

**TO: Joint Editorial Board for  
Uniform Trusts and Estates Act**

**FROM: James R. Wade**

**DATE: February 18, 2002**

**RE: Minutes, Chicago, Illinois - February 15, 16, 17, 2002**

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The meeting was called to order at 9:00 A.M. on February 15, 2002 by Chair Malcolm A. Moore. Those in attendance included David English, James Wade, Jackson Bruce, Lawrence Waggoner, Eugene Scoles, Richard Wellman, Mary Louise Fellows, Malcolm Moore, John Langbein, Edward Halbach, Raymond Young, Joe Kartiganer, Judith McCue, Sheldon Kurtz, and Division Chair Joe Mazurek. Robert Stein attended the meeting on Saturday. Not in attendance was Charles Collier.

1. **Prior Meeting.** The minutes of the prior meeting had been previously circulated. Jim Wade reported that he had received comments and amended the minutes to reflect the attendance of Charles Collier and to correct several typographical errors. As amended the minutes were approved.

2. **Missouri Law Review Uniform Trust Code Symposium.** The JEB members were invited guests to a symposium on the Uniform Trust Code.

Presentations were made by Scott Boulton, Professor Karen Boxx, Professor Ronald Chester, Professor Paula Monopoli, Raymond Young and Joseph Kartiganer, Professor (and JEB Member) Eugene Scoles, and Professor (and JEB Executive Director) David English.

Professor English provided and discussed a handout listing the Uniform Trust Code policy issues which have developed in connection with discussions with bar and bankers associations groups.

3.     **Uniform Trust Code - NCCUSL Activities.**   Professor English introduced the following NCCUSL representatives:

King Burnett, President

Fred Miller, Chair Executive Committee

Bill Henning, Executive Director

John McCabe, Legislative Director

Mike Kerr, Legislative Counsel

Michelle Clayton, Counsel

Initially it was reported that the Uniform Trust Code has been introduced in West Virginia, Oklahoma, Kansas, District of Columbia, and Tennessee and that the bill is ready for introduction in Connecticut, Colorado, and Wyoming.

King Burnett reported that the Conference considers the Trust Act to be of special importance to the Conference and has designated a staff person, Michelle Clayton, to work with the Commissioners on a state wide basis and with interested groups to educate all interested parties regarding the Code.

One proposal is for a video/DVD presentation. In this regard, a memorandum from Michael Kerr and a memo from Michelle Clayton describing the project are attached.

Proposed funding will come from (1) NCCUSL in connection with providing staff support; (2) a proposal pending before the ACTEC Foundation; (3) a proposal to the Uniform Law Foundation; and (4) a request for funding from the Joint Editorial Board itself to the extent of \$5,000 per year for four years.

Michelle Clayton reported that a letter entitled “UTC Notes” will be prepared and circulated, based loosely on the UPC Notes which Professor Wellman produced in the 1970s to promote the adoption of the Uniform Probate Code. The newsletter will be available primarily electronically on the NCCUSL website and through the websites of related interested organizations.

The meeting adjourned at 5:00 p.m. and resumed at 8:30 a.m. Saturday.

4.     **King Burnett.** The President of NCCUSL noted that the Uniform Acts tracked by the Joint Editorial Board has always been a large part of the Conference’s agenda. He noted that during the last several years the Conference was substantially occupied with the Uniform Commercial Code and that that push is through. There will be a renewed interest in our area, both in terms of looking at new projects and keeping current with traditional projects such as the Anatomical Gifts Act and the Institutional Management of Funds Act.

5.     **Woodward Case.** The ABA Section on Real Property, Probate, and Trust has requested the comments of the JEB on the *Woodward* case. This is a Massachusetts case in which the Massachusetts Supreme Court has responded to a question

of inheritance rights under local law advisory to a Federal District Court case determining Social Security Benefits. In the case a husband, apparently in connection with a leukemia diagnosis, became a sperm bank donor. Two years later following his death, his wife, using the donated deposited sperm, gave birth to a child.

The Massachusetts Court said that the requirements for establishing heirship status were (1) determination of the genetic connection; (2) consent of the sperm donor to establish the parent/child relationship; and (3) consent of the donor to support the child following the death of the donor. This third requirement did not seem relevant to the Board.

The provisions of the Uniform Probate Code were discussed. It was noted that the Uniform Probate Code definition relates to “surviving descendants” while the Massachusetts statute spoke in terms of “issue.” The matter is covered in the Uniform Parentage Act. Mary Louise Fellows noted that the Parentage Act would recognize a parent-child relationship of a posthumous child if the deceased spouse had consented “in a record.”

