



MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

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

Re: Minutes from December 2013 Meeting; Chicago, Illinois
FINAL – APPROVED 12/5/2014

The meeting was called to order on Friday, December 6, 2013, at 9:00 a.m. by Chair Malcolm Moore. Others present were Turney Berry, Mary Louise Fellows, Thomas Gallanis, Edward Halbach, Susan House, Sheldon Kurtz, John Langbein, Carlyn McCaffrey, Judith McCue, Kevin Millard, Benjamin Orzeske, Pam Schneider, Robert Sitkoff, Martha Starkey, Bruce Stone, James Wade, Lawrence Waggoner, and Raymond Young. ULC Executive Director John Sebert attended part of the meeting on Friday. David English and ULC Division Chair Elisa White attended the Saturday session.

- 1. Approval of Minutes.** Mr. Berry moved to approve the minutes from the 2012 meeting. Prof. Sitkoff asked for a review of action items from the 2012 meeting. Prof. Gallanis reported that the subcommittee to draft an abbreviated version of the 2008 Uniform Probate Code (UPC) amendments was still working on its draft, and that the planned technical amendments to UPC Article III were not yet completed. Action: Mr. Orzeske agreed to produce a version of Article III with gender-neutral language. Following this discussion, the minutes were unanimously approved.
- 2. Resolution in Memory of Prof. Eugene Scoles.** The Board unanimously approved the following resolution: “The Joint Editorial Board for Uniform Trust and Estate Acts, by resolution adopted December 6, 2013, gratefully recognizes the distinguished and devoted service of EUGENE F. SCOLES (1921-2013) to this Board and to the Uniform Law Commission over a period of more than four decades, his scholarly expertise not only in trust and estate law but also in conflict of laws and international conventions, and the wisdom, sound judgment, and genuine collegiality he brought for so many years to the deliberations of this Board.” Action: Prof. Gallanis agreed to contact Prof. Susan Gary about providing a copy of the resolution to the Scoles family.
- 3. Report from the Drafting Committee on Fiduciary Access to Digital Assets.** Suzanne Brown Walsh, Drafting Committee Chair, and Naomi Cahn, Reporter, joined the Board by telephone for this portion of the meeting. Prof. Cahn summarized the act for the Board and addressed the potential conflict between fiduciary access and privacy concerns, particularly rights protected by federal law. She noted that the act will provide different default rules for

each of four types of fiduciaries: personal representatives of a decedent's estate, guardians or conservators of a protected person, agents under a power of attorney, and trustees. Prof. Cahn also suggested that the Board may wish to consider conforming amendments to the UPC and the Uniform Power of Attorney Act (UPOAA) following the draft act's expected approval in July 2014. The Board discussed the draft act's provisions and provided advice to the committee.

4. **Memorandum of Understanding.** Prof. Gallanis informed the Board that a Memorandum of Understanding among the ULC, ACTEC, and the ABA-RPTE Section has been drafted and is awaiting approval by ABA-RPTE. The Memorandum is expected to memorialize the terms under which the Board has historically operated.
5. **Report from the Study Committee on Trust Protectors.** Mr. Berry, Study Committee Chair, reported that the committee had delayed its work in deference to the other ongoing T&E projects, but had scheduled a conference call for the following week. After a discussion of the issues involved, the Board agreed that a new uniform act on trust protectors was a good idea. Action: Mr. Berry agreed to provide the Board with a copy of the committee's upcoming report to the ULC Scope and Program Committee. Action: The Board resolved to recommend to the Scope and Program Committee the appointment of a drafting committee on trust protectors, and to place a high priority on this project.
6. **Conforming Amendments to UPC § 2-213.** The new Uniform Premarital and Marital Agreements Act (UPMAA) is inconsistent with UPC § 2-213 on waiver of the right to elect. Prof. Gallanis circulated draft conforming amendments for the Board's comments. Prof. Fellows asked whether the amended section should contain a hardship exception. Prof. Sitkoff explained that the UPMAA drafters debated whether to include a hardship exception applicable at the time of enforcement in addition to the unconscionability exception applicable at the time of execution, and determined that optional bracketed language was appropriate because some state courts have allowed hardship exceptions in case of divorce, but not at death. Prof. Kurtz moved to include a bracketed hardship provision in UPC § 2-213 along with an explanatory comment, and the motion passed. Action: Prof. Gallanis agreed to consult with Prof. Waggoner and with the chair and reporter of the UPMAA drafting committee, and to circulate a revised draft conforming amendment to the Board for review, either before or at the next Board meeting.
7. **Conforming Amendments to UPC §§ 2-608 and 2-704.** The new Uniform Powers of Appointment Act (UPOAPPA) is inconsistent with UPC § 2-608 (Exercise of a Power of Appointment) and § 2-704 (Power of Appointment; Meaning of Specific Reference Requirement). Prof. Gallanis circulated draft conforming amendments, and Prof. Kurtz moved to accept the draft and recommend its adoption. The motion passed. Action: Prof. Gallanis agreed to submit the proposed changes to the ULC Executive Committee for approval.
8. **Registration of Trusts.** Former Article VII of the UPC included provisions on registration of trusts, but the subject was not addressed in the UTC other than in the Prefatory Note containing a cross-reference to UPC Article VII. There was general consensus that adding

