UNIFORM TRUST CODE

UTC NOTES

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INSIDE...

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UNIFORM TRUST CODE 2005

Legislative Process, Enactment Prospects and Healthy Debates

By Michelle W. Clayton,
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Introduction

The Uniform Trust Code ("UTC") enters its fifth year with ten enactments in the following jurisdictions: District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah and Wyoming. UTC bills are pending in Pennsylvania and Massachusetts. Legislative prospects for 2005 are very good with at least ten states planning introductions, many of which already have support from their state bar and bankers.

Although the UTC does have some detractors, mainly due to misunderstandings about the creditor rights provisions in Article 5, many legislatures are expected to enact the UTC because it improves trust law, particularly in states that have very little or many gaps in their statutes. This article includes a brief discussion of the legislative process, a short synopsis of the states expected to introduce UTC bills as well as those studying it for future enactment, and a very brief statement of some of the "issues" that might cause unnecessary concern in the states. More in-depth and scholarly articles on these issues will be published in early 2005.

The Legislative Process

In some articles about the UTC, information on legislative activity has been somewhat misleading, suggesting that some states are "rejecting" the UTC. Each state legislature has a different power structure, legislative tradition and differing relationships with the bar, bankers and other groups. Factoring in the

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major budget crisis in most states that dominated the legislatures' attention, it is fortunate that the UTC (which has no fiscal impact) was taken up for consideration at all, much less enacted in ten jurisdictions.

It is important to look at the circumstances since the states are each unique in their legislative process and personalities. Some states and/or bar associations tend to take longer to study and enact uniform acts than others. Large states, like Texas, with comprehensive trust law already on the books, are naturally slower to adopt something as complex as the UTC. While it was reported that Texas "rejected" the UTC, the comments to the current bill draft to revise the Texas Trust Code tell a very different story. Many of the proposed revisions to the Texas trust statutes are taken straight out of the UTC and the comments indicate from which UTC section the new language is derived. Furthermore, the current Texas Trust Code was the source of many of the provisions in the UTC.

In some states, any controversy, legitimate or not, will kill a bill. Therefore, to say that a state has "rejected" the UTC is simply not accurate, particularly in cases like Oklahoma. The Oklahoma bill had strong support from the bar and bankers, passed out of one House without opposition, but was killed when one legislator unilaterally moved the bill off the agenda of the last committee meeting. One could not accurately say that the Oklahoma Legislature "rejected" the UTC. Similarly, some UTC bills, like Virginia's, are introduced without the intention of them passing that year. Instead, it is introduced to give notice to any interested parties that it is pending in that state to allow time for the most input possible. When those bills do not pass, they are not "rejected" by the legislature, and legislators do not view it in those terms unless an overwhelming negative vote is recorded.

Even in Arizona, where the UTC was repealed, the legislative note on the repeal is not a clear "rejection." Instead, the bill that repealed the UTC specifically stated that the Arizona Legislature "*[a]ffirms the efforts of the NCCUSL and the intent of the Legislature to continue studying the UTC so that acceptable elements may be implemented to improve Arizona trust laws.*" The Arizona Bar continues to meet about the UTC and has resolved many of the issues that caused the repeal.

Additionally, many of the already enacted UTC states, such as Nebraska, will amend their versions of the UTC by including the 2004 amendments and potentially other changes that will enable the UTC to better meet the needs of particular states. Because the UTC, with comments, is over 150 pages long and quite complex, these amendments are normal and reflect the simple fact that the law is never static.

The twenty or more state bar associations working to enact the UTC in their states are doing so enthusiastically, making necessary changes and recognizing that passing a large complex statute may not happen overnight. But, even if it takes some years, most think it worth the effort because clear statutory law will be a major improvement for trust lawyers, administrators, and, most of all, the many citizens now using trusts.

UTC Introductions Expected in 2005

Alabama is expected to introduce a UTC bill through the Alabama Law Institute in cooperation with the Alabama Bar Association and the Alabama Bankers' Association.

After a two-year study, the ***Arkansas*** Bar Association is sponsoring a UTC bill with some modifications. It will be introduced in the General Assembly in January and has support from the Arkansas Bankers' Association.

