UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (1996)

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ON UNIFORM STATE LAWS

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WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (1996)

PREFATORY NOTE

This Act reforms the common law concerning unincorporated nonprofit associations in three basic areas – authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association.

A nonprofit organization may take at least three forms, in alphabetical order – charitable trust, corporation, or unincorporated association.

The Uniform Supervision of Trustees for Charitable Purposes Act largely governs the charitable trust form. The Uniform Law Foundation is organized as an Illinois charitable trust. Ill. Ann. Stat. Ch. 14, Sections 51-6g (Smith-Hurd 1992). A nonprofit organization, such as a church, could be two entities – a charitable trust with respect to a building and its use and a nonprofit corporation with respect to its other activities.

The American Bar Association's Model Nonprofit Corporation Act, first issued in 1952 and most recently revised in 1987, has been adopted in most States. Unlike this Act, it deals comprehensively with nonprofit corporations. The Model Act follows the same organization and numbering system as the ABA Model Business Corporation Act and so is equally comprehensive. It regulates both the external and internal relations of a corporation – from a corporation's responsibilities to contractors and public officials to rights and obligations among members and the corporation. It is the form commonly chosen by lawyers in organizing a nonprofit organization. Unlike this Act, the Model Act provides answers to most questions and provides some state regulation.

At common law an unincorporated association, whether nonprofit or for-profit, was not a separate legal entity. It was an aggregate of individuals. In many ways it had the characteristics of a business partnership.

This approach obviously created problems. A gift of property to an unincorporated association failed because no legal entity existed to receive it. For example, a gift of Blackacre to Somerset Social Club (an unincorporated nonprofit association) would fail because in law there is no legal entity to receive title. Some courts in time became uncomfortable with this result. Some construed such a gift as a grant to the officers of the association to hold the real estate in trust and manage it for the benefit of the members of the association. Later, some

legislatures provided various solutions, including treating the association for these purposes as an entity.

Proceedings by or against an unincorporated association presented similar problems. If it were not a legal entity, each of the members needed to be joined as party plaintiffs or defendants. Class action offered another approach. Again courts and legislatures, especially the latter, provided solutions. "Sue and be sued" statutes found their way on the law books of most States.

Unincorporated associations, not being legal entities, could not be liable in tort, contract, or otherwise for conduct taken in their names. On the other hand, their members could be. Courts borrowed from the law of partnership the concept that the members of the association, like partners, were co-principals. As co-principals they were individually liable. Again courts and legislatures, responding to concerns of their constituents about this result, modified these rules. Courts found that, in large membership associations, some members did not have the kind of control or participation in the decision process that made it reasonable and fair to view them as co-principals. Legislatures also took steps. Perhaps the most striking are the statutes adopted in many States in the last decade excusing officers, directors, members, and volunteers of nonprofit organizations from liability for simple negligence. There is great variety in the details; a few statutes condition the immunity on the association carrying appropriate insurance or qualifying under Internal Revenue Code Section 501(c)(3).

Related to liability is the question of enforcement of a judgment obtained against an unincorporated association, its members, and its property. If fewer than all members are liable in contract or tort, the property that members own jointly or in common may not be seized in execution of a judgment without severing the interest of those who are liable from those who are not. Some members may not be liable because the judgment was not rendered against them. Again, courts using "joint debtor," "common property," and "common name" statutes fashioned more workable solutions. Some legislatures have also addressed the problem directly. For these purposes, unincorporated associations have been treated as legal entities – like a corporation.

The unincorporated nonprofit association is now governed by a hodgepodge of common law and state statutes governing some of their legal aspects. No State appears to have addressed the issues in a comprehensive, integrated, and internally consistent manner. This Act deals with a limited number of the major issues relating to unincorporated nonprofit associations in an integrated and consistent manner.

The Uniform Unincorporated Nonprofit Association Act (UUNAA) reforms the common law in three basic and important areas. It was drafted with the small informal associations in mind. These informal organizations are likely to have no legal advice and so fail to consider legal and organization questions, including whether to incorporate. The Act provides better answers than the common law for a limited number of legal problems. Its answers are more in accord with the expectations of those participating in the work of the unincorporated nonprofit association than the common law. While the Act is primarily directed at small nonprofit organizations, it may be surprising that some large nonprofit organizations are or until recently were unincorporated; for example, National Conference of Commissioners on Uniform State Laws, Association of American Law Schools (1900-1972), and American Bar Association (1878-1992). That these three are lawyer organizations may provide further evidence of the vitality of the rule of the shoemaker's children.