registration provisions to the UTC was unnecessary, and instead the UTC Prefatory Note's reference to Article VII should be deleted. Action: Prof. Gallanis will prepare the appropriate technical amendment and submit it to the ULC Executive Committee for approval.

9. **Report from the Drafting Committee on Trust Decanting.** Stanley Kent, Drafting Committee Chair, and Susan Bart, Reporter, joined the Board for this portion of the meeting. Ms. Bart circulated a draft of the act that the committee will consider at its first meeting on December 7-8. Ms. Bart summarized the state of the common law of decanting and the widely divergent statutes in the twenty-one states that have legislated on the subject. She stated the draft act would use a bifurcated structure to walk the middle ground by giving greater authority to trustees with full discretionary powers and lesser authority to trustees with limited discretion. The Board discussed portions of the draft act and provided advice to the committee.
10. **Discussion of *Hillman v. Maretta*'s effect on the UPC.** Prof. Gallanis informed the board that the U.S. Supreme Court's recent decision in *Hillman v. Maretta*, 133 S.Ct. 1943 (2013), potentially affects five sections of the UPC: §§ 2-210, 2-702, 2-706, 2-803, and 2-804. Prof. Langbein presented the issue: the UPC contains post-distribution remedies that create a cause of action when a person who would have otherwise received a benefit is prevented from doing so because of preemption by federal law. The Court held that a similar provision of a Virginia statute was preempted. The Board discussed various alternatives: approach Congress to legislate a solution, watch the Supreme Court docket and file amicus briefs in future cases, or approach the Solicitor General to encourage advocacy for the principle of restitution under a common law approach. There was no desire to amend the UPC in light of *Hillman*. Action: Prof. Gallanis will draft a revised comment and circulate it to the Board for review before submitting it to the ULC Executive Committee for approval.

The Board adjourned at 4:30 p.m. until Saturday, December 7, 2013 at 9:00 a.m.

11. **Wellman Awards.** At dinner on Friday, December 6, the Board presented Richard V. Wellman Awards, for distinguished service to uniform laws in the field of trusts and estates, to Professors John Langbein of Yale University and Lawrence Waggoner of the University of Michigan.
12. **Resolution Thanking David English for Service.** The Board unanimously approved the following resolution: "The Joint Editorial Board for Uniform Trust and Estate Acts, by resolution adopted December 7, 2013, gratefully recognizes the distinguished and devoted service of DAVID M. ENGLISH to this Board as its Executive Director, for fifteen years, from 1998 to 2013, and expresses this Board's utmost regard for him and its sincere appreciation for his superb administrative leadership, his scholarly expertise, and his wisdom, sound judgment, and genuine collegiality."
13. **Proposed Revision of the Uniform Guardianship and Protective Proceedings Act.** Prof. Linda Whitton joined the Board for this portion of the meeting. The Board discussed Prof. English's proposal (in his capacity as the Chair of the ABA Commission on Law and Aging)

to the Scope and Program Committee to revise the Uniform Guardianship and Protective Proceedings Act (UGPPA; UPC Article V). Prof. English stated that the act should be revised in response to recommended standards from the third National Guardianship Summit in 2011, and presented a series of proposed amendments. Prof. Whitton presented a study of current state guardianship law showing the need for reform. Action: The Board resolved to recommend, in its report to the Scope and Program Committee, the appointment of a drafting committee to revise UGPPA, and to urge Scope and Program to place a high priority (equal to trust protectors) on this project.

