

# **WEST VIRGINIA COMMISSION ON UNIFORM STATE LAWS**

## **REPORT TO THE WEST VIRGINIA LEGISLATURE REGULAR SESSION 2008**

### **I. INTRODUCTION**

The West Virginia Commission on Uniform State Laws submits this annual report to the West Virginia Legislature in accordance with the provisions of West Virginia Code, § 29-1A-4. Since the establishment of the West Virginia Commission on Uniform State Laws, its members have regularly and actively participated in the National Conference of Commissioners on Uniform State Laws (also called the “National Conference” and “NCCUSL”) as required by Section 29-1A-4 of the West Virginia Code. From the Uniform and Model Acts promulgated by the Conference, the West Virginia Commissioners have selected those which they think would be most immediately beneficial to the State of West Virginia and have worked with the state Legislature for their passage.

### **II. HISTORY OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS**

In 1889, the New York Bar Association appointed a special committee on uniformity of laws. In the next year, the New York Legislature authorized the appointment of Commissioners “to examine certain subjects of national importance that seemed to show conflict among the laws of the several commonwealths, to ascertain the best means to effect an assimilation or uniformity in the laws of the states, and especially whether it would be advisable for the State of New York to invite the other states of the Union to send representatives to a convention to draft uniform laws to be submitted for approval and adoption by the several states.” In that same year, the American Bar Association adopted a resolution recommending that each state provide for Commissioners to confer with the Commissioners of other states on the subject of uniformity of legislation on certain subjects. In August of 1892, the first National Conference of Commissioners on Uniform State Laws convened in Saratoga, New York, three days preceding the annual meeting of the American Bar Association.

By 1912, every state was participating in the National Conference. In each year of service, the National Conference has steadily increased its contribution to state law. The National Conference has attracted some of the best of the profession. In 1912, Woodrow Wilson became a member. This, of course, was before his more notable political prominence and service as President of the United States. Justices of the Supreme Court of the United States (Louis Brandeis, Wiley Rutledge, and William Rehnquist) have been members. Legal scholars have served in large numbers. Examples are Professors Wigmore, Williston, Pound, and Bogart. This distinguished body has guaranteed that the projects of the National Conference are of the highest quality and are enormously influential upon the process of the law.

As it has developed in its 114 years, the National Conference is a confederation of state interests. It arose out of the concerns of state government for the improvement of the law and for better interstate relationships. Its sole purpose has been, and remains, service to state government and improvement of state law.

### **III. THE OPERATION OF THE NATIONAL CONFERENCE**

The National Conference is convened as a body once a year. It meets for a period of eight days, usually in late July or early August. In the interim period between the annual meetings, drafting committees composed of commissioners meet to supply the working drafts which are considered at the annual meeting. The various drafts are accessible on the Internet. The address is [www.nccusl.org](http://www.nccusl.org). At each annual meeting, the latest drafts of the drafting committees are read and debated. Normally, each Act is considered over a minimum period of two years. No Act becomes officially recognized as a Uniform Act until the National Conference is satisfied that it is ready for consideration in the state legislatures. It is then put to a vote of the state delegations, during which each state caucuses and votes as a unit.

The governing body is the National Conference Executive Committee, composed of the officers, certain ex-officio members, and members appointed by the President of the National Conference. Certain activities are conducted by standing committees. For example, the Committee on Scope and Program considers all new subject areas for possible Uniform Acts. The Legislative Committee superintends the relationships of the National Conference to the state legislatures.

A small staff located in Chicago operates the national office of the National Conference. The national office handles meeting arrangements, publications, legislative liaison, and general administration for the National Conference. The total staff numbers only nine people.

The National Conference maintains relations with several sister organizations. Official liaison is maintained with the American Bar Association, which contributes an amount each year to the operation of the National Conference. Liaison is also maintained with the American Law Institute, the Council of State Governments, and the National Conference of State Legislatures on an ongoing basis. The Uniform Commercial Code is a continuing joint project of the National Conference and the American Law Institute. Liaison and activities may be conducted with other associations as interests and activities necessitate.

### **IV. ACTIVITIES OF THE WEST VIRGINIA COMMISSION ON UNIFORM STATE LAWS**

#### **A. Annual Meeting of the Commission**

The West Virginia Commissioners are Richard E. Ford of Lewisburg, Judge Frederick P. Stamp, Jr., of Wheeling and Vincent P. Cardi of Morgantown who

succeeded John L. McClaugherty of Charleston. Richard Ford is Chairperson of the West Virginia Commission and Frederick Stamp, Jr., is Secretary. The Commissioners met in July and in September by phone and after some discussion, decided to introduce the following Uniform Acts for eventual approval by the West Virginia Legislature at its 2008 session.

1. Revised Uniform Anatomical Gift Act
2. Uniform Prudent Management of Institutional Funds Act
3. Uniform Trust Code

The Commissioners also discussed the desirability of seeking passage of the Revised Uniform Limited Liability Company Act.

The final decision was to be left to Commissioner Cardi after his discussions with members and counsel to the West Virginia Joint Legislative Commission on Interstate Cooperation, Delegates and Senators serving on the Joint Commission, and other citizens and groups who would naturally have an interest.

**B. National Conference Offices Held by Commissioners from West Virginia and Committee Memberships**

Judge Stamp was until recently a Trustee of the Uniform Law Foundation.

Richard Ford is a member of the Legislative Council and is Regional Chairman for West Virginia, Virginia, the District of Columbia, Maryland, and North Carolina. He has also served for two years on the Executive Committee and has served for two years as Secretary of the National Conference of Commissioners on Uniform State Laws. Vincent Cardi is the Legislative Liaison Member for West Virginia.