The ***Colorado*** Bar continues its push to enact the UTC, despite some setbacks in the past few years. After a full debate on the impact of the UTC on special needs trusts, the Trust and Estates Section of the Colorado Bar voted down a motion to temporarily withdraw support for the UTC and plans to continue to move forward towards enactment in the next two years.

The ***Connecticut*** Bar Association and the Connecticut Bankers' Association continue discussions in an attempt to find common ground and an agreed upon version of the proposed Connecticut UTC. However, the bankers first priority is reform of Connecticut's probate system before they will consider the UTC, because of the additional powers the UTC would confer on our court system. Therefore they are considering stand alone provisions of the UTC that would not affect courts powers or jurisdiction until the probate courts can be modernized or reformed. In the meantime, the bar is working diligently on the probate court issue.

A broad based UTC study committee is expected to start meeting in ***Massachusetts*** in January 2005. It is hoped that the UTC bill already introduced in the Legislature will be supported once the study is completed and the bill is modified to meet the needs of that state.

After a thorough review for several years the Estate Planning and Fiduciary Law Section of the ***North Carolina*** Bar Association has recommended its version

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of the UTC for approval by the Bar's Board of Governors in January 2005. If approved, a UTC bill will be introduced in 2005.

The ***Ohio*** Bar and Bankers' Associations expect the UTC to be introduced and passed in 2005. It is now working through a list of simple technical issues to the Ohio version and will be introduced in the new General Assembly early in the session. If enacted early in the session, it could be effective the first of 2006.

The ***Oklahoma*** Bar Association passed the UTC Resolution at its annual meeting in November 2004 by unanimous consent. It will be introduced in the Oklahoma Legislature in January 2005. The Oklahoma UTC bill will have a November 1, 2005 effective date.

The ***Oregon*** Bar conducted a two year study that included numerous other interest groups. The bill has been drafted and will be introduced in 2005.

The ***Pennsylvania*** UTC was introduced in 2004 and is expected to pass in 2005.

A UTC bill is expected to be introduced in ***South Carolina*** in the next two months after a study by the Bar.

The Trusts and Estates Section of the ***Virginia*** Bar Association will seek reintroduction of the UTC in January. A bill implementing the Section's recommendations is being prepared by the Division of Legislative Services.

Current UTC Studies

The ***Florida*** Bar subcommittee studying the UTC has almost concluded its three-year study of the UTC. Its draft will soon go to the full RPPT section of the Florida Bar and then through the full Bar. A Florida UTC bill is likely in 2006.

The ***Georgia*** Bar is currently conducting its review of the UTC and expects to complete the study for possible introduction in 2006.

The ***Idaho*** Bar continues its study of the UTC, but will not have a bill in 2005.

The ***Michigan*** Bar and Bankers' Associations each continue to study the UTC for possible enactment.

The ***Montana*** Bar, having just enacted the Uniform Principal and Income Act and the Uniform Prudent Investor Act, expects to complete a study of the UTC for an introduction in 2007 (Montana's Legislature skips every other year.)

A task force in ***Washington*** began studying the UTC in 2003.

New Studies

The ***South Dakota*** State Bar is reviewing the UTC and hopes to complete the study by mid-April so that it can be submitted for Bar approval at the annual bar convention in June. If approved it would then be submitted in the January 2006 legislative session for implementation on July 1, 2006. The committee is working in conjunction with the Governor's Task Force and the Banking Commission. Introduction in 2006 is expected.

Although the UTC has been introduced several times in the ***West Virginia*** Legislature, it has had no success because a full study has not been conducted. The West Virginia Law Institute has recently taken the UTC up as a project for review. We expect to see an introduction in 2006.

The ***Wisconsin*** Bar recently formed a UTC study committee with representation from the Bankers' Association. The committee expects to start meeting in early 2005.

Latest "Issues" Addressed

Several recent articles about the UTC claim that it will cause problems with protecting assets, permitting special needs trusts, encouraging divorce litigation, and attorney malpractice. These claims are based on a misunderstanding of the UTC and its provisions.

The UTC largely codifies traditional American trust law with regard to spendthrift clauses and most of the traditional exceptions to the spendthrift rule. The current majority rule regarding the exception of spouses, former spouses and children with valid support claims is codified because of its important policy implications. However, because there is considerable variation among a number of the states on the exceptions to spendthrift, it is not surprising that several states have changed the exceptions to reflect their current law.

