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THE IMPACT OF UNIFORM LAWS ON THE TEACHING OF TRUSTS AND ESTATES

DAVID M. ENGLISH*

INTRODUCTION

Beginning in 1969 with the approval of the Uniform Probate Code (UPC),¹ uniform laws have had a major impact on the teaching of the basic Trusts and Estates course. This is not the place to list the close to thirty uniform acts relating to Trusts and Estates that have been approved.² Rather, this Article will focus on the impact that uniform laws have had on the content of what is taught in the Trusts and Estates course. Uniform laws are not written in a vacuum. Like other legislative enactments, they are the product of societal changes and changes in legal culture. This article will attempt to place the various uniform law enactments and their impact on the teaching of Trusts and Estates within the context of these broader trends. The following trends will be discussed:

- I. The Decline of Probate
- II. The Increasing Use of Trusts
- III. The Repeal of the Rule Against Perpetuities
- IV. The Decline of the Federal Estate Tax
- V. The Changing American Family
- VI. The Rise of Elder Law

I. THE DECLINE OF PROBATE

When an individual dies, the person's assets can be broadly classified as either probate or nonprobate. In the case of a nonprobate asset, the document of title contains directions as to how the asset is to be transferred upon the owner's death.³ The life insurance or retirement plan proceeds will pass as provided in a beneficiary designation, the joint bank account or payable-on-

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1. UNIF. PROBATE CODE (amended 2010).

2. For such a list, see Thomas P. Gallanis, *Trusts and Estates: Teaching Uniform Law*, 58 ST. LOUIS U. L.J. 671, 674–675 (2014).

3. See, e.g., UNIF. PROBATE CODE § 6-101.

death account will pass as provided in the signature card contract, joint tenancy or tenancy by the entireties real estate will pass as provided in the deed, and assets held in a revocable trust will pass as provided in the trust document.

The “probate” assets are assets for which the document of title does not provide guidance. Probate assets include real estate held in fee simple or as tenants-in-common and personal property, whether tangible or intangible, held by the decedent in absolute ownership form. Probate assets are the only assets that pass under the will or to the heirs absent a will.⁴ These are also the only assets that must go through the administrative process supervised by the probate courts.⁵ In the case of nonprobate assets, no court involvement is necessary to transfer title and the court will rarely be involved except to resolve disputes.⁶ In the case of probate assets, the court must be involved in order to transfer title to the asset regardless of how routine the matter might be.⁷

Efforts to simplify the probate process began decades before the UPC was approved in 1969. A Model Probate Code was promulgated by the American Bar Association’s Section of Real Property, Probate and Trust Law in 1946 but was not widely enacted.⁸ The big pressure for reform did not come from within the legal profession but from outside. In 1965, Norman Dacey published his bestselling book, *How to Avoid Probate!*;⁹ it was widely popular and stimulated the completion of the UPC.¹⁰ The flexible system of probate estate administration inaugurated by Article III of the UPC was described by its drafters as the “heart of the Uniform Probate Code.”¹¹ The system includes an affidavit procedure for probate estates under \$25,000,¹² a summary administration procedure for probate estates for larger estates not in excess of the statutory allowances and expenses,¹³ and the option for the informal

4. WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* § 13.1 (4th ed. 2010).

5. *Id.*

6. *Id.*

7. *Id.*

8. For the genesis of the Model Probate Code, see Russell D. Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1947). For the text of the Model Probate Code, see LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW* 1–238 (1946).

9. NORMAN F. DACEY, *HOW TO AVOID PROBATE* (1965).

10. For a brief history of the Uniform Probate Code (UPC), see John H. Martin, *Principles of Probate Reform in Michigan*, 12 OHIO PROB. L.J. 87 (2002).

11. UNIF. PROBATE CODE art. III general cmt. (amended 2010).

12. *Id.* at § 3-1201. The original amount was \$5000 but was inflation-adjusted upward to \$25,000 in 2010. *Id.* at § 3-1201 2010 cmt.

13. *Id.* at § 3-1203. “If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and

opening of the estate in front of a court clerk instead of a judge.¹⁴ Once an estate is opened and a personal representative is appointed, administration proceeds without the supervision of the court unless the court orders such supervision.¹⁵ Supervision by the court may be ordered only if directed in the will or if the court finds that supervised administration is necessary under the circumstances.¹⁶ The Uniform Law Commissioners have concluded that eighteen states have enacted the complete UPC.¹⁷ The UPC has also influenced reforms in many non-UPC states,¹⁸ including the many states that have enacted alternative simplified forms of estate administration not based on the UPC.¹⁹

Despite these simplifications, the strong desire to avoid probate has continued. The simplified procedures have failed to address the public's concern for privacy or to substantially shorten the time or reduce the expense of estate settlement.²⁰ The simplified probate process, because it still usually requires the appointment of a personal representative to administer the estate, is cumbersome when compared to the systems in many civil law countries where title passes automatically to the heirs or devisees at death and the appointment of a personal representative is rare.²¹ The various methods for transferring property by nonprobate means are now so well established that it is doubtful that probate will ever recover its formerly favored position.

