

TO: Joint Editorial Board for Uniform Trust and Estate Acts

FROM: David English

DATE: December 15, 2003

RE: Minutes, Chicago, IL - November 7 - 8

The meeting was called to order at 9:00 A.M. on November 7, 2003 by Malcolm Moore. Those in attendance included: Malcolm Moore, David English, Jackson Bruce, Mary Lou Fellows, Edward Halbach, Joseph Kartiganer, Sheldon Kurtz, Judith McCue, Eugene Scoles, Martha Starkey, Robert Stein, Larry Waggoner, and Raymond Young. NCCUSL President Fred Miller, NCCUSL Executive Director William Henning and NCCUSL Legislative Counsel Michelle Clayton also attended. Guests at the meeting on Saturday included Thomas Gallanis (presenting his paper on Inheritance Rights of Committed Partners), Susan Gary (presenting her paper on Inheritance Rights of Children and, as Reporter for UMIFA asking policy questions) and Courtney Joslin (a representative from the ABA Section on Individual Rights and Responsibilities). Not in attendance were Charles Collier, John Langbein, James Wade, and Richard Wellman.

1. Minutes.

The minutes of the December 6-7, 2003 meeting had been widely circulated. The minutes distributed were approved with the prerequisite that two sections needed to be added. NCCUSL President Fred Miller reported that there are requests to publish JEB minutes on the internet for informational purposes. The Board approved prospectively posting summaries of the minutes on the NCCUSL website, as well as seeking to post them on the ABA RPPT and ACTEC websites. Full copies of the minutes will continue to be available upon request.

2. UPC

A. *Integrated UPC.* Professor English reported that the NCCUSL office is close to finishing an integrated Uniform Probate Code, at which point it can be posted on the website. The

amendments from the 1990's were never fully integrated. Professors Wellman and Waggoner will approve a draft prior to posting. The Estate Tax Apportionment Act is the last part that needs to be integrated into the UPC and will be done in a way similar to the Disclaimer Act.

B. *UPC/UTC Overlaps.* Professor English noted that there are several overlapping or conflicting provisions between the UPC and the UTC. Because of this, UPC states adopting the UTC can end up with two provisions on animal trusts, overlaps with UPC Article 7, or nonconforming versions of the representation provisions. NCCUSL President Miller recommended creating legislative notes that more clearly instruct states as to the issue of duplicated animal trust provisions and the importance of deleting UPC Article 7 upon the adoption of the UTC. A recommendation was also made that NCCUSL's Executive Committee should consider deleting Article 7 of the UPC completely since any state considering adopting new trust law would most certainly turn to the much more comprehensive UTC. Any changes to the UPC could be considered by NCCUSL's Executive Committee at its Mid-Year meeting in January. With respect to the representation issue, Professor English agreed to provide sample language at the Board's next meeting for discussion. Any proposed amendments to the UTC would need clearance from the UTC Standby Committee.

C. *Article 2 Case Law Research.* Professor English reported that a NCCUSL law clerk has prepared a listing of cases that have cited UPC Article 2. Professor Waggoner commented on important cases having to do with harmless error and revocation by divorce of pre-effective life insurance. A reorganization of the research is needed, at which point it will be distributed to the Board.

D. *Elective Share.* Professor Waggoner reported that he is publishing an article on elective shares and the community property approach and would like to present his views at the next JEB meeting.

3. Disclaimer Act.

Professor Kurtz reported that he had cleaned up the comments to the Uniform Disclaimer of Property Interests Act. There remains, however, a numerical problem within the comments pertaining to an extremely confusing example. The Reporter, Bill LaPiana, is agreeable to making changes. Professors Kurtz and Waggoner agreed to assist in clearing up any problems with the comments and making sure the UPC and free-standing Act are both consistent.

