

MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Thomas Gallanis

Re: Minutes, November 10-11, 2006; Philadelphia, Pennsylvania
Draft – Not Yet Approved by the JEB-UTEA

The meeting was called to order on Friday, November 10, 2006, at 9:05am by Chair Malcolm Moore. Others present were (in alphabetical order) Jackson Bruce, David English, Mary Louise Fellows, Thomas Gallanis, Edward Halbach, Susan House (on Saturday), Joseph Kartiganer, John Langbein, Carlyn McCaffrey, Judith McCue, Lawrence Waggoner, and Raymond Young. Eugene Scoles participated by speakerphone during the discussion of the International Wills projects. Not present were Levi Benton, Naomi Karp, Sheldon Kurtz, Martha Starkey, and James Wade. Guests included William Henning (NCCUSL Executive Director), Curtis Reitz (Commissioner from Pennsylvania and member of the NCCUSL Committee on International Developments), and Howard Swibel (NCCUSL President).

1. **Minutes.** The Board approved the minutes of the February 2006 meeting.
2. **Welcome.** The Board welcomed two new members: Carlyn McCaffrey and Susan House.
3. **Richard Wellman Award.** The Board discussed criteria for the award and reaffirmed the criteria described in the February 2006 minutes. The Board agreed that the award should aim to recognize contributions to law reform through NCCUSL and/or the American Law Institute. The Board indicated that a subcommittee should be formed to develop a list of potential award winners. Members of this subcommittee include (in alphabetical order) Professor English, Ms. McCue, Mr. Moore, and Professor Waggoner.
The Richard Wellman Award for 2006 was awarded 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. The award was presented at a luncheon on Friday, November 10, to Mr. Straus's widow, Rosemary, who was accompanied by her husband, Mr. George Nofer.
4. **Constituent Groups.** The Board was asked for its opinion on whether Board members appointed by the constituent groups (ABA-RPPT, ACTEC, and NCCUSL) should be appointed for terms, perhaps with term limits. The Board indicated that any terms or term limits would be decided ultimately by each constituent organization. The Board was not in favor of nonrenewable term limits, which would deprive the Board of important institutional memory. The Board concluded that it would be comfortable with renewable four-year terms for members appointed

from constituent groups specializing in trusts and estates (ABA-RPPT and ACTEC); it would not recommend terms for NCCUSL Commissioners, comparatively few of whom have specialist knowledge of this field. Mr. Moore agreed to communicate a summary of the Board's discussion of these matters to Mr. Bruce Ross of ACTEC and Ms. Christine Albright of ABA-RPPT.

The Board also discussed ideas for enhancing communication with the constituent groups. The Board agreed to post minutes of Board meetings, and the mid-year and annual reports, on ABA-RPPT and ACTEC websites, to send minutes and reports directly to the ACTEC State Laws Committee and the ABA-RPPT Committee on Uniform Laws, and to submit news on a regular basis for publication in the ACTEC Journal.

5. UPC Articles 3, 4, and 7. The Board discussed in general terms a list of potential amendments to Articles 3 and 4 of the Uniform Probate Code, prepared by Professor English. The Board agreed that amendments to Articles 3 and 4 are needed, and that as changes are being made the Board should also consider whether improvements are needed to the UPC's probate procedures. Professor English agreed to contact Mr. Wade and the ACTEC State Laws Committee, to get feedback from eminent practitioners in UPC states. Professor English also suggested that Ms. Michelle Clayton at NCCUSL could be of help in identifying leading practitioners in UPC states. Professor English agreed to seek responses in advance of the next Board meeting.

The Board agreed to delete Article 7, which has been supplanted by the Uniform Trust Code. There are a few references elsewhere in the UPC to Article 7, and Professor English agreed to prepare a list of conforming amendments.

At the Spring meeting, the Board will identify the amendments that can be approved by the NCCUSL Executive Committee, and those that will require additional process.

6. UPC Amendments Concerning the Parent-Child Relationship and Related Matters. 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 inclusion of stepchildren in §2-103. The Board suggested that stepchildren should inherit but in the last tier, as in the current draft.

b. The inheritance rights of half-blood relatives in §2-107. The Board suggested that half-blood relatives should continue to inherit a full share.

d. The termination of parental rights, and other factors, as grounds for barring inheritance in §2-114. The Board discussed whether §2-114 should be limited to parents whose rights have been terminated (omitting the references to abandonment and failure to support) but reached no consensus. The Board did suggest that a requirement should be added that the conduct must have occurred while the decedent was a minor, as in N.Y. EPTL §4-1.4.

