ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8609 HOUSE JUDICIARY

HB
308

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 308
1995 LEGISLATIVE SESSION

Revision Date:
Title: "...relating to the Uniform Probate Code, including nonprobate transfers, guardianships..."
Sponsor: Representative Parnell
Requester: Representative Parnell

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill repeals and reenacts some of the state's laws on probate to conform to the Uniform Probate Code recommended by the National Conference of Commissioners on Uniform State Laws. The principal subject matter is succession to property at an owner's death, as controlled by will, interstacy statutes, and the probate process. Aspects of non-probate transfers at death by contract, trust, or other lifetime arrangement are also covered as are guardianships and other protective arrangements for minors and others incapable of self-management. The bill integrates nonprobate transfers with the Uniform Act, thus allowing the use of pay-on-death clauses in joint tenancy deposit account contracts, avoiding the expense and delay of probate. The probate procedures in the amended provisions were designed to meet the public's demand for quicker and less expensive settlements of decedents' estates. The bill will not have a fiscal impact on the Department of Law, because it primarily deals with matters between private parties and it should make the settlement of estates less expensive and simpler for survivors.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 4/19/95

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 4/19/95

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Alaska State Legislature

REPRESENTATIVE
SEAN R. PARNELL

716 WEST 4TH AVENUE, SUITE 320
ANCHORAGE, ALASKA 99501
(907) 258-8194

While in Juneau
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-2995

HOUSE OF REPRESENTATIVES

SPONSOR STATEMENT
House Bill 308

"An act relating to the Uniform Probate Code, including nonprobate transfers, guardianships, trusts, and multiple-party accounts; relating to the Uniform Simultaneous Death Act; amending Alaska Rule of Probate Procedure 5: and providing for an effective date."

HB 308 adopts the American Bar Association's newly revised Uniform Probate Code with a few modification. The provisions contained in this bill have been reviewed in depth by the Alaska Bar Association's Uniform Probate Committee and Alaska's National Conference of Commissioners on Uniform State Laws. In drafting this legislation, any changes from current law that could not be agreed upon by interested parties were set aside for discussion in separate legislation.

I request your support of HB 308.

LAW OFFICES
DILLON & FINDLEY
A PROFESSIONAL CORPORATION

The Ebner Building
350 North Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

JUNEAU
Dennis C. Bailey
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson
Peter K. Putzier

ANCHORAGE
Ray R. Brown
Maun Long

510 L Street, Suite 603
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 277-9696

July 25, 1995

Jane Demmert, Executive Director
Alaska Commission on Aging
Department of Administration
P. O Box 110209
Juneau, Alaska 99811-0209

Re: HB 308 -- Uniform Probate Code, Article II
(intestacy, wills, and donative transfers)
and Article VI (nonprobate transfers)

Dear Jane:

As you requested after you received my April 20, 1995 letter to you, I am attaching some material that speaks more of the substance of HB 308 than does my April 20 letter.

HB 308 is based on the revision promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) -- the body that wrote the original Uniform Probate Code. The attached materials should be read with my April 20 letter.

You will find the following four items attached:

-- a description of 10 major improvements made by the NCCUSL's revision;

-- the official release by the American Association of Retired Person (AARP), regarding the Article II revision;

-- AARP's official release regarding the "multiple-person accounts" (or "pay on death" [POD]) part of Article VI;

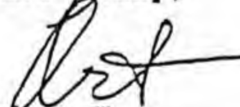
--AARP's official release regarding the "transfer on death" (TOD) part of Article VI.

In the first item, I have written in the relevant sections of HB 308. Note that, on page 3, there is a description of an item (regarding a surviving spouse's "elective share") that Rep. Parnell did not include in the bill. I urge you and your commission members to read that description carefully and express your support for its inclusion. Another item (regarding writings that don't meet the formal requirements of a will) not included is mentioned on page 5, but Alaska's Uniform Law Commissioners have agreed to

leaving that one out.

Let me know if you would like to have additional information. As I have mentioned, Professor Richard Wellman, of the University of Georgia School of Law, and Professor Lawrence Waggoner, of the University of Michigan Law School, are the leading national experts in this field. They would be best able to answer detailed, technical questions, and explain the rationale behind any change made by the bill.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska.

Enclosures (4)

cc w/encs.: Rep. Sean Parnell

cc w/o encs.: Rest of Alaska's ULC Delegation:
Hon. Jay A. Rabinowitz
W. Grant Callow, Esq.
Tamara Brandt Cook, Esq.
L. S. Kurtz, Jr., Esq.
Deborah E. Behr, Esq.

A SUMMARY OF MAJOR POINTS AFFECTED BY REVISIONS OF UPC ARTICLES II AND VI*

— 1995 HB 308

Intestate Succession

. Share of spouse who is also parent of decedent's children and who has no child by another, increased from $50,000 plus 1/2 of excess over $50,000, to 100% of the decedent's estate. Proposed AS 13.12.102.

Explanation: Absence of any cap on the amount to which the spouse of an intestate decedent is entitled to the exclusion of any inheritance by the decedent's child or children, is what most married persons want as shown by dispositive patterns of wills made by married persons. If the children are young, it is important to disinherit them in favor of a total taking by their surviving parent to avoid guardianships and related complications of a family's financial resources. If children are grown and gone from the family home, the usual desire of married persons is that resources of the parents be devoted to support of the parents and the survivor of them before being dissipated via shares for children. Persons who do not desire this typical dispositive plan can opt out by will.

*By Richard V. Wellman, Executive Director, JEB/UPC

Joint Editorial Board for Uniform Probate Code

Spring 1995?

. Descendants of an intestate, and descendants of the intestate's parents and grandparents, take equally if they are of the same generation.

Proposed AS 13.12.103.

<u>Explanation:</u> Under original UPC, equality of shares for descendants was the norm, but was not fully achieved. For example, if a single person without descendants is survived by a brother, two children of a deceased sister, and one child of another deceased sister, the shares of the three nephews and nieces were 1/3 for the sole child of the one sister, and 1/6 each for the two children of the other. Under revised UPC, each of the three takes an equal 2/9th share.

. The status of adopted and non-marital children as potential heirs of birth and adoptive parents is clarified.

Proposed AS 13.12.114.

<u>Explanation:</u> Under the revision, most adoptions end the connection between the child and birth parents, but where the connection is preserved, as in the case where the adopting parent is a spouse of one of the child's parents, the continued connection to the other parent of the child serves only to preserve the possibility that the child might inherit from or through that other parent; it does not qualify such other parent to inherit as a parent from the child if the child has property and dies intestate and without surviving spouse or child. A birth parent of a non-marital child also may be a source of inheritance by the child, but is denied status as an inheritor

from the child if he or she either failed openly to treat the child as his or hers, or refused to support the child.

Elective Share of Surviving Spouse

This group of changes is not included in HB 308 as introduced. See proposed AS 13.12.202.

. The rarely encountered Elective Share remedy for a disinherited surviving spouse is improved in a number of particulars so as to more closely resemble equitable distribution of marital property on dissolution.

Explanation: One change reduces the risk of over-compensation of a survivor of a very short marriage, usually at the cost of decedent's children by a prior marriage. It features a schedule keyed to the length of the marriage as of the decedent spouse's death. Under original UPC, a marriage of any duration, no matter how short, qualified the surviving spouse for protection against being left with less than one-third of the total of decedent's and survivors' assets that were derived from the decedent. The new schedule describes a scale of entitlement or percentage ranging from 3% from one year of marriage, to a full 50% portion for the survivor of a marriage of 15 or more years. The resulting shares are in an expanded amount because all of the surviving spouse's assets as well as all of the decedent's are included in the calculation without regard to source. The 15 year vesting period and inclusion of all assets of decedent and surviving spouse in the calculation produce results approximating those expected in community property states

when the spouse holding title to most marital assets dies first. The deletion of the vesting schedule proposed by some Alaska lawyers badly distorts the remedy and would leave the state with a remedy that threatens serious overcompensation for a surviving spouse who married the decedent late in life and shortly before death. Another change prevents a need for guardianship proceedings to protect elective share recoveries on behalf of an incapacitated spouse by directing such recoveries into a discretionary-support trust for the spouse.

. Provision from probate estate assets for an unintentionally omitted spouse subordinated to deceased spouse's gifts by will to children by a prior marriage. Proposed AS 13.12.301.

Explanation: Applicable only when the surviving spouse of a decedent married the decedent after the date of decedent's last will and is not provided for by other elements of the decedent's estate plan, this provision has been changed so that decedent's provision by will for children comes ahead of a provision designed to approximate what decedents are believed to desire when they neglect to re-do their estate plan after becoming married. The change reflects that a marriage occurring after a decedent has children and has made a will favoring such children, is probably a late-in-life marriage between persons having property that they would prefer to pass to their descendants, rather than to the new marital partner and his or her relatives.

Like the elective share revisions described above, these revisions are designed to fit the law to changing family patterns and especially to late-in-life marriages by persons having children by earlier marriages.

. A provision is added that enables a court to determine that a writing, though not executed as required for a will, is made valid because clear and convincing evidence indicates that the decedent intended the writing to be effective.

This provision is not included in HB 308, as introduced. See proposed AS 13.12.502; its subsec. (c) was deleted.

Explanation: The revision emphasizes substance over form and reduces the risk that a decedent's assets will end up in unwanted takers at the expense of testator's intended beneficiary.

. Familiar rules governing the meaning of wills counter the tendency of persons to neglect changing wills when changes in family circumstances make earlier planning obsolete in part. Revised Article II extends these rules to death benefits provided by revocable trusts, life insurance and other non-probate transfers at death.

Proposed AS 13.12.701 and following sections, esp. § 706.

Explanation: Under revised UPC Article II divorce serves to revoke a gift by a will or will substitute executed before the divorce to the former spouse. The former provision applied only to wills. The revised section, newly applicable also to gifts to

relatives of the former spouse, does not apply if the divorce was followed by the couples' remarriage or if the matter is addressed in the divorce decree or settlement. Also, a death benefit provided by will or will substitute to a relative of the testator who dies before the testator does not fail but passes instead to the relative's children, but the will or other controlling instrument can provide otherwise. The former coverage was limited to gifts by will.

The reason for broadening default rules applicable to wills to will substitutes is that will substitutes have become much more prevalent. Group life insurance benefits and other employee benefits, like wills, tend to be arranged long before death and are frequently forgotten or neglected as changes in family circumstances occur. And, in some states, revocable trusts have almost replaced wills as the estate planning instrument of choice.

. A new section makes trusts for the care of domestic or pet animal enforceable, changing traditional law that gave the trustee an option to ignore the intention of the creator of the trust. Proposed AS 13.12.907.

Explanation: People frequently are very anxious to have assurance that their money will be used after their death for the care of pets and other domestic animals that they have cared for during life. The revision meets this needs.

Article VI — Proposed AS 13.33, beginning on page 78 of the bill.

. The statute controlling financial institution accounts in more than one name is importantly improved in an effort to reduce litigation over whether a surviving party to a joint account was intended to enjoy a death benefit of the account balance at death. Proposed AS 13.33.212.

Explanation: Revised coverage of what was headed "Multiple-Party Accounts" in original UPC, now carries the title "Multiple-Person Accounts." A major feature of the revision is a statutory deposit form that invites account prospects to select from a menu that includes joint (survivor intended to have death benefit), agency (person identified as agent not intended to have any present or future beneficial interest), and p.o.d. (only death benefit intended) account forms. The statute is designed to encourage banks to provide depositors with choices and information necessary to eliminate arguments about death benefits in joint accounts. AARP and elder law specialists identify litigation over joint accounts as a serious burden on elderly single persons who frequently want another name on their account merely to aid them in accessing their money. Power of attorney (agency) accounts need to be available; presently, banks typically steer customers to use the joint account because of concerns over revoked powers of attorney. This revision answers such concerns.

Proposed AS 13.33.204.

. The Uniform TOD Security Registration Act is now included in UPC Article VI. Proposed AS 13.33.301 — 13.33.310.

Explanation: Already in 22 states following promulgation in 1989, this statute encourages mutual funds, brokerage offices, banks and other financial intermediaries to offer a transfer at death (TOD) form of registration enabling non-probate transfer of investments to a trust, a charity, or any designated death beneficiary who outlives the security owner. Registration of a security in the names of "O, TOD B" signals that O remains complete owner of the security and can sell or transfer ownership, or change the death beneficiary at will and without B's consent at any time. If the account form remains in this form at O's death, B becomes entitled to demand re-registration in his or her name. The new registration form is designed to enable persons to accomplish what many have used joint tenancy with right of survivorship forms to accomplish, but without the complications that attend joint tenancy registration.

This summary of the highlights of the UPC Article II and VI revisions does not mention dozens of small, technical improvements reflected in the revised version of UPC. Overall, the new versions of Articles II and VI are greatly improved, and should remain stable for the indefinite future.

UPC Article II

— AARP

Article II of the 1990 Uniform Probate Code covers a host of inheritance and estate planning matters that are of great importance to elderly persons.

The improvements over original UPC Article II coverage reflected by the 1990 revision bring the uniform law up to the demands of the 1990's and beyond. The earlier work reflected family make-up of the 1960's when incidence of divorce, remarriage, step-children, single parents, and reasonably affluent grandparents was much less frequent than at present. Changes in family characteristics must be reflected in rules of heirship if the law is to keep pace with the needs of people. Revised UPC Article II offers heirship recommendations that meet 1990's family needs and reduce pressure on individuals to resort to custom-made estate plans.

The Revised UPC Article II also resolves a problem regarding the fair share of marital assets to be enjoyed by one suddenly left alone as a result of divorce or death of a spouse. Divorce laws in all states now assure a fair share of marital assets to a divorced spouse. Probate law has not kept up. A surviving spouse now can be left with almost nothing by the plan of a decedent spouse who, for good or no reason, decides to direct his or her wealth away from the survivor. Revised

UPC corrects this problem in a manner that measures the survivor's entitlement by the length of the marriage and avoids complex tracing of acquisitions through the history of a marriage. The emerging law assures fairness and should serve to remove some of the complexities that often dissuade elderly single persons with families from marrying even though marriage might be preferred.

Original UPC Article II also failed to anticipate sufficiently the tremendous growth in popularity of probate-avoiding living trusts and other will substitutes. In result, though wills rules prevent benefits from passing to a former spouse by an out-of-date will that was not re-done following divorce, rules governing death benefits via joint and survivor holdings, insurance policies, and living trusts are often different. Revised UPC Article II remedies this and related problems stemming from failure to think about and revise death benefits via out-of-date plans whether controlled by will or other form.

AARP strongly supports simplification, modernization and uniformity of rules relating to succession to assets of decedents. Revised UPC Article II responds to these goals and merits AARP's full

endorsement and support. _______________'s* ____** AARP members respectfully urge approval and enactment of ___________________ (Bill #) by the legislature.

*Insert name of state.

**Insert number of AARP members.

UPC Article VI Part 2

— AARP

The Multiple-Person Accounts Act recognizes that individuals, especially the elderly and others living alone, frequently cause their bank accounts to appear to belong to themselves and one or more others named as co-depositors. The form implies that the person making the arrangement has made a present gift of a portion of the account to the other or others, though rarely is this intended, even as between married couples. The form also implies that on the death of a party, all account balances belong to the survivor, but this, too, is not always intended for the joint account is frequently used, especially by elderly singles, merely to enable a trusted friend to access the account when and if the source depositor is unable to do so. A consequence of this misuse of the joint account form is frequent litigation after the source depositor's death to determine why the depositor set up the account.

Depositors misuse the joint account form because banks lack statutory protections necessary to induce them to offer explicit agency account arrangements. Without protection, banks would be at risk in honoring a known agent's demand for the owner's funds after the owner's death. The risk does not attend agency arrangements disguised as joint accounts for legislation in all states protects banks in

payments made to an apparent co-depositor without regard for the other party's continuing life or other circumstances.

The Multiple-Person Accounts Act, a 1989 product of the Uniform Law Commissioners, is an improvement over an earlier uniform state law that has been enacted or approximated in more than 20 states. The improved version has been enacted to date in Colorado, New Mexico, and North Dakota. As of 1994, add Arizona, Montana and Nebraska. It explicitly encourages joint, p.o.d. (pay on death) and agency accounts. The agency account involves statutory protection of banks acting on an agent's request after the principal's death. The p.o.d. form prevents an intended beneficiary of an account from claiming any control or withdrawal right unless and until the bank has received satisfactory proof of the owner's death and the beneficiary's survival. The joint account form is made more reliable because its selection from the three forms optimally available will signal a clear intention to have shared control of the account until a party's death, followed by clear rights to the balance at death for the survivor. Also, the statute assures a person placing funds in a joint account against being held to have made an unintended present gift of a portion of the fund to a co-depositor.

The statute includes a recommended form offering a choice among the three account types. Banks are not required to offer the several account forms and need not use the statutory form in any event. But, protections and clarity attending use of the statutory form should encourage utilization.

With full recognition that the act will not instantly correct or prevent misuse of joint accounts and attendant litigations, AARP strongly recommends enactment of the Uniform Multiple-Person Accounts Act. Its enactment is a vital first step towards gradual correction of a very real banking problem having special impact on the "elderly." The act has been carefully drafted by legislative specialists familiar with banker, depositor, and lawmaker experience with joint account problems. The statute is wholly enabling for it forces nothing on anyone. It would, however, establish national standards that would enable AARP and other organizations to better educate consumers about proper use of deposit form options. It is needed legislation that _______________*'s _____** AARP members will thank you for supporting.

*Insert name of state.

**Insert number of AARP members.

UPC Article VI Part 3

-- AARP

The Uniform TOD Security Registration Act is a late-1989 product of the National Conference of Commissioners on Uniform State Laws. It has been enacted to date in twenty-two states (Arizona, Arkansas, Colorado, Illinois, Kansas, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming), and is highly likely to be enacted in 1994 by several additional states.

The proposed statute is wholly enabling; it forces nothing on anyone. It is addressed to financial intermediaries, such as mutual funds, banks and brokers maintaining securities accounts for customers, and other organizations responsible for registries showing investment ownerships. The statute encourages and protects intermediaries who decide to offer a security or account registration form showing the owner's name and another designated as the owner's choice to become owner at the owner's death. A registration under the act might say: "owner; John Q. Investor; TOD beneficiary, Martha G. Investor" or more simply, just "John Q. Investor TOD Martha G. Investor." The letters T.O.D. stand for "transfer on death" signalling that the investment or account is to be re-registered on

request after the owner's death in the name of the beneficiary.