4. Uniform Estate Tax Apportionment.

Professor English expressed concern about the comments and the prefatory note of the recently approved UETAA. The Prefatory Note does not describe the policy issues for why the Act is needed in any detail and many sections are not properly cross-referenced. President Miller recommended taking the issue of improving the comments to the Chair, Reporter, Stand-by Committee and then to the Executive Committee. Professor Waggoner also agreed to incorporating the numbered sequences of the UETAA into the UPC to correct some problems.

5. Guardianship Jurisdiction.

Professor English described that at the request of the Board, NCCUSL appointed a Guardianship Study Committee, chaired by Lyle Hillyard from Utah. The purpose of the Study Committee is to consider whether any revisions are needed to the jurisdictional provisions of the Uniform Guardianship and Protective Proceedings Act (UPC Article V, Parts 1-4). Professor English has written memos on the issues and Senator Hillyard sent letters to interested groups requesting comments before a drafting committee is recommended. The Board recommended that NCCUSL staff Michelle Clayton resend letters to the ABA, ACTEC and other appropriate groups. President Miller indicated that the final report from the study committee is not expected until next Summer.

6. Anatomical Gift

Professor Kurtz reported that a study committee has been formed to consider updating the Uniform Anatomical Gift Act. Members of the study committee are currently soliciting

informational requests from the ABA before recommending the appointment of a drafting committee.

7. Uniform Law Classification

A. *Prudent Investor*. Professor English informed the Board that Professor Langbein complained about the major changes to Pennsylvania's version of the Uniform Prudent Investor Act on important provisions dealing with diversification and inception assets. Professor Langbein was particularly disturbed by the result in the Hershey case, which cited the Pennsylvania version of the Act, and suggests that Pennsylvania be taken off the list of adopting states. The Board decided that the issue would be held over until the next meeting at which time Professor Langbein can present the issue. President Miller reminded the Board that final determination of what acts are classified as uniform is made by NCCUSL Legislative Director and Legal Counsel John McCabe.

B. *Iowa Trust Code*. Professor Kurtz provided the Board with a chart comparing the Iowa Trust Code with the Uniform Trust Code and suggested that it be considered as a "substantially similar" enactment. Because Iowa enacted an early draft of the UTC, many of its provisions are similar to the final UTC. The Board discussed the meaning of "substantially similar" enactments and determined that it balances the expectation that there will be core uniformity versus conforming language, procedural and major policy changes. The Board recommended that John McCabe consider Professor Kurtz's chart and determine whether Iowa should get credit for a substantially similar enactment.

8. Principal and Income

Professor English reported that Uniform Principal and Income Act Reporter James Gamble completed his comments to Section 105 and it is now on the NCCUSL website. Professor English described how the 37 adopting states have enacted the Act in varying ways including: 1) with Section 104 on Power to Adjust; 2) without Section 104; 3) with Section 104 and 105 on Judicial Discretion; 4) with Section 104, 105 and the California notice provisions. Several states have enacted a nonuniform unitrust only provision. Section 105 on Judicial Discretion was drafted as an effort to

assuage fears the banking community had about Section 104 - Power to Adjust, which has now been adopted in approximately 17 states. The final comment to Section 105 suggests that Section 104 would permit the use of unitrusts. Mr. Moore expressed concern about unitrusts being fundamentally different and that they should not be mentioned for the first time in the comments after numerous states already adopted the Act. Ms. McCue recommended that the comment be placed under Section 104 rather than 105. President Miller proposed using the comment change policy and sending it to the NCCUSL Executive Committee after clearance from the Chairman of the Standby Committee. The Board recommended that John McCabe contact James Gamble and request that he alter the comment for Section 104. The Board also discussed the need to revise the Uniform Principal and Income Act, but rejected the idea based on tax issues that have yet to be resolved under the Internal Revenue Service.

