



MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Benjamin Orzeske
ULC Legislative Counsel and Staff Liaison to the JEB-UTEA

Re: Minutes from November 2015 Meeting; Chicago, Illinois
FINAL – APPROVED April 29, 2016

The meeting was called to order on Friday, November 20, 2015, at 9:00 a.m. by Chair Malcolm Moore. Others present were Pamela Bertani (ULC Division Chair), David English, Mary Louise Fellows, Thomas Gallanis (Executive Director), Susan House, Carlyn McCaffrey, Kevin Millard, Benjamin Orzeske (ULC Staff Liaison), Pam Schneider, Martha Starkey, Bruce Stone, and James Wade. Turney Berry and Robert Sitkoff participated by phone for the Saturday morning session, primarily on the Divided Trusteeship project.

- 1. Approval of Minutes.** Mr. Stone moved for approval of the 2014 minutes. Ms. House seconded the motion, and the Board unanimously approved.
- 2. Proposed Amendment to UPC Section 2-209 (Elective Share).** The Board discussed Judge Wade’s proposal for an amendment to Uniform Probate Code §2-209(e), to add the language “but interest shall commence to run one year after determination of the elective share amount by the court.” The issue was brought to light in a Colorado case involving a large oil and gas estate that was litigated for many years, in part because of disputes over the calculation of interest. Action Item: A subcommittee consisting of Judge Wade and Ms. McCaffrey was asked to draft two versions of a model amendment for consideration at the Board’s Spring 2016 meeting: one based on Judge Wade’s original proposal, and one based on Ms. McCaffrey’s approach using both income and interest, with a cap. Mr. Stone suggested also drafting a version using a unitrust/annuity approach. Prof. Gallanis agreed to work with the subcommittee on drafting.
- 3. Drafting Committee to Revise the Uniform Guardianship and Protective Proceedings Act (UGPPA).** The Board discussed the October 1 draft of the Revised Uniform Guardianship and Protective Proceedings Act. Reporter Nina Kohn participated in the discussion by phone. The Board discussed a number of issues including terminology, person-centered planning and assisted decision-making, promotion of limited guardianships, bond requirements, and visitation, offering feedback to the committee. The Board noted that the drafting committee will meet again in the spring which will enable the Board to have another opportunity to provide feedback prior to the first reading of the draft at the ULC annual meeting in July 2016.

- 4. Referral from Scope and Program – Mental Health Advance Directives.** The Board reviewed a proposal to incorporate mental health advance directive provisions into the Uniform Health-Care Decisions Act (UHCDA), a proposal which was similar to a previously considered proposal from Professor Judy Clausen for a stand-alone act on mental health advance directives. The Board noted that a ULC study committee on the subject disbanded without reaching a consensus, and the Board unanimously agreed to recommend that the Scope and Program Committee not appoint a study committee because there had been no substantial changes since the previous consideration of the issue. Moreover, the UHCDA focuses on medical advance planning with an emphasis on end-of-life decision-making, and it expressly allows patients to revoke their directives. As Professor Clausen herself noted in her letter to the ULC dated June 16, 2014, the states enacting MHAD statutes with the irrevocable “Ulysses arrangements” favored by Professor Clausen have done so separately from the UHCDA or its equivalent. Action Item: Prof. Gallanis will convey the Board’s decision to the Scope and Program Committee.
- 5. Report from the Subcommittee to Consider Conforming Amendments to Uniform Acts Due to Approval of the Uniform Fiduciary Access to Digital Assets Act (UFADAA).** A subcommittee consisting of Prof. English, Prof. Gallanis, and Ms. Starkey reported that it had deferred consideration of any conforming amendments to uniform acts in light of the Uniform Fiduciary Access to Digital Access Act (UFADAA) because UFADAA itself underwent a significant revision. Action Item: Now that a revised version of UFADAA has been approved by the ULC, the subcommittee will consider whether amendments are needed to other uniform acts, and will report back to the Board at its meeting in Spring 2016.
- 6. Report from the Subcommittee on Conforming Amendments to Uniform Probate Code §2-213.** Ms. McCaffrey reported that she and Mr. Berry spoke by conference call with the chair of the drafting committee for the Uniform Premarital and Marital Agreements Act (UPMAA), raising the question whether the UPMAA needs to be amended to deal with the issue of unilateral waiver of a spouse’s elective share. The upshot of the call was that the members of the UPMAA drafting committee are divided on the question, and an amendment to the UPMAA is unlikely. The Board resolved to go ahead with technical amendments to Uniform Probate Code §2-213. Action Item: The subcommittee consisting of Ms. McCaffrey and Mr. Berry will report back to the Board at its Spring 2016 meeting with suggested conforming amendments to UPC §2-213, for consideration by states that have adopted both the UPC and the UPMAA. Prof. Gallanis agreed to work with the subcommittee on drafting.
- 7. DeFacto Marriage Proposal.** At the suggestion of Prof. Langbein, the Board had a preliminary discussion of a proposal by Prof. Waggoner to recognize de facto marriage for all purposes, rather than only for purposes of inheritance. Action Item: The Board will continue its discussion of the topic at its Spring 2016 meeting, with Profs. Langbein and Waggoner participating either by speakerphone or in person.
- 8. Conforming Amendments to Uniform Acts in Light of the Supreme Court Decision in Obergefell v. Hodges.** The Board noted that the ULC had appointed a committee to

consider whether changes to uniform acts are necessary due to the *Obergefell* decision on same-sex marriage. Action Item: Mr. Orzeske will liaise with Committee Chair Gail Hagerty to assess whether potential amendments to any uniform trust and estate acts should be placed on the Board's Spring 2016 agenda. Mr. Orzeske will also alert the ULC committee to the UPC language concerning "paternal" and "maternal" grandparents that will need to be updated.