Control of an investment registered in TOD beneficiary form, including the right to change or cancel the death beneficiary, lies solely with the owner and may be exercised via use of the intermediary's standard procedures for new registrations.

As is so with securities registered in two names with right of survivorship, the transfer of ownership at an owner's death to a survivor designated in the title form results from the registration form and occurs outside the probate process and without reference to any will. Proof of death and survivorship necessary to effect a re-registration or liquidation after the owner's death will be handled as survivorship claims of surviving joint tenants are handled today; i.e., by submission of a death certificate and an application for liquidation or re-registration in the beneficiary's name.

The statute proposes nothing that is novel or untested. Beneficiary form registrations of U.S. Savings Bonds have been available under federal law for more than half a century. Bank accounts and c.d.'s in an owner's sole name and payable on death to a named beneficiary are available in a number of states under p.o.d. account rules found in many banking codes. Life insurance and

retirement benefit accounts by-pass probate en route to death beneficiaries designated in controlling paperwork. Mutual funds have occasionally offered a trust form registration that, like bank accounts in the name of one as trustee for another, achieve the results of a TOD registration by use of language that is much less understandable as to its purpose.

The statute enables avoidance of probate without the risk of problems caused by joint and survivor security titles that are especially hard on the elderly. A person, typically elderly and worried about the impact of high probate costs on family survivors, decides to add the name of a child to her own to create a joint tenancy with right of survivorship on a security or account title. The sole purpose is probate avoidance. The elderly originator of the joint holding probably does not realize that the one named co-owner now appears to own half of the asset meaning that the investment can't be cashed out or re-registered without the consent of both owners. The bad news may come when a child's creditors or divorcing spouse lays claim to the child's half. In short, to get the benefit of probate avoidance through co-ownership and survivorship, an elderly owner has to subject money set aside for future needs to the whims and claims of others, including possible

strangers to the family. TOD security registration merely permits realization of the probate avoidance benefits of a joint registration without loss of sole control for the owner. In time, the TOD registration form should replace joint and survivor titling of investments.

This simple bill is very important for it responds directly and efficiently to serious problems having a unique impact on the elderly that attend joint and survivor titling of investments. It also sanctions a title form that would enable probate-avoiding transfers at death in favor of any death beneficiary, possibly including recognized charitable organizations or a trust company that could not be listed as a co-owner with survivorship under conventional joint tenancy rules. It entails no unwanted costs for anyone, meets a strong need of the elderly, and is without downside risks to any but those very few who continue to feed on assets passing through probate. ________________'s* ____** AARP members strongly urge its approval by this committee and pledge support for it throughout its course towards enactment and approval by the Governor.

*Insert name of state.

**Insert number of AARP members.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M April 19, 1995

SUBJECT: Sectional summary of HB 308
(Work Order No. 9-LS0898\C)

TO: Representative Sean Parnell
Attn: Richard

FROM: Theresa L. Bannister
Legislative Counsel

The following is a sectional summary of the above described bill draft. As a preliminary matter, note that a sectional summary of a draft should not be considered an authoritative interpretation of the draft and the draft itself is the best statement of its contents.

Section 1. Establishes six rules to be used in addition to the Alaska Rules of Evidence to determine death and status.

Section 2. Provides definitions for certain terms in the state's probate code.

Section 3. Adds a new chapter to the state's probate code to replace AS 13.11, the current chapter on intestate succession and wills, which is repealed by sec. 9 of the bill. The chapter relates to intestacy, wills, and donative transfers. Article 1. Sections 13.12.101 - 13.12.114 relate to intestate succession.

Sec. 13.12.101 states that a decedent's estate that is not effectively disposed of by will passes by intestate succession to the decedent's heirs under the state's probate code, except as modified by the decedent's will. Authorizes the use of a will to exclude or limit the persons to inherit the property passing by intestate succession, and indicates how the property passes in that situation.

Sec. 13.12.102 indicates how much of the intestate estate, including inalienable Native corporation stock, that the spouse of a decedent receives in various situations.

Sec. 13.12.103 indicates when and how much of an intestate estate the heirs other than the spouse receive in various situations.

Sectional Analysis

Sec. 13.12.104 requires an individual to survive the decedent by 120 hours to be considered an heir for the purposes of homestead allowance, exempt property, and intestate succession. Requires the survival to be established by clear and convincing evidence. Prevents these requirements from applying if the result is that the state takes the intestate estate.

Sec. 13.12.105 gives property in the intestate estate to the state if there isn't a taker under this chapter, subject to statutes on unclaimed property and escheated real property.

Sec. 13.12.106 establishes the rules for determining the heirs and allocating shares of an intestate estate when the estate passes "by representation" to the decedent's descendants or to the descendants of the decedent's deceased parents or grandparents.

Sec. 13.12.107 states that relatives of the half-blood inherit as if they were of the whole blood.

Sec. 13.12.108 treats an individual in gestation at a particular time as living at that time if the individual lives 120 hours or more after birth.

Sec. 13.12.109 states that property given to an heir before the decedent's death is not charged as an advance against the heir's share in the decedent's intestate estate unless certain evidence exists to that effect. Establishes how "advanced" property is valued. Prevents, with one exception, the advance from being taken into account for the intestate estate if the recipient of the advanced property does not survive the decedent.

Sec. 13.12.110 states that a debt owed to a decedent is not charged against the intestate share of anyone but the debtor. States that the debt is not considered when computing the intestate share of the debtor's descendants if the debtor fails to survive the decedent.

Sec. 13.12.111 states that being an alien or claiming a share through an alien does not disqualify an individual to take as an heir.

Sec. 13.12.113 states that an individual related to the decedent through two lines takes only a single share, which is based on the relationship that yields the larger share.

Sec. 13.12.114 considers, for the purpose of intestate succession by, through, or from a person, that an individual is the child of the individual's natural parents--without regard to their marital status--except as provided otherwise in the section. Provides that the parent and child relationship may be established under AS 25.20.050. States that an adopted child is the child of the adopting parents and not the natural parents, except as provided in the section when the child is adopted by the spouse of a natural parent. Precludes inheritance from or through a child by the natural parents or their kindred unless the natural parents satisfy certain conditions. This section governs if it conflicts with two other statutes relating to legitimation and the effect of adoption decrees.

Article 2. Secs. 13.12.201 - 13.12.214 relate to the elective share of a surviving spouse.

Sec. 13.12.201 defines terms for the article.

Sec. 13.12.202 entitles a surviving spouse to take an elective share amount equal to one-third of the augmented intestate estate. The election is subject to the limitations and conditions in Article 2. Provides for a supplemental elective share if the result of certain calculations is less than a certain amount. Provides that the surviving spouse's homestead allowance, exempt property, and family allowance are in addition to the elective share and supplemental elective share. Makes the right to take an elective share of property in this state subject to the law of the decedent's domicile at death, if the decedent dies domiciled in another state.

Sec. 13.12.203 explains what property constitutes the augmented estate: the net probate estate, nonprobate transfers to others, nonprobate transfers to the surviving spouse, the surviving spouse's property, and the surviving spouse's nonprobate transfers to others.

Sec. 13.12.204 states that the net probate estate is included in the augmented estate and identifies what property the net probate estate covers.

Sec. 13.12.205 states that the decedent's nonprobate transfers to others are included in the augmented estate and lists what property is included in this category.

Sec. 13.12.206 states that the decedent's nonprobate transfers to the surviving spouse are included in the augmented estate and identifies what property is included in this category.

Sec. 13.12.207 states that the surviving spouse's property and nonprobate transfers to others are included in the augmented estate and identifies what property is included in this category. Indicates how and when the property is valued and what reductions are allowed.

Sec. 13.12.208 indicates when property is excluded from the decedent's nonprobate transfers to others. Provides some guidelines for reducing and including property in the augmented estate and for handling property covered by overlapping provisions.

Sec. 13.12.209 prioritizes the property sources from which the surviving spouse's elective share is payable.

Sec. 13.12.210 identifies which recipients of the decedent's nonprobate transfers to others and which donees of the recipients are liable to make a contribution toward the satisfaction of the elective share and how the contribution may be made. Explains what happens if a provision of this Article 2 is preempted by federal law with respect to property included in the decedent's nonprobate transfers to others.

Sec. 13.12.211 establishes the procedure, including time limitations and notices, for making and enforcing the election. Allows the surviving spouse to obtain an extension of the time for making the election. Allows the surviving spouse to withdraw a demand for an elective share until a set time.

Sec. 13.12.212 limits the right of election to a surviving spouse who is living when the petition for the elective share is filed in the court. Authorizes the exercise of the right by a conservator, guardian, or agent of the surviving spouse. Directs that certain elective share property be placed in a custodial trust for the benefit of the surviving spouse, if the spouse is incapacitated. Establishes certain exceptions to the operation of the Alaska Uniform Custodial Trust Act (AS 13.60) for this situation.

Sec. 13.12.213 authorizes a surviving spouse to waive the right of election and other rights, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse. Establishes when a waiver is not enforceable.

Sec. 13.12.314 provides that a third party is not liable for a good faith payment or transfer of property claimed under an election, if the payment or transfer is made before the third party receives written notice from the surviving spouse about the election. Holds that the third party is liable for payments made or other actions taken after receiving written notice about the election. Establishes procedures relating to the notice, to third party payment or deposit of the property in court, and to court handling of property deposited with it.

Article 3. Sections 13.12.301 - 13.12.302 relate to the situation where the spouse and children are not provided for in the will.

Sec. 13.12.301 provides that a surviving spouse who married the testator after the execution of the testator's will is entitled to receive not less that the share the spouse would have received if the testator had died intestate as to a certain identified portion of the estate, except in certain circumstances. Establishes that devises made by the will to the testator's surviving spouse are applied first to satisfy the share provided by this section, and that certain other devises abate as provided in AS 13.16.540.

Sec. 13.12.302 establishes how children born or adopted after the execution of the will share in the estate if the testator failed to provide for them in the will. Provides that a child not provided for in the will because the testator believed that the child was dead is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

Article 4. Sections 13.12.401 - 13.12.405 address exempt property and allowances.

Sec. 13.12.401 indicates that Article 4 applies only to the estate of a decedent who dies domiciled in this state. Provides that rights to homestead allowance, exempt property, and

family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death.

Sec. 13.12.402 provides a homestead allowance to the surviving spouse or, if there is not a surviving spouse, to the minor and dependent children of the decedent. Exempts from and gives priority to the homestead allowance over all claims against the estate. Makes the homestead allowance in addition to other shares passing to the surviving or minor or dependent children by the decedent's will, except as otherwise provided, by intestate succession, or by elective share.

Sec. 13.12.403 states that, in addition to the homestead allowance, the surviving spouse or, if there is no surviving spouse, the surviving children are also entitled from the estate a certain value in certain property. Gives this exempt property priority over all other claims against the estate, but allows for abatement under certain conditions. Indicates that the exempt property rights under this section are in addition to a benefit or share passing to the spouse or children by the will, unless otherwise provided, by intestate succession, or by way of elective share.

Sec. 13.12.404 provides the surviving spouse and certain minor children with a reasonable allowance from the estate for their maintenance during the administration of the estate. The family allowance may not last longer than one year if the estate is inadequate to discharge allowed claims. Establishes how the allowance may be paid and to whom it is paid. Exempts the allowance from and gives it priority over all claims except the homestead allowance. Provides that the family allowance is not chargeable against the share of the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share. Death terminates the right to what has not yet been paid.

Sec. 13.12.405 establishes, with one exception, that the surviving spouse, guardians of minor children, or adult children may select property of the estate to satisfy the homestead allowance and the exempt property entitlement. Authorizes the personal representative to execute the appropriate documents to distribute the selected property. Authorizes the personal representative to determine the family allowance in a lump sum up to a certain amount or periodic installments not exceeding a certain monthly amount for a year. Authorizes the personal representative to disburse funds for the homestead allowance and the family allowance. Allows the personal representative or an aggrieved person to petition the court for appropriate relief.

Article 5. Secs. 13.12.501 - 13.12.517 address wills, will contracts, and the custody and deposit of wills.

Sec. 13.12.501 establishes who may make a will.

Sec. 13.12.502 establishes the requirements for a will, including its execution and witnessing. Validates a noncomplying will as a holographic will under certain conditions.

Sec. 13.12.504 provides for a will to be simultaneously executed, attested, and made self-proving. Provides the form that the will must be substantially in order to qualify. Allows an attested will to made self-proved after its execution at any time by the acknowledgement of the will by the testator and the affidavits of the witnesses in substantially the form provided in the section. Validates certain signatures affixed to a self-proving affidavit attached to the will.

Sec. 13.12.505 provides that an individual who is generally competent to be a witness may witness a will. Prevents the invalidation of a will or a provision of a will because an interested person signed the will.

Sec. 13.12.506 validates a will if it is executed in compliance with AS 13.12.502 or with the laws of another jurisdiction having a specified relationship to the execution of the will or to the decedent.

Sec. 13.12.507 indicates what actions and writings revoke or supplement a will.

Sec. 13.12.508 provides, with certain exceptions, that a change of circumstances does not revoke all or part of a will.

Sec. 13.12.509 establishes the principles for determining when all or part of a revoked will is revived.

Sec. 13.12.510 authorizes the incorporation of a writing into a will by the will's reference to the writing if the language of the will manifests this intent and if the will sufficiently describes the writing.

Sec. 13.12.511 allows a will to validly devise property to certain qualifying trusts. Provides that such a devise is not invalid because the trust is amendable or revocable or because the trust is amended after the will's execution or the testator's death. Provides that, unless provided otherwise by the will, the devised property becomes part of the trust and is administered under the trust's governing instrument. States that, unless the will provides otherwise, the revocation or termination of the trust before the testator's death causes the devise to lapse.

Sec. 13.12.512 allows a will to refer to dispose of property by reference to acts and events, including the execution or revocation of another individual's will, that have significance apart from their effect on the will.

Sec. 13.12.513 allows a will to devise property by referring to a written statement or list disposing of the items, except money. Establishes how a writing qualifies for this purpose.

Sec. 13.12.514 indicates how a contract to make a will or a devise, or not to revoke a will or devise, or to die intestate is established. States that the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will(s).

Sec. 13.12.515 allows a will to be deposited with a court for safekeeping, under the rules of the court. Establishes certain rules for the confidentiality, delivery, and examination of the will.

Sec. 13.12.516 directs the custodian of a will, after the testator's death and on request of an interested person, to deliver the will with reasonable promptness to a person able to secure its probate or, absent such a person, to the appropriate court. Holds a person who wilfully fails to so deliver the will liable for damages. Subjects to contempt of court a person who wilfully refuses or fails to deliver a will after a court order.

Sec. 13.12.517 states that a penalty clause for contesting a will is unenforceable if probable cause exists for the contest.

Article 6. Secs. 13.12.601 - 13.12.609 address the rules of construction applicable only to wills.

Sec. 13.12.601 states that certain rules of construction control the construction of a will in the absence of a finding of a contrary intent.

Sec. 13.12.602 states that a will may pass all property that the testator owned at death and all property acquired by the estate after the testator's death.

Sec. 13.12.603 establishes the rules for the passage of property when certain devisees fail to survive the testator.

Sec. 13.12.604 provides that, with certain exceptions, a devise that fails becomes part of the residuary estate. Establishes how the residuary estate passes when the share of a residuary devisee fails, if the residue is devised to two or more persons.

Sec. 13.12.605 provides that if a testator's will devises securities then owned by the testator, the devise includes certain additional securities owned by the testator at death if acquired after the will's execution as a result of the testator's ownership of the original securities. States that pre-death cash distributions with respect to a described security are not part of the devise.

Sec. 13.12.606 provides that a specific devisee is entitled to the specifically devised property and to certain property connected with the specifically devised property, except in certain circumstances. Provides for the devisee to receive a general cash devise rather than the specific property under certain conditions.

Sec. 13.12.607 provides that a specific devise passes subject to any mortgage interest, without the right of exoneration, even if the will contains a general directive to pay debts.

Sec. 13.12.608 states that, absent a requirement that a power of appointment be exercised by a reference or by an express or specific reference to the power, a general residuary clause or a general disposition of all the testator's property expresses an intention to exercise the testator's power of appointment only under certain conditions.

Sec. 13.12.609 provides that property given by a testator during the testator's lifetime satisfies a devise only under certain circumstances. Establishes a valuation date when there is partial satisfaction. Indicates how the gift is treated if the devisee fails to survive the testator.

Article 7. Secs. 13.12.701 - 13.12.711 address the rules of construction applicable to wills and other governing instruments.

Sec. 13.12.701 indicates which rules of construction control the construction of a governing instrument.

Sec. 13.12.702 requires that, except for certain listed situations, an individual must survive an event, which includes the death of an individual, by 120 hours in order to be considered to have survived the event. The survival must be established by clear and convincing evidence. Establishes other rules relating to survivorship. Establishes when a third party is liable for payments or transfers made to persons not entitled to the payment or transfer or for having taken other action in reliance on a beneficiary's apparent entitlement. Establishes the procedure for handling a claimed lack of entitlement under this section. Establishes when a purchaser or recipient is required to return the payment, property, or benefit, or is personally liable for the amount of the payment or the value [illegible] ty or benefit. Indicates how to proceed if all or part of this section is preempted [illegible] w with respect to a payment, an item of property, or a benefit.

Sec. 13.12.703 provides that, except in certain situations, the meaning and legal effect of a governing instrument is governed by the local law of the state selected in the instrument.

Sec. 13.12.704 establishes a presumption relating to the intention of the donor of a power of appointment.

Sec. 13.12.705 provides that adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. Indicates what certain terms of relationship include and exclude. Indicates which children are included in certain dispositive provisions made by persons who are not the natural or adopting parents of the children.

Sec. 13.12.706 establishes certain rules governing inheritance when certain beneficiaries fail to survive the decedent. Establishes when a payor is liable for making a payment under the terms of the beneficiary designation when a substitute gift is claimed under the section. Establishes the procedure to be followed for the handling of claims to substitute gifts. Establishes when a purchaser of property or a recipient of a payment or other property is obligated to return the payment, property, or benefit, or liable for the amount of the payment, or value of the property or benefit when there is a claimant for a substitute gift. Establishes what happens if all or a part of this section is preempted by federal law with respect to particular property.

