



MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Benjamin Orzeske
ULC Legislative Counsel and Staff Liaison to the JEB-UTEA

Re: Minutes from December 2014 Meeting; Tucson, Arizona
FINAL – AS APPROVED ON NOVEMBER 20, 2015

The meeting was called to order on Friday, December 5, 2014, at 9:00 a.m. by Chair Malcolm Moore. Others present were Turney Berry, David English, Thomas Gallanis (Executive Director), Edward Halbach, Carlyn McCaffrey, Judith McCue, Kevin Millard, Benjamin Orzeske (ULC Staff Liaison), Pam Schneider, Martha Starkey, Bruce Stone, James Wade, Elisa White (ULC Division Chair), and Raymond Young. ULC President Harriet Lansing attended parts of the meeting, including the discussion of Items 2 and 15. Mary Louise Fellows, Susan House, and Robert Sitkoff were unable to attend.

- 1. Approval of Minutes.** Mr. Wade suggested two revisions to the draft of the December 2013 meeting minutes: (1) in Item 10, that the words “under federal common law” be added to the end of the fourth sentence, after “restitution”; and (2) in Item 14, that, in the penultimate sentence, the words after “flawed” be deleted. The Board unanimously approved these revisions and the minutes as so amended.
- 2. Trust Decanting Act.** Stanley Kent, Drafting Committee Chair, and Susan Bart, Reporter, joined the Board for this portion of the meeting. The Board reviewed and commented on the November 18, 2014, draft of the Trust Decanting Act. Among the many topics discussed were: (1) decanting for the purpose of converting current distributions into distributions in trust; (2) the interaction between decanting and special needs trusts; (3) the treatment of charitable interests in trust; (4) decanting to convert a grantor trust into a non-grantor trust, and vice versa; and (5) the application of the Rule Against Perpetuities and related rules to the property in a second trust. The Act is scheduled for final reading at the ULC annual meeting in July 2015.
- 3. Drafting Committee on Divided Trusteeship.** Mr. Berry, Drafting Committee Vice-Chair, reported that the drafting committee was approved in July 2014 and has held one introductory conference call but has not yet met in person. The committee expects to have a draft ready for the Board’s review at the Board’s Fall 2015 meeting.

4. **Drafting Committee to Revise the Uniform Guardianship and Protective Proceedings Act.** Prof. English, Drafting Committee Chair, reported that the newly approved committee is gathering observers in preparation for its first meeting in April 2015. The committee expects to have a draft ready for the Board's review at the Board's Fall 2015 meeting.
5. **Tribal Probate Code Drafting Committee.** Prof. English, Co-Reporter for the Drafting Committee, reported that the committee met in April 2014 to introduce observers to the project and to develop a list of possible issues that the project could address. The committee expects to have a draft ready for the Board's review at the Board's Fall 2015 meeting.
6. **Conforming Amendments to Uniform Probate Code §2-213.** Prof. Gallanis presented draft amendments to UPC §2-213 to conform it to the Uniform Premarital and Marital Agreements Act (UPMAA). Ms. McCaffrey suggested, and the Board agreed, that the draft should be amended: (1) by inserting the word "only" before "a written agreement signed by both spouses" in proposed subsection (b); and (2) by adding a new subsection (i) stating "(i) This section applies only to an agreement signed on or after the effective date of this section and does not apply to an agreement or waiver signed before the effective date of this section." In the course of the discussion, the Board observed that the UPMAA is unclear about whether the Act applies to a unilateral waiver by one spouse of elective-share rights. The Act governs a "premarital agreement" or a "marital agreement," but the definitions of these terms (an "agreement between individuals" or "agreement between spouses") do not seem to cover a unilateral waiver. The Board concluded that further investigation is needed. Action Items: (1) Prof. Gallanis will incorporate the approved revisions into his draft of §2-213; (2) Prof. Gallanis will defer submitting the amended version of §2-213 to ULC headquarters; (3) Mr. Berry and Ms. McCaffrey, both of whom served on the UPMAA drafting committee, will serve as a subcommittee of the Board to investigate the application of the UPMAA to unilateral waivers (including seeking the views of the Act's committee chair and reporter) and to consider whether technical amendments are needed to the UPMAA; (4) Mr. Berry and Ms. McCaffrey will coordinate with Prof. Gallanis so that the Board can receive a status report either by e-mail or teleconference in Spring 2015; (5) If the subcommittee and the Board conclude that no technical amendments are needed to the UPMAA, Prof. Gallanis will submit the amendments to UPC §2-213 to the ULC Executive Committee for its July meeting; (6) If the subcommittee and the Board conclude that technical amendments are needed to the UPMAA, Prof. Gallanis will coordinate with the relevant parties including the JEB for Uniform Family Law.
7. **Proposed Technical Amendment to Uniform Probate Code §2-209.** Mr. Wade reported that Colorado had enacted an amended version of UPC §2-209(e), providing that "interest shall commence to run one year after the determination of the elective share amount by the court." Mr. Wade proposed that the Board approve similar language as a technical amendment to the UPC. During the discussion of this proposal, some members of the Board suggested that the issue could be addressed instead either (1) by giving the surviving spouse a share of any increase in value in the elective-share property during the period the elective-share balance remains unsatisfied, or (2) by a state changing its legal interest rate to a more realistic reflection of prevailing interest rates and having interest run from an earlier time. Action Item: Mr. Wade and Ms. Schneider agreed to form a subcommittee to prepare a