9. State Death Taxes

The Scope and Program Committee requested that the JEB review the Uniform Interstate Arbitration of Death Taxes Act and the Uniform Interstate Compromise of Death Taxes Act. The purpose of the review is to make a determination as to whether a revision might be desirable given the growing number of states that have decoupled their state estate tax from the federal credit for state death taxes. The Board reviewed a memo written by William LaPiana that describes the problems caused by the various ways that states have decoupled their tax from the federal credit. The new decoupling provisions are particularly problematic for decedents who own property located in two or more states. The Board noted that the two uniform acts deal only with disputes over domicile, not with conflicts on how states compute the tax. Noting that NCCUSL has not historically addressed substantive tax policy, the Board determined that the two acts do not need revising at this time.

10. Durable Power of Attorney

Linda Whitton, the Reporter for the revision of the Durable Power of Attorney Act (DPA), could not attend the meeting but provided a list of issues for the JEB to discuss. Professor English lead the discussion and reported that an initial draft of issues was discussed at NCCUSL's annual

meeting this past August. The Board considered the following issues:

_____A. *Presumption of Durability - 102(2)*. Under the current Act, a DPA is nondurable unless language to that effect is inserted in the document. After considering such issues as the practice for recording real estate transfers and brokerage firm practices, the Board considered whether an estate planning DPA should be presumed to be durable unless it states otherwise. The Restatement of Agency has very few provisions on durable powers of attorney and it was recommended that the DPA presumption should be coordinated with ALI. After much discussion, the Board took a straw poll that was split 5-4 on the issue of whether estate planning POAs should be presumed to be durable

B. *Duty to Act - 104(e)*. The Board next discussed whether an agent who knows of a breach by another agent has a duty to act. Several issues were discussed including:

- Is the “knowingly acquiesces in” standard sufficient?
- Professor English asked to what extent obligations of a trustee should be imposed and whether the UTC language should be imported. Or, is an agent a fiduciary in a lesser sense and therefore subject to less trustee like responsibilities?
- Professor Halbach offered that if a duty to act is not accepted, there should be an obligation to notify the rejection of the duty in some form of a disclaimer.
- Chairman Moore noted that an agent may not know they were named as an agent.
- Commissioner Starkey questioned whether agent duties should mirror trustee duties.
- Mr. Kartiganer noted that a trust is a defined world with understandable objectives, but agents do not always know what they have to do.
- Professor Waggoner asked whether imposing the duty to act would necessitate increased reliance on attorneys. Mr. Bruce noted that a power is a power, not a set of duties.
- Professor Kurtz opined that most principals want agents to come in and take over affairs (i.e. daughter pays nursing home and other bills); therefore, it is more like a

custodial trust. Professor Waggoner said the DPA committee should look at the Custodial Trust Act for guidance. Professor Halbach offered that durable powers are similar to a trust but it is not a trust. He noted that in the previous Act, the committee seriously avoided adding duties.

- Commissioner Starkey noted that things have changed so much since the first act since there are so many more DPAs that are being used all over. Professor Fellows said there is an unclear line that does not have to be decided and queried whether there was a way to make all of these duties springing.
- Mr. Bruce commented that because under HIPPA doctors cannot reveal a patient's condition, conduct of an agent should move to the front as a serious issue.
- Professor Kurtz asked under Section 401 how do agents accept the designation? Professor Halbach replied that if one is told to act, then they should have to act with reasonable care. Professor English suggested informing the committee that Section 401 is a key issue. It was noted that adding too many burdens will result in people not wanting to be agents.

_____ C. *Execution Requirements for DPA - Section 201.* Several Board members disagree with a notary requirement because of an added chance of failure and the inconvenience, but Professor Waggoner indicated that a notary requirement is at least some check on power. Professor English cautioned that the problem of forgery is real, particularly relating to capacity issues. Ms. McCue stated that the states are very uniform in requiring some kind of formalities. Professor Fellows suggested bracketing the provision.