Sec. 13.12.707 states that a future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date. Establishes certain rules for inheritance if the person fails to survive.

Sec. 13.12.708 provides that if a class gift using certain words does not specify the manner of distribution, the property is distributed among the class members who are living when the interest is to take effect in such shares as they would receive if the designated ancestor had died intestate owning the property.

Sec. 13.12.709 provides the rules for distributing property "by representation," "per capita at each generation," or "per stirpes."

Sec. 13.12.710 abolishes the "worthier title" doctrine. Provides that certain language does not create a reversionary interest in the transferor.

Sec. 13.12.711 provides how certain present or future distributions or interests are to pass.

Article 8. Sections 13.12.801 - 13.12.804 supply general provisions concerning probate and nonprobate transfers.

Sec. 13.12.801 allows a person to disclaim the receipt of property by delivering or filing a written disclaimer under this section. Establishes a time limit and procedure for handling the disclaimer in testamentary and nontestamentary situations. Addresses disclaimers by joint tenants and tenants by the entirety. If the disclaimed property is real property or an interest in real property, allows a copy of the disclaimer to be recorded. Indicates what a disclaimer must contain and that it must be signed. Indicates how a disclaimed interest, testamentary or nontestamentary, passes. Establishes that a disclaimer or a written waiver of the right to disclaim binds the disclaimant or person waiving and all persons claiming through or under either of them. Indicates that certain activities bar the right to disclaim. Indicates that this section does not abridge the right of a person to waive, release, disclaim, or renounce property under another statute. Provides a transition section for disclaiming certain property interests existing on the effective date of this Act.

Sec. 13.12.802 establishes how a divorce, annulment, or decree of separation affects the establishment of a "surviving spouse." Excludes certain persons from the status of "surviving spouse."

Sec. 13.12.803 establishes the effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.

Provides that an individual who feloniously kills the decedent forfeits all benefits under this chapter with respect to the decedent's estate. If the decedent died intestate, the estate passes as if the killer disclaimed the killer's intestate share.

States that felonious killing revokes certain revocable dispositions, provisions, and nominations, and severs the interests of the decedent and the killer in certain jointly held property. Provides that a severance doesn't affect the rights of certain third parties acquiring the property.

Provides that provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in a certain case, as if the killer predeceased the decedent.

States that a wrongful acquisition of property or interest by a killer not covered by this section is to be treated under the principle that a killer may not profit from the killer's wrong.

States that, after exhaustion of appeals, a conviction establishing criminal accountability for the felonious killing of the decedent conclusively establishes the convicted individual as the decedent's killer for the purposes of this section. Without a conviction, the court is to determine upon request whether the individual would be found criminally accountable for the felonious killing, and, if so, the individual is considered the decedent's killer for the purposes of this section.

Establishes when a payor or other third party is liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument affected by a felonious killing, or for having taken other action in reliance on the validity of the instrument. Establishes when a person who purchases property or receives a payment or other property in satisfaction of a legally enforceable obligation is obligated to return the payment, property, or benefit, or is liable for the amount of the payment or value of the property or benefit, to the person entitled to it under this section.

Establishes the procedure for handling claims of a forfeiture or revocation under this section. Establishes what happens when this section is preempted by federal law with respect to a payment, or to property or other benefit, covered by this section.

Allows a court, under certain circumstances, to set aside certain provisions of this section in the case of a felonious killing that was unintentional.

Sec. 13.12.804 establishes, except in certain circumstances, that a divorce or an annulment revokes certain dispositions, provisions, and nominations, and severs the interests of the former spouses in property held by the spouses as joint tenants with the right of survivorship. Indicates that a severance does not affect certain third-party interests in property acquired under certain conditions. States that provisions are given effect as if the former spouse and relatives of the former spouse disclaimed all the provisions revoked by this section, or, in a certain case, died immediately before the divorce or annulment. States that provisions revoked solely by this section are revived by remarriage to the former spouse or nullification of the divorce or annulment. States that a change of circumstances other than as described in this section and in sec. 13.12.803 does not effect a revocation. Establishes the liability of property payors, payees, transferors, and transferees in these circumstances. Establishes the procedure for handling claims under this section based on divorce, annulment, or remarriage. Indicates the effect of federal preemption on the section.

Article 9. Sections 13.12.907 - 13.12.921 contain provisions relating to honorary trusts, trusts for pets, and international wills.

Sec. 13.12.907 authorizes the performance of certain honorary trusts for 21 years. Validates, except as otherwise provided in this section, trusts for the care of a domestic or pet animal and the animal's offspring, indicates when a trust for a pet terminates, and provides for a liberal construction of the governing instrument. Establishes some rules for honorary and pet trusts.

Sec. 13.12.912 validates as to form a will that is made in the form of an international will complying with secs. 13.12 912 - 13.12.921, irrespective of where the will is made, where the assets are located, and the nationality, domicile, or residence of the testator. States that the invalidity of a will as an international will does not affect its formal validity as a will of another kind. States that the sections on international wills do not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Sec. 13.12.913 establishes the formal requirements for an international will.

Sec. 13.12.914 establishes additional formal requirements for international wills.

Sec. 13.12.915 requires the authorized person to attach to an international will a certificate to be signed by the authorized person establishing that the requirements of secs. 13.12.912 - 13.12.921 for valid execution of an international will have been complied with. Requires the person to keep a copy of the certificate and to deliver another to the testator. Establishes the form that the certificate must substantially comply with.

Sec. 13.12.916 establishes that, in the absence of contrary evidence, the certificate of the authorized person is conclusive of the formal validity of the will. Indicates that the absence or irregularity of the certificate does not affect the formal validity of the will.

Sec. 13.12.917 states that an international will is subject to the ordinary rules of revocation of wills.

Sec. 13.12.918 describes the source and desired construction of the international will provisions.

Sec. 13.12.919 indicates which individuals qualify as authorized persons for the purposes of international wills.

Sec. 13.12.920 provides for the registration of information on international wills. Directs the Department of Commerce and Economic Development to establish the registry system. Establishes certain rules regarding the registry system, what information may be registered, and the confidentiality and communication of the information.

Sec. 13.12.921 provides definitions for the sections on international wills.

Section 4. States that a will must be declared to be valid in certain ways in order for it to be effective to prove the transfer of property or to nominate an executor.

Section 5. Establishes a time limit for starting probate, testacy, and appointment proceedings. Provides certain exceptions to the time limit. States that the time limits do not apply to construe probated wills or to determine the heirs of an intestate person.

Section 6. Makes conforming and technical amendments.

Section 7. Makes technical amendments.

Section 8. Makes a conforming amendment.

Section 9. Makes conforming and technical amendments. Also provides under certain circumstances for the distribution of the residuary estate in any equitable manner.

Section 10. Alters one reference to cover any "governing instrument," not just probated wills.

Section 11. Makes technical amendments.

Section 12. Establishes a new chapter on nonprobate transfers. Sec. 13.33.101 is Article 1. Secs. 13.33.201 - 13.33.227 are Article 2, which relates to multiple-person accounts.

Secs. 13.33.301 - 13.33.310 are Article 3, the Uniform Transfer-on-Death Security Registration Act.

Sec. 13.33.101 states that provisions for nonprobate transfer of property on death in certain written documents are not testamentary. Identifies certain provisions that are covered by the section. Declares that the section does not limit the rights of creditors under other laws of this state.

Sec. 13.33.201 defines some terms for the article on multiple-person accounts.

Sec. 13.33.202 describes certain accounts that are not covered by Article 2.

Sec. 13.33.203 states that an account with a financial institution may be for single or multiple parties and that a multiple-party account may be with or without a right of survivorship. Allows, subject to sec. 13.33.212(c), a single-party or multiple-party account, to have a pay-on-death designation, an agency designation, or both. Describes the application of Article 2.

Sec. 13.33.204 provides that contracts of deposit containing provisions in substantially the form established in the section establishes the type of account provided, and the account is governed by the Article 2 provisions applicable to an account of that type. Provides for Article 2 coverage for contracts of deposit that don't contain provisions substantially in the form provided by this section.

Sec. 13.33.205 allows the parties on an account to designate a person other than a party to the account as the agent for the parties on the account. States that the agent's authority survives disability and incapacity of a party to the account unless the agency designation provides otherwise. Allows an agent to act for a disabled or incapacitated party until the agent's authority is terminated. Provides that the death of the sole party to the account or of the last surviving party to the account terminates the agent's authority.

Sec. 13.33.206 establishes applicability of secs. 13.33.211 - 13.33.216 and secs. 13.33.221 - 13.33.227.

Sec. 13.33.211 ties the ownership of an account during the lifetime of all parties to the proportionate net contribution of each party to the account, unless clear and convincing evidence establishes a different intent. For parties married to each other, presumes each contributed equally, unless there is proof otherwise. States that a beneficiary in an account having a pay on death designation is not entitled to deposited sums during the lifetime of any party. States that an agent in an account with an agency designation does not have a beneficial right to sums on deposit.

Sec. 13.33.212 establishes the ownership rights to account money at a party's death for the various types of accounts covered by Article 2. Also addresses the liability of a surviving party or beneficiary for unpaid requests for payments.

Sec. 13.33.213 establishes that rights at death under the previous section are determined by the type of account. Allows the parties to change the type of account and establishes the procedure for doing so. States that a right of survivorship created in certain ways may not be altered by will.

Sec. 13.33.214 states that, with exceptions, a transfer resulting from the application of sec. 13.33.212 is not testamentary or subject to certain sections of the state's uniform probate code.

Sec. 13.33.215 provides that, under certain conditions, a transfer resulting from a right of survivorship or a pay on death designation under Article 2 is not effective against an estate if needed to pay certain claims against the estate. States that surviving parties or beneficiaries who receive payments after the death of a party to the account are liable to account to the personal representative for certain amounts. Establishes a condition for beginning a proceeding to assert the liability of the party or beneficiary, and the time by which the proceeding must be begun. Authorizes a surviving party or beneficiary to join in the proceeding a surviving party or beneficiary of another account of the decedent. States that sums recovered by the personal representative are administered as part of the decedent's estate. Indicates how this section relates to sec. 13.33.226.

Sec. 13.33.216 establishes that deposit of community property in an account does not change the community character of the property or community rights in the property, but prohibits changing by will certain express rights of survivorship for the account between married parties. States that Article 2 doesn't affect the law governing tenancy by the entirety.

Sec. 13.33.221 authorizes a financial institution to enter into a contract of deposit for a multiple-party account and to provide for pay on death and agency designations in both single-party and multiple-party accounts. Provides that the institution doesn't have to inquire as to the source of a deposit to an account or the proposed application of a payment from an account.

Sec. 13.33.222 indicates to whom a financial institution, on request, is authorized to pay money from a multiple-party account.

Sec. 13.33.223 indicates to whom a financial institution, on request, may pay money in an account with a payment on death designation.

Sec. 13.33.224 authorizes a financial institution, on request, to pay to an agent under an agency designation for an account the money in the account whether or not certain described conditions exist.

Sec. 13.33.225 authorizes a financial institution to make a payment under AS 13.46, if the payment to a minor beneficiary is required or permitted under Article 2.

Sec. 13.33.226 states that payment made under Article 2 in accordance with the type of account discharges the financial institution from all claims for the money paid, whether or not the payment is consistent with the beneficial ownership of the account. Authorizes payment whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased. Limits this section's protection in certain circumstances. Authorizes a financial institution to refuse, without incurring liability, to make payments in accordance with the terms of the account in certain circumstances. States that the protection under this section does not affect the rights of certain disputing parties relating to the beneficial ownership of account moneys.

Sec. 13.33.227 authorizes a financial institution to receive a setoff against the account for an indebtedness of a party to the financial institution. Describes the extent of the setoff.

Secs. 13.33.301 - 13.33.310 are Article 3, the Uniform Transfer-on-Death Security Registration Act.

Sec. 13.33.301 defines terms for Article 3.

Sec. 13.33.302 establishes who can obtain registration of a security in beneficiary form. Establishes how multiple owners can hold a security registered in beneficiary form.

Sec. 13.33.303 authorizes the registration of a security in beneficiary form if the form is authorized by this or a similar TOD statute in states having certain specified connections with the issuer, registering entity, the registering entity's transfer agent, or the owner. Establishes a presumption of validity for other registrations.

Sec. 13.33.304 establishes when a security is considered to be registered in beneficiary form.

Sec. 13.33.305 establishes the language that can be used to show registration in beneficiary form.

Sec. 13.33.306 states that the designation of a transfer-on-death beneficiary on the registration of a security does not affect ownership until the owner's death. Authorizes the cancellation or change of a registration in beneficiary form at any time without the beneficiary's consent.

Sec. 13.33.307 establishes who owns the security when the sole owner or the last of multiple owners dies, and allows reregistration in the names of the surviving beneficiaries. Provides that multiple beneficiaries surviving the death of all of the owners hold their interests as tenants in common until the security is divided after the death of all the owners. Provides that the estate of the deceased sole owner, or of the last to die of all multiple owners, owns the security if a beneficiary does not survive the sole owner or the multiple owners.

Sec. 13.33.308 provides that a registering entity is not required to provide registration of a security in beneficiary form. If the entity does offer this registration, the owner is considered to have assented to the protections provided to the entity under Article 3. If the entity accepts a request for the registration, the entity agrees that the registration will be implemented on the owner's death as provided in Article 3. Discharges the registering entity from all claims by certain persons if, in good faith reliance on Article 3, on the registration, or on certain information, it registers a transfer of the security in accordance with AS 13.33.-307. Limits the extent of the protections provided by Article 3. States that the Article 3 protections provided to the registering entity do not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred, its value, or its proceeds.

Sec. 13.33.309 declares that a transfer on death resulting from a registration in beneficiary form is not testamentary. States that Article 3 does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

Sec. 13.33.310 authorizes a registering entity to establish the terms and conditions under which it will receive and implement registrations in beneficiary form. Indicates what the terms may provide, including substitution of beneficiaries. Provides some illustrations of registrations in beneficiary form that a registering entity may authorize.

Section 13. Amends the Uniform Custodial Trust Act (AS 13.60) to make certain trust termination provisions subject to the Uniform Probate Code.

Section 14. Amends the Uniform Custodial Trust Act (AS 13.60) to make certain trust administration provisions subject to the Uniform Probate Code.

Section 15. Amends the Uniform Custodial Trust Act (AS 13.60) to make certain trust expenditure provisions subject to the Uniform Probate Code.

Section 16. Amends the Uniform Custodial Trust Act (AS 13.60) to make certain trust property expenditure provisions subject to the Uniform Probate Code.

Section 17. Makes a conforming amendment.

Section 18. Repeals three current chapters on intestate succession and wills, nonprobate transfers, and the uniform simultaneous death act.

Section 19. Provides transition provisions for the bill.

Section 20. Explains how the bill amends Alaska Rule of Probate Procedure 5.

Section 21. Makes the Act effective January 1, 1996.

If I may be of further assistance, please advise.

TLB:klb
95-277.klb

LAW OFFICES
DILLON & FINDLEY
A PROFESSIONAL CORPORATION

JUNEAU
Dennis C. Bailey
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson
Peter K. Putzier

The Ebner Building
350 North Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

ANCHORAGE
Ray R. Brown
Mauri Long

510 L Street, Suite 603
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 277-9896

April 20, 1995

Jane Demmert, Executive Director
Alaska Commission on Aging
Department of Administration
7th Floor, State Office Building
Juneau, Alaska 99801

HAND-DELIVERED

Re: HB 308 -- Uniform Probate Code, Article II (intestacy, wills, and donative transfers) and Article VI (nonprobate transfers)

Dear Jane:

Here is some information on this bill, as you requested yesterday.

BACKGROUND:

At the request of Alaska's uniform law commissioners and a number of members of the Probate and Estate Planning Section of the Alaska Bar Association, Representative Sean Parnell introduced HB 308 April 13, 1995. Essentially, it proposes enactment of the official revision of Uniform Probate Code (UPC) Articles II and VI. The revision of these two articles, along with compatibility amendments in other articles, was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) -- the same organization that promulgated the original UPC itself in 1969.

In 1972, Alaska enacted the UPC. Although there have been a few relatively minor amendments of it in the intervening decades, this bill presents the NCCUSL's first comprehensive updating of Article II and its revision of Article VI. Since Alaska has enacted the UPC, we need to keep up-to-date with national developments.

The national version of the UPC consists of seven "articles." In Alaska's numbering system, those articles have become "chapters." This bill amends Article II (**AS 13.11**, which the bill repeals and replaces with **AS 13.12**) and Article VI (**AS 13.31**, which the bill repeals and replaces with **AS 13.33**). It includes some compatibility amendments in Article I (**AS 13.06**) and Article III (**AS 13.16**). The subjects are:

AS 13.06 -- General Provisions

4/20/95 Peterson's letter

AS 13.12 -- Intestacy, Wills, and Donative Transfers
AS 13.16 -- Probate of Wills and Administration
AS 13.33 -- Nonprobate Transfers.

THE ARTICLE II CHANGES:

The bulk of this 94-page bill presents the Article II revision. In addition to the basic wills and intestacy provisions, Article II includes several components[1] that you might occasionally hear referred to independently.

The general thrust of the Article II changes is to update that article and to provide protection for surviving spouses in intestate succession. The NCCUSL summarizes the revision as follows:

> This revision reflects a recommitment of the UPC to family protection, to reducing the risk of technical invalidation of wills, and to harmonization of rules of presumed intention for probate and nonprobate transfers of property at death. The 1969 UPC II served the first two of these three purposes; twenty years' experience with the original provisions and changes in the makeup of American families during recent decades have pointed the way to new improvements in earlier formulations.

Essentially, there are three motivations behind the revision: (1) over 20 years' experience with implementing the original version and dealing with a variety of interpretation questions that have arisen; (2) the statistics on the increasing number of American families involved in divorce, remarriage, and children with multiple families; and (3) evolving notions of how to provide for decedents' survivors.

