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

FROM: **James R. Wade**

DATE: **December 2002**

RE: **Minutes, Washington, D.C. - December 6-7, 2002.**

The meeting was called to order at 1:00 P.M. on December 6, 2002, by Chair Malcolm A. Moore. Those in attendance included James R. Wade, Malcolm Moore, Eugene F. Scoles, Linda Whitton, Edward Halbach, Joe Kartiganer, Mary Louis Fellows, Judith McCue, Jackson Bruce, Richard Wellman, Joe Mazurek, Ray Young, Larry Waggoner, and the Reporter, David English. Not in attendance were Chuck Collier, John Langbein and Sheldon Kurtz.

1. **Prior Meeting**. The minutes of the February 15-17, 2002 meeting had been previously circulated. The minutes were approved. Mr. Moore noted several follow up items in connection with the minutes. In connection with the discussion on the Uniform Durable Power Act Professor English was requested to do outreach with other professional groups and report back to the JEB at the next meeting. Part of this morning's program is responsive to that.

With respect to the Uniform Anatomical Gift Act, Professor Kurtz was unable to attend the meeting and requested that his report be deferred until the next meeting.

2. **Guests**. Professor English introduced the following guests: Michelle Clayton from the Staff of the Conference; Linda Whitton, the Co-Chair of JEB's Advisory Committee on Durable Powers of Attorney; Erica Wood, Nancy Coleman, and Julia Calvo from the staff of the American Bar Association Commission on Law and Aging; Jerry Frank Jones, an attorney from Texas with a particular interest in power of attorney legislation; and Sally Hurme from AARP.

3. **Guardianship Jurisdiction**. Prior to the meeting Professor English had provided a background summary on the developing issues in connection with guardianship jurisdiction. A copy of his December 12, 2002 memo is attached which provides this background information. Materials circulated to the Board included a portion of a report from the National Guardianship Association which summarized the so-called "Texas Model" and the National College of Probate Judges Model Statute. The Guardianship Association memo stated, "In today's society, family members do not always live in the same state. In order to encourage family members to become guardians for their relatives, it is imperative that a guardianship obtained in one state receive full faith and credit in another state."

Nancy Coleman provided copies of the following additional materials:

1. A summary of enacted Durable Power of Attorney legislation, 2000-2002 by Julia C. Calvo together with an accompanying chart.

2. Highlights from the Hague Convention on the International Protection of Adults.

3. Wingspan Guardianship Conference Recommendation Number 1 (Standard procedures be adopted to resolve inter-state guardianship controversy and to facilitate transfers of guardianship cases among jurisdictions).

4. Highlights from the proposed Addendum to the National Probate Court Standards regarding interstate guardianship.

5. Copy of an article by Johns, Gottlich, and Carson, Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act (Clearinghouse Review, October 1992, p.647).

During the discussion the following main issues were identified:

A. Where more than one state has contacts with the protective person, which Court should have initial jurisdiction?

B. How should the guardianships be transferred from one jurisdiction to another?

C. State law changes to facilitate the provisions of the Convention should it become effective in the US.

A spirited discussion followed including contributions from Nancy Coleman and Sally Hurme who were both advisors to the Hague Convention.

In connection with the question of original jurisdiction the existing provisions of the Uniform Guardianship and Protective Proceedings Act authorize jurisdiction either on the basis of presence or domicile. Mr. Kartiganer felt that the statutes should be broad and liberal in granting jurisdiction and then focus on the more difficult issues of priority and transfer. Mr. Young agreed that the model should be most liberal and flexible to assist

families in dealing with the great majority of cases where there is no controversy. Mr. Bruce also expressed that notion.

Mr. Moore questioned whether the present test for initial jurisdiction should be limited to temporary guardianship proceedings and limited guardianships.

Mr. Wade noted that, under the provisions of the Uniform Guardianship and Protective Proceedings Act, limited guardianships and conservatorships (or single transactions) could be commenced in one state followed up by plenary proceedings in a second state which had greater family contact and also noted that the Court, under the statutes, was authorized to enter limited orders itself rather than appoint a fiduciary and that this might be useful in connection with commencing a proceeding in one state with follow up in another state (such as in the case where a care facility in State 1 simply needs an order from a court in State 1 authorizing placement in State 2, the State where the family contacts are).