Former Commissioner John L. McClaugherty served two years as Chairman of the Executive Committee and served two years as President of the National Conference, an honor for lawyers second only to the Presidency of the American Bar Association.

The commissioners from West Virginia serve on several committees of the National Conference. Richard Ford serves on the Committee on Review of Conference Act and the Committee on Membership and Attendance. Judge Stamp was the Chairperson of the Study Committee on Conflicts of Laws-Limitations Act, has served on the Scope and Program Committee and the Drafting Committee for the Correction or Clarification of Defamation Act, and serves on the drafting committee for the Uniform Regulation of Charities Act and the Committee on Review of Conference Acts. Vincent Cardi serves on the Study Committee for Regulation of Medico-Legal Death Investigations and served on the Study Committee on Notice and Repair of Construction Defects.

### **C. Work of the West Virginia Commissioners**

The tasks of the three commissioners, among other duties that arise as their Conference work demands, are to:

- (1) Meet at least once every two years as required by § 29-1A-3 of the West Virginia Code.
- (2) Participate as members of the Uniform Laws Commission as required by § 29-1A-4 in drafting Uniform and Model State Acts and other functions of the National Conference.
- (3) Work with the West Virginia Legislature's Joint Legislative Commission on Interstate Cooperation by
  - a. reporting on the work of the National Conference,
  - b. recommending to this Joint Legislative Commission Uniform and Model Acts produced by the National Conference that the West Virginia Commissioners think the Commission should introduce in the Legislature for enactment, and
  - c. working with this Joint Legislative Commission in advising and assisting the Commission in considering these Uniform and Model Acts.
- (4) Testify on the Uniform and Model Acts that have been introduced by the Joint Legislative Commission (or by other legislative committees) before the Judiciary Committee or other committees that have taken up these acts when needed, and otherwise assist the legislature in gathering information on and understanding these acts.
- (5) Make this annual report about the activities of the West Virginia Commission on Uniform State Laws to the Legislature as called for under § 29-1A-4 of the statute which creates the Commission.

### **V. THE WEST VIRGINIA COMMISSIONERS AND THE ANNUAL CONFERENCE OF THE UNIFORM LAW COMMISSION**

Commissioners Ford and Stamp attended the 116th Annual Conference of the National Conference of Commissioners on Uniform State Laws in August of 2007 in California, where they worked with other commissioners considering Uniform and Model Acts being presented to the Conference by various committees of state commissioners who have been working on the particular acts. Commissioner Cardi was unable to attend because as President of the Southeastern Association of Law Schools he had to attend its annual meeting taking place at the same time. This year the work of the Conference focused on the following:

- (1) discussing areas of social, commercial, and legal concerns which appear to be ripe for new state legislation, and deciding whether to appoint committees to study and make recommendations as to whether new state statutes should be drafted to address these problem areas;

- (2) deliberating on presentations from existing study committees as to whether a permanent drafting committee should be appointed to actually draft Acts on topics which have been studied over the last several years;
- (3) examining line-by-line preliminary drafts of Acts produced by existing drafting committees on various problems, and debating the policy implications of these drafts, the language of the drafts, and other matters surrounding these works in progress; and
- (4) participating in line-by-line readings of final drafts which are being presented to the conference for approval by the drafting committees.

Once the commissioners approved the final drafts they sent the resulting Uniform and Model Acts to the American Bar Association for its review.

The leadership of the Conference, on the advice of other commissioners, recommended to the commissioners attending the conference a list of "targeted acts," which are Uniform and Model Acts which they think are particularly ripe for presentation to state legislatures.

Throughout the conference, special conference committees and subcommittees met regularly during the morning, day, and evenings on particular tasks involving conference business.

Throughout the year, committees of commissioners met, and are continuing to meet, to study problem areas and to draft Model Acts.

#### **A. Creation of New Study Committees**

At this year's conference and at the winter meeting of the Executive Committee, 4 new study committees were appointed to consider subjects for possible future drafting. These include:

- (1) **Study Committee on the Hague Convention on Choice of Court Agreements**

This study committee will work with the U.S. State Department in connection with the implementation and ratification of the Hague Convention on Choice of Courts Agreement. The committee work will include consideration of the merits of ratification by the U.S., the effect of the Convention on U.S. law, the appropriate means for implementation, and whether any current uniform laws would need to be amended in light of the Convention.

- (2) **Study Committee on Certificate of Title System for Boats**

This study committee will consider whether a certificate of title system for boats, and possibly manufactured homes, should be drafted. Many states

do not have certificate of title law governing these types of goods and those that do have considerable differences in terms. The committee will also consider whether such an act should be a free-standing act or incorporated within the Uniform Certificate of Title Act (UCOTA).

**(3) Study Committee to Revise Model Drug Dependence Treatment and Rehabilitation Act**

The UDDTRA was approved in 1973 and was intended to complement the Uniform Controlled Substances Act with procedures to substitute treatment for incarceration. The fundamental principle of the act was fostering social and economic reintegration of drug dependent persons into society. Since the original 1973 act was not adopted in any state, the study committee will focus on enactment feasibility.

**(4) Study Committee to Revise Uniform Federal Lien Registration Act**

This committee will research the need to revise the Uniform Federal Lien Registration Act to better harmonize the filing requirements for notices of federal liens with those applicable to security interests under UCC Article 9. Security interests and tax liens should be readily discoverable by third parties because lenders and buyers are concerned with both encumbrances

**B. Creation of New Drafting Committees**

Drafting committees composed of commissioners, with participation from observers, advisors and reporter-drafters, have been meeting and will meet throughout the year. Tentative drafts of the laws are not submitted to the entire Conference until they have received extensive committee consideration. Proposed Acts are subjected to rigorous examination and debate in at least two annual meetings before they become eligible for designation as Conference products.