14. Proposal to draft a Uniform Act on Ante-Mortem Probate. The Board discussed a proposal from Commissioner Tenenbaum of Illinois to draft a uniform act on ante-mortem probate. Prof. Gallanis noted that the ULC had previously formed a drafting committee on ante-mortem probate in the early 1980s that was subsequently disbanded. Prof. Langbein summarized a paper on the topic he had written in the 1970s, and noted that in the few states where ante-mortem probate is available it is rarely used; instead, estate planners often use living trusts. The Board reached a strong consensus that ante-mortem probate is flawed. Action: The Board resolved to recommend in its report to the Scope and Program Committee that no drafting committee be appointed.

15. Report from the Drafting Committee on Interjurisdictional Recognition of Substitute Decision-Making Documents. Prof. Linda Whitton, Reporter, joined the Board for this portion of the meeting. Committee Chair Prof. English discussed the committee's progress and reported its plans to read the act for the second and final time at the ULC's 2014 Annual Meeting. The Board asked questions and advised the committee.

16. Unitrust Amendment to the Uniform Principal and Income Act. Prof. English presented a report showing at least thirty states have enacted some form of a unitrust statute. Prof. Langbein stated that, in hindsight, the drafting committee for the Uniform Principal and Income Act (UPAIA) should have included unitrust provisions, but at the time there was no guidance available from the U.S. Treasury Department. The Board resolved to study the issue of a unitrust amendment to UPAIA, but to make no recommendation to the Scope and Program Committee for now. Action: Mr. Millard agreed to canvass ACTEC fellows at the upcoming meeting in Spring 2014. Action: Prof. Sitkoff agreed to contact trust administrators at Northern Trust and U.S. Trust, and to compile materials for discussion at the next Board meeting.

17. Revision of the Uniform Disposition of Community Property Rights at Death Act. The Board recommended in 2012 that the Scope and Program Committee approve the appointment of a drafting committee to revise the Uniform Disposition of Community Property Rights at Death Act (UDCPRDA), but the Scope and Program Committee took no action. Action: The Board resolved to reiterate, in its report to the Scope and Program Committee, the Board's recommendation to approve a drafting committee to revise UDCPRDA or, alternatively, to authorize a sub-committee of the Board to revise the Act, perhaps assisted by a law professor from a community-property jurisdiction. However, the Board resolved to recommend that Scope and Program prioritize the trust protectors project and the UGPPA revision.

18. Publicizing Uniform Trust and Estate Acts. Prof. Sitkoff suggested standardizing the process for introducing new uniform T&E acts at the Heckerling Institute on Estate Planning. Action: Mr. Orzeske agreed to work with Heckerling staff to publicize uniform T&E acts each year.

19. Outreach to Other Organizations. Prof. Sitkoff suggested reaching out to the American Bankers' Association and the National Conference of Lawyers and Corporate Fiduciaries, initially as guests during the discussion of unitrusts at the next Board meeting, and possibly in the future as liaison members. Action: Prof. Gallanis will work with Prof. Sitkoff to identify one or more appropriate guest participants in the discussion of unitrusts for the Board's Fall 2014 meeting.

20. Amendment to UPC § 6-211 on Ownership of Multiple-Party Accounts. The Board previously considered whether to amend UPC § 6-211 in light of *Lee v. Yang*, 111 Cal. App. 4th 481 (2003), but determined that no action was necessary. California recently amended its non-uniform version of UPC § 6-211 in response to *Lee v. Yang*. The Board reconsidered the issue and again determined that no action was necessary.

The Board adjourned at 3:35 p.m.

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