

08/09/84

First Supplement to Memorandum 84-68

Subject: Topics and Priorities for 1985 (Uniform Acts)

One duty imposed by statute upon the Law Revision Commission is the duty to:

Receive and consider proposed changes in the law recommended by the . . . National Conference of Commissioners on Uniform State Laws . . . .

There are three Uniform Acts that the staff believes should be considered by the Law Revision Commission during 1985.

Uniform Premarital Agreements Act. Some time ago, the Commission directed the staff to prepare this Uniform Act in a form suitable for enactment in California and to distribute it to interested persons for review and comment. We have provided a copy of the draft to Commissioner Gregory for review prior to distribution for review and comment. (Commissioner Gregory served as the Chairman of the Committee of the Uniform Law Commissioners that drafted this Uniform Act.) This is an important project. There is a great need for statutory provisions dealing with this subject. The staff recommends that this project be given a top priority with a view to submitting a recommendation to the 1985 session, if possible, or to the 1986 session at the latest.

Uniform Fraudulent Transfer Act. At its 1984 Annual Meeting, the Conference of Commissioners on Uniform State Laws approved a new Uniform Fraudulent Transfer Act. The Law Revision Commission has been engaged in revision of the law relating to creditors' remedies for a number of years. On numerous occasions, the staff and members of the Commission have noted the need for a modern statute governing fraudulent transfers. However, we have not undertaken to draft the needed statute ourselves because the Uniform Commissioners have been engaged in that task. The present Uniform Act was approved in 1918. The present act needs to be modified to reflect the developments since then, such as the new Bankruptcy Code, proposed amendments to the Model Business Corporation Act of the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association, the enactment of the Uniform Commercial Code, and at least one significant judicial decision.

A copy of the new Uniform Act is attached as Exhibit 1. (We do not ask that you read the Uniform Act at this time.) Because the staff has considerable familiarity with the existing California statute, we believe that we can prepare material to distribute for review and comment without too much drain on staff resources. Accordingly, we would give this Uniform Act a top priority with the view to submitting our recommendation to the 1986 legislative session.

Uniform Statutory Will Act. At its 1984 Annual Meeting, the Conference of Commissioners on Uniform State Laws approved a new Uniform Statutory Will Act. This Act does not provide for a statutory will form such as the one that now exists in California. Instead, the new Uniform Act is designed to provide a scheme of testamentary disposition of broad utility. The Act contemplates that a testator will adopt the statutory will through incorporation by reference in a "simple will." The Act does not provide a battery of optional schemes or provisions, but it does permit modifications and additions to be made by the will which adopts the statutory-will scheme generally or for some portion of the testator's estate. The statutory will may be the entire will of a testator and thus apply to all of the testator's testamentary estate, or it is adaptable to apply to a portion of the testator's estate as part of a will which includes other devises.

A copy of the new Uniform Act is attached as Exhibit 2. (We do not ask that you read the Uniform Act at this time.) The staff recommends that the Commission review the new Uniform Act during 1985 when time permits. It is anticipated that this will be a widely adopted Uniform Act and, in view of the Commission's activity in the probate law field, the staff believes that it is desirable that the Commission review the new Uniform Act to determine whether it would be a desirable enactment for California. If the Commission agrees, the staff suggests that the Commission provide the Estate Planning, Trust and Probate Law Section of the State Bar with copies of the Uniform Act and request that they make a careful study of the Act and give the Commission their views. When the views of the State Bar Section are available, the Commission can give this project further consideration.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

FOR FINAL APPROVAL

UNIFORM FRAUDULENT TRANSFER ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS NINETY-THIRD YEAR  
KEYSTONE, COLORADO

JULY 27 - AUGUST 3, 1984

UNIFORM FRAUDULENT TRANSFER ACT

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UNIFORM FRAUDULENT TRANSFER ACT

SECTION 1. DEFINITIONS.

As used in this [Act]:

(1) "Affiliate" means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 or more percent of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(ii) a corporation 20 or more percent of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by a person who directly or indirectly owns, controls, or holds with power to vote, 20 or more percent of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor but does not include:

(i) property to the extent that it is encumbered by a valid lien;

(ii) property to the extent that it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entirety to the extent that it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim against a debtor.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person against whom a creditor has a claim.

