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An Eclectic History and Analysis of the 1990 Uniform Probate Code

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AN ECLECTIC HISTORY AND ANALYSIS OF THE 1990
UNIFORM PROBATE CODE

Lawrence H. Averill, Jr.*

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I. INTRODUCTION

This piece quickly overviews the history of the Uniform Probate
Code ("UPC" or "Code")¹ and then proceeds to analyze selected

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Arkansas at Little Rock. Professor Averill was Administrative Assistant to Chief Justice Rehn-
LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL (2d ed. 1987).
¹ See infra notes 13-55 and accompanying text.
physical and substantive attributes of the UPC. As the UPC has been called an eclectic system,\(^2\) this Article is an eclectic analysis. Although it includes a short historical review and critical analysis of the old and new Code, it is neither a comprehensive history, nor a plenary analysis of the 1990 UPC. As an experienced advocate for the Code, I offer some suggestions concerning its promotion and the dissemination of information concerning the Code.\(^3\) Additionally, this Article discusses the physical format of the 1990 UPC,\(^4\) as well as the policy\(^5\) and formalism\(^6\) aspects of the new Code.

Over the last twenty-plus years, I have spent countless hours perusing the Code and comparing it with the laws of several jurisdictions.\(^7\) Much time was spent in committee meetings with Bar Association groups advocating the Code and attempting to mold it in a politically acceptable fashion. I have explained to, and debated with, lawyers, legislators, judges, and governors the merits and demerits of the Code. Frankly, I was greatly demoralized when my most strenuous and sincere efforts went for naught in 1975. At that time then-Governor of Wyoming, Ed Hershler, vetoed a bill that had been passed by overwhelming majorities in both the House and the Senate of the State Legislature.\(^8\)

For those of us who have supported the 1990 UPC, what are the prospects of its continued advancement? It was refreshing to see that the National Conference of Commissioners on Uniform State Laws ("National Conference") showed a renewed interest in the 1990 UPC\(^9\) and that a full scale promotional campaign for its adoption will be pursued.\(^10\) The approval of the 1990 amendments to article II consti-

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\(^2\) J. Pennington Straus, History and Origin of the Uniform Probate Code, in ACLEA NATIONAL CONFERENCE ON THE UNIFORM PROBATE CODE: STUDY MATERIALS 1, 14 (1972).

\(^3\) See infra notes 56-64 and accompanying text.

\(^4\) See infra notes 65-91 and accompanying text.

\(^5\) See infra notes 92-116 and accompanying text.

\(^6\) See infra notes 117-54 and accompanying text.


\(^8\) First the Good News... and Then the Bad, 13 UPC NOTES (Joint Editorial Board for the Uniform Probate Code, Chicago, Ill.), Sept. 1975, at 6, 11.


\(^10\) See Letter from Richard V. Wellman, Executive Director, Joint Editorial Board for Uniform Probate Code, to Arkansas Uniform Law Commissioners (Feb. 14, 1992) (on file with the
tute an important starting point for this effort. I sincerely hope that interest in the 1990 UPC will be rejuvenated and the many states, which have either completely ignored or only given lip service to the total concept of the Code, will be re-exposed to its merits and accept the total package. How the new sections in article II fare in legal literature, such as the articles in this Symposium, may significantly influence the success of the new 1990 UPC.

Although I have some criticisms of the 1990 UPC, I am not an opponent. My complaints are like those of a sibling: they remain within the family. I will defend the Code against outside carping. I sincerely believe that the 1990 UPC is better than anything else available. In addition, although some of my comments may seem insignificant to some, I do not intend to nitpick the 1990 UPC. The original Code received too much of that during the initial years when several comparative pieces were issued that were pure diatribes. The Code, as initially promulgated, was quibbled to death. Too little credit was given to it as a comprehensive, integrated package. As such a package, it was far better than any the critics were able build themselves. My observations are food for thought, and I hope they will provide a basis for future improvement of the 1990 UPC and its processes.

II. HISTORY OF THE 1990 UPC

A. Historical Overview

If a complete history of the UPC is to be written, it should be done by Professor Richard V. Wellman. No one else has dedicated as many years to this Code as he has, although others have certainly labored...
long and hard on the project. Perhaps he will write that opus for posterity before he leaves the project. This piece does not contend to be a complete history of the UPC. Rather, it is a snap-shot of the 1990 UPC from a historical perspective. Some thought will be given to where the 1990 UPC came from, the sources of its substance and language, and what needs to be done to gain greater future acceptance of the Code.

