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

FROM: **James R. Wade**

RE: **Minutes, October 29, 2004**

The meeting was called to order at 9:00 A.M. on October 29, 2004, by Chair Malcolm A. Moore. Others in attendance included 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, Joseph Kartiganer, and the Reporter, David English. Not in attendance were Sheldon Kurtz and Robert Stein. Also in attendance were Joanne Huelsman, Division Director from NCCUSL and Howard Swibel, the Chair of the NCCUSL Executive Committee. Guests included Professors Susan Gary and Linda Whitton.

1. **PRIOR MEETING.** The minutes from the prior meeting were circulated prior to the meeting. Professor Langbein and Mr. Collier provided some non-substantiative editing changes to the Secretary. The minutes were approved.

2. **POSTHUMOUSLY CONCEIVED CHILDREN.** Professor Gary and Professor Waggoner led the discussion in this area. Two memos by Professor Gary had been circulated prior to the meeting, one contained a discussion of the existing case law in

the area and generally identifying the issues; the other contained this same information together with proposed language for the Uniform Probate Code providing the basis for inheritance rights and also a section redefining the parent-child relationship.

Initially it was noted that three reported cases had come up in the context of defining the eligibility of a posthumously conceived child to receive Social Security benefits. In these cases, particularly the 9th Circuit Federal case, there was a request by the court for a legislative solution. Also it was noted that Social Security eligibility depends upon Federal Law and regulations, and it is at least arguable that the deference which the courts made to state law was misplaced. There was a consensus that the development of new statutory language should not be driven by Social Security qualification considerations but should take a more general approach.

Professor Gary identified three principal issues which would have to be covered:

1. Should consent be required from the sperm donor and, if so, in what form.

2. By whom should the materials be able to be used in order to create a child with an inheritance interest;

3. How quickly must the child be conceived (in the context of the normal probate process) to take as an intestate distributee.

The following points were made in connection with the discussion on

consent:

Professor Fellows said that she didn't believe that it was really a question of consent, but rather part of the larger issue of intention. This notion was reinforced by the observations that a lot of what we do in will and trust construction is to determine and enforce intent, sometimes on a presumed intent basis.

There was considerable discussion regarding the use of a form as evidence of consent. It was noted initially that there is not yet good empirical data as to the language on use or intent in standard or specialized forms which sperm banks provide to their users. The thought was that they probably focus more on liability protection for the sperm bank than deal with such issues as the length of time that the material would be on deposit and issues regarding access to it. Professor Langbein suggested that a form might be the single most important part of a statutory provision since it would not only provide evidence of intent but would also help get sperm bank donors focused on and deal with the inheritance issues.

It was noted that a good model exists in other Uniform Acts for use of a form, including the Uniform Principal and Income Act and the Uniform Health Care Decisions Act.

Although no vote was taken, it seemed to be the consensus that a specific consent provision in writing need not be a necessary element. Professor Langbein suggested that the simple act of making a deposit in a sperm bank might create a

presumption of the availability of use post death and that this would naturally include inheritance rights.

The issue is easier if the use of the materials is to be limited to a surviving spouse. This was the situation in the three reported cases, and it occurs fairly commonly where the husband is ill or about to undergo medical treatment which may produce sterility. The reasonable assumption here would be that the intent of the sperm deposit was to authorize its use either following the event of sterility or in the event of death. There seemed to be a consensus that, in the husband/wife situation, a presumption of consent might be implied.

On the second question, by whom can the material being used, again it was noted that the most common situation was that of the husband's sperm in a traditional marital relationship. The statute should cover this situation and should not cover anonymous donors nor commercial donors. Following discussion, the consensus was not to cover a domestic partners at this time but to limit coverage to husband and wife cases where the husband made the sperm deposit prior to death.

On the question of timing, there was a wide range in discussion.

Mr. Kartiganer thought that the predominant policy should be that of favoring the interests of the child and that efficiency in administration should be secondary to that. He also noted that the impact of an extended time period could be overcome by a partial distribution and by reserving or holding back an appropriate share

of the estate for a later born child. Professor Fellows agreed with the use of a set-aside.