(7) An "insider" includes:

(i) if the debtor is an individual,

1 (A) a relative of the debtor or of a general partner  
of the debtor;

2 (B) a partnership in which the debtor is a general  
partner;

3 (C) a general partner in a partnership described in  
clause (B); or

4 (D) a corporation of which the debtor is a director,  
officer, or person in control;

5 (ii) if the debtor is a corporation,

6 (A) a director of the debtor;

7 (B) an officer of the debtor;

8 (C) a person in control of the debtor;

9 (D) a partnership in which the debtor is a general  
partner;

10 (E) a general partner in a partnership described in  
clause (D); or

11 (F) a relative of a general partner, director,  
officer, or person in control of the debtor;

12 (iii) if the debtor is a partnership,

13 (A) a general partner in the debtor;

14 (B) a relative of a general partner in, of a general  
partner of, or of a person in control of the debtor;

15 (C) another partnership in which the debtor is a  
general partner;

16 (D) a general partner in a partnership described in  
clause (C); or

17 (E) a person in control of the debtor;

18 (iv) an affiliate, or an insider of an affiliate as if the  
affiliate were the debtor; and

19 (v) a managing agent of the debtor.

20 (8) "Lien" means a charge against or an interest in  
property to secure payment of a debt or performance of an  
obligation, including a security interest created by agreement, a  
judicial lien obtained by legal or equitable process or  
proceedings, a common-law lien, or a statutory lien.

21 (9) "Person" means an individual, partnership,  
corporation, association, organization, government or  
governmental subdivision or agency, business trust, estate,  
trust, or any other legal or commercial entity.

22 (10) "Property" means anything that may be the subject  
of ownership.

23 (11) "Relative" means an individual related within the  
third degree as determined by the common law, a spouse, or an  
individual related to a spouse within the third degree as so  
determined, and includes an individual in an adoptive  
relationship within the third degree.

24 (12) "Transfer" means every mode, direct or indirect,  
absolute or conditional, voluntary or involuntary, of disposing of  
or parting with an asset or an interest in an asset, and includes  
a payment of money, a release, a lease, and the creation of a  
lien or encumbrance.

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1 (13) "Valid lien" means a lien that is effective against the  
2 holder of a judicial lien subsequently obtained by legal or  
3 equitable process or proceedings.

4 SECTION 2. INSOLVENCY.

5 (a) A debtor is insolvent if, at a fair valuation, the sum  
6 of the debtor's debts is greater than all of the debtor's assets.

7 (b) A debtor who is generally not paying his [or her]  
8 debts as they become due is presumed to be insolvent.

9 (c) A partnership is insolvent under subsection (a) if, at  
10 a fair valuation, the sum of the partnership's debts is greater  
11 than the aggregate of all of the partnership's assets and the sum  
12 of the excess of the value of each general partner's  
13 nonpartnership assets over the partner's nonpartnership debts.

14 (d) Assets under this section do not include property  
15 that has been transferred, concealed, or removed with intent to  
16 hinder, delay, or defraud creditors or that has been transferred  
17 in a manner making the transfer voidable under this [Act].

18 (e) Debts under this section do not include an obligation  
19 to the extent the obligation is secured by a valid lien on  
20 property of the debtor not included as an asset.

21 SECTION 3. VALUE.

22 (a) Value is given for a transfer or an obligation if in  
23 exchange for the transfer or obligation property is transferred  
24 or an antecedent debt is secured or satisfied, but value does not  
25 include an unperformed promise made otherwise than in the  
26 ordinary course of the promisor's business to furnish support to  
27 the debtor or another person.

(b) For the purposes of Sections 4(a) (2) and 5, a person  
gives a reasonably equivalent value if the person acquires an  
interest of the debtor in an asset pursuant to a regularly  
conducted, noncollusive foreclosure sale or execution of a power  
of sale for the acquisition or disposition of the interest of the  
debtor upon default under a mortgage, deed of trust, or  
security agreement.

(c) A transfer is made for present value if the exchange  
between the debtor and the transferee is intended by them to be  
contemporaneous and is in fact substantially contemporaneous.

SECTION 4. TRANSFERS FRAUDULENT AS TO PRESENT  
AND FUTURE CREDITORS.

(a) A transfer made or obligation incurred by a debtor is  
fraudulent as to a creditor, whether the creditor's claim arose  
before or after the transfer was made or the obligation was  
incurred, if the debtor made the transfer or incurred the  
obligation:

1 (1) with actual intent to hinder, delay, or defraud any  
2 creditor of the debtor; or

3 (2) without receiving a reasonably equivalent value in  
4 exchange for the transfer or obligation, and the debtor:

5 (i) was engaged or was about to engage in a  
6 business or a transaction for which the remaining assets of the  
7 debtor were unreasonably small in relation to the business or  
8 transaction; or

9 (ii) intended to incur, or believed or reasonably  
10 should have believed that the debtor would incur, debts beyond  
11 the debtor's ability to pay as they became due.

