

**The Joint Editorial Board for Uniform Probate Code
Meeting Minutes
9/15/99-9/17/99**

The Joint Editorial Board for Uniform Probate Code met at the Embassy Suites Outdoor World in Grapevine, Texas on 9/15/99-9/17/99. In attendance from JEB were Executive Director David English, Executive Director Emeritus Richard Wellman, Chair Malcolm Moore, Members Clarke Gravel, Jackson Bruce, Raymond Young, Ed Halbach, Joe Foster, and Charles Collier, Law School Liaisons Eugene Scoles and Mary Lou Fellows, and State Courts Liaison James Wade.

Also in attendance from the NCCUSL leadership for portions of the meeting were Division Chair David Biklen, King Burnett, the Chair of the Executive Committee, and Fred Miller, the NCCUSL Executive Director. Reporter William Lapiana was present on Saturday for the discussion of the Uniform Disclaimers Act.

Sending regrets were Commissioners John Langbein and Robert Stein, and Director of Research Lawrence Waggoner.

The meeting began on Friday afternoon with a variety of miscellaneous matters followed by a discussion of the Uniform Parentage Act and the beginning of the discussion of the Uniform Trust Act. Saturday morning, other than for a brief presentation on the Uniform Parentage Act by King Burnett, the discussion centered on the Uniform Trust Act. Saturday afternoon the discussion shifted to the Uniform Disclaimers Act and returned to the Uniform Trust Act on Sunday morning.

Minutes

The minutes of the prior meeting were approved.

Name Change

David English reported that the Commissioners' Executive Committee, at its 1999 annual meeting in Denver, had approved the name change. Following approval by ACTEC and the ABA Section of Real Property Probate and Trust Law, JEB will now be known as the Joint Editorial Board for Uniform Trust and Estate Acts. Raymond Young and Charles Collier will shepherd the name change through ACTEC, which is meeting in Boston in mid-October. David English will shepherd the name change through the ABA Section Supervisory Council, which is meeting in Vail the first weekend in October. Following approval by ACTEC and the ABA Section, David English will inform the Chicago office.

Estate Tax Apportionment Act

King Burnett reported that the Commissioners would shortly be appointing a drafting committee to revise this Act, last revised in 1963. The first meeting of the new drafting

committee has not yet been scheduled, but might be held next Spring.

Uniform Guardianship and Protective Proceedings Act (1997)

Responding to a request from King Burnett, and following consultation in Denver with the Standby Committee on UGPPA, JEB will conduct a study and make a recommendation as to how and to what extent the UGPPA statutory text and comments should be revised to incorporate a 1998 National College of Probate Judges study on interstate transfer of guardianship. David English will contact Judge Nikki DeShazo, the Chair of NCPJ, about scheduling a meeting on the UGPPA at the NCPJ annual meeting in November. Already in attendance at the NCPJ meeting for other reasons are David English, who was an Advisor on the UGPPA, Raymond Young, who served as a member of the NCPJ Task Force which prepared the NCPJ report, James Wade, the JEB liaison to NCPJ and an Advisor on the UGPPA, and Rebecca Morgan, the Reporter for the UGPPA.

The plan is to discuss this again at the next JEB meeting in the hopes of having a recommendation ready to pass on to the Standby Committee on UGPPA and the NCCUSL leadership.

Adult Kidnaping

Responding to a request from King Burnett, JEB will conduct a study of the broader issue of adult kidnaping, sometimes referred to as "granny snatching." The purpose of the study is to ascertain the issues and to make a recommendation on whether this is a subject amenable to uniform legislation. A Special Reporter will likely be appointed for this project, and contact will be made with other groups with possible expertise in the subject, including NAELA, the elder law committees of the ABA Section, the ABA Commission on Legal Problems of the Elderly, and NCPJ.

Uniform Durable Power of Attorney Act

Issues with respect to the possible revision of this Act were discussed at the 1998 meeting in Wilmington. Linda Whitton, a professor of Valparaiso University School of Law and a committee chair in the ABA Section, has agreed to act as a Special Reporter for this project. JEB will visit this subject again at its next meeting, which Linda will be invited to attend.

Uniform Statutory Rule Against Perpetuities

David English noted that eleven states have now abolished the rule against perpetuities.

Recent Developments

David English reported on 1999 enactments, which included:

Custodial Trust - enacted in Colorado

Health-Care Decisions - enacted in Hawaii, on Governor's desk awaiting signature in California;

Principal and Income - enacted in Arkansas, California, Connecticut, Iowa, North Dakota and Virginia. In none of these states did the legislatures enact the unitrust alternative currently being considered in New York.

Statutory Form Power of Attorney - enacted in Arkansas;

Uniform Testamentary Additions to Trusts - enacted in Nebraska and Virginia;

Transfers to Minors - enacted in Michigan

UPC - bills to enact complete Code pending in Massachusetts and Vermont; enactment of Article 2 pending in DC.

Uniform Parentage Act

Mary Lou Fellows, who is one of the Observers to this project, led a discussion of this Act.

