 F.2d 1071 (9th Cir. 1982)), and extends to all property included in the gross estate even though not part of the probate estate. This special estate tax lien encumbers a property even though the property may create a marital deduction. It lasts 10 years unless the estate tax is earlier paid in full or becomes unenforceable. IRC § 6324(a)(1).

The general tax lien of IRC § 6321 may also apply, and the two liens can apply separately or simultaneously. See Regs. § 301.6324-1(d). The general tax lien requires assessment and demand (and does not arise automatically at death) but applies to

all property of the taxpayer (here the personal representative) at the time the lien arises or later acquired. *Glass City Bank v. U.S.*, 326 U.S. 265 (1945). The lien has no specific expiration and continues until the tax is paid or becomes unenforceable by lapse of time. Generally (subject to some rules which can extend time limits), if taxes are timely assessed, proceedings with respect to the lien must be begun within 10 years of the assessment. IRC § 6502. The general tax lien has priority mostly based on filed notices of lien, subject to certain super-priority liens which can have priority over a general tax lien.

There are also special liens for specially valued property under IRC § 2032A (see IRC § 6324B) or deferred taxes under IRC § 6166 (see IRC § 6324A).

The lien rules are in addition to the transferee rules and either set of provisions may be used to collect taxes. See *U.S. v. Russell*, 461 F2d 605 (10th Cir.), *cert. denied*, 409 US 1012 (1972), (transferee provisions of Section 6901 "are not exclusive and mandatory, but are cumulative and alternative" to other collection mechanisms.)

i. Divesting for Charges and Expenses. The estate tax lien is divested as to property used to pay charges against or administration expenses of the estate where the charges or expenses are allowed by a court with jurisdiction. IRC § 6324(a)(1). Judicial action is required to divest the lien (*Kleine v. US*, 539 F.2d 427 (5th Cir. 1976)), but the action may be before or after disbursement if allowed by state law (*US v. Security-First National Bank of Los Angeles*, 30 F. Supp. 113 (DC CA 1939), *app. dismissed*, 113 F.2d 491 (9th Cir. 1940)). Allowed charges must have been personal obligations of decedent at the time of death. *A&B Steel Shearing & Processing Inc., v. US*, 145 F.3d 1329 (6th Cir. 1998).

ii. Transferees – Personal Liability and Lien Shifting. The transferee of the property takes subject to the estate tax lien whether the property is probate or nonprobate property. There is a key distinction as to nonprobate property (under IRC §§ 2034 to 2042), however, for lien and for personal liability purposes.

For nonprobate property (such as trusts), special lien shifting rules may apply to subject other assets of the transferee to the lien while divesting the lien on the transferred property. Also, as to a recipient of nonprobate property, such a transferee (who is treated as a transferee even if the personal representative never had possession) becomes personally liable for the tax to the extent of the value of the property at the decedent's death. IRC § 6324.

The personal liability of a transferee of nonprobate property will, in at least some federal Circuits, extend to interest on the estate tax beyond the value of the property. *Baptiste v. Com'r*, 29 F.3d 1533 (11th Cir. 1994) (the IRC § 6324 limit to value would apply to interest on tax since "tax" includes interest under IRC § 6601(e)(1) but the limit does not apply to interest on transferee liability under IRC § 6901(a) because

transferee liability is not a tax liability but an independent liability, also the transferee had use and benefit and one who possess government funds must pay interest for such benefit); compare this result from the Eleventh Circuit with the opposite result applicable to that taxpayer's brother in the Eighth Circuit, *Baptiste v. Com'r*, 29 F.3d 433 (8th Cir. 1994) *cert. denied*, 513 U.S. 1190 (1995) (maximum is value received). See also *US v. Marshall*, 771 F.3d 854 (5th Cir. 2015) (donee of indirect gift responsible for interest on gift tax beyond value of the gift).

Transferees of the transferee might also be liable under a statutory transferee liability theory. *Est. of Goldsborough v. Com'r*, 70 TC 1077 (1978), *aff'd* 49 AFTR 2d 82-1469 (4th Cir. 1982) (without discussion, finding that beneficiaries of estate of surviving joint tenant are liable); but compare this result to the conflicting result in *Englert v. Com'r*, 32 T.C. 1008 (1959) (under predecessor statute, the trustee of a trust is liable, but not the beneficiaries of that trust, based on a close analysis of legislative history).