12 (b) In determining actual intent under subsection (a) (1),  
13 consideration may be given, among other factors, to whether:

14 (1) the transfer or obligation was to an insider;

15 (2) the debtor had retained possession or control of the  
16 property transferred after the transfer;

17 (3) the transfer or obligation was disclosed or  
18 concealed;

19 (4) before the transfer was made or obligation was  
20 incurred, the debtor was sued or threatened with suit;

21 (5) the transfer was of substantially all the debtor's  
22 assets;

23 (6) the debtor had absconded;

24 (7) the debtor had removed or concealed assets;

25 (8) the value of the consideration received by the  
26 debtor was reasonably equivalent to the value of the asset  
27 transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent  
shortly after the transfer was made or the obligation was  
incurred;

(10) the transfer had occurred shortly before or  
shortly after a substantial debt was incurred; and

(11) the debtor had transferred the essential assets of  
the business to a lienor who had transferred the assets to an  
insider of the debtor.

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20 SECTION 5. TRANSFERS FRAUDULENT AS TO PRESENT  
21 CREDITORS.

22 (a) A transfer made or obligation incurred by a debtor is  
23 fraudulent as to a creditor whose claim arose before the transfer  
24 was made or the obligation was incurred if the debtor made the  
25 transfer or incurred the obligation without receiving a  
26 reasonably equivalent value in exchange for the transfer or  
27 obligation and the debtor was insolvent at that time or the  
debtor becomes insolvent as a result of the transfer or  
obligation.

(b) A transfer made by a debtor is fraudulent as to a  
creditor whose claim arose before the transfer was made if the  
transfer was made to an insider for other than a present,  
reasonably equivalent value, the debtor was insolvent at that

1 time, and the insider had reasonable cause to believe that the  
2 debtor was insolvent.

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4 SECTION 6. WHEN TRANSFER IS MADE OR OBLIGATION IS  
INCURRED.

5 For the purposes of this [Act]:

6 (1) a transfer is made:

7 (i) with respect to an asset that is real property other  
8 than a fixture, but including the interest of a seller or  
9 purchaser under a contract for the sale of the asset, when the  
10 transfer is so far perfected that a good-faith purchaser of the  
11 asset from the debtor against whom applicable law permits the  
12 transfer to be perfected cannot acquire an interest in the asset  
13 that is superior to the interest of the transferee; and

14 (ii) with respect to an asset that is not real property  
15 or that is a fixture, when the transfer is so far perfected that a  
16 creditor on a simple contract cannot acquire a judicial lien  
17 otherwise than under this Act that is superior to the interest of  
18 the transferee;

19 (2) if applicable law permits the transfer to be perfected  
20 as provided in paragraph (1) and the transfer is not so  
21 perfected before the commencement of an action for relief under  
22 this [Act], the transfer is made immediately before the  
23 commencement of the action;

24 (3) if applicable law does not permit the transfer to be  
25 perfected as provided in paragraph (1), the transfer is made  
26 when it becomes effective between the debtor and the transferee;

27 (4) a transfer is not made until the debtor has acquired  
rights in the asset transferred;

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the  
parties; or

(ii) if evidenced by a writing, when the writing  
executed by the obligor is delivered to or for the benefit of the  
obligee.

21 SECTION 7. REMEDIES OF CREDITORS.

22 (a) In any action for relief against a transfer or  
23 obligation under this [Act], a creditor, subject to the limitations  
24 provided in Section 8, may obtain:

25 (1) avoidance of the transfer or obligation to the extent  
26 necessary to satisfy the creditor's claim;

27 [(2) an attachment or other provisional remedy against  
the asset transferred or other property of the transferee in  
accordance with the procedure prescribed by [ ];]

(3) subject to applicable principles of equity and in  
accordance with applicable civil rules of procedure,



- 1 (i) an injunction against further disposition by the  
2 debtor or a transferee, or both, of the asset transferred or of  
3 other property;  
4 (ii) appointment of a receiver to take charge of the  
5 asset transferred or of other property of the transferee; or  
6 (iii) any other relief the circumstances may require.  
7 (b) If a creditor has obtained a judgment on a claim  
8 against the debtor, the creditor may, if the court so orders,  
9 levy execution on the asset transferred or its proceeds.  
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11 SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF  
12 TRANSFEREE.

13 (a) A transfer or obligation is not voidable under Section  
14 4(a) (1) as against a person who took in good faith and for a  
15 reasonably equivalent value or any subsequent transferee or  
16 obligee.

17 (b) Except as otherwise provided in this section, to the  
18 extent a transfer is voidable in an action by a creditor under  
19 Section 7(a) (1), the creditor may recover judgment for the value  
20 of the asset transferred, as adjusted under subsection (c), or  
21 the amount necessary to satisfy the creditor's claim, whichever  
22 is less. The judgment may be entered against:

23 (1) the first transferee of the asset or the person for  
24 whose benefit the transfer was made; or

25 (2) any subsequent transferee.

