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

FROM: **James R. Wade**

RE: **Minutes, Phoenix, AZ - February 27-28, 2004**

The meeting was called to order at 9:00 A.M. on February 27, 2004. Those in attendance included Malcolm Moore, Eugene F. Scoles, Edward Halbach, Mary Louis Fellows, Judith McCue, Jackson Bruce, Joe Mazurek, Ray Young, Larry Waggoner, Chuck Collier, John Langbein, James R. Wade, and the Reporter, David English. Not in attendance were Richard Wellman and Sheldon Kurtz. Joseph Kartiganer attended by telephone conference for a portion of the meeting. Also in attendance were Michelle Clayton from the NCCUSL Staff and Howard Swibel, the Chair of the NCCUSL Executive Committee. Guests included Professor Linda Whitton.

1. **PRIOR MEETING**. The minutes of the December 6-7, 2003 meeting as amended by the completion of the materials regarding the addition of the Technical Amendments to the Uniform Trust Code were approved. The minutes of the January 21, 2004 meeting were approved subject to some editing changes noted by Professor Waggoner and Professor Langbein.

2. **DURABLE POWER OF ATTORNEY**. Professor Linda Whitton, the Reporter for the Revision of the Uniform Durable Power of Attorney Act (DPA) participated in a discussion of a February 15, 2004 draft which is scheduled to be presented to the Conference at its 2004 annual meeting for first reading.

There was a threshold discussion as to whether the DPA should be made a part of the Uniform Probate Code (UPC). The logical place would be in Article V, Part 5. The consensus was that it should be a part of the UPC and there was discussion about the protocol within NCCUSL to advise the NCCUSL leadership of this intention. A more general discussion followed about the desirability of incorporating other related free standing uniform acts into the UPC. The consensus was that there should be space in the Code to incorporate such free-standing acts if a state wishes; but in connection with new enactments of the Code, we should not necessarily build all of the free-standing act provisions into the UPC.

Professor Whitton noted that the new draft contained a short statutory form of power of attorney and that the draft act contained a list of powers. The list of powers can be incorporated by reference into a lawyer drafted documents or the statutory form may be used. The optional form at Section 201 begins with some instructive language to the principal; and then provides for the designation of an agent; provides instruction as to whether co-agents must act together or may act independently; provides for the designation of a successor agent; then

provides for a grant of powers with respect to the following subjects: real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of business; insurance and annuities; estates, trusts and other beneficiary relationships; claims and litigation; personal and family maintenance; benefits from government programs or military service; retirement plans taxes. These are defined in Article 3 of the DPA. They are available except those which are crossed out.

The form then provides a choice as to whether the power is presently effective or effective in the future upon incapacity or some other date or event; then provides for indemnification by the principal of persons who rely on the power of attorney.

The form then provides for a signature and notarization of the signature and concludes with a paragraph under the DPA Section 301which contains a general grant of authority. 301(B) contains a list of activities which can be undertaken only if the principal expressly authorizes them. These include the power to make and revoke gifts; estate planning powers (that is the power to change the dispositive provisions and the principal's probate and non-probate documents); and the power to delegate powers granted to the agent to another person.

Under Section 303 the execution of a durable power of attorney may incorporate by reference the powers listed in Sections 304 through 319 and these cover the following kinds of property and activities:

Section 304 - Real Property
Section 305 - Tangible Personal Property
Section 306 - Stocks and Bonds
Section 307 - Commodities and Options
Section 308 - Banks and Other Financial Institutions
Section 309 - Operation of Business
Section 310 - Insurance and Annuities
Section 311 - Estates, Trusts, and Other Beneficiary Relationships
Section 312 - Claims and Litigations
Section 313 - Personal and Family Maintenance
Section 314 - Benefits from Government Programs or Military Service
Section 315 - Retirement Plans
Section 316 - Taxes
Section 317 - Gifts
Section 318 - Delegation of Authority
Section 319 - All Other Matters

The discussion on the DPA and the statutory form went throughout the morning session and a portion of the afternoon session. Some of the discussion focused on the use and

design of the statutory form (recalling that there is presently a free-standing Uniform Statutory Form of Power of Attorney Act which provides a very long form with a great many options). Professor Whitton noted the objective of her Drafting Committee was to provide a much shorter form, probably in the two to three page length.