The standard Trusts and Estates course in the law school curriculum is three or four semester hours. Given the “nonprobate revolution,”²² it is logical that increased attention be paid to the various nonprobate transfers. Article VI of the UPC, entitled “Nonprobate Transfers on Death,” has also expanded over

reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative may, without giving notice to creditors, immediately disburse and distribute the estate to the persons entitled thereto, and file a closing statement as provided in Section 3-1204.”

14. *Id.* at §§ 3-301 to 3-311.

15. *Id.* at art. III general cmt.

16. UNIF. PROBATE CODE § 3-502.

17. UNIFORM LAW COMMISSION, 2012–2013 REFERENCE BOOK 144 (2012) [hereinafter ULC REFERENCE BOOK] (reporting that the eighteen states are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah).

18. *See, e.g.*, Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 599–600 (1985).

19. For a description of the statutes, see John H. Martin, *Non-Judicial Estate Settlement*, 45 U. MICH. J.L. REFORM 965, 969–71 (2012).

20. *See id.* at 966.

21. For a discussion of the civil law system, see MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 13.2.

22. If the term was not coined by John Langbein, it has become associated with his work. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

the years.²³ Part 3, the Uniform TOD Security Registration Act, was added in 1989.²⁴ Part 4, the Uniform Real Property Transfer on Death Act, was added in 2009.²⁵ As discussed below, other topical areas, including trusts and elder law, have also increased in importance, putting additional pressure on coverage. It is perhaps not surprising that the preface to one of the leading trusts and estates casebooks notes that its authors have pruned away a step-by-step discussion of how to settle an estate, stating somewhat dismissively that this subject is easily learned from local practice books.²⁶ With all of the other pressures on course coverage, the limits on available time can no longer justify spending extended time on a process that is so often avoided.

II. THE INCREASING USE OF TRUSTS

While there are other ways to avoid probate, the method of choice, particularly among wealthier individuals, is the revocable trust. The settlor will typically name himself or herself as trustee, with a successor trustee designated to take over in the event of the settlor's death or incapacity. To avoid probate, the settlor will usually re-register all of his or her otherwise probate-eligible assets into his or her name as trustee. Because the settlor might miss some assets, the settlor is advised to also execute a will with a "pour-over" provision, under which all assets passing under the will are transferred to the trustee of the revocable trust upon the conclusion of estate administration. But if the settlor successfully re-registers all assets into trust form, there will be no probate estate to be settled and no need to appoint a personal representative. Following the settlor's death, the trust assets will be distributed to the settlor's successors as provided in the trust document.

Trusts are also increasingly being used to provide extra benefits for a disabled beneficiary who is otherwise eligible for government welfare programs, the principal programs being Medicaid, which pays for health care,²⁷ and Supplemental Security Income (SSI), which provides a monthly cash payment.²⁸ To qualify for such benefits, an individual must usually have less than \$2000 in "available" resources.²⁹ The challenge is to draft the trust in such

23. See UNIF. PROBATE CODE art. VI Prefatory Note (amended 2010).

24. *Id.* This Act has been enacted in every state except Louisiana. ULC REFERENCE BOOK, *supra* note 17, at 145.

25. UNIF. PROBATE CODE art. VI Prefatory Note. For an analysis of the UPC Article VI, Parts 1–3, see William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1329–30 (1992).

26. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES xxxii (8th ed. 2009).

27. JOHN J. REGAN, REBECCA C. MORGAN & DAVID M. ENGLISH, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 10.02 (2013).

28. *Id.* at § 8.2.

29. *Id.* at §§ 8.12, 10.07[1].

a way that the trust will not count as an available resource but will still allow distributions to be made from the trust to pay for “special needs” not compensated for by the government program. Special needs trusts are created either with the disabled person’s own assets, referred to as a “first-party” trust, or with the assets of another person such as a parent, referred to as a “third-party” trust.³⁰

Additionally, trusts are being used increasingly to shield trust assets from the claims of a settlor’s creditors. Traditionally, a settlor could not be a beneficiary of a trust and at the same time shield assets of the trust from claims of the settlor’s creditors.³¹ Any trust property that *could* in the exercise of the trustee’s discretion be distributed to the settlor-beneficiary was subject to the claims of the settlor’s creditors.³² The drafters of the Uniform Trust Code (UTC) followed the traditional approach, concluding that it reflected sound policy.³³ But beginning with Alaska in 1997, fourteen U.S. states have enacted what are known as Domestic Asset Protection Trust (DAPT) statutes.³⁴ A DAPT normally involves the appointment of a trust bank in the applicable state to act as trustee.³⁵ If the other requirements of the particular state statute are met, the settlor-beneficiary may be eligible to receive discretionary distributions from the trust without the settlor’s creditors being able to reach the settlor’s beneficial interest.³⁶