e. The relationship between an adopted individual and his or her genetic parents in §2-116. The discussion centered on:

i. the need for a definition of incapacity in subsection (e);

ii. whether "estranged" in subsection (e)(C) should be replaced by "known to the genetic family": the Board suggested the latter formulation;

iii. whether subsections (e)(A) and (e)(C) should also apply in abandonment: the Board reached no consensus on this question;

iv. whether adult adoptions should create inheritance rights with respect to other relatives of the adopting parent (e.g., if A adopts an adult B, is there a grandparent relationship between A's parent and B?): the Board reached no consensus on this question;

f. The protections for unadopted stepchildren in §2-117. The discussion centered on:

i. the meaning of "but for a legal barrier": the Board suggested that California cases explicating this concept should be described in the Comment;

ii. whether the section should extend to foster children: the Board's suggestion was in the negative;

iii. whether the UPC should define or codify the doctrine of equitable election in subsection (c): because the doctrine varies from state to state, the Board's suggestion was in the negative;

g. The status of children of assisted reproduction in §§2-118 and 2-119. The discussion focused on whether consent to posthumous conception can be inferred from behavior contemplating conception in general, or whether the behavior must specifically contemplate *posthumous* conception. The Board suggested that it should be the former, not the latter.

h. The constructional rules governing class gifts in §2-705. The discussion centered on:

i. the wording of subsection (a): the Board suggested that the subsection should read "Except as provided in subsections (b) and (c), class gifts are construed in accordance with the rules for intestate succession.";

ii. the requirement in subsection (b) of living while a minor as a regular member of the household: the Board encouraged the committee to adopt a broader formulation akin to the "functioned as a parent" test in Restatement 3d §14.7;

iii. whether subsection (b) should refer explicitly to nonmarital children: the Board reached no consensus on this question;

iv. whether subsection (c) should be replaced with the language from Restatement 3d §14.5(2): the Board reached no consensus on this question.

v. whether there should be a time-limit in subsection (e) on adoptions in progress: the Board's suggestion was in the negative.

7. 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 §2-208(b)(2) should be amended to treat state pension funds akin to Social Security, which is excluded from the augmented estate. The Board's conclusion was in the negative; §2-208(b)(2) should be kept in its current form.

b. Whether §2-213 should be revised to be consistent with Restatement 3d §9.4. The Board agreed with the draft's approach, except that:

i. subsection (c)(3) should be revised to delete the phrase "if the surviving spouse was needy" and to add "reasonable" before "costs of the surviving spouse's representation";

ii. language drawn from the first sentence of Restatement 3d §9.4, Comment k, emphasizing that the time for determining unconscionability is the time of execution, should be added.

c. The need to add language to §2-207 to clarify that enhancements to the surviving spouse's earning capacity (e.g., a law degree) are not "property" that would be included in the augmented estate. Professor Waggoner will draft language for the Board to consider.

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

a. The addition of a COLA adjustment to the UPC in §1-109. The Board agreed to add this provision, which should not be in brackets (though proposed subsection (c) should remain in brackets).

b. The amendment of §2-502 to treat a signed and notarized will as validly executed. The Board reaffirmed its approval.

c. The amendment of §2-502(c) to repudiate *Estate of Foxley*, 575 N.W.2d 150 (Neb. 1998). The Board approved the proposed language.

d. The definitions of a "descendant" in §2-603. The Board agreed that the intestacy definition should determine the meaning of "descendant" in the first sentence of §2-603(b) and for the substitute gifts created by §2-603(b)(1), and that the class-gift definition should be used for the substitute gifts created by §2-603(b)(2).

e. The slayer rule in §2-803 and whether it should be extended to physical or financial abuse. The Board asked Professor Waggoner to prepare draft language for consideration at the next meeting.

f. The rule of revocation-on-divorce and whether §2-804(b) should be amended to revoke a gift to a relative of the former spouse only where it is an alternative to a spousal gift. The Board decided that the 1990 version of §2-804(b) should be retained.

i. The proposed §2-805 on reformation to correct mistakes. The Board approved this section.

j. The proposed §2-806 on reformation to achieve the transferor's tax objectives. The Board approved this section as drafted; the Board concluded that the section should not contain a list of specific tax objectives.

k. The revision to §3-406(b) to clarify the effect of a self-proved will. The Board agreed that if a will is self-proved, the requirements for execution under §2-502 should be conclusively presumed.

i. The amendment of §6-211(b) to repudiate *Lee v. Yang*, 111 Cal.App.4th 481(2003). The Board approved the proposed language.