The ABA Model Act deals comprehensively with nonprofit corporations, including troublesome questions of governance and membership. UUNAA, on the other hand, does not treat these and other questions. Enactment of UUNAA would leave these matters to a jurisdiction's common law or its statutes on the subject.

This Act applies to all unincorporated nonprofit associations. Nonprofit organizations are often classified as public benefit, mutual benefit, or religious. For purposes of this Act, it is unnecessary to treat differently these three categories of unincorporated nonprofit associations. Unlike some state laws, it is not confined to the nonprofit organizations that are described in Section 501(c)(3), (4), and (6) of the Internal Revenue Code. There is no principled basis for excluding any nonprofit association. Therefore, the Act covers unincorporated philanthropic, educational, scientific, and literary clubs, unions, trade associations, political organizations, cooperatives, churches, hospitals, condominium associations, neighborhood associations, and all other unincorporated nonprofit associations. Their members may be individuals, corporations, other legal entities, or a mix.

The Act is designed to cover all of these associations to the extent possible. To the extent a jurisdiction decides to retain statutes dealing with specific kinds of nonprofit associations, this Act will supplement existing legislation. Many States have statutes on special kinds of unincorporated nonprofit associations, such as churches, mutual benefit societies, social clubs, and veteran's organizations. A State electing to adopt this Act will need to examine carefully its statutes to determine which it wants to repeal, which to amend, and which to retain.

The basic approach of UUNAA is that an unincorporated nonprofit association is a legal entity for the purposes that the Act addresses. It does not make these associations legal entities for all purposes. It is left to the courts of an

adopting State to determine whether to use this Act by analogy to conclude that an association is a legal entity for some other purpose.

It should be noted, too, that many of the provisions are intended to be supplemented by a jurisdiction's existing law. For example, Section 5, which provides for the filing of a statement of association authority, does not provide details concerning the filing process. It leaves to other law such details as whether the filing officer returns a copy marked "filed" and stamps the hour and date thereof, and the amount of the filing fee.

Two sections are bracketed as optional – Section 12 on venue and Section 13 on service of process. A jurisdiction may decide that its present rules are consistent with the entity view of an association and provide the appropriate rule. Therefore, it would not adopt Sections 12 and 13. Both sections deal with only a part of the questions of venue and service of process. This means that if they are adopted they are only a part of the jurisdiction's law on the subject. They should probably be placed in the court rules or statutes on those subjects instead of in the State's code with the other sections of this Act.

There has been concern that this Act may deter nonprofit organizations from incorporating and that failure to incorporate would deprive the public of protections incorporation would provide. Clearly, incorporation does provide governmental involvement that this Act does not.

Most jurisdictions regulate solicitation by charitable organizations. Many of these are comprehensive. See, for example, Ill. Ann. Stat. ch. 23, Sections 5100-5121 (Smith-Hurd 1992); Minn. Stat. Ann. Sections 309. 50-309.61 (West 1992); Uniform Management of Institutional Funds Act. These statutes frequently require, among other things, filing of a comprehensive statement with the attorney general before soliciting funds, including a copy of contracts with any professional fund-raisers, and registration of professional fund-raisers. A range of civil and criminal sanctions are provided. These statutes apply to all persons soliciting for charitable purposes, incorporated or not. In short, this Act's nonprofit associations are covered.

UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (1996)

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization, other than one created by a trust, consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

Comment

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member's responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liabilities to third

parties on a contract of the nonprofit association. Therefore, "member" is defined in terms appropriate to these purposes. "Member" includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fund-raising device commonly used by many nonprofit organizations is the membership drive. In most cases the contributors are not members for purposes of this Act. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy." Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 nevertheless protects "a person considered to be a member by a nonprofit association" even though the person is not within the definition of member in paragraph (1).