Mr. Wade noted the importance in Uniform Probate Code states of efficient administration and distribution of estates and noted that small and medium sized estates may be able to be distributed immediately upon the expiration of the outside creditor period (one year in the State of Colorado on account of a short self-executing statute of limitation). Where closing is done by informal closing statement (which might be as early as six months after opening) the Code provides six and twelve month limitation periods. The outside limitation in the Probate Code is the three year provision for setting aside informal opening proceedings with a formal testacy hearing. Mr. Kartiganer noted that you could have a quick distribution provision coupled with transferree liability in the case of early distributions so as to protect the interest of the later born child.

Professor Waggoner noted that the issue will be moot in the great majority of cases because cause of the U.P.C. provision for a large intestate share off the top for the surviving spouse. The result is that there may not, as a practical matter, be a intestate share available for any of the children. He noted, accordingly, that the problem tends to be limited to the first estate, that is the estate of the sperm donor or husband and that one can apply general rules of construction and status regarding subsequent estates and regarding class gift construction. He was inclined to stay as close as possible to the present design and time limits in the Probate Code.

It was also noted that a person who goes to the trouble of exploring or

implementing this kind of reproductive approach may well have a will and that wills are available to take care of the hard cases and that what we are talking about is default law.

Professor Gary's memorandum also discussed the wider range of parent/child relationship issues which traditionally have included adoption and non-marital children. The need for updating U.P.C. in this area has been discussed for some time with attention to the special areas of step parent adoptions, adoption by a genetic relative, adult adoption, adoption by partners in non-marital relationship, and the area of foster child adoption.

Professor Waggoner suggested that the draft provisions on functional parents would not work and that the Restatement of Property does not recognize this relationship, that is a functional definition of parent/ child relationships. He suggested that the existing Restatements would provide a good model for a revised statute.

Professor Gary agreed to move the language closer to the current step-parent adoption provision, and to focus on adoption by other family members and, more generally take into account the provisions of the Restatement.

3. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UMIFA).

Professor Susan Gary is also the reporter for the drafting committee on a revised UMIFA and she Professor Langbein led the discussion.

It was reported that prior to the annual meeting of the Conference, a decision had been made not to go to final reading so that there is still additional time for work and commentary.

The discussion that followed was a continuation of a UMIFA discussion at the last meeting of the Board. The drafters are still dealing with the threshold issue of the appropriate standard of conduct for the managers of institutional funds. It was recalled that, while most charitable funds are managed by a board of directors, under state non-profit corporation statutes, there are a significant number of charitable funds managed by trustees under trust instruments.

The present Act speaks largely to a corporate governance and standards, although an objective of the revised Act is to carry over the basic provisions of the existing Prudent Investor Act (with its trustee focus) on fund management.

The question has basically been whether there should be a trustee standard of conduct or something closer to a business standard under the non-profit corporation standard. There is one very important difference, that being in the area of self-dealing. A trust standard of loyalty would tend to prevent a self-dealing, while the corporate standard would permit it with disclosure. The matter is further complicated by the fact that some funds managed by trustees are managed in what is essentially a corporate format with a large "Board" of trustees and with delegation of responsibility to the equivalent of a Chief Executive Officer or a Chief Financial Officer.

Three statutory models were proposed and were articulated by Professor Langbein.

Model 1 - the draft which we presently have which does not distinguish between the nature of the governance organization and which picks up the Non-Profit Act standard "in the best interests of the institution."

Model 2 - two separate statutes, one for trustee governance and one for corporate governance. In this model, the trustees' governance provisions should be incorporated into the Uniform Trust Code and be free standing in the revised UMIFA which would apply solely to non-profit corporation governance.

Model 3 - takes the present draft but in a preliminary "scope" provision provides for different standards of governance, depending upon the nature of the entity; probably with a note that a particular section would apply to trustee governance and other sections would apply to corporate governance; and the bulk of the sections would be applicable to both. It was noted that such a provision would be similar to Section 102 of the Uniform Trust Code and that there is a similar code section in the Uniform Disclaimer Act.