This year 10 new drafting committees were created to begin working on new Acts. These are:

**(1) Drafting Committee to Revise Uniform Division of Income for Tax Purposes Act**

This committee will revise the Uniform Division of Income for Tax Purposes Act, last amended in 1966, in conjunction with the proposed revision of the Multistate Tax Compact. Twenty states have adopted the Compact and 20 have adopted UDITPA, with some overlapping. The committee will focus on Section 17 of UDITPA (Article IV of the Compact) which deals with sales factor sourcing for transactions other than sales of tangible goods.

- (2) Drafting Committee on Electronic Recordation of Custodial Interrogations**  
This committee will draft an act addressing the issue of the use of audio and/or video electronic devices to record law enforcement officers' interviews of criminal suspects who are in custody.
- (3) Drafting Committee on Environmental Controls and Hazards Notice System Act**  
This committee will draft an act to work with existing "one-call" systems (which allow landowners, contractors, and other workers to call prior to breaking ground in order to determine if underground utilities are present). It is hoped that these one-call systems will be significantly enhanced if environmental use controls and hazards are included in such notice systems.
- (4) Drafting Committee on Insurable Interests Relating to Trusts Act.**  
This committee will draft an act to address concerns regarding the purchase of life insurance trusts by trustees as it relates to insurable interest law. Life insurance trusts are a standard estate planning tool because proceeds of an irrevocable life insurance trust are not subject to estate taxes. Recent case law has raised the possible need for uniform law on insurable interests. The scope of the project is narrow and might be drafted within the Uniform Trust Code or as a free-standing act.
- (5) Drafting Committee to Amend Uniform Interstate Family Support Act**  
The purpose of this committee is to consider the impact of the expected November 2007 completion of the Hague Convention on Family Maintenance, which deals with international recovery of child support and other forms of family maintenance. The committee is expected to draft amendments to UIFSA that would comply with the new Hague Convention.
- (6) Drafting Committee to Revise Uniform Law on Notarial Acts**  
The purpose of this drafting committee is to revise the 1982 Uniform Law on Notarial Acts and address issues relating to new technologies. The charge is limited to notary responsibilities, electronic recording, interstate recognition, and remedies.
- (7) Drafting Committee on Presidential Electors Act**  
This committee will draft an act providing a state statutory remedy in the event a state presidential elector fails to vote in accordance with the voters of his or her state.

- (8) **Drafting Committee on Record Owners of Business Act**  
This committee will draft an act to conform uniform entity laws, including the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Limited Liability Company Act, and the Uniform Unincorporated Nonprofit Association Act, to address the availability of information regarding the owners of entities established under state law. The act would help address some national security concerns relating to companies operating for the purpose of organized crime, terrorist financing, securities fraud, tax evasion and other misconduct, while at the same time balancing important privacy concerns.
- (9) **Drafting Committee on Regulation of Charities**  
This committee will draft an act to address the state regulation of charities. The committee will focus on state attorneys general authority with regard to the protection of charitable assets, notice requirements, remedies and principles to guide attorneys general in interstate and multi-state cases.
- (10) **Drafting Committee on Tenancy-in-Common Partition Act**  
The purpose of this committee is to draft a uniform act that will address the issue of tenancy-in-common land ownership. Tenancy in common is a type of joint ownership without right of survivorship. When there is no right of survivorship, the death of a tenant in common can trigger an action to partition the land to satisfy the deceased tenant's heirs. In a partition, the land is sold to satisfy tenant in common interests, often in a sale that does not meet market value. This committee will draft a new law to protect vulnerable landowners by providing a buy-out option; balancing factors for judges on partition of real property; sale price minimums if dispossession occurs; and a waiting period of up to three years for strangers to title.

### C. Acts Reviewed and Debated at the Conference

Commissioners Ford and Stamp spent six days at the annual meeting with the commissioners from other states discussing the following evolving acts, and where drafts have been produced, reading and vigorously debating them for possible final consideration in the next few years:

- (1) **Rules Relating to the Discovery of Electronically Stored Information Act**  
The committee reported on its draft of rules regulating the allegations of parties to lawsuits in disclosing the existence and content of electronically stored information.



(2) **Drafting Committee on Uniform Interstate Depositions and Discovery of Documents Act**

This committee is drafting an act which would provide a procedure to enable a party to effectuate depositions and discover documents in other states.

(3) **Drafting Committee on Uniform Limited Cooperative Association Act**

This committee is drafting an act addressing the cooperative business format. Since the last NCCUSL effort in this area (the 1936 Uniform Agricultural Cooperative Association Act) there has been a tremendous amount of development in and use of this form of business entity, but with wide variation among the states. The committee is reexamining this form given nearly 70 years of development, the need for greater uniformity, and the growing use of cooperatives in providing marketing approaches.

(4) **Drafting Committee on Amendments to the Model Entity Transactions Act**

In July 2006, the Conference promulgated the Uniform Emergency Volunteer Health Practitioners Act in an effort to help state governments seeking to grant emergency licensing to out-of-state health professionals during a period of emergency. The drafting committee is now scheduled to continue its work on the act to determine whether to provide emergency health care practitioners with workers' compensation coverage and protection from some aspects of civil liability.

(5) **Drafting Committee on Amendments to Uniform Emergency Volunteer Health Practitioners Act**

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(6) **Drafting Committee on Uniform Adult Guardianship Interstate Jurisdiction and Enforcement Act.**

This committee is drafting an act that addresses the issue of jurisdiction over adult guardianships, conservatorships, or other protective proceedings, and may also draft conforming amendments to the Uniform Guardianship and Protective Proceedings Act and other acts impacted by the proposed Uniform Act.