D. *Substituted Judgment - Section 106.* Professor English queried whether there should be a substituted judgment standard to inform the court's decision and noted the problem of conservators without knowledge of a power of attorney. Chairman Moore noted that the original Act covered property and most states DPAs are directed at property but have a separate health care part. Mr. Young opined that with a laundry list some things are always left out. It was mentioned that most forms have boxes, with some noting exceptions so the presumption is that the agent has the power.

Concerns were raised over specific powers in conflict or inconsistent with regard to Section 301. Professor Halbach said an agent cannot use it to benefit themselves personally. Professor Waggoner noted that with respect to Section 312 on gifts, much of it was taken from Uniform Durable Power Statutory Form Act. Professor Halbach suggested that if relying on a principal's best interest it should be defined as to what that means and also mentioned the issue of 401(b) with respect to an act in self interest.

E. *Penalties – Section 502.* Mr. Kartiganer noted the UTC provision on third parties. Professor Kurtz urged that the penalties in Section 502 were inadequate.

The Board determined that the list of issues was too difficult to entertain without benefit of a full day review of an actual draft. Professor English informed the Board that the Durable Power Committee would meet in December and would therefore be able to provide a draft for the February JEB meeting. Chairman Moore requested that the Board send comments to Linda Whitton or Michelle Clayton to send to the Durable Power Committee Chair Jack Burton prior to the DPA meeting in December. The Board indicated that the Durable Power Committee may need more than two years to fully study and revise the Durable Power Act and it may request that NCCUSL slow down the timetable as it did for the Estate Tax Apportionment Act.

11. Uniform Trust Code

A. *Arizona and Connecticut.* The Board reviewed newspaper advertisements in Arizona and listserve postings stemming from Connecticut that involve attorneys and trust mill operators who are pushing self-settled spendthrift trusts or simply seeking to increase business by telling settlors their trusts must be re-drafted due to enactment of the UTC. The Board determined that no official response was needed, but that Board members would individually aid state bar members working on UTC legislation. The Board agreed that these types of attacks could result in never-ending communications with individuals who are unknowledgeable of the common law of trusts.

B. *Issue of Qualified Beneficiary by Bank of America.* Professor English informed the Board that the Bank of America General Counsel and UTC study committee member posited a question about whether the definition of “qualified beneficiary” is conjunctive or disjunctive. The Board determined that the definition is conjunctive so that it could, in a particular case, include all three categories. Professor Waggoner offered clarifying language. The Board decided that this might be a hip-pocket amendments as there was no technical drafting problem; however, if a technical amendment is desired, it should be submitted to the Executive Committee. President Miller also suggested providing examples in the comments for additional clarification.

_____ C. *Additional UTC Technical Issues*

_____ i. Section 103 - “Settlor” Definition and Crummey Trusts. Professor English asked the Board how the definition of settlor would apply to a Crummey trust, especially if there are multiple contributors. The Board recommended that Professor English revise the comments to Section 603 and Section 103 and add a Crummy Power example. Professor Waggoner observed that once the power lapses, the original contributor should step in as settlor.

_____ ii. Section 111 - Estate of Lange Case. The Virginia UTC Committee posited the question as to whether the court’s application of virtual representation in the New Jersey case of Estate of Lange would be authorized by the UTC. In Estate of Lange, the court approved the application of virtual representation to validate a settlement agreement even though the agreement was nonjudicial and the action approved was “ultra vires.” The Board agreed that the settlement agreement in Lange would have been authorized under the UTC. Pursuant to Section 111, the agreement of the parties could have been approved by the court and was therefore authorized under the UTC.

