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## MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

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

Re: Minutes from December 2017 Meeting; Chicago, Illinois  
**FINAL – Approved April 13, 2018**

The meeting was called to order on Friday, December 1, 2017, at 9:00 a.m. by Chair Bruce Stone. Others present were Molly Ackerly (ULC Division Chair), Turney Berry, David English, Mary Louise Fellows, Thomas Gallanis (JEB Executive Director), Shirley Kovar, John Langbein, Carlyn McCaffrey, Kevin Millard, Benjamin Orzeske (ULC Staff Liaison), Pam Schneider, Martha Starkey, James Wade, and Suzanne Brown Walsh.

- 1. Welcome to New Members.** Prof. Gallanis introduced Ms. Walsh as a new member of the Board and Ms. Ackerly as the Board's new Division Chair. Prof. Gallanis also announced that Prof. English had relinquished his ULC appointment and had been subsequently reappointed to the Board as a representative of the ABA Section on Real Property, Trust and Estate Law.
- 2. Approval of Minutes.** Ms. Kovar moved for approval of the draft Spring 2017 minutes, Mr. Millard seconded the motion, and the Board unanimously approved the draft.
- 3. Model Tribal Probate Code.** Prof. English reported that there had been no activity on this project since the Board's spring meeting, but the committee plans to have an updated draft for review in Spring 2018.
- 4. Uniform Fiduciary Income and Principal Act.** Mr. Berry reported on the latest draft, which was reviewed and discussed at the committee's meeting last month in Washington, D.C. The committee concentrated its discussion on the provisions governing a fiduciary's power to adjust and unitrust conversions.

The committee is revising the list of factors to be considered by a trustee before exercising a power to adjust, in an attempt to provide trustees clear guidance without imposing a duty to consider adjustments in every case.

The committee also discussed unitrust conversion guidelines, with some members favoring a clear default standard unitrust rate that follows current treasury regulations, and other

favoring a more flexible standard. Prof. Langbein commented that the solution may be to provide an optional, bracketed unitrust rate for states to consider, similar to the optional language contained in the last revision of the Uniform Prudent Management of Institutional Funds Act.

Ms. Walsh raised the issue of accounting for commercial annuities held in special needs trusts, and asked the committee to provide clear guidance in the comment to Section 409.

Judge Wade requested clearer language in Section 201 governing the trustee's fiduciary standard, and Mr. Berry reported the committee had decided to make that change.

Mr. Millard raised the question of whether express unitrusts are subject to the same tax regulations as trusts later converted to unitrusts. Ms. Schneider commented that the uncertainty was due to language contained in the federal regulations, but thought the committee could express its intent to treat express unitrusts under the same rules.

5. **Electronic Wills.** Ms. Walsh reviewed the issues discussed at the committee's first drafting meeting in October. The committee determined that the draft should require an authorized supervisor for valid electronic wills, and should contain provisions for a centralized will repository. Execution requirements can be similar to the current requirements for electronic notarization. Revocation of electronic wills is problematic. While blockchain technology could provide an eventual solution, the committee will likely require revocation in a record at a minimum.

Prof. Langbein questioned whether allowing execution of electronic wills without the advice of a qualified attorney was good public policy. Ms. Ackerly suggested the committee should consider separately the issues involving remote parties and the issues involving electronic media. Mr. Orzeske informed the group that a ULC Committee was amending the Revised Uniform Law on Notarial Acts to allow for remote notarization. Action Item: Mr. Orzeske will provide a copy of the draft amendments to RULONA to the Board at its Spring meeting.

6. **Management of Funds Raised through Crowdfunding Efforts.** Mr. Berry and Mr. Orzeske reported that the committee had been appointed but has not yet met. It was not yet known whether the committee would have a draft for review in the Spring. Action Item: Prof. Gallanis will contact the reporter (Prof. Boxx).
7. **Economic Rights of Unmarried Cohabitants.** The Board agreed with the recommendation of the ULC Study Committee that a drafting committee should be appointed. Action Item: Prof. Gallanis will draft a memo to the ULC Scope and Program Committee expressing the Board's view.
8. **Conforming Amendments to the UPC in Light of the Uniform Parentage Act.** A subcommittee consisting of Prof. English, Prof. Fellows, and Prof. Gallanis reported that it met and identified portions of the UPC that require amendment. Action Item: The subcommittee will draft a set of proposed amendments for consideration by the Board at its Spring meeting.

