

MEMORANDUM

To: Joint Editorial Board for Uniform Trust and Estate Acts

From: Thomas Gallanis

Re: Minutes, October 10-11, 2008; Chicago, Illinois

DRAFT – NOT YET APPROVED

The meeting was called to order on Friday, October 10, 2008, at 9:02am by Chair Malcolm Moore. Others present were (in alphabetical order): Jackson Bruce, David English, Mary Louise Fellows, Thomas Gallanis, Edward Halbach, Susan House, Joseph Kartiganer, Michael Kerr, Sheldon Kurtz, Carlyn McCaffrey, Judith McCue, Anne McGihon, Eugene Scoles, Bruce Stone, Lawrence Waggoner, and Raymond Young. Not present were Naomi Karp, John Langbein, Martha Starkey, and James Wade. Guests present included Steven Gorin, a member of the Council of the ABA Section on Real Property, Trust and Estate Law, Barry Hawkins, JEB Liaison to the Committee on Scope and Program, and John Sebert, ULC Executive Director. Participating by speakerphone were Carol Cantrell, a vice-chair of the Income Tax Committee of the ABA Section on Real Property, Trust and Estate Law, here representing the American Institute of Certified Public Accountants, and Stanley Kent, Commissioner from Colorado and a member of the drafting committee of the Insurable Interests Relating to Trusts Act.

1. **Minutes.** The Board approved the minutes of the March 2008 meeting.

2. **Premarital and Marital Agreements.** Professors Kurtz and Waggoner led a discussion of the need to amend the Uniform Premarital Agreement Act. The Board strongly supported the appointment of a drafting committee for this purpose. Professors Kurtz and Waggoner will work with the Joint Editorial Board for Uniform Family Law to prepare a memorandum from both JEBs to the Committee on Scope and Program. The memorandum will be circulated to the JEB-UTEA by e-mail for comments, to the JEB-UFL for its December meeting, and to the Committee on Scope and Program for its January meeting.

3. **Uniform Probate Code: 2008 Amendments and Clean-Up.** Professor Waggoner reported on the status of the Article 2 amendments approved by the ULC in July. Professor English will prepare a memorandum to the Executive Committee proposing conforming amendments to the UPC to reflect the approval of the Uniform Trust Code, the Uniform Power of Attorney Act, and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

4. **Uniform Probate Code: Potential Amendments.** Professor English led a discussion of potential amendments to UPC Articles 3, 4, and 6. The discussion of Article 6 focused on UPC §§6-102, 6-211, and 6-301. With respect to §§6-102 and 6-211, the Board observed that Mr. Nathaniel Sterling, Commissioner from California, is working with the California Law Revision Commission

on possible amendments to the California counterparts of these sections. The Board decided to defer amendments to §§6-102 and 6-211 in order to see how the CLRC project progresses. With respect to §6-301, the Board discussed an e-mail from Mr. John Burton, Commissioner from New Mexico, alerting the Board to amendments made by the New Mexico legislature. Professor English will ask Mr. Burton to submit a proposal of amendments to §6-301, to be considered at the Board's next meeting.

The discussion of Articles 3 and 4 focused on a memorandum from Professor English identifying possible amendments. The Board concluded that some of the amendments could be implemented administratively by Mr. Kerr. Others would be classified as technical, meaning that they could be approved by the ULC Executive Committee without the appointment of a drafting committee. Professor English will prepare a memorandum identifying the administrative and technical amendments and requesting that the technical amendments be approved under Section 4.3(b)(3) of the ULC Constitution. Other amendments discussed were substantive, hence likely to need consideration by the full ULC. These substantive amendments included, but were not limited to:

- (a) Adding a lost-will provision in §3-402.
- (b) Providing in §3-610(c) that resignation is effective only upon delivery of assets.
- (c) Extending the priority rule of §3-702 to all letters of administration.
- (d) Incorporating the current standard of prudence in §3-703(a).
- (e) Clarifying to whom the personal representative owes duties in §§3-703 and 3-715.
- (f) Updating the list of powers in §3-715 in light of the Uniform Trust Code.
- (g) Consolidating §3-716 with §3-613.
- (h) Codifying the common fund theory in §3-720.
- (i) Coordinating §3-915 with the Uniform Trust Code.
- (j) Revising §3-1001 as proposed in Professor English's draft.
- (k) Incorporating the "actual contest" standard in §3-1102(c).
- (l) Revising §§3-1201 and 3-1202 as proposed in Professor English's draft.