Finally, and as discussed below, trusts can now be created to last longer than they could before. Twenty-nine US states have repealed or greatly scaled back the Rule Against Perpetuities, with nearly all of the enactments having occurred since 1995.³⁷ In these states, trusts can last for periods ranging from 360 to 1000 years and in nineteen of the states trusts can theoretically last forever.³⁸

Given these developments, it is not surprising that the Uniform Law Commissioners have paid more attention to trust issues in recent years. The hallmark was the approval of the Uniform Trust Code (UTC) in 2000, which has subsequently been enacted in twenty-five states plus the District of

30. For an introduction to special needs trusts, see MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 9.7.

31. UNIF. TRUST CODE § 505 cmt. (amended 2010).

32. MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 9.8.

33. UNIF. TRUST CODE § 505(a)(2) cmt.

34. *Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC (June 30, 2012), http://www.actec.org/public/documents/studies/shaftel_dapt_chart_06_30_2012.pdf.

35. David G. Shaftel, *IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trusts*, 112 J. TAX’N 213, 218 (2010).

36. *See Comparison of the Domestic Asset Protection Trust Statutes*, *supra* note 34.

37. Daniel J. Amato, Note, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. CAL. L. REV. 637, 654–55 (2013).

38. For a table of the states, see *id.* at 655.

Columbia.³⁹ But it was preceded by the Uniform Prudent Investor Act in 1994, enacted in forty-one states plus the District of Columbia,⁴⁰ and the 1997 revision of the Uniform Principal and Income Act, enacted in forty-six states plus the District of Columbia.⁴¹ Although historically considered part of the law of property, the power of appointment is used today almost exclusively as a term of a trust. The 2013 approval of the Uniform Powers of Appointment Act completes the package of trust enactments.⁴²

Prior to the 1994 approval of the Uniform Prudent Investor Act, the Commissioners had ventured into the subject of trusts only in tentative and incomplete ways. The misnamed Uniform Trusts Act of 1937, which was enacted in only six states, dealt with only a handful of topics, including the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries.⁴³ Article VII of the UPC, although ambitiously titled “Trust Administration,” similarly addressed only selected issues, including the jurisdiction of the court to hear trust disputes and the liability of trustees to persons other than beneficiaries.⁴⁴ The Uniform Trustee Powers Act was approved in 1964 and as its name suggests, was known primarily for containing a list of specific trustee management powers.⁴⁵ The most significant of the earlier Acts were the 1931 and 1962 versions of the Uniform Principal and Income Act, although unlike the 1997 version, it left many open issues.⁴⁶

39. See *Legislative Fact Sheet—Trust Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Dec. 28, 2013). For an analysis of the UTC, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002).

40. See *Legislative Fact Sheet—Prudent Investor Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Prudent%20Investor%20Act> (last visited Dec. 28, 2013). For an analysis of the Uniform Prudent Investor Act, see John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

41. See *Legislative Fact Sheet—Principal and Income Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Principal%20and%20Income%20Act> (last visited Dec. 28, 2013). For an analysis of the 1997 revision of the Uniform Principal and Income Act, see E. James Gamble, *If it's the 1990s, it Must be Time for Another Principal and Income Act*, 32 INST. ON EST. PLAN. 8–1 (1998).

42. For the text of the Uniform Powers of Appointment Act as approved at the Commissioners' 2013 Annual Meeting, see *Uniform Powers of Appointment Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/shared/docs/Powers_of_Appointment/2013AM_UPAA_As%20approved.pdf (last visited Dec. 28, 2013).

43. UNIF. TRUST CODE Prefatory Note (amended 2010).

44. See *id.*; UNIF. PROBATE CODE art. VII (withdrawn 2010).

45. UNIF. TRUST CODE Prefatory Note.

46. For a comparison of the 1997 version with the predecessor acts, see Gamble, *supra* note 41.

The more recent uniform acts relating to trusts have and will continue to transform the teaching of trust law. The Prudent Investor Act updated trust investment law to reflect the teaching of modern portfolio theory.⁴⁷ The 1997 revision of the Principal and Income Act provided a means to implement the emphasis in the Prudent Investor Act on investing for total return as opposed to predecessor Principal and Income Acts, which focused on production of certain levels of “income” in disregard of the total growth of the trust.⁴⁸ Although the UTC contains a number of innovations, the UTC is most notable as the first national codification of the law of trusts.⁴⁹ By making the law more accessible, the UTC makes trust law easier to teach. For example, the law on creation of trusts can now be taught directly from the UTC itself instead of from reading numerous cases.⁵⁰ The codification of the common law of powers of appointment is the exclusive aim of the Uniform Powers of Appointment Act.⁵¹ It will likewise transform the teaching of that subject, allowing much of the law on powers of appointment to be taught directly from the Act itself instead of from cases.

