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

FROM: **James R. Wade**

RE: **Minutes, February 4-5, 2005; Chicago, Illinois**

The meeting was called to order at 9:00 A.M. on February 4, 2005, by Chair Malcolm A. Moore. Others in attendance included Eugene Scoles, Edward Halbach, Jackson Bruce, Raymond Young, Lawrence Waggoner, Charles Collier, James Wade, Joseph Kartiganer, Michelle Clayton, Sheldon Kurtz, Robert Stein, and the Executive Director, David English. Not in attendance were John Langbein, Judy McCue, and Richard Wellman. Also in attendance was Marti Starkey, Conference Division Chair. Guests included Professors William LaPiana, Susan Gary, and Alan Newman. In addition, Professor Rob Sitkoff from Northwestern University visited for a portion of the meeting as did Christine Albright, Probate Division Director for the Real Property, Probate, and Trust Law Section of the American Bar Association.

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

Professor Waggoner noted that the draft minutes at the top of page 15 did not reflect the response to Ms. McCue's observation that the elective share formula would be

inaccurate for early marriages for younger persons. Professor Waggoner noted that this was considered when the elective share was drafted, and was not thought to create a problem, for the following reasons: Instances of remarkably premature death of a young married person who dies with a will executed during the marriage that disinherits his or her surviving spouse are rare indeed. But, even in this minuscule proportion of cases, the supplemental elective-share feature guarantees the surviving spouse no less than $50,000 plus the probate exemptions and allowances which under the UPC amount to a minimum of $43,000—$93,000 in total. Considering the smallish size of most estates of young decedents, the supplemental elective-share feature should amply reward all or almost all of the occasional surviving spouses who are both young and disinherited in a marriage in which the marital assets were disproportionately titled in the name of the decedent. The prior minutes will be so supplemented.

2. **UNIFORM ANATOMICAL GIFTS ACT**. Board Member Sheldon Kurtz is Reporter to a Drafting Committee that are working on the 1997 Anatomical Gifts Act. He reported that he expected there to be changes in three areas:

A. Expansion of the list of surrogate decision makers during lifetime;

B. While the present Act purports to make gifts irrevocable and not subject to family override, this is not working and there will be a new provision to strengthen the language protecting donor intent.

C. The Act will be updated to take into account and be consistent with modern medical practices and procurement of organs, including the facilitating of better organ registries.

He said that the Act would probably not attempt to provide a presumption for consent to anatomical gifts (requiring an opt out); and would not get into the area of sales of body parts and financial incentives for organ donations.

3. **UNIFORM DISCLAIMER ACT**. Prior to the meeting a copy of the April 2004 *Estate Planning* magazine of Professor Adam Hirsh and Richard Gans was circulated together with a memorandum from Professor LaPiana.

It was recalled that Professor LaPiana is the Reporter for the Disclaimer Act; that Malcolm Moore had been the American Bar Association Advisor; and that the Act has been enacted in 11 states with modest changes. It was noted that the Hirsh/Gans article contains a proposed rewrite of the statute.

A copy of Professor LaPiana's January 11, 2005 memorandum is attached to these minutes.

Professor LaPiana went through his memorandum and commented on each of the areas where there was a proposed change.

There was discussion specifically regarding jointly held property. Professor LaPiana noted that there does not seem to be any authority to deal with the multiple joint

tenancy situation. Following discussion there was a consensus that the existing Act is correct in not making a distinction between joint tenancy bank accounts and joint tenancy property in general and the resolution in the two examples was appropriate under the existing Act.

There was also discussion on the disclaimer of powers of appointment. It was recalled that the present Act allows a partial exercise of a special power of appointment and a disclaimer of the balance; it does not provide for a partial exercise of a general power of appointment with a disclaimer of the balance. This distinction seemed correct in light of the nature of general powers.

Most of the discussion focused on the question of disposition of a disclaimed interest.

The discussion included the possibility of generally replicating the UPC 2-7-07 (Anti Lapse) solution; and whether the coverage should include both legal and trust instruments. Professor LaPiana suggested that Professor Hirsh's suggested solution does not work for trusts without an anti lapse statute and noted that we do not want to create a transmissible interest under these circumstances.

After discussion the consensus of the Board was to recommend to Professor LaPiana that he modify the Act in this regard by changing the first sentence in Section 6(b)(3)(A) so that the disclaimed interest "passes as if the disclaimant had died intestate and unmarried immediately before the time of distribution" and to note that this would

apply whether or not a state had adopted UPC 2-707 and note that it applies only to transmissible future interests.

There was also discussion on the question of coordination with the Internal Revenue Code. The Gans/Hirsh proposal would remove the reference to the Internal Revenue Code "as now or hereafter amended" and substituting "as in effect on [effective date]." The consensus here was that, while this was a valid point, the solution will depend upon state law and that the issue should be discussed in a comment.

Finally, it was noted that while a number of the discussion points were interesting, they were not clearly preferable to the existing language and it was noted that they have not caused problems in any of the enacting states.