In connection with the issue of transfer of jurisdiction it was noted that the existing Uniform Probate Code Section 5-107 has a provision for this and requires consultation between the Judges of the original Court and the second Court and allows the

second Court, after consultation, either to assume or decline jurisdiction, whichever is in the best interest of the ward or protected person. Both the Texas model and the National College of Probate Judges Standards elaborate on this. These models appear to deal with the "easy" case where the guardian in one state applies to move the guardianship to another state with the same guardianship appointment and continuity of fiduciary relationship.

In this area it was generally noted that the family should not have to recommence the entire guardianship proceeding in the second state, but there should be a responsibility on the "receiving" state to follow up, especially to see that the transfer had been effected and to impose the receiving state's monitoring requirements.

Professor English noted that, while the Guardianship and Protective Proceedings Act requires one state to respect the conservatorship (property management) orders in another, there is not the same provision regarding guardianship, and there was consensus that this should be looked into.

Mr. Young recalled the provisions in the UPC ancillary administration provisions regarding decedent's estates and conservatorships which allow a personal representative or conservator to exercise powers created by the original estate in an ancillary

jurisdiction upon the filing of the original jurisdiction appointment papers. He suggested that this concept could be extended to guardianships.

In the area of contested proceedings involving overlapping jurisdictions Professor Scoles noted that the Uniform Child Custody Act would be a useful model regarding the extent to which the Court with jurisdiction second in time is to respect the orders of the originating Court. Professor English noted the need for more full faith and credit in this area and for a better model to resolve conflicts between competing jurisdictions.

Professor Wellman urged that the Board recommend that the Conference appoint a study committee to further study and to report on these issues, including state law changes to accommodate the Hague Convention, and to obtain input from the interested groups such as the ABA Commission, AARP, and the NCPJ. Following discussion the consensus was to make such a recommendation for a study committee whose responsibility would not cover all current issues in the area of guardianship reform, but rather be limited to multi-jurisdiction and recognition issues.

4. **Durable Powers of Attorney**. In this regard it was noted that Professor Linda Whitton had revised the Advisory Committee on Durable Powers of Attorney February 12, 2002 Report (reviewed and discussed at our last meeting) as of October 21, 2002 and that this had been circulated prior to the meeting. In addition, Professor Whitton's Committee had provided a new memorandum dated October 29, 2002 providing the results of a survey and commenting on areas of legislative change suggested by the survey. The survey and the survey memorandum had been circulated by Professor English as a part of the materials for this meeting. In addition, it was noted that Julia Calvo of the ABA Commission staff had prepared and circulated a paper summarizing Durable Power of Attorney Bills enacted by State Legislatures during 2000-2002.

Professor Whitton reviewed the design and results of the survey. She noted that the participants in the survey were grouped into three classes: those from States which had adopted the Uniform Power of Attorney Act without significant variation (general adoption states); states which had adopted the general statute with modifications (modified states); and thirdly states which have the Uniform Act as its core but made substantial modifications, generally elaboration on provisions. She noted that, interestingly enough, there was substantial identity in the response to the various questions from the three categories of respondents. She noted that there had been 371 written responses.

A question had arisen as to whether the use of the short Uniform Act statutory short form would tend to produce greater incidence of abuse of power of attorney under the theory that it might be to easy for an unscrupulous person to go to a legal stationary store and obtain the form. The results were separately tabulated identifying respondents from states that had adopted the statutory short form statute and no difference was noted.

Ms. McCue noted that we should view this as part of the larger issue of abuse of the elderly and that abuses exist not only in connection with the use of powers of attorney but also in connection with guardianship, revocable trusts, trustees, care givers, and the like.

There was discussion as to whether it was possible effectively to deal with the issue of elder abuse by statute. Professor Whitton mentioned that while abuse could not be prevented that the nature and extent of abuse was relevant in connection with attempting to design protections and sanctions.