(7) **Drafting Committee on Certification of Unsworn Foreign Declarations Act**

This committee will draft an act that would permit, in state court

proceedings, unsworn declarations under penalty of perjury to be executed by witnesses located outside the United States in lieu of affidavits, verifications, or other formally documents. Obtaining an affidavit abroad can be a costly and time-consuming process. A uniform state law on this subject would be extremely useful in transnational litigation.

**(8) Project to Create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America**

This committee will review developments relative to the Uniform Unincorporated Association Act, last amended in 1995, and will draft updated amendments to promote the act's national uniform adoption in conjunction with an effort to harmonize similar applicable laws in Canada and Mexico.

**(9) Drafting Committee on a Uniform Act on the Collateral Consequences of Conviction Act**

This committee is drafting a statute addressing the various penalties and disqualifications that individuals face incidental to criminal sentencing, including disqualification from voting, prohibitions from running for office, exclusion from certain types of employment, etc. The act is intended to be narrow in scope, applying only to the procedures surrounding collateral sanctions, not defining or limiting what those sanctions are.

**(10) Amendments to the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act**

This act addresses the problem of representing the interests of children in situations where the parents and guardians could possibly have interests adverse to those of the children.

**(11) Drafting Committee on Amendments to the Uniform Common Interest Ownership Act**

This committee is revising the Uniform Common Interest Ownership Act in light of intervening developments in this area of law, and will study and recommend corresponding amendments to the Uniform Condominium, Planned Community, and Real Estate Cooperative Acts. The committee will consider a number of topics, including owner access to budget and financial records of the association, the establishment and funding of reserve accounts, and issues to improve the usefulness of the act.

**(12) Drafting Committee on a Uniform Statutory Trust Entity Act**

The business trust format – often used in mutual funds, ERISA pension funds, and various types of regulatory compliance trusts – is increasingly used as an alternative to other business entities such as a corporation and limited partnership. Business trusts are special purpose vehicles, the closest equivalent being limited partnerships. Although there are few

business trusts compared to other types of business forms, trillions of dollars of assets are invested in this business format. This committee is drafting an act that will apply to business trusts and other analogous statutory trusts. It will not apply to the kind of trusts used in estate planning.

**(13) Drafting Committee on a Misuse of Genetic Information in Employment and Insurance Act**

This committee will draft uniform or model legislation on the misuse of genetic information in the context of employment and health insurance.

**(14) Drafting Committee to Amend Intestacy Provisions of the Uniform Probate Code**

This committee will amend the intestacy provisions of the UPC that deal with inheritance by children. Newer reproductive technologies – including posthumous conception – are becoming more and more commonplace, and yet the inheritance rules that govern in these circumstances are outdated or nonexistent. This committee will amend specific sections of the UPC, and possibly carve those sections off as a freestanding uniform act. The Committee also will consider a limited number of potential amendments to other portions of the UPC.

**(15) Drafting Committee to Revise the Model State Administrative Procedure Act**

This committee is revising the 1980 Model State Administrative Procedures Act, which provided procedures for promulgating administrative regulations and for adjudicating disputes before administrative bodies. A revision is necessary to update the act to recognize electronic communications and other state procedural innovations since the act was originally promulgated. Upon completion of its main charge, the committee will study the development of an administrative procedures act for use by interstate compact entities.

**(16) Drafting Committee on a Business Organizations Act**

The purpose of this committee is to draft common provisions of business organization law such as definitions; the mechanics of filings; names of entities, registered agents and registered offices; qualification of foreign entities; and administrative powers of the Secretary of State; and incorporate Model Entity Transactions Act provisions on merger, interest exchanges, conversions, domestications and divisions. Working in partnership with an ABA committee, the drafting committee will also consider future expansion of the project.

## VI. NEW ACTS APPROVED BY NCCUSL AND TARGETED ACTS

### A. Approval of New Acts and Amendments

At the 2007 California meeting, the Commissioners approved the following five new Acts and Amendments to two Acts for presentation to state legislatures.

(1) **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act**

This act addresses the issue of jurisdiction over adult guardianships, conservatorships, and other protective proceedings. Because there are more than fifty guardianship systems in the United States, problems of determining jurisdiction are frequent. This act provides an effective mechanism for resolving multi-state jurisdictional disputes. It contains specific guidelines to specify which court has jurisdiction to appoint a guardian or conservator for an incapacitated adult. The objective is that only one state will have jurisdiction at any one time.

(2) **Uniform Interstate Depositions and Discovery Act**

This act provides simple procedures for courts in one state to issue subpoenas for out-of-state depositions. The Act is simple and efficient: it establishes a simple clerical procedure under which a state subpoena in the “trial state” can be used to issue a subpoena in another state. The act has minimal judicial oversight; the goal is to simplify and standardize the current patchwork of procedures across the various states for deposing witnesses for purposes of out-of-state litigation.

(3) **Uniform Rules Relating to Discovery of Electronically Stored Information**

These new uniform rules will bring the state rules and statutes concerning discovery in civil cases up-to-date. With the emergence of electronic technology, the extent to which individuals and institutions store or maintain information in an electronic form has clearly increased since the adoption of rules governing discovery generally. By some estimates, more than 90% of corporate information is being stored in some sort of digital or electronic format. This new act mirrors the recently adopted amendments to the Federal Rules of Civil Procedure dealing with electronically stored information.