Since the Disclaimer Act Stand By Drafting Committee has been disbanded it was suggested to Professor LaPiana that he submit any proposed changes to the NCCUSL Executive Committee.

4. **UNIFORM PRINCIPAL AND INCOME ACT**. James Gamble, the Reporter for the Act, had submitted a memorandum for the information of the Board.

Initially, it noted that there is still a question with the Internal Revenue Service (in light of lack of clarity in the Section 643 Regulations) as to whether a state needs to have a unitrust conversion statute to avoid adverse tax consequences. Mr. Gamble did, however, attach a copy of a recent Private Letter Ruling which reviewed the

proposed modification of an income only trust to a total return trust and concluded that, notwithstanding the fact that the State of Michigan did not have a conversion statute, there would be no GST tax consequences; that realized capital gains would be allocated to DNI and taxed to the beneficiary rather than to the trust; and that the proposed conversion would not result in a sale and exchange under Code 1001 with respect to the income beneficiary.

Mr. Gamble's memo also noted that there was a recent California State Court decision which apparently misconstrued § 401(d)(2). Mr. Gamble had inquired as to whether the Conference might prepare an amicus brief. He was advised by John McCabe that, with rare exception, the Conference did not file amicus curie briefs or letters, but that this would not preclude Mr. Gamble from doing this individually, even if he listed among his credentials that he was Reporter for the Uniform Act.

5. **UNIFORM TRUST CODE**. In this regard the meeting materials included the following:

A. A memorandum from Professor English suggesting that he would like to have input on the comments to Section 603 (Power of Withdrawal), Section 813 (Duty to Inform and Report), and Section 814 (Discretionary Powers).

B. The 2004 and 2005 amendments to the UTC.

C. October 2004 Estate Planning article "How Will Asset Protection of

Spendthrift Trusts be Effected by the UTC" (Merric and Oshins).

D. An article by Walsh, Davis, Kent, and Newman "The Status of Creditors Under the Uniform Trust Code."

E. An article "Creditors' Rights Under the Uniform Trust Code" by Alan Newman.

Professor English introduced Professor Newman, Professor of Law at the University of Akron, who has been active with the Ohio Bar. Professor Newman noted that he was a "Reporter" for the Ohio Uniform Trust Code Committee. He noted that, after issues were raised in Arizona regarding Article V, he was asked by the Ohio Committee to do a report on creditor rights and he did so by producing an article which was co-authored with Richard Davis. He reported that the Ohio Committee has also come up with a free standing wholly discretionary trust enabling statute, which has special relevance to Ohio in light of its traditional failure to recognize spendthrift provisions. He noted that his article discussing Article V has just been published in Estate Planning magazine.

Professor English then reported on the 2005 UTC amendments. These have been approved by the Executive Committee; and have been circulated for objection; and absent objection will be final in 30 days.

There is an amendment to Section 105(b)(2) which is a technical correction to conform language to that of other sections.

There are some amendments in Article V which are more organizational. Section 501 applies to trusts without spendthrift clauses and Section 502 applies to trusts with spendthrift clauses.

In Section 501 the pre-amendment language provided that "to the extent a beneficiary's interest is not protected by a spendthrift provision," the Court may "authorize a creditor or assigning of a beneficiary to reach the beneficiary's interest by attachment of a present or future interest to or for the benefit of the beneficiary or other means." The"not protected" language which is rooted in Scott and the Restatement seemed to be ambiguous and has been clarified.

Section 503 deals with exemption (to spendthrift provision) creditors. Subsection (b) provides that the only remedy available to an exemption creditor is the attachment of a present or future distributions. The amended section clarifies that the Court has the authority to limit the creditor relief as appropriate under all of the circumstances.

Section 506 deals with "Overdue Distributions." This section seemed to be clear although it was criticized in several articles. It simply provides that a mandatory distribution means a distribution required to be made by a trustee including a distribution upon termination of a trust. The amendment adds a definition of "mandatory distribution" that clarifies that the term excludes a distribution subject to exercise of the

trustee's discretion.

The discussion then shifted to the 2004 amendments.

Mr. Kartiganer focused the discussion on Section 504 (Discretionary Trusts; Ascertainable Standard) (e) which reads: "A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustees or co-trustees discretion to make distributions for the trustees or co-trustees own benefit is limited by an ascertainable standard." Mr. Kartiganer, although recalling the estate tax reason for reference to the ascertainable standard, said that it appeared to him that a beneficiary-trustee under this would get more protection than a beneficiary who was not a trustee. The idea is that a beneficiary-trustee should not be worse off in avoiding a potential bad tax result.

Mr. Kartiganer suggested that the concept should be: If a trustee or co-trustee, who is a beneficiary, has discretionary powers and the trustee's discretion to make a distribution is limited by an ascertainable standard this should not increase the rights of the beneficiary's creditors. Professor Scoles suggested that the result could be achieved by noting that the general provisions of Section 504 should not be changed by the fact that a beneficiary is also a trustee. The consensus was that Mr. Kartiganer's concept was approved and that Professor English should circulate the proposed revision to the Style Committee since it involves a matter of style and not a change in substance.