III. THE REPEAL OF THE RULE AGAINST PERPETUITIES

The common law Rule Against Perpetuities is one of the foundation principles of American property law. Although not directed specifically at the duration of trusts, it regulated their duration indirectly by invalidating contingent beneficial interests that might vest too remotely.⁵² Over time the harshness of the common law was ameliorated by various reform doctrines including wait-and-see and *cy pres*,⁵³ but the effect of the reforms was to make an already complicated subject even more difficult to teach. In order to understand the reforms, students first need to understand the common law Rule. The apex of the reform movement occurred in 1986, when the Commissioners approved the Uniform Statutory Rule Against Perpetuities (USRAP), which approved wait-and-see as the preferred approach.⁵⁴ At one point, twenty-eight states had enacted USRAP.⁵⁵

47. UNIF. PRUDENT INVESTOR ACT Prefatory Note (1994).

48. UNIF. PRINCIPAL AND INCOME ACT Prefatory Note (amended 2008).

49. UNIF. TRUST CODE Prefatory Note.

50. *See id.* at art. 4 general cmt.

51. UNIF. POWERS OF APPOINTMENT ACT Prefatory Note (2013).

52. For the operation of the Rule, see MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 11.2.

53. For a summary of the reforms, see *id.* at § 11.4.

54. For an analysis of the Act, see Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569 (1986).

55. ULC REFERENCE BOOK, *supra* note 17, at 144. Although the current edition of the Reference Book lists twenty-eight states, twelve of those states plus the District of Columbia have subsequently passed legislation allowing perpetual or near-perpetual trusts. These states are

Ironically, USRAP was approved in 1986, the same year that Congress enacted the current version of the federal tax on generation-skipping transfers (GST).⁵⁶ But at the same time that it imposed a tax on generation-skipping transfers, Congress created a \$1,000,000 exemption from the GST tax for each transferor.⁵⁷ The result was that a transferor could leave \$1,000,000 in trust in perpetuity without the assessment of a transfer tax at the death of his or her children or any subsequent generation. But in order to create such a perpetual trust, state trust law needed to be reformed to eliminate or scale back the Rule Against Perpetuities. When the GST was enacted in 1986, only three states, Idaho, South Dakota and Wisconsin, had abolished the Rule or had never had the Rule in the first instance.⁵⁸ Realizing a business opportunity, South Dakota financial institutions began to heavily market the perpetual trust in order to take maximum advantage of the GST exemption.⁵⁹ Not wanting to lose out on trust business, beginning in 1995 other states began to repeal the rule.⁶⁰ By 2010, twenty-nine states had either repealed the rule in its entirety or allowed trusts to exist for very long periods ranging from 360 to 1000 years.⁶¹ The amounts of money potentially involved are enormous. One study estimated that through 2003, one hundred billion dollars in trust assets had flowed into states allowing perpetual or near-perpetual trusts.⁶²

With perpetual or near-perpetual trusts now allowed in a majority of U.S. states, an instructor may justifiably give the Rule Against Perpetuities a lower priority, particularly given other emerging topics demanding greater attention, including changes in the American family and the rise of elder law as discussed below.

Alaska, Arizona, Colorado, the District of Columbia, Florida, Hawaii, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Tennessee, and Virginia. *Compare id.*, with Amato, *supra* note 37, at 655.

56. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431, 100 Stat. 2085, 2717 is applicable to generation-skipping transfers made after October 22, 1986.

57. *Id.* at 2731 (enacting Internal Revenue Code § 2631(a)).

58. RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) ch. 27 Intro. Note (2011).

59. *See id.*

60. Amato, *supra* note 37, at 655.

61. The history of the repeal movement is most completely described in Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003). For the most current list of the state statutes, see Amato, *supra* note 37, at 655.

62. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410–11 (2005).

IV. THE DECLINE OF THE FEDERAL ESTATE TAX

Prior to 1977, the federal estate tax exemption was \$60,000.⁶³ Thereafter, Congress repeatedly increased the exemption until it reached \$675,000 in 2001.⁶⁴ Congress then enacted even more dramatic increases.⁶⁵ For individuals dying in 2002–03, the exemption was \$1,000,000;⁶⁶ in 2004–05, \$1,500,000;⁶⁷ in 2006–08, \$2,000,000;⁶⁸ and in 2009, \$3,500,000.⁶⁹ The estate tax was initially repealed for deaths occurring in 2010, but it was retroactively reinstated in late 2010 with an exemption of \$5,000,000.⁷⁰ In early 2013, the \$5,000,000 exemption with adjustments for inflation was made permanent.⁷¹ For deaths occurring in 2013 the exemption is \$5,250,000.⁷²

The increase in the federal estate tax exemption has resulted in a drastic reduction in the number of decedents subject to the federal estate tax. According to a study by the Tax Policy Center, a total of 99,100 estate tax returns would have been due had the exemption in 2011 dropped back to \$1,000,000, but only 8600 were required at a \$5,000,000 exemption amount.⁷³

This 8600 is only a little more than three-tenths of one percent of the projected 2,586,000 deaths that occurred during the year.⁷⁴

Because the Uniform Law Commission drafts state and not federal statutes, the involvement of the Commission with federal tax issues is necessarily limited. However, how property is taxed for federal tax purposes frequently depends on state law. For example, the provisions of the UTC relating to judicial modification of trusts will be employed frequently to qualify a trust for federal tax benefits.⁷⁵ Also, state law on tax apportionment will determine

63. Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, IRS 122, <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf> (last visited Dec. 28, 2013).

