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## Summary and Comments

### SB 225

#### GENERAL PROVISIONS

**Section 1. Purpose.** This new section would assist courts in understanding the primary purposes of the UPC and further would assist the courts in construing the Uniform Probate Code (UPC).

**Section 2. Severability.** This section is a standard provision designed to protect the code in the event any part of it is found to be invalid.

**Section 3. Definitions.** Subsections (43) and (46) were added to the definitions to permit electronic communications to constitute a “record” of a matter and to permit electronic signatures.

**Section 4. Territorial Application.** Subsection (4) has been added to clarify that the UPC includes provisions dealing with survivorship (such as joint tenancy with rights of survivorship).

**Section 5. Jury Trial.** This amendment would clarify statutory language by indicating that the right to a jury applies to any proceeding in which a controverted question of fact arises and the party has a constitutional right to trial by jury.

**Section 6. Waiver of Notice.** The UPC requires fiduciaries (such as personal representatives) and other individuals to notify specified parties of certain matters that may affect those parties. However, to save time and money, parties may waive these notice requirements. The proposed amendment precludes a waiver by a person who is a respondent in a guardianship proceeding. A person who would be directly affected by a guardianship must know about the proceeding.

**Section 7. Pleadings – when orders or notice binding one binds another -- representation.** Specified orders binding one person also bind another person if there is no conflict of interest. The proposed amendment would clarify that orders binding the holder of a general testamentary power may bind others to the extent their interests are subject to the power.

#### INTESTACY

**Section 8. Share of Spouse.** If a married person dies without a will (“intestate”), existing Montana law provides that all of that person’s probate assets go to the surviving spouse, so long as the parties’ children are children of both spouses. If some of the children are not, the surviving spouse still receives the bulk of the estate, which is more specifically defined in dollar amounts plus a fraction of the remainder of the estate over that dollar amount. The proposed amendments would increase those dollar amounts to reflect inflation.

**Section 9. Requirement that heir survive decedent for 120 hours.** This section avoids multiple administrations by requiring heirs to survive decedents by 120 hours. For example, husband and wife are involved in an automobile accident. Husband dies instantly at the crash scene and the wife dies one day later at a hospital. Rather than having husband’s estate be distributed to wife’s estate and then having those same assets be distributed as part of wife’s estate to their children, husband’s estate would be directly distributed to the children in a one-step process. The amendment clarifies this result by indicating that the wife (in this case) is “deemed” (rather than “considered”) to have predeceased her husband.

**Section 10. Representation.** The concept of representation concerns who takes in the place of a deceased person, or a person who is “deemed” to be deceased. The change from the term “considered” to the term “deemed” makes this representation provision consistent with the language in section 9.

**Section 11. Afterborn heirs.** Individuals in gestation have long been treated as living if they survive 120 hours or more after birth. The amendment requires “clear and convincing” evidence of surviving the 120-hour period.

**Section 12. Parent barred from inheriting from a deceased child in certain circumstances.** If an unmarried child has no children or grandchildren and dies without a will, the child’s parents would inherit under existing Montana law. Existing law requires that the parent must have openly treated the child as the parent’s child and not refused to support the child.

This new section provides more exacting language. The parent inherits, unless his/her parental rights have been terminated, or where immediately before death, there is “clear and convincing evidence” that parental rights could have been terminated under state law. Existing Montana law, Mont. Code Ann. § 42-2-607, lists 5 specific grounds for terminating the parent-child relationship.

#### **ELECTIVE SHARE**

**Sections 13-26. Elective Share Provisions Generally.** The elective share provisions protect the surviving spouse from disinheritance. Under a partnership theory of marriage, a surviving spouse (wife or husband) in a long-term marriage (15 or more years) is entitled to 50% of the couple’s collective assets. Usually, both husband and wife have contributed (directly or indirectly) to the acquisition of the assets or their preservation.

The surviving spouse’s percentage of the estate is phased in during the first 15 years of marriage. If the parties have married for only one year, the percentage is 3%. That percentage increases, at the rate of 3% per year of marriage, until after 10 years of marriage, it increases at the rate of 4% per year.

To a great extent, the substantive elective share provisions of the bill are the same as existing Montana law. However, many of the provisions have been reorganized into easier-to-understand shorter sections.