On a transfer through security interest or purchase by the first transferee of a property subject to the lien, the lien on the property would be divested from that property but the lien automatically shifts to that transferring first transferee's other property. IRC § 6324(a)(2).

However, these personal liability and lien shifting rules apply only as to tax due to estate inclusion under IRC §§ 2034 to 2042, not for example to tax on property included under IRC § 2033 (where decedent holds an interest at death–typically probate assets). Nevertheless, the estate tax lien itself applies to the entire gross estate, probate and nonprobate assets both.

For probate estate property under IRC § 2033, the lien may be divested on transfer to a purchaser or security interest holder *if* the personal representative has been discharged of personal liability for tax obligations (not the same as a probate court discharge), and the lien then applies to all consideration received. IRC § 6324(a)(3); Regs. § 301.6324-1(a)(2)(iii); CCA 201129037. Thus although personal liability may not apply, under IRC § 6324(a)(2), to a transferee of probate property, nevertheless, without discharge of the personal representative the 10 year special estate tax lien continues as to probate property (*i.e.*, included under IRC § 2033) even after transfer of such property to a purchaser, including to any holder of a security interest or a judgment lien (subject to a special exception for a mechanics lien, or certain super priority items, under IRC tax collection under IRC § 6901 (c)); this is quite unlike the situation where estate tax inclusion is for non-probate property under IRC §§ 2034 to 2042 where personal liability as a transferee may apply but the lien is divested (and may shift) on transfer to a purchaser. As mentioned above, the special estate tax lien requires no filing to be effective.

The government may collect transferee liability using the same general procedures as for tax collection under IRC § 6901. The ability of the government to use the tax collection procedures of IRC § 6901 will not preclude its ability to use other remedies to enforce transferee liability. *U.S. v. Russell*, 461 F.2d 605 (10th Cir. 1972), *cert. denied*, 409 U.S. 1012 (1972); *U.S. v. Geniviva*, 16 F.3d 522 (3d Cir. 1994); but see *U.S. v. Schneider*, 92-2 USTC 4160, 119 (D.N.D. 1992). Tax collection under IRC § 6901 is not a precondition to suit under IRC § 6324(a)(2) for transferee liability and such liability, being derivative of the estate tax, may not be barred under statutes of limitation where the estate has received extensions of time to pay tax which extended the limitations period against the estate. *U.S. v. Mangiardi*, (DC 2013) 112 AFTR 2d ¶ 2013-5108.

iii. Personal Liability. The property included in the gross estate of the decedent under IRC §§ 2034-2042 which can trigger personal transferee liability on the recipient (see IRC § 6324(a)(2)) are nonprobate assets, including such things as revocable trusts (the trustee of the revocable trust is personally liable rather than the beneficiaries; *Englert v. Com'r*, 32 TC 1008 (1959), *acq*; *First Western Bank & Trust Co. v. Com'r*, 32 TC 1017 (1959) *rev'd on other grounds sub nom*, *Melba Schuster v. Com'r*, 312 F.2d 311 (9th Cir. 1962)); trusts subject to general powers of appointment (the trustee's liability continues despite the exercise of the general power by the decedent, *Govern v. Com'r*, TC Memo 1996-434); life insurance (the beneficiary is liable, *US v. Melman*, 398 F. Supp. 87 (DC Mo. 1975), *aff'd* 530 F.2d 790 (8th Cir. 1976)).

Even lifetime gifts may trigger the personal liability for estate tax. Donees are personally liable where the estate gross-up rule (estate tax on the gift tax paid where death is within three years) of IRC § 2035(b) applies to treat the gift tax as if it were included in the estate or where IRC § 2035(c)(1)(C) applies to treat gifts made within three years of death as if includable for tax lien provision purposes, which provisions include the provisions of IRC § 6324(a)(2) imposing personal transferee liability. *Armstrong v. Com'r*, 114 TC 94 (2000). It is also noteworthy that the potential of having to pay estate tax on gifts does not reduce the value of the gifts for gift tax purposes because that potential is deemed too highly conjectural at the time of the gift. *Est. of Frank Armstrong Jr. v. US*, 277 F.3d 490 (4th Cir. 2002) (related to the *Armstrong* Tax Court case cited above) and *Murray v. US*, 687 F.2d 386 (Ct. Cl. 1982).