Arguments are being made that the elimination of a separate category for support trusts and their treatment as the same as other discretionary trusts is somehow detrimental to special needs trusts. In fact, this change actually strengthens and clarifies the right to beneficiaries regarding distributions and their protection against government intrusion. Furthermore, the UTC clarifies and improves creditor protection in third-party special needs trusts because it prohibits creditors from forcing

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trustees to exercise discretion regardless of the standard employed.

Another misreading relates to the good faith standard for trustee's exercise of discretion regardless of trust terms such as "uncontrolled" or "absolute." The standard does not increase the beneficiary's ability to compel distributions and does not prevent asset protection planning for the interests of beneficiaries. The standard is consistent with the common law.

It is also incorrect to claim that the UTC will impact divorce litigation since the UTC has little or no effect on a beneficiary's right to compel a discretionary distribution. Therefore, it does not change how or if such trust interests are considered for spousal and child support purposes. The division of property in divorce proceedings is not even addressed in the UTC. The UTC does not alter existing law on the characterization of trust interests for this purpose.

Finally, because the above claims are false, the argument that creating a trust in a UTC state will cause attorneys to be sued for malpractice is wrong as well. This grasping argument could be made the other way and is simply an effort to cause confusion and panic in the estate planning bar, most of which supports the UTC.

Conclusion

The UTC will likely have its best year in 2005. As state bar associations finish up two and three year studies, fine-tuning of this important legislation combined with state-by-state educational programs and discussions will continue to increase the knowledge and expertise of the estate planning bar. Although there is a national debate about what the common law is and should be, these discussions are helpful to the process. All over the country, attorneys are refining their knowledge of trust law through the study of the UTC. NCCUSL benefits from this scrutiny by carefully considering each valid critique offered and making amendments where necessary. Because each state will be responsible for the final determination of public policies relating to trusts, the UTC will never be fully uniform from state to state. However, it will greatly improve American trust law for those who work in the field of trusts, and, most importantly, for the millions of Americans now using trusts.

UTC NATIONAL COMMITTEE EVALUATES CONCERNS

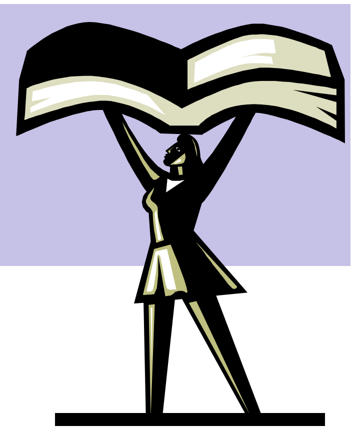
Since the formation of the UTC National Committee in April 2004, its members have considered a number of issues relating to the Uniform Trust Code, both from an overall national perspective and from how the UTC might affect their own state's law on certain policy issues. The members of the UTC National Committee consist of state UTC study committee chairs (from over 25 states), representatives from the UTC drafting committee, and American Bar Association official advisors to the UTC.

The National Committee provided valuable feedback to the UTC Standby Committee as it drafted several amendments that were approved at NCCUSL's annual meeting in August 2004. Those amendments were distributed to states now considering the UTC. Many of the comments bracket or provide alternatives to notice provisions since the states are not likely to enact them uniformly. NCCUSL and the UTC Drafting Committee, however, still conclude and strongly recommend that notice is preferable to a silent trust which provides no protection for beneficiaries. As noted in the description of John Langbein's article, Rise of the Management Trust, in this issue of UTC Notes, the evolution of trusts has necessitated more legal protection for beneficiaries as assets shifted over the centuries from ancestral land to investment portfolios.

The National Committee recently analyzed claims made regarding the asset protection aspects of the UTC made in both Trust & Estates and Estate Planning magazines as well as on some estate planning online listserves. The Committee concluded that they were either incorrect or misinterpretations of the UTC, the Restatement of Trusts, and the common law. Several members of the National Committee, with support from the entire group, wrote full responses to the claims made in the articles that will be published early in 2005.

SIMPLY EXPLAINED:

UTC ARTICLE 5 ON CREDITORS' RIGHTS



By Professor Valerie J. Vollmar

Willamette University College of Law

Co-Chair of the Oregon State Bar UTC Committee

Editor's Note:

On a conference call in mid-October, the National UTC Committee discussed various aspects of UTC Article 5 on creditors' rights. The group was working to respond to mis-readings in recently published articles about the UTC. Professor Valerie J. Vollmar of Willamette University College of Law, the Co-Chair of the Oregon UTC Committee, began to describe Article 5 section by section in such a clear way that the rather large group of estate planning experts from around the country fell silent. After the call, I asked her if she would write down exactly what she had said. The following is what Professor Vollmar emailed to me.

