



DELBERT HOSEMANN  
*Secretary of State*

**2009 BUSINESS REFORM STUDY GROUPS  
MEETING OF THE TRUST LAWS STUDY GROUP**

**Second Meeting**

Tuesday, August 25, 2009  
11:00 A.M.

**Secretary of State's Office  
700 North Street  
Jackson, Mississippi**

**AGENDA**

1. Welcome – Cheryn Baker
2. Approval of minutes
3. Sub-Group reports
  - a. Asset-protection trusts – Len Martin
  - b. Dynasty trusts and virtual representation – Barry Jones
  - c. Uniform Principal and Income Act – Lynne Green
  - d. Uniform Prudent Management of Institutional Funds Act – Mark McCrary
4. Reminder of upcoming meetings
5. Adjourn 1:00 P.M (or earlier)

**Upcoming Meeting Date: September 15**

Handouts

1. Group roster
2. Minutes of July 22, 2009, Trust Laws Study Group meeting
3. Status report – Dynasty Trusts / Virtual Representation Sub-Group



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**2009 Business Reform Committees  
Minutes of the Trust Laws Study Group, Meeting # 1  
July 22, 2009**

The first meeting of the Trust Laws Study Group was called to order on Wednesday, July 22, 2009 at 11:05 A.M. at the Secretary of State’s Office, 700 North Street, Jackson, Mississippi. A list of the persons who were present is attached as Exhibit A.

**Introduction**

Cheryn Baker, Assistant Secretary of State, Policy and Research Division (“the Division”), welcomed everyone to the meeting and described the purpose of the study group. Secretary Hosemann also expressed his appreciation to everyone for serving on the study group.

**Opening Remarks**

Study Group Co-Chairs Jimmy Young and Jamie Houston explained the purpose of the group and thanked Secretary Hosemann and Ms. Baker. The co-chairs also noted their belief that support from the Division would drastically improve the group’s effectiveness.

**Presentation**

Doug Jennings, Senior Attorney, Policy and Research Division, delivered a brief presentation on some of the topics to be addressed by the group: (1) asset-protection trusts, (2) dynasty trusts, (3) virtual representation; (4) the Uniform Principal and Income Act (“UPAIA”), and (5) the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”).

**Asset-protection trusts.** Mr. Jennings explained that asset-protection trusts (“APTs”) were first recognized in the United States in 1997 by Alaska, and by Delaware shortly thereafter. Prior to this date, APTs were available only offshore. Mr. Jennings gave a summary of why a settlor (i.e., a person who creates a trust) would want to place assets into an APT: for tax benefits, protection from tort claims, protection for gifts and inheritances, assistance in pre-marital planning, and to protect estate-planning vehicles. Mr. Jennings stated that APT states generally prohibit creditors from accessing trust assets to satisfy a debt or judgment; however, states recognizing APTs have adopted various exceptions to this rule. Further, most APT states allow a former spouse to access trust assets to recover child support or alimony payments. Delaware also recognizes an exception allowing a tort claimant to recover against the trust assets

for claims arising before the creation of the trust. Mississippi currently does not recognize APTs, as its statutes expressly allow invasion of trust assets by a creditor when the settlor and beneficiary of a trust are the same person.

**Dynasty trusts.** Mr. Jennings explained that dynasty trusts are trusts which last longer than permitted by the traditional Rule Against Perpetuities and which are intended to benefit many successive generations. Many states have abolished the Rule outright, while most APT jurisdictions have merely modified it to allow trusts a greater duration. For example, some APT states have modified their laws to allow trusts to last for up to 1,000 years.