Also, state law fraudulent conveyance and probate or trust transferee liability rules can create transferee liability (but without special lien shifting) even if the property is not included under IRC §§ 2034-2042. See *Gumm v. Com'r*, 93 TC 544 (1989), *aff'd* 1991 US App LEXIS 11372 (9th Cir. 1987, unpublished); *Ewart v. Com'r*, 85 TC 544 (1985), *aff'd* 814 F.2d 321 (6th Cir. 1987); *Frost v. Com'r*, TC Memo 1993-94. Utah has adopted the Uniform Voidable Transaction Act. UCA §§ 25-6-101 *et seq*. In addition to other methods of imposing transferee liability (see IRC § 6901), for debts owed to the United States (including, but not limited to taxes), the government may not only be entitled to relief under state fraudulent conveyance law, but may also be entitled to relief

under similar federal rules pursuant to the Federal Debt Collections Procedures Act of 1990, 28 USC §§ 3001-3308. Contractual assumption of obligations for taxes can raise transferee liability as well, but a provision disclaiming third party beneficiaries of the assumption may be helpful in preventing transferee liability. See *LR Development Company, LLC v. Com'r*, TC Memo 2010-2003. Transferee liability may attach where the taxpayer made the transfer after liability for the tax accrued, whether or not the tax was actually assessed at the time of the transfer. Transferee liability applies to all kinds of taxes, including the decedent's income taxes from the periods prior to death. Distributees of a decedent's estate can be transferees for purposes of such liability. Regs. § 301.6901-1(b).

Where more than one person may be liable for the tax, the personal liability under IRC § 6324(a)(2) is for the full amount of the tax to the extent of the value of the property received, not just a proportionate share of tax. See *Hamar v. Com'r*, 42 TC 867 (1964).

iv. State Transferee Liability. In Utah, liability for the tax follows the estate itself. If by reason of the distribution of the estate and the discharge of the executor or administrator, it appears that collection of tax cannot be made from the executor or administrator, each legatee or distributee must account for his proportionate share of the tax due and unpaid to the extent of the distributive share received by him or her. State Tax Com'n Rule R865-9I-20. This can apply to a trust as well since the obligation to file follows the obligation under IRC § 6012(b) which provides that "If an individual is deceased, the [income tax] return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent." UCA § 59-10-504.

v. Surviving Spouse. There are substantial reasons for the surviving spouse to want to serve as, or to keep close tabs on, the personal representative of the estate even though the burden of estate taxes may be allocated to other beneficiaries under state law (see UCA § 75-3-916(5)), the decedent's will, or some other dispositive instrument. Let's look at what happens with joint tenancy property as an example. The joint tenancy property held by a decedent and the surviving spouse is deemed to be one half the property of the decedent for inclusion in the gross estate for estate tax purposes. Therefore, the property which was formerly held by decedent as a joint tenant with the surviving spouse is subject to the special estate tax lien even though it is outside the probate estate and even though it will give rise to a marital deduction that reduces the tax. The tax lien remains on the former joint tenancy property, the surviving spouse as transferee at the decedent's death becomes liable for the tax, and on the transfer of such property by the surviving spouse by sale or grant of security interest, the lien on the property itself would be divested but would shift to affect all of the surviving spouse's property including after acquired property and separate property that was not derived from the decedent. The surviving spouse has a strong and continuing interest in

the proper and lawful administration of the estate and the full and complete payment of all the estate taxes.

vi. Gift Taxes. There is a similar lien and similar transferee liability and lien shifting rule for gift taxes as well. IRC § 6324(b).

Generally, the donor is primarily liable for the gift tax. IRC §§ 6019, 2502(c); Regs. § 25.2511-2(a). The personal representative or other fiduciary of the donor, if there is a responsibility of the fiduciary to pay such taxes which arose during decedent's lifetime, can become personally liable under 31 USC § 3713(b).

A lien arises on all gifts during a return period in the amount of the tax, which lien extends for 10 years from the date of the gift. The lien shifts to all assets of the property recipient if the property is sold or a security interest is granted in the property. IRC § 6324(b).