Necessarily, no attempt will be made to trace the history of all areas of law dealt with by the 1990 UPC. Suffice it to say that many of the American concepts in this area of law are traceable to the English law system. When states first enacted probate laws they removed many of the archaic and undesirable elements of the English laws. Paradoxically, much of English probate law today has been improved and modernized in contrast to the current law of most of our states. Many of the modern and improved rules and procedures presently existing under English law greatly influenced the draftsmen of the UPC.

The perception of a substantial percentage of non-lawyers is that the word "probate" refers to a system reeking of unnecessary costs and delays. The resultant cry has been "avoid probate." Several successful commercial enterprises have been launched from this conceptual pad and they accuse the legal profession of perpetuating and perpetrating this undesirable situation.


One such person who deserves special recognition is the late Professor William F. Fratcher of the University of Missouri School of Law. He was the original Research Director and had direct involvement in drafting the UPC, particularly article V concerning guardianship and conservatorship. Professor Fratcher wrote many articles about probate reform and the Code. See, e.g., William F. Fratcher, Estate Planning and Administration Under the Uniform Probate Code, 110 TR. & EST. 5 (1971); William F. Fratcher, Toward Uniform Succession Legislation, 41 N.Y.U. L. REV. 1037 (1966); William F. Fratcher, Toward Uniform Guardianship Legislation, 64 MICH. L. REV. 983 (1966).

See William F. Fratcher, Probate Can Be Quick and Cheap: Trusts and Estates in England (1968) (a description of the English system of probate and suggestions as to how such a system may improve American probate law).

The definition of the term "probate" is a "[C]ourt procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a decedent is administered." BLACK'S LAW DICTIONARY 1202 (6th ed. 1990).


See Murray T. Bloom, The Trouble with Lawyers 233-63 (1968) (chapter eleven is entitled "Our Unknown Heirs" and is concerned with excessive attorney fees); Norman F. Dacey, How to Avoid Probate! (rev. ed. 1990). The Dacey book is still in print and claims it has sold
The source of much of the present dissatisfaction is in the laws themselves. First, there is no uniformity between the laws of most of the fifty states. This fact may cause not only unjust results but also an inherent confusion and distrust among a very mobile lay populace. Second, many of the laws in this area are not contemporary; consequently, they do not take into account the material changes that have occurred in our society. Not only have we changed from a primarily rural to primarily urban society, but also from one with a primary emphasis directed to ownership of real estate to one directed toward ownership of personal property and other contractual relationships. Furthermore, our society continues to progress from one educationally and sociologically provincial to one nationally and even internationally cognizant. The continued increase in the number of persons who have had multiple marriages and children with more than a single spouse creates a social phenomenon that much current succession law does not adequately address. Many of the present laws on these matters, therefore, do not adequately deal with the primary problems posed by the average person in the succession of wealth at death or in the management of that person's property during disability.

These deficiencies are not only obvious today but were obvious to some almost fifty years ago. In 1940, Professor Atkinson suggested to the American Bar Association Section of Real Property, Probate and Trust Law ("Probate Section") that this organization prepare a Model Probate Code. This idea resulted in the publication of a Model Probate Code and accompanying studies in 1946.

Although the Model Probate Code had a direct influence and effect on legislative revisions in several states, it had neither the comprehensiveness nor the impetus to influence a majority of states to adopt it. Therefore, in 1962, the Probate Section and the National Confer-


19 This trend is one of the principal reasons for the substantial alteration of article II made in the 1990 UPC. See *Unif. Prob. Code* ("U.P.C.") art. II, prefatory note (1991).


ence accepted a suggestion made by J. Pennington Straus of the Philadelphia Bar to revise and consolidate the Model Probate Code and other related and relevant uniform laws into a uniform probate law. In response, each organization formed a separate committee and the late Professor William F. Fratcher of the University of Missouri School of Law was appointed Research Director to conduct preliminary studies during 1963-1964. Thereafter a reporting staff was recruited to draft the Uniform Probate Code under the supervision of the two committees. Professor Richard V. Wellman, then of the University of Michigan and now of the University of Georgia, became the reporting staff's Chief Reporter.