_____ iii. Section 411 - Strangi Case. The Board considered whether the Strangi case would cause a settlor to have a Section 2036 taxable power under Section 411, which codifies the common law allowing settlors and beneficiaries to jointly terminate an irrevocable trust. It was determined that IRC 2038 has always been considered comparable to IRC 2036 by the courts, and that it is clear from the 2038 regulations that a power granted under state law is not taxable. Strangi

is now being appealed at the 5th Circuit. ACTEC is filing an amicus brief. The Board agreed that Section 411 should not be changed and requested Professor English to respond to the listserve on which the issue was initially raised.

iv. Section 802 - Side Bank Transactions. The issue of whether subsection (d) should be deleted has been raised in North Carolina and Ohio regarding trust beneficiaries visiting the commercial side of a bank to obtain a personal loan. The Board determined that the issue was not significant enough to recommend a change.

v. Section 816- List of Powers. Professor English noted that it has been noticed that the laundry list of powers does not include a college savings plan. The Board recommends that no action is necessary as revisions to the laundry list could be never-ending.

_____vi. Section 817 - Inadequate Reserve. The issue is whether the Section adequately provides that trustees have a right of reimbursement if the reserve is not sufficient. Some states require that a trustee reserve the right to refunds. Mr. Kartiganer indicated he thought it was clear enough. Professor English was asked to include a clarifying sentence in the comments relating to unjust enrichment._____

_____vii. Section 1005 - Representative. Professor English raised a question about the term “representative” under Article 3 because under Section 305 the term is also used as a substitute for guardian ad litem. The Board agreed that it should be put on the list for another future technical amendment and that it should also be clarified in the comment.

viii. Section 1106 (a)(3)(4) - Prior Law Conflict. Professor English queried whether there is a potential conflict and how the two provisions interrelate. Professor Halbach expressed concern that it might prejudice the rights of the parties and unfairly put them in jeopardy. Professor Waggoner opined that (a)(3) would fail in cases that have already commenced and (a)(4) is necessary so that old rules of construction do not apply for too long. He suggested that in (a)(4) should read

“except as provided in (a)(3).” Professor English will draft a comment for clarification that the Section was not intended to interfere with pending proceedings.

ix. Section 603 - Comment Concern. Professor Waggoner expressed concern about the comment under Section 603(a) being misleading because it suggests that the beneficiaries have enforcement rights that are “postponed.” It should be clarified that remainder beneficiaries do not have rights in cases in which a settlor had capacity. Professor English agreed to fix the comments by changing the word “postpone.”

12. Inheritance Rights of Committed Partners.

Professor English began the discussion by reminding the Board that the issue of the inheritance rights of committed partners was brought to the Board for study at the request of the ABA RPPT Section, and that it is an issue which the ABA Individual Rights and Responsibilities Section also has an interest. The Board supported a study conducted by Professor Thomas Gallanis of the Washington and Lee University Law School.

Professor Waggoner noted the empirical research conducted by Professor Fellows and the three new state laws recognizing in some form committed partner unions for the purpose of inheritance rights. He indicated that the issue has become much riper and suggested that a draft by the JEB would be useful to the states.

Professor English reminded the Board members that NCCUSL discourages drafting of uniform acts by the JEB and suggested that the JEB could assist with an ABA draft. Mr. Bruce expressed concerns that since most states have gotten rid of common law marriage similar uncertainty should not be reintroduced by means of a committed partnership statute. Professor Fellows opined that an inheritance model act would provide space for coalitions to be built that are not on either end of the spectrum.

Professor Gallanis began his presentation by summarizing ALI’s position and outlining

Professor Waggoner's four questions and how his study responds to those questions:

- 1) Should an inheritance rights law target same sex and/or opposite sex couples?
 - His study recommends targeting all domestic partners.
- 2) How should partners identify themselves as partners?
 - Self-identifying or statutory identification alone are suboptimal. The study recommends combining both methods.
- 3) What kind of intestate shares?
- 4) Should rights go beyond intestacy?