THE ARTICLE VI CHANGES:

UPC Article VI, on nonprobate transfers, clarifies the law of joint tenancy and tenancy in common for deposit accounts, with or without right of survivorship, and declares that pay-on-death (POD)

---

[1] -- Testamentary Additions to Trusts Act (1991), UPC sec. 2-511 (AS 13.12.511);
-- Simultaneous Death Act (1991), UPC sec. 2-702 (AS 13.12.702);
-- Disclaimer of Property Interests Act (1990), UPC sec. 2-801 (AS 13.12.801);
-- International Wills Act (1977), UPC art. II, part 10 (AS 13.12.912 -- 13.12.921).

clauses in the contracts that establish deposit accounts are nontestamentary. This means that such clauses allow the payment of the money in an account to the beneficiary named in a POD clause even though the clause does not meet the formal requirements for a will. The money is paid without passing through the estate of the decedent account holder. The expense, frustration, and delay of probate are thus avoided.

The amendments in this bill offer substantial improvements over the original version. In addition to improving the current statutes governing pay-on-death deposit accounts, the amended article provides for transfer-on-death (TOD) investment securities -- stock, bonds, mutual fund shares, security accounts, and the like. They, too, are then nontestamentary and need not go through probate, thus further avoiding unnecessary expense, frustration, and delay.

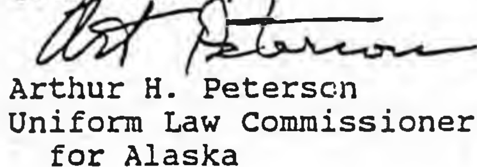
CONCLUSION:

This bill makes a number of improvements, addresses the concerns that have developed in a changing society, and helps keep Alaska law current with that in the rest of the country.

The American Association of Retired Persons supports this measure. Your commission's vocal support would be welcome too.

Please let me know if you would like to have more information on this bill. The national expert with whom I have conferred on UPC matters is Professor Richard Wellman, University of Georgia School of Law, Athens, Georgia 30602 (phone: 706-542-5174; FAX: 706-542-5556), and you might wish to contact him directly.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

cc: Rep. Sean Parnell
Prof. Richard V. Wellman
Rest of Alaska's ULC Delegation:
Jay A. Rabinowitz
W. Grant Callow
Tamara Brandt Cook
L. S. Kurtz, Jr.
Deborah E. Behr

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DILLON & FINDLEY
A PROFESSIONAL CORPORATION

JUNEAU
Dennis C. Bailey
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson
Peter K. Putzier

The Ebner Building
350 North Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

ANCHORAGE
Ray R. Brown
Mauri Long

510 L Street, Suite 603
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 277-9896

April 11, 1995

Hon. Sean Parnell
Alaska State Legislature
Room 515, State Capitol
Juneau, Alaska 99801-1182

Re: Uniform Probate Code update

Dear Representative Parnell:

I have reviewed Bob Manley's March 20, 1995 letter to you, a copy of which he very kindly sent me. In it, he makes a pitch for deleting from the national version of the Article II revision the phase-in approach to the surviving spouse's elective share (proposed AS 13.12.202(a) [UPC sec. 2-202 in the NCCUSL's official version], pages 14 and 15 of the 3/9/95 draft).

While introduction and enactment of the bill should not get hung up on the presence of the phase-in approach, I would like to make one last, summarized pitch for its inclusion. We certainly appreciate your willingness to introduce and support this bill, since it makes many improvements in the law even without sec. 202's phase-in.

In a nutshell, here are some reasons why I think that your bill should include the official UPC's sec. 2-202 phase-in:

1. It's good policy. In the case of a surviving spouse who has devoted a substantial portion of his or her life to the development of the marital estate, it simply is more fair to entitle that survivor to a larger percentage of the "augmented estate" than a short-term spouse. In addition, the survivor exercising the elective-share option will be taking some portion of the assets left to others, who, in the case of a late-in-life marriage, will very likely be children from a prior marriage.

2. The old approach, based on an ancient concept derived from English law concerning dower, has been severely criticized -- especially by women's organizations and by scholars. The new approach brings the elective-share concept more in line with the contemporary partnership or "marital sharing" theory of marriage.

4/11/95 Peterson's letter

3. Bob's group is divided on whether the phase-in approach should be deleted, and, as he indicated, even the existence of a majority is somewhat uncertain. In such a case, it is best to go with the official version.

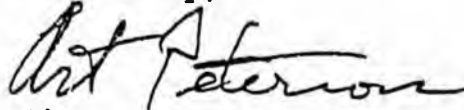
4. Since Alaska has enacted the complete Uniform Probate Code, we should strive to maintain as much uniformity in it as possible. When it is updated or otherwise revised nationally, we are well-advised to enact the national revision. There is great value to the uniformity, per se.

5. The American Association of Retired Persons (both the national association and the Alaska chapter) supports this measure, including the elective share phase-in. Nothing that I have seen from AARP indicates any problem with sec. 202.

6. In the spirit of compromise and to get the bill moving, we have gone along with six of the seven suggestions made by Bob Manley and Peter Brautigam. It would behoove them to take a step toward agreement, too.

So, that's it for now. Thanks again for your work on this bill.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

cc: Peter B. Brautigam

Robert L. Manley

Prof. Richard V. Wellman
University of Georgia Law School

Rest of Alaska's ULC Delegation:
Jay A. Rabinowitz
W. Grant Callow
Tamara Brandt Cook
L. S. Kurtz, Jr.
Deborah E. Behr

Alaska State Legislature

REPRESENTATIVE
SEAN R. PARNELL

716 WEST 4TH AVENUE, SUITE 320
ANCHORAGE, ALASKA 99501
(907) 258-8194

While in Juneau
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-2995

HOUSE OF REPRESENTATIVES

May 3, 1995

Arthur Peterson
Law Offices of Dillon & Findley
350 North Franklin Street
Juneau AK 99801

Dear Art:

Thank you for your letter outlining your position on the proposed Uniform Probate Code. I appreciate the time and work you have contributed to its drafting. In response to your position on the surviving spouse elective share, I respectfully disagree for the following reasons.

I believe it is better policy to leave the current law unchanged and not adopt the phase-in approach because I reject the notion that a person is "more married" after three years than after one. I do not see any compelling reason to make a definitional change to marriage by establishing a time biased judgment on the surviving spouse's value.

With regard to the women's groups, I have received a different opinion than what you stated in your letter. I spoke with representatives of the Council on Domestic Violence and Sexual Assault, The Alaska Network on Domestic Violence and Sexual Assault and The Women's Lobby. Each representative questioned the phase-in approach as being discriminatory.

Finally, the political reality surrounding this controversial provision should not be understated. HB307 stalled last year in the House State Affairs Committee and according to the Chairman, Rep. Al Vezey, it was primarily due to the proposed phase-in approach. With a divided legal community and a divided political community, it does not make sense to push a voluminous bill with a controversy that will, in my opinion, kill the bill in a committee.

Thank you, again, for your assistance on this bill, I look forward to working with you in the future.

Very truly yours,

Rep. Sean Parnell

Rep. Parnell's response

ALASKA WOMEN'S LOBBY
P.O. BOX 22156, JUNEAU, ALASKA 99802

May 2, 1995

Representative Sean Parnell
Alaska House of Representatives
State Capitol
Juneau, Alaska

Dear Representative Parnell:

This letter is in reference to HB 308, the Uniform Probate Code and to urge you to consider an amendment to the Uniform law.

We are concerned about the changes proposed to the elective share of the surviving spouse. The Uniform law would change that share from 1/3 of the estate and homestead and jointly held property to a share percentage determined by the length of time the spouse and the decedent were married to each other.

We would oppose that change and in fact have supported increasing the spousal entitlement from 1/3 to 1/2 in contested wills. A proposal to do that was introduced by the Governor for the Alaska Women's Commission in 1985.

Historically, it is women more than men who have been disinherited since men more often than women have controlled the bulk of economic wealth in the marriage. Women are also most likely to find themselves in poverty as they grow older. Women over the age of 65 have the highest incidence of poverty of any age group of either sex.

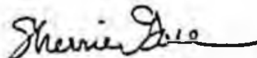
Marriage is a mutual undertaking. The contributions a spouse provides to a marriage such as time, labor, emotional support, financial income, and other resources, should not be diminished because the partner has died.

We believe the surviving spouse has an inherent economic interest in the other spouse's estate and should receive at least one-half of the remaining estate that they built together.

We hope that you will consider amending the bill to delete the proposed schedule of payments based on the length of time the spouses were married and consider instead providing complete equity to the surviving spouse.

Thank you for your consideration.

Sincerely,



Sherrie Goll
for the Alaska Women's Lobby

AK Women's Lobby

<u>New York Life's Testimony on Alaska House Bill 308</u>

As this committee is no doubt already aware, the UPC probate code was originally approved by the National Conference of Commissioners and by the American Bar Association in August 1969. For the past 25 years, Article II of that Code has excluded insurance related products from the insureds augmented estate. In 1991, the UPC was amended to strike this exclusion. The amendment was adopted without opportunity for comment by the insurance industry, the industry which is obviously most affect by this change. Unfortunately, the result was that many valid concerns were not addressed at that time. New York Life opposes House Bill 308's adoption of this amendment to the UPC because it reflects a complete reversal of the Code's original philosophy of the relationship between non-testamentary devises and the augmented estate and more specifically because it fails to recognize the role of insurance in helping individuals to address valid estate planning concerns which the insured is best suited to evaluate.

Including insurance in the augmented estate undermines the very nature of the business of insurance which is to provide insureds with a means to contract specific insurance benefits to designated individuals. For many, insurance provides a much needed tool to address specific individual life situations which the insured is in the best position to evaluate. A number of specific scenarios our agents have encountered may elucidate this concern. Insureds frequently purchase policies for a number of reasons which Bill 308 would undermine. For example:

- an insured might purchase a policy to ensure funding for his children's education, housing or welfare which is particularly a concern for children from previous marriages;
- or an insured might purchase a policy to secure payment for the care of his aging parents or a handicapped child, who will need to be cared for for the rest of their natural lives;
- an insured might also purchase insurance to provide liquidity for an estate so probate costs, estate taxes, etc. can be paid for from the proceeds of the policy rather than from a forced liquidation of real estate at an inopportune time such as when real estate values are low, or in situations where the family does not want to sell family property, such as in family farms.

These examples demonstrate just a few of the many reasons an insured might consider in planning his estate. These situations are unique to the individual. Consequently, that individual is the person most capable of assessing and providing for those needs. Insurance is an invaluable tool for such individuals to prepare to address their unique needs. The individual's wishes in providing this protection to their family and loved ones should not be overridden by a probate court's application of a uniform distribution of part of those proceeds. Those who advocate inclusion of insurance proceeds in the augmented estate contend that this bill is necessary to protect surviving spouses. Their concern is that unscrupulous individuals will purchase insurance as a means of defrauding their spouses of their elective share in an estate. However, these advocates have never advanced any evidence that insureds are actually using insurance in this manner. Given that there is no real world harm that this change would address, and given the plethora of legitimate estate planning concerns that individuals currently use insurance to address, the most prudent policy decision seems to be to leave the choice of an insurance policy's beneficiary up to the person most capable of assessing the insured's specific family needs--that person is the insured. For these reasons I hope you will oppose this amendment to the UPC.

LAW OFFICES
DILLON & FINDLEY
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JUNEAU
Dennis C. Bailey
Caroline Crenna
Paul L. Dillon
Thomas W. Findley
Richard D. Monkman
Arthur H. Peterson
Peter K. Putzier
Paralegals
Melanie E. Mickelson
Susan E. Schrader
Amanda H. Wilkens

The Ebner Building
350 North Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

ANCHORAGE
Ray R. Brown
Mauri Long
Kristen D. Pettersen
Paralegal
Linda St. Denis

510 L Street, Suite 603
Anchorage, Alaska 99501
Telephone (907) 277-5400
Facsimile (907) 277-9896

November 7, 1995

Richard Vitale, Staff Assistant
Rep. Sean Parnell's Office
716 West 4th Avenue, Suite 320
Anchorage, AK 99501-2133

Re: HB 308 (Uniform Probate Code, arts. II & VI)
-- Four Points

Dear Richard:

Here are four points regarding Sean's HB 308:

1. I reviewed Bob Manley's October 18, 1995 letter to you suggesting an additional amendment to proposed AS 13.12.515 in Sean's HB 308, and we discussed that point during the October 31 teleconference of Alaska's Uniform Law Commissioners. We have no objection to the change that he is suggesting. In conjunction with that change, however, it might be helpful to amend sec. 20 of the bill for clarity. Perhaps Bob could quickly draft something for that section. (If he is not familiar with provisions like that sec. 20, you might point out to him that, in addition to a reference in the title of the bill, it is the legislature's means of assuring compliance with the requisite two-thirds vote requirement for legislative change of court rules, in art. IV, sec. 15, of the Alaska Constitution.)

2. Don't forget NCCUSL's two technical amendments (concerning proposed AS 13.33.213 and 13.33.226) that I sent Sean September 5, 1995.

3. In connection with the issue concerning the phase-in approach to the surviving spouse's elective share, you might refer Sean to the case of Doyle v. Doyle, 815 P.2d 366 (Alaska 1991), where, at page 370, the courts states:

> We likewise uphold the trial court's use of the factor 1/2 of 19/20 here because it fairly represents the wife's eligibility for a share of the pension in proportion to the number of years the parties'marriage and the husband's military service overlapped. [Footnote omitted.]

While that case was not one involving a spouse's elective share, the court's language suggests its recognition of the merit of a phase-in approach.

4. As we have discussed, you'll find enclosed the following four items:

-- Richard Wellman's January 12, 1995 memorandum responding to the December 6, 1994 American Council of Life Insurance letter to me;

-- the UPC Joint Editorial Board's January 1995 Summary of the Response to the Life Insurance Industry:

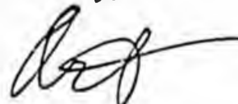
-- the Joint Editorial Board's early 1994 Response to the Life Insurance Industry;

-- the December 6, 1994 letter to me from Jerry O'Leary, Senior Counsel for the American Council of Life Insurance.

Jerry O'Leary's description of the situation is, at best, rather strange. Although he speaks of opposition to the entire revision of art. II of the UPC, he is, as I understand it, concerned about only two points. He would like special life-insurance exemptions from the provisions pertaining to the augmented estate (proposed AS 13.12.203 -- 13.12.205 [related to the spouse's elective share under proposed AS 13.12.202]) and from the provisions setting rules of construction applicable to wills and other governing instruments (proposed AS 13.12.701 -- 13.12.711). In his letter, he never does identify the specific amendments he would propose to make the bill acceptable to him. His point, essentially, is that life insurance policies should be given special treatment, different from all other forms of nonprobate transfer. His letter is fraught with inaccuracies and other kinds of mistakes. I think his letter is well answered by the responses from the Joint Editorial Board for the Uniform Probate Code. And Dick Wellman tells me, in a February 10, 1995 letter, that the North Dakota legislature recently passed the UPC art. II revision without the life-insurance exemptions.

Hope the bill progresses smoothly. Thanks for your support.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner for Alaska

Enclosures (4)

cc w/o encs.: Rest of Alaska's ULC Delegation:
Honorable Jay A. Rabinowitz
W. Grant Callow, Esq.
Tamara Brandt Cook, Esq.
L.S. Kurtz, Jr., Esq.
Deborah E. Behr, Esq.

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JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE

Uniform Law Commissioners

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P.O. Box 369
76 St. Paul St.
Burlington, VT 05402
802/658-0220
FAX 802/658-1456

JOHN H. LANGBEIN
Yale Law School
401A Yale Station
127 Wall St.
New Haven, CT 06520
203/432-7299
FAX 203/432-1040

ROBERT A. STEIN
Univ. of Minnesota
School of Law
Minneapolis, MN 55455
612/625-4841
FAX 612/625-2019

American Bar Association

JACKSON M. BRUCE, JR.
28th Floor
411 E. Wisconsin Ave.
Milwaukee, WI 53202
414/277-5829
FAX 414/271-3552

EDWARD C. HALBACH, JR.
Univ. of California
School of Law
Boalt Hall
Berkeley, CA 94720
510/642-1829
FAX 510/643-6171

MALCOLM A. MOORE, *Chair*
2600 Century Square
1501 Fourth Ave.
Seattle, WA 98101
206/622-3150
FAX 206/628-7040

American College of Trust and Estate Counsel

CHARLES A. COLLIER, JR.
Suite 800
1800 Avenue of the Stars
Los Angeles, CA 90067
310/277-1010
FAX 310/203-7199

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Lansing, MI 48933
517/377-0843
FAX 517/482-0887

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338 Law Center
Minneapolis, MN 55455
612/626-0264
FAX 612/625-2011

EUGENE F. SCOLES
Univ. of Oregon Law School
1101 Kincaid St.
Eugene, OR 97403
503/346-3862
FAX 503/346-1564

Executive Director

RICHARD V. WELLMAN
Univ. of Georgia
School of Law
Athens, GA 30602
706/542-5174
FAX 706/542-5556

Director of Research and Chief Reporter

LAWRENCE W. WAGGONER
Univ. of Michigan Law School
Hutchins Hall
Ann Arbor, MI 48109-1215
313/763-2586
FAX 313/764-8309

January 12, 1995

SUBJECT: SPECIFIC RESPONSE TO LETTER FROM ACLI SENIOR COUNSEL, JERRY P. O'LEARY

FROM: RVW RICHARD V. WELLMAN, Executive Director, Joint Editorial Board for Uniform Probate Code

The principal response of the Joint Editorial Board to the anti-UPC stance of the Life Insurance Industry is set forth in the enclosed JEB document titled *Response to the Life Insurance Industry*.

This memorandum specifically addresses the letter dated December 6, 1994, from Jerry P. O'Leary, Senior Counsel, American Council of Life Insurance (ACLI), to Art Peterson. The O'Leary letter contains many inaccuracies that cannot go uncorrected. Mr. O'Leary is either woefully deficient in his understanding of the UPC provisions he attacks, which he refers to as "UPC-II," or is content to mislead as he works to incite opposition.

I. BASIC INACCURACIES IN O'LEARY'S LETTER

Portions of the O'Leary letter seem to confuse the inclusion of life insurance in the *probate* estate and the much more limited inclusion of life insurance in the *augmented* estate. Life insurance proceeds have always passed "outside of probate," i.e., outside of the probate estate, unless the insured names his/her own estate as beneficiary. Passing outside of probate means that the proceeds are paid directly to the beneficiary of the policy rather than to the decedent's executors for subsequent distribution to the beneficiaries. Nothing in the UPC changes this. Life insurance still passes outside of probate. Yet, portions of the O'Leary letter seem to suggest that the UPC has now forced life insurance into the probate estate. If this is what he thinks, or wants readers of his letter to think, the claim is absolutely untrue.