After six drafts, six years of extensive research, consultation, and discussion, an official text was approved in August 1969, by the National Conference and by the House of Delegates of the American Bar Association. Although inspired and initiated as a project to re-draft and update the Model Probate Code, the eventual finished product turned out to be much more. It not only was more comprehensive in coverage but also exhibited greater innovation and imagination. In addition, many of its basic philosophies were different. Consequently, the Code offered a more viable package for influencing and affecting modern probate legislation.23


One commentary technique that proved very beneficial to reform was the comparison article. Numerous articles comparing the Code to local laws have been published over the years. See, e.g., The State Bar of California, The Uniform Probate Code: Analysis and Critique (1973); Robert A. Diab, New Jersey and the Uniform Probate Code, 2 SETON HALL L. REV. 323 (1971); John W. Fisher II & Scott A. Curnutte, Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems, 93 W. VA. L. REV. 61 (1980); Camilla K. Haviland, Shall We Rebuild Our House of Probate? The Uniform Probate Code, 19 U. KAN. L. REV. 575 (1971); John P. McKleroy, The Uniform Probate Code: A Comparison With Existing Alabama Probate Law, 2 CUMB.-SAMFORD L. REV. 1 (1971); James N. Zartman, supra note 11; see also supra note 6 (citing comparative articles by Lawrence H. Averill, Jr.).
In March of 1971 Idaho\textsuperscript{24} became the first state to adopt the Code substantially in whole. Since that time, more than thirty percent of the fifty states have enacted laws that substantially conform to the Code or parts of it.\textsuperscript{25} Promotion and enactment of the Code have not been easy in the states and have had varying degrees of success.\textsuperscript{26} Its primary detractors include what would appear to be bonding companies, loosely organized groups of older bar members, and occasionally newspaper publishers. In some situations, these opponents have proved to be formidable adversaries and have shown considerable influence with state legislators and governors.

B. Maintenance Efforts

For the purpose of promulgating the UPC, a Joint Editorial Board for the Uniform Probate Code ("Editorial Board") was established in 1970. Its membership now consists of three persons selected by the National Conference, three members selected by the Probate Section, three members of The American College of Trust and Estate Counsel, one Liaison—American Association of Retired Persons, two Liaison—Law School Teachers, one Liaison—Probate Judge, the Executive Director, and the Director of Research.\textsuperscript{27} The Editorial Board's responsibilities are: (a) to monitor literature dealing with the Code; (b) to watch for problems that develop in the Code itself and that arise in states which have enacted or are considering whether to enact it; (c) to educate the Bar and public about the Code; and (d) to reevaluate, alter and edit the Code's text for the purpose of removing imperfections and improving content, both substantially and editorially.\textsuperscript{28} Professor Wellman was named as the its first Educational Director.\textsuperscript{29}

After the initial rush of enactments in the late sixties and early seventies, the Code passed into a less turbulent, but also less productive, time from a legislative enactment standpoint. This is not to say

\textsuperscript{24} See Idaho Code §§ 15-1-101 to 15-7-401 (1972).
\textsuperscript{25} See U.P.C., 8 U.L.A. 1-4 (Supp. 1992). The Code was not offered to legislatures on a take-it-or-leave-it basis. States were encouraged to accept parts they liked and exclude parts they did not. See Richard V. Wellman, A Reaction to the Chicago Commentary, 1970 U. Ill. L.F. 536, 542.
\textsuperscript{26} For a discussion of some of the problems proponents faced during the first ten years, see John H. Martin, Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 735 n.34 (1980).
\textsuperscript{27} See Joint Editorial Board, 1 UPC NOTES (Joint Editorial Board for the Uniform Probate Code, Chicago, Ill.), July 1972, at 2.
\textsuperscript{28} Id.
that the Code was moribund or inert. Much work was being done and
meritorious alterations were constantly being made as Professor
Wellman continued to promote and advocate both the enactment of
the Code and its continual improvement.

