

MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Thomas Gallanis

Re: Minutes, March 14-15, 2008; Tucson, Arizona

DRAFT – NOT YET APPROVED

The meeting was called to order on Friday, March 14, at 9:05am by Chair Malcolm Moore. Others present were (in alphabetical order): Jackson Bruce, Michelle Clayton, David English, Mary Louise Fellows, Thomas Gallanis, Edward Halbach, John Langbein, Carlyn McCaffrey, Judith McCue, Eugene Scoles, Bruce Stone, James Wade, Lawrence Waggoner, and Raymond Young. Not present were Susan House, Naomi Karp, Joseph Kartiganer, Sheldon Kurtz, Anne McGihon, and Martha Starkey. Guests included Carol Cantrell, a vice-chair of the Income Tax Committee of the ABA Section on Real Property, Trust and Estate Law, here representing the American Institute of Certified Public Accountants, and (by speakerphone) Steven Gorin, a member of the Council of the ABA Section on Real Property, Trust and Estate Law.

1. **Minutes.** The Board approved the minutes of the December 2007 meeting.
2. **UPC Amendments.** Professor Waggoner reported on the work of the NCCUSL drafting committee. Mindful of the committee's role, the Board offered feedback on the following topics:
 - a. The use of descriptive titles in subsections of the UPC. The Board strongly supported the use, observing that subsection titles appear in the existing version of the UPC and in the recently approved technical amendments to the UPC. The titles also assist the teaching of the UPC to law students, many of whom will become legislators, judges, or policymakers.
 - b. The provisions in §2-120(c) and (d) on the parent-child relationship. The Board supported the committee's approach.
 - c. The presumptive effect of a birth certificate in §2-120(e). The Board encouraged the committee to obtain more information about how and by whom birth certificates are prepared.
 - d. The rules governing a parent-child relationship with an individual other than a birth mother in §2-120(f). The Board encouraged the committee to consider whether subsection (f)(1) should be amended to require, in addition, the approval of the birth mother.
 - e. The effect of an adjudication of parentage in §2-121(b). The Board supported the committee's approach.

f. The provision creating a parent-child relationship under certain circumstances with a gestational mother in §2-121(c). The Board encouraged the committee to check that the rule will not cause unintended consequences.

g. The two-year time limit in §2-121(d)(1). The Board encouraged the committee to think further about this limit. The example raised in discussion was of a soldier stationed away from home.

h. The presumption governing a gestational agreement after a spouse's death or incapacity in §2-121(f). The Board supported the committee's approach but encouraged the committee to re-draft the opening clause as: "In the absence of (i) an adjudication of parentage as described in subsection (b), (ii) a signed record that satisfies subsection (e)(1), or (iii) clear and convincing evidence to the contrary,...."

i. The rule governing when a posthumously conceived gestational child is treated as in gestation in §2-121(g). The Board encouraged the committee to consider whether "individual" should be used instead of "decedent."

j. The provision governing a transferor who is not the genetic parent in §2-705(e). The Board encouraged the committee to consider including former spouses, but only if doing so would be consistent with the Restatement Third of Property.

k. The rules governing contested cases in §3-406. The Board suggested moving the last sentence of subsection (3) ["An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events cited in the clause occurred."] earlier in the section.

l. The provisions on delayed distribution in §3-703. The Board suggested that this section be dropped from the current round of UPC statutory revisions and that, instead, the proposed change be moved into the section's Comment, with a corresponding change in the Comment to Uniform Trust Code §817.

m. The rules governing ownership during lifetime of a multiple-party bank account in §6-211. The Board encouraged the committee to remove this section from the current draft and instead defer any amendment of this section to a future round of UPC revisions focusing on Article 6.

3. Premarital Agreement Act. The Board approved a motion to join with the JEB on Uniform Family Law in a request to the NCCUSL leadership that a study committee be formed to consider whether to appoint a drafting committee to revise the Uniform Premarital Agreement Act. Twin aims of the revisions would be to expand the Act to cover marital agreements and to consider harmonizing uniform law with the provisions of the Restatement Third of Property. Professors English and Waggoner will meet with the JEB-UFL in May.