[Re-printed from the December 2004 edition of E-State, the American Bar Association Real Property, Probate and Trust Law Section electronic newsletter.]

A BASIC DESCRIPTION OF UTC 501 THROUGH 504

Introduction

Article 5 of the Uniform Trust Code governs the rights of creditors to reach trust property. These provisions of the UTC have created a great deal of controversy, in part because of misunderstandings about what the UTC actually says. For the most part, Article 5 simply restates the traditional rules about the rights of creditors. Although Article 5 does include some more innovative provisions, many of the states that have adopted the UTC have elected to reject or modify these provisions.

Section 505 of the UTC covers the rights of creditors of *the settlor* of a trust. Sections 501 through 504, on the other hand, cover the rights of creditors of *a trust beneficiary* who is *not* the settlor of the trust. Most of the confusion involves Sections 501 through 504, which are described below.

Section 501

Section 501 applies only to trusts that do *not* contain a spendthrift provision. Most trusts today are spendthrift trusts, so this section rarely applies.

In the rare case in which a trust does not contain a spendthrift provision, Section 501 conforms to the traditional rules that (1) a beneficiary of a non-spendthrift trust can voluntarily transfer the beneficiary's interest in the trust, and (2) creditors of the trust beneficiary may be able to force involuntary access to the beneficiary's interest to satisfy their claims. Before an assignee or creditor can reach the beneficiary's interest through the procedures authorized by state law, however, Section 501 requires that a court give its approval. Moreover, the court may limit access to a non-spendthrift trust based on equitable considerations such as the support needs of the beneficiary and the beneficiary's family.

Section 502

Section 502, unlike Section 501, does apply to spendthrift trusts. But Section 502 does not describe specifically what rights particular creditors have.

Instead, subsections (a) and (b) say that a spendthrift provision is valid only if it restrains both voluntary transfers by a trust beneficiary and involuntary transfers forced by the beneficiary's creditors, and that words like "spendthrift trust" are sufficient to create a valid spendthrift trust. Subsection (c) states the traditional rules that (1) a beneficiary of a spendthrift trust cannot make a voluntary transfer of the beneficiary's interest, and (2) a beneficiary's creditor cannot force involuntary access to a spendthrift trust unless the creditor is an "exception" creditor given special treatment for policy reasons.

Section 503

Section 503 identifies the "exception" creditors that may be allowed to reach a beneficiary's interest in a spendthrift trust.

Two categories of "exception" creditors are traditional ones: (1) a beneficiary's child, spouse, or former spouse with a valid support judgment or order that has

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not been paid; and (2) a state or federal government claim authorized by state or federal law (such as a claim for unpaid taxes). One category of "exception" creditors under Section 503 is more novel, but is unlikely to apply in very many cases: a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust (such as a beneficiary's lawyer in trust litigation who has obtained a judgment against the beneficiary for failing to pay the lawyer's fees). Section 503 also shrinks the list of traditional "exception" creditors, by eliminating creditors who have supplied "necessaries" (such as food, clothing, or shelter) to the trust beneficiary.

One very important fact about "exception" creditors is that Section 503 permits them to reach only distributions *required by the express terms of the trust* (such as mandatory payments of income) and *distributions a trustee has already decided to make anyway* (such as through actual exercise of the trustee's discretion to make certain distributions). Section 503 does not authorize any creditor—including a child or spousal claimant—to *compel* a discretionary distribution. See UTC Sec. 503 cmt.

Section 504

Section 504 is the UTC provision that has generated the most controversy about the rights of a trust beneficiary's creditors. This section, unlike Section 503, potentially permits a beneficiary's creditor to *compel* a distribution from a discretionary trust, even one that contains a spendthrift provision.

Section 504(b) states the traditional general rule that a *beneficiary's creditor* may not compel a distribution from a discretionary trust, even if the trustee has violated a standard of distribution (such as "health, education, support, and maintenance") or abused the trustee's discretion. (Of course, as Section 504(d) makes clear, *the beneficiary* could compel a distribution for his or her own benefit by proving that the trustee violated a standard or committed an abuse of discretion.)