64. *Id.*

65. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 521(a), 115 Stat. 38, 71.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 302(c)(2)(A), 124 Stat. 3296, 3301.

71. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2315 (2013).

72. Rev. Proc. 2013-15, 2013-5 I.R.B. 444, 448.

73. *See* Table T11-0156: *Estate Tax Returns and Liability Under Current Law and Various Reform Proposals, 2011–2021*, TAX POLICY CENTER (June 2, 2011), <http://taxpolicycenter.org/numbers/displayatab.cfm?Docid=3037&DocTypeID=7>.

74. *Id.*

75. The provisions relating to judicial modification of trusts are found at UNIF. TRUST CODE §§ 412–16 (amended 2010), and are discussed in English, *supra* note 39, at 169–76. For a

which beneficial interests in the estate will be charged with payment of the federal estate tax. In 1999, the Commission announced a project to revise the Uniform Estate Tax Apportionment Act, which was first approved in 1958.⁷⁶ When the project was announced, the federal estate tax exemption was \$650,000.⁷⁷ When the revised Act was completed in 2003, the exemption had increased to \$1,000,000,⁷⁸ but as discussed above, even more significant increases were already on the horizon. Despite the steep declines in the number of decedents subject to the federal estate tax, the revised Act has received eleven enactments to date.⁷⁹

Many trusts and estates casebooks and other student texts contain a chapter on the estate and gift tax.⁸⁰ This material was presumably included on the assumption that some instructors might want to include a tax unit in the basic course. Given the drastic decrease in the number of decedents subject to the federal estate tax and other emerging topics competing for the instructor's attention, perhaps it would be better to reserve the tax material for the advanced estate planning seminar.

V. THE CHANGING AMERICAN FAMILY

Because Trusts and Estates concern primarily disposition of property among family members, it should perhaps not be surprising that changes in the American family have affected the reform of the law of trusts and estates and the teaching of the course in law schools. As the American family has become more complex, so have related trusts and estates topics and the time required to teach them. Discussed here are the rules of intestate succession, the spousal elective share, and the interpretation of terms of relationship in estate planning documents.

Under the English Statute of Distribution of 1670, if the decedent did not leave a valid will, the surviving spouse was entitled to one-third of the decedent's personal estate if the decedent was survived by descendants and to

discussion of the limited circumstances when a state court modification will be binding on the Internal Revenue Service, see UNIF. TRUST CODE § 416 cmt.

76. UNIF. ESTATE TAX APPORTIONMENT ACT Prefatory Note (amended 2003).

77. See Jacobson, Raub & Johnson, *supra* note 63, at 122.

78. See *id.*

79. *Legislative Fact Sheet—Estate Tax Apportionment and Probate Code 3-916*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Estate%20Tax%20Apportionment%20and%20Probate%20Code%203-916> (visited Dec. 29, 2013). For an analysis of the Uniform Estate Tax Apportionment Act, see Douglas A. Kahn, *The 2003 Revised Uniform Estate Tax Apportionment Act*, 38 REAL PROP. PROB. & TR. J. 613 (2004).

80. See, e.g., DUKEMINIER, SITKOFF & LINDGREN, *supra* note 26, at 935, 948; ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES ch. 14 (4th ed. 2009); WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, PRINCIPLES OF WILLS, TRUSTS AND ESTATES 706, 720 (2d ed. 2012).

one-half if the decedent had no descendants or no descendants survived.⁸¹ With regard to real property, a surviving wife was entitled to a lifetime dower interest in the husband's lands and a surviving husband was entitled to a lifetime curtesy interest in the lands owned by his deceased wife.⁸² Dower and curtesy have long been abolished in all but a few American states,⁸³ but, like the English Statute of Distribution, in many states the share of the spouse remains a fixed fraction regardless of the size of the estate and whether the children are from the current or former marriage. Illinois is a typical example. The surviving spouse is entitled to one-half of the intestate estate if the decedent was survived by descendants and to the entire estate if only other relatives survived.⁸⁴

The UPC's intestacy statute takes a different approach. Based on empirical studies of how decedents who make wills actually leave their property,⁸⁵ the drafters of the UPC have varied the spouse's share based on whether the decedent and spouse have common children and whether the decedent or spouse have descendants from another relationship.⁸⁶ In situations where the decedent and spouse have children and neither have descendants from another relationship, decedents making wills typically leave their entire estate to their spouses on the assumption that the spouse will provide for the descendants. But in blended families, decedents who make wills tend to leave a portion of their estates to their own descendants unless the estate is small.⁸⁷

81. An Act for the better settling of Intestates Estates, 1670, 22 & 23 Car. 2, c. 10, § 3 (Gr. Brit.).

82. For historical background on dower and curtesy, see 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 185–97 (3d ed. 1923).