26 (c) If the judgment under subsection (b) is based upon  
27 the value of the asset transferred, the judgment must be for an  
amount equal to the value of the asset at the time of the  
transfer, subject to adjustment as the equities may require.

(d) A creditor may not recover under subsection (b) (2)  
from a good-faith transferee or obligee who took for value or  
from any subsequent transferee or obligee.

(e) Notwithstanding voidability of a transfer or an  
obligation under this [Act], a good faith transferee or obligee is  
entitled, to the extent of the value given the debtor for the  
transfer or obligation, to

(1) a lien on or a right to retain any interest in the  
asset transferred;

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the  
judgment.

(f) A transfer is not voidable under Section 5(b):

(1) to the extent the insider gave new value to or for  
the benefit of the debtor after the transfer was made unless the  
new value was secured by an otherwise unavoidable lien;

(2) if made in the ordinary course of business or  
financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to  
rehabilitate the debtor and the transfer secured present value  
given for that purpose as well as an antecedent debt of the  
debtor.

1 (g) A transfer is not voidable under Section 4(a) (2) or  
2 Section 5 of this [Act] if the transfer results from:

3 (1) termination of a lease upon default by the debtor  
when the termination is pursuant to the terms of the lease and  
4 applicable law; or

5 (2) enforcement of a security interest in compliance  
with Article 9 of the Uniform Commercial Code.

6 SECTION 9. EXTINGUISHMENT OF CAUSE OF ACTION.

7 A [cause of action] [claim for relief] with respect to a  
fraudulent transfer or obligation under this [Act] is  
8 extinguished unless action is brought:

9 (a) under Section 4(a) (1), within 4 years after the  
transfer was made or the obligation was incurred or, if later,  
within one year after the transfer or obligation was or could  
10 reasonably have been discovered by the claimant;

11 (b) under Section 4(a) (2) or 5(a), within 4 years after  
the transfer was made or the obligation was incurred; or

12 (c) under Section 5(b), within one year after the transfer  
was made or the obligation was incurred.

13 SECTION 10. SUPPLEMENT OF PROVISIONS.

14 Unless displaced by the provisions of this [Act], the  
principles of law and equity, including the law merchant and the  
15 law relating to principal and agent, estoppel, laches, fraud,  
misrepresentation, duress, coercion, mistake, insolvency, or  
16 other validating or invalidating cause, supplement its provisions.

17 SECTION 11. UNIFORMITY OF APPLICATION AND  
18 CONSTRUCTION.

19 This [Act] shall be applied and construed to effectuate its  
general purpose to make uniform the law with respect to the  
20 subject of this [Act] among states enacting it.

21 SECTION 12. SHORT TITLE.

22 This [Act] may be cited as the Uniform Fraudulent Transfer  
23 Act.

24 SECTION 13. REPEAL.

25 The following acts and all other acts and parts of acts  
26 inconsistent herewith are hereby repealed:

FOR FINAL APPROVAL

UNIFORM STATUTORY WILL ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS NINETY-THIRD YEAR  
KEYSTONE, COLORADO

JULY 27 - AUGUST 3, 1984

UNIFORM STATUTORY WILL ACT

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UNIFORM STATUTORY WILL ACT

SECTION 1. DEFINITIONS.

In this [Act]:

(1) "Child" means, except as otherwise modified by this paragraph, any child of the natural parent whose relationship is involved. An adopted individual is the child of the adopting parents and not of the natural parents, but an individual adopted by the spouse of a natural parent is also the child of either natural parent. An individual born out of wedlock is not the child of the father unless the individual is openly and notoriously so treated by the father. The term does not include any individual who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(2) "Issue" of an individual means all lineal descendants of all generations, with the status of a child at each generation being determined by the definition of child contained in this [Act].

(3) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same functions relating to the estate of a decedent under the law governing their status.

(4) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property.

(5) "Representation" means the estate is divided into as many equal shares as there are surviving issue in the nearest degree of kinship and deceased individuals in the same degree who left issue surviving the decedent, each surviving issue in the nearest degree receiving one share and the share of each deceased individual in the same degree being divided among issue of that individual in the same manner.

(6) "Statutory-will estate" means the entire testamentary estate, except as the will otherwise provides.