A nonuniform provision of existing Montana law would be deleted if the bill is enacted. Existing Montana law excludes pension, profit-sharing and retirement benefit plan benefits from the calculation of the couple’s assets. Thus, a husband could name his paramour as the beneficiary of his IRA and his surviving spouse would receive nothing from the IRA upon the husband’s death. Given the significant amount of assets that currently are in many IRA accounts, the potential for major abuse is significant. The bill would eliminate this exception and subject such benefits to the surviving spouse’s elective share.

Because of this change and the substantial reorganization into easier-to-understand shorter sections, Mont. Code Ann. §§ 72-2-221, 72-2-222, 72-2-224, 72-2-226, and 72-2-227 would be repealed.

**Section 13. Definitions.** This new section provides the definitions for the elective share sections.

**Section 14. Elective Share.** This new section grants the surviving spouse the right to an elective share.

**Section 15. Composition of the Augmented Estate.** Subsection (1) of this new section lists the four components of the “augmented estate” (the couple’s collective assets). Subsection (2) sets forth the elective share percentages which depend on the length of the marriage.

**Section 16. Decedent’s net probate estate.** This new section is the first of four components of the augmented estate and consists of the probate estate less funeral and administrative expenses, enforceable claims, and exempt property and allowances.

**Section 17. Decedent’s nonprobate transfers to others.** This new section is the second of four components of the augmented estate. It consists of specified, nonprobate assets transferred from the decedent spouse to someone other than the surviving spouse.

**Section 18. Decedent’s nonprobate transfers to surviving spouse.** This new section is the third of four components of the augmented estate and consists of specified, nonprobate assets transferred from the decedent spouse to the surviving spouse.

**Section 19. Surviving spouse’s property and nonprobate transfer to others.** This new section is the final component of the augmented estate and consists of property owned by the surviving spouse at the decedent spouse’s death. Additionally, it consists of specified, nonprobate assets transferred from the surviving spouse to a third party. Further, this section includes specified transfers from the surviving spouse to third parties made within 2 years of the decedent spouse’s death.

**Section 20. Exclusions, valuations, and overlapping application.** This new section lists a number of assets not included in the augmented estate. Consistent with existing Montana law, life insurance payable to persons other than the decedent’s surviving spouse, is excluded. The section also provides rules for valuing assets and provides that if the same asset is included in the augmented estate more than once because of different code provisions, the asset is counted only once. If the different code provisions give rise to different values for the same asset, the highest value applies.

**Section 21. Sources from which elective share is payable.** This new section provides an order for satisfying the elective share. In general terms, the following order applies:

- First, assets the surviving spouse received from the probate estate and the marital portion of assets owned by the surviving spouse;
- Second (if there is an elective share deficiency), assets in the probate estate that go to third parties and nonprobate transfers to third parties; and
- Third (if there still is a deficiency), assets included in the augmented estate, which assets were transferred by the decedent spouse to third parties within 2 years of death.

**The bill should be amended by changing the reference in subsection (2) from “(1)(b)” to “(1)(c)”.**

**Section 22. Effect of premarital or marital agreement right to elect and of other rights.** Under existing Montana law, the parties can enter into a premarital agreement and agree to accept less than the full amount of the elective share. However, existing Montana law is silent on whether the parties can enter into an effective agreement after marriage. This new section expressly authorizes post-nuptial agreements.

Additionally, in order for agreements to be enforceable, the new section requires that the agreements be voluntary, and not be the result of duress. The surviving spouse must have access to independent

legal representation and must have received adequate financial disclosure. These concepts are not defined in current Montana statutory law.

**Section 23.** Right of election personal to surviving spouse – incapacitated surviving spouse.

**Section 24.** Proceeding for elective share – time limit. **Section 25.** Protection of payors and other third parties. **Section 26.** Personal liability of recipients. These sections would be amended to reflect new section numbers. Substantive law would not be altered.

#### **EXEMPT PROPERTY AND ALLOWANCES**

**Section 27.** Homestead allowance. **Section 28.** Exempt Property. These two sections protect the family from the decedent's unsecured creditors up to specified dollar limits. These sections would be amended to increase those limits to reflect inflation. The homestead allowance would be increased from \$20,000 to \$22,500, and the exempt property allowance from \$10,000 to \$15,000.

**Section 29.** Source, determination, and documentation. This section would amend Mont. Code Ann. § 72-2-415 by increasing the \$18,000 limit to a \$27,500 limit on the personal representative's authority to determine the family allowance. The family allowance is another protection from the decedent's unsecured creditors. Again, this amendment is an inflation adjustment.