**Virtual representation.** Mr. Jennings stated that trust proceedings in Mississippi involving certain types of beneficiaries (such as minors, unborn children, or incompetent persons, to name a few) currently require the appointment of a guardian ad litem who must be an attorney. This requirement adds considerable expense and time to the proceedings. By adopting a statute allowing virtual representation of these types of beneficiaries (that is, allowing a person with an interest in the trust to represent all other parties with the same interest), trust proceedings involving these types of beneficiaries would be made more efficient and cost-effective. For example, such a statute would allow a parent to represent a child or unborn beneficiary with the same interest, rather than requiring that every potential beneficiary be represented separately by counsel or by a guardian ad litem. Mr. Jennings briefly outlined different approaches to virtual representation taken by the Uniform Probate Code, the Uniform Trust Code, and by state statutes in New York and Delaware. One study group member pointed out that the Mississippi Bar had considered virtual representation as part of its legislative agenda last year and that was a reason for including it on this year's study group agenda.

**UPAIA.** The UPAIA was enacted by the National Council of Commissioners on Uniform State Laws ("NCCUSL") in 1997 and is a modernization of the rules regulating how trustees may manage trust assets. Previous enactments of the act followed the "prudent person" rule, which required trustees to allocate assets to maximize present income, rather than to accumulate capital gains. Unfortunately, this rule required trustees to act in the interest of present beneficiaries at the expense of future beneficiaries. The UPAIA departs from this approach by allowing trustees to invest for total return and to allocate a certain amount of capital gains to income in each year as necessary to fulfill his or her duty of impartiality. Moreover, the UPAIA's investment rules give greater effectiveness to the Uniform Prudent Investor Act which was adopted by Mississippi in 2006 and which modernizes the law of trust investments.

**UPMIFA.** UPMIFA is a uniform act which provides rules for the investment and management of endowments and charitable funds. The former version of this act, the Uniform Management of Institutional Funds Act (adopted by Mississippi in 1998), prohibited an organization from spending money from any charitable fund below that fund's "historic dollar value," i.e., the dollar value at the time the fund was established. UPMIFA dispenses with the concept of historic dollar value and imposes, rather, the duty of prudent investing on trustees managing charitable funds. This approach gives trustees more flexibility in crafting investment strategies while still preventing excessive spending of trust assets. UPMIFA also provides a number of factors that trustees must consider when making investment decisions, as well as a

number of other minor provisions intended to make trust management easier and more efficient. UPMIFA has been adopted by 37 states since its adoption by NCCUSL in 2006.

Mr. Jennings stated that UPMIFA was introduced in Mississippi in 2009 but died in committee. Ms. Baker pointed out that UPMIFA's failed adoption was not due to opposition in the legislature, but was rather a result of the lack of any organized advocacy on the act's behalf.

## **Discussion**

A committee member asked whether the staff and co-chairs had considered having the Group review the Uniform Trust Code (the "UTC") for potential adoption in Mississippi. Mr. Jennings responded that other states which had adopted the UTC had studied it for a number of years before adopting it and that he and the co-chairs had decided that review and consideration of the entire UTC would not be possible in the study group's limited time frame. However, Mr. Jennings pointed out that the study group would be considering two topics that are set forth in portions of the UTC: Article 3, regarding virtual representation, and Article 8, regarding trustee powers.

Ms. Baker urged the members to submit to the group for discussion any changes that they, their colleagues, or clients would like to see in Mississippi's trust laws. She said the Division would be glad to conduct further research on these issues as necessary.

Mr. Jennings called for further comments or questions from the group members. There being no comments or questions, he announced the creation of four sub-groups and asked or volunteers: (1) asset-protection trusts; (2) dynasty trusts and virtual representation; (3) UPAIA and the trustee's powers provisions of Article 8 of the UTC; and (4) UPMIFA. Mr. Jennings explained that the sub-groups would meet as needed between the larger group meetings and that the sub-group chairs would present their reports and recommendations to the entire group.

## **Reminders about Upcoming Meetings and Other Business**

Ms. Baker reminded the members of the remaining meetings scheduled for August 4<sup>th</sup>, August 25<sup>th</sup>, and September 15<sup>th</sup>. Mr. Jennings pointed out the suggested readings on page two of the agenda (see Exhibit B for a list of recommended reading) and stated that the Secretary of State's Office would be glad to provide a copy for any study group members without access to those materials.