After considerable discussion, a straw vote was taken. There were three votes for Model 1; one vote for Model 2, and the balance, a large majority, for Model 3.

There were, in addition, several free standing issues which were discussed.

First, was the question of whether it was appropriate for the new draft to

remove the investment restrictions based upon historical costs. Under the present UMIFA, under a total return model, capital gains can be treated as income, but only in excess of historical cost. It was noted, on one hand, that this might be consistent with donor expectations; on the other hand, it was noted that, with the normal ups and downs in the market, certain charitable funds might be "under water" for long periods of time and that the charitable purposes of the fund might not be able to be accomplished. Although there was not a formal vote, there was a consensus in favor of removing the historical floor.

Second, was the question of whether the statute should provide a percentage or a range of distributable percentages of asset value (based on current fair market value of the fund) which would either presumptively be a safe harbor or would presumptively be invalid. It was noted that several of the states, Massachusetts and Pennsylvania, have adopted this approach. Consistent with the Board's action at the last meeting, there was a consensus that the statute should not prescribe percentage limits for spending ratios. Again it was recalled that there is a wide variety in charitable organizations with different asset bases and dependence upon current fund raising, and that a one-size-fits-all approach was not appropriate. There was also a concern that an outside spending ratio, e.g. 7% on the high side, was certainly unrealistic in the current market and that fund managers might get an unreasonable feeling of safety in adopting that ratio to the detriment of the fund.

Thirdly, there was a discussion on the issue of retroactivity, but no vote was taken.

Fourthly, there was a discussion on Section 6, the Cy Pres Doctrine. In this area, it appeared that the Reporters approach seemed to be tracking the Uniform Trust Code and that it should be left as is.

Professor Halbach noted that sub d appears to have merged the traditional distinction between administrative deviation and changes in purpose and that the drafter should consider bringing in the settlor's views, if living, if the proposed change is not one of use.

Professor Waggoner thought it was useful to distinguish between releasing or relaxing investment restrictions rather than relaxing "use" or "purpose" and there seemed to be a consensus of the board in favor of that position.

4. **GUARDIANSHIP REFORM**. This was not an action item, but a report by Professor English which followed up on the report at the last meeting.

Professor English noted that there was a question at the last meeting as to what the continuing issues were and what the interest was in guardianship reform. He noted that guardianship reform is going to be a principal area to be covered in a November joint meeting of the National College of Probate Judges, NAELA, and the National Guardianship Association in Colorado Springs, Colorado. He noted that there

was going to be a one day, free-standing follow up meeting on the recent Wingspan guardianship reform conference, although the purpose of the followup meeting would not be to work on new policy but rather to discuss issues of implementation.

Probably, the most interesting current area is that of multi-state issues in guardianship. There are two sub issues. One is the question about transferring an existing guardianship proceeding from one state to another. This matter is covered both in the revised Uniform Guardianship and Protective Proceedings Act and in a supplement to the National Probate Court Standards. Each of these appears to provide a workable model.

The second issue is more difficult, and deals with how issues of conflicting jurisdiction should be sorted out at the threshold. The present practice (although it may not really be based on the policy), is to allow the first court to obtain jurisdiction to exercise jurisdiction to the exclusion of other courts, unless the originating court sees an interest in transferring jurisdiction. Apparently, this is similar to the provisions in the Uniform Child Custody Act.

Mr. Wade will be attending the Colorado Guardianship meeting and will report back to the Board.

5. **UNIFORM PRUDENT INVESTOR ACT.** There were two items here for the Board's consideration.

The first was whether the Conference should change its listing of enactment states to remove Pennsylvania or to designate it as substantially similar rather than being a basic enactment.

It was reported that Pennsylvania has departed from the Uniform Act in a number of core areas including those dealing with inception assets, diversification, total return, and the delegation rule. Professor English noted that Montana and Wyoming have also changed the rule on inception assets and Professor Langbein noted that the New York and Florida statutes are close in concept to the Uniform Act although not structurally. The decision was that the Board would share its analysis with John McCabe to assist him in this decision and that it would be helpful if we learned more about the Conference's criteria for listing. Professor Langbein and Professor English will communicate our analysis to Mr. McCabe.