The Board engaged in an in-depth discussion of a variety of issues raised by the Gallanis study including:

- Professor Waggoner offered that elective share is the hardest issue because where there is case law in the states, common law marriages among domestic partners are not recognized. Courts correct situations by shifting to status and unjust enrichment theories.
- Professors Kurtz and Waggoner and Ms. Joslin from the ABA IRR Section discussed registration requirements and the pros and cons of such requirements.
- Professor Waggoner discussed the intent affecting and defeating methods under 2-804 explaining that the elective share would be intent affecting which is somewhat easier.
- Professor Scoles raised the issue that self identification raises points about people

who are married but do not divorce and asked what the effect is of a person in an existing marriage who also becomes a committed partner?

- Professor Gallanis addressed questions regarding the doctrine of putative spouses and the questions of termination of committed partner unions and the possible need of clear statements of intent. Mr. Kartiganer noted that it is time consuming and expensive to get out of marriage and that there should be very good reasons before supporting an intent defeating provision. Ms. Joslin described the state of the law as having many different patterns. She also indicated the difficulty some people have experienced when deciding to divorce after a civil union in Canada, they are unable to do so because the union would not have been recognized in the U.S. in the first place.
- Professor Fellows suggested rethinking the idea about intestate succession in light of what we know about the deceased from will substitutes - (life insurance, joint accounts, etc) which may provide the best evidence on how the deceased would want to leave the probate estate. There should be a way to approach 2-101 and 103 that is consistent with trying to better blend probate and non-probate. This path would also be consistent with the Restatement.
- Mr. Kartiganer suggested a state by state study. He also suggested that fact based intestacy statutes will be looked at negatively by the probate court.
- Professor Halbach mentioned the pretermitted heir/spouse statutes and how it creates the opposite effect.
- Professor Fellows suggested that discussing the issues regarding the UPC next November would give everyone more time for a thorough preparation and study.

Professor English surmised that the three issues on the table were 1) the scope of the study, 2) the specific proposals being made, and 3) the role of the JEB. He asked Professor Gallanis to describe to the Board his initial draft of a model statute. Professor Gallanis described that his draft substantially builds on an earlier draft of Professor Waggoner including having a multiple factor test designed to be as objective as possible. These factors such as observable symbols and common household lead to a discussion of how broad the factors should be.

Professor English reminded the Board that they were asked by the ABA RPPT Section to study the inheritance question in particular. Several Board members suggested that NCCUSL should undertake a uniform or model act on the issue and also consider amendments to the UPC. Professor English asked NCCUSL Executive Director Bill Henning to clarify the JEB role with respect to studying and drafting. Professor Henning indicated he would need to study the charter of the JEB to determine if there is a distinction between drafting and issuing a report, as opposed to making recommendations to the Conference on whether or not to study or draft a new uniform act or draft revisions to an existing one. Professor English supported making the report available to the groups working on the issue and suggested that the ABA might use the report as a basis for a House of Delegate resolution.

Professor English offered that there remain major decisions on issues such as registration only or registration with factors. Therefore, the group should consider a report with preferences rather than definitive decisions. Professor Scoles recommended another report that is a free-standing proposal with a description of the issues that would be helpful to states wishing to move forward. Ms. McCue suggested that the report should indicate that states are acting and since they are acting the report should offer suggestions as to how to move forward if they choose.

Professor Henning expressed concern that issuing a report and attaching statutory language, even as an appendix, might cross the line into the JEB drafting. Drafting projects undertaken by NCCUSL require approval by the Scope and Program Committee, Executive Committee and then entail the involvement of numerous interest groups and a series of meetings over a period of at least two years. NCCUSL's relationship with the ABA requires that the ABA must consult NCCUSL on any potential drafting projects. If the Scope and Program Committee determines that a study or drafting committee does not meet its criteria for going forward, then the ABA is free to go forward

with its own model act. The Scope and Program Committee meets twice a year and would seriously consider any proposal offered by the JEB.