The donee of the gift may be personally liable for the gift tax (with interest) under IRC § 6324(b) to the extent of the value of the gift. *Tilton v. Com'r*, 88 T.C. 590, 599 (1987), *acq*. 1987-2 C.B. 1. This issue is often discovered after the death of the donor who failed to pay the gift tax. The value of the gift limit applies even if the gift was subject to the gift tax annual exclusion and thus did not generate a tax obligation. *Baur v. Com'r*, 145 F.2d 338 (3d Cir. 1944), *aff'g* 2 T.C. 1016 (1943). This liability arises when the donor fails to pay the tax when due and requires no deficiency determination against the donor. It can even apply after the limitations period for the donor expires. See *O'Neal v. Com'r*, 102 T.C. 666 (1994). There is a split of authority about whether interest on the donee's tax liability is limited to the value of the gift. See *U.S. v. MacIntyre*, 109 AFTR 2d ¶ 2012-868 (DC Tex. 2012) (following the 11th Circuit case of *Baptiste v. Com'r,* 29 F.3d 1533 (11th Cir. 1994) (discussed above) as more persuasive, finds the transferee liability of donees of gifts for interest on the donor's unpaid gift tax under IRC § 6601 is not limited by the value of the gift (this limit applies to the tax itself) but donee liability and the interest on it is a separate obligation (not a tax) and is not so limited; discusses the split of authority on the matter).

The limitations for assessment against the donee are, under IRC § 6901(c)(1), one year after the expiration of the period of limitation for assessment against the donor (rather than after the date of gift). The donor's limitation period will not commence until a return has been filed, however (IRC § 6501(b)(1) and (c)(1)), and then the period for assessment will generally expire in three years (IRC § 6501), but can extend to six years if the properly includable gifts omit amounts which exceed 25% of the gifts shown on the return. The execution of a return by the Secretary (typically through the Service) under authority of IRC § 6020, does not start the running of the limitations on either assessment or collection. IRC § 6501(b)(3). The foregoing limitations rules as to donors and gift taxes are almost identical with the rules for estates and estate taxes.

However, for a gift tax return to start the limitations period on a gift, the gift must be adequately disclosed, (*e.g.*, with appraisals, etc.). IRC § 6501(c)(9); Regs. § 25.6019-4.

These rules raise similar issues as with the corresponding estate tax rules; for example, the issues relating to transferees of transferees, the amount of interest to which liability applies, and so on, will be quite similar.

vii. Exceptions. There are some exceptions to the estate and gift tax lien rules which make this tax lien ineffective against mechanics liens and against certain liens which would have super priority as to filed liens under IRC § 6323(b) and (e) (securities, motor vehicles, personal property purchased at retail or in a casual sale, personal property subject to a possessory lien, real property tax and assessment liens, residential property subject to repair or improvement liens, attorneys liens, certain insurance contracts, deposit account secured loans, and interest and expenses related to the super priority liens). IRC § 6324(c).

viii. Releases. In order to allow parties acquiring property from an estate to obtain clear title not subject to the estate tax lien, a surety bond acceptable to the government may be posted conditioned on the payment of the amount assessed, together with interest, within a specified time not later than six months before the statutory collection period ends. IRC § 6324(a)(2); Regs. § 301.6325-1(a)(2).

ix. Lien Duration. There is a split of authority concerning whether the estate tax lien acts like a limitations period for the bringing of a foreclosure action, or whether the lien flatly expires at the end of the 10 years even if a foreclosure action is pending but not complete; however, the strongest authority favors the flat expiration of the lien after 10 years. Compare cases from the Courts of Appeal, *U.S. v. Cleavenger*, 517 F.2d 230 (7th Cir. 1975), *U.S. v. Potemkin*, 841 F.2d 97 (4th Cir. 1988), and *U.S. v. Davis*, 52 F.3d 781 (8th Cir. 1995) (lien flatly expires under plain meaning of the statute), with these District Court cases which (prior to the later appellate cases) disagreed with *Cleavenger*: *U.S. v. Saleh*, 514 F. Supp. 8 (DC NJ 1980); *U.S. v. Warner*, 56 AFTR 2d 85-6583 (DC NY 1985); *Harrell v. U.S.*, 61 AFTR 2d 88-1328 (DC FL 1987).

