

MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Thomas Gallanis

Re: Minutes, February 10-11, 2006; Chicago, Illinois

The meeting was called to order on Friday, February 10, 2006, at 9:05am by Chair Malcolm Moore. Others present throughout the meeting included (in alphabetical order) Levi Benton, Jackson Bruce, Thomas Gallanis, Edward Halbach, Judith McCue, Eugene Scoles, James Wade, and Lawrence Waggoner. Charles Collier was present for part of the meeting due to the concurrent events at the ABA Senior Lawyers Division. David English and Martha Starkey were present for part of the meeting due to the concurrent work of the Uniform Power of Attorney Act (UPOA) drafting committee. Raymond Young was present for part of the meeting; the impending snowstorm on the East Coast necessitated his early departure. Sheldon Kurtz participated in part of the meeting by speakerphone. Naomi Karp (AARP Liaison) had hoped to participate but was occupied with the concurrent work of the UPOA drafting committee, then had to depart early due to the impending snowstorm. Not present were Mary Louise Fellows, Joseph Kartiganer, and John Langbein. Guests included Jack Burton and Linda Whitton of the UPOA drafting committee and William Henning (NCCUSL Executive Director).

1. **Minutes.** The Board approved the minutes of the November 2005 meeting.
2. **UPC Amendments in General.** The Chair reported that the NCCUSL Executive Committee has authorized the formation of a drafting committee to prepare amendments to Article 2 of the Uniform Probate Code (and a conforming amendment to §707 of the Uniform Parentage Act) concerning the parent-child relationship and related matters. The question was put to Professor Henning on Saturday whether the Board is authorized to be the drafting body for amendments outside the scope of parent-child (e.g., amendments to the elective share and miscellaneous amendments), the aim being to present these to NCCUSL at the same time as the parent-child drafting committee presents its work to NCCUSL. Professor Henning responded in the affirmative.
3. **UPC Amendments Concerning the Elective Share.** Professor Waggoner led a discussion of some proposed amendments to the UPC's elective share. The discussion focused on:
 - a. Whether the provision in §2-205(3)(iii) concerning gifts made within two years of death should track the gift tax annual exclusion (see p. 22 of Professor Waggoner's memorandum). The Board concluded that this provision should be kept as it currently exists in the UPC, except that the amount should be raised to \$12,000 and should be adjusted automatically in future as the Treasury Department adjusts the gift tax annual exclusion amount.

b. Whether §2-213 should be revised to be consistent with §9.4 of the Restatement (Third) of Property (Wills and Other Donative Transfers) (see pp. 26-27 of Professor Waggoner's memorandum). The Board agreed in principle. The suggestion was also made to retain the idea in current §2-213(d) concerning a waiver of "all rights." Professor Waggoner will draft language for the Board to consider.

c. Whether, in light of Rev. Proc. 2005-24, the surviving spouse should be entitled to make a partial election providing that a charitable remainder trust created by the decedent be excluded from the augmented estate. The Board suggested that §2-208(a)(ii) be amended to indicate that the surviving spouse's consent can be given "before or after the transfer." Professor Waggoner will draft language for the Board to consider.

d. Whether language akin to §2-208(a)(i) should be drafted to deal with bequests made in a will pursuant to a contract to devise. The Board concluded that the question is already handled by the definition of "claims" in §1-201(6).

4. UPC Miscellaneous Amendments. Professor Waggoner led a discussion of miscellaneous amendments to the UPC. The discussion focused on:

a. Whether to include a COLA adjustment (see pp. 2-5 of Professor Waggoner's memorandum). The Board agreed in principle. Professor Waggoner will draft language for the Board to consider.

b. Whether §2-502 should be amended to treat a signed and notarized will as validly executed (see pp. 8-9 of Professor Waggoner's memorandum). The Board agreed that §2-502(a)(3) should be redesignated §2-502(a)(2)(A), and a new §2-502(a)(2)(B) should say "notarized." (Later in the meeting, Professor Waggoner suggested an alternative wording for new §2-502(a)(2)(B): the language might track §105 of the proposed Uniform Power of Attorney Act, which speaks of a document "acknowledged before a notary public or other individual authorized to take acknowledgments.") The Board concluded that notarization should not be subject to a reasonable-time requirement.

c. How to redraft §2-502(c) to repudiate *Estate of Foxley*, 575 N.W.2d 150 (Neb. 1998) (see pp. 8-11 of Professor Waggoner's memorandum). Rather than adopting the proposed language in the memorandum, the Board agreed that it would be better to say that the intent and meaning of holographic insertions can be discerned from the non-holographic portions of the will. Professor Waggoner will draft language for the Board to consider.