This Act had its first reading in Denver in July. The anticipated final reading will occur next summer. The final drafting meeting is scheduled for Halloween weekend.

Mary Lou began the discussion by noting that the primary objective of the Act is to determine the father for purposes of child support. She then directed the Board's attention to the sections most relevant to inheritance:

202 - While not disagreeing with the basic thrust of this section - that there should be no discrimination based on a parent's marital status - the Board noted that distinctions are in fact made, e.g., if the parents are married, paternity is presumed, whereas if they are, paternity must be proven. The UPC also make distinctions in its constructional rules. See UPC 2-702(b).

203 - Question was raised whether this section, which provides that the parent-child relationship established by the Act applies for all purposes, is too broad.

604 - The Board recommended that (b) be deleted. The question of at what point the right to inherit from an estate should be cut off is a matter best determined by other law. A discussion of this other law should be added to the comments.

804 - A question was raised about whether it was in the best interest of the child to terminate a parent-child relationship of a child conceived after the death of the donor of eggs or sperm. The execution of finding a parent-child relationship if the donor consented in writing to a continuation of the donation posthumously may be too restrictive. The board took no position on this section.

805 - Stylistic changes regarding the provision on use of a husband's sperm after divorce was recommended.

The Board noted there are related issues not addressed by the Parentage Act, such as whether sperm can be bequeathed.

David English indicated that the ACTEC Committee on State Laws has a subcommittee studying issues engendered by new reproductive technologies.

On Saturday morning, King Burnett discussed some of the issues related to Article 9 on gestational agreements. Not speaking for the Board but individually, David English indicated that he would prefer wide enactment of the Act without Article 9 instead of including Article 9 if the result would be few enactments.

Uniform Trust Act

After giving a short report on the current status of the Act, David English led a discussion of selected sections of the 1999 annual meeting draft:

102 - the Board concluded that trying to define "general power of appointment" and "revocable" would be more trouble than it is worth. The Board recommended that 102(1)(B) be revised to provide: "holds any presently exercisable power of appointment or a general testamentary power of appointment over trust property in a capacity other than that of trustee." Note in comments that "power of appointment" is used in Act in property, not tax sense. Discuss in comments how term used in Act.

King Burnett gave a presentation on donations of conservation easements and their relationship to the law of charitable trusts. Particularly, concern was expressed on how the provision on nonjudicial termination of small charitable trusts might apply. Also, the comment should indicate that "trust" can include informal arrangements. The Reporter will consider how to best address this problem. The Reporter will also take a look at how these easements are treated under the Uniform Management of Institutional Funds Act.

103 - It was agreed that Subsection (a) should be revised to provide that the terms of the trust "govern" instead of "may govern."

106 - David English agreed that the comment will address the meaning of "national." In

(a), a trust will also be valid if it is created in a state where trust property is located. In (b), "application" will be changed to "designation." Consideration will be given to reversing (b)(1) and (b)(2).

It was also agreed that a discussion of public policy exceptions for marital rights and creditors should be addressed in comments and not in a statute.

107 - In (a) the Board agreed to take out language excepting out (b) and (c). The Board also concluded not to try to define "principal place of administration", but to discuss in the comments factors for determining "principal place of business". It was agreed to make standards in (a) and (c) consistent, and to consider moving the existing (b) to the beginning of the section. It was also agreed to separate out the second sentence (c) as a separate (d). Also, it was agreed that in (d), instead of repeating the rules of trustee succession, simply to refer to Section 704.

David English was authorized to make the standard in (a) and (c) consistent and to consider moving existing (b) to the beginning of the section. It was agreed to separate out the second sentence of (c) as a separate (d). Also, in (d), instead of repeating rules of trustee succession, the Board voted simply to refer to Section 704. Language will be added indicating that the court, on behalf of the beneficiaries, can move the trust, but to discuss in the comments the factors for determining the principal place of administration..

In addition, the Board voted to take the following actions:

203 - add language saying that required notices must be given to all interested persons. Limit paragraph (2) to notice to beneficiaries who are unborn or unascertained.

205 - clarify that venue in county where decedent's estate administered applies only while estate is still open.

Article 3 - change title to "Representation of Others."

301 - in (a) and (b) delete "a" from "a notice."

302 - move the "unless clause" starting in the second line to the end of (b) Line 11 of 301.

305 - add to comment discussion of when validity of representation to be judged. Similar to 203, add requirement that notice be given to minors and incapacitated beneficiaries. Change "unascertained" to "not reasonably ascertainable" both here and perhaps in 203. Finally, move concept of adequate representation in (2) to comment.

412 - in the comment, to discuss the effect of a spendthrift provision. Also to mention the

relationship to the marital and charitable deduction. Further, in discussing termination options to mention the Uniform Custodial Trust and the Transfers to Minors Acts.

603 - in (a)(1), to change "held by" to "subject to the control of". Consideration will be given to moving (a)(2) elsewhere and to provide that trustee may follow a "direction" instead of "written direction", given the philosophy that a revocable trust is to be treated the same as a will, it was voted to delete (b).