#### **RULES OF CONSTRUCTION**

**Section 30.** Antilapse -- deceased devisee – class gifts. Gifts in a will are called "devises." A devise in a will to a beneficiary who predeceases the testator is said to "lapse." Neither the beneficiary (devisee) nor any of his/her family receive the devise. Montana's existing antilapse statute provides some precisely-worded exceptions to this general rule. For example, if the deceased devisee is a descendant of the testator's grandparent, the devise does not lapse. Rather, the deceased devisee's descendants take the devise. This section would clarify several aspects of Mont. Code Ann. § 72-2-613.

**Section 31.** Nonademption of specific devises – unpaid proceeds of sale, condemnation, or insurance – sale by conservator or agent. Devises may be classified in a number of ways. A "general" devise could come from any of the testator's assets. For example, "I devise \$100 to each of my cousins." The \$100 devises could come from any of the estate's assets. A "specific" devise is the devise of a uniquely identifiable item. For example, "I devise my 1969 Buick Grand Sport to my brother." If the testator sells or otherwise disposes of that item prior to the testator's death, the question could arise whether the will's designated beneficiary ("devisee") of that item would receive something else as a replacement. This section provides that the devisee would not, unless it is established that such would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, or the date the testator sold that item, the testator did not intend that result. Thus, the general rule is that when a testator makes a specific devise and later disposes of the devised asset, the testator knows that the devise is no longer effective. This section would modify Mont. Code Ann. § 72-2-616 to make it consistent with the prevailing rule in other states.

**Section 32.** Requirement of survival by 120 hours. Mont. Code Ann. § 72-2-712 imposes the 120-hour survival requirement applicable to intestacy (see Section 9 of the bill) on wills as a rule of construction. As a result, there will be fewer successive administration of the same assets. Also, the bill clarifies this rule of construction. For example, like Section 9 of the bill, the term "deemed" replaces the word "considered."

**Section 33.** The bill should be amended to delete this section. Senate changes to the intestate succession provisions of the original bill require that Section 33 be deleted. Instead, existing Mont. Code Ann. § 72-2-715 should be retained because it is consistent with the intestacy provisions in this amended bill.

**Section 34.** Life insurance – retirement plan – account with POD designation – transfer-of-death registration – deceased beneficiary and **Section 35.** Survivorship with respect to future interests under terms of trust – substitute takers. Like Section 30 dealing with antilapse in an estate, these sections would provide similar rules to life insurance, retirement plans, pay-on-death accounts with financial institutions, transfer-on-death security registration, and future interests in a trust. Also, like Section 30, Sections 34 and 35 would clarify several aspects of existing Montana law.

#### **GENERAL PROVISIONS**

**Section 36.** Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations. Existing Montana law revokes any disposition of these assets to an heir (devisee, beneficiary, or surviving joint tenant) if that heir (devisee, beneficiary, or surviving joint tenant) kills the decedent. Existing Montana law, Mont. Code Ann. § 72-2-813(9)(b), purports to preclude an identified federal law from preempting state law. This amendment would eliminate this unenforceable provision.

**Section 37.** Revocation of probate and nonprobate transfers by divorce – no revocation by other changes of circumstances. Existing Montana law provides a rule of construction, which revokes a disposition of assets to a former spouse when the divorce or annulment occurs after the will, or the nonprobate transfer document, was signed. Existing Montana law, Mont. Code Ann. § 72-2-814(8)(b), purports to preclude an identified federal law from preempting state law. This amendment would eliminate this unenforceable provision.

**Section 38.** Reformation to correct mistakes. Courts have been reluctant to correct mistakes in wills. The courts are legitimately concerned that correcting mistakes would encourage litigation, which could dissipate the decedent's assets. This reluctance has been most profound when the mistake is that of omission, that is, the will omitted a beneficiary and the would-be beneficiary seeks a distribution after the decedent's death.

This new section would allow courts to reform the terms of a will, even if unambiguous, if clear and convincing evidence establishes doing so is necessary to implement the testator's intention. Mont. Code Ann. § 72-38-415 already applies a similar provision to trusts.

**Section 39.** Modification to achieve transferor's tax objectives. This new section would permit a court to modify the terms of a will to achieve the testator's probable tax objectives.