(4) **Uniform Emergency Volunteer Health Practitioners Act**

This act, approved in 2006 and already adopted in three states (Colorado, Kentucky and Tennessee), allows state governments to give reciprocity to other states’ licensees on emergency services providers so that covered individuals may provide services without meeting the disaster state’s licensing requirements. Newly approved amendments address the issues

of workers' compensation coverage and protection from some aspects of civil liability.

**(5) Uniform Limited Cooperative Association Act**

This act addresses the cooperative form of business, a unique business entity which is different from other forms of business organizations. This act creates a new form of business entity and is an alternative to other cooperative and unincorporated structures. It is more flexible than most current law, and provides a default template that encourages planners to utilize tested cooperative principles for a broad range of entities and purposes.

**(6) Amendments to the Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act and the Model Entity Transactions Act were also approved.**

**B. Targeted Acts**

The Executive Committee of the National Conference listed 15 Uniform and Model Acts as "Targeted Acts," Acts that they think are especially timely for state adoption this year.

Following is the list of 2007 Targeted Acts. By July 2007, West Virginia had already adopted 4 of these Acts.

**UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007)**

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act addresses the issue of jurisdiction over adult guardianships, conservatorships, and other protective proceedings. Under the act, a "guardian" is appointed to make decisions regarding the person of an incapacitated adult, and a "conservator" is appointed to manage the property. The objective of the new uniform act is simple: to ensure that only one state has jurisdiction at any one time. To that end, the act contains specific guidelines to specify which court has jurisdiction to appoint a guardian or conservator for an incapacitated adult. The act does this by prioritizing the states which might claim jurisdiction. The state with primary jurisdiction is the "home state," defined as the state in which the adult has lived for at least six consecutive months immediately before the beginning of the adult guardianship or protective proceeding. The second is the "significant-connection state," which is broadly defined to include the location of the individual's family, a state where the individual might have lived for many years, or the state where the individual's property is located. The act provides that once a court has jurisdiction, this jurisdiction continues until the proceeding is terminated or transferred; it also avoids the existing functional requirement of having to restart the guardianship process anew whenever the protected party crosses state lines.

The act also provides transfer procedures from one state to another. UAGPPJA enacted in no states.

### **UNIFORM ANATOMICAL GIFT ACT (2006)**

The Uniform Anatomical Gift Act (2006) (UAGA 2006) revises the earlier 1968 and 1987 Uniform Acts, which are the basis for organ donation throughout the United States. UAGA 2006 is an important update to reflect the current system for allocations of cadaver organs for transplant purposes. It makes it easier to make a document of gift, particularly as provided on drivers' licenses. It creates a power in certain individuals, such as a holder of a health care power of attorney, to authorize an anatomical gift on behalf of an incapacitated person, before death actually occurs. It expands the list of those who may make an anatomical gift after an individual dies, when the individual has not executed a document of gift. It makes it clear that an anatomical gift that does not specify the donees of organs goes to a recognized transplant organization responsible for allocating organs. It accommodates the use of donor registries upon which a potential donor may put a document of gift for notice purposes. It more clearly provides for a document of refusal if an individual does not want organs donated. There are criminal penalties for misrepresentation of a document of gift for the purposes of selling organs or tissue. The Act attempts to resolve ambiguity and conflict between anatomical gifts and "Do Not Resuscitate" instructions. Without changing the basic concept that an individual may execute a document of gift to donate organs, UAGA 2006 makes the Act more usable than the earlier acts are currently. UAGA enacted in 21 states: Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia.

### **UNIFORM CHILD ABDUCTION PREVENTION ACT (2006)**

The Uniform Child Abduction Prevention Act (UCAPA) authorizes a proceeding in a court between contestants in a child custody dispute during which the court considers the probability that a contestant will abduct a child to another state or foreign jurisdiction. Upon a finding that an abduction is highly probable, the court may issue orders as necessary to prevent that abduction. The court hears evidence respecting the risk of abduction, based upon statutorily provided risk factors: previous abductions or attempts to abduct; threats by a contestant respecting abduction; abuse of the child; domestic violence; negligence; or, refusal to obey an existing child-custody order. There are further risk factors if the anticipated abduction is to a foreign country, i.e., the country is not a party to the Hague Convention on International Child Abduction. Standing to bring such a proceeding broadly includes the court itself, a contestant in a child-custody proceeding, a prosecutor or a public attorney. UCAPA relies upon the jurisdictional rules of the Uniform Child Custody Jurisdiction and Enforcement Act. UCAPA adopted in seven states: Colorado, Kansas, Louisiana, Nebraska, Nevada, South Dakota, Utah.

## **UNIFORM COMMERCIAL CODE ARTICLE 1 (2001)**

Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions that apply to transactions covered by other articles of the UCC. As other articles of the UCC have been revised and amended to conform to modern usages and legal developments, the revisions to Article 1 are intended to make both conforming, technical changes, as well as changes clarifying various ambiguities that have arisen over the years. The revisions also make certain substantive changes, including expanding the definition of good faith to include "the observance of reasonable commercial standards of fair dealing," and allowing courts to use evidence of the "course of performances" of a transaction in contract interpretation. But perhaps the most significant change to Article 1 involves the ability of parties to designate the application of a particular state's law by contract. Under the current rule, all transactions must bear a "reasonable relation" to the designated state. Under the Revised Article 1, this requirement is dropped as a general restriction, and parties are instead allowed to designate the law of any state (in a domestic transaction) or that of any country (in an international transaction), subject to a limitation that such a designation is ineffective if that application would be contrary to a fundamental public policy of the state or country whose law would otherwise govern in the absence of a contractual designation. Where one of the parties is a consumer, however, the "reasonable relation" test still applies; more significantly, even if a contractual designation meets this test, the application of that state's law may not deprive the consumer of legal protections afforded by the law of the state or country in which the consumer resides, or where the consumer makes a contract and takes delivery of goods. UCC1 enacted in 30 states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, Texas, U.S. Virgin Islands, Utah, Virginia, **West Virginia**.