The controversial part of Section 504 is in subsection (c), which creates a special exception to the traditional general rule governing discretionary trusts. Under this exception, a beneficiary's child, spouse, or former spouse with a valid support judgment or order that has not been paid may claim that the trustee of a discretionary trust has violated a standard or abused the trustee's discretion in failing to make a distribution, and that the court therefore should *compel* the trustee to make a discretionary distribution to satisfy the claim. (Of course, the court may limit the amount paid to an amount the court determines is "equitable under the circumstances.")

States that have adopted or are considering adopting the UTC are all over the map in their response to Section 504. Some states favor the UTC approach to creditors' claims against discretionary trusts. Other states, however, reject this approach. Some of these states have deleted Section 504 entirely; other states expressly provide that *no* creditor can compel a distribution from a discretionary trust; others give special rights to the beneficiary's children but not to former spouses.

The important point here is that UTC Section 504 is not some "monolithic" new rule likely to sweep the country. Individual states will continue to make their own policy decisions about whether child and spousal claimants should be afforded special treatment that departs from traditional trust rules about discretionary trusts.

JOHN LANGBEIN DETAILS THE RISE OF THE MANAGEMENT TRUSTS

Professor John H. Langbein, Commissioner from Connecticut, has published an article titled, Rise of the Management Trust, in the October 2004 issue of Trusts & Estates magazine. The article, which was written for the magazine's centenary celebration issue, points out how the trust has changed function across the past century, and how that change in function has led to major changes in the law of trusts that now come to expression in the Uniform Trust Code and related uniform acts.

Well into the nineteenth century, Langbein explains, the core function of trustees was simply to hold and then convey interests in land. The primary purpose of the modern trust, by contrast, is the management of a portfolio of

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financial assets. As the nature of the trust property changed, so did the nature of trusteeship. When family real estate was the typical trust asset, trustees had relatively little to do, beyond transferring the land according to the terms of the trust instrument when somebody died. Such trustees were commonly family members or other amateurs. When, however, trusteeship came to embrace the work of active financial management (which includes buying, selling, and voting shares, and making and keeping financial and tax records appropriate to such active management), the modern trust industry came into existence. Fee-paid professionals--specialists in investment management, trust accounting and taxation, and fiduciary administration--have increasingly displaced amateurs.

Trusteeship is meant to benefit the beneficiaries, Langbein writes, but the trustee's ownership of the beneficiary's property carries with it the intrinsic danger that the trustee might mismanage or misappropriate the property. Trust law has always been alert to protect against that danger. In the early centuries of the trust, the law simply denied most transactional powers to the trustee. The rise of the management trust forced the law to abandon the strategy of disempowering trustees. Managing a portfolio of marketable securities requires extensive transactional authority, now exemplified in the Uniform Trustee Powers Act and equivalent provisions of the Uniform Trust Code. In place of disempowerment, says Langbein, twentieth-century trust law substituted fiduciary law--the rules that require trustees to use trust powers prudently and for the best interest of the beneficiaries.

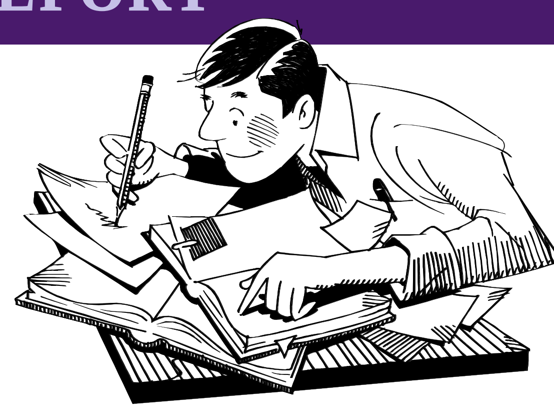
Langbein emphasizes that the trust industry has become increasingly national in character. The corporate fiduciaries who offer trust services tend more and more to do business in many states, and it is ever more common for individual trusts to have property and beneficiaries in more than one state. Accordingly, he notes, American trust law has also become ever more national in character. Langbein points to the three Restatements of Trusts (1937, 1959, 1992-date), and to the uniform laws, as the main agents of this movement. He emphasizes the central importance of the Uniform Trust Code and its associated legislation (the Uniform Prudent Investor Act and the Uniform Principal and Income Act) as part of this trend toward nationally uniform trust law.