83. See CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 165 (1987) (noting that between 1890 and 1982 the percentage of common law states limiting the spouse to a life estate in the decedent's lands fell from sixty-nine percent to less than twelve percent).

84. 755 ILL. COMP. STAT. ANN. 5/2-1(a), (c) (West 2007).

85. The studies are listed in UNIF. PROBATE CODE § 2-102 cmt. (amended 2010).

86. See *id.* at § 2-102.

87. The theory of the UPC spousal intestacy provisions is discussed in Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 229–35 (1991). UNIF. PROBATE CODE § 2-102 provides: “The intestate share of a decedent's surviving spouse is: (1) the entire intestate estate if: (A) no descendant or parent of the decedent survives the decedent; or (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent; (2) the first [\$300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent; (3) the first [\$225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent; (4) the first [\$150,000], plus one-half of any balance of the intestate

When dower was repealed, it was replaced by the elective share, which granted a spouse a right to elect against the will and receive a minimum fraction of the probate estate, typically a third.⁸⁸ But as nonprobate transfers became more common and easier to create, the elective share became easy to evade. The original UPC, which was approved in 1969 and is sometimes referred to as UPC I, addressed this problem of evasion by introducing the concept of the “augmented” estate, under which the surviving spouse was guaranteed a minimum of a third of the decedent’s combined probate and nonprobate transfers.⁸⁹

The “augmented” estate elective share approach differs from the way property is divided in community property states where all assets acquired by reason of the marriage are owned equally by the couple as community property.⁹⁰ The augmented estate approach also conflicts with the way property is divided in a divorce. In a method of division known as “equitable distribution,” each divorcing spouse will presumptively receive an equal share of the “marital” property.⁹¹ The thought behind equitable distribution is that marriage should be viewed as a partnership and that property acquired by reason of this partnership should be divided equally. Because a married couple in a community property state have an equal ownership right in the community property at all times during the marriage, the division of the community at the death of one of the couple is well accepted and can be done with minimum dispute. Achieving a similar division would be much more difficult in a common law jurisdiction, where ownership follows title and the marital property rights of the other spouse attach only at two points in time, at divorce and at death. In addition, there is a reluctance at death to give the court the same power it has at divorce to equitably adjust the spousal shares. More certainty is desired. The elective share provisions of UPC II, approved in 1990, attempt to implement a partnership approach but are admittedly only a rough approximation of the results achieved under a community property system.⁹² To avoid having to compute exactly which property of the couple was acquired by reason of the marriage and which was acquired from other sources, UPC II assumes that in a marriage of fifteen years or longer, all of the couple’s

estate, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.”

88. *Id.* at § 2-112 (noting that dower and curtesy are abolished); *see also* Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 988–91 (1977).

89. The elective share system of UPC I is discussed in *id.* at 1011–61.

90. MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 3.8.

91. For a survey of the various approaches, see Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 193–97 (1989).

92. *See* UNIF. PROBATE CODE art. II, pt. 2 general cmt.

property was acquired by reason of the marriage.⁹³ A lower percentage is applied to marriages of shorter durations. For marriages of fifteen years or longer, the surviving spouse is entitled to end up with at least fifty percent of the couple's combined assets or a minimum of \$75,000.⁹⁴ Unlike UPC I, where the surviving spouse was always entitled to a minimum third of the decedent's estate regardless of the size of the spouse's own estate, under UPC II, an elective share will be denied to a spouse who already owns in value more than fifty percent of the couple's combined assets.⁹⁵

Defining who is a child is important whether or not the decedent has a will. If the child was adopted, born out-of-wedlock, or conceived posthumously, is the "child" entitled to take an intestate share of the estate or entitled to take as a "child" or "descendant" under the decedent's will or other estate planning document? Although such questions are not new, they have increased in importance as the number of children born out-of-wedlock has increased over the past thirty years from eighteen percent to nearly forty percent of births⁹⁶ and the use of artificial reproductive technology (ART) to produce children has rapidly grown. In 2010, 61,564 children were born with the assistance of ART.⁹⁷ The provisions of the UPC on adoption and children born out-of-wedlock were most recently revised in 2008 at the same time as the provisions on ART were approved.⁹⁸

The UPC provisions on non-marital children are more notable for what they omit than for what they contain. Unlike the New York inheritance statute upheld by the U.S. Supreme Court in *Lalli v. Lalli*,⁹⁹ the UPC does not require that paternity be adjudicated during the father's lifetime.¹⁰⁰ Nor does the statute limit how paternity can be established.¹⁰¹ The definition of "genetic father" contemplates that paternity can be established using any method of

93. See *id.* § 2-203(b).

94. See *id.* § 2-202(b).

95. See *id.* at §§ 2-201 to 2-214. For an analysis of these provisions, see Waggoner, *supra* note 87, at 235-53.

96. See U.S. DEPT. HEALTH & HUMAN SERVS., Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NCHS DATA BRIEF NO. 18, May 2009, at 1, 2.