The second matter was a discussion of the published comments of Mr. Peter Kinder, regarding the Reporter's comments regarding socially responsible investing. Professor Langbein, the Reporter, thought that the comments fairly refer to the range of law review commentary and noted that, while there may not be an absolute per se prohibition of socially responsible investing, such investing would generally be inconsistent with the Act to the extent that it reduces the universe of investments and thereby diminishes the potential benefits of the beneficiary. He reported that the ERISA article reported in the comment notes that the labor standard re socially responsible

investing is that the approach is permissible so long as it is "free", that is that it is does not cost or put at risk the beneficiaries interest.

Following discussion, there was a decision of not to recommend any changes in the comments.

6. UNIFORM TRUST CODE - CY PRES PROVISION.

This matter was taken out of order since Professor Langbein would not be available to attend the entire Sunday meeting. He discussed a case which might fall short of traditional cy pres, that is the creation of a fund, by collected donations, for the victims of a particular illness, and all of the victims either died or got well. Therefore, there would be a failure of purpose in an area which was not charitable since the purpose was not general. There are difficult remedial aspects; for example it would be difficult under a reversionary scheme to provide escheat to the extent that donors could not be located. Professor Langbein's proposal would be to apply a kind of cy pres and he will prepare materials for a future meeting. This was agreeable to the Board.

This meeting was adjourned at 5:00 P.M. to resume at 8:30 A.M.

7. UNIFORM PROBATE CODE.

The primary U.P.C. agenda item was further discussion from last meeting on Professor Waggoner's proposal for a partially redesigned elective share. In this regard, he circulated a recent article which he authored in the University of Michigan Journal of Law Reform entitled "The Uniform Probate Code's Elective Share: Time for a Reassessment," 37 U. Mich. J. L. Reform 1 (2003).

Initially, he proposed clarifying what the approximation schedule was designed to do, which was to define 50% of the "marital estate" as defined in the statute. Professor Waggoner's exact language appears in his handout and in the law review article and, following discussion, this change was approved.

The other major questioned raised by Professor Waggoner was whether to lengthen the vesting schedule in the case of a later in life marriage where there were children on both sides. In this case, he noted that the couple might be spending down income and assets rather than accumulating them, with the result that there might be very little marital property generated. His materials indicated that a median length marriage in this situation was approximately 15 years and that this would, under the present structure, allow the surviving spouse the maximum 50% elective share which he suggested was too great. His materials produced an alternate 20 and 25 year schedules.

Professor Langbein was uncomfortable with the proposal and thought that it might now be misperceived as anti-female, although it might be appropriate if this had

been done when the elective share provisions were originally drafted.

Professor Scoles felt that, although the proposal might be accurately based on economics, it was not sensitive to the more important concept of commitment in marriages. Professor Waggoner noted that in post-widowhood remarriages there is also a commitment to the children of the previous marriage.

Ms. McCue suggested that the formula would cause problems in marriages for younger persons. Professor Waggoner responded that this was not likely to be the case for several independent reasons.

First, that among younger married people marriages would tend to end in divorce and not death; secondly that there are very rare cases of premature deaths, a very small percentage of married people dying prior to age 55; thirdly, he noted that there are very few people who consciously use wills to disinherit a surviving spouse. He also noted that the supplemental elective share amount tends, in the case of marriages for younger persons, to provide benefit without getting into the formula.

Professor Langbein noted that there was a case to be made for abandoning forced share statutes all together, in part under the theory that virtually all bad second marriages end in divorce. Professor Fellows countered that the elective share statutes are important since they set the parameters for pre-nuptial planning and for divorce strategy. Professor Waggoner also noted that there are failed marriages that do not end in divorce.