x. Fiduciary Discharge. The discharge of the fiduciary from liability (see IRC § 2204) (applicable to personal representatives but not to trustees who are treated as transferees for this purpose as well as for transferee liability) does not release the lien entirely. The lien divests on a sale or grant of security, but attaches to the proceeds of sale or other consideration received in the hands of estate distributees, heirs, or devisees. IRC § 6324(a)(3). However, for the benefit of purchasers from the estate, obtaining the fiduciary discharge will remove the special lien from the property they purchased; thus, a purchaser, including a security interest holder, will greatly like to see the discharge occur. The discharge also does not release the potential for transferee liability. See 4(a)(ii) above regarding IRC § 6324(a)(2).

xi. Lien Notice After Death. If the tax is assessed during life, the issuance of a notice of federal tax lien after death is valid. The general tax lien attaches on the assessment of the tax. As stated in *Estate of Brandon v. Com'r*, 133 T.C. No. 4 (2009) (which case involved the IRC §6672 penalty tax for a responsible person failing to pay employment trust fund taxes), "After a lien attaches to property, it remains attached and is not invalidated by a transfer of the property. See *United States v. Bess*, 357 U.S. 51, 57 (1958) (holding that the transfer of property after attachment of a lien does not invalidate the lien); *Burton v. Smith*, 38 U.S. 464, 483 (1839)."

5. **Company Issues**. On the death of an equity owner of a business organization, special issues can arise as to control exercised by the holder of the interest of the deceased or as to rights of the estate to have the interest bought out. For an estate struggling with insolvency and holding significant interests in closely held organizations, these issues can be critical. These matters are often dealt with in buy-sell agreements, partnership agreements, or operating agreements. Otherwise they are dealt with under applicable statutes. The following is a summary of what happens under Utah statutes absent an agreement. (Citations to the UCA below as to partnerships and LLCs are to the provisions effective January 1, 2014. Those provisions apply to these types of organizations formed on or after that date or formed earlier and electing to be governed by these provisions, and apply to all organizations of the affected type after 2015 regardless of when formed. Before those dates the rules for these types of organization were somewhat different.)

a. Corporation. The stock of the corporation passes to the personal representative who can vote it.

i. S-corp. If the corporation is an S-corporation (*i.e.*, with the small corporation election under IRC § 1361), the decedent's estate can hold the S-corp stock for a reasonable period of administration without destroying the S-corp election. IRC § 1361(b)(1)(B). A bankruptcy estate can also be a qualified stockholder. IRC § 1361(c)(3). A will recipient trust (a testamentary trust) only qualifies as a shareholder for two years beginning on the day the stock is transferred to it from the estate. If longer term holding by a trust of the stock with the S-election continuing an election as a qualified subchapter S trust or QSST (IRC § 1361(d)) or as an electing small business trust or ESBT (IRC § 1361(e)), will be required.

ii. Dissolution or Buy-out. There is generally no mandatory dissolution of the corporation or required buy-out of the deceased owner's stock. If however, the corporation is a professional corporation, a buyout of disqualified (non-licensed) shareholders is required at reasonable fair value. UCA § 16-11-13.

b. Partnership. Death of a partner dissociates that partner as a partner of a general partnership, including a limited liability partnership. UCA § 48-1d-

701(6)(a). This may under the partnership agreement lead to a dissolution and winding up, or the business may continue with a buy out of the deceased partner's interest and indemnity against all partnership liability under UCA § 48-1d-801.

i. Winding up. Death is generally not an event for a mandatory winding up under the statute (UCA § 48-1d-901) except for a partnership for a definite term or particular undertaking, in which cases the express will of at least half the remaining partners will cause a winding up to occur. UCA § 48-1d-901(2)(a). If there will be a winding up of the business, the remaining general partners may wind up the business or if there are none remaining, the legal representative of the last surviving partner may wind it up (UCA § 48-1d-902).

ii. Management. Other than where the representative of the last survivor is authorized to wind up the business, the deceased partner and the estate of the deceased partner (unless the estate is admitted as a partner) have no right to participate in management, whether winding-up occurs or not. UCA § 48-1d-703(2)(a).

iii. Buy out. Absent a winding up, the buyout of the deceased partner is at a price in the amount that would have been distributable if the partnership had been wound-up with its assets sold as of death (the date of disassociation) at the greater of liquidation or going concern value, with interest accruing from disassociation until payment. UCA § 48-1d-801(2).

c. Limited Partnership. There are significant differences in the effect of death which turn on whether the deceased was a general partner or was a limited partner.

i. General Partner. Death dissociates a general partner. UCA § 48-2e-603(6)(a).