#### **DISCLAIMERS**

**Sections 40-56.** Disclaimers Generally. A beneficiary does not have to accept a distribution from an estate and can file what is known as a "disclaimer." When a beneficiary files a disclaimer, the disclaiming beneficiary does not receive the distribution and the disclaiming beneficiary is treated as predeceasing the testator. The disclaimed property then passes to the next person in line, whether under the decedent's will or through the laws of intestacy if there was no will.



The disclaimer is a versatile and occasionally utilized post-mortem (death) estate planning tool. Disclaimers can, under specified circumstances, save a family taxes while continuing to follow the decedent's expressed intent. Disclaimers can also be used to attempt to keep the disclaimed property from the disclaimant's creditors.

Existing Montana law concerning disclaimers consists of one code section, namely Mont. Code Ann. § 72-2-811. To a great extent, that section tracks a provision of the Internal Revenue Code, with little guidance. For example, existing Montana law requires the disclaimer of a will provision to be made within 9 months of the decedent's death. Reflecting the fact that many disclaimers are not made because of tax purposes, the bill eliminates this specific time limit. The only bar to a disclaimer is the beneficiary's acceptance of the property.

Sections 40-56 comprise the "Uniform Disclaimer of Property Interest Act," a comprehensive act that deals with all aspects of disclaimers. This act has been adopted by 21 states and the District of Columbia. The Uniform Law Commission has recommended the act's incorporation into the UPC.

Sections 40-56 would replace Mont. Code Ann. § 72-2-811, which would be repealed.

**Section 40. Short title.** This new section indicates that the title of the act is the "Uniform Disclaimer of Property Interest Act."

**Section 41. Definitions.** This new section provides definitions for the act.

**Section 42. Scope.** The act applies to any interest in property.

**Section 43. Disclaimer provisions supplemented by other law.** Other areas of law supplement the act. For example, Section 47 permits a trustee to disclaim, yet the disclaiming trustee must still adhere to all applicable fiduciary duties found in trust law.

**Section 44. Power to disclaim – general requirements – when revocable.** This new section would give persons and fiduciaries broad powers to disclaim interests in, and powers over, property. Subsection (3) sets forth the formal requirements of a disclaimer. The disclaimer must be in writing or in a "record" (as defined in the act) and must be signed. A person making a disclaimer, may disclaim his or her entire interest in the disclaimed property, or any fraction or percentage of the property. The disclaimer becomes irrevocable when delivered or filed in accordance with Section 51.

**Section 45. Disclaimer of interest in property.** This new section makes a disclaimer effective at the time the instrument creating the interest become irrevocable. A will and a revocable trust become irrevocable upon the testator's death or the trust creator's (settlor's) death. The disclaimed assets pass as directed in instrument creating the interest, usually the will or trust. If that instrument does not provide any direction, the section sets down rules to determine who will be recipient of the disclaimed property.

**Section 46. Disclaimer of rights of survivorship in jointly held property.** In the context of some joint tenancies, a joint tenant owns a fraction of the property, the numerator of which is 1 and the denominator of which equals that number of joint tenants just prior to death. In the context of other joint tenancies, a joint tenant owns what the tenant contributed to the property. A surviving joint

tenant cannot disclaim something the surviving joint tenant already owns. A surviving joint tenant can disclaim the interest coming from a decedent joint tenant.

**Section 47. Disclaimer of interest by trustee.** Subject to the trustee's fiduciary duties, a trustee may disclaim what would have become trust property. The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not include such a provision, the property reverts back to the donor.

**Section 48. Disclaimer of power of appointment or other power not held in fiduciary capacity.** This new section provides rules concerning disclaimers by holders of powers of appointment, including the time when such disclaimers take effect.

**Section 49. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.** This new section provides rules concerning disclaimers by appointees and takers in default of powers of appointment, including the time when such disclaimers take effect.

**Section 50. Disclaimer of power held in fiduciary capacity.** This section covers disclaimers by trustees, personal representatives, agents acting under powers of attorney, and other fiduciaries. The rules of the section indicate the time when disclaimers by such fiduciaries take effect.

**Section 51. Delivery or filing.** Existing law requires that an effective disclaimer must be made within 9 months of the event giving rise to the right to disclaim. Thus, an effective disclaimer of a provision in a will must be made within 9 months of the testator's death. The 9-month rule corresponds with provisions in the Internal Revenue Code.