There was some concern that the areas of authority were not fairly descriptive of the authority granted. Professor Whitton noted that those were all defined terms which had elaborate provisions in the statute. There was a question raised as to whether these could be better described or summarized, perhaps on the reverse side of the form, Ms. McCue noting that this was the approach in the Illinois Act.

Ray Young thought that the warning language "important information for agent" at the end of the document should be stronger.

There were questions about the approach of allowing all of the stated powers to be effective except those stricken by interlineation noting that there might be a greater risk for error in striking provisions as opposed to requiring the principal to activate provisions by checking a box.

Jim Wade raised a general concern about allowing such a statutory short form to provide for any gifting or estate planning powers, although not questioning the basic usefulness for property management during lifetime.

In the area of estate planning powers Malcolm Moore questioned whether a distinction could be drawn between changes in dispositive provisions (such as insurance and pension beneficiary designations) as opposed to administrative changes (such as change in fiduciary designation and succession) or formatting an existing will in revocable trust form, suggesting that administrative changes might be more appropriate. Mr. Moore also suggested that the form should add greater detail on the areas that needed specific authorization (gifts and delegation of authority) but no more action was taken on this suggestion.

With respect to the signature portion of the form in Section 104 of the Act Professor Langbein raised the question of whether there should be a notarial requirement, a matter discussed by the Board at its last meeting. There was a general discussion of the extent to which more formalities in this area were appropriate. It was noted that state real estate law or practice might require an acknowledgment on powers relating to real estate and that it would tilt toward the notarial requirement. Professor Whitton said that this had been fully discussed in her Committee and that the Drafting Committee had opted for the notarial requirement.

Particularly with respect to Section 314 and 315 (Government Benefits and Retirement Benefits) Professor Langbein referred to the federal pre-emption issue. He noted that the approach in Section 2-804 of the Uniform Probate Code and the possible use of this Section to establish federal common law in cases where the federal government does not waive pre-emption.

Mr. Bruce noted that although the statute and the form provide for use of successor agents there is no distinction regarding the powers given to the first named agent and those given to the a successor agent. He suggested possibly expanding the warning language to note that powers given to the initial agent might not be suitable for successors.

Professor English noted that there might be a clarification regarding Section 301 on delegation and noted that the delegation which is contemplated under the statute goes well beyond the traditional narrower delegation of ministerial acts related to specific assets or transactions.

In the area of the agent's duties and responsibilities, Ray Young noted the provision of Section 115 that responsibilities attach only when the agent first chooses to act and questioned whether this was the right rule. With respect to Section 123 (Failure of Third Party to Respect Agency) Professor Waggoner suggested that the Section should provide for both specific performance and damages. Professor English noted that, by analogy, Section 14 of the Health Care Decisions Act authorized the Court to direct the third party to carry out the requested relief.

Mr. Wade questioned the provision in the statutory form to the effect that the principal agrees to indemnify third parties with respect to use of the power. It is not in the statute. The language is in the present Uniform Statutory Power of Attorney Act. Professor Whitton said that she would raise this question with the Drafting Committee.

Professor Whitton reported that there was a question under 107 (Two Agents Acting) whether one agent must or should be required to disclose breaches by a co-agent. Professor English noted that Trust Code 703 has a duty to disclose and redress. Professor Whitton responded that there may be a difference in the sense that an agent under a power of attorney may not know about the assets which may be subject to the power and have fewer duties whereas in the context of conservatorship and trust law the fiduciary should know about the assets with which he or she is dealing. Professor Langbein noted, nevertheless, that the Power of Attorney Act should provide affirmative duty to demand redress or discovery of past conduct and that there should be a requirement that the agent take action based upon actual knowledge.