d. Who should count as a "descendant" for purposes of §2-603. Professor Waggoner proposed using the intestacy definition to determine a "descendant" in the first sentence of §2-603(b), but using the class gift definition for the substitute gifts created by §§2-603(b)(1) and (b)(2). The Board agreed with this approach. Professor Waggoner will draft language for the Board to consider.

e. Whether non-substantive amendments should be made to clarify when a substitute gift is superseded by an alternative devise in §§2-603(b)(4), 2-706(b)(4), and 2-707(b)(4) (see pp. 14-16 of Professor Waggoner's memorandum). The Board agreed with the proposal and with the suggestion in the memorandum that the order of proposed subsections (i) and (ii) should be reversed.

f. Whether the slayer rule in §2-803 should be extended to physical or financial abuse (see pp. 17-25 of Professor Waggoner's memorandum). The Board expressed concern that the concept of abuse may cover too broad a spectrum to be a useful trigger for the automatic loss of succession rights. The Board concluded that this issue should not be handled in the current round of UPC revisions.

g. Whether §2-804 should be extended to the termination of a legally-recognized domestic partnership (see p. 26 of Professor Waggoner's memorandum). The Board concluded that this issue should be kept in abeyance pending the work of the parent-child drafting committee.

h. Whether in §2-804(b) a gift to a relative of the former spouse should be revoked only where it is an alternative to a spousal gift (see pp. 27-28 of Professor Waggoner's memorandum). The Board agreed in principle. Professor Waggoner indicated that he would like to work further on the draft language.

i. Whether a new §2-805 should be added to permit reformation to correct mistakes (see p. 31 of Professor Waggoner's memorandum). The Board approved the draft language in Professor Waggoner's proposal.

j. Whether a new §2-806 should be added to permit reformation to achieve the transferor's tax objectives and, if so, whether the section should speak in general terms, as in Professor Waggoner's draft, or whether it should be specific, akin to California statutory law (see pp. 31-35 of Professor Waggoner's memorandum). The Board agreed in principle with the idea of reformation to achieve tax objectives and preferred the general language in Professor Waggoner's draft. Professor Waggoner will prepare draft comments, explaining how proposed §2-806 will work, for the Board to consider.

k. Whether §3-406(b) should be revised to clarify the effect of a self-proved will (see pp. 36-37 of Professor Waggoner's memorandum). The Board agreed in principle that this subsection should be amended to reflect an approach similar to Texas Probate Code §84. Professor Waggoner will draft language for the Board to consider.

i. Whether §6-211(b) should be amended to repudiate *Lee v. Yang*, 111 Cal.App.4th 481(2003) (see p. 38 of Professor Waggoner's memorandum). The Board approved Professor Waggoner's suggested amendment and indicated that this technical correction might be put on the consent calendar of the NCCUSL Executive Committee.

Professor Waggoner indicated that he would like a half-day on the Fall 2006 agenda for UPC matters.

5. UPC Amendments Concerning the Parent-Child Relationship and Related Matters.

Mindful of the drafting committee's role, the Board engaged in a general discussion of amendments on the parent-child relationship, proposed by Professor Waggoner. The topics included:

a. Inclusion of stepchildren in §2-103 (see pp. 6-7 of Professor Waggoner's memorandum). The Board indicated a general sense that stepchildren should inherit but in the last tier, as in Professor Waggoner's draft; they should not inherit ahead of grandparents or descendants of grandparents. The question was raised whether an even lower category should be created for stepchildren who did not live with the decedent; the consensus on the Board was that this question should be answered in the negative.

b. Minor corrections to §2-104, to make the section clearer (see p. 8 of Professor Waggoner's memorandum). The Board supported these changes but suggested that "120 hours or more" should be replaced either by "120 hours" or "at least 120 hours."

c. Inheritance by half-blood relatives, perhaps giving rights only to those having a shared upbringing with the decedent (see pp. 9-11 of Professor Waggoner's memorandum). The Board discussed the pros and cons of a nuanced approach but reached no conclusion.

d. Termination of parental rights as a basis for terminating inheritance rights (see pp. 13-14 of Professor Waggoner's memorandum). The Board concluded that the drafting committee will need to consult experts on family law in order to learn more about the fact-patterns triggering termination of parental rights.

e. The relationship between an adopted individual and his or her biological parents (see p. 16 of Professor Waggoner's memorandum). The Board tentatively agreed with the general direction of Professor Waggoner's draft.

f. Protections for unadopted stepchildren (see p. 17 of Professor Waggoner's memorandum). The discussion focused on whether these protections should extend to foster children; the Board's tentative conclusion was in the negative.

g. The status of children of assisted reproduction (see pp. 18-23 of Professor Waggoner's memorandum). The Board had a general discussion of issues arising under proposed §§2-118, 2-119, and 3-916 without reaching any conclusions.