The consensus was one of lack of support for lengthening the schedule but

agreement with the idea that we might provide a reference to the Michigan Law Review article in the Comment, which might prompt enacting states to adopt a lengthened schedule. The Board supported adding a deferred marital property provision as bracketed alternative language in the statute itself. In this regard he noted that he plans to change the caption of a proposed sub section from "Deferred Community Property Systems" to "Deferred Marital Property Systems."

Finally, in connection with the elective share, Professor Waggoner asked if there was any interest in increasing the supplemental guaranteed amount of the surviving spouse from $50,000 to $100,000. It was noted that the supplemental amount is often in addition to the statutory and exempt property, family allowance and homestead amounts and that recent state statutory increases might put the allowances in the $50,000 range.

Professor Waggoner then provided a list of other Uniform Probate Code issues which he will plan to bring before the Board:

1. He will propose a reformation of donative instrument provision similar to that in the Uniform Trust Code. It was noted that this provision had not caused any controversy in the UTC and he was encouraged to do this.

2. He led a discussion regarding Section 3-406, the effect of a self-proving affidavit, particularly raising the question of what is meant by a "conclusive presumption" of signature requirements and what presumptive effect there was for "other requirements."

There was some discussion as to what the purpose of the affidavit was and it appeared that the general language of the section was consistent with the purpose.

The discussion of this question is to be continued at the next meeting.

3. Mr. Wade recalled that, several meetings ago, the Board had acted to correct a gap in the elective share statute arising out of a case in the Denver Probate Court. The question was whether a surviving spouse, in the case of a time delay between the time of election and the distribution of the elective share, should be entitled to appreciation in value on the amount to be contributed, particularly those assets diverted from the probate residue, or whether interest should be paid. The present statute provides for neither. The action of the Board was to go with an interest provision similar to the provision on delayed distribution of pecuniary devises.

4. Professor Waggoner circulated some materials on a possible revision clarifying Section 2-603(b)(4) in the antilapse statute and this will be followed up at the next meeting.

8. **UNIFORM POWER OF ATTORNEY ACT.** Professor Linda Whitton, the Reporter for the Drafting Committee, joined the group as did Commissioner Jack Burton, the Chair of the "Drafting Committee to Review Uniform Durable Power of

Attorney Act." She circulated and commented on the new draft.

Under Article 1 it is noted that the Act can be free-standing for states that don't want either a statutory form or an incorporation by reference model.

New Section 106 (Creation) has a notarization provision, but this goes only to the presumption of validity.

There was discussion about Section 103, the portability provision. The intent is that the power should be valid if its format is valid in either the state of execution, the state of use, or the place of the principal domicile. Mr. Young noted that the issue might be more one of the extent of powers than validity since (c) provides that an agent cannot exceed the powers provided in the state of execution. With respect to third party acceptance Mr. Wade suggested that the Act might be enlarged to grant the agent a power to create and attach a schedule listing some or all of the assets then subject to the power, that is the ability at the time of use to make the power asset specific.

Mr. Young noted that there may be an issue where the rules of different states make different provisions as to whether agents may act singly, by majority, or concurrently. He and Mr. Kartiganer suggested following the Uniform Trust Code providing for third party protection by use of an agent's certificate of authority.

Section 108 provides for powers which must be specifically mentioned, such as the power to delegate and the power to execute disclaimers. In this regard Mr. Moore noted that the restricted provision regarding disclaimers was inconsistent with the

Uniform Disclaimer Act, and there was consensus to suggest removing the restriction. Similarly, there was discussion as to whether the authority to make a surviving spouse's augmented estate election should be specific in the agency instrument; and the consensus was that this should be covered in the elective share statute.

There was discussion about the problems inherent in making a general grant of authority to different agents on different forms. Ms. McCue said that this was common practice in Illinois. No decision was reached except to state a preference for use of co-agents rather than concurrent agents.

Professor English led a discussion regarding the duty of loyalty. The Act would provide for this basic fiduciary duty and Section 115(b)(2) provides that the agent should avoid conflicts of interest. Mr. Moore noted that there should not be any presumption of conflict when an agent is personally involved, noting that we normally include a family member agent in the class entitled to receive gifts under a power of attorney. The basic notion is that there is nothing inherently inconsistent between the exercise of a power in favor of the agent being valid as to third parties while at the same time causing a breach of duty by the agent vis a vis the principal.