4. Real Property Transfer on Death Act. Professor Gallanis reported on the work of the NCCUSL drafting committee. Mindful of the committee's role, the Board offered feedback, focusing on the following topics:

a. References in the commentary to the stand-alone Uniform Nonprobate Transfers at Death Act. The Board suggested that the references instead be to Article 6 of the Uniform Probate Code, which is the more commonly known.

b. Presentation of the Act as consistent with uniform law principles. The Board suggested a Prefatory Note explaining that the Act is implementing the long-standing principle, codified in UPC §6-101, that a nontestamentary conveyance of real property can be made effective at death.

c. The requirements for a valid transfer on death deed in §204. The Board encouraged the committee to consider adopting one of three alternative approaches each of which would validate a deed not recorded before the transferor's death: (1) providing a grace period for recordation of a certain number of days after the transferor's death, as record offices are not open on weekends or holidays; (2) providing a harmless error rule loosely akin to UPC §2-503; or (3) providing that an unrecorded deed would be treated in probate as a specific devise of the property.

d. The provisions in §§204(b) and 207(d) concerning an agent under a power of attorney. The Board encouraged the committee to move this material to the Comments.

e. The rule in §206 on forms of ownership. The Board supported the principle of the section but encouraged the committee to think further about the drafting.

f. The rule in §207(f) preventing revocation or modification by will. The Board encouraged the committee to consider permitting revocation, perhaps along the lines of Uniform Trust Code §602(c)(2)(B). However, the Board observed that a rule permitting revocation by will in this Act would then require the amendment of UPC §6-213(b).

g. The effect of the deed during the transferor's lifetime. There was a vigorous discussion of §208(4), which provides that the beneficiary receives no interest until the transferor's death. The Board reached no consensus but encouraged the committee to think further about its approach.

h. The alternative provisions on disclaimers in §210. The Board observed that all states have disclaimer statutes and encouraged the committee to delete Alternative 2.

i. The rule in §212 on bona fide purchasers. The Board encouraged the committee to delete this section.

j. The provisions in §214 on contests. The Board strongly encouraged the committee to delete subsections (b) and (c).

k. The form of a transfer on death deed in §401. The Board encouraged the committee to redesign the form to give the transferor additional options for designating primary and alternate beneficiaries. For example, a transferor might wish to substitute an alternate for one predeceased primary beneficiary even if other primary beneficiaries survive.

5. **Richard Wellman Award.** At dinner on Friday, Mr. Moore and Mrs. Natalie Wellman presented two Richard Wellman Awards for outstanding contributions to uniform laws in the field of trusts and estates. The recipients were: (i) Professor Scoles, accompanied at the dinner by Ms. Dorothy Gill, and (ii) Mr. E. James Gamble (posthumously), represented at the dinner by his son, Mr. Paul Gamble.

6. **Communication With Constituent Groups.** The Board indicated its desire to ensure that constituent groups have regular information about the Board's activities. Ms. Clayton discussed the distribution of information within ABA-RPTE. Mr. Moore will ask Mr. Turney Berry to make a recommendation on how best to disseminate information within ACTEC.

7. **Disclaimer of Property Interests.** Professor Gallanis led a discussion of three topics concerning the Disclaimer of Property Interests Act:

a. A proposed Comment to §4 to explain the purpose of having the Act supplemented by other law. The Board approved the following Comment:

Comment

The supplementation of the provisions of the Act by the principles of law and equity in Section 4(a) is important because the Act is not a complete statement of the law relating to disclaimers. For example, Section 5(b) permits a trustee to disclaim, yet the disclaiming trustee must still adhere to all applicable fiduciary duties. See Restatement (Third) of Trusts §86 Reporter's Notes to cmt. f. Similarly, the provisions of Section 13 on bars to disclaiming are subject to supplementation by equitable principles. See *Badouh v. Hale*, 22 S.W.3d 392 (Tex. 2000) (invalidating a disclaimer of an expectancy as contrary to equity, on the ground that the putative disclaimant had earlier pledged it to a third party).

Not only are the provisions of the Act supplemented by the principles of law and equity, but under Section 4(b) the provisions of the Act do not preempt other law that creates the right to reject an interest in or power over property. For example, cases have found such rights in the terms of property agreements attendant on divorce. See *Eredics v. Chase Manhattan Bank, N.A.*, 100 N.Y.2d 106, 760 N.Y.S.2d 737 (2003); *Silber v. Silber*, 99 N.Y.2d 395, 757 N.Y.S.2d 227 (2003). The growth of the law would be unduly restricted were the provisions of the Act completely to displace other law.

b. Whether the Comment to §6(b)(3)(D) should be revised to suggest alternative approaches for jurisdictions that have enacted the Act but not UPC §2-707. The Board voted not to revise the Comment.

c. Whether to amend §§12 and 15 to provide a method for disclaiming an interest under a transfer on death deed. The Board indicated that this issue should be deferred until the Uniform Real Property Transfer on Death Act is finalized.