The discussion then shifted to Section 603 (Settlor's Powers; Powers of

Withdrawal). (a) provides: "While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiary are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."

The question is the extent to which a remainder beneficiary or successor trustee can take action against a trustee for misconduct which occurred during the settlor's lifetime.

Professor English noted that this had been an on-going subject of discussion and that this section was amended in 2001 and 2003 as well as 2004.

The conclusion was that if there had been a serious breach of third party trustee duties during the settlor's lifetime, of which the settlor was not aware, the language "duties of the trust are owed exclusively to the settlor" might preclude the surcharge action by the remainder beneficiary.

Professor Halbach suggested that extreme cases, such as those including fraud, could be dealt with under trust law and could be dealt with on the same basis as any case regarding the question of pre-death conduct by a third party to the settlor.

If there is a remedy the question is whether the remedy should be in the (1) trust beneficiaries; (2) as successor trustee; or (3) a personal representative of the estate. Mr. Wade noted that often, in the real world, the successor trustee or the personal representative of the estate might well be the same person as the trustee suspected of wrong doing.

Professor Scoles suggested that 603(a) was flawed since the trustee has duties to all of the beneficiaries, subject only to the settlor's control during the period of his or her lifetime and capacity.

Professor English suggested that the Board focus on the Comment and not the language of the text. The consensus seemed to be that the Board does not like the phrase "owed exclusively" but this is included in the version passed by ten states and the language is less objectionable where we have the bracketed limiting language "and the settlor has capacity to revoke the trust."

Mr. Young suggested that Professor English consider removing the first sentence from the first paragraph of the Comment and, in paragraph 4, add language regarding post-death enforceability by the successors in interest of the settlor, normally the beneficiaries or the successor trustee.

In connection with other amendments Professor English noted the following:

In Section 103 (Definitions) "ascertainable standard" was defined and was tied to the new definition of "power of withdrawal" by reference to limitation by an ascertainable standard.

In Section 105 (Default and Mandatory Rules) (a), the duty of the trustee under Section 813 to notify and report to qualified beneficiaries was bracketed; and under (9) the duty under 813(a) to respond to the request of a qualified beneficiary of

an irrevocable trust for reports and information was also bracketed.

Professor Alan Newman reported further on his research and writing in the creditor rights area. He and Professor English did a recent Heckerling Institute program. He reported, in particular, on the response to two major issues raised by Mr. Mark Merric and others:

There is a claim that the combination of (1) the requirements that the trustee, in exercising discretion act in good faith together with the (2) alleged blurring of the distinction between discretionary trusts and those with standards creates enlarged rights in beneficiaries and their creditors which, in turn, may create problems in the context of bankruptcy, divorce, and supplemental needs trusts.

The issue is dealt with in detail in the Newman article which basically suggests that the language of the Trust Code should not make any basic change in the law and the result of cases. He noted that there is no real distinction between "bad faith" standard and "a lack of good faith" and that Professor Scott and the Second Trust Restatement used the term interchangeably. He suggested that there be a better explanation in the Commentary.

The other major issue involved supplemental needs trusts and whether the UTC made those trusts more subject to creditors; it was suggested that the Comment note that the standard in these trusts tends to be limited to supplemental needs and not support of the beneficiary within the exercise of trustee discretion.

Professor Halbach said that the Restatement Third Commentary was intended to protect supplemental needs trusts and further noted that the trustee's duty of impartiality (between the current beneficiary and the remainder beneficiary) may tilt trustee discretion toward the remainder beneficiary since the trustee would be justified in declining to make distributions to a beneficiary which would be at risk of attachment or which might cause disqualification from benefits.

Professor English will look at the Comments under 504(b), 814, and 501 in this regard.

6. **UNIFORM POWER OF ATTORNEY ACT**. Professor Linda Whitton led the discussion. She provided a three page list of outstanding drafting issues; a proposed set of revisions for the next interim draft containing what she thought would be non controversial or consensus provisions to sections including 102 (Scope); 104 (Knowledge; Notice); 106 (Creation); 108 (Authority of Agent); 111 (Termination); 112 (Co-Agents and Successor Agents); 114 (Agent's Duties); 119 (Protection of Persons Dealing with Agents); 120 (Liability for Refusal to Accept Agent's Authority); 202 (Construction of Powers Generally); and 210 (Estates, Trusts, and Other Beneficiary Relationships).

She also provided an update of the Article 3 form with proposed modifications highlighted. She has not met with her Drafting Committee since our last

meeting. She will meet with her Drafting Committee between now and the time of the NCCUSL Annual Meeting, and it is not clear at this point whether this Act will go to the Conference this summer for final reading.