With no further business to discuss the meeting was adjourned at 11:45 A.M.

Respectfully Submitted,

Cheryn Baker  
Assistant Secretary of State  
Policy and Research Division

# EXHIBIT A

## Minutes of the Trust Law Study Group, Meeting #1 July 22, 2009

### In Attendance:

1. Jamie Houston (Co-Chair)
2. Jimmy Young (Co-Chair)
3. Bill Brown
4. Donna Bruce
5. Pete Cajoleas
6. Becky Covington
7. Greg Cronin
8. Joe Dick
9. Jeramie Fortenberry
10. Lynne Green
11. Mark Hartnett
12. Rusty Hawkins
13. Barry Jones
14. Linda Bounds King
15. Len Martin
16. Michelle Mahoney
17. Mark McCrary
18. James Pettis
19. Randy Shell
20. Julie Skipper
21. William Staggers
22. Jay Travis
23. Primus Wheeler
24. Warren Wiltshire

### Attending by Phone:

1. Sen. Buck Clarke
2. David Cleland

3. Richard Courtney
4. Albert Delgadillo
5. Tony Edwards
6. Fred Hoff
7. Rob Jackson
8. Lee Murphy
9. Robert Paine
10. Brad Walsh
11. William Wilkins
12. Eric Wooten

### Secretary of State's Staff:

1. Delbert Hosemann, Mississippi Secretary of State
2. Martin Hegwood, Mississippi Secretary of State, Executive Division
3. Cheryn Baker, Assistant Secretary of State, Policy and Research
4. Doug Jennings, Senior Attorney, Policy and Research
5. Kay Earles, Division Coordinator, Policy and Research
6. Michael Kelly, Legal Intern, Policy and Research
7. Steven Corhern, Legal Intern, Policy and Research

## **EXHIBIT B**

### **Minutes of the Trust Law Study Group, Meeting #1 July 22, 2009**

#### Recommended Reading for Trust Laws Study Group

1. Robert H Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: an Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).
2. Garrett Morris, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588 (2003).
3. Martin D. Begleiter, *Serve the Cheerleader – Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP. TR. & EST. L.J. 311 (2008).

## MEMORANDUM

TO: Secretary of State Trust Laws Study Group

FROM: Dynasty Trust/Virtual Representation Sub-Committee

DATE: August 21, 2009

RE: Status Report Concerning Examination of Rule Against Perpetuities and Virtual Representation

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Introduction - This Sub-Committee is charged with examining the potential reform of the Rule Against Perpetuities and the introduction of Virtual Representation into State Law. The Sub-Committee is charged with providing a recommendation to the Secretary of State Trust Laws Study Group. The Secretary of State Trust Laws Study Group will, in turn, make recommendations for proposed legislation to be introduced in the 2010 Legislative Session.

Rule Against Perpetuities - The Sub-Committee has studied and discussed statutes adopted by various states to reform the Rule Against Perpetuities based on research provided by the Secretary of State Division of Policy and Research. The Sub-Committee has also reviewed the research findings of Prof. Robert H. Sitkoff, Visiting Professor of Law, New York University, and Associate Professor of Law, Northwestern University, and Prof. Max M. Schanzenbach, Assistant Professor of Law, Northwestern University.

At present, the consensus of the Sub-Committee is to recommend reformation of the Rule Against Perpetuities in Mississippi. Specifically, the Sub-Committee is discussing the following two approaches:

(1) Leave the existing Rule Against Perpetuities as the default provision. Add a provision that allows an attorney to chose a modified Rule Against Perpetuities affirmatively stated in the trust. Under this approach, the attorney could insert a provision in the trust that would provide a restriction on alienation of trust property for a period of 150 years. For consistency, the Rule would apply to both personal and real property. To preserve flexibility, the attorney would also have to provide in the trust either (a) a power allowing the trustee to make a sale of personal or real property, in their discretion, despite the specific restraint on alienation or (b) a right granted to one or more beneficiaries or third parties to terminate the trust. This approach would be coupled with a repeal of the fiduciary income tax.