(7) "Surviving spouse" means the individual to whom the testator was married at the time of death except a spouse from whom the testator was then separated under a decree of separation, whether or not final, or written separation agreement signed by both parties. An individual separated from the testator whose marriage to the testator continues in effect under the law of this State solely because an existing judgment of divorce or annulment of the marriage is not recognized as valid in this State is not the testator's surviving spouse under this [Act]. An individual whose marriage to the testator at the time of death is not recognized in this State solely because an existing judgment of divorce or annulment of a previous marriage of either or both of them is not recognized as valid in this State is the testator's surviving spouse under this [Act].

1 (8) "Testamentary estate" includes every interest in  
2 property subject to disposition or appointed by a will of the  
3 decedent.

4 (9) "Testator's residence" means one or more properties  
5 normally used at the time of the testator's death by the testator  
6 or the surviving spouse as a residence for any part of the year.  
7 If the property used as a residence is a unit in a cooperative or  
8 other entity, it includes all rights and interests relating to that  
9 unit. If the property is used in part for commercial,  
10 agricultural, or other business purpose, the testator's residence  
11 is an area not exceeding [3] acres, which includes the structure  
12 used in whole or in part as a residence and structures normally  
13 used by the testator in connection with the dwelling and  
14 excludes structures and areas outside the dwelling primarily  
15 used for commercial, agricultural, or other business purpose.

16 (10) "Trustee" includes an original, additional, or  
17 successor trustee, whether or not appointed or confirmed by the  
18 court.

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SECTION 2. MAKING STATUTORY WILL.

Any individual having capacity to make a will under the laws  
of this State may make a statutory will under this [Act]. The  
will must be executed in a manner recognized as valid under the  
laws of this State.

SECTION 3. INCORPORATION BY REFERENCE.

(a) A will may incorporate by reference the provisions of  
this [Act] in whole or in part and with any modifications and  
additions the will provides. To the extent that an express  
provision of a will conflicts with a provision of this [Act], the  
express provision of the will governs.

(b) A provision that all or part of the testator's  
testamentary estate is to be disposed of in accordance with the  
[Enacting State's] Uniform Statutory Will Act incorporates by  
reference provisions of this [Act] in effect on the date the will  
is executed.

(c) An incorporation by reference of provisions of this  
[Act] may be in the following or a substantially similar form:  
"Except as otherwise provided in this will, I direct that  
my testamentary estate be disposed of in accordance with the  
[Enacting State's] Uniform Statutory Will Act."

SECTION 4. SHARES UNDER STATUTORY WILL.

The statutory-will estate passes as provided in Sections 5  
through 9.

1 SECTION 5. SHARE OF SPOUSE.

2 (a) The share of the surviving spouse is:

3 (1) if there is no surviving issue, the entire  
statutory-will estate; or

4 (2) if there is a surviving issue,

5 (i) subject to any lien or encumbrance, the  
testator's residence and tangible personal property, except  
personal property held primarily for investment or for  
commercial, agricultural, or other business purpose;

6 (ii) the greater of [\$300,000], or one-half of the  
balance of the statutory-will estate; and

7 (iii) subject to subsection (b), an interest in the  
remaining portion of the statutory-will estate, including any  
property that would pass under subsection (a) (2) (i) or  
8 (a) (2) (ii) but disclaimed by the surviving spouse, in a trust  
upon the terms set forth in Section 6.

9 (b) If the personal representative, other than the  
surviving spouse, determines that the trust under Section 6  
10 would be uneconomical, the entire statutory-will estate passes to  
the surviving spouse.

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12 SECTION 6. TRUST FOR SPOUSE AND ISSUE.

13 Property held in trust under Section 5 (a) (2) (iii) is held upon  
the following terms:

14 (1) During the life of the surviving spouse, the entire  
net income must be paid to or for the benefit of the surviving  
15 spouse in quarter-annual or more frequent installments. Net  
income accrued or undistributed on the death of the surviving  
16 spouse must be paid to the estate of the spouse. If any  
unproductive property is held in the trust, the surviving spouse  
17 at any time by written instrument delivered to the trustee may  
compel conversion of the unproductive property to productive  
18 property.

19 (2) During the life of the surviving spouse, the trustee  
at any time may pay to or for the benefit of the surviving  
spouse and issue of the testator amounts of the principal the  
20 trustee deems advisable, giving reasonable consideration to other  
resources available to the distributee, for the individual's needs  
21 for health, education, support, or maintenance. For the  
purpose of making these discretionary payments, the principal  
22 shall be administered as two separate shares, which at the  
inception of the trust shall be equal. One share is the  
23 surviving spouse's share of the principal. During the life of the  
surviving spouse, no payments may be made from the surviving  
24 spouse's share to anyone other than the surviving spouse.  
Primary consideration must be given to the needs of the  
25 surviving spouse and the children who are under the age of [23]  
years or under disability. The trustee may rely in good faith  
26 on a written statement furnished by a beneficiary. The  
discretion to pay principal to or for the benefit of any individual  
27 includes the discretion after that individual's death to pay