She noted that a significant current issue in statutory design dealt with statutes designed to provide third party protection. Several states have considered that this has been too protective of third parties at the expense of the principal under the power and have created exceptions to the protection (a) in cases where the third party is actually aware of

abuse under the power of attorney; and (b) where the action taken is clearly outside the scope of the agency.

Some additional specific issues were discussed as follows:

1. In connection with the relationship between agents under a power of attorney and trustees of revocable trusts, Professor Halbach noted that we need to focus on standards by which an agent is given power to amend or revoke a revocable trust and suggested that the status should be that of substituted judgment.

2. Professor Whitton reviewed the series of conclusions on page 14 of her report which noted a series of conclusions as to where there was at least a 70% consensus among respondents.

A. Regarding the use of an affidavit to confirm a springing power there did not appear to be a consensus as to whether such use of an affidavit would be discretionary or mandatory; and there did not appear to be a consensus as to whether the affidavit should be exercised by the agent or by a disinterested third party.

B. Regarding the power to gift it appeared that a strong majority felt that no power to gift should be the default rule and that the power needed to be specific regarding gifting. There was a problem noted, however, with the position of the IRS in connection with recognition of gifts made under a power of attorney. The IRS public ruling position is to disregard all gifts. Jim Wade noted that, in dealing with this issue with an Appellate Officer, the matter was compromised to the benefit of the taxpayer by reference to Professor Waggoner's Restatement of Property revision which allows the existence of gifting in the non-specific documents to be substantiated by extrinsic evidence. There was a suggestion that there might be an exception in cases which continue prior patterns of giving.

Professor Fellows noted that there was danger in tying gifting authority to tax related standards such as annual exclusion gifts in light of the present political uncertainties regarding the entire design of the transfer tax system.

C. What should be the default standard regarding fiduciary duties. The general approach seemed to favor a full trustee standard. Mr. Young noted that this was tied to the issue of the sanctions for abuse and that existing criminal, civil, and that common law standards were adequate. He did acknowledge, however, that it might be appropriate

to require accounting following the incapacity of the principal and to enlarge the group which would have standing to bring abuse allegations to the Court.

D. There was considerable discussion about the inter-relationship between agency grants and Court appointments of guardians and conservators and there did not appear to be a consensus, although the existing provisions of the Revised Uniform Guardianship and Protected Proceedings Act have taken clear positions on this.

E. There was consensus that the Act should cover the relationship among multiple agents. Professor English noted that some states do not allow co-agency; some provide that all act together; and some provide that each act separately.

It was agreed that Professor Whitton would be provided with individual comments from members of the Board in this area. Her e-mail address is lindawhitton@valpo.edu.

After discussion, there was a consensus that the Board would recommend to the Conference the appointment of a Drafting Committee. The recommendation would mention the disparity among the states, note that there are a number

of items not covered in the existing Uniform Act, and note that the relationship between the Uniform Power of Attorney Act and the Uniform Statutory Form Act needed to be studied. Professor Whitton's two summary paragraphs on page 14 further explain the need for uniformity and for an update of the Act.

5. **Housekeeping Items**. It was noted that Professor English's work on the Uniform Trust Code is crowding out his Reporter's responsibilities in connection with the Joint Editorial Board and vice versa. In connection with the Trust Act he is getting a lot of e-mail questions from the various states, a number of which Michelle Clayton cannot answer. He also noted the burdens of a full teaching schedule.

It was suggested that a panel of Trust Code experts, including Ray Young, Joe Kartiganer, and practitioners from states and study committees, might be utilized to assist with the questions.

Professor Waggoner noted that we are behind in revising the Comments in connection with the incorporation into the UPC of the Uniform Disclaimer Act and particularly in dealing with some apparent errors in the comments. It was decided that

Professor Waggoner would undertake to make the necessary revisions and submit them to the JEB and the NCCUSL office.

Professor Waggoner also noted that some of the other Official Comments to UPC Article II are out of date for a variety of reasons. The question is whether there is a articulated and followed mechanism to update Official Comments. Professor Waggoner agreed to take a look at the Comments and report back to the JEB on or before the next meeting.