(2) Leave the existing Rule Against Perpetuities as the default provision. Add a provision that allows an attorney to chose a modified Rule Against Perpetuities affirmatively stated in the trust. Under this approach, the 150 years is a default rule and the attorney could draft a provision to extend the 150 year default rule for an additional period of time. The Sub-Committee discussed the possible extensions of time to be 300 years, 500 years or 1,000 years. For consistency, the Rule would apply



to both personal and real property. To preserve flexibility, the attorney would also have to provide in the trust either (a) a power allowing the trustee to make a sale of personal or real property, in their discretion, despite the specific restraint on alienation or (b) a right granted to one or more beneficiaries or third parties to terminate the trust. This approach would also be coupled with a repeal of the fiduciary income tax.

Attached to this Memorandum is an excerpt from a *Yale Law Journal* Article “Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities in Taxes,” by Professors Robert A. Sitkoff and Max M. Schanzenbach. The attached graph is provided by the authors to support the hypothesis that the experience of those states that abolish the Rule Against Perpetuities and did not tax income in trusts attracted from out-of-state a significant inflow of large trust funds upon abolishing the Rule.

The Sub-Committee formulated additional questions which the Secretary of State Division of Policy and Research has presented to Prof. Sitkoff as follows:

- A. His opinion concerning the advantages and disadvantages of the two approaches listed above.
- B. His comments with respect to states (such as Delaware) that have completely abolished the Rule Against Perpetuities for assets in trust.
- C. Since the studies performed by Prof. Sitkoff have shown a significant

increase in the average size of trust accounts in Delaware and South Dakota, after reform of the Rule Against Perpetuities, the Sub-Committee inquired of Prof. Sitkoff if there was any significant difference in the approach taken as long as the statute allows dynasty trusts.

D. If there is any reason to think that raising the time period from 150 years to 300 years, or from 150 years to 1,000 years, would have any effect on the total trust assets for average account size;

E. If, other than Delaware, Illinois and South Dakota, he can identify any other states which have benefitted greatly from appealing or reforming the Rule Against Perpetuities;

F. If his studies reveal any evidence of trust assets or average trust account size decreasing in jurisdictions that have modified or repealed the Rule Against Perpetuities and abolished fiduciary income taxation; and

G. If he has seen any definitive evidence that validating asset protection trusts will increase the amount of trust assets or average trust account size in states recognizing asset protection trusts.

Prof. Sitkoff has advised the Secretary of State Division of Policy and Research that he wishes to confer with his colleague, Prof. Schanzenbach and will respond to the questions posed by the Sub-Committee thereafter.

Virtual Representation - The Sub-Committee was provided by the Secretary of State Division of Policy and Research a research paper discussing various approaches to Virtual Representation. The research paper notes that Mississippi has not adopted a statute allowing for Virtual Representation. The current law in Mississippi is defined by *Miss. Code Ann.* (1972), as amended, §9-5-89, which allows the Chancery Court to appoint a guardian *ad litem* to represent a minor or “defendant of unsound mind,” if the Court deems it necessary for the protection of the interests of the minor or “defendant of unsound mind.” The Secretary of State Division of Policy and Research also provided the Sub-Committee with case law from the Fifth Circuit Court of Appeals providing that Virtual Representation “demands the existence of an expressed or implied legal relationship in which parties in the first suit are accountable to non-parties who file subsequent suits raising identical issues.” The Fifth Circuit has defined a number of situations in which the Doctrine may arise, including “estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries and a trust beneficiary by the trustee.”