1 expenses incurred before the individual's death and funeral and  
2 burial expenses. If the trustee, other than the surviving  
3 spouse, determines that continuation of the trust is  
4 uneconomical, the trustee may terminate the trust by distribution  
5 of principal to the surviving spouse. Principal that in the  
6 exercise of the trustee's discretion is paid to or for the benefit  
7 of any issue may be charged against any share of income or  
8 principal thereafter existing for that issue or for any ancestor  
9 or descendant of that issue, if the trustee upon equitable  
10 considerations so determines. If the surviving spouse or any  
11 issue is serving as trustee, the trustee's discretion provided in  
12 this paragraph is not exercisable in favor of that trustee except  
13 as necessary for the trustee's needs for health, education,  
14 support, or maintenance nor is the trustee's discretion  
15 exercisable in favor of the trustee's estate, or the trustee's  
16 creditors, or the creditors of the trustee's estate.

17 (3) On the death of the surviving spouse, the principal,  
18 unless retained in trust under Section 8 or 9, must be paid,  
19 subject to any charges made by the trustee under paragraph  
20 (2), to the children of the testator in equal shares if all of the  
21 children are then living, otherwise to the then living issue of  
22 the testator by representation or, if no issue of the testator is  
23 then living, to the individuals who would be entitled to receive  
24 the estate as if the property were located in this State and the  
25 testator had then died intestate domiciled in this State under the  
26 law as it then exists in the proportions so determined.

#### 27 SECTION 7. SHARES OF HEIRS WHEN NO SURVIVING SPOUSE.

(a) If there is no surviving spouse, the statutory-will estate passes, subject to Sections 8 and 9, as follows:

(1) if there is surviving issue, in equal shares to the children of the testator if all of them survive, otherwise to the surviving issue of the testator by representation;

(2) if there is no surviving issue, to the individuals entitled to receive the estate as if the property were located in this State and the testator had died intestate domiciled in this State in the proportions so determined.

(b) Unless the personal representative determines that a trust would be uneconomical, property to which Section 8 or Section 9 applies shall be distributed to the trustee. If the personal representative determines that a trust would be uneconomical, the property passes under subsection (a) free of trust. The discretion provided in this subsection to the personal representative is not exercisable by any of the testator's issue serving as personal representative.

1           SECTION 8. TRUST IF CHILD UNDER SPECIFIED AGE.

2           (a) If property is distributable under Section 6(3) or  
3 Section 7 to a child of the testator who is under the age  
4 specified in the will or, if the will does not specify an age,  
5 under the age of [23] years, all shares distributable to issue of  
6 the testator shall be held in a trust under this section. In  
7 exercising powers under subsections (b) and (c), primary  
8 consideration must be given to the needs of children who are  
9 under the age of [23] years or under disability.

10           (b) Until no living child is under the age determined  
11 under subsection (a), the trustee shall pay the income and  
12 principal of the trust to or for the benefit or account of one or  
13 more of the issue of the testator in amounts the trustee deems  
14 advisable for their needs for health, education, support, or  
15 maintenance. Income not so paid may be added to principal.

16           (c) The trustee at any time in its discretion may  
17 distribute to a beneficiary the share, in whole or in part, of the  
18 trust to which the distributee would be entitled if the trust then  
19 terminated. If the whole of a share has been distributed under  
20 this subsection, the trustee thereafter shall not make any  
21 further distribution of income or principal to that distributee or  
22 issue of that distributee.

23           (d) The trust terminates when no living child is under  
24 the age determined under subsection (a) or the trustee in its  
25 discretion determines that continuation of the trust is  
26 uneconomical.

27           (e) Subject to subsection (c) and Section 9, the property  
in the trust must be distributed upon termination to the issue of  
the testator in proportion to the shares determined at the death  
of the surviving spouse under Section 6(3), or at the death of  
the testator under Section 7, if there is no surviving spouse.  
In determining the amount to be distributed to any distributee,  
the trustee shall charge the share of that distributee with any  
partial distribution made under subsection (c) and may charge,  
in its discretion, the share of that distributee with distributions  
under subsection (b) to or for the benefit or account of the  
distributee, or issue or ancestor of the distributee. If any  
issue whose share is held in trust under this section dies before  
the complete distribution of the share, the property to which the  
issue would have been entitled if living must be distributed to  
the assignees, or, if none, to the estate of the deceased issue.