Chairman Moore recommended that several JEB members undertake a report that will be presented to the ABA RPPT, IRR and Family Law Sections, ACTEC Executive Committee and NCCUSL Executive Committee. The Board appointed Professors Waggoner and Fellows and Messrs. Young and Kartiganer to draft a cover report to Professor Gallanis's study. Professor Gallanis will update his study according to some of the discussion of the day. Professor English recommended that the report be an approximately 3-4 page position paper highlighting issues and observations about the Gallanis study. Professor Waggoner cautioned that if there is no statutory language, the report will not be of much assistance to the states. The report will be discussed at the February meeting of the JEB. The Board will decide whether to take a recommendation to NCCUSL Scope and Program in August or continue the study again at the November JEB meeting which would allow for a meeting with the JEB Family Law Section to discuss the issues at hand. The Board agreed that no reports will be distributed to interested groups until the JEB has had an opportunity to go through the issues again. Ms. Joslin informed the Board that the ABA IRR, RPPT and Family Sections would like to start such a project and they feel confident they could get recommendations approved by the ABA.

13. Inheritance Rights of Children.

Professor Waggoner informed the Board about the history of revising UPC Section 2-214 particularly noting that the issues of assisted reproduction issues and the changes recently made in the Uniform Parentage Act were not on the agenda at that time.

Professor Susan Gary went over her materials which included her article in the University of Memphis Law Review "The Parent-Child Relationship Under Intestacy Statutes", a draft of Section 2-108 by Ronald Chester, a draft titled "Posthumously Conceived Heirs Under a Revised Uniform Probate Code" by Ronald Chester (to be published in the RPPT Journal) and a draft of and comments about Section 2-114 by June Carbone. Additionally, Professor Gary prepared a memo summarizing the issues for the Board. The discussion went as follows:

- 2-108. Afterborn Heirs

The Board agreed that posthumously conceived children could be afterborn heirs. They then discussed the issues relating to whether consent of the deceased parent should be required and in a record. Professors Halbach and Fellows agreed that when sperm is left by a nonanonymous donor it should be presumed that the child is the donor's even if the birth occurs after his death even if the father never contemplated posthumous conception. Professor Waggoner opined that determining the status of the child produced is the aim of the statute so that a record that affirmatively agrees to posthumous conception qualifies; however, other evidence, such as consent by behavior, should also be taken into account.

The Board then discussed whether Professor Chester's three year time limit for gestation and birth is adequate. Professor Waggoner objected to having to file a petition in court. It was decided that before anything can be done as to time limits it must be determined what happens under the UPC generally. Professor English stated that there was a workable plan for 2-108, but the class gift problem must be addressed separately. The Board determined that the revised provisions should not merely refer to the Uniform Parentage Act because there was a general consensus among the group that the consent provision in the UPA is too narrow.

- 2-114. Parent-Child Relationship

Professor Waggoner described the '69 UPC and various distinctions and changes that should be made to modernize the statute. He indicated that the UPC errs on the side of overinclusion in its rules in an effort to satisfy the probate bar which seems to prefer rules to standards. He suggested that the UPC be expanded to include adoptions by relatives of the birth parents as in the Restatement and that standards rather than rules be used to address cases where children have taken root (i.e. such as can occur in the case of step-children).

Chairman Moore noted that the Board seemed to agree to expand the following:

1) adoption by a relative of a parent; 2) adoption following death of parents (or incapacitating event); and 3) addressing domestic partnerships adoptions.

Professor Halbach discussed the options of a presumptions on the rooting issue with regard to the Restatement and noted California law which has both rules and standards. Professor

Waggoner suggested that Professor Gary start with 2-114 and build on it. He also suggested issues he has with 2-113 on half-blood inheritance.

Professor English questioned how to address cases in which domestic partners adopt each other for inheritance purposes. Professor Fellows suggested language that would say that any child born to a committed relationship is the child of that relationship.