There was extended discussion on the provisions of the DPA dealing with the authority of the agent to make gifts and to engage in estate planning activities on behalf of the principal.

In the area of gifting the following comments were made:

Professor Waggoner noted that under Section 301 the language might be construed to require to provide oral direction regarding making gifts. The consensus was that any such direction should be provided in writing in the document. He raised a question as to whether there was tension between 301(B)(3) (the power to make or revoke a gift) and language

on page 37, line 3, which limits gifting to annual exclusion gifts. Professor Whitton noted that the gifting beyond this limit would have to be provided by special drafting.

Professor Waggoner also inquired as to whether the DPA allowed joint and split gifts. Professor Whitton noted that the general provisions would allow the agent to participate in tax elections. It was suggested that Section 317 should be amended to make it clear that split gifting was allowed pursuant to IRC § 2513.

Professor Scoles wondered whether the reference to Section 2503(b) was inconsistent with (3) on line 18.

Professor Fellows suggested that the language be expanded to include a reference to gifting pursuant to Section 2503(e), the provision which allows tax free gifting by payment of educational and medical expenses and might include contributions to Section 529 Plans. Professor Whitton noted that Section 313 (Personal and Family Maintenance) may authorize this, and Mr. Moore noted that in a formal sense Section 2503(e) gifts are gifts in a property law sense but not in a transfer tax sense.

In the area of the authority of an agent to do estate planning the following comments were made.

Mr. Wade questioned whether a statutory form or check the box power, as opposed to an individually drafted power, should be sufficient to do estate planning.

Professor Langbien questioned whether the estate planning provisions included the power to create or alter a will. The Board did not think that the agent should have this power and that without recourse to Court. Professor Langbein said that if you determine not to allow the agent to change a will you should say so directly, but point out that there may be a alternative by creation of a revocable trust (or a "single transition" under the conservatorship provisions of the Uniform Probate Code).

Professor Halbach recalled the historical developments and the question of the power of a third party to make or change a will and that the Uniform Protective Proceedings Act had been changed to allow a conservator, based upon a Court Order, to engage in estate planning changes, including the making of a will. Professor Halbach noted that there should be a substituted judgment standard rather than a community standard in connection with estate planning changes and Mr. Young noted that there might be a problem in Massachusetts with the substituted judgment standard.

Mr. Young also raised a concern about the provision that an agent can take into account public assistance eligibility, in the context of the listing of fiduciary standards regarding the agent's duty.

Mr. Moore noted that he assumed that the default rule was that a power of

attorney would be presently effective as opposed to being springing in nature and thought that the statute should spell this out. He also raised the question as to whether the Board thought that the state of the drafting was such that it was ready to submit to the Conference for first reading and there was a consensus that it was substantially improved and should be submitted.

3. **HIPPA**. The Department of Health and Human Services has posted materials on its website relating to rights of legal representatives relating to HIPPA. The policy may be in conflict with the Uniform Health Care Decisions Act, promulgated by NCCUSL in 1993. A copy of the Uniform Health Care Decisions Act and the DHHS Office of Civil Rights website information relating to the issue was provided prior to the meeting.

Professor Whitton noted that, under the Act, an agent has the authority to obtain health care information as a "personal representative" both as to access to health care and as a "personal representative" for the limited purpose of paying bills.

Professor English noted that in general that there should be no problem if there is an existing power of attorney in place but the problem tended to arise in connection with the drafting of existing powers of attorney where a triggering mechanism was a determination of incapacity. He suggested that the Uniform Health Care Decisions Act might be amended to authorize an agent to obtain medical information that this might be a triggering act in defining that person as a "personal representative;" or perhaps a medical providers refusal to provide information should become the triggering mechanism which would qualify the named agent as a "personal representative" under state law.

Professor Langbein noted that it would be helpful to review the structure of the Uniform Health Care Decisions Act as a procedural guide (looking first to agency, then to surrogacy and to the Court only as a last resort) and then providing a standard of ordinary medical practice, which should be protective for doctors and hospitals if followed. He noted that the HIPPA issues may extend across a broad spectrum of uniform state laws including the Health Care Decisions Act, and the Uniform Probate Code. Professor English will alert the NCCUSL Executive Committee of this issue.