She requested comments on some structural issues regarding the design of the Act and asked for comments on some narrower issues. In connection with the narrow issues the Board's response was as follows:

A. Article 1 - There was no interest in adding a provision or comment that addressed bank guarantees of signature.

B. Article 1 - There was no interest in adding a provision similar to UTC 105 dealing with default and mandatory rules.

C. Section 211, subsection 6, should be revised to clarify that the list is not exclusive - yes.

D. Section 212 (Personal and Family Maintenance) - should the section be revised to clarify that payment of educational and medical expenses which are deductible under IRC § 2503(e) is included. The consensus is that the family support provision should be free standing and not limited by § 2503(e). Mr. Wade suggested that there be language and a comment that such distributions, although authorized under the Act, might not qualify for annual exclusion gift tax treatment. He also suggested that the Drafting Committee consider whether the agent should be authorized to treat non pro-rata distribution to family members as advancements subject to hotchpot at the time of death

and execute appropriate documents evidencing the advancements. There was also a question as to whether this Section should clarify that contributions to § 529 Plans are included. The consensus was that this should be handled under § 216, the gift section.

E. Gifts - The consensus was that this Section should be revised to clarify that split gift making under Code § 2513 was permitted; and also that contributions to § 529 plans should be included. It was suggested that the question of whether gifts can include multi year front loading of donations to § 529 plan accounts should be handled one way or the other, either permit or prohibit.

F. The consensus was that the authority to incur indebtedness on behalf of the principal not be removed from the various powers sections.

G. On the question of whether language in any of the powers section needed to be revised to deal with authority to deal with specific government agencies it should be reconsidered, but the Board had no insight about specifically what was involved here.

H. In connection with Article 3, the proposed statutory form of power, Professor Whitton asked for advice as to whether the document should be modified (1) to advise that the POA be kept in an accessible place; (2) that the agents should be informed of the designation and given a copy of the POA; (3) that a copy of the POA have the same force and effect as the original; and (4) that there be an admonition that powers granted to the initial agent that may not be suitable for successor agents. There was no strong

consensus in favor of any of these modifications.

A question was raised as to whether the form should include options for creating a springing power of attorney or a non durable power. Professor Whitton noted that the form provided that it could be modified by signing an optional instruction block. The consensus was against providing a check the box option for durable or non durable power of attorney. It was noted that the leading New York printer of legal forms has reported that 98% of power of attorney forms utilized are durable powers and that the risk of inadvertently making a durable power non durable was too great. Similarly, there was no particular support for creating optional boxes for springing versus presently effective powers, the Drafting Committee having decided to prepare the form as presently effective.

There was no support for the proposal that the form include an optional exoneration provision.

As to the question as to whether the "important information to agent" section should include an admonition to stop acting on behalf of the principal once the agent learns of any event or revocation or termination (such as by death) of the power of attorney or the agent's authority, the consensus was that this would be a good provision to add.

On the question of whether the statute should require that the reverse side of the form contain a definition or listing of the powers there was considerable discussion

but no consensus in favor of this.

Also in connection with the form, Professor Kurtz thought there would be confusion is using the form since in one place the user was required to check items to activate powers and in another part the user had to cross out items; and that crossing out would be easy to manipulate. It was noted that the cross out provisions would be better if they were coupled with a requirement for initialing.

Mr. Stein and others noted that it would probably be more productive to have the design of the form reviewed by experts in psychology and communications rather than lawyers and there seemed to be agreement to this. [NOTE: NCCUSL Executive Director Fred Miller sat in the afternoon session and participated in the discussions on the power of attorney act.]

Professor Whitton also asked for advice regarding the structure of the Act and referred to the Table of Contents. As presently structured Article 1 contains a broad range of general provisions and definitions, including all of the basic provisions regarding the creation effectiveness, termination of agent's liabilities, agent's resignation, and protection of persons dealing with an agent. Also in Article I, Section 107 deals with portability of powers and Section 108 contains a general grant of authority

Article 2, captioned Powers, deals with delegation, incorporation of powers by references, construction of powers, and in Sections 203 through 214, deals with authority over specified kinds of assets. Section 215 deals with tax authority and Section

216 deals with authority to make gifts.

Article 3 contains the statutory form and Article 4 contains miscellaneous standard provisions such as uniformity of application, construction, and effective dates.

Professor Whitton reported that the structure of the Act had been modified at the request of the Drafting Committee to sort out the provisions regarding powers under Article 2 so that a state might have the option to adopt Article 1 and not Article 2 or Article 3. A narrow question is whether, given the structure, the provisions of Section 108 should be moved to the beginning of Article 2. Professor Whitton noted that Articles 2 and 3 are connected in the sense that there is a trend in modern drafting to provide a statutory form and also to have a list of detailed enumerated powers. It is difficult to have a statutory form outside of the context of enumerated powers. It was noted that third party acceptance might be easier when there is a list of powers.

After considerable discussion the consensus was that separating Section 108 and Article 2 was confusing and that it would be better to move Section 108 to the beginning of Article 2 or at least to cross reference it to Article 2 if it is to remain in Article 1. The consensus was that Section 108 should be moved to Article 2 with a statement that the agent has all of the powers except those personal powers specified in Section 108(a).