(1) Effect on Partner's Interest. The interest of the deceased general partner no longer carries management rights. UCA § 48-2e-605(1)(a). It is not a discharge of any obligation. UCA § 48-2e-605(2). The interest becomes that of a mere transferee (UCA § 48-2e-605(1)(d)), except that for the purposes of settling the estate it will have the rights of a limited partner to receive information. UCA § 48-2e-704.

(2) Effect on Partnership. If there is at least one other general partner, the consent within 90 days of a majority of the partners (general or limited) with rights to receive distributions as partners will cause dissolution and winding-up. UCA § 48-2e-801(1)(c)(i). If there are no other general partners, dissolution and winding up will occur unless within 90 days a majority of the rights to receive distributions as limited interests consent to continue and admit a general partner who consents to act effective as of the date the last general partner ceased to be a general partner. UCA § 48-2e-801(1)(c) (ii).

ii. Limited Partner. Death dissociates a limited partner. UCA § 48-2e-601(2)(f).

(1) Effect on Partner's Interest. The interest of the deceased limited partner no longer carries a limited partner's rights. UCA § 48-2e-602(1)(a). Of course, limited partners have no management rights to discontinue. UCA § 48-2e-302. Dissociation is not a discharge of any obligation. UCA § 48-2e-602(2). The interest becomes that of a mere transferee (UCA § 48-2e-602(1)(c)), except that for the purposes of settling the estate it will have the rights of a limited partner to receive information (there may also be rights under the merger, conversion, or domestication provisions). UCA § 48-2e-704.

(2) Effect on Partnership. On the death of the last limited partner, the partnership dissolves and winds up unless within 90 days the partnership admits a limited partner. UCA § 48-2d-801(1)(d). This generally requires the consent of all partners, in this case general partners since there are no limited partners. UCA § 48-2e-301. A contribution by the limited partner may not be required. See UCA § 48-2e-102(2) and UCA § 48-2e-301(3).

iii. Winding Up. If there is a general partner, general partners control winding up. See UCA § 48-2e-406(1). If there are none, a majority of the rights to receive distributions as limited interests may appoint a person to wind up the partnership. UCA § 48-2e-802(3). If no one is appointed in a reasonable time any partner may request a court to make the appointment. UCA § 48-2e-802(4)(a).

iv. Buy out. There is no statutorily required buyout of a partner in a limited partnership.

d. Limited Liability Company. Death dissociates a member. UCA § 48-3a-602(7)(a).

i. Winding Up. Dissociation, including by reason of death, does not require dissolution and winding up of the company unless it results in there being no members for a period of 90 consecutive days. UCA § 48-3a-701(3). If the deceased was the last member, the legal representative can designate a person to become a member if such new member consents effective as of the date the last member ceased to be a member. UCA § 48-3a-401(3)(d). No contribution or transferable interest as to distributions is required to be a member. UCA § 48-3a-401(4). Any dissolution is controlled by the remaining members with management authority or the remaining managers of a manager managed company, but subject to consents of members as to dispositions outside the ordinary course. See UCA § 48-3a-703; UCA § 48-3a-407(5); UCA § 48-3a-407(2)(d); UCA § 48-3a-407(3)(c) and (d). However, if there are no members, the legal representative of the last member may do the winding up. UCA § 48-3a-703(3).

ii. Management. Dissociation of a member by death terminates management rights both if the company is member managed (UCA § 48-3a-603(1)) and if the member is also a manager of a manager managed company (UCA § 48-3a-407(3)(e)). Termination of management rights does not in either event terminate any liability. UCA § 48-3a-407(3)(f); UCA § 48-3a-603(2). The member's interest becomes that of a mere transferee (UCA § 48-3a-603(1)(c)) except for the right of the legal representative to information of a current member for purposes of settling the estate (UCA § 48-3a-504; UCA § 48-3a-410). The information available to members is different for a company that is member managed and one that is manager managed. UCA § 48-3a-410.

iii. Buy-out. There is no general requirement to buy out a member's interest on death or other event. If however, the company is a professional services company under UCA § 48-3a-1101, a buyout of a deceased member is required at reasonable fair market value at the time of death within 90 days of the company being notified of the death. UCA § 48-3a-1111(2) and (3). If court action is needed, attorney's fees and costs can be awarded, and the court has authority to require liquidation of the company. UCA § 48-3a-1111(4), (5), and (6).