## **UNIFORM COMMERCIAL CODE ARTICLE 7 (2003)**

Article 7 governs the transfer of bills of lading and warehouse receipts as documents of title. Generally, transfer of a document of title from one person to another transfers the rights in the goods represented by the document of title. Article 7 provides for negotiable documents of title, which transfer interests in goods represented in such documents free of any claims or defenses of the issuer or other transferor of the document. The revisions establish the rules for electronic documents of title. It authorizes them, incorporates electronic records and signatures for statute of fraud purposes, provides an analogous system for transfer of electronic documents to the system of negotiable paper documents of title, provides for conversion of electronic documents of title into tangible documents of title and vice versa, and prepares for the expected reliance upon electronic documents of title into the future. A key concept to transfer of electronic documents of title is that of "control." Control occurs when it is possible to identify every transfer of an authoritative copy of an electronic document with absolute certainty and when transfer can only occur when the party

in control authorizes transfer. UCC7 enacted in 28 states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, Texas, Utah, Virginia, **West Virginia**.

### **UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT (2007)**

The Uniform Emergency Volunteer Health Practitioners Act, first approved in 2006, allows state governments to give reciprocity to other states' licensees on emergency services providers so that covered individuals may provide services without meeting the disaster state's licensing requirements. Amendments to UEVHPA were approved in 2007 to complete previously reserved sections addressing the civil liability of disaster volunteers and the care of volunteers who are injured, become ill or die while delivering emergency services. With regard to civil liability, the act provides two options. In "Alternative A," a volunteer health practitioner is not liable for acts or omissions, nor can any party be held vicariously liable for a volunteer practitioner's acts or omissions, unless the conduct in question rises to the level of willful misconduct, or wanton, grossly negligent, reckless, or criminal conduct, represents an intentional tort; involves a breach of contract, is a claim by a host or deploying entity, or is an act or omission relating to the operation of a motor vehicle, vessel, aircraft, or other vehicle. "Alternative B" utilizes the same basic exclusions, but caps the compensation a volunteer can receive in connection with the emergency (not including reimbursement of reasonable expenses) at \$500 per year, and does not include the limitation on vicarious liability. It is anticipated that enacting states will choose the alternative that most closely tracks their existing state provisions regard "Good Samaritan" liability protection and/or each state's implementation of federal law on this subject. The 2007 Amendments also provide that a volunteer health practitioner who is not otherwise covered by the workers' compensation laws of the host or deploying state may elect to be deemed an employee of the host state for purposes of making a claim under the host state's workers' compensation system. The act directs enacting states to coordinate implementation of this coverage with other enacting states. UEVHPA enacted in three states: Colorado, Kentucky, Tennessee.

### **UNIFORM ENVIRONMENTAL COVENANTS ACT (2003)**

This uniform act creates an interest in real estate called an "environmental covenant" that assures a plan of rehabilitation for contaminated real property (brownfields) and control of use that may be separately conveyed to and enforced by a relevant third person called a holder. An underlying plan between state or federal government and landowner for "remediation" of the property must be in place for an environmental covenant to be created and conveyed. The ultimate objective of this act is to allow contaminated property to be returned to those uses consistent with prescribed clean-up, essentially making them marketable. The act provides for the creation of such a covenant, its termination when appropriate,



priority over other real estate interests and enforcement over the time the covenant is in place. An environmental covenant is perpetual unless a specific term is prescribed in the instrument creating it. The interest will be recorded in the real estate records. UECA enacted in 21 states: Alabama, Delaware, District of Columbia, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, U.S. Virgin Islands, Utah, Washington, **West Virginia**.

#### **UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005)**

This Act is a revision of the Uniform Foreign Money-Judgments Recognition Act of 1962, which codified the most prevalent common law rules with regard to the recognition and enforcement of money judgments rendered in other countries. Recognition in an American state court is a step towards enforcement of the judgment against assets of the judgment debtor. This revision continues the basic policies and language of the 1962 Act; the main purpose of this modest revision is to correct and clarify gaps in the 1962 Act revealed in the case law. For example, the 2005 Act provides that a petitioner for recognition has the burden of proving that the judgment is entitled to recognition under the standards of the Act, and that any respondent resisting recognition and enforcement has the burden of proof respecting denial of recognition. Burdens of proof were not addressed in the 1962 Act. The 2005 Act has statutes of limitations provisions not found in the 1962 Act at all. The result is a more comprehensive Act and better response to the conditions of international trade. UFCMJRA enacted in three states: Idaho, Michigan, Nevada.

#### **UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROTECTION ORDERS ACT (2000)**

This act implements the obligation of full faith and credit for domestic violence protection orders required by the U.S. Constitution and the federal Violence against Women Act. There are two principal methods of enforcement: 1) direct enforcement by a court of the domestic violence protection orders of another state; or 2) enforcement by law enforcement officers upon a finding that there is probable cause to believe that a domestic violence protection order from another state has been violated. In addition, a domestic violence protection order from another state may be registered in advance of any possible violation of that order to expedite enforcement by courts or law enforcement officers. UIEDVPOA 2000 enacted in 18 states: Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Kansas, Mississippi, Montana, Nebraska, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, U.S. Virgin Islands, Utah, **West Virginia**.