There was also consensus that there should be a legislative note regarding the enactment of Article 1 without Articles 2 and 3 and a note that a general grant of

authority should include all of Section 108 powers except the Section 108(a) personal powers.

Professor Whitton asked specifically for a comment on the portability section 107 (power of attorney executed in another state or country; pre-existing powers of attorney; interpretation). She said that the drafting reflects a "complex" approach and is based upon the Trust Code and not on existing state power of attorney statutes. She stated that she was looking for a simpler statement of the rules which would simply say that the power would be valid in the state of use if it were valid in the state of execution.

Professor Scoles noted that if she continues to use existing Section 107 under (a)(1) the power should be enforceable also in a state where property is located which is subject to the power.

Professor English noted that there is an important difference between determining the validity of a power executed in another state and the question of the extent of powers available in the state of use. In this regard it was noted that 107(b) provides that the Act may not be applied to enlarge the scope of the authority granted to an agent in a power of attorney executed in another state or country or under pre-existing law. There was some question as to whether this was the proper rule noting that an argument could be made that, at least as to third party protection, there might be a presumption that the agent had authority under the power to do all things consistent with local power of attorney law. Professor Whitton noted that this was properly the result

under Section 119(b) which provides that a third party who in good faith accepts an agent's authority is not required to inquire into "the extent of the agent's powers or the propriety of their exercise, but may require and rely upon without further investigation, an agent's certification as to any matters concerning the power of the attorney or principal."

There was some thought that the certification should be unnecessary where there is consistency with local law. It was noted that there is a statutory provision in New York which would provide, as a matter of law, that the simple act of the agent's signature would amount to a certificate of authority.

The "bottom line" consensus seemed to be in a favor of a simpler format for Section 107 together with a focus on third party acceptance and protection.

There was specific discussion of several other specific provisions:

i. In connection with the form provision on the grant of special authority (actions required to be valid) Professor Halbach noted that there might be a inconsistency (if both boxes are checked) between checking the authority to create, modify, or revoke a trust and checking the authority to make a gift, noting that a gift might be made in trust (such as a § 2503(c)) Trust) or to a Uniform Transfers to Minor's Act custodian which might be viewed as the equivalent of creating a trust). Also, in connection with the form section on grant of specific authority it was suggested that the original language be made more direct, i.e.: "My agent may not do any of the following acts...."

ii. There was considerable discussion about Section 212 (personal and family maintenance). Professor Whitton reported that the basic language (authority to "perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal...") was from the existing statutory short form Act.

A hypothetical was posed: What about an appropriate $50,000 expenditure on behalf of a wealthy principal to take care of medical expenses for a seriously ill grandchild. There is no duty to support, and the expenditure would be in excess of the $11,000 annual exclusion. Consensus was that the language should be broadened to authorize this, subject to the agent's duty of impartiality and that the section should be broadened. Professor Halbach noted that generally we should enlarge the grant of fiduciary and agency powers and make clear that they are subject to fiduciary duties.

iii. Section 216 (Gifts). It was noted here that the authority to make gifts (when deemed to be in the principal's best interest based on a number of relevant factors) is limited to the annual exclusion amount both as to gifts to individuals and organizations. It seems that gifts to charities would be limited to the annual exclusion.

There was a question as to how this section would apply to the purchase of an annuity (probably not apply since that would be a transaction for

value) or to the creation of a charitable remainder trust. It was noted that the value of the charitable gift would be measured by discounting the charitable remainder interest to present value. This might produce an amount lower than the annual exclusion amount (even though the gift itself, although not protected by the annual exclusion on account of its status as a future interest, would be wholly excludable under the charitable deduction).

iv. The last section discussed was the delegation provisions of Section 114 (agent's duties). Under (f) "an agent that employs another person on behalf of the principal is not liable for an error of judgment, act, or default of that person provided the agent exercises due care, competence, and diligence in selecting and monitoring the person." (g), however, provides "if an agent is granted delegating authority under Section 108(7) to delegate to another person the agency authority granted by the principal, the agent remains responsible to the principal for the exercise or non-exercise of the delegated authority."

The question was whether there was a realistic distinction between the two sections and whether it not be better in all cases to follow the delegation rule in the Prudent Investor Act and the Trust Code which would not distinguish between delegation of ministerial actions versus judgmental actions and protect the agent where there was care and prudence used in connection with the (1) selection; (2) instruction; and (3) monitoring of the employee or sub-agent.

Professor Whitton thought that there was a valid distinction

between (f) and (g) since the agent would be available more easily under (f) to monitor the employee, whereas under (g) if the agent were away for some period of time there might be a lack of effective monitoring by either the principal or the agent.

Professor English opined that this was an area where we should follow the Trust Law principles stated above (Prudent Investor Rule and Uniform Trust Code rather than the agency rules) and the consensus was in agreement with this.