O'Leary's letter claims that the UPC leaves the selection of a life insurance beneficiary to be determined by "an impersonal court or governmental unit." This claim is also untrue. Insured persons will continue to have sole control over the selection of beneficiaries to receive policy proceeds payable on death.

The UPC provisions, which are distorted by his letter, describe a remedy available to a decedent's surviving spouse to recover part of gifts received by others as a result of the other spouse's death. Even in a worst case scenario -- e.g., the spouse is penniless, the decedent's only asset is a $1,000,000 life insurance policy payable to another -- the maximum recovery by the spouse against the insurance beneficiary and available only if the couple had been married for 15 or more years, would be $500,000. If they had been married for only 5 years, the maximum recovery would be $150,000. These recovery figures would be reduced, dollar for dollar, by any property of the spouse whether or not derived from the decedent and by any inheritance or death benefit to which the spouse is entitled under the decedent's estate plan. The recovery would be against the beneficiary of the insurance, not the life insurance company. The insurance beneficiary would keep the difference between the policy proceeds and the amount due the disinherited spouse. The decedent's estate (none in the case supposed) has no right to the recovery and has no responsibility for aiding the spouse's recovery.

II. THE REAL ISSUE

The O'Leary letter conceals the real issue between the Life Insurance Industry and UPC proponents. The real issue is whether the proceeds of life insurance payable to one other than the insured's spouse should be counted in rare post-death inquiries as to whether a surviving spouse has or has not received a fair share of assets available to the couple immediately prior to the death of one. Married persons in the nine community property states of the country cannot use life insurance or any other will-like device to deprive a surviving spouse of his or her share of community property. The UPC is not a community property proposal, for it leaves individual ownership in place for married couples and does not distinguish between marital and non-marital property. But, it approximates the results that would be reached in a community property state when a spouse who owns property dies survived by the other.

Thus, the UPC's elective share remedy is designed to subject recipients of all non-probate transfers at death, whether accomplished by joint accounts, joint and survivor titling of land or securities, revocable trusts, employee and survivor benefit plans, or life insurance, to the possibility of a surviving spouse's fair share remedy.

What the Life Insurers Industry is doing is insisting that death benefits from their products should enjoy a statutory exemption from a state law designed to support marriage and family values. The Industry would have us believe life insurance should be left out of a statutory classification embracing all forms of nonprobate gifts at death because life insurance benefits historically have passed outside probate. The Industry fails to note that assets passing at death through living trusts, employee benefit contracts, and joint and survivor ownership forms also pass outside of probate. In short, the Industry insists that life insurance alone must continue to be an investment form available to married persons intent on defeating the marital property rights of their spouses.

Page 5 of the O'Leary letter makes much of the benign uses of life insurance. But the other will-substitutes have benign uses also. The fact that will substitutes (including life insurance) can and usually are used for benign purposes is not the point. The point is that they can also be used to disinherit a surviving spouse, and if one type of will substitute is exempted, that will be the will substitute of choice for those intent on depriving their surviving spouse of their fair share and who go to lawyers who are sophisticated enough to spot a loophole in the spouse's statutory protection.

Obviously, a clear statement of the problem reveals the solution. The Life Insurance Industry's contention is preposterous and calls for repudiation by legislators.

The questions for state legislators are quite simple: If it is not permissible to disinherit your surviving spouse by will, should it not also be impermissible to disinherit your surviving spouse by will substitute? If it is not permissible to disinherit your surviving spouse by will or by will substitute, why should it be permissible to disinherit your surviving spouse by a specific form of will substitute -- life insurance?

Incidentally, at page 5, Mr. O'Leary misrepresents the statements made by UPC representatives at the meeting with ACLI representatives in Washington, D.C. (The meeting was in December 1993, not in January 1994.) What the UPC representatives stated was that they <u>had</u> heard of cases in which decedents <u>had</u> purchased life insurance policies for the singular purpose of disinheriting their surviving spouses. The reason why the case law under the UPC is not replete with instances of such use (O'Leary letter p. 4) is because the 1969 UPC specifically exempted life insurance payable to a non-spouse from the augmented estate. What would be the point of litigating about a matter that was clearly and unambiguously (but mistakenly) covered by a statutory exemption?

Under non-UPC law, the possibility of bringing life insurance under the property available to disinherited surviving spouses was

specifically mentioned by Justice Wilkins in Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984).

More importantly, the O'Leary letter fails to mention that the American Law Institute in the Restatement (Second) of Property recently included life insurance in the property subject to the elective share. Within the drafting committee of the Restatement and in the floor debates, the inclusion of life insurance was not the least bit controversial. No one thought that life insurance was so unique that it should receive a special exemption. In fact, we have not seen a single disinterested commentator argue that life insurance should be unavailable to disinherited surviving spouses. *It is only the Life Insurance Industry that thinks that its products must be exempted!*

III. <u>OTHER ERRORS IN ACLI LETTER</u>

A few other points raised by the O'Leary letter can be disposed of summarily. First, the implication that life insurance benefits were slipped into the Spouse's Elective Share provisions <u>after</u> the UPC revisions were approved by the Uniform Law Commissioners and the ABA House of Delegates is utterly untrue. The exemption of life insurance from the UPC's elective share sections as published in 1969 was widely criticized in legal literature of the '70s and early '80s. Correcting this omission was a primary goal of the Joint Editorial Board as it began in the mid-'80s to develop the UPC Article II revisions. The final drafts as debated and approved by the Uniform Law Commissioners in drafting committee and annual meeting sessions of the entire conference held in 1988, 1989 and 1990 were substantially similar to the re-styled version published in 1993; life insurance benefits, whether payable to the spouse or to another, were included in the calculation of a spouse's protected share in all drafts. As in the American Law Institute, the inclusion of life insurance in the augmented estate concept was not the least bit controversial, either within the drafting committee nor in the floor debates in the Uniform Law Conference. No one rose to suggest that life insurance was somehow different and entitled to a special exemption.

Second, the ACLI's O'Leary notes reliance by life insurers on a 1986 meeting in New York City called by the ULC Article VI drafting committee as justifying an industry assumption that UPC drafters would not reverse the historic exclusion from probate administrations of life insurance payable to a named beneficiary. The focus of that discussion was on whether a life insurance beneficiary designation could be changed by a later provision in the insured's last will and the consensus was that <u>policy provisions should continue to control</u>. To date, UPC representatives have not departed from that consensus. The contrary assertion by Mr. O'Leary reflects a propensity noted elsewhere in this statement to equate mere mention of life insurance in a probate law with inclusion of insurance in the

assets under the control of the estate fiduciary. As stated earlier, inclusion of life insurance in the calculation to determine whether a surviving spouse has been left with less than a fair share of marital property <u>does not require inclusion of policy proceeds in the probate estate.</u> The handling of death benefit payouts will continue as at present. Unless someone starts a lawsuit, neither estate fiduciary nor probate court is involved in the computation or collection of sums possibly due an electing spouse. The question is whether the recipient of such proceeds may be called upon in rare cases to repay some portion of what has been collected from the insurer. Mr. O'Leary and ACLI say this should never happen; UPC proponents think otherwise and doubt that ACLI can win in state legislatures unless they succeed in confusing the issue beyond recognition.

Third, the laundry list of horribles found on pp 6 et seq of Mr. O'Leary's letter contains little of merit. What "assurance" is presently available to insured persons that their beneficiaries will use insurance proceeds for the purposes intended by the insured? We know of none unless the insurance goes into a protective trust from which a disinherited spouse, as a creditor of all beneficiaries of the trust, may or may not be able to collect.

Fourth, the recurring suggestion that a change of beneficiary within 2 years of death has a bearing on inclusion of insurance in an augmented estate calculation is way off base. Unless the decedent's interests in the policy have been irrevocably assigned more than 2 years before death, a late assignment <u>or</u> change of beneficiary is disregarded and insurance proceeds are included in the augmented estate calculation.

IV. <u>OTHER POINTS AND "ISSUES"</u>

UPC proponents have no objection to including a definition of "life insurance" among defined terms. We simply see no reason for a definition in this context. We note also that the federal estate tax taxes the value of life insurance proceeds in the insured's estate without defining "life insurance." Also, we have invited ACLI representatives to suggest better protections to insurers making payments according to policy terms; to date, no suggestions for improving UPC section 2-214 have been brought to our attention.

The "issues" raised under and following the paragraph discussing interest due in cases of delayed payment of policy proceeds largely disappear on careful reading of UPC 2-214. Under it, an insurer has an expanded opportunity to pay proceeds into court as a means of discharging itself from liability for principal and interest.

No noticeable increase in the cost of doing business is likely for insurers and other third parties. Experience to date with UPC's elective share remedy teaches that elections become

exceedingly rare once it is understood that all wealth available to a surviving spouse is taken into account in calculating whether he or she has been left with a fair share of the couples resources. Also, it is a certain sign of misunderstanding of the UPC elective share remedy to assert, as Mr. O'Leary does in sub b on page 7, that electing spouses will continue to have an option to elect to take under the will or under the law. The UPC scheme charges the elector with all values available under the decedent's plan that are not disclaimed; there is no choice between taking under the will or the law. The only choice arises after undisclaimed values available to the spouse under the plan have been calculated and determined to leave the spouse with less than his or her elective share entitlement. Then, the choice is whether to pursue a claim for the deficiency and prove that the elector's own assets are inadequate to offset a disappointing inheritance from the decedent or to pass up the claim.

The "full" consideration discussion at pp. 7 and 8 of Mr. O'Leary's rambling letter apparently seeks to rally the support of real estate title interests to the cause against UPC to which ACLI has committed itself. The point made rests on the fallacious assumption that a real estate transfer made by a married transferror without the consent of the spouse will fail if made within two years of death and for less than full consideration. This is wrong. UPC 2-208 (a) excludes the value transferred from the augmented estate calculation <u>to the extent of</u> consideration received; only the gift portion is taken into account and the procedural burden of showing that a partial gift was involved is on the electing spouse. Moreover, the donee's title is not jeopardized by the possibility that a contribution of money to make up a deprivation of a spouse's fair share may be claimed and enforced. The remedy is personal liability of the donee to make restitution of never more than 50% of the gift value involved, which is the value as of the date of the gift. See UPC 2-210, 2-205 (3) (ii). So, title to property in the hands of a transferee of the decedent is not affected and title examiners and insurers need not be concerned.

V. <u>ANTI-LAPSE; REVOCATION BY DIVORCE</u>

Beginning on p.9 of the ACLI letter, the text shifts to complaints about the UPC's anti-lapse rules. Again, we encounter the assertion that mentioning life insurance in a probate code means that insurance proceeds are included in the probate estate. This is wrong as to anti-lapse, just as it is wrong as to the elective share. Indeed, it is wrong across the board.

When we attempt to see what problems the Life Insurance Industry has with the UPC's anti-lapse provisions, we again encounter failure by ACLI to understand what displeases them. In the end, all we can make of the arguments presented is that insurers do not like the idea that something in the probate code

may affect their product.

Their premise is that they may be held liable to a beneficiary who loses some of what he or she has collected from an insurer. The apprehended loss would be a recovery by a descendant of a predeceased beneficiary. The question is one of determining the legal meaning of the policy's death benefit provision. The UPC provision, which would substitute the child of the predeceased relative is merely a default rule that controls only where the policy provisions are unclear as to whether surviving members of a class take all as against children of deceased class members claiming in their parents' place. If the policy provisions are clear, no possible liability will attend payment according to policy terms. If they are unclear, perhaps the insurer should have some responsibility. No law beyond the control of the companies is imposed by this UPC provision, the sole purpose of which is to induce insurers to offer beneficiary designation forms to insured persons that can be readily understood as to application to possible future events.

The ACLI complaint about UPC 2-804's rule that divorce revokes a life insurance or other nonprobate death benefit in favor of a former spouse is also a rule that can be made inapplicable by a contrary provision in the policy. Group life insurance is a notorious source of death benefits likely to have been arranged years earlier that were overlooked when the insured and spouse were divorced. The UPC provision merely increases the prospects that the employee was offered a clear choice in the form for designating a beneficiary as to whether a death benefit for the employee's spouse will or will not be revoked in the event of the couple's later divorce. If ACLI has a legitimate concern about the provision, it would relate to the question of whether the new legislation should apply to policies in force prior to the effective date of the legislation. They cannot defend perpetuation of insurance policy boilerplate generating this notorious source of surprising and unwanted post-death distributions.

We find it curious that the Life Insurance Industry is against protecting the decedent's actual surviving spouse against disinheritance by life insurance but is in favor of protecting the decedent's former spouse. To use Mr. O'Leary's appellation, the Life Insurance Industry is against "canonizing" the surviving spouse, but does not shrink from "canonizing" the former spouse (who, without the UPC's §2-804, might take the proceeds instead of the decedent's current spouse). There is only one explanation for this anti-current spouse, pro-former spouse stance -- the Life Insurance Industry just doesn't want to bother doing what everyone (but the Industry) agrees is right in the circumstances. In order to continue doing business as usual, the Industry just wants to pay the proceeds to the named beneficiary on the policy, regardless of any injustice that might result. This, despite the rather generous "payor protection" provisions that insulate insurers from liability if they pay to the named beneficiary before receiving notice of a contrary claim or if they pay to court after receiving notice of a

contrary claim or if they pay to court after receiving notice of a contrary claim. The only possible exposure to liability arises if they pay to the named beneficiary after receiving notice of a contrary claim.

It is also curious that the O'Leary letter fails to mention non-UPC provisions already in the statute books of at least four important states that address the problem of apparently forgotten or overlooked insurance beneficiary designations favoring one from whom the insured was later divorced. Was the Industry unsuccessful in opposing this legislation, or is it active on the issue only when UPC is involved?

On p. 10, the O'Leary letter mentions the "family farm." This strikes us as utterly unrelated to anything else in the letter, and unworthy of comment.

We also have problems with O'Leary's boasts on p. 11 about 1994 legislative defeats for the UPC due to insurance industry objection. We know that a pro-UPC campaign in Mississippi failed, but that had little to do with Life Insurance Industry opposition. We acknowledge and deplore that Denver's Eugene F. Copeland and Security Life Insurance Co. forced Colorado Bar Association committees to agree to amendments giving insurer's the outrageous exemptions they demanded as a price for permitting any of the product of several years of study and effort to escape the wastebasket. We question whether the struggle for a fair rule in Colorado is completely finished. We have heard that some state legislators are angry at the high-handed way Security Life behaved in that struggle. We also doubt that 1995 studies by North Dakota's legislature will result in drastic modifications of the 1993 enactment there.

VI. THE LIFE INSURANCE INDUSTRY IS A POWERFUL LOBBY, WHICH TRIES TO GET ITS WAY REGARDLESS OF THE MERITS OF ITS POSITIONS

Over the years, the Life Insurance Industry has become notorious -- indeed, infamous -- for getting its way in state legislatures. The industry has far more funding for lobbying efforts than the Uniform Law Commissioners, which essentially relies on the merits of its proposals and on volunteers. In an effort to bring public attention to the industry's claim for special treatment, efforts will be made to bring the industry's anti-spouse and anti-grandchild lobbying efforts to the attention of local and national news organizations.

In closing, we urge recipients of Mr. O'Leary's letter to agree that the ACLI message is fatally flawed by lack of understanding of the proposals they attack and related errors in assessing the impact of enactment. Properly understood, the UPC proposals attacked by ACLI are meritorious and impose no significant burdens on life insurers or other third party

interests. Life insurance plainly should not be singled out as a unique investment device having special utility to disgruntled spouses intent on defeating legitimate marital property expectations of surviving mates.

R.V.W.

January 1995

JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE

SUMMARY OF RESPONSE TO THE LIFE INSURANCE INDUSTRY

- Both the Uniform Law Conference (in the UPC) and the American Law Institute (in the Restatement, Second, of Property: Donative Transfers), the two premier and disinterested national organizations devoted to law reform, agree that life insurance should be included in the property that is subject to the elective share of the surviving spouse and that life insurance and other nonprobate transfers should be subject to the same rules of construction.

- The UPC protects insurance companies (and other payors) from liability if they pay to the designated beneficiaries before receiving notice of a contrary claim. If they receive notice of a contrary claim before making payment, they can disentangle themselves from the dispute (and avoid liability) by paying the proceeds into court. Consequently, the UPC does not impose administrative costs on insurance companies (or other payors). Insurance companies (or other payors) need not expend resources on investigating the validity of claims under the elective share or the rules of construction.

- Cases in which a contrary claim is filed will be small in number. They will be the exception, not the rule. In those isolated cases, the courts, not the insurance companies, are charged with determining who is ultimately entitled to receive the insurance proceeds.

- Under the UPC's elective share system, the *most* that the surviving spouse could take from life insurance beneficiaries is 50% of the proceeds. In most cases, the surviving spouse will be entitled to substantially less.

- If the public policy of this country is to protect surviving spouses–mostly elderly widows–from disinheritance by will, there is no defensible case for allowing disinheritance by will substitutes (nonprobate transfers), which are functional equivalents of wills. Recently, federal law recognized this by protecting surviving spouses from being deprived of employee death benefits under plans covered by the Employee Retirement Income Security Act (ERISA), as amended by the Retirement Equity Act (REACT).

- There is nothing unique about life insurance. The purchase of life insurance by the decedent spouse is a way of shifting the decedent's assets into one of a variety of forms of investment. There is no meritorious case for treating one form of investment more favorably than other forms of investment.

- There is a profound parallel between the elective share of the surviving spouse and the federal estate tax. The federal estate tax taxes both probate and nonprobate transfers (including life insurance). The reason is simple. If the federal estate tax only taxed probate transfers, the tax would be ineffective because people would swarm to the nonprobate transfers. If the federal estate tax taxed both probate and nonprobate transfers, but left out one form of nonprobate transfer–life insurance–people would use life insurance to avoid the estate tax. The same point holds true for the elective share. If life insurance were the only exempted nonprobate transfer, life insurance would be the estate-depleting transfer of choice for people determined to disinherit their surviving spouses.

- Life insurance is one of the most important forms of wealth transmission in the United States. Life

insurance has become the principal last will and testament of our legal system. If the elective share is to be effective, life insurance must not be exempted.