604 - clarify in the comment that the section does not address revocable trusts which became irrevocable while settlor was alive. In (a)(1), to change "informed" to "notified" and in comment to refer to the rules of civil procedure. Also, add Bob Whitman's point that notice to potential contestants should inform of time limit and procedure for bringing contest. David English will look at CPC 16061.7 for possible language to revise (a)(2) to something like: "if a pourover devise to the trust is provided under the settlor's will, [120] days after the date the person was sent notice of the will's admission ~~will was admitted~~ to probate."

In (a)(4), to use language other than "statute of limitation", which is a term of art.

708 - Jackson Bruce suggested that the section not address the issue of whether an attorney-trustees is entitled to dual compensation. This topic is already being addressed in the ethics rules.

813 - the Board had an extensive discussion of (a)(5), which requires that a trustee provide advance notice to beneficiaries of certain extraordinary transactions. The Board concluded that the requirement should be subject to the power to direct to the contrary in the terms of the trust. The Board rejected the Washington approach of trying to specify more precisely the transactions for which advance notice is required (e.g., sale of land constituting in value more than 25% of value of trust property) but did conclude that the language "the fair market value of the property is readily ascertainable" is too vague. The Reporter was asked to devise a suitable solution.

The Board suggests that the comments should make clear that waiver by the settlor of the duty to provide advance notice does not waive other trustee duties. Also, the comments should cross-refer to BFP provisions to make it clear that the third party need not verify that the trustee has complied with the advance notice requirement before proceeding with a transaction.

In (d), to clarify that a beneficiary may revoke his or her waiver of a right to information. Also, in the comment, the reporter will clarify that Article 3 representation can be applied to determine the effect of consent.

It was agreed to add language from UPC, either here or elsewhere, that authorizes trustee to send out schedule of proposed distribution.

815 - To add the comment, cross-references to specific powers contained other than in Section 816.

ARTICLE 10

In discussing Section 1003 of Article 10, the Board agreed to follow the lead of Wash. Stat. Sec. 11.98.100, which absolves a trustee exercising reasonable care from liability for failing to become aware of events, such as marriage, divorce, or meeting educational requirements. It was further agreed to consider adding a statute of limitations on liability for improper distribution.

1006 - The Board agreed to make this section consistent with Article 3 (i.e., appointment of GAL/special representative not required for unborns/unascertained).

It was suggested that the reporter add to the comment that a trustee cannot condition distribution on the signing of a release, explaining why such releases are invalid..

It was suggested that the language of (a) could use clarification.

UNIFORM DISCLAIMER OF PROPERTY INTEREST ACTS (1999)

In considering the Prefatory Note, it was suggested that in line 10, the words "that is" should be replaced by the words "including those", and that at line 11, the language reading "At the same time, it does not" should be replaced by "however, it does not". Similarly, at line 15 it was suggested that at line 15 the words "a type of" should be replaced by the word "an".

In line 23, it was suggested that the word "in" be placed after the word "drafted" and that at line 33 after the word "remainder" the words "whether or not" should be inserted.

It was also suggested that line 7 - 12, on page 2 of the Prefatory Note should be re-ordered.

The Board then reviewed the styled version of the act, dated September 11, 1999, with William Lapina, the Reporter.

The following suggestions were made and agreed to by Lapina.

Page 1, line 14, insert after the word "person", the words "or one with authority".

Page 2, Line 3, to reinsert the word "other" which was stricken by the style committee. Page 3, line 10, to similarly replace the word "under" as it appears in the Trust Act. Page 4, line 8 to strike the words "or limitation" inserted by the style committee. Page 4, line 18 to reinsert the words "writing or other" or to rewrite line 23 and 24 to include a writing.

Page 5 to remove the provisions in line 11-17 relative to other law into SECTION 4. Page 6, line 9 to remove the words "in possession or enjoyment". Page 7 line 9 - 19, line 19-22 relating to the fractional share should be reinstated. Page 8, line 3, to change "delivered or filed" to "becomes effective". Page 8, line 12, the meaning of "disclaimant" should be made clear. Page 11, line 3 to eliminate "expressly so provides". Page 9, line 13 to replace the words "power ceased to exist", with the word "expired". Pages 9 and 10, accept the striking of the language by the style committee. Page 13, line 13 and 20 to reinstate the original language which was stricken and to remove the substituted language. Page 15, line 8, the Word "and" should be written and "or". Page 15, line 11, 12 and 13 to consider omitting (c) as suggested in footnote 27 at the bottom of page 16. Page 16, line 4 to omit the words "is not barred by this section if it", and to omit the entire sentence on line 7, 8 and 9, beginning with the word "failure". The board suggested the possibility of placing (g) in a separate section. Page 17 to eliminate this section as written by the style committee, and to return to the language of Section 13(b).

Lapinia stated his appreciation for these suggestions and will utilize them with the drafting committees concurrence, in the next revision of the Act.

These minutes were written the cooperation of the executive director, David English and Law School Liaison, Mary Lou Fellows.



Clarke A. Gravel, Secretary