3. The role of a member in the affairs of an association is described as "may participate in the selection" instead of "may select or elect" the governing board and officers and "may participate . . . in the development of policy" instead of "may determine" policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. "Person" instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (2) defines "nonprofit association." The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. A charitable trust is a form of an unincorporated nonprofit legal organization. It is, however, not a nonprofit association within this Act. To the extent that trust law does not supply an answer to a legal problem concerning a charitable trust, a court could look to this Act to develop by analogy a common law answer.

7. The term "nonprofit association" is used instead of "association" for several reasons. The risk that this Act when placed in a state's code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term "association" alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term "association," which it defined to include only for-profit organizations. "Association" was held in 1938 to include an unincorporated political party and the act applied to it. *Richmond County v. Democratic Organization of Richmond County*, 1 NYS 2d 349 (1938). Subsequent decisions applied the act to other unincorporated nonprofit organizations. The use of "nonprofit association" instead of merely "association" should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, *Statutes as Sources of Law Beyond their Terms in Common Law Cases*, 50 Geo. Wash. L. Rev. 554 (1982).

Legal issues concerning unincorporated for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a State's other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated for-profit association would not be appropriate.

8. Two or more persons is the common statutory requirement to constitute an unincorporated nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number – two. Consideration was given to specifying "one" instead of "two." For example, the developer of a condominium may have created

a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be "joined by mutual consent for a common purpose?" To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several States provide that they be "joined together for a **stated** common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

9. "Nonprofit" is not defined. A common definition – it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution – does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit. Instead, the act contains rules, regulations, and procedures applicable separately to each of the three kinds of nonprofit corporation – public benefit, mutual benefit, and religious. It does not define the three kinds; it described what they can do and how they may function. Considering the corporation's intended activities and the rules, regulations, and procedures applicable to each of the three different kinds of corporations, a choice is made. Having made a choice, the corporation is bound by the rules, regulations, and procedures prescribed for the kind of nonprofit corporation chosen.

10. The final sentence of paragraph (2) is adapted from Section 201(d)(1) of Uniform Partnership Act(1994). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

11. The definition of "person" in paragraph (3) is a standard NCCUSL definition.

12. The definition of "State" in paragraph (4) is a standard NCCUSL definition.

SECTION 2. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW AND EQUITY. Principles of law and equity supplement this [Act] unless displaced by a particular provision of it.

Comment

1. This section is adapted from Uniform Commercial Code Section 1-103. The reference in Section 1-103 to "the law merchant" and its examples of supplementary rules, such as those of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act's rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by someone empowered by the nonprofit association to give the authority? To decide a case like this a court must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance – applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations – large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

SECTION 3. TERRITORIAL APPLICATION. Real and personal property in this State may be acquired, held, encumbered, and transferred by a

nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.

Comment

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 makes a conveyance or devise of land located in a State that has adopted this Act effective even though it would not be effective under the law of the State in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the State is required.

SECTION 4. REAL AND PERSONAL PROPERTY; NONPROFIT ASSOCIATION AS LEGATEE, DEVISEE, OR BENEFICIARY.

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

Comment

1. Subsection (a) makes a nonprofit association a legal entity separate from its members for purposes of its dealing with real and personal property. This reverses the common law view that a non-profit association was not a legal entity.

2. Subsection (b) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations*, 1-45 (Oxford Univ. Press (1959); 15 A.L.R. 2d 1451 (1951);

Warburton, *The Holding of Property by Unincorporated Associations*, Conveyancer 318 (September-October 1985).

3. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any "unincorporated society or association and every lodge or branch of any such association, and any labor organization" full right to acquire, hold, or transfer any "real estate and other property as may be necessary for the business purposes and objects of the society," and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated association is not an entity the statutory solutions are often partial – limited to special circumstances and associations. Subsection (b) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

4. Even if a nonprofit association's governing documents provide that it "may not acquire real property," subsection (b) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members against their association and its appropriate officers to undo the transaction.

5. Subsection (c) is a necessary corollary of subsection (b) and, thus, it may be unnecessary. However, several States expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (c) applies to both trusts and contracts. Not all state statutes apply expressly to both.

SECTION 5. STATEMENT OF AUTHORITY AS TO REAL PROPERTY.