6. Richard Wellman Award. The Board discussed possible criteria for the award. The Board reached consensus on the following: (i) sitting Board members should not be formally excluded as candidates but the current practice should be to exclude them; (ii) the aim should be to present the award annually, but with flexibility in case there is no suitable candidate in a given year; (iii) the recipient should have some connection with Uniform Laws; (iv) the award can be posthumous; and (v) Natalie Wellman should be invited to be present, if possible, when the award is given. The subcommittee on this award [Mr. Moore (chair) and Professors English, Scoles and Waggoner] will formulate more specific criteria. The Board agreed to present the next award posthumously to J. Pennington Straus, co-chair of this Board (then known as the Joint Editorial Board for the Uniform Probate Code) from 1974 to 1986 and chair from 1987 to 1991, at a Uniform Trust Conference to be held in conjunction with the ACTEC Fall 2006 meeting in Providence.

7. Statutory Trust Act. The Board expressed strong concern that the Act's name is causing confusion, especially with the Uniform Trust Code. The Board asked Professor Henning to request the Act's drafting committee to consider a different name (perhaps the Statutory Business Trust Act).

8. Uniform Guardianship Interstate Jurisdiction and Enforcement Act. Professor English offered a general overview of the Act and described the recent work of the drafting committee. Professor English explained that the Act (the name of which is expected to change) is planned to be incorporated into the Uniform Guardianship and Protective Proceedings Act and into Article 5 of the UPC. The Board agreed to consider the Act in detail on the Friday morning of the Fall 2006 meeting.

9. **TOD Real Property Registration Act.** Professor Gallanis presented a draft memorandum addressed to NCCUSL's Committee on Scope and Program, requesting the appointment of a drafting committee for this proposed project. The memorandum has been circulated to the JEB for Uniform Real Property Acts, with feedback expected in March. The Board was positive about the project and, subject to the comments of the JEB-URPA, agreed that the request should be submitted to Scope and Program for consideration at its Summer 2006 meeting.

10. **Unitrust Act.** The Board considered a suggestion from Mr. James McKay proposing a Uniform Unitrust Act, either as a stand-alone act or as an amendment to the Uniform Principal and Income Act. The Board expressed doubt about the feasibility of adding a unitrust option to the UPIA, given the high number of states that have already adopted unitrust provisions. However, the Board agreed to make two inquiries on the topic of the interplay between unitrusts and Internal Revenue Code §2041: (1) the Board will ask Mr. E. James Gamble, the co-reporter of the Uniform Principal and Income Act, whether he would have an interest in seeking clarification from the Internal Revenue Service on the issue; and (2) the Board will ask Ms. Linda Hirschson (of the Greenberg Traurig law firm in New York) whether she had asked about §2041 when she sought guidance from the IRS on other unitrust matters.

11. **Uniform Power of Attorney Act.** Mr. Jack Burton and Professor Linda Whitton led a discussion of the Act's most recent draft. They outlined some of the major changes from the draft considered by the Board in November 2005:

- a. Protection of persons who accept, or liability for persons who reject, a power of attorney (§§ 118-119).
 - i. Former §104 on knowledge has been deleted; the Act now refers to "actual knowledge" without defining that term.
 - ii. If the power of attorney is not in English, the person presented with the power can require a translation (§118(c)).
 - iii. If the form is different from the statutory form, the person presented with the power can require an opinion of counsel (§118(d)).
- b. Definition of a presently exercisable power of appointment (§102). The Board recommended replacing the words "absolute ownership" in the proposed definition with "property or property interests."
- c. Appointment and authority of co-agents under the statutory form (§301). The form will be amended to state that the principal may appoint co-agents. The default rule will be that co-agents can act independently, rather than (under the prior draft) by majority vote.
- d. Effect of notarization (§105). There was considerable discussion about whether notarization should be required, or whether it should merely provide a presumption of validity. The consensus on the Board was that non-notarized powers should be valid and durable, but not entitled to the protections of the Act absent a court order.

(After the meeting, a discussion was held by e-mail about the definition of a "power of attorney" in §102 of the Act. The consensus was that the definition should be: "'Power of attorney' means a writing or other record, evidenced by the record to be a power of attorney, in which a principal grants authority to an agent.")

The meeting adjourned on Saturday, February 11, 2006, at 1:05pm.

Respectfully submitted,

Thomas Gallanis
Assistant Executive Director