written report for the Board to consider in Spring 2015. If one or more technical amendments are recommended, the report will contain a draft of the proposed amendments.

- 8. Conforming Amendments to Uniform Acts Due to the Approval of UFADAA.** The Board held a preliminary discussion of whether various uniform trust and estate acts—including the Uniform Probate Code, the Uniform Trust Code, and the Uniform Power of Attorney Act—require amendments to conform them to the newly approved Uniform Fiduciary Access to Digital Assets Act (UFADAA). Mr. Orzeske reported that the UFADAA Chair and the Reporter for the Uniform Power of Attorney Act had already begun discussing possible amendments. Action Item: Prof. English, Prof. Gallanis, and Ms. Starkey agreed to form a subcommittee, chaired by Prof. Gallanis, to discuss the issues with the relevant parties and to prepare a written report for the Board to consider at its Fall 2015 meeting. If conforming amendments are recommended, the report will contain a draft of the proposed amendments.
- 9. Proposed Amendments to UTC §802 from the American Bankers Association Trust Counsel Committee; UTC Queries from Professor Robert Whitman.** Prof. English led the discussion of a proposal submitted by the American Bankers Association Trust Counsel Committee to revise UTC §802. The proposal would expand the types of investments authorized under the section and extend protection from liability to certain affiliates associated with the trustee. The Board discussed whether this topic should be addressed by itself or as part of a larger package of possible revisions to the UTC. The Board noted, for example, that Professor Robert Whitman of the University of Connecticut had written to Prof. Gallanis with suggestions for amendments or clarifications to various UTC provisions. The Board decided to move forward with the process of considering whether a larger package of UTC amendments would be appropriate. Action Items: (1) Prof. English will inform the American Bankers Association Trust Counsel Committee of the Board’s decision to consider its proposed amendments as part of a larger package of UTC revisions; (2) Prof. Gallanis will communicate similarly with Prof. Whitman; (3) Prof. Gallanis will contact Gideon Rothschild (RPTE Chair) for feedback from RPTE on possible UTC revisions; (4) Mr. Millard will similarly solicit feedback from ACTEC; (5) Prof. English and Prof. Gallanis will assemble and coordinate the feedback into a written report for discussion by the Board at its Fall 2015 meeting. If Prof. English and Prof. Gallanis conclude that a drafting committee to revise the UTC is appropriate, the written report will contain sufficient detail to support a subsequent memorandum to the ULC Committee on Scope and Program in case the Board votes in Fall 2015 to recommend one.
- 10. Gender-Neutral UPC.** Mr. Orzeske, working with ULC staff, produced a draft of amendments to the UPC to replace single-gender pronouns with gender-neutral terms, in compliance with the current ULC Style Guide. The draft was presented to the Board for its review. Action Item: Prof. Gallanis and Prof. English will review the draft amendments and request guidance from John Sebert (ULC Executive Director) on whether the changes can be implemented ministerially by the ULC.
- 11. Uniform Principal and Income Act.** The Board reviewed feedback it received regarding possible amendments to the UPAIA and determined that a drafting committee to revise the

UPAIA is necessary. Action Items: (1) Prof. English and Mr. Millard will form a subcommittee, chaired by Mr. Millard, to prepare a memorandum to the ULC Committee on Scope and Program supporting the appointment of a drafting committee. This memorandum will be reviewed by the Board, either by e-mail or teleconference, in Spring 2015, so that the memorandum can be considered by Scope and Program in July; (2) Prof. Gallanis will contact Prof. Sitkoff to invite him to join the subcommittee. Update (December 8): Prof. Sitkoff has volunteered to be available to consult with the subcommittee but, given the press of other commitments including chairing the Divided Trusteeship project, is not able to join the subcommittee.