(a) A nonprofit association may execute and [file] [record] a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority [filed] [recorded] in the office in the [county] in which a transfer of the property would be [filed] [recorded].

(c) A statement of authority must set forth:

(1) the name of the nonprofit association;

(2) the federal tax identification number, if any, of the nonprofit association;

(3) the address in this State, including the street address, if any, of the nonprofit association, or, if the nonprofit association does not have an address in this State, its address out of State;

(4) that it is an unincorporated nonprofit association; and

(5) the name or title of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(d) A statement of authority must be executed in the same manner as [a deed] [an affidavit] by a person who is not the person authorized to transfer the estate or interest.

(e) A filing officer may collect a fee for [filing] [recording] a statement of authority in the amount authorized for [filing] [recording] a transfer of real property.

(f) An amendment, including a cancellation, of a statement of authority must meet the requirements for execution and [filing] [recording] of an original statement. Unless canceled earlier, a [filed] [recorded] statement of authority or its most recent amendment is canceled by operation of law five years after the date of the most recent [filing] [recording].

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is [filed] [recorded] in the office of the [county] in which a transfer of real property would be [filed] [recorded], the authority of the person named in a statement of authority to transfer is conclusive in favor of a person who gives value without notice that the person lacks authority.

Comment

1. This section is based on Uniform Partnership Act(1994) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the officer where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1994) Section 303 provides for central filing, such as

with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. “Filed” and “recorded” are bracketed to direct an enacting State to choose. In most jurisdictions “recorded” will be the appropriate choice.

5. Subsection (c)(2) deals with the problem caused by the similarity of names of small local nonprofit associations. There is no duplication of federal tax identification numbers. Therefore, any confusion of identity is avoided by this requirement.

Subsection (c)(3) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

Subsection (c)(4) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

6. Subsection (c)(5) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each State to determine.

8. Subsection (f) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association’s current leadership from being effective. Reliance on a filing or recording this old is, in effect, not in good faith.

9. Subsection (g) is based on Uniform Partnership Act (1994) Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in

the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 5(g). Instead, Section 2 applies and would invoke the other law of the State. In many States the deed would be a nullity. See Boyer, Hovenkamp, and Kurtz, *THE LAW OF PROPERTY*, An Introductory Survey (West Pub. Co. 4th ed. 1991).

SECTION 6. LIABILITY IN TORT AND CONTRACT.

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort.

(b) A person is not liable for a breach of a nonprofit association's contract merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

(c) A person is not liable for a tortious act or omission for which a nonprofit association is liable merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered as a member by the nonprofit association.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered as a member by the nonprofit association.

(e) A member of, or a person considered to be a member by, a nonprofit association may assert a claim against the nonprofit association. A nonprofit association may assert a claim against a member or a person considered to be a member by the nonprofit association.

Comment

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. Subsection (a) changes that. It makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

2. This Act does not deal with liability of members or other persons acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 leaves that to the other law of the jurisdiction enacting this Act.

3. Subsections (b) through (e) are applications to common cases of the basic principle in subsection (a). Because a nonprofit association is made a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) specifies that result with respect to contracts.

4. Subsection (b) applies the principle in subsection (a) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated nonprofit association was not a legal entity; one purporting to act for it breached this implied warranty. *Smith & Edwards v. Golden Spike Little League*, 577 P. 2d 132, 134 (Utah 1978). Subsection (b) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. **"Merely"** because a person is a member does not make the person liable on an association's contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) relieves

members only of their vicarious liability. Liability for one's own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent's representative status is liable on the contract. Under agency law an agent acting within the agent's scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. *Restatement (Second) Of Agency* 320-322; Reuschlein and Gregory, *Agency & Partnership* 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. Comment, *Piercing the Nonprofit Corporation Veil*, 66 Marq. L. Rev. 134 (1984). Section 6 makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this doctrine to a nonprofit association. In *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, *Law of Corporations*, pp 344-352 (West 3d ed. 1983); Alfred F. Conard, *Corporations in Perspective*, pp 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members' liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for "debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association." As noted earlier, partial and uncoordinated statutory solutions of common law problems are typical.