7. **GUARDIANSHIP JURISDICTION**. Professor English had attached to the agenda a letter to NCCUSL Scope and Program and Executive Committees from several guardianship network members recommending that a Drafting Committee be appointed to deal with jurisdictional issues pertaining to guardianship. The Executive Committee decided to appoint a Drafting Committee, of which Professor English would be Reporter, which will most likely prepare a free standing Act on guardianship jurisdiction that could be later incorporated into the UPC and the Uniform Guardianship and Protective Proceedings Act. Professor English will have a meeting this Spring in Washington DC with representatives of AARP, the ABA Commission on Law and Aging, ACTEC and the Real Property, Probate, and Trust Law Section to discuss the scope and elements of such a free standing Act.

[END OF FRIDAY SESSION]

SATURDAY SESSION, 2/5/05

The resumed meeting was called to order at 9:00 A.M. by Chairman Moore.

8. **STATUTORY WILLS ACT**. Professor English reported that Commissioner Jack Burton of New Mexico had asked whether his State should repeal the Statutory Wills Act, which had been enacted only in Massachusetts and New Mexico. A copy of the Act was attached to the meeting materials. It was noted that this is an incorporation by reference statute which was prepared in the early 1980's. The consensus was that there is no reason why enacting states should repeal the Act.

9. **INFORMAL DISPUTE RESOLUTION**. Professor English reported that Professor Robert Whitman has asked the Board to consider his proposal to enact an informal dispute resolution procedure with respect to the Uniform Probate Code and/or the Uniform Trust Code. The meeting materials contain some of Professor Whitman's materials regarding alternative dispute resolution.

While the Board acknowledged that informal dispute resolution is an important concept there is a question as to whether it should become a statutory provision in either the Uniform Probate Code or the Trust Code. Professor Whitman has not proposed any language. It was noted that the problem appears to come up more in the

context of will and trust administration than probate estate administration.

It was noted that several states, either by statute or local rule, require courts to provide for alternate dispute resolution in the litigation context.

There was a question as to whether, in the context of bank fiduciaries, the field was occupied by the Comptroller of the Currency. There was a suggestion that Professor Whitman might determine whether the Comptroller could make informal dispute resolution a part of its audit process, noting that it would be virtually impossible to require private individual trustees to set up a procedure for discussions with beneficiaries. It was suggested that while it might be good practice for a bank, it might be hard to tie to a fiduciary duty.

It was also noted that there are more important issues at this time regarding amendments to the Uniform Trust Code and the consensus was not to suggest adding this to the Code at this time.

10. **UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT**.

Professor Susan Gary, the Reporter for the UMIFA Drafting Committee joined the meeting and led the discussion on the Draft Act. Her memo to the JEB dated January 24, 2005, regarding the current status, was included in the meeting materials and is attached to these minutes. She said that the intent is to have the Revised Act go to the Conference for a final reading this summer. She will be circulating a final draft to interested groups

for their comments.

As was noted in memo, the Revised Act will not apply to trusts managed by corporate trustees. The corporate trustees think they have enough guidance from the Prudent Investor Act and the Principal and Income Act. The Drafting Committee decided to go back to the provisions of the original Act which would not apply to professional corporate trustees, although it would apply to corporate charities who are trustees of charitable trusts.

In connection with coordination between the various Acts Professor Gary wants to be sure that Section 6 (release or modification of restrictions on use of investments is available to all institutional fund managers and that the Uniform Trust Code concept of cy pres and equitable deviation would be made available to funds managed by corporations and professional trustees.

There was considerable discussion on the spending rule, and the Drafting Committee's decision to move the seven percent presumption of imprudence to the comment. It was reported that there seems to be a lack of consensus both among the charitable community and the State Attorneys General as to whether a specific spending ratio is useful either as a safe harbor or as a presumption of imprudence. Managers of large funds, such as university endowments, seem to be worried about any mention of seven percent, while having a safe harbor may be important to managers of smaller funds. The consensus was that it was important to provide a well drafted spending rule provision

for states that felt that it was necessary and that it was better to put this in a Comment than to bracket the provision.

A question was asked as to whether, in cases where there are multiple funds on the list of a single charity, if the Act applied on a fund by fund basis. The answer to this was yes since the various funds might have different purposes and funding activities and it was noted that this was required under the old Act where maintaining historical costs was required.

11. **UNIFORM PROBATE CODE - DRAFT AMENDMENTS**. Professor Waggoner, as a preliminary matter, reminded the Board that, under Conference protocol Joint Editorial Boards are not charged with the responsibility of drafting Code provisions but to bring drafting areas to the attention of the Conference for assignment to a Drafting Committee. Our Board historically, however, did the drafting of the Uniform Probate Code.

Professor Waggoner said that his draft would be important for consideration by a Drafting Committee and that Fred Miller, Executive Director of the Conference, said that there would be no problem if our Board considered and reacted to his UPC report at this meeting.

In connection with the definition of parent-child relationships in the context of intestacy Professor Waggoner reminded that this is covered in part in UPC II, but that

the area was not fully developed in the uniform statute on parent-child relationships and was moved to the end of the Part 2 as 2-114 to allow for drafting of new related provisions. He recalled that we had previously focused on adoptive and non-marital children but that nothing had been drafted on children of assisted reproduction .