This new section rejects a time requirement for making a disclaimer. Many disclaimers are made for non-tax reasons. So long as the disclaimant has not waived the right to disclaim and so long as the disclaimant is not barred from disclaiming the property under Section 52, a disclaimer may be made.

**Section 52. When disclaimer barred or limited.** A disclaimer is barred if the would-be disclaimant accepted the interest sought to be disclaimed, voluntarily assigned or conveyed the interest, or if there has been a judicial sale of the property.

Also, this section describes where the written disclaimer must be delivered or filed, which depends upon the type of interest being disclaimed.

**Section 53. Tax qualified disclaimer.** If a disclaimer meets the qualifications of the Internal Revenue Code, the disclaimer is effective under Sections 40-56.

**Section 54. Recording of disclaimer.** This new section permits recording of a disclaimer of an interest in real property. In order to establish the chain of title to real property, disclaimants will likely record the disclaimer.

**Section 55. Application to existing relationships.** If a disclaimer is barred by the running of a time period of existing law, it will continued to be barred under this section.

**Section 56.** Relation to electronic signatures in global and national commerce act. This section consists of standard language in uniform acts which permits states to preempt application of the federal Electronic Signatures in Global and National Commerce Act.

#### **PROBATE AND ADMINISTRATION GENERALLY**

**Section 57.** Necessity of order of probate of a will. Some individuals understand the term “probate” to include the entire administration of an estate, from the opening petition to the closing order. Mont. Code Ann. § 72-3-102 provides that an order declaring a will to be valid is necessary to prove title. That order is considered “probate.” This section would make the title of Mont. Code Ann. § 72-3-102 consistent with the substance of that section.

**Section 58.** Venue for estate proceedings. Existing Montana law, namely, Mont. Code Ann. § 72-3-112, provides venue rules for estate proceedings. This section would add subsection (4). A debt of a nondomiciliary is located where the debtor resides, or if the debtor is not an individual, it is located where the principal office of the debtor is located. Section 66 replaces Mont. Code Ann. § 72-3-113, which would be repealed.

**Section 59.** Time limit on probate, testacy, and appointment proceedings – exceptions. This section makes no substantive change to Mont. Code Ann. § 72-3-122. A phrase “after the time period” is replaced with “thereafter” in subsection (d).

**Section 60.** Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons. This section would make the title of Mont. Code Ann. § 72-3-131 consistent with the title to its corresponding section in the UPC. There is no change to substantive law.

**Section 61.** Applications to be verified. This section would amend Mont. Code Ann. § 72-3-201 by requiring verification of petitions for informal probate and informal administration. The amendment is consistent with the corresponding section in the UPC.

**Section 62.** Required contents of application. This section would amend Mont. Code Ann. § 72-3-202 by adding a requirement that a petition for informal probate or informal administration include a statement that the petition was made within the time limits proscribed by Mont. Code Ann. § 72-3-122. The amendment is consistent with the corresponding section in the UPC.

**Section 63.** Probate and appointment under will – additional information required. This section would amend Mont. Code Ann. § 72-3-203 to accommodate the change included in Section 62 above.

**Section 64.** Formal testacy proceedings – contested cases. This new section clarifies the burden and standards of proof in will contests. Section 64 would replace Mont. Code Ann. § 72-3-309, which would be repealed.

#### **PERSONAL REPRESENTATIVES**

**Section 65.** Supervised administration – nature and purpose – presumptive entitlement. This section would amend Mont. Code Ann. § 72-3-401. A supervised administration requires a court order before the personal representative may make distributions to beneficiaries. Supervised administrations incur additional costs and are rarely utilized. This amendment, consistent with the UPC, would set forth additional responsibilities of a personal representative in a supervised administration and would eliminate a provision granting a devisee a presumptive entitlement to a supervised administration.

**Section 66.** Powers of personal representative in supervised administration. This section would amend Mont. Code Ann. § 72-3-404 to accommodate the change included in Section 65 above.

**Section 67.** Priorities for appointment. This section would amend Mont. Code Ann. § 72-3-502, which lists individuals who would have priority to be appointed as personal representative. If a decedent dies without a will and is not survived by a spouse, this amendment would give next priority to the parent of an adult decedent who was survived by minor children.

**Section 68.** Renunciation – nomination of other – two or more persons sharing priority. This section would modify Mont. Code Ann. § 72-3-504, which currently refers to Mont. Code Ann. § 72-3-502(6). The bill would modify this cross reference by changing subsection (6) to (7) in order to accommodate the change made in Section 67 above.