- The UPC's elective share, as revised in 1990, has been endorsed by the American Association of Retired Persons and by the Consumer Federation of America.

- The UPC has always covered nonprobate transfers and other matters extending beyond decedents' estates. UPC coverage of nonprobate transfers (including life insurance) is not new.

- One of the themes of the 1990 revisions of the UPC was further to unify the law of probate and nonprobate transfers, so that all donative transfers, whether by will or will substitute, would be covered by the same rules of construction.

- One of the rules of construction that the UPC extends to nonprobate transfers (including life insurance) is a provision on "antilapse." The main goal of antilapse statutes is to protect against an unintended disinheritance of the decedent's grandchildren. Antilapse statutes are founded on common intention--on the conviction, borne out by experience, that most decedents, if they had thought about the possibility of an unusual order of deaths, would have provided that a deceased child's share should go to the deceased child's issue. Antilapse statutes do not, however, force this result on donors: if there is persuasive evidence that the decedent did think about the possibility and deliberately provided that the deceased child's issue not take, then that intent is honored.

- An antilapse statute for life insurance and similar beneficiary plans is especially needed. Life insurance is often taken out early in life when the policyholder is a young adult, fairly recently married, and with young children. This is a time of life when the parent is least likely to anticipate the possibility of an unusual order of deaths.

- The problem is compounded by the fact that life insurance companies and similar payor institutions typically offer a fairly rigid set of beneficiary options that usually do not include the one that most people would choose were it offered--the one designating a deceased child's issue to take the share that the deceased child would have taken.

- The option that most insurance companies give their policyholders is one providing that the deceased child's share goes to the other (surviving) children, not to the deceased child's issue. For the administrative convenience of the insurance companies, the Life Insurance Industry promulgates the false idea that this anti-grandchild option is what most policyholders want.

- The Life Insurance Industry often misrepresents, exaggerates, and distorts the true meaning and significance of the UPC provisions to which they object.

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Early 1994

RESPONSE TO THE LIFE INSURANCE INDUSTRY

The Joint Editorial Board for the Uniform Probate Code (JEB) has become aware of lobbying efforts against the Uniform Probate Code by the Life Insurance Industry, spearheaded by the American Council of Life Insurance (ACLI). The JEB issues this statement in response to the Life Insurance Industry's opposition. The Life Insurance Industry's opposition must be understood for what it is--not a principled argument on the merits, but a claim by a powerful industry lobby for special treatment for its industry's products. Regrettably, in their anti-UPC lobbying efforts, the ACLI and other representatives of the Life Insurance Industry often misrepresent, exaggerate, and distort the true meaning and significance of the UPC provisions to which they object.

The main targets of the Life Insurance Industry are the UPC inclusion of life insurance payable to third parties as part of the property that is subject to the elective share of the surviving spouse and the inclusion of life insurance and other nonprobate transfers in the UPC's rules of construction. The JEB observes at the outset that the American Law Institute, in the Restatement (Second) of Property (1992), has also taken the position that life insurance payable to third parties should be subject to the surviving spouse's elective share and that rules of construction for both probate and nonprobate transfers (including life insurance) should be uniform. *Consequently, state legislators should be aware that both the Uniform Law Conference and the American Law Institute, the two premier and disinterested national organizations devoted to law reform, agree on these two issues.*

The UPC Protects Insurance Companies (and Other Payors) from Liability. Before discussing the merits of the UPC's position on these two issues, the JEB wishes to point out that the UPC (but not the Restatement) goes out of its way to protect insurance companies from liability. The UPC contains elaborate payor protection provisions. The term "payor" is a defined term that includes life insurance companies. Insurance companies (and other "payors") are protected from liability if they pay to the designated beneficiaries before receiving notice of a contrary claim. If they receive notice of a contrary claim before making payment, they can disentangle themselves from the dispute (and avoid liability) by paying the proceeds into court. Consequently, the UPC does not impose administrative costs on insurance companies (or other payors). Insurance companies (or other payors) need not expend resources on investigating the validity of claims under the elective share or the rules of construction. Cases in which a contrary claim is filed will be small in number. They will be the exception, not the rule. In those isolated cases, the courts, not the insurance companies, are charged with determining who is ultimately entitled to receive the insurance proceeds. For additional discussion of the UPC's payor protection provisions and related issues, see Attachment No. 5.

NCCUSL: 676 North St. Clair Street, Suite 1700, Chicago, IL 60611, 312/915-0195, FAX 312/915-0187

Elective Share of the Surviving Spouse. The elective share of the surviving spouse is one of the few instances in American law where freedom of disposition is curtailed. State law has long protected surviving spouses from disinheritance by will (probate transfers). The spouse's elective share remedy never entitles the spouse to 100% of the decedent's assets, however. As revised in 1990, the UPC elective share is unique in that it grants the surviving spouse in a long-term marriage (a marriage of 15 years or more) a right to 50% of the couple's *combined* assets, with the surviving spouse's own assets counted toward satisfying this entitlement. In a shorter-term marriage (a marriage of less than 15 years), the surviving spouse is entitled to a smaller percentage of the combined assets. Consequently, in a worst-case scenario under the revised UPC–the surviving spouse of a long-term marriage who is penniless–the *most* that the surviving spouse could take from life insurance beneficiaries is 50% of the proceeds. In most cases, the surviving spouse will be entitled to substantially less.

If the public policy of this country is to protect surviving spouses–mostly elderly widows[1]–from disinheritance by will, there is no defensible case for allowing disinheritance by will substitutes (nonprobate transfers), which are functional equivalents of wills. Recently, federal law recognized this by protecting surviving spouses from being deprived of employee death benefits under plans covered by the Employee Retirement Income Security Act (ERISA), as amended by the Retirement Equity Act (REACT).

As first promulgated in 1969, the UPC subjected will substitutes such as revocable trusts and joint tenancies to the spouse's elective share, but did not then subject life insurance payable to third parties. The decision to exempt life insurance was not based on any principled distinction between life insurance and other will substitutes. It was based on an apprehension of opposition from the Life Insurance Industry. The recent Life Insurance Industry opposition suggests that the fear that existed in 1969 was justified. Indeed, the life insurance lobby seems determined to make its product exempt from the spouse's elective share. The state of New York recently revised its legislation on the elective share. The Advisory Committee appointed by the New York legislature to study the matter, a commission composed of disinterested lawyers, judges, and law professors, recommended several revisions, all designed to strengthen the protection given to the surviving spouse. Among the recommended revisions was the inclusion of life insurance payable to third parties.[2] The inclusion of life insurance was so obviously correct that the Committee Report states that the suggestion was "readily accepted" by the Committee. See First Report of the EPTL Advisory Committee at p. 15 (1991). But, according to the New York Times, when it came to legislative consideration of the Advisory Committee's proposals, "that recommendation [to include life insurance] was dropped from the final draft of the bill after intense lobbying by the insurance industry, which was worried that people might choose alternative investments." See N.Y. Times, August 30, 1992, § 3, page 17.

We deem it very important that the Life Insurance Industry does not put forward a principled case for distinguishing life insurance from other will substitutes nor, indeed, from wills themselves. Boiled down to its essentials, the only argument that the industry makes is that subjecting life insurance to the

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[1] Sixty-six percent of the male decedents for whom an estate tax return was filed in 1989 left a surviving wife. Only 24% of the female decedents left a surviving husband. *See* IRS, SOI BULLETIN 77 (Spring 1993).

[2] The recommended inclusion was of "insurance policies on the life of the decedent wherein the decedent retained or transferred within one year of his death any incidents of ownership." See First Report of the EPTL Advisory Committee at p. 15 (1991).

spouse's elective share would deprive the decedent of the right to use life insurance to benefit someone other than his surviving spouse and would displease those non-spouse beneficiaries. That argument, if persuasive, would not merely support exempting life insurance from the elective share, but all donative transfers--by will or by will substitute. At its base, that argument, in other words, is an anti-spouse argument--an argument for entirely abolishing the elective share. It is, after all, also true that subjecting probate assets to the elective share deprives the decedent of the right to use his probate assets to benefit someone other than his surviving spouse and displeases those non-spouse legatees and devisees, for they may be forced to give up part of what the decedent wanted them to have (but did not have the right to give them). The same is true of beneficiaries of revocable trusts, surviving joint tenants, and other beneficiaries of nonprobate transfers.

There is nothing unique about life insurance. The purchase of life insurance by the decedent spouse is a way of shifting the decedent's assets into one of a variety of forms of investment. Life insurance companies are profit-making organizations, which means that their customers as a group pay more in premiums[3] than they get back in the form of death benefits. Instead of buying life insurance, the decedent could have invested in real estate, stocks, bonds, T-bills, certificates of deposit, or other forms of investment. There is no meritorious case for treating one form of investment more favorably than other forms of investment.

There is a profound parallel between the elective share of the surviving spouse and the federal estate tax. See **Attachment No. 4.** The federal estate tax taxes both probate and nonprobate transfers (including life insurance). The reason is simple. If the federal estate tax only taxed probate transfers, the tax would be ineffective because people would swarm to the nonprobate transfers. If the federal estate tax taxed both probate and nonprobate transfers, but left out one form of nonprobate transfer--life insurance--people would use life insurance to avoid the estate tax. The same point holds true for the elective share. If life insurance were the only exempted nonprobate transfer, life insurance would be the estate-depleting transfer of choice for people determined to disinherit their surviving spouses, since people of any age not only can change beneficiaries of existing policies but can also buy new policies.[4]

Life insurance is one of the most important forms of wealth transmission in the United States. The ACLI itself boasts that there was over $10.4 trillion in life insurance coverage in the United States in 1992, up from about $4.5 trillion in 1982. During 1991, life insurance companies paid $25.4 billion to beneficiaries of deceased policyholders. According to a prominent writer on life insurance, life insurance has become the principal last will and testament of our legal system. See **Attachment No. 6** (About Life Insurance). If the elective share is to be effective, life insurance must not be exempted.

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[3] Part of the profits life insurance companies make comes from returns on investments the companies make with the premiums their customers pay them. These investment returns earned by life insurance companies are part of the price paid by the customers, for by paying premiums to the company, the customers give up the opportunity of making these investment returns for themselves.

[4] Either way, the transfer is estate-depleting. The higher premiums older persons must pay to purchase a new life insurance policy roughly makes up for the premiums they did not pay for that policy when they were younger, and vice versa. Note also that the proper measure of the included amount is the value of the asset that the decedent's premiums purchased, not the value of the premiums the decedent paid for the asset, *i.e.*, the proper amount to be included is the value of the insurance proceeds payable to third parties.

State legislators should be aware that the UPC's elective share, as revised in 1990, has been endorsed by the American Association of Retired Persons (Attachment No. 7) and by the Consumer Federation of America.

Rules of Construction (Antilapse). The UPC has always covered nonprobate transfers and other matters extending beyond decedents' estates. Article V of the original UPC covered guardianship and protective proceedings and Article VI governed nonprobate transfers such as joint bank accounts, Totten trusts, and payable on death (POD) accounts. Article VI also contained a section protecting nonprobate transfers (including life insurance) against challenge based on noncompliance with the formalities for executing a valid will. Article II contained a provision--called the slayer rule--that prevented probate and nonprobate transfers (including life insurance benefits) from being paid to someone who feloniously and intentionally killed the decedent. UPC coverage of nonprobate transfers (including life insurance) is not new.

One of the themes of the 1990 revisions of the UPC was further to unify the law of probate and nonprobate transfers, so that all donative transfers, whether by will or will substitute, would be covered by the same rules of construction. It makes no sense, for example, to have a rule of construction providing that adopted children are presumptively included in a class gift to "children," but to limit that rule of construction to wills. If the term "children" contained in a will presumptively includes adopted children, the term should mean the same when included in other documents making donative transfers.

One of the rules of construction that the UPC extends to nonprobate transfers (including life insurance) is a provision on "antilapse." The main goal of antilapse statutes is to protect against an unintended disinheritance of the decedent's grandchildren. These statutes, which are traditional in probate codes, are necessitated by the fact that parents do not instinctively expect to bury their children. For a child to die before a parent constitutes what the Internal Revenue Service calls an "unusual order of deaths." Antilapse statutes are founded on common intention--on the conviction, borne out by experience, that most decedents, if they had thought about the possibility of an unusual order of deaths, would have provided that a deceased child's share should go to the deceased child's issue. Antilapse statutes do not, however, force this result on donors: if there is persuasive evidence that the decedent did think about the possibility and deliberately provided that the deceased child's issue not take, then that intent is honored. This is known as the contrary intent rule, and it applies to all rules of construction. Rules of construction are intent-effecting because they only apply if there is no contrary intent.

The UPC's extension of antilapse statutes to will substitutes is supported by precedent. Although conventional antilapse statutes only apply to wills, some courts have recently applied these statutes to will substitutes, a position supported by the Restatement (Second) of Property § 34.6(3)(b) (1992) (set forth in Attachment No. 1). An antilapse statute for life insurance and similar beneficiary plans is especially needed. Unlike wills, which are typically prepared later in life, life insurance is often taken out early in life when the policyholder is a young adult, fairly recently married, and with young children. This is a time of life when the parent is least likely to anticipate the possibility of an unusual order of deaths. The problem is compounded by the fact that life insurance companies and similar payor institutions typically offer a fairly rigid set of beneficiary options that usually do not include the one that most people would choose were it offered--the one designating a deceased child's issue to take the share that the deceased

child would have taken.[5]

What option do most insurance companies give their policyholders? The typical beneficiary option given is one providing that the deceased child's share goes to the other (surviving) children, not to the deceased child's issue. The Life Insurance Industry seems to assume that this anti-grandchild option is what most policyholders want. For a different view of why most insurance companies only offer this option, see Attachment No. 3 (Extracts from Letter of May 26, 1993, to the Joint Editorial Board from the Retired Attorney of a Subsidiary of a Major Corporation).

Insurance policies express this anti-grandchild option in a variety of ways. In Attachment No. 2, we give a series of examples showing that the UPC's antilapse statute does not overturn the plain meaning of these beneficiary designations when they are stated plainly enough so that the policyholder should clearly understand what he or she is signing. The antilapse statute only becomes operative when the insurance policy fails to state this anti-grandchild option, or states it so subtly, by using mere words of survival, that few people would understand that they are cutting out their grandchildren if one of their children predeceases them.

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[5] A prominent exception (there may be, and hopefully are, others) is Northwestern Mutual Life, whose policies, at least since 1954, have offered a checkoff option similar to the one described in Attachment No. 2, Example 4. If all insurance companies and other institutions offering beneficiary plans had always provided the array of options offered by Northwestern Mutual, there would be no need for an antilapse statute for life insurance and other beneficiary plans.

SCHEDULE OF ATTACHMENTS

Attachment No. 1.	Provisions of the Restatement (Second) of Property (1992)
Attachment No. 2.	Examples Illustrating the UPC's Antilapse Statute
Attachment No. 3.	Extracts from Letter of May 26, 1993 to the Joint Editorial Board from the Retired Attorney of a Subsidiary of a Major Corporation
Attachment No. 4.	Provisions of the Internal Revenue Code Taxing Life Insurance in the Decedent's Estate and Making the Beneficiaries Liable to the Executor for their Portion of the Tax
Attachment No. 5.	Correction of Errors in Various Life Insurance Industry Documents
Attachment No. 6.	About Life Insurance
Attachment No. 7.	American Association of Retired Persons Endorsement
Attachment No. 8.	About the Joint Editorial Board

ATTACHMENT NO. 1

PROVISIONS OF THE RESTATEMENT (SECOND) OF PROPERTY
DONATIVE TRANSFERS (1992)

§ 32.4, Comment f [Defining Life Insurance as a "Substitute for a Will"]:

The insured may direct the insurance company to pay the insurance proceeds on the insured's death outright to a named person, or to the trustees of a trust. An arrangement may be made with the insurance company to retain the proceeds and pay them out over a period of time under one of the options in the policy. In each of these situations, the pay-out arrangement, though revocable by the insured, is an inter vivos donative document of transfer that is a substitute for a will.

§ 34.1(3) [Providing that Life Insurance (and Other Will Substitutes) Payable to Others is Subject to Spouse's Elective Share]:

An inter vivos donative transfer to others than the donor's spouse that is a substitute for a will, or that is revocable by the donor at the time of the donor's death, is subject to spousal rights of the donor's spouse in the transferred property that would accrue to the donor's spouse on the donor's death if the transfer had been made by the donor's will.

§ 34.6((3)(b) [Providing that State Antilapse Statutes May be Judicially Extended to Life Insurance (and Other Will Substitutes)]:

If the document of transfer is a substitute for a will, the subject matter may pass, by analogy to the antilapse statute in the controlling state, to the substitute taker such statute would have provided if the document of transfer had been a will.

EXAMPLES ILLUSTRATING THE UPC'S ANTILAPSE STATUTE

The following examples, which have now been incorporated into the Official Comment to the UPC's antilapse statute for life insurance and other beneficiary plans, demonstrate that that statute is not nearly as intrusive as the Life Insurance Industry contends, and provides no reason for the great concern expressed in that document.

Also, contrary to suggestions from the Life Insurance Industry, the UPC does provide guidance showing how to draft language expressing a contrary intent. The Official Comment to the antilapse provision related to life insurance directs readers to the Official Comment to the companion provision, the antilapse provision related to wills. The Official Comment to that provision provides extensive guidance on how to express a contrary intent.

Example 1. G is the policyholder. When the policy was taken out, G was married to S; G and S had two young children, A and B. G died 45 years after the policy was taken out. S predeceased G, A survived G, and B predeceased G leaving three children (X, Y, and Z) who survived G. G's policy names S as the primary beneficiary of the policy, but because S predeceased G, the secondary (contingent) beneficiary designation became operative. The secondary (contingent) beneficiary designation of G's policy states: **"equally to the then living children born of the marriage of G and S."**

The printed terms of G's policy provide:

> If two or more persons are designated as beneficiary, the beneficiary will be the designated person or persons who survive the Insured, and if more than one survive, they will share equally.

The UPC's antilapse statute does not override the printed terms of the policy.[1] A is entitled to all of the proceeds of the policy.