97. See Section 5: ART Trends 2001-2010, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art/ART2010/section5.htm> (last visited Dec. 29, 2013).

98. The provisions on ART are analyzed in Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30 (2009) and in MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at § 2.11. This section follows the section on non-marital children, *id.* at § 2.9, and the section on adoption, *id.* at § 2.10.

99. *Lalli v. Lalli*, 439 U.S. 259 (1978).

100. UNIF. PROBATE CODE § 2-115(5) and Legislative Note.

101. *Id.* at § 2-115(5).

proof that might be available under the Uniform Parentage Act or other local law.¹⁰²

The UPC provisions on adoption generally follow the prevailing approach under American law that adoption completely severs inheritance ties with the genetic family and substitutes the adoptive family in its place. But there are a number of circumstances where there often will be a continuing relationship with members of the genetic family. On the other hand, the desire for certainty in estate administration dictates that exceptions to the full substitution approach be carefully defined and limited. The UPC hopefully achieves the appropriate balance. The exceptions under which the child may continue to inherit from the genetic relative include the right to inherit from and through the excluded genetic parent in a stepparent adoption,¹⁰³ a continued right to inherit through the genetic relationship when the child is adopted by a genetic relative,¹⁰⁴ and the continued right to inherit from the relatives of the genetic parents when the child is adopted following the death of both parents.¹⁰⁵ These are also common situations where the will or other estate planning documents of the genetic parent or other relative will likely refer to “children” or “descendants” without expressly stating whether the adoptee is to be included within such terms. Under the UPC, the creation of an inheritance tie with the genetic parent or other relative will trigger the application of a rule of construction that will include the adoptee within terms of family relationship used in the document.¹⁰⁶

UPC Sections 2-120 and 2-121 deal with children born by means of ART.¹⁰⁷ Section 2-120 applies to children born outside of the surrogacy context.¹⁰⁸ Section 2-121 is applicable to children born to surrogates.¹⁰⁹ If a husband and wife conceive a child through artificial insemination or in vitro fertilization, a parent-child relationship is deemed to exist between the child and both parents.¹¹⁰ If a sperm or egg donor was used and appropriate consents were obtained, the husband will be treated as the father and the wife as the mother.¹¹¹ Somewhat more complicated rules apply if the intended parents are unmarried, whether of the same or different sex. Without taking a position on the enforceability of surrogacy agreements, the UPC provides that an inheritance tie is created with the intended parent, either as established by court

102. *Id.* at § 2-115(5) and Legislative Note.

103. *Id.* at § 2-119(b).

104. *Id.* at § 2-119(c).

105. UNIF. PROBATE CODE § 2-119(d).

106. *Id.* at § 2-705(b).

107. *Id.* at §§ 2-120, 2-121.

108. *Id.* at § 2-120.

109. *Id.* at § 2-121.

110. UNIF. PROBATE CODE § 2-120(d).

111. *Id.* at § 2-120(f).

order¹¹² or if the intended parent actually functions as a parent within two years of the child's birth.¹¹³ With regard to children posthumously conceived with the deceased husband's sperm, the husband will be treated as the father if it is established by clear and convincing evidence that the husband intended to be treated as the father.¹¹⁴ Ideally, this issue will have been addressed in the donor agreement.

VI. THE RISE OF ELDER LAW

Elder law is the study of legal issues that exclusively or disproportionately impact the elderly (generally, persons age sixty-five or older). Elder law includes the study of government benefit programs (Medicaid, Supplemental Security Income, Social Security, Medicare), issues related to the provision of long-term care, and problems related to planning for mental incapacity and termination of life-support. Elder law emphasizes life-care planning, with the usual goal to avoid the appointment of a guardian or conservator. To plan for management of property, the typical tools are the durable power of attorney and sometimes the revocable trust. To plan for healthcare decisions, the available tools include the durable power of attorney for health care or the living will. Paying for health care is also a major concern. Medicare has many gaps. To cover these gaps, most elderly persons purchase Medigap policies. Many also purchase long-term care insurance.

None of these problems are new, but they have grown in importance as the percentage of the elderly population has increased. In 2010, there were slightly over forty million Americans age sixty-five or older.¹¹⁵ By 2050, the number will exceed eighty-eight million.¹¹⁶ Life expectancies are also increasing. In 1990, the average life expectancy was 75.4 years,¹¹⁷ and in 2010, it was 78.3 years.¹¹⁸ By 2030, life expectancy is projected to increase to 81.5 years.¹¹⁹

112. *Id.* at § 2-121(b).