8. Subsection (c) applies the principle in subsection (a) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980's all States have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations and Volunteers* (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes."

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution – the Open Courts provision. Note, *The Constitutionality of the Charitable Immunity and Liability Act 1987*, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 does not affect these statutes. As noted earlier Section 6 deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6, perhaps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In *Guyton v. Howard*, 525 So. 2d 918 (Fl. App. 1988) a nonprofit organization was held liable for the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) applies the principle in subsection (a) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6, however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. *Marshall v. International Longshoreman's and Warehouseman's Union*, 57 Cal. 2d 781, 371 p. 2d 987 (1962); Judson A. Crane, *Liability of an Unincorporated Association for Tortious Injury to a Member*, 16 Vand L Rev 319, 323 (1963).

13. Subsection (e) applies the principle in subsection (a) to reverse the common law rule that a member may not sue the member's unincorporated nonprofit association. A member as co-principal is logically a defendant as well as a plaintiff in such an action. The logic is that one may not sue oneself.

Subsection (a) makes an unincorporated nonprofit a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987)

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated nonprofit association of which the person is a member. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The court also followed recent developments in other courts.

15. Section 6 relieves from vicarious liability not only members but also certain others. Persons who are "authorized to participate in the management of the affairs of the nonprofit association" are protected. Persons within this group – largely directors and officers, however denominated – are likely also to be members as defined in Section 1(1), and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 extends protection to this group out of abundant caution. It is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 prevents that somewhat remote possibility.

Section 6 also extends protection to a person who is not within the definition of "member" in Section 1(1) but is "considered to be a member by the nonprofit association." A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 accords this person protection.

As noted earlier, Section 6 concerns vicarious liability only. Liability for one's own conduct is covered by other law of the enacting jurisdiction.

SECTION 7. CAPACITY TO ASSERT AND DEFEND; STANDING.

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

Comment

1. Subsection (a) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many States have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01 (Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) does not have – a description of the association name to be used.

Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a) – (1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) does not require that it have a name.

3. Subsection (b) describes an association's standing to represent the interests of its members in the proceeding. It is the federal standing rule. *Hunt v. Washington Apple Advertising Commn*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53, L. Ed. 2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interest of its members. If the suit concerns only the nonprofit association's interests, subsection (b) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

5. Subsection (b) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing to represent the interests of its members. *Warth v. Seldin*, 422 U.S. 490, 511 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Some States require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This approach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many States have adopted the three-pronged federal rule, which is the rule in subsection (b).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

SECTION 8. EFFECT OF JUDGMENT OR ORDER. A judgment or order against a nonprofit association is not by itself a judgment or order against a member or a person authorized to participate in the management of the affairs of the nonprofit association.

Comment

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation . . . ."

2. Section 8 applies not only to judgment but also to orders, such as an award rendered in arbitration or an injunction.

3. Section 8 reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.

4. Some States changed the common law rule by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).

5. That a judgment against a nonprofit association is also not a judgment against one authorized to manage the affairs of the association recognizes fully the entity status of a nonprofit association.

6. An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

SECTION 9. DISPOSITION OF PERSONAL PROPERTY OF INACTIVE NONPROFIT ASSOCIATION. If a nonprofit association has been inactive for [three] years, or for a longer or shorter period specified in a document of the association, a person in possession or control of personal property of the association may transfer custody of the property:

(1) if a document of a nonprofit association specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) if no person is so specified, to a nonprofit association or nonprofit corporation pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

Comment

1. Section 9 is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

2. "Inactive" is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

"Inactive" does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization "inactive."

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has been inactive for that period will begin functioning again. Thus, it is prudent to transfer custody of its assets to someone likely to make appropriate use of them. While it is unlikely that a nonprofit association would deal with this issue, if its document does provide a shorter or longer period, that period governs.

3. Section 9 applies only to personal property – tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All States have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1995) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which the Uniform Unclaimed Property Act (1995) applies, according to Section 3, is that in “a safe deposit box or any other safekeeping repository.” Many States have additional statutes that apply to property abandoned in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 is very unlikely to be in the position of an obligor on such intangible property. In summary, there appears to be limited overlap.

Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a “recognized tax exempt charitable organization formed for educational, religious or scientific purposes.” Tex. Code Ann. Elections Section 251.012(d) and (e) (Vernon’s 1986). Minnesota provides that if an unincorporated religious society “ceases to exist or to maintain its organization” title to its real and personal property vests in the “next higher governing or supervisory” body of the same denomination. Minn. Stat. Ann. Section 315.37 (West 1992).

4. It is the custody of and not the title to the property that is transferred. To whatever purpose the property was dedicated while in the hands of the transferor, it remains so dedicated in the hands of the transferee. Identification of the persons to whom the property may be transferred and cy pres principles recognize that the purpose to which the transferee may put the property need not be precisely that to which it was initially dedicated. For example, the initial purpose may no longer be viable.

5. Section 9 does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare

case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

6. To obtain a Section 501(c)(3) tax classification as a nonprofit association an association must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1).

7. If there is no bylaw or other controlling document the person may transfer the custody of the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

8. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. It is less clear that Section 15 of the 1995 Act recognizes this action. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

9. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

SECTION 10. APPOINTMENT OF AGENT TO RECEIVE SERVICE OF PROCESS.

(a) A nonprofit association may file in the office of the [Secretary of State] a statement appointing an agent authorized to receive service of process.

(b) A statement appointing an agent must set forth:

(1) the name of the nonprofit association;

(2) the federal tax identification number, if any, of the nonprofit association;

(3) the address in this State, including the street address, if any, of the nonprofit association, or, if the nonprofit association does not have an address in this State, its address out of State; and

(4) the name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and [acknowledged] [sworn to] by a person authorized to manage the affairs of the nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the [Secretary of State] and giving notice to the nonprofit association.

(d) A filing officer may collect a fee for filing a statement appointing an agent to receive service of process, an amendment, a cancellation, or a resignation in the amount charged for filing similar documents.

(e) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement.

Comment

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5, which concerns a statement of authority with respect to property. Because one requires local and other central filing they are not combined.

SECTION 11. CLAIM NOT ABATED BY CHANGE. A [claim for relief] against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

Comment

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1994) Sections 29 and 31(4). This Act's entity approach requires this change of the old common law rule. Similar provisions are found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations, Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973). Uniform Partnership Act (1994) adopts an entity approach and so changes the old rule. See Sections 603(a) 701, and 801 of 1994 Act.

[SECTION 12. VENUE. For purposes of venue, a nonprofit association is a resident of the [city or] county in which it has an office.]

Comment

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all States for fixing venue is the county of residence of the defendant. Most States specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See Wright, Miller, & Cooper, 15 *Federal Procedure & Practice* 3812 (1986). Conforming to the entity view of an association, Section 12 rejects the common law view.

This section is bracketed because some States have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides." Ill. Code Civ. Prac. Section 2-102(c).

3. Section 12 makes a nonprofit association a resident of any county (or city) in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

4. "City," in brackets, is for use by those States, such as Virginia, in which there is territory that is not in a county but in a city only.

[SECTION 13. SUMMONS AND COMPLAINT; SERVICE ON WHOM. In an action or proceeding against a nonprofit association a summons and complaint must be served on an agent authorized by appointment to receive service of process, an officer, managing or general agent, or a person authorized to participate in the

management of its affairs. If none of them can be served, service may be made on a member.]

Comment

1. In most States the law with respect to service of process is in court rules. Where that is the case, this section, if adopted, should be placed in these rules.

2. Some States have expressly addressed service of process on a nonprofit association. Those States may wish to continue their rules and so should not adopt this section. For this reason this section is bracketed.

Section 13 adapts Rule 4 of the Federal Rules of Civil Procedure to this setting. However, it leaves to other applicable law details concerning service, such as who may make service and the kind of the mailing. It specifies only to or on whom the service of process must be addressed.

By rule or statute all jurisdictions have extensive law on service of process. The real question for nonprofit associations is which set of these rules should apply. This Act treats a nonprofit unincorporated association as a legal entity. Thus, the rules applicable to another legal entity, the corporation, seem most appropriate.

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

SECTION 15. SHORT TITLE. This [Act] may be cited as the Uniform Unincorporated Nonprofit Association Act (1996).