**Section 69.** Demand for bond by interested person. This section would amend Mont. Code Ann. § 72-3-514, which permits a person or creditor having an interest or claim in excess of \$1,000, to demand that the personal representative obtain a bond. The amendment would make an inflationary adjustment and increase the \$1,000 minimum amount to \$5,000.

**Section 70.** Inventory – appraisal. This section would amend Mont. Code Ann. § 72-3-607. The amendment narrows the class of people entitled to receive a copy of the estate inventory. Rather than “interested persons” as provided under existing law, “heirs, devisees and creditors whose claims have not been satisfied” would be entitled to receive a copy.

**Section 71.** No surcharge for authorized acts generally – limitation. This section would clarify Mont. Code Ann. § 72-3-611 by indicating that the personal representative owes duties to claimants whose claims have been allowed.

**Section 72.** Transactions authorized for personal representative. This section would amend Mont. Code Ann. § 72-3-613. The amendment would eliminate requirements that the personal representative must first obtain the consent of the heirs or the court before abandoning worthless property or negotiating settlement of claims against the estate. Such requirements can make administration cumbersome and potentially costly.

**Section 73.** Powers of personal representatives in general. This new section would clarify that a personal representative has the same powers over assets of an estate that the owner would have, and that the personal representative has access to digital assets as provided in the Uniform Fiduciary Access to Digital Assets Act, which the Legislature adopted in 2017.

**Section 74.** Persons dealing with personal representative – protection. This section would clarify Mont. Code Ann. § 72-3-618 by referencing Mont. Code Ann. § 72-3-404 in its entirety.

**Section 75.** Compensation of personal representative. Mont. Code Ann. § 72-3-631 includes a nonuniform provision, which imposes a formula limiting a personal representative’s compensation to “3% of the first \$40,000 of value of the estate . . . and 2% of the value of estate assets in excess of \$40,000...” The bill would make Montana law consistent with the UPC as promulgated by the Uniform Law Commission and simply provides that “a personal representative is entitled to reasonable compensation for services.”

The existing Montana formula has occasionally led to unattended consequences. On one hand, the formula has prompted some personal representatives of large estates to argue that a 2% change is reasonable in circumstances when, in fact, such a charge is unreasonably high. On the other hand, the formula has discouraged other individuals from agreeing to serve as personal representatives of small estates. The bill would eliminate these unintended consequences by eliminating the formula and requiring that compensation be reasonable in all estates.

Existing Montana law authorizes the personal representative to employ persons, including attorneys, auditors, and investment advisors. [Mont. Code Ann. § 72-3-613(21)] Further, existing Montana law permits an estate beneficiary, or other interested person, to challenge the reasonableness of compensation paid to persons employed by the personal representative. Mont. Code Ann. § 72-3-634. The bill would repeal Mont. Code Ann. § 72-3-633 which limits attorney fees to 1 ½ times the amount allowed for personal representatives. In light of the change in personal representative fees to a reasonable standard, it does not make sense that attorneys could be paid 1 ½ times a reasonable fee. Attorney fees must be reasonable.

The Montana Supreme Court has established a seven-part test applicable to all civil matters by which the reasonableness of an attorney fee is determined. For example, the court evaluates the requirements of the case, such as technical skills, the time required, and the complexity of the issues.

#### **CREDITORS AND CLAIMS**

**Section 76. Nonclaim – limitations on presentation of claims – exceptions.** This section would amend Mont. Code Ann. § 72-3-803. The statute imposes time limits on when creditors must make their claims after the death of an alleged debtor. The amendment makes it clear that these time limits apply to nonprobate transfers as well as probate transfers.

**Section 77. Compromise of claims.** This section would amend Mont. Code Ann. § 72-3-815. The amendment would eliminate requirements that the personal representative must first obtain the consent of the heirs or the court before compromising claims against the estate. Such a requirement can make administration cumbersome and potentially costly.

**Section 78. Distribution to person under disability.** This section would amend Mont. Code Ann. § 72-3-917, which gives options to a personal representative when a disabled person is a beneficiary. If the property to be received does not exceed \$10,000 in value, the personal representative may make the distribution to the disabled person's spouse or other close relatives. The amendment would make an inflationary adjustment and increase the \$10,000 limit to \$50,000.