Section 2-103 deals with the intestate share of heirs other than the surviving spouse. Professor Waggoner suggested adding a provision to provide for step-children and the descendants of deceased step-children in the case where there is no surviving parent, descendant of a parent, grandparent or a descendant of a grandparent under the theory that this is a sufficiently close connection to avoid application of the state escheat statute. The consensus was that this was a good idea in concept.

Professor Waggoner commented on Draft Section 2-115 which would provide for the parent/child relationship in the context of step-child and foster child relationships. His draft is based upon the California statute. Under the draft a step-child or a foster child is treated as a child if the relationship began during the child's minority and continued through the joint lifetime of the step-parent or foster parent and it is established by clear and convincing evidence that the step-parent or foster parent would have adopted the child but for a legal barrier. There was some discussion that "but for a legal barrier" a test was similar to the common law doctrine of equitable adoption and there was a question as to whether this test might not properly apply more broadly to other kinds of relationships with children. There was also discussion about possible

confusion with foster child relationships since there are wide spread reports regarding situations involving multiple foster children.

The consensus was to encourage Professor Waggoner to keep this section limited to step-children.

Professor Waggoner next discussed present Section 2-104 (Requirement that heirs survive the decedent for 120 hours). This is the existing UPC provision, and Professor Waggoner suggests a couple of non-substantiative clarifications. There has been a problem here in the context of assisted reproduction, Professor Waggoner proposes a separate provision in this area. The Board professed no problem with the drafting clarifications on 2-104 and 2-108 (After Born Heirs).

Professor Waggoner next discussed Section 2-114 (Parent and Child Relationship; Adopted Individual). A question was raised as to whether a child could adopt through two lines. Professor Waggoner responded that generally not, and noted that there was a separate provision dealing with this. The consensus was that this was a good approach although there was a question regarding sub-section (e)(3) regarding whether a person who after the death or incapacity of either genetic parent is adopted by an individual who was acquainted with either generic parent would continue to be the child of both "generic parents."

Professor Waggoner then discussed Section 2-116 (Parent and Child Relationship; Non-Marital Child). (g) provides that a parent who has refused to

acknowledge or has abandoned his or her child, or a person whose parental rights have been terminated, is barred from inheriting from or through the child. The issue here was whether this section should be limited to non-marital children or should apply generally and should be a separate section. There was some sentiment for the general principle that a child's misconduct should not necessarily preclude his or her child from adopting through grandparents.

Prior to the lunch break Commission Harry Tindall from Texas was introduced. He is a Commissioner from Texas and is Chair of the Uniform Parentage Act Committee and Chair of the JEB for Family Law Act. Professor English advised him about our interest in (a) the inheritance rights of a child of assisted reproduction; (b) adoptive children; (c) out of wedlock children; and (d) step-children and also the guardianship act and jurisdictional issues involved (including the analogy to transfer of child custody procedure jurisdiction) and also of our work on the power of attorney act (including the provision regarding termination of an agent's authority upon the commencement of a dissolution of marriage action).

The Board then broke for lunch.

12. **UNIFORM TRUST CODE.** Professor English continued his discussion on the Comments to the Uniform Trust Code.

He first discussed the Comments to Section 813 (Duty to Inform and

Report) particularly in light of the materials provided on the Uniform Trust Code by Richard Covey and Dan Hastings in the recent Developments in Estate, Gift, and Income Taxation portion of the recent Heckerling Institute.

Professor English received the input of the Board in connection with changes which he is considering.

Professor English then discussed the Comments to Section 817 (Distribution Upon Termination). He wishes to elaborate on the comments regarding distribution under a "plan for distribution" by clarifying that the doctrine of virtual representation as provided in Article 3 will apply and also to clarify the effect of a distribution pursuant to a proposal for distribution under subsection (1) clarifying that consent to a distribution would not constitute a full release by the beneficiary in connection with the administration and distribution of the trust, but would only amount to a kind of consent to the valuation and selection of assets in kind covered by the distribution plan.

13. **INDIAN PROBATE CODE**. Professor English informed the Board of the American Indian Probate Reform Act of 2004. This deals with intestate succession interest in tribal property, provides funding to help tribes develop their own Probate Codes regarding non-tribal land, and covers trust lands and funds held for Indians in the federal trust fund.

There is a problem in connection with small fractional interests in tribal lands where there are large families and few wills with the result that there are very small fractional interests in property. There is a provision for different rules of intestate succession where the decedent owned more or less than five percent of an asset. There is a partition provision. Professor English said that the tribes may be asking for help in adapting the Uniform Probate Code for their use. Professor Halbach noted that Professor Getches at the University of Colorado Law School may be helpful on Indian law and Professor Scoles noted that the Conference is working on a Commercial Code for Indian Tribes.

14. **UNIFORM PROBATE CODE - AMENDMENTS**. Professor Waggoner continued his discussion on UPC issues in connection with inheritance rights of children.