Larry Waggoner noted that the Restatement of Property Third would support the result of the *Woodward* case. Mary Louise Fellows noted that the Parentage Act needs updating and recalled that while the that Act looks to the Uniform Probate Code regarding inheritance rights, the Uniform Probate Code follows the Parentage Act as to presumption.

There was a sense of the Board that UPC § 2-114 should be revisited. Professor Waggoner will have a draft of the new Restatement position on class gifts which may be relevant and it was noted that South Dakota and Arizona have new statutes in this regard.

King Burnett noted that the Parentage Act does cover this issue and noted that there is a stand by committee for the Parentage Act which might take up the issue. Professor Langbein, however, recalled that the JEB has unfinished business on inheritance rights.

The consensus was that: Professor English will prepare an issues memo prior to our next meeting and will circulate it to the full Board. In addition, he will appoint

a smaller committee to further analyze the issue and make a proposal regarding proposed uniform law changes.

6. **Proposed Uniform Estate Tax Apportionment Act.** The Reporter of the Act, Professor Douglas Kahn, participated in an extensive discussion on the present provisions of the Draft Uniform Estate Tax Apportionment Act. He provided the Board with a memorandum regarding current issues and also with a copy of the Draft Act itself.

Professor Kahn reported that he had met with the ACTEC State Laws Committee and that the ACTEC Committee had a disagreement with several of the basic provisions of the Draft Act.

The principal issue is whether pre-residuary devises should bear their share of tax where the governing instrument does not contain a provision. The ACTEC Committee position was that they should not. Professor Scoles recalled that historically the basis of apportionment acts is fairness and equality and that all gifts should bear the burden of the payment of tax attributable to the gift. It was noted, however, that most will and trust drafting places the tax burden on the residue so that pre-residuary gifts, which tend to be smaller, do not bear tax. Professor Kahn noted that his drafting protects small gifts, either

probate or non-probate, which are under \$10,000. There was discussion as to whether probate assets should be exhausted before the tax burden extended to non-probate transfers including revocable trusts. After considerable discussion there was a vote of 6-1 basically favoring the ACTEC position over the position of the current draft. Following further discussion the consensus of the Board was that assets subject to tax be categorized as (1) probate transfers; (2) revocable trust transfers; (3) other non-probate transfers. The decision was that within probate estates and revocable trust estates the death taxes attributable to those entities should be charged first against the residue. There was then discussion as to whether the balance should be equitably apportioned or subject to an abatement type statute and the consensus was that there should be pro-rata apportionment.

Professor Halbach suggested that the probate and revocable trust estates should be aggregated and that the combined residues should be exhausted before any apportionment to pre-residuary devises. There did not seem to be support for this position, and no vote was taken.

Another important issue discussed was regarding the tax burden in connection with a qualified terminal interest trust. The Internal Revenue Code Section provides that the tax in the second estate on the QTIP assets which escape tax in the first



estate on account of the marital deduction would be computed at the marginal federal estate tax rate in the second estate rather than average rates. Professor Kahn's Drafting Committee feels that the tax should be imposed at the average rate and the ACTEC State Laws Committee thought that the tax should be based on incremental or marginal rates. A straw vote among the JEB members favored marginal rate use 5-2.

There was another issue regarding the credit for property previously taxed. The present Drafting Committee language Section 5C provides that the credit is for the general benefit of the second estate. Professor Pennell questioned whether the provision was equitable when the recipient of the property previously taxed can be identified and proposes that the benefit would go to that person. Following discussion the consensus of the JEB was that the Drafting Committee had the correct solution.

The discussion then shifted to Section 6 of the Draft Act which covers apportionment between time limited and other interests and included the concept of "insulated property" as property which is "unavailable" for payment of an estate tax because of legal limitations or obstacles making collection "impracticable" and which is subject to a time limited interest. Section 6B provides that the tax imposed on split interests (that are not insulated) will be paid from the corpus of the property but if an election is made to defer

payment of the tax on remainder interests in uninsulated property the interest payable on the deferred tax is to be paid from the income produced by the property.

As drafted Section 6C reapportions the tax attributable to insulated property among the uninsulated holders in proportion to the value of their interests and when the distribution of insulated property is made each uninsulated holder may recover from the distributee a ratable portion of the reapportioned fraction of the distribution.