The article concludes by noticing the new frontier of trust law, in commercial trusts, especially the burgeoning use of the trust as the vehicle of choice for asset securitization, pension funds, and mutual funds. So vibrant is the management trust that both the trust and the modern law of trust administration are now spreading to legal systems such as Japan and Italy, to which the trust is not indigenous.

REPORTERS REPORT

The UTC and Crummey Powers

by David English



This report answers the question posed to me by an attorney in New Hampshire, who after reading an article on the Steve Leimberg listserv asked, "Why under the UTC a creditor of the holder of a lapsed Crummey power ought not to be able to attach the debtor's full interest in the trust, since it's considered a self-settled trust?"

The answer is that Section 505 specifically excludes Crummey and 5 and 5 powers from creditor claims following their lapse or release. Here are the details:

The email article conflates the UTC and the Restatement Third together, criticizes the Restatement, and then assumes that the UTC is the same. The creditor provisions of the UTC and the Restatement Third are very different.

As a general rule, Section 505(b)(1) treats the holder of a power of withdrawal for creditor purposes the same as the settlor of a revocable trust during the period the power can be exercised. Upon the release or lapse of the

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power, the property subject to the power would presumably therefore be subject to creditor claims.

But the UTC has a very big exception not present in the Restatement. Section 505(b)(2) provides that upon the lapse, release or waiver of the power, the holder of a Crummey or 5 and 5 powers is not treated as a settlor. The power holder would be treated as the settlor only to the extent the power exceeds the Crummey or 5 and 5 amounts.

The article states that only two states subject property under a power of withdrawal to creditor claims. I count at least six (Arizona, California, Michigan, New York, Texas, Wisconsin). Of those six, only Arizona and Texas specifically protect Crummey/5 and 5 powers.

The article points out that subjecting the property subject to a power of withdrawal is a dramatic change in the common law. However, the cases are very old. The common law also provided that the property of a revocable trust was exempt from creditor claims at the settlor's death. Few believe that these old cases on revocable trusts are still viable. It is hard to distinguish the settlor of a revocable trust from the holder of a power of withdrawal that extends to the entire trust. It is easy to make an argument for an exception for Crummey and 5 and 5 powers which is why the UTC creates this exception.

All 10 jurisdictions that have enacted the UTC to date have retained the language of Section 505(b) as is, in several following a committee debate as to the appropriate scope of creditor protection. Section 505 is but one of 94 sections of the UTC. Section 505(b) is certainly not the most important provision in the UTC and we certainly understand that states may make changes.

Revising UMIFA

By Susan Gary

The Uniform Management of Institutional Funds Act ("UMIFA") was promulgated in 1972 and has been adopted in 47 jurisdictions. The Act provides guidance to charities on investment decision making, the delegation of authority to independent financial advisors, the expenditure of endowment funds, and the release of restrictions on the use or investment of funds. A Drafting Committee to revise UMIFA has been working on the Act for several years and expects to ask NCCUSL for approval of Revised UMIFA at this year's annual meeting.

Revised UMIFA applies to all charities, regardless of the form of organization. Although current UMIFA does not apply to trusts managed by corporate trustees, much of Revised UMIFA already applies to charitable trusts, in states that have adopted the Uniform Prudent Investor Act and the Uniform Principal and Income Act. In Revised UMIFA only the endowment spending rules and part of the cy pres rules are different from existing uniform laws applicable to trusts. These rules are permissive and do not require action by charities, so under Revised UMIFA the benefits will be available to all charities.

Revised UMIFA updates the standard for investing and managing institutional funds. The standard remains a prudence standard, as it is under current UMIFA, but the formulation of the standard draws from both the Revised Model Nonprofit Corporation Act and from the Uniform Prudent Investor Act. The standard is consistent with the business judgment standard under corporate law, but as applied to charitable institutions and not to businesses. The charitable nature of the institution will affect the decision making of a prudent person acting under the UMIFA standard. In making decisions, directors, trustees and others responsible for managing charitable funds must consider directions from the donor in the gift instrument, the purposes of the charity and of the fund, the needs of the institution to make distributions and to preserve capital, and other resources of the institution. Other factors look to general economic conditions and to investment strategies that analyze the portfolio as a whole, including total-return investing and sensitivity to the risk and return curve of the entire portfolio.