There was a general discussion about the problems of determination of incapacity, not of the principal but of agents so as to trigger successor agency and trustee provisions given possible HIPPA limitations. Professor Whitton noted that one can always ask for a judicial determination and noted that, at least as to third parties, the use of a certificate as to the authority of a successor fiduciary would be protective.

Professor Fellows questioned whether there should be some limits on the use of the medical information once received, that is that it should be used for the limited purpose for which it was obtained. Professor Scoles suggested that there be a note in the Comment that such information is received in a fiduciary capacity subject to the duties of prudence and loyalty.

4. **GUARDIANSHIP JURISDICTION**. The Board's previous recommendation that a study committee be formed to consider revising the 1997 Guardianship

and Protective Proceedings Act was approved. The study committee is actively seeking comments from the relevant groups. A conference call was held on January 7th by the study committee with representatives from ABA, ACTEC, AARP, NAELA, and NCPJ. Professor English had circulated a report from Lyle Hillyard, Chair of a Study Committee, presented to NCCUSL's Scope and Program Committee. It was noted that the attempts to obtain input for the identification of issues from the "Guardianship Network" was not workable since the Network only meets for a couple of hours a year in connection with other meetings and was not a real action organization.

It was recalled that this Board's been has been actually working on this issue since 2002 and our materials should have identified all of the issues and alternate solutions. We have provided a copy of these materials to Mr. Hillyard.

It was also noted that Sally Hurme of AARP has done several papers in this area and has recently published an article in the ABA Real Property, Probate and Trust Law magazine, *Probate and Property*.

After discussion there was a resolution that the Board ask Sally Hurme to prepare a short executive summary type of report to be provided to the NCCUSL study committee which would summarize the identification of the issues together with the likely range of solutions; and identify who would be the appropriate observers for a drafting project. Professor English is to report this status to Mr. Hillyard.

5. **UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UMIFA)**. Professor Langbein circulated a report from the Reporter, Susan Gary, together with a February 26, 2004 redraft of the proposed Revised Act.

He recalled that the mandate to the UMIFA Drafting Committee was (1) to update the investment standards so as to tie into the Prudent Investor Act; (2) to update the cy pres provisions to tie better to the Uniform Trust Act; (3) to clarify definitional issues, particularly to clarify that charitable trusts are covered as well as non-profit corporation governance; and (4) to consider the standing of third parties to question performance, particularly the question of the standing of the donor. In this regard the Drafting Committee determined not to provide for donor standing.

Professor Langbein noted that the Act deals essentially with investment and spending rules for "endowments" whether they are managed by non-profit corporations or charitable trusts. There is an overlap in the charitable trust area under the Uniform Trust Code. In the area of non-profit corporations governance, the Commissioners do not have a uniform law.

In connection with the spending rule the Act continues the concept of looking to total investment return, rather than traditional trust accounting distinctions between principal and income. The old Act allowed expenditure only of capital gains (the excess in value over historical cost). The new draft no longer limits spending to the excess over historic costs and

allows endowment managers to pick an annual spending amount in terms of a percentage of total value. A prior draft provided a safe harbor rule if spending does not exceed seven percent of market value. This has been taken out.

In the area of cy pres and disregard of restrictions on use of funds, it was noted that this is a concept from trust law and not non-profit corporation law. The approach is to look to the Uniform Trust Code for dealing with restrictions as a provision for releasing restrictions on small amounts without notice to the Attorney General or a Court Order.

There was general concern about including any percentage spending ratio as a safe harbor. If the percentage is too high managers may adopt it even if it is too high for their circumstances. Professor Halbach noted that there are great variations in connection with annual sources for funds, that some institutions need substantial annual fund raising which will have the effect of keeping the corpus growing; others may have a single initial gift and the only source of receipts is the return on investments; the former may need a smaller spending ratio to generate the growth over time.