Dennis Belcher, from the Real Property, Probate, and Trust Law Section of the ABA had questioned the need for this section.

There was discussion, as to the right of contribution under 6C, as to whether it should be based on a fractional interest or a fixed dollar amount. Professor Langbein said that in the pension area, there was a question as whether the interest could be reached at all in light of the ERISA anti-alienation provision. He is inclined to believe that the interest can be reached once the interest is fully distributed from the plan (similar to spendthrift trust collections).

It was noted that the IRS has a tax lien on all of the assets and that there is personal liability on the personal representative only to the extent of assets under his or her control. Mr. Young worried that Section 6 might put a new and continuing burden on the personal representative.

Professor English does not like the word “impractical” and questions whether the right of contribution under 6C should extend only to a portion of the current payment, as opposed to allowing reimbursement entirely out of the first funds received.

Professor Kahn then discussed the treatment of charitable remainder trusts. The present drafting requires payment out of the corpus with the knowledge that this will reduce the value of the charitable remainder interest somewhat and will increase the estate tax due somewhat. At the ACTEC meeting Professor Pennell suggested fully protecting the charitable deduction by creating a lien against the income interest and finding a way to collect from the income interest. Professor Kahn rejected the idea of collecting from the income interest. Following discussion it was the JEB consensus that Professor Kahn’s approach was correct here.

King Burnett reminded the JEB that it was critical to get their input to Professor Kahn since the Apportionment Act had been approved last summer on first reading and the final reading will be this summer.

7.     **Uniform Principal and Income Act.** It was reported that there have been good enactments of the Principal and Income Act; that there are continuing problems with Section 104 (the equitable adjustment provision) and that a number of states that are considering adoption may shift from an adjustment power to a unitrust concept.

8.     **Uniform Durable Power of Attorney Act.** Professor Linda Whitton, Co-Chair of the Advisory Committee on Durable Powers of Attorney, reported on the status of a study conducted by her Committee.

It was recalled that at the last meeting the JEB decided to get some outside help in connection with the Power of Attorney Act and that Professor English appointed a four person committee to review the current state of the statute, including Professors Susan Gray, Rebecca Morgan, Linda Whitton, and Karen Boxx.

The Committee had prepared a memorandum which was submitted to the JEB. The memo contains several charts showing the status of adoptions in the state with detail as to each of the five sections.

As noted, additional issues dealt with by the statutes go beyond the basic provisions of the Act, and chart the report reflect the treatment by the various states of these additional provisions. The executive summary of the report identified eight of these particular issues which were identified as a result of the study as developing trends or concerns. These include:

- A.     Fiduciary Standards of Care and Remedies for DPA Abuse (full trustee standards vs. more limited agency standard).
- B.     Liability and Sanctions for Refusal to Accept Agent's Authority.
- C.     Protection for Third Party Good Faith Reliance on Agents Authority.

D. Relative Authority of Later-Appointed Fiduciary of Guardian  
Vis-a-Vis the Agent.

E. Authority to Make Gifts.

F. Springing Powers.

G. Impact of Divorce or Legal Separation on the Authority of a  
Spouse/Agent.

H. Portability of DPA's.

These were discussed by Professor's Whitton and Boxx who also  
attended the session.

There was also some discussion about the studies which report on abuse  
of powers of attorney and suggest additional safeguards such as (a) notice to beneficiaries;  
(b) monitoring; and (c) registration. These would be in addition to making clear that full

trustee type fiduciary standard of care apply to the agent, at least during the time following the disability of the principal when the agent acts more as a trustee than an agent.

Professor Whitton noted that there is a study on power of attorney abuse funded by the ACTEC Foundation which may be more meaningful than a recent Albany Law School study which listed detailed elder abuse based on a survey of elder abuse case workers. It was also noted that there is a revision to the Restatement of Agency pending, although its focus may be more on commercial agencies rather than personal agencies.

It was also noted there were pre-existing bodies of law which might be incorporated by reference to deal with fiduciary misconduct, such as the Uniform Trust Code, the Uniform Custodial Trust Act, and the conservatorship provisions of the Uniform Guardianship and Protective Proceedings Act.

The consensus of the JEB was that the Committee appointed by Professor English do outreach with the other professional groups and report back to the JEB at its next meeting on specific recommendations. It was also suggested that JEB members who have additional specific issues and concerns should communicate them directly to Professor Whitman.