- 9. Referral from Scope and Program – Crowd-Funded Trusts for Minors.** The Board considered a proposal by Prof. Karen Boxx for a study committee to consider the desirability of a uniform act creating a trust format for funds raised by crowd-funding for minors. The Board voted to recommend the appointment of a study committee. Action Item: Prof. Gallanis will recommend to the ULC Scope and Program Committee the formation of a study committee to consider Prof. Boxx's proposal and to determine whether the scope of the issue to be addressed is broader, for example to include trusts for crowd-funding on behalf of adults.
- 10. Report of Subcommittee Considering Amendments to the Uniform Trust Code.** The Board discussed a compilation of suggestions for Uniform Trust Code amendments received from, among others, the American Bankers Association Trust Counsel Committee, Prof. Robert Whitman, and fellows of ACTEC. The Board agreed that the suggestions compiled to date were not sufficient to warrant a project of UTC revision at this time. The Board resolved to continue to seek input on possible UTC amendments, with an eye to revisiting the question when circumstances warrant. Action Item: Mr. Orzeske will work with Prof. English and ABA staff to solicit further input on proposed UTC amendments from RPTE members.
- 11. Tribal Probate Code Drafting Committee.** The Board discussed the September 23 draft of the Model Tribal Probate Code and offered suggestions to the drafting committee. The Board looks forward to discussing a future draft at the Board's Spring 2016 meeting. Action Item: Mr. Orzeske will contact the Tribal Law Committee of the American Association of Law Schools and solicit help to recruit additional observers representing Indian tribes.
- 12. Uniform Probate Code Articles 3 and 4.** The Board discussed whether the time has come to revise UPC Articles 3 and 4, which date from 1969. The Board answered the question in the negative: none of the issues identified for consideration is pressing. Any action to revise Articles 3 and 4 should remain on the back burner until circumstances warrant moving the project to the front burner.
- 13. Adult Visitation.** At the request of the ULC Committee on Scope and Program, the Board considered a proposal from Ms. Catherine Falk for a study committee to consider whether a uniform act should be drafted to facilitate a petition by an adult child for the right to visit the child's parent. This proposal was initially referred to the drafting committee revising the Uniform Guardianship and Protective Proceedings Act and was later referred to the Board (and to the JEB for Family Law) because visitation issues arise both inside and outside of guardianships. At the suggestion of Professor English, the Board voted to defer discussion of the proposal until the Board's Spring 2016 meeting. Professor English explained that the

drafting committee to revise the UGPPA will make a preliminary effort at tackling the issue of adult visitation in the draft to be discussed at its Spring 2016 meeting (occurring before the Board's meeting), and it will be helpful for the Board to see the draft and know the outcome of the drafting committee's discussion. Action Item: Prof. Gallanis will communicate with the ULC Committee on Scope and Program.

The Board adjourned for the day at 5:00 and resumed meeting at 8:30 the following morning.

14. Drafting Committee on Divided Trusteeship. The Board reviewed the October 2 draft of the Divided Trusteeship Act, offering feedback to the drafting committee. Participating in the discussion by phone were Mr. Berry, Prof. Sitkoff, and the reporter Prof. John Morley. The Board noted that the drafting committee will meet again in the spring, which will enable the Board to have another opportunity to provide feedback prior to the first reading of the act at the ULC annual meeting in July 2016.

15. Conflict of Laws in Trusts and Estates. The Board had a brief preliminary discussion of whether there might be a need for a uniform act on conflict of laws in trusts and estates. The Board noted that the American Law Institute is beginning a Restatement Fourth of Conflict of Laws and that this project eventually will include provisions relevant to wills and trusts. The Board observed that it would be helpful to coordinate any ULC effort with the ALI's project, and also to offer the ALI the benefit of the Board's expertise. The Board recommended that the ULC authorize Profs. Gallanis and Sitkoff to be a joint envoy from the Board to the ALI, to learn more about when the Restatement project might address issues relevant to trusts and estates and to explore in a preliminary way the possibility of cooperation between the Board (and ULC) and the ALI when the appropriate time comes. Action Item: Prof. Gallanis will contact the ULC Executive Committee and the ULC Committee on Scope and Program.

16. Resolution of Appreciation. The Board unanimously approved a resolution expressing its thanks to Ms. House for her years of service as an ACTEC representative to the Board.

The Board adjourned at 1:00 p.m.

Respectfully submitted,
Benjamin Orzeske
ULC Chief Counsel and Staff Liaison to the JEB-UTEA