There was a consensus that a "Junior" Law Professor be designated to assist Professor English with his Reporter responsibilities, probably in the capacity as a "Special Consultant" to the Board.

The meeting adjourned at 5:00 P.M. to return at 9:00 A.M.

6. **Reconvene**. The meeting resumed at 9:00 A.M. with a discussion on intestacy rights of children led by Professor Waggoner. Prior to the meeting Professor Waggoner had circulated a memo defining some of the current issues together with the some materials.

Some of the main issues include:

A. Updating the current provisions of UPC II- 2-114 and 2-705 in light of the new biology and reviewing whether the class gift provisions are adequate. The new drafting should take into account the *Woodward* decision discussed at the last JEB meeting and should deal with the apparent flaws in that decision. In this regard it was noted that the article by Professor Chester elaborates well on this.

B. There was a general discussion as to whether our drafting regarding inheritance rights would be constrained by the provisions of the Uniform Parentage Act (Sections 704 and 707) which provide that consent to parentage by assisted conception must be in a "record" signed by both the man and woman and that a person who consented then dies prior to the union of the egg and the sperm would not be a parent under the Act unless the decedent had consented to parentage in a "record."

Professor Halbach suggested that we might be able to circumvent this by couching our provision in terms of who inherits from whom, rather than refining who is a parent of the child. In this regard it was noted that the Parentage Act generally defers to the UPC in matters of inheritance.

Professor Waggoner recommended designating a special reporter or consultant in this area and suggested Professor Susan Gary of the University of Oregon for such a position. She is working on an article regarding the inheritance rights of children, including the Section 2-114 issues.

A decision was reached by consensus that Professor English would contact Professor Gary and attempt to get a report and draft statute for next year's JEB meeting. Professor Waggoner noted that the step-parent/step-child exemption be enlarged to be similar to the provisions in the new Property Restatement. Professor Fellows is attracted to the idea that, if an adoption occurs after the death of both parents, then the child should not lose rights to inherit from the natural grandparents on both sides (which would be consistent with Comment G to the Restatement).

It was also noted that a new Act or Section should consider the area of same sex couples adoption.

Professor English said that he would provide the Board with a copy of Professor Gary's article once it is available. The consensus was that Professor Gary be designated as a Special Consultant to advise the JEB in this regard. Each of the Board

members would correspond with her regarding their views in support or opposition to the positions in her article and to identify any areas of omission. She would have a group of Advisors from the Board which would include Professor English, Professor Waggoner, Professor Fellows, and Professor Halbach.

7. **Inheritance Rights of Unmarried Partners**. Again, Professor Waggoner led the discussion. In advance of the meeting he had provided a memorandum and the supplemental material.

Professor English recalled that there was a renewed interest in this area in the aftermath of September 11. At the American Bar Association 2002 Annual Meeting, the Section on Individual Rights and Responsibilities has questioned whether the rights of committed partners are significantly enough protected. The ABA Section on Real Property, Probate, and Trust Law agreed with the concern but suggested that the statute not be adopted which would override existing law without a study as to the effectiveness of the current law. Under an accommodation between the two Sections the Section on Real Property, Probate, and Trust is to provide a report and recommendation and has requested the JEB to provide advice in this regard.

A discussion followed on some of the substantive issues. Professor Waggoner provided a copy of an updated working draft of a section which is a draft amendment to the intestacy provisions of the Uniform Probate Code which would give a committed partner the same inheritance rights as a spouse. He also provided an earlier working draft with the same concept but with more limited inheritance rights.

Professor Waggoner also circulated a copy of a portion of the American Law Institute Principles of Family Dissolution and noted that the ALI position granted property rights to a committed partner similar to that in a traditional marriage. The ALI document does not deal with intestacy. It was noted that inheritance rights should be easier to justify than "divorce" rights since a harmonious relationship until death should be more worthy of protection than in the dissolution context.