The Board resolved to defer, until the time is ripe for the appointment of a drafting committee, further discussion of the amendments that cannot be made administratively or under §4.3(b)(3) of the ULC Constitution.

5. Principal and Income. Professor English, joined by Mr. Gorin and Ms. Cantrell, led a discussion of matters arising under the Uniform Principal and Income Act. The discussion focused on:

- (a) The amendments approved at the ULC annual meeting in July 2008.
- (b) Possible amendments to the 20% rule in §401(d). The Board discussed memoranda prepared by Ms. Cantrell and Mr. Gorin. The Board resolved to solicit input from the ABA-RPTE Uniform Laws Committee (by Professor Gallanis), the ABA-RPTE Fiduciary Income Tax Committee (by Ms. Cantrell), and the ACTEC State Laws Committee (by Professor English).
- (c) Possible amendments to the 90/10 rule in §409. Professor English will ask his research assistant to catalog the different approaches to §409 in the enacting states. The Board also resolved to solicit input from ABA-RPTE and ACTEC as above.

The input from ABA-RPTE and ACTEC will be considered by the Board at its next meeting.

6. Real Property Transfer on Death. Professor Gallanis reported on the work of the ULC drafting committee. Mindful of the committee's role, the Board offered feedback on the current draft, focusing on the following topics:

(a) Whether a deed could be used by a grantor to transfer property inter vivos to a grantee with a TOD beneficiary designation in favor of a third party, and how this would affect the definition of "transferor" in §102(7).

(b) The effect, if any, of an instrument not meeting the requirements of §204.

(c) Whether a transferor should be permitted to make a TOD deed irrevocable, contrary to §206(a).

(d) The possibility that joint owners could execute and record a TOD deed, then sever the joint tenancy, then wish to revoke the TOD deed – a scenario not covered by the current §206(c)(2).

(e) The need for additional clarity in §208(a) and (d).

(f) Whether §209, Alternative B, should instead be a Legislative Note.

(g) The deletion of §§211-213 and the inclusion of a section on the statute of limitations.

(h) The bracketing of §214 on the ground that some states do not give creditors rights in assets passing outside probate.

(i) The forms in Article 3, including whether the provision of simple and more complex TOD deed forms, both of which should be optional as in the Uniform Health-Care Decisions Act. The Board also suggested a check-off box for the transferor to select antilapse protection for a deceased beneficiary's surviving descendants.

Following the next meeting of the drafting committee, in December 2008, Professor Gallanis will circulate by e-mail a revised draft for feedback from the Board.

7. Insurable Interests. Mr. Kent reported on the work of the ULC drafting committee. Mindful of the committee's role, the Board offered feedback on the current draft, focusing on the following topics:

(a) The definition of "settlor" in subsection (a).

(b) The opening phrase of subsection (b) ["Subject to other applicable law of this state"], which wrongly suggests that other law trumps this section. Instead, this section should trump other law.

(c) The desirability of deleting "an individual insured under a life insurance policy owned by the trustee of the trust if on the date the policy is issued the individual whose life is insured is" from subsection (b), which otherwise might be read, wrongly, to require that the trustee already own a policy on the individual's life in order to purchase additional insurance.

(d) The desirability of a subsection (b)(3), giving the trustee an insurable interest in at least some of the trust's beneficiaries, perhaps relying on the Uniform Trust Code's definition of a "qualified beneficiary" (UTC §103(13)).

