

Memo to: Commissioner Richard B. Long
Chair, UUDDA/UUDA Drafting Committee

From: Joe Colquitt
Reporter

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Apart from a few routine tweaks, at the close of our meeting there were three issues to be addressed. I have spent considerable time researching, reading and deciding how to address the issues raised. Here are my suggestions:

ISSUE 1: Question: How can a statute overrule a constitutional provision?

That is a good question with an easy answer. It cannot. Thus, as explained below, I have tweaked the language in § 2(2) and left § 4(a) intact.

Why the question? Section 2(2) defines “law” to include “the federal or a state constitution, a federal or state statute, a judicial decision or order, a rule of court, an executive order, and an administrative rule, regulation, or order.”

Section 4(a) states that with limited exceptions, “if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this [act] has the same effect as a sworn declaration.”

Assume the enacting state’s constitution required all declarations used in adoption proceedings be under oath or sworn (any law to the contrary notwithstanding). Applying Section 4(a), the “law [i.e., “state constitution” – § 2(2)] of the state requires use of a sworn declaration,” yet 4(a) establishes that an unsworn declaration “has the same effect as a sworn declaration.”

Ergo, the [act] trumps the state constitutional provision. But, of course, it *cannot*; thus, the provision is defective and declarations for adoption proceedings would need to be under oath as required by the state constitutional mandate.

There are at least 3 ways to eliminate the conflict:

1. Delete § 2(2) and leave “law” undefined in the act.
2. Delete “federal or a state constitution, a federal or” from § 2(2). The section would then read:

(2) “Law” includes a state statute, a judicial decision or order, a rule of court, an executive order, and an administrative rule, regulation, or order.”
3. Insert a new exception in Section 4(b), to-wit:

(6) a declaration required by constitutional law to be sworn.

I chose method 2 and amended § 2(2) accordingly. That approach leaves “law” defined but eliminates the issue. Of course, the issue is unlikely to arise because with the exception of oaths (which are excluded from the reach of the act in § 4(b)(2)) or perhaps a few other unique situations, it would be unusual to find a constitutional requirement that a declaration be sworn. As a result of the change, the act would not clash with a constitutional provision which could only be amended by a constitutional revision or amendment.

A good argument could be made that method 1 is the best choice because the meaning of “law” is rather well settled and the definition is therefore unnecessary. Once an attempt is made to define the word, new issues arise [e.g., should the law of Indian nations or municipal ordinances be added to the definition, etc?]

Actually, the word “law” only appears five times in the act (seven, if you count words in brackets, but those words will be deleted during the enactment process). In all but one provision it refers to the law of the enacting state. The context is unambiguous and the definition may be unnecessary. I did not believe it was necessary in the UUFDA act, but the UUFDA Committee concluded it would be helpful. But the definition creates an anomaly – a provision in an act that ostensibly trumps constitutional law (but doesn’t).

ISSUE 2: Should “acknowledgement” be added to the list of sworn declarations in § 2(6) and to the exempted declarations in § 4(b)?

The notaries noted that some declarations handled by notaries (e.g., affidavits, depositions, oaths) are addressed by the act but that acknowledgements are not. They would argue that acknowledgements should be listed as an excepted declaration in § 4(b), thus not permitting an unsworn declaration if a statute required an acknowledgement. Others might believe acknowledgements should be included in the definition of sworn declarations (§ 2(6)).

I suggest we do not add acknowledgements in either §2 or §4(b). First, they are not listed or exempted in the federal and California statutes which were used as source materials for UUFDA. These statutes have been law for decades and no one has advanced case law showing that the laws create problems. Nor are acknowledgements listed or exempted in UUFDA or the various state enactments of UUFDA (over 20); nor in the majority of non-uniform unsworn declaration statutes preexisting UUFDA. Second, many declarations requiring acknowledgement address real estate, trust or estate matters, and those declarations are excluded by §§4(4) (real estate) & 4(5) (self-proved wills) in UUFDA/UUDA/UUDDA. Thus, under the act as written, the principal areas in which acknowledgements are required already are excluded. Third, because at the outset we sought to remain close to the approach and language of UUFDA in these acts. A retreat from UUFDA’s scope would cause non-uniformity in ULC uniform acts. Without good cause to reject UUFDA language (as in the case of § 2(2), definition of “law”), we should use UUFDA’s language so as not to indicate an attempt to expand or retreat from its provisions. Additionally, UUFDA/UUDA/UUDDA do leave intact the enacting state’s law relating to real estate and self-proving wills. Acknowledgements are used in these areas of the law and the acts leave those laws and practices intact through exclusions in § 4(b)(4) (real estate) and § 4(b)(5) (self-proving wills).