The Uniform Probate Code (“UPC”) provides for Virtual Representation with a specific requirement that the representation be adequate. The UPC Virtual Representation applies to “formal proceedings involving trusts or estates of decedents,

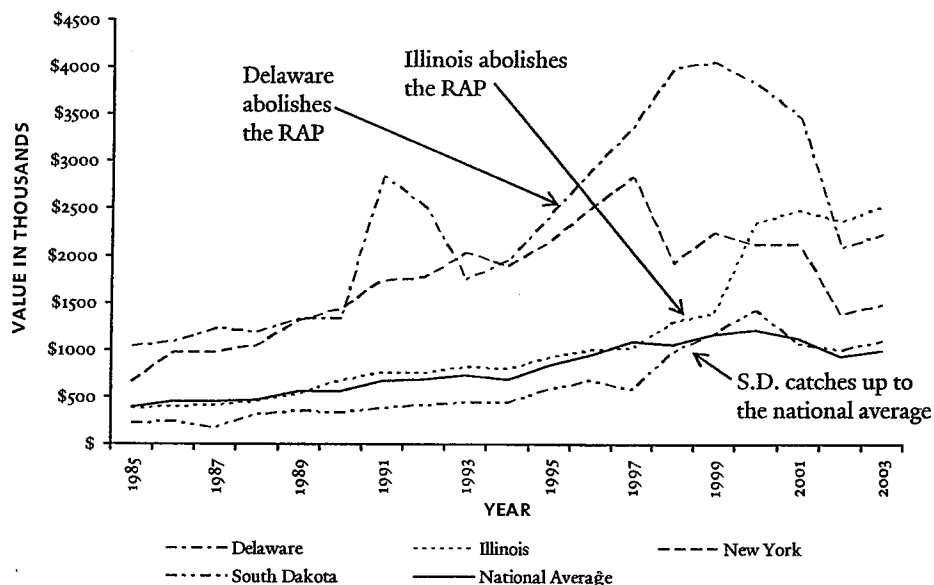
minors, protected persons, or incapacitated persons, and in judicially supervised settlements.” The UPC approach does not apply to non-judicial proceedings. The UPC approach has been adopted by a total of 19 states.

The research paper discusses Section 304 of the Uniform Trust Code (“UTC”) which provides Virtual Representation for a “minor, incapacitated or unborn individual or person whose identity or location is unknown and not reasonably ascertainable.” Under the UTC these individuals are represented by a party having a “substantially identical interest with respect to the particular question or dispute.” Neighboring states that have adopted the UTC approach include Alabama, Arkansas, Florida, North Carolina, South Carolina and Tennessee. In all, 23 states have adopted the UTC Virtual Representation provision. The UTC approach does not differentiate between judicial and non-judicial proceedings.

The Sub-Committee is discussing the potential recommendation of the UTC approach to Virtual Representation. The consensus of the Sub-Committee is that the adoption of the Virtual Representation statute would in no way limit the discretion of the Chancery Court to appoint a guardian *at litem* if the Court deems it necessary to protect a particular party’s interest. In addition, the Sub-Committee is still discussing whether Virtual Representation by remaindermen should also apply to contingent remaindermen.

Figure 8.

AVERAGE ACCOUNT SIZE IN DELAWARE, ILLINOIS, NEW YORK, AND SOUTH DAKOTA



In our view, the foregoing graphs support the hypothesis that those states that abolished the RAP and did not tax income in trusts attracted from out of state experienced a significant inflow of large trust funds upon abolishing the Rule. This hypothesis is borne out in the econometric analysis below.

These data also suggest that the abolition of the Rule Against Perpetuities prior to the introduction of the GST tax had no observable effect on a state's trust assets. Recall that Idaho (1957), Wisconsin (1969),<sup>117</sup> and South Dakota (1983) abolished the RAP prior to the 1986 enactment of the GST tax, and that throughout this period South Dakota did not have a FIT. Yet in 1985 and 1986, the two years prior to the GST tax that are included in our sample timeframe,

117. Wisconsin may have abolished its Rule even earlier (indeed, Wisconsin may never have had the Rule). See Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 550 (1964); W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 974-75 (1965). We need not resolve the status of the Rule in Wisconsin prior to 1985, however, because our data do not begin until that year.