It was also noted that, since the date of Professor Waggoner's initial working draft, "private" rules and regulations have developed by which municipalities, corporate employers, and universities allow individuals to register their "partnership" by designating same sex partners as beneficiary of employee benefits. These "registrations" generally do not involve opposite sex partners on the theory that marriage is available in that case and is generally to be encouraged.

It is also noted that, in the same vein as "registration" discussed above there are two states, Hawaii and Vermont, which sanction civil unions by providing by statute a kind of registration process, in Vermont by "Civil Union" and in Hawaii by "reciprocal beneficiary agreement."

If the inheritance rights of committed partners are to be recognized, a major drafting question is whether the recognition for civil unions would be limited to some kind of registration or other kind of formal documentation authorized by state law or whether there should be, in addition, a multi-factor test such as that indicated in Professor Waggoner's most recent working draft. In support of the more narrow approach was the notion expressed by Mr. Kartiganer that the overarching issue is the right of committed partners during lifetime and that inheritance rights are being fairly dealt with by will. The multi factor test is more consistent with the recognition of non-probate beneficiary designation of committee partners; the contrary argument was that those that used non-probate beneficiary designations could reasonably be expected to have wills.

Also in favor of the narrow approach is that it would tend to be more politically attractive to State Legislatures and to the ABA House of Delegates.

Professor Waggoner and Professor Fellows expressed support for the multi-factor test. Professor Fellows noted that a more liberal definition would tend in common practice to strengthen the estate planning done by the parties. There was the notion that will contests would be discouraged if the back up taker was the committed partner.

Professor Scoles noted that we have achieved a great deal of success under the Uniform Probate Code in enlarging the intestate share of the surviving spouse. In this area committed partner protection would not only benefit the committed partner but would, in many cases, do so at the expense of other family members which makes it a more complex and politically sensitive issue. Professor Scoles suggested that protection for a committed partner might be limited in amount or phased in over time, similar to the elective share provisions in the UPC for the surviving spouse.

There was some discussion regarding possible third party funding sources and possible funding additional research regarding attitudes in the gay and lesbian community regarding committed partner inheritance and reporting and drafting in this area.

Professor Waggoner identified Professor Thomas Gallanis of Washington and Lee as an individual who would likely be interested working in this area as a special reporter.

The consensus was that the JEB should conduct a study in this area, including the possible production of a "model" statute if funding was available, and agreed to the expenditure of up to $5,000 in connection with the study and drafting.

If additional funding should become available to complete the study regarding community attitudes on committed partner inheritance, then such a study should be coordinated, but at this time we should go ahead with the more narrow project involving the preparation of a model statute.

8. **Miscellaneous UPC Items**.

A. In response to the request of Jim Wade the relationship between the UPC section on the elective share of the surviving spouse and the intestacy provision for an omitted spouse were discussed.

Professor Waggoner recalled that this matter had been analyzed earlier and that it was his opinion that the sections were complimentary, particularly noting that the omitted spouse provision applies only to probate property not devised to children. The issue of enlargement of intestate shares tends to come up with late in life marriages where the will beneficiaries are strangers or collateral relatives. After discussion it was determined not to take any action.

B. Jim Wade had also called the Board's attention to possible confusion to Section 2-209 relating to contributions of both probate and non-probate assets which make up the shortage occurring in connection with the surviving spouse's augmented estate election. The language of the statute talks both about "equitable" apportionment and "ratable" apportionment. It was recalled that what was intended was ratable contribution and that the court was not intended to be able to have discretion to reallocate the shortage. Accordingly there was consensus that the word "equitable" should be removed as a technical

amendment. If was also agreed that this change should be processed along with other miscellaneous changes which might be identified at an appropriate future time.

In this regard Professor English undertook to obtain some law student assistance in reviewing the reported cases under the UPC to determine whether there were any other statutory sections where drafting clarifications might exist.