Although neither UUFDA, nor the federal and California statutes from which UUFDA was derived exempt acknowledgements, during research, seven statutes were located that exempt acknowledged declarations from the reach of the acts. UUFDA has been enacted in over 20 states and a number of the 16 or so non-uniform acts do not exempt acknowledgements. E.g., 28 U.S. Code § 1746; Calif. Civ. Proc. Code § 2015.5.

The minority of jurisdictions that do directly exclude acknowledgements are:

1. Alaska: Alaska Stats. § 09.63.020. The Alaska statute, a non-uniform declarations act adopted before UUFDA was drafted, excludes acknowledgements from its provision authorizing the use of unsworn declarations in place of sworn declarations.

“(a) A matter required or authorized to be supported, evidenced, established, or proven by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making it (other than a deposition, an acknowledgment, an oath of office, or an oath required to be taken before a specified official other than a notary public) may be supported, evidenced, established, or proven by the person certifying in writing “under penalty of perjury” that the matter is true. The certification shall state the date and place of execution, the fact that a notary public or other official empowered to administer oaths is unavailable, and the following:

“‘I certify under penalty of perjury that the foregoing is true.’

“(b) A person who makes a false sworn certification which the person does not believe to be true under penalty of perjury is guilty of perjury.”

2. Iowa: Iowa Code § 622.1. (as to self-proved wills and certain other specified declarations):

When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting the matter, the person may attest the matter by an unsworn written statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person. This section does not apply to acknowledgments where execution is required by law, to a document which is to be recorded under chapter 558 or to a self-proved will under section 633.279, subsection 2

3. Montana: Montana Code § 1-6-105 (as to “writings requiring an acknowledgement”)

4. Oklahoma: 12 Okla. Stats. § 426 (“This section shall not affect any requirement for acknowledgment of an instrument affecting real property.”)

Whenever, under any law of Oklahoma or under any rule, order, or requirement made pursuant to the law of Oklahoma, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or any oath of office, or an oath required to be taken before a specified official other than a notary public), the matter may with like force and effect be supported, evidenced, established, or proved by the unsworn statement in writing of the person made and signed under penalty of perjury setting forth the date and place of execution and that it is made under the laws of Oklahoma. The statement under penalty of perjury may be substantially in the following form:

“I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

(Date and Place)

(Signature)”

“The signed statement under penalty of perjury shall constitute a legally binding assertion that the contents of the statement to which it refers are true. This section shall not affect any requirement for acknowledgment of an instrument affecting real property.”

5. Washington: Wash. Rev. Code § 9A.72.085(4) (“writings requiring an acknowledgement” excepted)

6. West Virginia: W. Va. Code § 39-1-10a (restricted to a writing “which does not require an acknowledgement”)

8. Wyoming : Wyo. Stats. § 1-2-104 (acknowledgements excepted)

UUFDA, UUDA and UUDDA permit unsworn declarations to substitute for sworn declarations and view perjury laws alone as sufficient to deter the use of false declarations. An oath before a notary is not sufficient as a deterrent to false swearing; otherwise, we would need only the oath and not the perjury offense.

An acknowledgement in one of its principal forms has nothing to do with the veracity or accuracy of the contents of the declaration. Rather, although it is a declaration, the acknowledgement’s declaration addresses the identity of the declarant, not the truthfulness of the contents of the document. See, e.g.,

Do you acknowledge that you freely and wilfully executed (or signed) this document [state type, if known] for the purposes contained in it? /or/

Do you acknowledge that this is your signature, and that you freely and wilfully executed (or signed) this document [state type, if known] for the purposes contained in it?

Alfred E. Piombino, Notary Public Handbook 99 (Nat’l ed. 1996).

“There are three essential components of an acknowledgement:

1. the personal appearance before the notary public;
2. positive identification; and
3. the actual acknowledgement of signing to the notary public.”