Professor Langbein particularly requested comment on the following section:

> SECTION 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUNDS
>
> (a) Each individual responsible for the governance of an institution must, in managing an institutional fund, act in a manner that the individual reasonably believes to be in the best interest of the institution.

Professor Langbein noted that in a prior draft this provision consisted of language similar to the Uniform Trust Code standard of undivided loyalty. It has been suggested that this standard was not workable in connection with large institutions which operated in corporate format with large Boards of Directors, committees of the Board, and the like. Under non-profit corporation governance members who have conflicts of interest can abstain from acting, which may not be the case in connection with trustee governance. Professor English worried that under this standard a restricted gift might be more easily diverted under the best interests of the institution language although Professor Langbein said that the emphasis in Paragraph D(1) on the terms of the gift instrument would override 3(a).

It was noted that the ABA Advisor to the Drafting Committee came from the Business Section and that there were no Advisors from ACTEC or the ABA Real Property, Probate, and Trust Law Section.

Following discussion Professor Langbein stated that he would report back to the Drafting Committee four options:

1. Replace redrafted Section 3(a) with a trustee standard.

2. Leave the provisions as is.

3. Leave out the section entirely, but provide language, either in the text of the statute or in the comment, that one would refer to the underlying law of trusts or non-profit corporations as appropriate regarding loyalty issues in governance.

4. Consider creating some bright lines which would differentiate between large boards and small boards, and between transactions involving small amounts as opposed to large amounts of money.

It was also agreed that the Board should provide copies of the minutes of this discussion to ACTEC and to the Real Property, Probate, and Trust Section.

6. **UNIFORM TRUST CODE - ARIZONA ISSUES.**

The Saturday morning session commenced with a discussion with Arizona representatives regarding the efforts in Arizona to repeal the previously enacted Uniform Trust Code which has a deferred effective date. Uniform State Law Commissioner Jim Bush from Arizona attended.

The Arizona guests included the following: Susan Smith, Esq.; Steve Case, Esq.; Lee Raatz, Esq.; Linda Bowers (Arizona Bankers); and Christine Thompson (Arizona Bar Government Relations; and Arizona State Legislator Tom Boone.

Steve Case from the Probate Section of the Arizona Bar Association identified the main issues as follows:

1. The question of whether the Code provision that a settlor of an irrevocable could consent to waive material purpose in an action by the beneficiaries to modify or terminate a trust could be considered as a retained power which would subject the value of the trust assets to taxation in the settlor's estate under Internal Revenue Code Section 2036 or 2038.

2. Creditor protection issues, particularly whether the exceptions to spendthrift provisions were too broad and whether spendthrift provisions should be available under self-settled trusts.

3. The extent of notification and reporting to trust remainder beneficiaries.

4. The provision of the Code that settlor can designate the applicability of another state's law only when not contrary to Arizona public policy.

In a two hour session these issues were discussed. The Board noted that there should be some leeway in connection with Uniform Acts to take into account local conditions and policy concerns.

With respect to the estate tax issue it was the consensus of the Board, based upon analysis of the *Strangi* case by its members and based upon the academic commentary which had developed that this should not be a problem. The Board was, however, sensitive to retroactivity issues raised in the event that there turned out to be an estate tax problem. There was no objection if Arizona wanted generally to modify the provision to remove settlor involvement entirely (although this would be a narrowing of the common law rule on termination and modification).

In the creditor area it was noted that there exists a disparity between states as to the extent of spendthrift trust protection particularly in the area of Court ordered spousal and child support. The draftors of the Trust Code did what they thought was the fairest balance in this area but did understand the possible interest in variations in this area.