C. It was noted that the Judge of the Denver Probate Court had ruled that there was no statutory provision for the elective share of a surviving spouse either to bear interest or to share in the appreciation or depreciation in the value of the assets. There was consensus that the issue simply had not been considered in the original drafting. Mr. Kartiganer stated the view that sharing an appreciation or depreciation was fairest, although the consensus was that there was the virtue of simplicity providing for interest. After further discussion it was voted that the elective share amount should bear an interest in a manner similar to a pecuniary devise under Section 3-904.

9. **Estate Tax Apportionment**. There was a draft of the current Apportionment Act circulated as a part of the meeting materials. It has been substantially rewritten. At the last JEB meeting there was considerable discussion as to whether the statute should provide

for pure apportionment or whether, at the least all pre-residuary devises should be from apportionment assuming that the residue is sufficient or, at the least, whether modest pecuniary devices and property should be exempt from apportionment. The Drafting Committee for the Act finally opted in favor of pure apportionment (which is the present model in the Uniform Probate Code provisions on tax apportionment).

Individual members of the Board were encouraged to submit their own comments to Professor Kahn as the Reporter.

10. **Uniform Trust Code**. Professor English led a discussion on the current status of the Uniform Trust Code. He noted that it had been passed in Kansas and that it is under discussion in 39 additional states.

He mentioned that there has been a great deal of negative reaction to the provisions of Section 813 on notice. The statute requires notice to "qualified beneficiaries" and the states are considering changing the definition to lessen the amount of notice or to be provided, particularly to remainder beneficiaries who are not current income beneficiaries.

The discussion was generally in favor of not modifying the provisions of Section 813. Ms. McCue thought it was to early to abandon the existing notice provision. Mr. Kartiganer stated that the provisions are so central to the notion to trusts that they were necessary. Professor Halbach agreed and stated that it made no sense to take out accounting responsibilities to remainder beneficiaries. He noted that the Restatement of Trusts pending update would allow the settlor to waive information only as to items which the beneficiaries did not have a real need for and noted that the conservatorship provisions of the Probate Code provide information on a need to know basis. It was generally noted that the duty of impartiality depends upon information provided to trust beneficiaries.

The discussion then focused on Section 813(a), dealing with the incapacity of the settlor of a revocable trust triggering the information requirements to qualified beneficiaries. It was noted that, in connection with a will, the intended beneficiaries do not have access to will provisions and during the incapacity of a testator, although that information may be available to a conservatorship. Under the Trust Code, in the advent of incapacity, the rules change and the beneficiaries do have information rights. Professor English noted that some states are building in a presumption of capacity and an affidavit to establish that relationship with third parties. Following discussion Professor English agreed that no changes in this provision would be proposed.

Professor Waggoner suggested the need for more commentary about the fact that conduct by a settlor/trustee which might otherwise be viewed as a breach of trust, should be viewed as an amendment to the terms by conduct and suggested that this be discussed with a cross-reference to Section 4.07(a).

As a technical amendment it was determined to delete Section 6.03(b) and amend 6.02(b) as follows:

[MAL MOORE OR DAVE ENGLISH TO PROVIDE SINCE JRW WAS OUT OF THE ROOM]

11. **Report of Michelle Clayton**. Michelle Clayton gave the following report regarding the status of the Trust Code.

A. She is continuing with the new Uniform Trust Act newsletter electronically. There have been three issues with 400 names on the distribution list.

B. She received a grant from the Uniform State Laws Foundation to produce a video which has been accomplished.

C. There has also been a $20,000 grant from the ACTEC Foundation to provide eight educational seminars.

D. There is a symposium issue of the Missouri Law Review on the Uniform Trust Code and it will be circulated to the JEB.

E. Professional English has met with NAELA to discuss the provisions.

F. A web site has been set up to coordinate state and bar group information and questions: www.utcproject.org.

G. There was discussion regarding the propriety and design of an annual symposium on the UTC. No decision was reached. It was determined to encourage the National Conference of Lawyers and Corporate Fiduciaries to seek to determine what are presently the banks' issues. Professor English also reported that he would continue to work with US Bank nationally as to its concerns.

12. **Adjournment**. The meeting adjourned at 1:00 P.M. on Saturday, December 7, 2002.

Respectfully submitted,

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James R. Wade

Recording Secretary