Example 2. The facts are the same as in Example 1, except that G's policy names "A and B" as secondary (contingent) beneficiaries. The printed terms of the policy provide:

> If any designated Beneficiary predeceases the Insured, the interest of such Beneficiary will terminate and shall be shared equally by such of the Beneficiaries as survive the Insured.[2]

The UPC's antilapse statute does not override the printed terms of the policy. A is entitled to all of the proceeds of the policy.

---

[1] In the language of the statute, the printed clause constitutes an "alternative beneficiary designation," which supersedes the substitute gift to the deceased beneficiary's children.

[2] See note 1, supra.

Example 3. The facts are the same as Examples 1 or 2, except that the printed terms of the policy do not contain either quoted clause or a similar one.[3]

Under the UPC's antilapse provision, A would be entitled to half of the policy proceeds and X, Y, and Z would divide the other half equally.

Example 4. The facts are the same as Example 3, except that the policy has a beneficiary designation that provides that, if the adjacent box is checked, the share of any deceased beneficiary shall be paid "in one sum and in equal shares to the children of that beneficiary who survive." G did <u>not</u> check the box adjacent to this option.

Under the UPC's antilapse statute, G's deliberate decision not to check the box providing for the share of any deceased beneficiary to go to that beneficiary's children constitutes a clear expression of a contrary intent. A would be entitled to all of the proceeds of the policy.

Example 5. G's policy names her niece, A, as primary beneficiary, and provides that if A does not survive her, the proceeds are to go to her niece B, as contingent beneficiary. A predeceased G, leaving children who survived G. B survived G.

Contrary to the suggestion in the American Council of Life Insurance Legislative Alert (see Attachment No. 6), the UPC's antilapse statute does not override the express terms of the policy.[4] The proceeds go to B, not to A's children.

Example 6. G's policy names her niece, A, as primary beneficiary, and provides that if A does not survive her, the proceeds are to go to her niece B, as contingent beneficiary. The printed terms of the policy specifically state that if neither the primary nor secondary beneficiaries survive the policyholder, the proceeds are payable to the policyholder's estate. A predeceased G, leaving children who survived G. B also predeceased G, leaving children who survived G.

The UPC's antilapse statute does not override the express terms of the policy.[5] The proceeds go to G's estate, not to A's children or to B's children.

---

[3] Most life insurance policies do contain a similar clause.

[4] In the language of the statute, the contingent beneficiary designation constitutes an "alternative beneficiary designation," which supersedes the substitute gift to the deceased primary beneficiary's children.

[5] See note 1, supra.

EXTRACTS FROM LETTER OF MAY 26, 1993 TO THE JOINT EDITORIAL BOARD FROM THE RETIRED ATTORNEY OF A SUBSIDIARY OF A MAJOR CORPORATION

[O]ur beneficiary designation forms generally had a provision similar to many insurance policies which stated "to my beneficiaries in equal shares, in equal shares to the survivors of them." [Among the] situations that caused what the families and everyone connected with the process felt was unfair and not what the employee would have intended [was] distribution to children which excluded distribution to the children of a deceased child. . . . .

From time to time a distribution would be made only to the surviving children where one of the named beneficiaries was deceased. The brothers and sisters were always surprised to learn that this would be the result and often requested that the distribution be made to the children of their deceased brother or sister. The committee never felt it had such authority, even with consent of all the distributees. In 1969 [our parent corporation] was written and advised of the problem. A request was made for approval of a form that would permit elective adoption of an anti lapse provision. The issue was submitted to their life insurance advisors . . . . They advised against use of such a form for a number of reasons. First, it wasn't the insurance company's obligation to make the distribution fair. Employees could insure fairness by keeping their beneficiary designations up to date. It was administratively more expensive to distribute to any one but named beneficiaries. During the insured's lifetime, the company earned money on the premiums. Once death occurs, everything that occurs thereafter is an expense and the procedures should minimize all further activity on an account. Distribution to children of a deceased child would pose the likelihood that they would be minors and require distribution to a court appointed conservator. More costs are incurred in monitoring this type of distribution than just making out a check to a named beneficiary. Also there would be no way for the insurance company or employing company to determine who were the lineal descendants of a deceased child without incurring a substantial risk of error. Determining children of the deceased employee was not that big of a problem under the afterborn child rule because of supervisor and fellow employee knowledge and other company records (Blue Cross claims). Such information would not be available to help identify children of a deceased child because the company in most cases has no direct contact with families of an employee's children. The caliber of their clerical personnel would have to be substantially upgraded for them to analyze heirship matters and they would have to charge [our parent company] for the training and additional supervision required for such a program. [Our parent company] recommended that the form not be used. . . .

[We continued to receive] requests to distribute to the children of a deceased child. We declined and advised the families that they could divide up the distribution privately. In one case I felt that this would be done. In another case a brother thought that the distribution should be made as the beneficiary form provided as that is what he thought his brother must have wanted since the employee had a number of years to make the change and didn't. In one case the deceased employee, a grandfather, had substantially helped his son's wife financially to raise the grandchildren after the son's death. He had promised to pay their way through college. The daughter-in-law was devastated when she learned that the grandfather had died and had not provided for her or the grandchildren. The grandfather had named his children as

primary beneficiaries of his group life insurance. A second spouse of some years received his pension, savings plan account and plan death benefit. The son's wife did not feel that she would continue to receive help from her step-mother-in-law. Moreover, the brother and sisters did not seem inclined to want to help their deceased's brother widow or her children.

One afternoon late in the day I was staring out the window when John, our house service man, saw me and asked what was troubling me? I told him the situation and asked who he thought should get the money. He didn't hesitate a minute in telling me that the share belonged to the children of the deceased child and should not be divided up among the brother and sisters. I thought that if John, an old, uneducated person of modest means, knew what was the right thing to do, that a sophisticated bureaucratic organization ought to be able to figure out a way to handle the problem. . . .

[The subsidiary subsequently adopted a comprehensive set of beneficiary designation options, including one that directed that the share of a deceased child should go to that child's issue. The following paragraphs address the subsidiary's experience under this option.]

Our experience was based on handling hundreds of cases each year. Normally, the number of cases handled annually amounted to one per cent of the active work force, not counting retirees. With 80,000 employees we handled about 800 death cases. As the work force went down to 60,000, we had 600 death cases. Usually, only one or two a year posed problems and I can't remember a case where we were not confident that we had the information to make a proper distribution. So we felt we could handle these cases from an information standpoint. . . .

[The] number of problem cases was very very small, so that when the cost is averaged over all cases, the additional cost is really very little. [Our parent corporation's life insurance company] used this argument to suggest that it wasn't worth doing. But while the number is small and of no great consequence to the company, it means everything for the family and individuals involved. They only get one chance at receiving an inheritance from their parents. . . .

When you ask [attorneys from other companies] if they were the employee's attorney would they write the employee's will to cut out the lineal descendants of the employee's deceased child, they always say no. When you then ask why they write the employee's will substitute to cut out the descendant of a deceased child, they answer that it is just different, without being able to articulate why. The real answer is they just don't want to be bothered.

ATTACHMENT NO. 4

PROVISIONS OF THE INTERNAL REVENUE CODE TAXING LIFE INSURANCE IN THE DECEDENT'S ESTATE AND MAKING THE BENEFICIARIES LIABLE TO THE EXECUTOR FOR THEIR PORTION OF THE TAX

The following provisions of the Internal Revenue Code closely parallel the UPC's provisions protecting the surviving spouse from disinheritance by purchasing life insurance. Section 2042 includes life insurance proceeds in the decedent's taxable estate, Section 2035 includes the full value of life insurance proceeds in the decedent's taxable estate if the decedent gave the policy away within 3 years of death, and Section 2206 makes the beneficiaries of the life insurance liable to pay a proportionate part of the estate tax.

> IRC § 2042. Proceeds of Life Insurance. The value of the gross estate shall include the value of all property--
>
> (1) Receivable by the Executor.--To the extent of the amount receivable by the executory as insurance under policies on the life of the decedent.
>
> (2) Receivable by Other Beneficiaries.--To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. . . .

> IRC § 2035. Adjustment for Gifts Made Within 3 Years of Decedent's Death.
>
> (a) Inclusion of Gifts Made by Decedent.--Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.
>
> (b) Exceptions.--Subsection (a) shall not apply--
>
> (1) to any bona fide sale for an adequate and full consideration in money or money's worth, and
>
> (2) to any gift to a donee made during a calendar year [within the $10,000 per donee annual exclusion]. Paragraph (2) shall not apply to any transfer with respect to a life insurance policy.

> IRC § 2206. Liability of Life Insurance Beneficiaries. Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio. . . .

The UPC contains similar provisions, one including life insurance proceeds as part of the property subject to the spouse's elective share (§ 2-205(1)(iv)), one including the full value of life insurance proceeds if the decedent gave the policy away within 2 years of death (§ 2-205(3)(ii)), one exempting all transfers for adequate consideration in money or money's worth (§ 2-208(a)), and another making the non-spouse beneficiaries of the life insurance liable for their proportionate part of the spouse's entitlement (§ 2-210).

CORRECTION OF ERRORS IN VARIOUS LIFE INSURANCE INDUSTRY DOCUMENTS

The initial portion of this memorandum sets forth the reasons that make the case so compelling for subjecting life insurance to the surviving spouse's elective share and for applying the UPC's rules of construction equally to probate and nonprobate transfers (including life insurance). The Life Insurance Industry, however, has generated and still is generating a number of anti-UPC documents. Of the Industry documents that we have seen, we have observed a number of assertions that are in error or exaggerated and hence require correction.

UPC Antilapse Statute Does Not Displace Contingent Beneficiaries of Life Insurance. Contrary to the statement in at least one Life Insurance Industry document,[1] the UPC's antilapse statute does not "displace the contingent beneficiaries provided in the documents (e.g., insurance policies)." This point is demonstrated in Example 5 of Attachment No. 2.

Malpractice Exposure Easily Avoided. The main text of this memorandum observes that the UPC contains elaborate payor protection provisions. These provisions protect insurance companies (and other "payors") from liability if they pay to the designated beneficiaries before receiving notice of a contrary claim. If they receive notice of a contrary claim before making payment, they can disentangle themselves from the dispute (and avoid liability) by paying the proceeds into court. Consequently, insurance companies (or other payors) need not expend resources on investigating the validity of claims under the elective share or the rules of construction. The courts, not the insurance companies, are charged with determining who is ultimately entitled to receive the insurance proceeds.

At least one Life Insurance Industry document[2] states, however, that insurance companies and their agents may still be exposed to malpractice actions. Although the exact nature of the malpractice exposure is not disclosed, we assume that the concern is that courts might impose a duty on a life insurance company or its selling agents to inform potential customers of a possible spousal claim to part of the proceeds if they name someone other than their spouses as primary beneficiary. To the extent that there might be such a duty to inform, life insurance companies and their agents are potentially subject to that duty already because the Restatement (Second) of Property subjects life insurance proceeds to the spouse's elective share. See Attachment No. 1. Moreover, the companies would seem to be under a host of similar duties--e.g., a duty to inform customers in community property states that their spouses might own half of the policy and that the spouse's ownership interest will continue to exist even if the couple moves to a common-law state; a duty to inform customers in common-law states who have recently moved from a community property state that their spouses might own as much as half of the policy; a duty to inform customers that the federal government might have a claim to part of the proceeds to pay the estate tax (see Attachment No. 4), since many members of the lay public think that life insurance is not taxable. Whether or not a duty to inform customers about the possibility of a spousal claim to part of the proceeds actually exists, life insurance companies, if truly worried about malpractice, could easily

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[1] Document of Feb. 2, 1994, entitled *Legislative Alert* promulgated by the American Council of Life Insurance.

[2] Document of Feb. 4, 1994, entitled *Legislative Alert* promulgated by Security Life of Denver, Colorado.

discharge that duty by putting a spousal consent form on their policies and on their change of beneficiary forms,[3] together with a suitable notice cautioning that spousal consent may be advisable if the insured is naming someone other than his or her spouse as primary beneficiary.[4] A similar spousal consent form is already required by the Retirement Equity Act for beneficiary designations under employee benefit plans covered by the Employee Retirement Income Security Act (ERISA).

Possible Non-uniformity Does Not Impose Administrative Burdens. At least one Life Insurance Industry document[5] states that the possibility that some enacting states might modify the UPC's rules of construction requires their sales agents to retain local counsel in order to assist their clients in drafting beneficiary designations. In addition, the Industry document states, the client might have to alter the beneficiary designation if the client changes domicile. These statements are founded, however, on two faulty propositions. The first faulty proposition is that rules of construction are intent-defeating, when in fact they are intent-effecting. Regardless of any local law variations in detail, rules of construction yield to a contrary intention. Consequently, the anti-grandchild beneficiary designation favored by most insurance companies would control–if clearly stated–regardless of local-law variations in the antilapse rule. Also, contrary to the statement in this Industry document, the UPC does provide guidance showing how to draft language expressing a contrary intent. The Official Comment to the antilapse provision related to life insurance directs readers to the Official Comment to the companion provision, the antilapse provision related to wills. The Official Comment to that provision provides extensive guidance on how to express a contrary intent. See Attachment No. 2. The second faulty proposition is that the law of the policyholder's domicile at death necessarily governs, when in fact UPC § 2-703 specifically provides that "the meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument." A simple choice-of-law clause written into the printed terms of the policy can limit the applicable rules of construction to those of the designated jurisdiction.

UPC's Treatment of Gifts Within Two Years of Death Not Unreasonable. Life Insurance Industry documents[6] sometimes express concern about the UPC's treatment of gifts within two years of death. Gifts of life insurance policies within a few years before death are such notorious estate-depleting devices that Congress, in the federal estate tax, singled such gifts out as one of the few outright transfers that are taxed under the estate tax rather than under the gift tax. See IRC § 2035, **Attachment No. 4.**

UPC § 2-205(3)(ii) subjects the face value of a life insurance policy irrevocably transferred to a non-spouse within two years of death only "to the extent the proceeds were payable at the decedent's death" to someone other than the decedent's surviving spouse. The proceeds, in such a case, are treated as if

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[3] Under UPC § 2-208(a), written spousal consent removes nonprobate transfers (including life insurance) from the property subject to the elective share.

[4] As long as the spouse is named primary beneficiary, no spousal consent to naming someone else as secondary (contingent) beneficiary would be necessary.

[5] Document of Feb. 4, 1994, entitled *Legislative Alert* promulgated by Security Life of Denver, Colorado.

[6] Document of Feb. 2, 1994, entitled *Legislative Alert* promulgated by the American Council of Life Insurance; Document of Feb. 4, 1994, entitled *Legislative Alert* promulgated by Security Life of Denver, Colorado.

the decedent still owned the policy. If, however, the donee of the policy surrenders the policy for its cash value before the decedent's death, UPC § 2-209(b) relieves the donee of all liability to return any portion of that cash value except in the exceedingly rare case in which the spouse's elective share entitlement is not fully satisfied from the decedent's probate estate and <u>other</u> nonprobate transfers.

Non-Spouse Beneficiaries Will <u>Not</u> be At Risk for an Indefinite Period of Time. Certain Life Insurance Industry documents[7] repeatedly state that the UPC's inclusion of life insurance in the property subject to the spouse's elective share leaves non-spouse beneficiaries at risk of being forced to repay part of the proceeds "for an indefinite period of time after the insured's death." This, however, is a serious misreading of the UPC's elective share provisions. UPC § 2-211, prominently titled "Proceeding for Elective Share; Time Limit," limits the time for filing an election to the 9-month period after the decedent's death and requires the electing spouse to give notice of the election to the recipients of nonprobate transfers (including non-spouse beneficiaries of life insurance). Section 2-211 further provides that, after notice and hearing, the court shall fix the liability of any person who has possession of property subject to the elective share. Under this section, the non-spouse beneficiaries are clearly not at risk of being forced to repay "for an indefinite period of time after the insured's death."[8]

[7] Document of Feb. 4, 1994, entitled *Legislative Alert* promulgated by Security Life of Denver, Colorado.

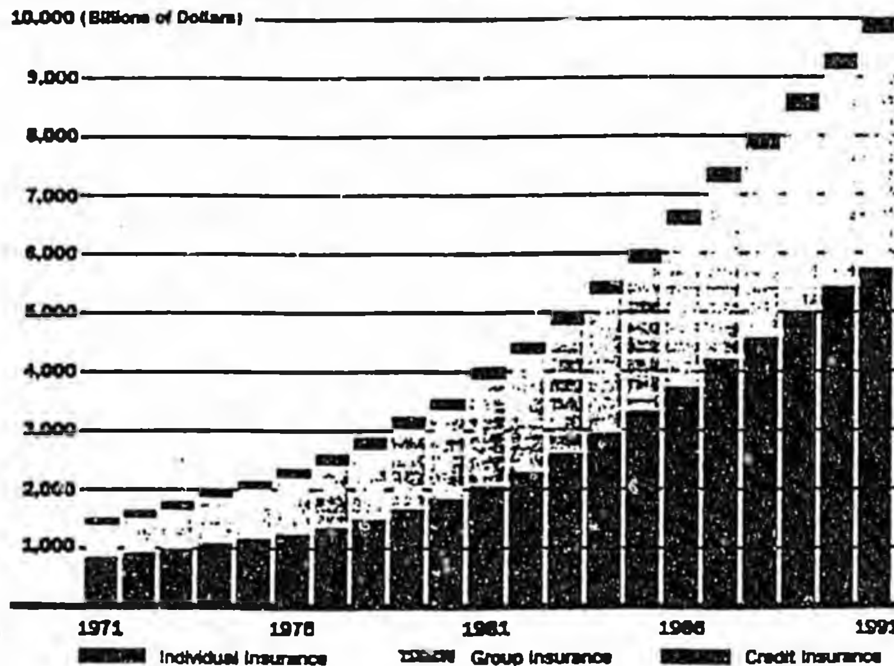
[8] Section 2-211 also allows the petition for an elective sh[illegible] filed within 6 months after the probate of the decedent's will, even if that is beyond the 9-months-after-[illegible] period, but if the petition is filed more than 9 months after the decedent's death, the decedent's nonprobate transfers (including life insurance) are <u>not</u> subject to the elective share. The only exception allowed arises if the spouse, within 9 months after the decedent's death, petitions the court for an extension of time and gives notice of this petition to the recipients of nonprobate transfers. The court is authorized to grant the petition only "for cause shown." Consequently, extensions will be rare, and if they are granted, the recipients of the decedent's nonprobate transfers (including non-spouse life insurance beneficiaries) will be on notice of the extension <u>and its length</u> within 9 months after the decedent's death.