Regarding the issues on notice and information to beneficiaries it was noted that Arizona residents presently have the Uniform Probate Code which has a requirement for information to beneficiaries, at least to all current income and discretionary beneficiaries. Concern was expressed that some lawyers might not want to create charitable remainder interests particularly if modifiable by trust provisions, which would cause current trust operations to be reviewable by a remainder beneficiary. There is also an issue, which may be more technical in nature, as to whether notice should be given to remainder beneficiaries who are takers in default of a power of appointment. Several Board members noted that, taking into account the basic fiduciary relationship, it would not be wise to approve variations which eliminate the trustee's duty to account to or provide information to a number of the beneficiaries since that would create an essentially unenforceable trust.

Professor Halbach noted that while you may not need the choice of law provision in the Trust Code, you should not deprive a state of the ability to protect its own public policy in the trust context. He noted that the great bulk of the Trust Code provisions codify existing common law and the existing Arizona case law. The virtue of the Code is to bring predictability and closure to issues where there may be disparities in case law treatment of issues and conflicting commentary by the academic authorities.

The Board and the NCCUSL staff offered assistance in working on drafting solutions to these issues short of repealing the Arizona statute. Repeal would apt to be misunderstood in other jurisdictions as a complete repudiation of the Code. It was also suggested that extending the effective date would provide more time to resolve these issues, including the retroactivity issues.

Later in the afternoon session the Board determined to advise the Reporter and the NCCUSL staff that, should inquiries arise, the Board would have no objection (1) to removal of the Choice of Law section; (2) to changing the "consent" of the settlor to a "waiver" of the material purpose requirement or waiver of participation in trust termination; (3) to providing retroactivity protection for perceived *Strangi* problems; (4) to delay of effective date provisions; (5) to recognize state variations in spendthrift trust exceptions; (6) regarding notice and information, to acknowledge modifications short of the creation of secret trusts.

There was also a discussion to defer consideration of a request for a Revenue Ruling until the *Strangi* case appeal is determined.

7. **INHERITANCE RIGHTS OF UNMARRIED PARTNERS**. Professor Tom Gallanis presented a modified version of his JEB study and report on intestacy laws for unmarried partners, the report dated January 12, 2004. It was recalled that the Board had appointed a subcommittee to review the report, consisting of Sheldon Kurtz, Raymond Young, and Joe Kartiganer. The committee has not been active since the last meeting.

Chairman Moore noted that the main issue is whether there is a need for NCCUSL action in this area. There was discussion as to whether the Board should make a recommendation to NCCUSL Scope and Program Committee and whether further study or a joint meeting with the JEB on Uniform Family Law Acts is needed.

A discussion followed focusing on some of the substantive items in Professor Gallanis' report and his draft legislation.

Following the discussion, Professor Gallanis was encouraged to turn his draft report to the Board into a Law Review Article[1] authored by him, rather than revising it and redelivering the revised report (without the legislation) to the Board.

The Board determined, with Professor Gallanis' approval, that it would not at this time ask for any NCCUSL action with respect to this matter.

8. **ESTATES AND FUTURE INTERESTS**. Professor English recalled that Martha Lee Walters, Chair of the NCCUSL Scope and Program Committee, has requested that we consider perpetuity reform. Professor Gallanis has written a law review article about a uniform law in the area of future interests. It was noted that Professor Waggoner is covering the area in the Restatement of Property (Donative Transfers Third), and the consensus was that Uniform Acts should follow that Restatement.

9. **UNIFORM PRINCIPAL AND INCOME ACT**. It was noted that there are new fiduciary income tax regulations dealing with the Principal and Income Act allocations. A question has been raised as to whether the Principal and Income Act needed to be revised in light of the regulations. We have a memorandum from the Reporter, James Gamble, which indicates that there should be no need in the abstract for the Act to be changed since it is possible under Section 104 of the Act to convert to a unitrust. Mr. Gamble also noted that the IRS safe harbor of 3%-5% in the Regulations is achievable under the Act and that the power to adjust is also a safe harbor for tax compliance.

[1] Since the meeting, the Tulane Law Review has accepted publication in its December, 2004 issue.

