

To: New Jersey Law Revision Commission
From: Vito J. Petitti
Re: Uniform Probate Code
Date: February 8, 2016

MEMORANDUM

This Memorandum is intended to update the Commission regarding the Uniform Probate Code (UPC), approved and recommended by the Uniform Law Commission for enactment in all the States. Preliminary research for this potential project was conducted by Rutgers School of Law – Camden pro bono students, Zachary Green and Joshua Bauers.

Executive Summary

The Law Revision Commission often benefits from the work of pro bono law students who apply their skills to real-world projects under the supervision of licensed attorneys. In this case, Mr. Green and Mr. Bauers were tasked with identifying provisions included in the latest version of the UPC, but not yet enacted as New Jersey law.

Staff requests the Commission's authorization to conduct further research and analysis, and to engage in outreach for comment on this project, with a view to possible recommendation of all or part of the latest version of the UPC for adoption in New Jersey.

The Uniform Probate Code

The UPC, last substantially revised by the Uniform Law Commission in 2010, has been enacted in 17 states, including New Jersey, and also in the U.S. Virgin Islands, and is accepted in part in all but a few of the remaining states. It is intended to update and simplify most aspects of state probate law, and also contains related acts on guardianships and protective proceedings, powers of attorney, and non-probate transfers upon death.¹

Existing New Jersey Law

New Jersey's probate law, Title 3B, is modeled on the 1969 version of the Uniform Probate Code and was revised in 1990 to reflect subsequent amendments to the UPC. Although New Jersey has not yet proposed or enacted the most recent amendments to the UPC, the Uniform Trust Code (UTC), enacted by the New Jersey Legislature in the previous legislative session, supplements and revises New Jersey's existing *trust laws*.² Of note, it may be

¹ Legislative Fact Sheet – Probate Code, Uniform Law Revision (2014), <http://www.uniformlaws.org> (last visited 2/5/2016).

² See Thatch, Susan G. "Ante-Mortem Probate in New Jersey—An Idea Resurrected?," 39 Seton Hall Legis. J. 331, 346-7 (2015).

appropriate to consider the incorporation of the UTC's virtual representation provision into the probate code. Since trusts and estates may have minor, incapacitated, unborn, or unascertained beneficiaries who cannot represent their own interests and who cannot legally enter into binding agreements-judicial or non-judicial, it is necessary for someone else to represent such beneficiaries' interests.³ The doctrine of virtual representation, the principle that a judgment may bind a person who is not a party to the litigation if one of the parties is so closely aligned with the nonparty's interests that the nonparty has been adequately and effectively represented by the party in court, addresses such issues.⁴ Should the Commission authorize further research and analysis, Staff will address whether this and other UTC provisions should be incorporated into the probate code.

Results of Preliminary Research

Preliminary research in this area consists chiefly of a comparison of the corresponding sections of the UPC and Title 3B of the New Jersey Statutes, with the primary concern of articulating any substantive differences and identifying provisions that could benefit from revision or adoption. At 800 pages, analyzing the text of the UPC was a formidable undertaking for the student researchers. Exemplary of their findings is the following:

Regarding the UPC's Section 1-107, Evidence of Death or Status, New Jersey law, which has no corresponding section, could benefit from a clarification in cases where a person is legally deceased and there is a question as to when the legal process can begin.

Regarding Section 2-105, Requirement of Survival by 120 Hours, Individual in Gestation, incorporating this provision into New Jersey law could prevent litigation in connection with resolving the issue of an heir in gestation at the time of decedent's death.

Section 2-112 explicitly abolishes dower and curtesy, which is a surviving spouse's right to receive a set portion of the deceased spouse's estate. New Jersey retains the concept although most states have abolished it. Dower refers to the surviving wife's entitlement; curtesy refers to what the surviving husband may claim.⁵

Under Section 2-120, the UPC covers extensively the rights of parties conceiving children by assisted reproduction where the child is not born to a gestational carrier. New Jersey has no counterpart and such cases are likely to arise. Neither is there a provision relating to children born to gestational carriers, such as in the UPC's Section 2-121.

³ Susan T. Bart, Lyman W. Welch, Gail E. Mautner, and Heidi L.G. Orr, Virtual Representation in Trust and Estate Dispute Resolution: Opportunities and Risks, available at <http://www.files.ali-cle.org> (last visited 2/4/2016).

⁴ *Black's Law Dictionary* 1565 (7th ed. 2001).

⁵ *Id.* at 389, 507.

The UPC's Section 2-205, Decedent's Nonprobate Transfers to Others, corresponds to Meaning of Augmented Estates in New Jersey law, but the UPC offers much more detail regarding various types of nonprobate transfers and New Jersey law could benefit from a clarification.

The language of Section 2-211, Proceeding for Elective Share; Time Limit, is much more detailed and thorough than its Title 3B counterpart.

The concept of a notarized will is presented in Section 2-502, Execution; Witnessed or Notarized Wills; Holographic Wills. New Jersey's probate code could benefit from the addition of such a provision. A notarized will (in lieu of attestation by two witnesses) would seem to serve all the functions of traditional will execution formalities – and it has been argued that the danger that a notarized will would not reliably represent the decedent's wishes seems minimal.⁶

Section 2-503, Harmless Error, allows for the preservation of the proponent's intent in the event of minor procedural errors. New Jersey has no corresponding provision.

Section 3-708, Duty of Personal Representative; Supplemental Inventory, requires the representative to make supplementary filings if the value of property changes or new property is discovered. No such provision exists under Title 3B.

Section 5-204, Judicial Appointment of Guardian: Conditions for Appointment, outlines procedures for petitioning to become a court-appointed guardian and for ensuring that the guardianship is in the minor's best interest. There is no corresponding section within Title 3B.

UPC Section 5-305, Judicial Appointment of Guardian: Preliminaries to Hearing, ensures that the incapacitated person is represented and proven to need a guardian, submitting the incapacitated person to an evaluation, if necessary. There is no corresponding section within Title 3B. In fact, more than a dozen other UPC sections dealing with guardianships have no New Jersey counterparts.

Section 5-401, Protective Proceeding, is much more detailed than its New Jersey counterpart and provides guidance regarding how to proceed where the conservatee declines the arrangement.

Section 5-413, Who May be Conservator: Priorities, unlike its Title 3B counterpart, explicitly states that certain persons in a relationship with the prospective conservatee, such as the owner of a long-term care facility, cannot become conservator.

⁶ See Waggoner, Lawrence W. "The UPC Authorizes Notarized Wills." ACTEC J. 34 (2008): 83-7.