#### **UNIFORM LIMITED LIABILITY COMPANY ACT (2006)**

The Uniform Limited Liability Company Act (2006) (ULLCA 2006) replaces the Uniform Act of 1996. A limited liability company (LLC) is an entity that shares the limitation of liability characteristic of a corporation with partnership-like capacity to structure the entity by agreement rather than as prescribed by statute. Like a partnership, a limited liability company does not pay federal income tax on

its profits. Its distributions of income to members are taxed as their income. This characteristic has made limited liability companies very popular throughout the U.S. Like the 1996 Act, ULLCA 2006 authorizes the filing of a certificate of registration to create an LLC. The terms of the Act, including fiduciary obligations and contractual obligations, govern the relationships between members and between members and managers, if there are designated managers. Most of the rules, as in the 1996 Act, are default rules. Express provisions of the operating agreement prevail over most statutory rules. These are some of the changes the ULLCA 2006 makes over the 1996 Act: the 2006 Act leaves the designation of a manager-managed LLC to the terms of the agreement rather than the certificate of registration; electronic records and signatures are recognized; the standard of care becomes ordinary care subject to the business judgment rule; there is the ability to certificate member transferable interests for the purpose of free transfer as investment securities; it is possible to eliminate the duty of loyalty or duty of care in an agreement, so long as not "manifestly unreasonable;" a member may bring a direct action against the company for misfeasance, not just a derivative action; a company threatened by a derivative action may form a litigation committee to assume the burden of investigating the action and take certain actions on behalf of the company in its best interests. ULLCA enacted in no states.

#### **REVISION OF UNIFORM LIMITED PARTNERSHIP ACT (2001)**

The Uniform Limited Partnership Act (2001) updates limited partnership law to reflect modern business practices by allowing for greater variety and flexibility in the formation and management relationships within these entities. The ULPA allows for the use of a limited partner's name in the entity's name, and authorizes family limited partnerships, entities which by nature require entrenched management and passive limited partners. It shifts default liability away from limited partners by allowing for limited liability limited partnership status, and allows for easier dissolution upon the consent of all general partners together with a number of limited partners owning a majority of the rights to distributions. The ULPA furthers estate planning considerations by restricting the ability of a limited partner to disassociate from an entity prior to its termination, except for specific circumstances. Finally, the ULPA eliminates the previous rule requiring a termination date to be included in a limited partnership certificate, thereby allowing for the default creation of a perpetual entity. ULPA is also a free-standing, comprehensive act, no longer dependent upon general partnership law for rules that are not contained within ULPA. The ULPA represents a significant revision of limited partnership law to reflect modern usages, makes the limited partnership even more appealing to business ventures and estate planners, and will enhance the business climate of those states which adopt it. RULPA enacted in 14 states: Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Minnesota, Nevada, New Mexico, North Dakota, Virginia..

## **UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006)**

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) is an update of the Uniform Management of Institutional Funds Act which dates back to 1972. UPMIFA applies to funds held for charitable purposes by nonprofit, charitable institutions. The three principal issues addressed are scope of coverage, investment obligations and expenditure of funds. The earlier Act did not include charitable trusts or necessarily nonprofit corporations. UPMIFA applies its rules to charitable institutions no matter how organized. That is its scope. Investment obligations are governed by prudent investment rules derived from the Uniform Prudent Investor Act. They sharply refine the investment obligations in the 1972 Uniform Act. An express rule for prudent expenditure of appreciation as well as income replaces the older rule in the 1972 Act. Abolished is the concept of historic dollar value as a floor beneath which an endowment cannot be spent. The new rule allows a prudent use of total return expenditure. An optional provision allows a state to flag a total return expenditure of more than 7% of total return measured by a three year average as presumed imprudent. UPMIFA also provides a better, modern rule for exercise of cy pres that is changing an obsolete charitable purpose. Changing a charitable purpose will require notice to the appropriate regulator in a state. UPMIFA enacted in 14 states: Connecticut, Delaware, District of Columbia, Idaho, Indiana, Montana, Nebraska, Nevada, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah.

## **UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT (2004)**

The Uniform Real Property Electronic Recording Act equates electronic documents and signatures to original paper documents and manual signatures so that electronic documents pertaining to real estate transactions may be electronically recorded. The Act also establishes a state board to establish standards for electronic recording. URPERA enacted in 15 states: Arizona, Arkansas, Delaware, District of Columbia, Florida, Idaho, Illinois, Kansas, Nevada, New Mexico, North Carolina, Tennessee, Texas, Virginia, Wisconsin.

## **UNIFORM TRUST CODE (2000)**

The Uniform Trust Code (UTC) is the first effort to codify the law of trusts in the history of the United States. A trust is formed when an individual (called settlor) transfers assets to a person called the trustee. The assets are held in "trust" for identifiable beneficiaries or for a valid beneficial purpose. All voluntary trusts fall under the UTC. Involuntary trusts such as resulting trusts are not included. The UTC provides rules for charitable trusts and other honorary trusts such as pet trusts, as well as for ordinary trusts in which there are income beneficiaries and remainder beneficiaries at the conclusion of the trust. Spendthrift trusts are recognized. A spendthrift trust prevents creditors of a beneficiary from attaching a trust distribution until it is actually made to that beneficiary. UTC distinguishes revocable trusts from irrevocable trusts. All trusts are revocable unless the trust instrument makes them irrevocable. A revocable trust, which allows the settlor to revoke it before the settlor dies or becomes incapacitated, is treated as a will substitute. Any individual with the legal capacity to make a will can create a

revocable trust. UTC provides for fiduciary obligations of a trustee, except for those contained in the Uniform Prudent Investor Act. There can be valid oral trusts under UTC. A written instrument is not necessary for enforcement. There are rules for jurisdiction and enforcement. Almost all the rules in the UTC are default rules, and may be waived or varied in a trust instrument. UTC 2000 enacted in 20 states: Alabama, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Wyoming.