The most significant change from current UMIFA affects endowment spending. Both current UMIFA and Revised UMIFA include rules that permit endowment spending based on prudence rather than on a determination of "income" based on trust accounting principles. Current UMIFA allows spending above "historic dollar value," the amount actually contributed to a charity, without adjustment for changes in purchasing power over time. Revised UMIFA deletes the concept of historic dollar value and instead permits spending of amounts that are prudent. Revised UMIFA includes a rebuttable presumption of imprudence for spending in excess of seven percent of the asset value of a fund, determined as a three-year rolling average. The presumption is not intended to imply that spending below seven percent is prudent, and a charity must make its spending decisions after careful consideration.

UMIFA rules on endowment spending are default rules and can be overridden by a donor's direction when making a gift. Many large charities use spending formulas and ask donors to agree to the spending formula, as

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adjusted from time to time by the governing board of the charity. A charity will always be bound by the donor's intent, but a donor's direction to hold a gift "as an endowment" will mean that UMIFA will apply.

Like current UMIFA, Revised UMIFA allows a donor to release a restriction imposed on a gift, and allows a charity to ask a court to release a restriction if the donor has died or cannot be found. Revised UMIFA also makes clear that a charity can ask a court to apply the doctrines of cy pres and equitable deviation to alter a restriction. Revised UMIFA adds a new provision that allows a charity to apply cy pres itself, after notice to the Attorney General, if a restriction on a fund that is more than 20 years old and is valued at less than $25,000 has become unlawful, impracticable, impossible to achieve, or wasteful. The Drafting Committee determined that for some small funds that have existed for a long time, a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be prohibitive. The new provision permits a charity to modify the restriction without the cost of going to court.

Finally, it is important to remember that UMIFA is not a comprehensive statute addressing all legal issues that apply to charitable organizations. UMIFA governs the investment and management of charitable funds, the spending of endowment funds, and the modification of restrictions on charitable funds. Those who govern charities will continue to look to other laws for guidance on other governance issues. Charities organized as nonprofit corporations will be governed by the laws applicable to nonprofit corporations, including any nonprofit corporation statute, and charities organized as charitable trusts will be governed by trust law, both the common law and any statutory law.

The Drafting Committee continues to solicit input from anyone with an interest in Revised UMIFA. Comments should be sent to Susan Gary, by email if possible to sgary@law.uoregon.edu, or by regular mail to Professor Susan N. Gary, University of Oregon School of Law, Eugene, OR 97403-1221. An electronic copy of the current draft is posted on the NCCUSL website.

Uniform Power of Attorney Act Has First Reading

By Linda Whitton

A proposed draft of the Revised Uniform Durable Power of Attorney Act was considered for a first reading before the National Conference of Commissioners on Uniform State Laws in August. Comments from Commissioners and other interested persons were considered by the drafting committee in October to produce a revised draft. The latest draft of the proposed Act, tentatively renamed the Uniform Power of Attorney Act, is available on the NCCUSL website. After the fall drafting committee meeting, Linda Whitton, Reporter for the Act, met with the Joint Editorial Board for Uniform Trusts and Estates Acts, the leadership of the National Conference of Lawyers and Corporate Fiduciaries and the ABA Section of Real Property, Probate and Trust Law, seeking further input on the revised draft. A new interim draft based on feedback since the October drafting committee meeting will be available for review on the NCCUSL website in late January.

Significant enhancements in the proposed Act include a statutory presumption of durability for all powers of attorney and greater specificity in provisions concerning the conduct of agents and the acceptance of an agent's authority by other persons. To facilitate ease and certainty in drafting, the proposed Act contains statutorily defined powers that can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on an optional statutory short form. The Act also offers protection against unintended dissipation of a principal's property or alteration of the principal's estate plan by requiring a specific grant of authority for such powers as making gifts, making or changing beneficiary and survivorship designations, and revoking or creating a trust with the principal's property.

Anyone who wishes to offer comments or suggestions on the proposed Act is encouraged to contact Linda Whitton (Linda.whitton@valpo.edu), Reporter for the Act, or Jack Burton, Chair of the Drafting Committee (jburton@rodey.com).

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