ATTACHMENT NO. 6

ABOUT LIFE INSURANCE

Life insurance is one of the most important forms of wealth transmission in the United States. Indeed, a prominent writer on life insurance has described the life insurance beneficiary designation as "the principal 'last will and testament' of our legal system." Spencer Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74, 76 (J. Hellner & G. Nord eds. 1969).

According to the American Council of Life Insurance (ACLI), there was over $10.4 trillion in life insurance coverage in the United States in 1992, up from about $4.5 trillion in 1982. See ACLI, 1993 LIFE INSURANCE FACT BOOK UPDATE 4. In 85% of married households, at least one member owned life insurance; the mean amount of coverage was $160,900. In households with household income of $75,000 or more, the mean amount of coverage was $329,800. *See id.* at 17. During 1991, life insurance companies paid $25.4 billion to beneficiaries of policyholders who died. *See* ACLI, 1992 LIFE INSURANCE FACT BOOK 45. The enormous increase in life insurance coverage over the last two decades is depicted in the following chart, reproduced from ACLI, 1992 LIFE INSURANCE FACT BOOK 17.



The staggering amounts of life insurance depicted in the above chart make it unconscionable to exempt life insurance from the property subject to the surviving spouse's elective share.

ATTACHMENT NO. 7–AARP ENDORSEMENT

Bringing lifetimes of experience and leadership to serve all generations.

The American Association of Retired Persons strongly endorses the revised Uniform Probate Code, supports the JEB's statement in responding to American Council of Life Insurance objections to inclusion of life insurance in sections of revised UPC Article II relating to all types of nonprobate transfers at death, and urges state lawmakers not to exempt life insurance from the surviving spouses protection against disinheritance (UPC Elective Share) or from the UPC's rules of construction.

American Association of Retired Persons 601 E Street, N.W., Washington, D.C. 20049 (202) 434-2277

Eugene I. Lehrmann *President* · Horace B. Deets *Executive Director*

ATTACHMENT NO. 8

ABOUT THE JOINT EDITORIAL BOARD

The Joint Editorial Board for the Uniform Probate Code (JEB) is the oversight panel for the law reform activities of three organizations that promote the improvement of the law in the fields of trusts, estates, probate, and guardianship.

Those organizations are:

(1) The *National Conference of Commissioners on Uniform State Laws*, a body of delegates from each state. The Commissioners draft the uniform laws. The Commission is funded from the contributions of all the state legislatures. Commissioners are appointed by governors or from state legislatures, and include leading practitioners, judges, and law professors.

(2) The *American College of Trust and Estate Counsel*, whose 2,000 elected fellows comprise the most seasoned experts in trust and estate law.

(3) The *American Bar Association's* Section on Real Property, Probate, and Trust Law, the largest body of specialist practitioners in the field.

The JEB is responsible for monitoring and updating the Uniform Probate Code and is involved in preparation and review of other uniform legislation in the field of trusts and estates.

American Council of Life Insurance

Jerry P. O'Leary
Senior Counsel

DILLON & FINDLEY

DEC 12 1994

RECEIVED

December 6, 1994

Art Peterson, Esq.
Dillon & Findley
350 N. Franklin
Juneau,
Alaska
99801

Dear Counselor:

RE: ACLI's concern with the Uniform Probate Code (UPC-II)

This is in reply to my tela-conference call of yesterday to your office. With me was Alicia Cordova, Esq. our legislative director responsible for Alaska. You suggested, because of time constraints that we should send you our concerns about UPC-II. So that is what we are now doing.

As you will recall, I told you that changes to the Uniform Probate Code, usually referred to as UPC-II, could not be supported by this industry, and we will be opposing efforts in the various states to amend their probate code to incorporate the amendments made to the UPC, commonly known as UPC-II. We wanted to inform you as a courtesy so that when amendments to your state's probate code are proposed, if they are the language of UPC-II, this organization will be in opposition. Thus this letter probably could be considered a notification to you on the position of the life insurance industry.

The American Council of Life Insurance represents more than 650 life and health insurance member companies doing business in the United States and Canada. These companies account for over 92 percent of all the ordinary life and health insurance sold in these countries.

Let me start with a little background on how the life insurance industry became involved in the probate code and the Uniform Commissioners. Ever since 1969, when the Uniform Commissioners approved and promulgated the Uniform Act, and the American Bar Association House of Delegates supported its enactment, the Model Act has been in effect.

Section 2-202 (Augmented Estate) had a one sentence exception for most insurance products. That sentence read as follows:

1001 PENNSYLVANIA AVENUE, N W
WASHINGTON, D.C. 20004-2599
202 624-2179
FACSIMILE 202 624-2319

> "Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse."

Having that exception, or carve-out, in the uniform act, continue to allow insurance proceeds to be distributed outside the probate estate (unless the beneficiary of the policy was the estate of the insured). This is how it had been done for over 200 years.

Then in the late 1980's, Article VI (the nonprobate transfer article) came under review. This organization was alerted to the fact that amendments to that Article were under consideration. The ACLI Legislative Committee formed a Task Force to coordinate this industry's response to any amendments which were to be proposed.

Representatives of the ACLI Task Force as well as other organizations testified before the Article VI Drafting Committee. At that time, the Drafting Committee was chaired by one of Ed Wright's younger partners. You will recall Ed Wright was from Little Rock, Arkansas and had been President of the American Bar Association.

Representatives of this organization were informed by the Drafting Committee that their testimony would be considered and in closing, our spokesman asked that this organization (the ACLI) be kept informed of any proposals in the future, which would have an effect upon how this industry did its business. These assurances were given to our spokesman and changes were made to Article VI, but Section 101 (formerly Section 6-201) of the original Uniform Probate Code) continued to provide that "...an insurance policy...custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan,...or other written instrument of a similar nature is (was) nontestamentary."

The "Comment" section following Article VI, Part 1, Section 6-101, as printed in the 1993 Cumulative Annual Pocket Part, discussed the fact that most courts had held that certain specific types of transactions have been held to be testamentary and so the courts usually invalidated them because they had not been executed in accordance with the statute of wills. It further stated that these same courts for years had upheld beneficiary designations of life insurance contracts. The "Comment" said the "drafters of the original Uniform Probate Code declared they were unable to

identify policy reasons for continuing to treat these varied arrangements as testamentary.

Also in the "Comment" is this statement, "The sole purpose of this section is to prevent the transfer authorized here from being treated as testamentary."

So you can see that when the re-write of Article VI of the UPC was completed, insurance and insurance related products still were considered nontestamentary in nature and would continue to be handled outside the probate estate.

Now we move forward to the years 1990 and 1991. A Uniform Commissioner's UPC Drafting Committee amended, as far as the life insurance industry is concerned, Article II and more specifically, Part 2 entitled "Elective Share of Surviving Spouse". This was after the Uniform Commissioners had approved the amendments at its Annual Meetings and the American Bar Association's House of Delegates did likewise. Thus, was born UPC-II.

The ACLI never knew this Article was revised or even that a revision was being considered. The ACLI only learned about its existence in late 1993 after North Dakota House Bill 1111 was on the Governor's desk awaiting his signature.

The fact that the re-write of this Article removed this industry's exemption and we were never even given the courtesy of notification (when we had been assured only a few years before that we would be kept informed), certainly upset many within the life insurance industry. It is almost as if the drafters of the amendments were operating in a vacuum.

If we had been given the opportunity to testify before the UPC drafting committee, this industry would have argued for the continued exclusion of insurance issued products plus a broadening of the insurance exemption in Article II (using UPC-I language) to include additional products this industry is now selling which were not even in existence at the time the exemption language was originally written into the Uniform Probate Code over a quarter of a century ago.

Additionally, the Comment section of Article II, Part 2, starts by stating the amendments have been endorsed by the Assembly of the National Association of Women Lawyers, on the unanimous recommendation of its Executive Committee, leads to only one possible conclusion. Namely, the industry most affected by the amendments, as well as the one with the most expertise concerning the subject of insurance, was completely ignored and instead the Uniform Commissioners turned to a Bar

Association for "expert advise" in the drafting of the revised language.

The language in the same comment section, as printed in the 1992 Cumulative Annual Pocket Part, went even further and thanked that Bar Association, plus one other organization for its help in the revision. Lastly, a representative of the National Association of Women Lawyers was on the drafting committee while the life insurance industry was totally ignored.

This background section of this letter cannot be completed without restating the fact that for over 25 years, the Uniform Probate Code excluded life insurance products from the probate estate and no one to date has been able to show that insurance products are being used to deprive the surviving spouse of his or her "fair share". It would stand to reason the burden of proof is upon those people wishing to amend the Article to remove the exemption for life insurance products. If the amendments were needed to correct widespread abuses, it would stand to reason that there would be a plethora of case laws citing a litany of abuses which occurred because products issued by life insurance companies had been used to defeat the interests of a surviving spouse. We are still searching for "those smoking guns" but have come up empty handed.

Up to this point, I have touched on the complete lack of courtesy towards this industry on the part of the Uniform Commissioners and the absence of specific reasons why the insurance exemption was eliminated from Article II of the Uniform Probate Code.

The critical issue really is whether the person purchasing an insurance policy is better qualified to determine the beneficiary of an insurance policy or should that determination be left up to an impersonal court or governmental unit. <u>That really is the critical issue</u>.

If someone purchases an insurance policy, should they have the right to determine who is to receive the policy proceeds or should that determination be left to a probate court judge with no knowledge of the reasons motivating the policyowner to purchase the insurance product initially. For a court or state statute to substitute their reasoning or judgement in place of the owner of the insurance policy is indeed quite presumptuous.

Certainly the person buying the insurance product knows better than anyone else the situation in his or her own family;

their business; their favorite charity; and especially what motivated the insured to purchase the insurance policy.

I would now like to give a few reasons why life insurance products are unique and therefore should not be included in the probate estate, except in specific instances when the policy owner/insurer decides that he/she wants those proceeds made payable to the estate.

(1) To take care of a spouse.

(2) To help educate children of a 1st or 2nd marriage.

(3) To provide a down payment on a home for children of a 1st or 2nd marriage.

(4) To fund a buy-out agreement between two business partners.

(5) To provide liquidity for an estate so probate costs, estate taxes, inheritance taxes, etc., can be paid and the real estate (farms, office buildings, shopping centers, family home, etc.) in the estate, do not have to be sold when it is economically disadvantageous to do so because the value of real estate is down.

(6) To provide for the care into the future of a child, niece, nephew, younger brother or sister, etc. who is brain injured, retarded, or injured in an accident and will need constant care for the rest of their natural life, and perhaps the child's parents will never be able to accumulate the funds needed to provide for this eventuality which surely will take place.

(7) To provide for an aged parent with Alzheimer or who is in a nursing home; etc.

o We know of no horror stories which would have led the Uniform Commissioners to believe insurance was purchased to defraud the surviving spouse and hide assets from a surviving spouse.

Representatives from the Uniform Commissioners who met with the ACLI Task Force in early January, 1994, acknowledged they were unaware of any "horror stories" of surviving spouses being defrauded of their "fair share" by the use of insurance beneficiary designations, but they said they were concerned that it could happen sometime in the future.

- This industry did not concern itself with the UPC after the Nonprobate Transfer Article (Article VI of the UPC) was amended in the late 1980's since it continued to state that insurance was a nonprobate item and was not part of the probate estate since Article II had the insurance exemption in it.

- Because of the amendments to UPC-II, policyowners purchasing life insurance for specific purposes can no longer be assured that the policy proceeds will be available to fund what the policyowner originally intended the proceeds to be used for.

- Under the language of UPC-II, policyowners who change the beneficiary designation within 24 months of death, expose the policy proceeds to being swept up into the augmented and/or reclaimable estate. Some states have proposed further amendments to their probate code by providing that even if a power of appointment (the power to change the beneficiary) is retained by the policyowner, that is sufficient to bring that policy under the augmented / reclaimable estate.

- The amendments to the UPC go further than even community property states do since in those states property owned by one spouse prior to marriage, remains separate property during the marriage. In Wisconsin, which has enacted the Uniform Commissioner's Uniform Marital Property Act, if one insurance premium is paid with commingled funds, that policy becomes "joint property" regardless of whether the policy was purchased and/or owned prior to the marriage.

  The net effect is to change a state enacting UPC-II from a common-law state into a community property state. If the state wishes to do so, they should be up-front about it rather than doing so via the back door by amending its probate code.

- There is no definition of "insurance" in UPC-II.

- Better protection for insurance carriers making payments are needed.

- UPC-II is silent as to who is responsible for the payment of interest when a non-payment occurs, after a company receives notice of a possible claim to be made by the surviving spouse, but before the election is actually made.

  Several state statutes require a claim payment be made within 30 days. If that is not done, the current rate of interest paid by a company stops and a penalty interest rate commences, such as 12%, 14% or even 18% per annum. The issue is: Who is responsible for the higher interest payment which is caused by the time delay in payment of benefits?

  a. The company? Most statutes make it a responsibility of the company. Yet the company is in the position where it wants to pay the benefits but cannot because of the election notice received of a possible adverse claim.

  b. The surviving spouse who first served notice that he or she wants to keep their options open before deciding whether to take under the will or under the laws of intestacy?

  c. Is the insurance company protected by paying the proceeds into the probate court and walking away at that point? No one knows.

  d. What about a claim from the policy beneficiary who is not paid the policy benefits as contracted for in the policy?

  e. What if the beneficiary demands payment even if the notice was received?

- The augmented estate section contains a provision stating if full consideration was received for a piece of real property or insurance which was transferred within 24 months of the death of the owner, that property, real or personal, does not become part of the augmented estate.

  So arises the issue of the "adequacy of consideration" which may cause problems for either an insurance company or a purchaser of real property. Both would be left subject to a future claim by the surviving spouse

alleging no consideration was received by the deceased spouse.

In the case of an insurance policy, the alligation would be that the beneficiary of the policy did not give full consideration to the deceased spouse when the change of beneficiary was made. So, too, in the base of the purchaser of real estate, the same "inadequacy of consideration" alligation would be made concerning what the purchaser of the real property paid the deceased spouse.

So both the insurance company and the purchaser of the real property would be called on to pay the policy proceeds and/or return the real estate back to the estate of the deceased spouse.

The insurance company then is left in the position of requesting a return of the funds from the beneficiary to which it originally paid the policy proceeds to.

In the case of a purchaser of real estate, the recourse a buyer would have may be a cause of action against the estate of the deceased spouse since the purchaser of the real estate has now been called upon to pay twice for the same property.

Thus, the insurance company will have been involved in an additional lawsuit and may be forced to pay the policy proceeds out a second time. If it was real property involved in the lawsuit, the innocent purchaser from the deceased spouse would be forced to prove that "full consideration" was paid for the real estate when it was purchased from the deceased spouse. Again that purchaser or his company will have been dragged into a lawsuit when it never imagined it would be involved in such a thing.

- The insurance industry will end up with many more inter-pleader actions (expanded litigation) because the augmented estate language includes insurance products. The insurance company's cost of operations will increase, as well as being faced with a severe public relations problem -- being pulled into the middle of a "family fight".

- The purchaser of insurance products designates the beneficiary of a life insurance policy or an annuity. That indication couldn't be any clearer. However, under

UPC-II, the wishes and desires of the policy purchaser are secondary and the party named as the beneficiary may never received the policy proceeds. Based upon the estate situation, the language of UPC-II may direct the policy proceeds be payable to the estate. This makes the proceeds available for the surviving spouse when the purchaser never intended for this to take place.

- o The Antilapse Provisions of UPC-II would apply to life insurance policies and similar governing instruments and specifically to the language used in the beneficiary designation of the policy. With insurance policies being subject to the probate code, the beneficiary designation language would have to be reviewed in light of the state's antilapse provisions. When life insurance products were not included in the probate estate, this problem did not exist.

- o It appears that the drafters of UPC-II had a concern with the insurance designation language of many insurance policies. The Uniform Commissioners allege that some of the policy beneficiary designation language works to disinherit a line of descent because the person's lineal descendent failed to survive the insured. Again, if insurance products were only subject to Article VI (the nonprobate transfer section of UPC), many of the above problems would not exist.

- o Insurance proceeds generally are paid to the beneficiary shortly after the death of the named insured, usually within a week or two of the date of death. An insurance company usually requires a certified copy of the Death Certificate and, in some instances, a completed proof of loss form. After the insurance company receives that information, the funds are distributed in accordance with the wishes of the policyowner as reflected in his or her beneficiary designation and the records of the insurance company. The funds can be wire transferred to expedite the distribution rather than taking 24 or 48 hours by U.S. Mail.

  But when a large policy payment is involved in a state where UPC-II is in effect, an insurance company may wish to protect itself from a future lawsuit by a beneficiary who had to return to the estate, part or all of the policy proceeds. The company could require the surviving spouse to consent to the payment to the beneficiary even

though he or she is not a beneficiary under the policy. This is because the insurance company may fear that it could be held responsible for not forewarning the policyowner and/or spouse of the policyowner that any such beneficiary changes made within 24 months of death could result in a demand for a return of some or all of the policy proceeds.

- o UPC-II provides for automatic termination of a beneficiary upon divorce. If the policyowner is not aware of this provision in the state probate law, it will affect how he or she would like the policy proceeds to be distributed. If the policyowner moves to another state with this provision and is unaware of its consequences, what would be the result?

- o What about passing down the family farm to the next generation? That should be considered. If the farm has come down through the "father's line"; he dies before his spouse; and then the spouse remarries. Something new must be factored in.

  Does the new husband, if he is married to the widow for more than 15 years, have a right to 50% of the farm his wife inherited from her first husband? What rights do the children of the first marriage have? If the intention of the grandparents (the first father's parents) as well as the deceased husband and the surviving wife was that the surviving spouse (wife) would have the farm until she retired and they their children would inherit, what happens now?

  Where is the equity in this situation if the 2nd husband now stands to inherit part of that farm? UPC-II makes it much more difficult to pass the farm down to the "proper" lineal descendants without more estate planning and many times that is now done with young couples.

These are just some of the concerns the life insurance industry has. No attempt to place them in order of "strength of argument" (with better arguments being listed first). I just listed them as they occurred to me.

It is important to note that all of the concerns expressed above never need to arise except for the incorporation of UPC-II into the Alaskan probate code.