Profession Whitton suggested closing the discussion by focusing on proposed statutory form and discussing Sections 121 and 122 (third party interests).

Article 3 of the new draft is the proposed form. It is substantially simpler than in the last draft and contains fewer options; it is more like a default type form. In

particular (a) it contains no option for co-agents, although it does provide for the designation of successors; (b) there is no option for authority to be springing (that is to take effect upon a future event); (c) the third party indemnification provision has been removed; (d) a form has been added to evidence the agent's acceptance, although there is no provision or instructions as to when the agent should sign.

Ms. McCue and Mr. Collier expressed their view that a summary of powers should be printed on the form itself, on the reverse side.

Professor Fellows suggested that the form should contain instructions on how to revoke, noting that the draft statute is not clear on the distinction between revoking the agency document versus terminating the agent's powers.

Fred Miller, President of the Conference, was present for discussion on the draft provisions of Section 121 and 122. Profession Whitton noted that the provisions of the last draft were punitive against third parties in that they had to accept all agent actions regardless of the circumstances or face strong sanctions. The new draft provides a reasonableness standard for third party response and allows a third party reasonably to decline to honor the proposed use, providing a statement of reason for non-complying. There was no negative response by the Board to this.

It was noted that a major change from the prior draft is the language of Sections 115(b)(2) and 112(c) and (d) which provide the circumstances which trigger an affirmative duty of the named agent to act.

9. **UNIFORM DISCLAIMER ACT.** Prior to the meeting a copy of an article in the April 2004 *Estate Planning Magazine* authored by Professor Evan Hirsh and Ronald Gans had been circulated. The article was critical of the Disclaimer Act in a number of respects. This is in addition to several earlier critical articles written by Professor Hirsh. This new article is different in that it is co-authored by a member of the Florida Bar (Mr. Gans) and may have been prepared in the context of consideration of adoption of the Disclaimer Act in Florida.

Also circulated was a general rebuttal by the Reporter, Professor William Lapiana, already published in the Uniform Trust Code Notes. Mr. Moore had wondered if there shouldn't be a more detailed response, and wrote Professor Lapiana with a series of questions raised by the Hirsh/Gans article. This letter together with Professor Lapiana's response and also some additional correspondence back and forth between Professor Hirsh and Professor Lapiana was also included in the meeting materials.

It was recalled that the Board had reviewed the drafting of the Disclaimer Act as it progressed and that Mr. Moore and Mr. Kartiganer were Advisors to the Drafting Committee.

Following discussion it was determined that Professor English would contact Professor Lapiana prior to our next meeting and discuss with him what steps, if any, might be taken, such as a technical correction to the Act; further elaboration of the commentary; or simply a response.

10. **UNIFORM TRUST CODE.** Professor English noted several recent adoptions of the Trust Code and that the Trust Code has been repealed in Arizona.

There has been continuing organized opposition to the Trust Code by a group of asset protection lawyers. The opposition has been expressed in a three article series in Estate Planning Magazine and also in an article in Trusts and Estates Magazine. These articles tend to misrepresent the provisions of the Uniform Trust Code, the provisions of the Second Trust Restatement, and the evolution of the Third Trust Restatement.

Since our last meeting in Arizona, the Trust Code Drafting Committee proposed a series of changes which were adopted by the Executive Committee of the Conference.

The changes are basically in the following areas:

1. Notice.

2. Beneficiary/trustee - creditor issue.

3. Trust termination/alleged estate tax issue.

Discussion followed on what would be the best way to respond to the issues raised and to the inquiries received regarding these issues; and also on some of the substantiative issues.

In the creditor rights area, Professor Halbach stated, that with the exception of the revocable trusts, the law has not evolved much from the common law to the

Restatement of Trust Second to the Restatement of Trust Third. A spendthrift clause is not generally available to protect a beneficiary who is also the settlor of the trust; and there have been a series of public policy exceptions to spendthrift protection, generally in the area of court ordered alimony or maintenance, and with regard to child support.