          (f) If an issue is serving as trustee, the discretion of  
the trustee under this section is not exercisable, except as  
necessary for that individual's needs for health, education,  
support, or maintenance, in favor of that individual, or that  
individual's estate, or that individual's creditors, or the  
creditors of that individual's estate.

28           SECTION 9. EFFECT OF DISABILITY AT DISTRIBUTION.

29           (a) If property becomes distributable by a personal  
30 representative or trustee to an individual under the age  
31 specified in the will or, if the will does not specify an age,



1 under the age of [23] years, or to an individual who the  
2 personal representative or trustee determines cannot effectively  
3 manage or apply the property by reason of mental illness, mental  
4 deficiency, physical illness or disability, chronic use of drugs,  
5 chronic intoxication, or other cause: (i) the personal  
6 representative or trustee, as to either principal or income, may  
7 distribute part or all of the property to the distributee directly,  
8 by deposit or investment in the distributee's name or for the  
9 distributee's account, or to a guardian or conservator for the  
10 distributee; (ii) the personal representative may distribute to  
11 the trustee in trust under subparagraph (iii); or (iii) the  
12 trustee may retain all or any of the property in trust for the  
13 distributee and thereafter at any time the trustee may distribute  
14 or apply part or all of the principal or income to or for the  
15 benefit or account of the distributee.

16 (b) Unless terminated earlier, a trust under subsection  
17 (a) (iii) terminates upon the attainment of the required age,  
18 removal of the disability, or death of the distributee. The  
19 trustee shall distribute the remaining trust property to the  
20 distributee or personal representative of the distributee's estate.

21 (c) This section does not apply to distributions to a  
22 surviving spouse of the testator.

#### 23 SECTION 10. POWERS OF APPOINTMENT.

24 (a) A will incorporating by reference the terms of this  
25 [Act] does not exercise a power of appointment unless (1) the  
26 will complies with any conditions imposed on the exercise of the  
27 power, (2) the appointment is within the scope of the power,  
and (3) the will expressly refers to the power or expresses an  
intent to exercise any power of appointment held by the  
testator.

(b) If a power of appointment is exercised as provided in  
subsection (a), the appointed property passes as part of the  
statutory-will estate unless the will provides otherwise.

#### SECTION 11. SURVIVAL.

An individual who does not survive the testator by [30] days  
is treated as if the individual predeceased the testator.

#### SECTION 12. APPOINTMENT OF PERSONAL REPRESENTATIVE AND TRUSTEE.

(a) The person named in the will as personal  
representative or trustee is entitled to serve, if qualified, as  
personal representative or trustee.

(b) If no qualified person is named in the will as personal  
representative, or the named person is incapacitated, unwilling  
to serve, or dead, and a qualified alternate is not named in the  
will, priority for appointment as personal representative is

1 determined by the law of the state of decedent's domicile at  
2 death.

3 (c) If no qualified person is named in the will as trustee,  
4 or the named person is incapacitated, unwilling to serve, or is  
5 dead, and a qualified alternate is not named in the will, the  
6 personal representative may appoint, without court approval, a  
7 qualified person, including a person serving as personal  
8 representative, to serve as trustee.

9 (d) If a personal representative or trustee resigns, is  
10 removed, becomes incapacitated, or dies, the surviving spouse,  
11 or if there is no surviving spouse or the surviving spouse is  
12 unable or unwilling to act, a majority of the adult children of  
13 the testator, may appoint a qualified successor personal  
14 representative or trustee.

15 (e) In all other cases, personal representatives and  
16 trustees shall be appointed by the court.  
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ALTERNATIVE A

SECTION 13. POWERS.

(a) Except as expressly provided in the will, a personal  
representative has all powers available to personal  
representatives by law including powers set forth in [Enacting  
State's Personal Representatives' Powers Act].

(b) Except as expressly provided in the will, a trustee  
has all powers available to trustees by law including powers set  
forth in [Enacting State's Trustees' Powers Act].

(c) Except as expressly provided in the will, the personal  
representative or trustee shall observe the standards in dealing  
with the estate that would be observed by a prudent person  
dealing with the property of another, and if the personal  
representative or trustee has special skills or is named personal  
representative or trustee on the basis of representation of  
special skills or expertise, the person is under a duty to use  
those skills. Except to the extent qualified property is not  
available, only property that qualifies for the estate tax marital  
deduction under the Internal Revenue Code, as amended, may be  
allocated to the surviving spouse under Section 5 or to the  
surviving spouse's share of principal in a trust established  
under Section 6.

ALTERNATIVE B

SECTION 13. POWERS.