113. *Id.* at § 2-121(d).

114. *Id.* at § 2-120(f)(2)(C).

115. See *Projected Future Growth of the Older Population*, ADMINISTRATION ON AGING, http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx#age (last visited Dec. 30, 2013) (select "Persons 65 and older" under the "By Age: 1900–2050" heading to download Excel data file).

116. *Id.*

117. *Table 104. Expectation of Life at Birth, 1970 to 2008, and Projections, 2010 to 2020*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2012/tables/12s0104.pdf> (last visited Dec. 30, 2013).

118. *Id.*

119. *2012 National Population Projections: Summary Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/population/projections/data/national/2012/summarytables.html> (last visited Dec. 30, 2013) (select "Middle Series" XLS immediately under "Table 10. Projected Life Expectancy at Birth by Sex, Race, and Hispanic Origin for the United States: 2015 to 2060" to download Excel data file).

The use of the term “elder law” can be traced to the 1987 founding of the National Academy of Elder Law Attorneys (NAELA).¹²⁰ While now a recognized specialty law field, there is a considerable overlap between elder law and trusts and estates. Several of the subject areas identified by the National Elder Law Foundation as constituting “elder law,”¹²¹ including health and personal planning, pre-mortem legal planning, fiduciary representation, and legal capacity counseling, are subjects handled on a regular basis by attorneys specializing in trusts and estates. Perhaps the difference between the two fields is more one of emphasis than of degree, with elder law attorneys more focused on public benefit and long-term care issues than those who call themselves estate planners.

More than half of all U.S. law schools offer a separate class in elder law.¹²² Given the widespread availability of a separate class, perhaps the teachers of Trusts and Estates should tread only lightly into the related field of elder law. Among the authors of the standard Trusts and Estates casebooks and treatises, it appears that a consensus has emerged. Given that planning for incapacity and the preparation of powers of attorney for property or health care has long been a standard practice of estate planning attorneys, all of the books include a segment or chapter on planning for incapacity but not on other elder law topics.¹²³ These segments or chapters contain brief descriptions of the guardianship process, but focus mostly on the use of powers of attorney and planning for the end of life.¹²⁴

The Uniform Law Commission has approved several acts relating to elder law topics. These include the Uniform Guardianship and Protective Proceedings Act, last extensively revised in 1997,¹²⁵ and the Uniform Health-

120. Amelia E. Pohl, *Introduction: What is Elder Law Anyway?*, 19 NOVA L. REV. 459, 459 (1995).

121. The twelve areas are health and personal care planning, pre-mortem legal planning, fiduciary representation, legal capacity counseling, public benefits advice, special needs counseling, advice on insurance matters, resident rights counseling, housing counseling, employment and retirement advice, age and disability discrimination, and litigation with respect to any of the above. *Program for the Certification of Elder Law Attorneys*, NATIONAL ELDER LAW FOUNDATION 8, http://www.nelf.org/pdf/NELF_Certification_Book11.pdf (last visited Dec. 30, 2013).

122. See Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. LEGAL EDUC. 414, 418 (2010) (elder course listed in curriculum of 112 out of 192 law schools).

123. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 26, at 448–68; MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at §§ 14.1–14.7; ANDERSEN, *supra* note 80, at 125–32.

124. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 26, at 448–68; MCGOVERN, KURTZ & ENGLISH, *supra* note 4, at §§ 14.1–14.7; ANDERSEN, *supra* note 80, at 125–32.

125. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (amended 1998). See David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act (1997)*, 11 NAELA Q., Spring/Summer 1998, at 3, 3.

Care Decisions Act, approved in 1993.¹²⁶ A major Uniform Power of Attorney Act was approved in 2006,¹²⁷ and an act addressing issues of granny snatching and guardianship jurisdiction, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, was approved in 2007.¹²⁸

CONCLUSION

As this Article has hopefully demonstrated, uniform laws have played an important role in the teaching of Trusts and Estates in the United States. The UPC and UTC are the two acts most often mentioned, but many other acts cited in this Article are also cited and discussed in the Trusts and Estates casebooks and treatises. Over time, certain subject areas, such as probate, have received less attention, and others, such as the use of trusts and the impact of the changing American family, have received more attention. New issues will undoubtedly emerge in the coming decades. Hopefully, the close connection between the development of new uniform laws and the teaching of Trusts and Estates will continue.

126. UNIF. HEALTH-CARE DECISIONS ACT (1993). See David M. English & Alan Meisel, *Uniform Health-Care Decisions Act Gives New Guidance*, 21 EST. PLAN. 355 (1994).

127. UNIF. POWER OF ATTORNEY ACT (2006). See Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHX. L. REV. 343 (2008).

128. For information on this Act, see the Commissioners' webpage for the Act, *Adult Guardianship and Protective Proceedings Jurisdiction Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act> (last visited Dec. 30, 2013).