9. **Incorporating the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act into the UPC.** Prof. English reported that he is working with the Reporter for UGCOPAA to complete the official comments and, once those are completed, he will begin working on incorporating the newly approved act into Article 5 of the UPC.
10. **Proposed Amendment to the Uniform Powers of Appointment Act.** Following on the discussion at the Board's Spring 2017 meeting, the Board discussed whether to amend the UPAA to allow the holder of a nongeneral power to create a second nongeneral power with broader permissible appointees. The Board asked Prof. Gallanis to draft an amendment along these lines. Action Item: Prof. Gallanis will draft a technical amendment for consideration by the Board at its Spring 2018 meeting.
11. **Uniform Estate Tax Apportionment Act.** Ms. McCaffrey raised the issue of amending the Uniform Estate Tax Apportionment Act to address apportionment when the estate contains phantom property. Mr. Stone suggested that any proposed changes should wait until the legislation pending in Congress is passed. Action Item: A subcommittee consisting of Ms. McCaffrey, Ms. Schneider, and Mr. Berry will review the Act and report back to the Board with recommendations at the spring meeting.
12. ***Ajemian v. Yahoo!*** Ms. Walsh reported on the case of *Ajemian v. Yahoo!*, in which the Massachusetts Supreme Judicial Court recently ruled that fiduciaries may provide consent for release of electronic communications under the federal Stored Communications Act on behalf of the owner of an email account. This contradicts the rule for accessing the content of electronic communications in the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). Because Yahoo! has indicated that it will appeal the decision to the U.S. Supreme Court, the Board determined that it was premature to consider amending RUFADAA. The Board can revisit the issue if and when there is clarification under federal law.

Professor Robert Sitkoff joined the group by telephone.

13. **Conforming Amendments to Uniform Acts in Light of the Uniform Directed Trust Act.** Prof. Sitkoff led the discussion, and the Board agreed to the following changes:
  - a. Move UTC Section 808(a) to Section 603(a) and reword the section to state: "To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor which is contrary to the terms of the trust. To the extent a trust is revocable by a settlor only with the consent of another person consistent with Section 103(14), the trustee may follow a direction of the settlor and that person which is contrary to the terms of the trust."
  - b. Move UTC Section 603(a) to Section 603(b) and reword the section to state: "To the extent a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."
  - c. Move UTC Section 603(b) to Section 603(c).
  - d. Add a Legislative Note to UTC Section 703 that mirrors the Legislative Note in UDTA

Section 12.

- e. Amend the Comments to UTC Sections 408 and 409, UPC Section 2-907, and UTDA Section 23 to note that, if a state has adopted the UDTA, enforcers of pet trusts and non-charitable trusts are deemed to be trust directors and subject to regulation under the UDTA.
- f. Amend UTDA Section 17 by deleting subsection (c) and renaming current subsection (d) as subsection (c), reworded to state: “A second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by [insert citation to state’s Uniform Directed Trust Act statute][law of this state other than this act].” Add a legislative note.

Action Item: Mr. Orzeske will draft strike and score technical amendments for review by Prof. Sitkoff and the Board before eventual submission to the ULC Executive Committee.

**14. UPC §2-504 and Notarized Wills.** The Board discussed the policies behind allowing self-proved status for attested wills but not notarized wills and ultimately determined to revisit the issue after the Electronic Wills Drafting Committee had made policy decisions regarding self-proving measures for electronic wills.

**15. Incorporating Stand-Alone Trust Acts into the UTC.** Prof. Sitkoff observed that states are incorporating the UDTA and UTDA into UTC statutes, despite the Board’s decision not to incorporate those acts into the UTC. The Board determined that the ULC should offer guidance to states that attempt to do so. Action Item: Mr. Orzeske will work with Prof. Sitkoff to compile the UDTA’s Legislative Notes into an enactment guide, and contact Susan Bart and Stan Kent who can work with Prof. English on a similar guide for the UTDA.

The Board adjourned at approximately 3:30 p.m.

Respectfully submitted,  
Benjamin Orzeske