Professor Gary asked the Board their view on the functional definition of parent-child relationship. The Board rejected the functional approach despite it existing in the Uniform Parentage Act. Professor English said that the UPA common law parents doctrine was undesirable. Professor Waggoner was skeptical of going that far because a single parent with children may have a harder time finding a spouse if duties were attached. Professor Halbach opined that inheritance rights for stepchildren or foster children who are not adopted might be worth considering if there was evidence that step or foster parent attempted to adopt.

Professor Waggoner recommended a full day at next November's meeting to discuss the UPC. Professor English also suggested that it would be useful to meet with the JEB Family Law Section that weekend as well.

14. UMIFA

Professors Gary and Kurtz presented the latest draft of the revisions to the Uniform Management of Institutional Funds Act which is slated to become final in August of 2004. They first described the original accomplishments in the drafting of UMIFA in 1972 including: 1) Application of a prudence standard; 2) Authorization of endowment spending making possible total return investing; 3) Providing modification/termination standards similar to cy pres in trust law.

The revised UMIFA accomplishes the following:

- Adopts the prudent investor standard of the Uniform Prudent Investor Act.

- Adds modification provisions allowing a charity to modify a restriction on a small fund (less than \$50,000) without court approval or notice to the donor or state's Attorney General.

Professor English mentioned that the old Act did not generally apply to charitable trust. However, if this act applies to a charitable trust and the UTC applies to a charitable trust, it would be a problem if their provisions conflict. Among the provisions of concern: 1) donor standing provided in UTC but not in draft of UMIFA; 2) UTC small trust termination requires notifying AG; and 3) new UMIFA has a standard on distribution decisions and the UTC does not. Professor Halbach commented that there is a need to coordinate with other Uniform Acts. Professor Gary replied that institutions are "any entity organized or operated for charitable purpose" which comes from the old charitable purposes doctrine. The drafting committee is still working on defining "institutional fund." Professor Gary replied that UMIFA is silent on donor standing so the UTC applies but that the AG notification is a conflict with UTC. Professor Scoles opined that there might be a potential constitutional issue because not notifying Attorneys General might take away property rights. Professor Kurtz suggested notice to a settlor if living.

Messrs. Young and Kartiganer commented that with regard to notice and safe harbor, no one would speak in favor of getting rid of notice to Attorneys General, including ACTEC. Professor Halbach said that with cy pres in UTC, there may be times when you do not have to give notice to settlor but he felt that the Attorneys General should get notice. Professor Kurtz offered the example of obituaries soliciting money for scholarship funds in the deceased person's name because giving notice to all these people could be a problem. Therefore, he did not see a negative reaction to self-cy-pres through notice.

On the issue of safe harbors and historic dollar value, Professor English remarked that like unitrusts and power to adjust, in time rules of thumb develop and that he felt it would be a mistake to jump to a safe harbor. Professor Halbach commented that as with the Restatement of Trusts draft impartiality indicates there is nothing wrong with ongoing fund-raising - some organizations want to do a heavy spending rate while some want to maintain purchasing power. Charities sometimes have constantly expanding activities with many different kinds of purposes resulting in a need to keep flexibility to gear the expenditure rates. Others suggested that caution be used in providing safe

harbors for expenditure rates. Professor Gary replied that such situations were being considered by the drafting committee and they had a list of factors. Professor Kurtz offered the counter argument with respect to Directors and Officers who need to feel comfortable they will not get into trouble.

Since UMIFA applies to not for profits as well as to trusts, there is overlap and that is why UTC language may be necessary. Ms. McCue suggested referring to UTC donor standing though some kind of reference. Professor Kurtz noted that since it is a contentious issue, the committee would not want to make it harder to enact. Professor Halbach remarked that the ALI on nonprofits has returned to maintaining the distinction between equitable deviation and cy pres

15. Final Housekeeping.

The Board concluded that there were enough issues left to consider that a meeting in February would be desirable. The weekend is February 27-28 and will again be held on a Friday and Saturday with no Sunday meeting.