**Section 79. Liability of distributees to claimants.** This section would amend Mont. Code Ann. § 72-3-1012. The amendment would clarify that amounts distributed to satisfy family member's rights to the homestead, exempt property, and family allowances are true priorities, and are not available to satisfy unsecured creditor claims.

**Section 80. Limitation on actions against distributees.** This section would amend Mont. Code Ann. § 72-3-1013. If a personal representative makes an improper distribution, one can seek recovery from the improper distributee. Proceedings must be made before the later of 3 years after the decedent's death or 1 year after the time of distribution. The amendment would affect claims by the decedent's creditors

and limit their claims to 1 year after the decedent's death. That 1-year creditor limitation is consistent with other UPC provisions, namely, Mont. Code Ann. § 72-3-803.

#### **FOREIGN PERSONAL REPRESENTATIVE**

**Section 81.** Service on foreign personal representative. This section would amend Mont. Code Ann. § 72-4-403. The amendment would permit service of process on a personal representative of an out-of-state probate by registered mail.

#### **NONPROBATE TRANSFERS**

**Section 82.** Nonprobate transfers on death. This section would amend Mont. Code Ann. § 72-6-111. The amendment would change cross references to reflect the Uniform Real Property Transfer on Death Act, which is found in Sections 85 to 102 of the bill.

**Section 83.** Liability of nonprobate transferees for creditor claims and statutory allowances. Existing Montana law authorizes a number of nonprobate transfers, such as transfer-on-death brokerage accounts and pay-on-death bank accounts. This new section would clarify that unsecured creditors can reach these assets only to the same extent they can reach probate assets. Further, if the decedent did not specify which of the decedent's assets would be used first to satisfy legitimate creditor claims in a will or trust, this section provides a priority for payment.

**Section 84.** The bill should be amended to delete this section. Some Montana financial institutions have advised us that the section could require the modification of all their account forms.

**Sections 85-102.** Uniform Real Property Transfer on Death Act, generally. As promulgated by the Uniform Law Commission, the UPC now includes the Uniform Real Property Transfer-on-Death Act, as part of the Uniform Probate Code. Montana has previously adopted the Uniform Transfer-on-Death Security Registration Act, which permits the transfer of securities, such as stocks and bonds, without the necessity of probate. Montana has also adopted the Uniform Multiple-Party Accounts Act, which permits the transfer of bank accounts without the necessity of probate. Both of these uniform acts are part of Montana's Uniform Probate Code. The addition of the Uniform Real Property Transfer-on-Death Act to the Montana Uniform Probate Code would provide the benefits of another uniform act that permits the transfer of real property without probate.

The uniform act is more comprehensive than existing Montana law concerning the non-probate transfer of real property. Further, if adopted, Montana landowners and courts would have the benefit of the extensive comments the Uniform Law Commission has drafted about the act and would also receive guidance from the courts of the 18 states that have already adopted the Uniform Real Property Transfer-on-Death Act.

Sections 85-102 would replace Mont. Code Ann. § 72-6-121, which would be repealed.

**Section 85.** Short title. This new section indicates that the title of the act is the "Uniform Real Property Transfer-on-Death Act."

**Section 86.** Definitions. This new section provides definitions for the act.

**Section 87.** Applicability. This new section provides that the act applies to a transfer on death deed made before, on, or after the effective date of the act.

**Section 88. Nonexclusivity.** This new section provides that the act does not affect any method of transferring property otherwise permitted under state law.

**Section 89. Transfer on death deed authorized.** This new section authorizes a transfer on death deed and makes it clear that the transfer is not an inter vivos transfer. The transfer occurs at the transferor's death.

**Section 90. Transfer on death deed revocable.** This new section provides that the transferor retains the power to revoke the deed.

**Section 91. Transfer on death deed nontestamentary.** This new section indicates that the deed does not have to be executed in compliance with the formalities for wills, nor does the deed have to be probated.

**Section 92. Capacity of transferor.** This new section provides that the capacity required to make or revoke a transfer on death deed, which is a revocable will substitute, is the same as the capacity required to make a will.

**Section 93. Requirements.** Subsection (1) of this new section requires that a transfer on death deed contain the same essential elements and formalities, other than a present intention to convey, as are required for a properly recordable inter vivos deed under state law. Subsection (2) requires the deed to state that the transfer will occur on death. Subsection (3) requires the deed to be recorded.