10. **DISCLAIMERS OF PROPERTY INTERESTS**. A question has arisen regarding the effect under Section 2-1107 of the Act regarding disclaimer of joint tenancy interests. The question is whether the survivor should be able to disclaim 50% in all cases or only an amount equal to the survivor's contribution. Professor Halbach suggested that one should be able to disclaim the entire 50%, although only 40% might be transfer tax qualified. Professor Waggoner will provide the Reporter, Professor LaPiana, some suggested language for the Commentary.

11. **UNIFORM PROBATE CODE**.

A. Professor Waggoner reported that Professor Susan Gary has been engaged to prepare a report on inheritance rights of adoptive children.

B. Regarding Article 2, he noted that there are a couple of areas where language needs to be clarified. Professor Waggoner will bring a list of Article 2 loose ends to review at the next meeting.

C. Professor Waggoner then led a discussion of proposals to revise the UPC elective share. Prior to the meeting he had circulated a copy of his article, The Uniform Probate Code's Elective Share: Time for a Reassessment, 37 Mich. J. L. Reform 1 (2003).

He first proposed a more direct form of presenting the elective share that would make the system more transparent and therefore more understandable. The recommended form would incorporate three changes. First, the elective-share percentages now set forth in the schedule in section 2-202(a) would be replaced by a provision stating simply that the elective share percentage is always fifty percent. Second, the "augmented estate" would be renamed the "marital estate." Third, the schedule now located in section 2-202(a) would be moved to section 2-203 and the percentages in that schedule would be doubled. The schedule, as relocated in section 2-203, would provide that the marital estate in a marriage that has lasted fifteen years or more is one hundred percent of the sum of the four components of the marital estate: (1) the decedent's net probate estate, (2) the decedent's nonprobate transfers to others, (3) the decedent's nonprobate transfers to the surviving spouse, and (4) the surviving spouse's net worth. In a marriage that has lasted less than fifteen years, the schedule would provide that the marital estate is a percentage of the sum of these amounts, the percentages in each category being double the percentages now provided in section 2-202(a).

Although one of the benefits of the revised version is added clarity, an important byproduct of the proposed revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer a deferred-community approach. By making the elective share percentage a flat fifty percent of the marital estate, the proposed revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital estate to be defined either by the approximation schedule or by the deferred-community-property approach. The Board agreed with these changes.

Professor Waggoner then discussed the possibility of extending the schedule for full 50 percent "vesting" of the spouse's share beyond the current 15 years. The proposal is based on government date, which shows that the median length of a first marriage is 46.3 years, of a post-divorce remarriage is 35.1 years, and of a post-widowhood remarriage is 14.4 years. Consequently, under the current 15-year schedule, the median post-widowhood remarriage will last long enough to come close to full 50 percent vesting.

Professor Fellows noted that the partnership theory of marriage fails to account for the value in a later marriage of the extra burdens which a second spouse may take on as caretaker in a way that relieves the children of the former marriage of those responsibilities. Professor Waggoner said that we might be able to accommodate that idea in the supplemental elective share, and that he would try to work out a solution before the next meeting.

Professor Langbein suggested that any percentage is arbitrary and noted that the Canadian approach may be preferable which leaves the level of post-death support to judicial discretion.

The Board decided to revisit the issue at the next meeting, and asked Professor Waggoner to prepare statutory language for discussion at that meeting.

D. Re Multi-party bank accounts, the California Law Commission has requested that the JEB consider the question or whether a clarification or correction is needed in Article 6 Part 1 of the UPS relating to multiple person accounts. The memo from Nathan Sterling, Executive Director of the CLRC, had been circulated and described the recent California case interpreting the statute to allow a part to a multiple party account to withdraw funds in the account, regardless of the source of the funds, without having to account to the other parties. It was noted that Mr. Sterling was the Reporter for the Revised Multi-Party Account Section. The general consensus was that the case was wrongly decided and that the problem might be solved by removing the language "sums on deposit." The Board determined to add this to the list of accumulated Uniform Probate Code amendments.

12. **Adjournment**. The meeting adjourned at 4:00 P.M. on Saturday, February 28, 2004.

Respectfully submitted,

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James R. Wade
Recording Secretary