9. International Wills. Professors Henning and Reitz, and on Saturday Mr. Swibel, discussed with the Board the possibility of renewing efforts to enact the Uniform International Wills Act (1977) and to promote ratification of the Convention providing a Uniform Law on the Form of an International Will (1973). The Board agreed to convene a study group, including Board members Professors English and Scoles, to examine the feasibility and desirability of these efforts and, if favorable, whether the Act would need any updating.

10. Trust Code/Prudent Management of Institutional Funds. Professors English and Langbein led a discussion of the conforming amendments that might be needed to the Uniform Trust Code in light of the newly-promulgated Uniform Prudent Management of Institutional Funds

Act, especially the endowment spending rule of UPMIFA §4 and the application of cy pres to small old funds in UPMIFA §6(d). Professor English will draft amendments for the Board to consider at its Spring meeting.

11. Disclaimer of Property Interests. Professors English and Gallanis led a discussion of an article by Professor Adam Hirsch critiquing the Act. The Board expresses its thanks to Professor Hirsch for raising these issues for discussion. The discussion focused on:

a. Whether the Act should be amended to provide that a disclaimed interest in a will substitute passes as if the interest had been created in a will. The Board declined to adopt this suggestion, noting that there are important differences between wills and will substitutes, and that this proposal would lead to an anomaly: disclaimed future interests in trust would be subject to UPC §2-603 whereas non-disclaimed future interests in trust would be subject to UPC §2-707.

b. Whether the Act should be amended to provide that a disclaimed transmissible future interest created in a nonresiduary devise where the disclaimant has no descendants who survive the distribution date should pass through the transferor's residuary clause. Making this suggestion, Professor Hirsch cites UPC §2-707(d)(1). The Board noted that §2-707(d)(1) treats the residuary clause as if it created a future interest under the terms of a trust, hence invoking all of the provisions of §2-707. The Board reaffirmed the more feasible approach of UDPIA §6(b)(3)(D), which parallels UPC §2-711.

c. Whether the Act's treatment of joint interests in §7 needs revision. The Board asked Professor Gallanis to contact the Act's reporter, Professor LaPiana, to learn more about how and why §7 was drafted. Professor Gallanis will report back at the Spring meeting.

d. Whether §4 of the Act should be revised to supersede the state law of disclaimers. The Board asked Professor Gallanis to make inquiries of Professor LaPiana and report back at the Spring meeting.

e. Whether §14 of the Act, which refers to the federal Internal Revenue Code, constitutes a constitutionally impermissible delegation of power. The Board noted that this issue will vary by state, but that a legislative note to §14 should be added to discuss it. Professors English and Gallanis will consult with Professor LaPiana about language to be added and will report back at the Spring meeting.

f. Whether §3 of the Act raises constitutional problems because it applies to previously-existing property interests. The Board reaffirmed the retrospective application, noting that there are no property rights in the prospective takers until the disclaimer is made.

12. Disposition of Community Property Rights at Death. The Committee on Review of Conference Acts asked the Board to consider whether the Act should be re-designated as a model act. The Board recommends that it should remain a uniform act. Mr. Bruce, Professor English, Mr. Kartiganer, and Ms. McCaffrey will examine the Act to determine if any updating is necessary.

13. Power of Attorney. Professor English gave a brief report on the status of the Act, which has been approved by NCCUSL.

14. **Principal and Income.** The Board discussed the effect of Rev. Rul. 2006-26 on §409 of the Act. The Board agreed that the Act's co-reporter, Mr. Gamble, should discuss the issue with the Internal Revenue Service. Professor Gallanis will contact Mr. Gamble.

15. **TOD for Real Property.** Professor Gallanis gave a brief report on this new project. Board members are encouraged to provide feedback by e-mail to Professor Gallanis on the issues identified in his October 18, 2006, memorandum, which was included in the meeting materials.

16. **Elder Abuse.** The Committee on Scope and Program, responding to a request from Commissioner Sakai of Hawaii, asked the Board to consider whether NCCUSL should prepare a Uniform Elder Abuse Act. The Board declined to endorse a study committee, noting that it will be very difficult to achieve uniformity.

17. **Insurable Interest.** The Board considered a memorandum drafted by members of the ACTEC State Laws Committee proposing a Uniform Insurable Interest Act. The Board expressed its support for a NCCUSL study committee. Professor English will prepare a memorandum to be circulated to the Board for comments and will reach out to identify persons who should be consulted about this potential project.

18. **Adult Guardianship and Protective Proceedings Jurisdiction.** Professor English led a brief discussion of this Act, in progress. The discussion focused on the definition and concept of the "home state" (see, e.g., §103(7)). The Board reached no conclusions but expressed concern about the concept as currently defined.

The meeting adjourned on Saturday, November 11, 2006, at 5:40pm.

Respectfully submitted,

Thomas Gallanis
Assistant Executive Director