**Section 94. Notice, delivery, acceptance, consideration not required.** This new section makes it clear that a transfer on death deed is effective without notice, or delivery to, or acceptance by, the beneficiary during the transferor's lifetime. Further, no consideration is required.

**Section 95. Revocation by instrument authorized – revocation by act not permitted.** This new section concerns revocation of the transfer on death deed by instrument and revocation by act. Subsection (1) sets forth the exclusive means of revoking a transfer on death deed. A subsequent instrument revoking the TOD deed must be recorded prior to the revoking transferor's death. Subsection (3) indicates that after a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

**Section 96. Effect of transfer on death deed during transferor's life.** This new section provides that a transfer on death deed does not operate until the transferor's death. The transfer occurs at the transferor's death, not before. Thus, during the transferor's life, the transferor's creditors are not affected and the beneficiary's creditors have no claim to the property.

**Section 97. Effect of transfer on death deed at transferor's death.** Subsection (1) of this new section states 4 default rules. Subsection (2) concerns the effect of transactions during the transferor's life. Subsection (3) provides that the survivorship right of a joint owner takes precedence over a transfer on death deed. Subsection (4) states that a transfer on death deed transfers the property without covenant or warranty of title.

**Section 98. Disclaimer.** This new section provides that a beneficiary of a transfer on death deed may refuse to accept the property through the disclaimer process.

**Section 99. Liability for creditor claims and statutory allowances.** This new section provides that the beneficiary of a transfer of death deed is liable for legitimate claims against the transferor's estate, including the statutory allowances for family members. Section 99 would replace Mont. Code Ann. § 72-6-123, which would be repealed.

**Section 100. Optional form of transfer on death deed.** This new section provides an optional form for a transfer on death deed. Unlike existing Montana law, the back of the form prescribed in this section includes a number of frequently asked questions about the use of transfer on death deeds. The listed questions include:

- What does the Transfer on Death (TOD) deed do?
- How do I make a TOD deed?
- Is the "legal description" of the property necessary?
- How do I find the "legal description" of the property?
- Can I change my mind before I record the TOD deed?
- How do I "record" the TOD deed?
- Can I later revoke the TOD deed if I change my mind?
- How do I revoke the TOD deed after it is recorded?
- I am being pressured to complete this form. What should I do?
- Do I need to tell the beneficiaries about the TOD deed?

The responses to these questions are in plain, easy-to-read English and are contained on the back of the form. The responses are very consumer friendly.

**Section 101. Optional form of revocation.** This new section provides an optional form for an instrument to revoke a transfer on death deed. Unlike existing Montana law, the back of the form prescribed in this section includes a number of frequently asked questions about the use of the form. The listed questions include:

- How do I use this form to revoke a Transfer on Death (TOD) deed?
- How do I find the "legal description" of the property?
- How do I "record" the form?
- I am being pressured to complete this form. What should I do?
- I have other questions about this form. What should I do?

The responses to those questions are also very readable and consumer friendly.

**Section 102. Prior executed and recorded beneficiary deed.** This new section would further insure that beneficiary deeds that have been signed and recorded pursuant to existing Montana law, would be respected.

#### **MISCALLEANOUS**

**Section 103. Disclaimer.** This section would modify Mont. Code Ann. § 72-4-401 by deleting a reference to existing law, which would be repealed by this bill, and replacing the reference with the relevant bill section numbers.

**Section 104. Compensation of public administrator.** This amendment to Mont. Code Ann. § 72-15-301 accommodates the new provisions concerning the compensation of personal representatives as set forth in bill Section 75, which amends Mont. Code Ann. § 72-3-631.

**Section 105. Directions to the code commissioner.**



**Section 106.** Codification instruction.

**Section 107.** Repealer. The section-by-section descriptions above explain why the following sections of Mont. Code Ann. would be repealed: §§ 72-2-124, 72-2-221, 72-2-222, 72-2-224, 72-2-226, 72-2-227, 72-2-811, 72-3-113, 72-3-309, 72-3-633, 72-6-121, and 72-6-123.

Mont. Code Ann. § 72-2-215 would be repealed because it is inconsistent with Mont. Code Ann. § 72-2-121. The latter section permits aliens to inherit.

**This repealer section should be modified by deleting the reference to Mont. Code Ann. § 72-2-715 in light of the Senate amendments to the original bill. See comment to Section 33 above.**