SECTION 16. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 17. EFFECTIVE DATE. This [Act] takes effect ....

Comment

This Act provides an unincorporated, nonprofit association and its members with a legal structure that conforms to the expectations of many of them. Therefore, the need by the nonprofit association for additional time to revise procedures and forms to conform to a significant change in the law is not necessary. However, this Act materially affects third parties, particularly creditors of nonprofit associations. Anecdotal evidence suggests that many creditors place little reliance on their rights against members in extending credit. If they have any reservations about the creditworthiness of a nonprofit association they obtain guarantees from creditworthy members or insist on cash. To the extent that this is true, no change in credit policies is needed and so no extra planning time is needed.

Unless a jurisdiction's usual effective date rule provides little time for affected parties to learn of a new law, it is unnecessary to extend this Act's effective date.

SECTION 18. REPEALS.

(a) The following acts and parts of acts are repealed:

(1) ____________________________

(2) ____________________________

(b) The following acts and parts of acts are not repealed:

(1) ____________________________

(2) ________________________

(c) This [Act] replaces existing law with respect to matters covered by this [Act] but does not affect other law respecting nonprofit associations.

Comment

1. This Act is not a comprehensive revision of the law of unincorporated nonprofit associations. It is, however, designed to apply to all unincorporated nonprofit associations to the extent of its coverage.

Many States have a patchwork of law relating to these associations. Some laws apply to a specific kind of association, such as a denominational church or medical society. See, for example, California Corporations Code, Title 3, Unincorporated Associations, Section 21200 (West 1991) (County and Regional Medical Societies); Minn. Stat. Ann. Section 315.01 et seq. (West 1992) (religion societies). Other law deals with a very specific subjects, such as legal protection of an association's insignia. Some go beyond a subject's treatment in this Act, such as the recently enacted charitable immunity and liability acts that relieve individuals acting for an association from liability for simple negligence.

2. In preparing a bill for the enactment of this Act careful attention should be given to determining the appropriate relationship of this Act to existing statutes. It may be wise to repeal expressly certain laws and to specify that certain others are not repealed. While it is unusual to include a provision that certain statutes are not repealed, doing so in this situation will relieve courts of difficult questions of repeal by implication.

[SECTION 19. TRANSITION CONCERNING REAL AND PERSONAL PROPERTY.

ALTERNATIVE 1

If, before the effective date of this [Act], an estate or interest in real or personal property was by terms of the transfer purportedly transferred to a nonprofit association but under the law the estate or interest did not vest in the nonprofit

association, on the effective date of this [Act] the estate or interest vests in the nonprofit association, unless the parties have treated the transfer as ineffective.

ALTERNATIVE 2

If, before the effective date of this [Act], an estate or interest in real or personal property was by terms of the transfer purportedly transferred to a nonprofit association but under the law the estate or interest was vested in a fiduciary, such as officers of the nonprofit association, to hold the estate or interest for members of the nonprofit association, on or after the effective date of this [Act] the fiduciary may transfer the estate or interest to the nonprofit association in its name, or the nonprofit association may, by appropriate proceedings, require that the estate or interest be transferred to it in its name.]

Comment

1. Two versions of Section 19 are offered. The initial common law rule was that a purported transfer of property to an unincorporated nonprofit association totally failed as the association was not a legal entity. If a State has that rule, it should adopt the first alternative. If, on the other hand, its rule is that title does not pass to the association in its name but passes instead to a fiduciary, such as its officers, to hold the property for the benefit of the members, a State should adopt the second alternative.

If a State has by statute made transfers effective to some classes of nonprofit associations but not all, it should adopt the appropriate alternative to those not covered. If a State has made all transfers to all unincorporated nonprofit associations effective, it does not need Section 19.

2. Section 19 brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider an unincorporated nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. The first alternative gives effect to the gift. However, if parties were informed about the common law they may have treated the gift as ineffective. In that case, the final

clause of Alternative 1 provides that the gift does not become effective when this Act takes effect. The unless clause would apply, for example, if the residual beneficiaries of the donor's will, knowing that the devise of Blackacre to the nonprofit association was ineffective under the law, continued to use Blackacre as their summer home with the approval and acquiescence of members and representatives of the nonprofit association.