Id., at 98. [Note the absence of any “actual acknowledgement of the truth of the declaration”]

Thus, a declaration containing an acknowledgement (without more) contains no oath that the contents of the document are true. It only acknowledges that a person stated to the notary that he or she “freely and wilfully” signed or executed the declaration (even if the contents are false). Thus, a written declaration signed by the declarant and acknowledged by the declaration could be viewed as an unsworn declaration with respect to the factual assertions in the declaration because the acknowledgement only provides a declaration of identity and possibly the purpose for which the document was created (e.g., power of attorney, will, trust instrument, etc). Any factual assertions in the acknowledged declaration are unsworn.

“The acknowledgement provides a degree of protection to the public by certifying that a document was properly executed.”

Id., at 95. But it doesn’t certify that the declaration is true and correct. Thus, an acknowledgement is more a tool to establish identity and not a tool to establish truth.

“Acknowledgement is a formal declaration before an authorized officer by the person who has signed an instrument that it is his voluntary act and deed. . . . The purpose of acknowledgement is to entitle the instrument to record, and to provide official evidence of its execution.”

Anderson’s Manual for Notaries Public § 4.1, at 59-60 (2d ed, Carl Louis Meier, ed., 1940)

“An instrument need not be acknowledged unless required by statute, as acknowledgement was unknown to the common law. The statutory provisions of each state must be consulted to determine what particular instruments require acknowledgement. [mentioning as examples deeds, mortgages, leases, satisfaction of mortgages, written agreements fixing boundary lines, etc].

Id., § 4.2, at 60.

ISSUE 3: What is the effect if a state enacts UUDA or UUDDA but does not amend its perjury laws to include unsworn statements?

The same question would arise in the case of an enactment of UUFDA without revision of the perjury laws. In all three acts (UUFDA, UUDA, UUDDA), § 2(7) defines an unsworn declaration as one “not given under oath, but given under penalty of perjury.” If in fact, the unsworn declaration is not subject to the state’s perjury laws because those laws apply only to sworn statements, then an unsworn declaration cannot substitute for a sworn declaration. [See §

4(a), which sanctions the use of unsworn declarations “meeting the requirements of this [act]” for the same purposes as a sworn declaration serves.] But if the unsworn declaration is not subject to the penalty of perjury then it doesn’t meet the statutory definition of an unsworn declaration [§2(7)] and therefore does not “have the same effect as a sworn declaration.” [§ 4(a)].

As the Legislative Notes state in multiple places: “Enacting states will need to ensure that the perjury laws of the enacting state include unsworn declarations.”

A suggestion was advanced that a provision be added to UUDA/UUDDA directly amending the state perjury laws rather than leaving it to the enacting state to do so. This would not be in keeping with the approach of UUFDA or any of the other unsworn declarations statutes. UUDA/UUDDA are not revisions of criminal laws. Many states have comprehensive criminal codes and attempt to corral all of their criminal laws within their criminal code rather than having ad hoc criminal provisions inserted in other statutes placed outside the criminal code.

I have not modified the draft on this issue.

ISSUE 4: What does “medium” mean? [See § 5]

The provision is taken verbatim from the UUFDA (§5; see also § 2(3)).

The term “medium” is used in a number of uniform acts approved by the Uniform Law Commission – sometimes without definition, sometime with definition. See, e.g., Uniform Commercial Code §§ 7-102(10), 2A-206, 4-213, 7-105, 9-523(d), etc, etc; Uniform Adoption Act; Uniform Electronic Transactions Act (§ 2(13)); Uniform Real Property Electronic Recording Act (§2(1)); Uniform Recognition of Substitute Decision-Making Documents Act (§2(7)); Uniform Residential Mortgage Satisfaction Act (§ 102(3)).

ISSUE 5: Should § 10 contain a limiting provision stating the act becomes effective only “upon amendment of the [enacting state’s] perjury laws”?

UUFDA does not contain such a provision. Section 10 is taken from the UUFDA. The Legislative Notes on the subject (perjury laws) appended to UUFDA were approved by the UUFDA Drafting Committee, the ULC Style Committee, and the Commissioners at the Annual Conference. As I understand it from previous briefings, Legislative Notes are a standard approach to addressing the requirement for additional action by the enacting state beyond the enactment of the uniform act.