One of the most important developments in the past several years
was the recruitment and appointment of Professor John Langbein to
the Editorial Board and Professor Lawrence Waggoner as Director of
Research. Both have worked to instill a new and vibrant interest in
studying and improving the Code. Their law review articles and other
writings have demonstrated the need for this constant review and re-
vision.30 There is no doubt that the most recent draft of article II
clearly reveals their pervasive influence and draftsmanship. The com-
bination of Wellman as Executive Director and scholarly resources
such as Langbein and Waggoner provides the Editorial Board with
renewed inspiration. Considering the talents of these three, the 1990
Code is clearly on the move. Whether we are moving ahead, only the
success in state legislatures will tell. I am not convinced that we have
made it to the ultimate end and believe there is still a substantial
amount of work to be done.

With all of this supervision and support, the Code is continually
being updated and improved. During 1975-1976, the National Confer-
ence and the House of Delegates of the American Bar Association
approved significant amendments called the “1975 Technical Amend-
ments” promulgated by the Joint Editorial Board.31 Many of these
amendments included suggestions and improvements made by vari-
ous bar committees that had studied the Code for enactment in their
respective states. Other alterations were made in 1977, 1979, 1982,
approved a revision that substantially altered article II. This 1990
alteration was so significant as to justify calling it the Uniform Pro-

When the initial enthusiasm and national effort to enact the Uni-
form Probate Code as a comprehensive code lost much of its original
momentum, the commissioners altered their promotional approach

30 See, e.g., John H. Langbein, The Nonprobate Revolution and the Future of the Law of
Succession, 97 HARV. L. REV. 1108 (1984); John H. Langbein & Lawrence W. Waggoner,
Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. PA.
L. REV. 521 (1982); John H. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L.
REV. 489 (1975); Lawrence W. Waggoner, A Proposed Alternative to the Uniform Probate


32 Id.
regarding several new and old matters. In relevant and appropriately separable areas of probate law, the commissioners developed freestanding acts from similar provisions integrated into the Code. This technique permits the provisions to become law as part of the whole Uniform Probate Code or as a separable and possibly more palatable distinct uniform act. Accordingly, the Uniform Probate Code now incorporates the Uniform Durable Power of Attorney Act33 approved in 1979 and modifying part 5 of article V;34 the Uniform Guardianship and Protective Proceedings Act35 approved in 1982 altering parts 1, 2, 3, and 4 of article V;36 the Uniform International Wills Act approved in 1977 and adding part 10 to article II;37 and the Uniform Succession Without Administration Act38 approved in 1983 from sections 3-312 to 3-322, which had been added to article III of the Code in 1982.39

The trend to offer both integrated text and freestanding acts has intensified during the last few years. The 1990 UPC contains several examples. The Uniform Statutory Rule Against Perpetuities Act40 was promulgated separately in 1986 and was incorporated as part 9 of new article II.41 The Uniform Nonprobate Transfers at Death Act,42 which includes the Uniform Multiple-Person Accounts Act43 and the Uniform TOD Security Registration Act,44 was promulgated in 1989 and mirrors article VI of the 1990 UPC.45 New article II was separately promulgated as the Uniform Intestacy, Wills, and Donative Transfers Act in 1991.46 Finally, section 2-51147 of the 1990 UPC was promulgated as the new Uniform Testamentary Additions to Trusts

Act,\(^4\) and section 2-702 as the new Uniform Simultaneous Death Act,\(^4\) both in 1991.

The existence of freestanding acts makes the Code a more dynamic document. It permits those who advocate probate and related law reform to select the most politically palatable acts for passage in their jurisdiction. This innovation should increase the influence of the Code and motivate more jurisdictions to adopt its reform proposals.

C. Influence and Use of the Uniform Probate Code

The influence and the use of the Code is growing in a variety of ways. The laws of nearly all if not all states have been affected by the Code.\(^5\) The primary vehicles of influence are as follows:


2. Piece-meal enactment of segments or sections of the Code for inclusion into another probate code or law. Nearly all the other states have enacted some part or section of the Code.\(^5\) Sections of article II have been particularly popular. For example, California incorporated many provisions, in whole or in part, of the Code into its recent revision of its probate code.\(^5\)


Unfortunately, there is no source of data indicating what sections or parts of sections have been passed in the various non-Code states.

\(^5\) See Cal. Prob. Code (Deering 1991). In order to assure proper judicial construction of these Code provisions, the new California law requires that any portion of the state’s probate code that is the same “in substance” as a provision of the UPC, must be “construed as to effectuate the general purpose to make uniform the law in those states which enact” such provisions of the UPC. Id. § 2(b).
(3) Referred to as a model of modern policy by a court interpreting its own non-Code provision; and
(4) Referred to as secondary or persuasive authority for determining proper rules of construction for the common law.