He reviewed Draft Section 2-117 (Parent Child Relationship; Child of Assisted Reproduction). He focused on (b): "Except as [otherwise] provided ... a child who is conceived by means of assisted reproduction is a child of a person who (1) consented to be the child's parent or (2) functioned as the child's parent or was prevented from doing so by an event such as death or incapacity." With respect to the "functioned as the child's parent" requirement he noted that this was a different definition than Section 704(b) of the Parentage Act which basically provides a test of residing together in the same household. The discussion on this was divided with some suggesting that the

Parentage Act, which has been enacted in a number of states, should be deferred to and other preferring the functional definition.

Professor Waggoner asked for comment on paragraph (f) which provides for inheritance by posthumous children by assisted reproduction. There will be a defined period, under UPC Section 3-106 or otherwise which would provide a time period within which the child could inherit. Professor Waggoner asked whether there should be the same extended time if the intestate decedent is someone other than the child's parent (probably a grandparent) or whether there would be a requirement that the child has to be born or conceived at the date of death of the relative. Consensus seemed to be that rules should be different and that there should be no extension of time in the non-parent situation.

Professor Waggoner also requested comment on Paragraph (h) which basically provides that an entity that receives genetic material that may be used for conception shall make available to the person depositing the material a form which would specify treatment at death, that is destruction of the material or use by a surviving spouse so as to create inheritance rights. In this regard Professor Waggoner reviewed the forms which he had gathered from fertility clinics which were attached to the part of the program materials and noted that they generally would not cover this area and that those that did did not do this in the language of the Parentage Act.

There was discussion as to whether the inheritance type laws could require

third parties to perform certain acts to carry out the purpose of the inheritance laws. There was comment that the State should have a sufficient interest to require that. It was noted that the federal Medicaid law requires service providers to provide advance directives (living wills). The consensus was that Professor Waggoner should provide a mandatory form provision to such facilities.

Professor Waggoner then discussed the proposed Section 3-916 (Delayed Distribution in Case of Possible Posthumous Conception). There was comment that the provision of (a) that the personal representative has received notice that the surviving spouses "intends to use genetic materials" was imprecise, at least if the notice was not in writing. The question was whether the delayed distribution should be tied to Probate Code 3-1006 which provides a time limit, in intestate estates, for an individual to come in following a formal testacy determination and attempt to prove heirship rights. There was a division of opinion here with some thinking that the benefits of certainty and efficiency were paramount and that the three year rule (UPC 1006) was too long and others for including a distinction between the "laughing heir" situation and suggesting that there should be stronger provisions for a posthumously born child.

Professor Waggoner next discussed draft Section 2118 (Child Born to a Gestational or Surrogate Mother). He noted that this definition was taken directly from the Uniform Parentage Act, although the term gestational parent did not have a familiar meaning.

At the end of the discussion it was the consensus of the Board that Professor English advise the Scope and Program Committee of the Conference that there should be a Drafting Committee in this area and to identify the relevant areas. It might be noted that some of the changes are sufficiently technical in nature that they might, instead, be referred back to the JEB (possibly including the Anti-Lapse and Elective Share clarification).

Professor Waggoner's materials also contained some changes to the elective share of the UPC:

A. Draft 2-209(Sources from Which Elective Share Payable) would be amended by the addition of a (d) which would treat the unsatisfied balance of an elective share or supplemental elective share as a general pecuniary devise for purposes of Section 3-409. This would provide for interest at the legal rate on a delayed distribution. It was noted that there is a wide disparity between the state's legal rate of interest and amounts which can be earned during periods of administration and Professor Waggoner was asked to consider this.

Professor Waggoner also asked for advice as to whether there should be a change in the nature of outright gifts which should be pulled back into the augmented estate. The present provision provide for gifts within two years. If the main purpose is to prevent manipulative gifts, the suggestion was that the period might be shortened to one year. The consensus was that this was an important issue which should be reviewed.

In other UPC matters:

A. Professor Waggoner's proposal to create a Section 2-805 to provide for reformation of wills was approved in concept.

B. The proposal to revise the dollar amounts or cost of living adjustments for amounts specified in the Code (such as exempt property, family allowance, supplemental elective share amounts) was also thought to be an important area for study and drafting.

C. There was discussion on the present provisions of the Section 3-406 (Self-Proved Will) together with the Commentary. It was noted that the Comment which discusses witness execution in the presence of the testator is inconsistent with the statute and that there are questions as to what is intended to be "conclusively presumed" in terms of signature and execution. Another way of stating the question was whether the notarization should create a conclusive presumption as to the signature or as to all execution provisions.

D. Professor Waggoner reviewed a technical clarification to Section 2-603 (Anti Lapse) in connection with (4) regarding alternate devises with respect to a devise for which a substitute gift is created.

The consensus of the Board was that these were all areas that should be either corrected by technical correction or dealt with by a new Drafting Committee.

15. The meeting adjourned at 4:45 P.M.

Respectfully submitted,

James R. Wade, Secretary