He responded that Professor Scott had said generally that creditors could reach beneficiary interest under support trusts, but could not generally reach all discretionary trusts on the theory that the beneficiaries had no rights. This analysis was not correct, since beneficiaries do have rights and Professor Halbach noted that a close reading of the cases indicate that there was not a bright line, but there is a spectrum of trust provisions which are sometimes characterized as hybrid trusts. The new Restatement attempts to provide a reasoned basis for beneficiary enforcement of discretionary trusts, and there would be some incidental creditor benefit to that extent.

Professor English suggested that the Restatement Third may have gone too far regarding discretionary trusts and noted that the Trust Code does not go that far.

In this regard there was a discussion on Uniform Trust Code § 501 following which Professor English agreed to re-write the Comment to clarify the situation.

The next area of discussion was that related to creditor rights as they relate to a beneficiary who has a power of appointment or a power of withdrawal. Under § 505(b)(1) of the Trust Code the holder of a power of withdrawal or a presently an

exercisable general power of appointment is treated as if he or she is settlor of the revocable trust as to the subject assets and therefore those assets can be reached by a creditor.

It is assumed that this result is consistent with the bankruptcy rules which allow a trustee in bankruptcy to attach the interest of the holder of such a power.

Professor Halbach stated that the Restatement Third provides that only presently exercisable powers of appointment are treated as ownership.

Professor English noted that the Uniform Trust Code would allow creditors of a person with a right of withdrawal to reach property subject to the power of withdrawal, but only in the time period, which is often limited, during which the power could be exercised. This could apply to so-called 5x5 withdrawal powers under testamentary trusts; so-called Crummey withdrawal powers (often limited to $5,000 or the annual exclusion amount with respect to inter vivos or irrevocable trust); and also would apply to "hanging" withdrawal powers, that is powers to withdraw in excess of the above limits where the power exists prospectively until there are exemptions available for its full utilization.

The general consensus was that this was the correct result under common law principles and that to change the rule, say as it might apply to withdrawal rights under irrevocable life insurance trusts, would probably be a departure from existing common law. There was a consensus, however, that the Board would not object to

proposed state law variations in this area.

In another substantiative area, Professor Halbach expressed concern about the change which has been made by the Trust Committee's 2004 amendments in the trust modification or termination area. At common law an irrevocable trust could be terminated or modified only if there was consent of all of the beneficiaries and the modification or termination was not contrary to a material purpose of the trust. There was early case law that indicated that the existence of a spendthrift clause in a trust was a material purpose which would preclude an otherwise proper modification or termination. Under the original draft of the Trust Code the spendthrift clause was not presumed to be a material purpose, although this determination would be made on a case by case basis. This provision had been changed by the Committee to put in the bracketed alternative which would retain a spendthrift provision as a material purpose.

Following discussion there was consensus that the change was wrong and that the bracketed material should be removed. Professor English was asked to pursue this through NCCUSL channels.

11. HOUSEKEEPING MATTERS.

1. Following discussion Professor Waggoner, in his capacity as the Board's Director of Research, and on account of his substantiative law knowledge as Restatement of Property Reporter, was asked to take an active role in the drafting of new

Uniform Probate Code section defining the parent/child relationship.

2. There was some discussion about the composition of the Board and the need to bring on some younger members.

3. It was determined that there was need to have another meeting during this fiscal year, probably in late Spring of 2005, hopefully after the next meeting of the Durable Power of Attorney Drafting Committee. Agenda items would probably include:

a. The Uniform Probate Code parent/child relationship section.

b. Work on Professor Waggoner's list (described above) and a review of past minutes for other amendments which have been approved.

c. Further review of the Uniform Power of Attorney Act, especially if the Drafting Committee has met earlier.

d. Further review of the next version of UMIFA.

e. Continuing review on the Uniform Trust Code.

12. The meeting was adjourned on Saturday, October 30, 2004.

Respectively submitted.

James R. Wade, Secretary

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