8. Disclaimer of Property Interests. Professor Gallanis led a discussion of two clean-up matters. The Board recommended two technical amendments for approval by the ULC Executive Committee:

(a) The addition of the following Comment to §4 (and UPC §2-1104):

Comment

The supplementation of the provisions of the Act by the principles of law and equity in Section 4(a) is important because the Act is not a complete statement of the law relating to disclaimers. For example, Section 5(b) permits a trustee to disclaim, yet the disclaiming trustee must still adhere to all applicable fiduciary duties. See Restatement (Third) of Trusts §86 Reporter's Notes to cmt. f. Similarly, the provisions of Section 13 on bars to disclaiming are subject to supplementation by equitable principles. See *Badouh v. Hale*, 22 S.W.3d 392 (Tex. 2000) (invalidating a disclaimer of an expectancy as contrary to equity, on the ground that the putative disclaimant had earlier pledged it to a third party).

Not only are the provisions of the Act supplemented by the principles of law and equity, but under Section 4(b) the provisions of the Act do not preempt other law that creates the right to reject an interest in or power over property. The growth of the law would be unduly restricted were the provisions of the Act completely to displace other law.

(b) The following amendment to the fifth paragraph of the Comment to §7 (and UPC §2-1107):

These developments in the tax law of disclaimers are reflected in subsection (a). The subsection allows a surviving holder of jointly held property to disclaim the greater of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that it not attributable to the disclaimant's contribution to the jointly held property. In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC §2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. (Note that under subsection (a)(1) A can disclaim up to 50% of the account on B's death because there are two joint account holders, but the disclaimer would not be fully tax qualified. As previously noted, a tax qualified disclaimer is limited to 40% of the account.) If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC §2518 are met.

9. **Special Needs Trusts.** The Board discussed a suggestion from Mr. Seth Weisbrod, an attorney with United Disabled for Economic Security in Los Angeles, that a uniform act be prepared on special needs trusts. The Board concluded that a uniform act would not be feasible due to the lack of uniformity in state Medicaid regulations and bureaucracies. Professor English will communicate with Mr. Weisbrod.

10. **Mental Health Directives.** Professor English gave a brief report on the status of this project, which is being considered by a ULC study committee. The appointment of the study committee was supported by the Board (see March 2008 minutes, item 14(b)).

11. **International Matters.** Professors English and Gallanis reported on their meeting with Mr. David Stewart of the State Department. (Mr. Stewart's successor is Mr. Keith Loken.) Professors English and Scoles led a discussion of the international conventions covering wills, trusts, succession, and incapacitated adults. Professors English and Gallanis will meet with Mr. Loken in April 2009, when ABA-RPTE holds its spring CLE meeting in Washington, D.C. In the interim, Professor English will prepare, with assistance from Professor Scoles, a letter from the Board to the State Department, summarizing the repeated endorsements of these conventions by the Board's constituent groups, and urging that the conventions be ratified. Professor Gallanis will contact Professor Jeffrey Schoenblum, who has been on record as opposing ratification, to determine the nature of his objections.

12. **Mandatory Arbitration.** Professor English and Mr. Stone led a brief discussion of a new Florida statute making enforceable mandatory arbitration clauses in wills and trust instruments. The Board resolved to discuss the topic more fully at its next meeting.

13. **Wellman Award.** After a brief discussion, the Board decided not to make an award this year.

14. **Trustee's Duty to Diversify.** The Board briefly discussed a Montana statute permitting a trustee to retain farm or ranch property, a closely held family business, timber interests, or interests in oil, gas or minerals, unless otherwise directed by a majority of adult trust beneficiaries. The Board concluded that the statute would be better if the presumption ran in the other direction, requiring diversification unless the beneficiaries affirmatively authorized retention by the trustee.

The meeting was adjourned on Saturday, October 11, 2008, at 2:04pm.

Respectfully submitted,

Thomas P. Gallanis
Assistant Executive Director