3. Section 19 is not a retroactive rule. It applies to the facts existing when this Act takes effect. At that time Alternative 1 applies to a purported transfer of property that under the law of the jurisdiction that could not be given effect at the time it was made. The first alternative belatedly makes it effective – effective when this Act takes effect and not when made. The practical result of this difference is that when the purported transfer is effective, the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, Alternative 1 by its terms does not vest ownership in the nonprofit association.

4. Some courts gave effect to gift of property to an unincorporated nonprofit association by determining that the gift lodged title in someone, often officers of the association, to hold the property in trust for the benefit of the association's members. The second alternative addresses this situation. When the Act takes effect it authorizes the fiduciary to transfer the property to the association. If the fiduciary is unwilling or reluctant, the association may require the fiduciary to transfer the property to the association. In either case, the association will get a deed transferring the property to it which, in the case of real property, the association may record.

5. Jurisdictions that have a statute like New York's concerning grants of property by will have a problem that needs special attention. The New York statute provides that a grant by will of real or personal property to an unincorporated association is effective only if the association incorporates within three years after probate of the will. McKinney's N.Y. Estates, Powers & Trust Law Section 3-1.3 (1991). The grants by will that need attention are those that have not become effective by incorporation of the association and have not become ineffective by the running of the three year period. These grants seem entitled to the benefits of Section 19. If so, some modification of Section 19 may be required.

SECTION 20. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.

Comment

1. Section 20 is adapted from Uniform Partnership Act (1994) Section 1006(c). It continues the prior law after the effective date of this Act with respect to a (i) "right accrued" and (ii) pending "action or proceeding." But for this section the new law of this Act would displace the old in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act's enactment is substantial. Millard H. Ruud, *The Savings Clause – Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 286-293 (1955). A court generally applies the law that exists at the time it acts.

2. Almost all States have general savings statutes, usually as a part of their statutory construction acts. These are often very broad. See, for example, Model Statutory Construction Act, Section 53. As this Act is remedial, the more limited savings provisions in Section 20 are more appropriate than the broad savings provisions of the usual general savings clause. Section 20 and not a jurisdiction's general savings clause applies to the Act.

3. **"Right Accrued."** It is not always clear whether an alleged right has "accrued." Some courts have interpreted the phrase to mean that a "matured cause of action or legal authority to demand redress" exists. *Estates of Hoover v. Iowa Dept. of Social Services*, 299 Iowa 702, 251 N.W. 2d 529 (1977). In *Nielsen v. State of Wisconsin*, 258 Wis. 1110, 141 N.W. 2d 194 (1966), a landowner brought suit after the repeal of an act granting a landowner the right to recover from the State for damages to her land caused by the State's failure to install necessary culverts and the like to prevent flooding. Before the act's repeal the landowner's land had been damaged by flooding caused by the State's failures. The court held that the statutory saving of "rights of action accrued" saved her cause of action. In both of these cases, conduct that gave rise to a cause of action had occurred before the act was repealed. It is said that it is not enough that there is an inchoate right. Apparently, there is no "accrued right" under a contract, for example, until there is a breach.

4. **"Action or Proceeding" Pending.** The principal question is what is an "action or proceeding" for this purpose. "Action" refers to a judicial proceeding. "Proceeding" alone, especially when used with "action," is broader and so includes administrative and other governmental proceedings. It has been given the broader meaning. For example, in *State ex rel. Carmean v. Board of Education of Hardin County*, 170 Ohio 2d 415, 165 N.E. 2d 918 (1960) a petition to transfer certain land from one school district to another filed before a change in the law was a "pending proceeding" to be decided under the old law. Similarly, a request for permission to petition for an election to consolidate school districts was held to be a "proceeding commenced" so that the substance and procedure of the old law, which was

materially different from the new, was preserved. *Grant v. Norris*, 249 Iowa 236, 85 N.W. 2d 261 (1957).

5. Uniform Partnership Act (1994) provides that the Act does not "impair obligations of contract existing." This is not carried forward. This phrase is intended to save only obligations protected by the contracts clauses of state and federal constitutions. However, as it might be construed more broadly and the constitution would protect without the phrase, the phrase is not present in Section 20.