(a) Subject to subsection (c) and except as expressly  
provided by will, a trustee under this [Act], in addition to any  
other powers conferred by law, has the power without prior  
approval of any court to:

(1) retain any property in the form in which it is  
received including assets in which the trustee is personally  
interested;

1 (2) make ordinary or extraordinary repairs, store,  
2 insure, or otherwise care for any tangible personal assets, and  
3 pay shipping or other expense relating to the property as the  
4 trustee deems advisable;

5 (3) abandon any property the trustee determines to be  
6 worthless;

7 (4) invest principal and income in any property the  
8 trustee determines and, without limiting the generality of the  
9 foregoing, invest in investment company shares or in shares or  
10 undivided portions of any common trust fund established by the  
11 trustee;

12 (5) sell, exchange, or otherwise dispose of property at  
13 public or private sale on terms the trustee determines, no  
14 purchaser being bound to see to the application of any proceeds;

15 (6) lease property on terms the trustee determines even  
16 if the term may extend beyond the time the property becomes  
17 distributable;

18 (7) allocate items of income or expense to income or  
19 principal, as provided by law;

20 (8) keep registered securities in the name of a nominee;

21 (9) pay, compromise, or contest claims or  
22 controversies, including claims for estate or inheritance taxes, in  
23 any manner the trustee determines;

24 (10) participate in any manner the trustee determines in  
25 any reorganization, merger, or consolidation of any entity the  
26 securities of which constitute part of the property held;

27 (11) deposit the securities with a voting trustee or  
committee of security holders even if under the terms of deposit  
the securities may remain deposited beyond the time they become  
distributable;

(12) vote upon any securities in person or by special,  
limited, or general proxy, with or without power of substitution,  
and otherwise exercise all the rights that may be exercised by  
any security holder in an individual capacity;

(13) borrow any amount the trustee considers advisable  
to obtain cash for any purpose of the trust, and in connection  
therewith, mortgage or otherwise encumber any property on any  
conditions the trustee determines even if the term of the loan  
may extend beyond the term of the trust;

(14) allot in or towards satisfaction of any payment,  
distribution, or division, in any manner the trustee determines,  
any property held at the then current fair market values;

(15) hold trusts and shares undivided or at any time  
hold the same or any of them set apart one from another;

(16) enter into a lease or arrangement for exploration  
and removal of minerals or other natural resources or enter into  
a pooling or unitization agreement;

(17) sell or exercise stock subscription or conversion  
rights;

(18) employ persons, including attorneys, auditors,  
investment advisers, or agents, even if they are associated with  
the trustee, to advise or assist the trustee in the performance of  
duties, act without independent investigation upon their

1 recommendations, and instead of acting personally, employ one or  
2 more agents to perform any act of administration, whether or not  
discretionary;

3 (19) continue any unincorporated business or venture  
in which the decedent was engaged at the time of death;

4 (20) incorporate any business or venture in which the  
decedent was engaged at the time of death;

5 (21) distribute property distributable to the estate of  
an individual directly to the devisees or heirs of the individual;  
and

6 (22) perform any other act necessary or appropriate to  
administer the trust.

7 (b) Except as expressly provided in the will, the  
personal representative, in the administration of the estate, has  
8 all of the powers of a trustee conferred under subsection (a).  
In addition, the personal representative has the power to satisfy  
9 written charitable pledges of the decedent, irrespective of  
whether the pledges constitute binding obligations of the  
10 decedent or were properly presented as claims, if in the  
judgment of the personal representative the decedent would have  
11 wanted the pledges completed under the circumstances.

12 (c) Except as expressly provided in the will, the personal  
representative or trustee shall observe the standards in dealing  
with the estate that would be observed by a prudent person  
13 dealing with the property of another, and if the personal  
representative or trustee has special skills or is named personal  
14 representative or trustee on the basis of representation of  
special skills or expertise, the person is under a duty to use  
15 those skills. Except to the extent qualified property is not  
available, only property that qualifies for the estate tax marital  
16 deduction under the Internal Revenue Code, as amended, may be  
allocated to the surviving spouse under Section 5 or to the  
17 surviving spouse's share of principal in a trust established  
under Section 6.

18  
19 SECTION 14. BOND OR SURETY.

20 A personal representative or trustee under this [Act] shall  
serve without giving bond or surety unless the testator by will,  
21 or the court upon the application of any person interested in the  
estate, provides otherwise.

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23 SECTION 15. SHORT TITLE.

24 This [Act] may be cited as the [Enacting State] Uniform  
Statutory Will Act.

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SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 17. TIME OF TAKING EFFECT.

This [Act] takes effect \_\_\_\_\_.

[SECTION 18. REPEAL.

The following acts and parts of acts are repealed:

- (1) \_\_\_\_\_
- (2) \_\_\_\_\_