8. **Uniform Principal and Income Act.** Professor English, joined by Mr. Gorin and Ms. Cantrell, led a discussion of possible amendments to the Uniform Principal and Income Act. The Board expressed its gratitude to Mr. Gorin and Ms. Cantrell for their assistance. The discussion focused on three topics:

a. Amendments to §409(d) in response to Revenue Ruling 2006-26. The Board discussed a draft prepared by Mr. Gorin, with further revisions proposed by Mr. Stone. Professor English and Mr. Gorin will work on finalizing the draft while getting feedback from ABA-RPTE, ACTEC, and the IRS. The Board will ask Mr. Turney Berry to coordinate the process of getting feedback from ACTEC.

b. Amendments to §505 concerning the effect of tax distributions from flow-through entities to trusts. The Board discussed a draft prepared by Mr. Gorin and Ms. Cantrell. The Board approved the draft statutory text with some changes to the draft Comment. Professor English, Mr. Gorin, and Ms. Cantrell will finalize the draft while getting feedback from ABA-RPTE and ACTEC. The Board will ask Mr. Turney Berry to coordinate the process of getting feedback from ACTEC.

c. Potential amendments to other portions of the Act, including the rules governing partial liquidations in Section 401 and the use of a 90/10 ratio for principal/income in Section 409 and elsewhere. Professor English will speak with the NCCUSL leadership about how best to proceed on these matters.

9. Comprehensive or “Cross-Channel” Will. The Board voted to recommend to the NCCUSL leadership that a study committee be formed to consider whether a drafting committee should be appointed to prepare a uniform act enabling a will to revoke or modify nonprobate beneficiary designations.

10. Uniform Probate Code: Potential Amendments. Professor English led a discussion of potential amendments to the Uniform Probate Code. The discussion focused on five topics:

a. Potential amendments to Articles 3 and 4. This topic will be on the agenda for the Board’s Fall meeting. In the interim, Professor English and Ms. Clayton will gather feedback from ACTEC fellows in UPC states on how Articles 3 and 4 are working.

b. The status of Article 7. The Board voted to remove Article 7, now superseded by the Uniform Trust Code, and to place a Legislative Note to this effect in the UPC.

c. The prospect of amending §6-102. The Board discussed this topic in general terms, noting it as a matter for later action.

d. A request to Professor English from the office of the Arizona attorney general for an advisory opinion on the meaning and operation of §6-102(h). The Board concluded that none of its members is individually authorized to give an official interpretation of a uniform act. The Board itself has issued a statement on the interpretation of uniform law, but only on rare occasions.

e. A revision to §6-301 that has been proposed in New Mexico. This will be a topic of discussion at the Fall meeting. In the interim, Professor English will talk further with Mr. Jack Burton, a Commissioner from New Mexico.

11. Probate Code: Conforming Amendments. Professor English led a discussion of conforming amendments to integrate the Adult Guardianship and Protective Proceedings Jurisdiction Act into the UPC. The Board voted to approve the amendments. The Board also voted to approve the deletion of UPC Article 5, Part 5, and the insertion of a corresponding Legislative Note pointing to the new Uniform Power of Attorney Act.

12. Chief UPC Reporter/Director of Research. The Board voted to recommend that Professor Waggoner’s title be changed to “Chief UPC Reporter and Director of Research.”

13. **Insurable Interest.** Professor English and Ms. Clayton reported on the work of this drafting committee. The Board supported the committee's decision to limit the scope of the project to insurable interests in trust. A member of the drafting committee will be invited to the Board's Fall meeting.

14. **Proposals on Advance Directives.** The Board discussed two proposals on the topic of advance directives:

a. An e-mail message from Ms. Donna Appell of the Hermansky-Pudlak Syndrome Network encouraging the development of an immediately-effective (i.e., non-springing) advance directive. The Board observed that the Uniform Health-Care Decisions Act provides for this in §2(c). Professor English will communicate with Ms. Appell.

b. A proposal from Professor Karen Boxx and Ms. Catherine Seal that a study committee be formed to determine whether to appoint a drafting committee to prepare a uniform act facilitating the use of mental health advance directives. The Board voted to support the request for a study committee. The Board also recommended consultation with the ABA Commissions on Law and Aging and on Mental and Physical Disability Law and with the ACTEC Elder Law Committee.

15. **International Matters.** Professor English reported on his recent conversations with Mr. David Stewart of the U.S. State Department, who expressed interest in moving forward on the ratification of the International Conventions on the Law Applicable to Trusts and on their Recognition, on the Law Applicable to Succession to the Estates of Deceased Persons, and on the International Protection of Adults. Professors English and Gallanis and Ms. Clayton will meet with Mr. Stewart in May during the ABA-RPTE conference in Washington, D.C. One topic of exploration will be a way for NCCUSL or the Board to be represented on the relevant State Department advisory committee.

The meeting was adjourned at 3:51pm on Saturday, March 15, 2008.

Respectfully submitted,

Thomas P. Gallanis
Assistant Executive Director