## **VII. 2007 and 2008 RECOMMENDATIONS BY THE WEST VIRGINIA COMMISSION ON UNIFORM STATE LAWS AND WEST VIRGINIA LEGISLATIVE ACTION**

The Commissioners met in July and in September by phone and after some discussion, decided to introduce the following Uniform Acts for eventual approval by the West Virginia Legislature at its 2008 session.

1. Revised Uniform Anatomical Gift Act
2. Uniform Prudent Management of Institutional Funds Act
3. Uniform Trust Code

The Probate Committee of the West Virginia State Bar had been examining the Uniform Trust Code for several years. By late fall, it was clear that the Trust Code was not yet ready for introduction so it was not introduced to the Joint Legislative Commission on Interstate Cooperation.

At the October 2007 interim meeting of the West Virginia Joint Legislative Commission on Interstate Cooperation in Charleston, Commissioner Vincent Cardi reported on the activities of the July National Conference meeting among other matters and advised the Committee on the Acts that the West Virginia Commission would be recommending for enactment in the 2008 session.

At the November 2007 interim meeting of the Legislative Commission, Commissioner Cardi presented the Uniform Prudential Management of Institutional Funds Act and urged the commissioners to approve the introduction of the Act to the 2008 legislature for enactment.

Commissioner Cardi attended a January meeting of the House Health Subcommittee where the Uniform Amendments to the Anatomical Gift Act were debated.

In the 2008 Legislative Session, the West Virginia Legislature considered the following two Uniform Acts recommended by the Commissioners:

- (1) **UNIFORM ANATOMICAL GIFT ACT (2006)**  
The Uniform Anatomical Gift Act (2006) (UAGA 2006) revises the earlier 1968 and 1987 Uniform Acts, which are the basis for organ donation

throughout the United States. UAGA 2006 is an important update to reflect the current system for allocations of cadaver organs for transplant purposes. It makes it easier to make a document of gift, particularly as provided on drivers' licenses. It creates a power in certain individuals, such as a holder of a health care power of attorney, to authorize an anatomical gift on behalf of an incapacitated person, before death actually occurs. It expands the list of those who may make an anatomical gift after an individual dies, when the individual has not executed a document of gift. It makes it clear that an anatomical gift that does not specify the donees of organs goes to a recognized transplant organization responsible for allocating organs. It accommodates the use of donor registries upon which a potential donor may put a document of gift for notice purposes. It more clearly provides for a document of refusal if an individual does not want organs donated. There are criminal penalties for misrepresentation of a document of gift for the purposes of selling organs or tissue. The Act attempts to resolve ambiguity and conflict between anatomical gifts and "Do Not Resuscitate" instructions. Without changing the basic concept that an individual may execute a document of gift to donate organs, UAGA 2006 makes the Act more usable than the earlier acts are currently. UAGA enacted in 21 states: Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia.

(2) **UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006)**

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) is an update of the Uniform Management of Institutional Funds Act which dates back to 1972. UPMIFA applies to funds held for charitable purposes by nonprofit, charitable institutions. The three principal issues addressed are scope of coverage, investment obligations and expenditure of funds. The earlier Act did not include charitable trusts or necessarily nonprofit corporations. UPMIFA applies its rules to charitable institutions no matter how organized. That is its scope. Investment obligations are governed by prudent investment rules derived from the Uniform Prudent Investor Act. They sharply refine the investment obligations in the 1972 Uniform Act. An express rule for prudent expenditure of appreciation as well as income replaces the older rule in the 1972 Act. Abolished is the concept of historic dollar value as a floor beneath which an endowment cannot be spent. The new rule allows a prudent use of total return expenditure. An optional provision allows a state to flag a total return expenditure of more than 7% of total return measured by a three year average as presumed imprudent. UPMIFA also provides a better, modern rule for exercise of cy pres that is changing an obsolete charitable purpose. Changing a charitable purpose will require notice to the appropriate regulator in a state. UPMIFA enacted in 14 states: Connecticut, Delaware, District of

Columbia, Idaho, Indiana, Montana, Nebraska, Nevada, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah.

Both the Uniform Anatomical Gift Act and the Uniform Prudential Management of Institutional funds Act were passed by both houses of the West Virginia Legislature.

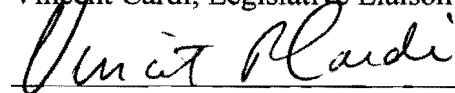
In preparation for the 2008 Legislative Session, Commissioner Cardi worked with the West Virginia State Bar Probate Committee in studying the effects of the Uniform Trust Code on existing West Virginia law. It is hoped that the Spring 2007 completion of a written study by West Virginia University College of Law students working under Commissioner Cardi's direction, comparing this Act with West Virginia law, and examination by the State Bar Probate Committee, the West Virginia Bankers Association, and other interested parties, will assist the Bar Probate Committee's completion of this uniform Act for the 2009 Session.

#### **VIII. DISTRIBUTION OF REPORT**

As recommended in the Performance Review Report pertaining to the Commission on Uniform State Laws, a copy of this report to the Legislature is being forwarded to the West Virginia State Bar, the West Virginia Bar Association, the Mountain State Bar Association, the West Virginia Trial Lawyers Association, and the Defense Trial Counsel of West Virginia.

Respectfully submitted this 17th day of March 2008.

Richard E. Ford, Chairman  
Frederick P. Stamp, Jr., Secretary  
Vincent Cardi, Legislative Liaison

  
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for the Commissioners