Even if comprehensive enactment does not continue, the Code's influence over the law of probate and related matters, by any of the above cited means, will continue to increase.

III. PROMOTION OF THE 1990 UPC

A. Endorsements

Whether the 1990 UPC will have a greater or lesser influence on state legislation than the original enactment depends largely upon the quality and scope of its promotion program. To the end of effective endorsement, several suggestions are in order.

Initially, proponents of the 1990 UPC should obtain the endorsement of specific groups interested in the Code's enactment, namely senior citizen and women's organizations. The members of both types of organizations have a direct interest in the 1990 UPC's enactment. These groups are likely to be strong supporters of the 1990 UPC and must encourage their local organizations to promote legislative enactment of the Code. There is no doubt that the senior citizen groups were important advocates of the original Code. Legislators count votes. The more voters who seem to be interested in the act, the better. The fact that segments of the bar or bench are against the 1990 UPC may work in its favor.

Where possible, additional sponsorship of the 1990 UPC should be solicited. The banking community was very helpful in the first major UPC effort. Since the American Bankers Association ("Bankers As-
(soc.) endorsed the first Code, they were supportive of it when it reached legislative consideration. The Bankers Assoc. needs to again be sought out, and their advocacy solicited. With the recent scandals in the financial community, an effort supporting the 1990 UPC may have meritorious public relations benefits to the banking community. More than mere endorsement by the Bankers Assoc. is necessary. It is hoped that persons who work in the banking community will prove to be useful resources and advocates for the 1990 UPC. Bankers often have significant contacts with state legislatures. The beliefs and desires of the banking community are very influential regarding legislation of this nature.

B. Empirical Studies

As part of the effort to gain endorsement, the Joint Editorial Board should encourage and sponsor studies to gather empirical information concerning the operation of the 1990 UPC in states that have substantial parts of the original code. In my numerous presentations of the Code to a wide range of lay, legal and judicial groups, a typical question asked is, "How well is the Code working where enacted?" In response, opponents of the UPC typically pose worst-case scenarios, claiming that the Code inadequately deals with the legitimate concerns raised. It would be tremendously valuable to be able to respond to such worst-case scenarios with the results of respectable and thorough studies demonstrating the Code's efficiency and ability to protect the legitimate concerns of interested persons.

C. Nonlegal Publications

The Joint Editorial Board is well advised to solicit nonlegal articles concerning the UPC that can be published in popular magazines such as Reader's Digest. As all estate planning teachers know, these publications tend to have more influence on the populace than all of the

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87 See generally Eric Schurenburg, The S & L Black Hole: How It Will Suck You In, MONEY, July 1990, at 68 (discussing the causes of the savings and loan crisis and the negative effect it will have on the banking industry and consumers alike).

88 Additional studies similar to the one by Terry L. Crapo need to be conducted. See Terry L. Crapo, The Uniform Probate Code—Does It Really Work?, 1976 B.Y.U. L. Rev. 395. Although the Crapo study was very positive, it concerned only one state (Idaho) after the Code had been in operation for only three and one-half years. See id. The UPC has been functioning for almost twenty years in several states. It is time to conduct another poll of lawyers, judges, clerks of court (registrars), and citizens who have passed through the system to see how well the Code is functioning.
good advice and counsel of the practicing attorney. Rather than
explain the 1990 UPC in detail, these articles should emphasize how
well the UPC is working in states that have enacted it.

D. Communication

Substantial effort should be made to increase communication be-
tween the Joint Editorial Board, law school faculty members teaching
in the area of trusts and estates, and faculty members who have ex-
pressed interest in the legislative progress, judicial interpretation,
and internal development and maintenance of the 1990 UPC. When
the Code was first promulgated in 1969, an academic liaison commit-
tee was formed. To my knowledge, this committee no longer exists.
Although there are Editorial Board members designated as law
school representatives, it appears that these persons have not com-
municated on a regular and organized basis with other faculty mem-
bers working in the area. Consequently, I urge that the liaison com-
mittee be reinstituted, and a broad and significant agenda of
activities be imposed upon it.