12. Uniform Probate Code Articles 3 and 4. The Board engaged in a preliminary discussion of whether the revision of UPC Articles 3 and 4 should be future drafting project. Action Item: Prof. English, Mr. Millard, and Mr. Wade will form a subcommittee, chaired by Prof. English, to prepare a written report for the Board to consider at the Board's Fall 2015 meeting. If the subcommittee concludes that a drafting committee to revise UPC Articles 3 and 4 should be appointed, the report will contain sufficient detail to support a subsequent memorandum to the ULC Committee on Scope and Program in case the Board votes in Fall 2015 to recommend one.

13. Referral from Scope and Program – Mental Health Advance Directives. The ULC Committee on Scope and Program referred to the Board a proposal by Professor Judy Clausen for the appointment of a study committee on mental health advance directives. The Board noted that a study committee on this topic was appointed in 2008 and was discharged in 2010 on the ground that the project was deemed unsuitable for a uniform act. A supermajority of the Board concluded that not enough had changed since the previous study committee's discharge to warrant the appointment of another study committee. Action Item: Prof. Gallanis will prepare a memorandum to the Committee on Scope and Program to this effect.

14. Referral from Scope and Program – Model Marital Property Act. The Committee to Review ULC Acts and the Committee on Scope and Program referred this Act to the Board for review and consideration. The Board discussed whether the Act should remain on the "current" list of ULC acts or whether it should be withdrawn. The Board observed that the Act has been introduced in 2014 in New Hampshire, and this inclined the Board to conclude that, for now at least, the Act should remain on the "current" list. The Board noted that the ULC committees should additionally consult the JEB for Uniform Family Law. Action Item: Prof. Gallanis will prepare a memorandum to the Committee on Scope and Program to this effect.

15. International Conventions on Trust and Estate Law. In addition to ULC President Harriet Lansing, the Board was joined for the discussion of this item by ULC Executive Committee Chair Richard Cassidy, ULC Executive Director John Sebert, and U.S. State Department Representative Michael Coffee. Prof. English began the discussion with a review of four relevant international conventions: the UNIDROIT Convention on International Wills, the Hague Convention on Trusts, the Hague Convention on Succession, and the Hague Convention on Protection of Adults. The discussion focused on the first two

of these, and on the Uniform International Wills Act (UIWA). Mr. Sebert reported that the JEB for International Law and the ULC's International Legal Developments Committee met in November and are interested in an enhanced effort to enact UIWA, which has been adopted in 18 jurisdictions. Mr. Coffee reported that the U.S. State Department intends to begin renewed efforts to implement the conventions on wills and trusts. He suggested that the Board could assist by renewing its support for both conventions and for UIWA, and by working with the State Department. The Board unanimously reiterated its support for the conventions on wills and trusts and for UIWA. Action Items: (1) Prof. Gallanis will send a letter to Mr. Coffee affirming the Board's support; (2) Prof. Gallanis agreed to serve as the Board's point person for international matters and to work with the U.S. State Department on these issues.

16. Uniform Trustee Act (Canada). The Board received, for informational purposes, a copy of the Uniform Trustee Act produced by the Uniform Law Conference of Canada.

17. Future Board Meetings. Prof. Gallanis noted that some of the newly appointed subcommittees will report back to the Board before its next in-person meeting, hence that the Board will need to take action via conference call or e-mail. He also noted the likelihood of two Board meetings in the 2015-16 academic year because of the number of uniform trust and estate acts with drafts for Board review. ULC President Lansing asked about future meeting sites, and all agreed that Chicago was a convenient location for Board meetings.

The Board adjourned at 4:30 p.m. At dinner later that evening, the Board presented its Richard V. Wellman Award to Prof. Halbach in recognition of his outstanding contributions to uniform laws in trusts and estates.

Respectfully submitted,
Benjamin Orzeske
ULC Legislative Counsel and Staff Liaison to the JEB-UTEA