9.     **Uniform Statutory Rule Against Perpetuities Act.** Professor Waggoner had previously circulated a memorandum, copy of which is attached, dealing with the issues raised in connection with the efforts around the country to repeal the Act. The report is that of the 27 jurisdictions which have enacted the Act; it has been repealed in 2 jurisdictions; and modified in 4 others.

Professor Waggoner's basic recommendation is that the Conference not oppose any amendments of a state enactment that retains the structure of USRAP so that only the time period is extended. The consensus of the Board was that Professor Waggoner prepare a memo reflecting this position together with his one page list of enactments to the Conference officers and staff so as to allow them better to respond to inquiries from the states.

10.    **Uniform Anatomical Gifts Act.** Board Member/Professor Sheldon Kurtz had questioned whether this Act should be revised and updated. In this regard he prepared a memo, copy attached, and which he then reviewed.

He reported that the waiting list for organ transplants was substantial, almost 80,000 persons on February 1, 2002. His memo listed some possible changes in



statutory provisions and practice so as to increase the effectiveness of organ donation. These are listed under B on page 2 of his memo.

The only proposed change which was substantial would be to change the basic presumption. The present law basically assumes that everyone has opted out of the organ donation program and requires evidence in writing to opt in or to consent to organ donation. Professor Kurtz's proposal would be to have an opt out provision, that is that a consent be presumed under the law subject to the ability of an individual to opt out. The discussion revealed that some Northern European countries have an opt out system which has increased the availability of organs. He clarified that such a system would be limited to organs, tissue, and bone parts and not to the entire body.

It was recalled that King Burnett listed this Act as something which the JEB which look into. Professor Langbein suggested that we should not get into a revision unless we were prepared to change the basic default rule.

Following discussion it was determined that Professor Kurtz should study the matter further, with particular attention to alternate systems in Canada and Europe and make a report and formal proposal at the next meeting.

11. **Hague Convention on Trusts.** It was reported that Sally Cummings of the US State Department had asked the Real Property, Probate, and Trust Section; ACTEC; and the Conference to re-endorse the Hague Convention. This has been done by the Section and by ACTEC. The Conference has a new Committee, the International Law Development Committee, which is looking into this. The JEB itself has re-endorsed the Convention, but the press has been for the Conference as a whole to provide the endorsement. The Head of the International Development Law Committee is Curtis Reitz, and Professor English will contact him to provide background and urge the support of the Hague Convention.

12. **International Wills Act.** Professor Wellman reported that there is both federal and state legislation required to make this effective. There have been a number of state enactments and Professor Wellman is trying to get this as a targeted Act for state enactment. There is federal legislation as well which is pending. The consensus was that we should advise the Conference to support the federal legislation when asked.

13. **Uniform Disclaimer Act.** This is a follow up item from the last meeting where Professor English had been asked to adapt the freestanding Uniform

Disclaimer Property Interest Act into the Uniform Probate Code as a separate section. He has done this, memorandum attached, as a new Part 11 to Article II.

The only question was on the definition of trusts. There is a different definition in the Uniform Probate Code from that in the Trust Code, and the Disclaimer Act picks up the Trust Code definitions. Since the freestanding Disclaimer Act has the Trust Act definition it was determined to leave in the Trust Code definition in this Part 11, Article II and to note the discrepancy from the general U.P.C. definition in a comment.

An article critical of the Disclaimer Act, by Professor Adam Hirsch, was circulated. Professor English will talk with Professor Lapiana about preparing a response which would be available to the officers and staff of the Conference in connection with inquiries and possibly to prepare a full response in law review format. The consensus was that there was nothing in Professor Hirsch's article which would warrant a change to the Act, although some of the points raised might be discussed in more elaborate commentary.

14. **Finances.** Professor English reported that there was a \$40,000 surplus shown on the last statement, although it did not include the costs of this meeting. There should be adequate funds for a fall meeting.

There was considerable discussion as to whether there were sufficient funds and whether it was appropriate for the JEB to support the staff administrative position to support the Uniform Trust Act educational and enactment effort for four years. The JEB has been requested to provide \$5,000 per year of funding.

There was discussion as to whether it was appropriate for the JEB, which has traditionally been an object of funding by its constituent groups, itself to become a funder and whether the constituent organizations should be contacted directly on this project.

The consensus was that the Conference's proposal for funding in this regard should be submitted formally to the JEB and that each of the representatives would then discuss it with their constituent group.

15. **Adjournment.** The meeting was adjourned at 5:00 P.M. Saturday afternoon, February 17<sup>th</sup>.

Respectfully submitted

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James R. Wade, Secretary