Another aspect of pre-1990 UPC promotion that has disappeared is
the newsletter, *UPC Notes*. This multipage newsletter was published
twenty-four times between July 1972 and October 1979. It provided
the type of information previously mentioned regarding law school liaisons. I recall this paper was very helpful in promoting the original Code. Its demise, apparently for economic reasons, was unfortunate and left those who are interested in the Code, but not on the Joint Editorial Board, without a steady source of useful information about the status and development of the UPC.

I submit that reinstatement of this newsletter would be extremely helpful in promoting the 1990 UPC. Faculty members generally constitute the primary advocates for Code enactment. Although the individual commissioners of the National Conference in each state are responsible for promoting uniform laws, I know from personal discussions with commissioners that assistance from faculty in this endeavor is essential and productive. Faculty members must be kept informed of Code matters. A newsletter would accomplish this. In this vein, it is my hope the articles in this Symposium will be circu-
lated to all professors in the field of trusts and estates.

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88 This is not meant as a criticism of such faculty members, but rather to identify a struc-
tural deficiency in the support organization.

89 See *UPC Notes* (Joint Editorial Board for the Uniform Probate Code, Chicago, Ill.), July
E. Consultative Groups

Several years ago the American Law Institute ("ALI") created consultative groups for its restatement projects. The groups are composed of members who express an interest in working on a particular project. Membership is voluntary and nonselective. Members of the groups receive copies of the working drafts and are invited, at their own expense, to comment in writing or attend meetings where the drafts are discussed. The principal advantage of the consultative groups is that they provide those drafting the project with a sounding board of interested persons able to offer greater insight into the issues raised by each draft. The apparent organizational theory behind this system is based upon the principle that the more persons to

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The arrangement [the Consultative Groups] responds to two concerns. First, many members with strong interest in specific legal fields have been unable to participate as members of the project Advisory Committees, owing simply to the limitations in the size of those Committees. Second, the drafts produced in our projects have not been getting the benefit of as many informed viewpoints as they might, particularly given the fact that floor discussion at Annual Meetings usually is governed by severe time restraints.

Id. at 511.

62 The broad circulation of drafts to persons showing an interest in the project is symbiotic. The drafters gain by seeing how other minds respond to language and concepts. This can have an extraordinarily beneficial effect on the final product. The interested outsider benefits by observing how the process works and seeing what matters were considered and rejected. This aids the latter when making final product interpretations. One of the troubles with the current drafting process is that those of us who are called upon to interpret the final product do not have any knowledge of what the drafters considered, rejected, or modified. This makes for strained and unfortunate reactions.

In their article in this symposium, Professors Halbach and Waggoner describe a situation where greater dissemination of the materials might have been very beneficial to the Joint Editorial Board in the final product and particularly in response to the final product. In explaining the process the Board considered in redrawing § 2-603 of the Code dealing with antilapse, they stated:

Admittedly, this question of the appropriate effect to be given to words of survivorship is a difficult one. Yet it is one that needed to be answered. It is not unimportant that many lawyers who draft wills appear to believe that the insertion of an express requirement of survivorship will prevent application of the statute. Indeed, the framers found the issue most troublesome, struggling conscientiously with a variety of possibilities in several meetings before settling on the present solution. It might have been workable, for example, to provide a considerably more limited (but hardly trouble free) protection against inadvertent omissions by extending the pretermitted heir statute to all descendants rather than merely protecting children. Or words of survivorship might have been treated as presumptively sufficient to overcome the antilapse statute, or as sufficient to overcome the statute except with respect to devises made to the surviving members of a class or group of devisees when none of the described or named devisees had descendants at the time the will was written. Following lengthy debate, however, including consideration of current drafting practices, examination of various alternative solutions, and review of drafts of
review a draft, the better the finished product will be. In addition, it pre-
views, for the reporters who draft the projects, potential contro-
versies that may arise when the projects are presented to the entire
body.

Although the structure of the National Conference and the Joint
Editorial Board may not permit an exact duplication of this tech-
nique, a modified version is possible. Although participation is volun-
tary, consultative groups of professors and lawyers could be organized
in line with the 1990 UPC’s organizational structure. For example,
since there are six substantive articles, at least six UPC consultative
groups could be formed. If subgroups are desirable, they too could be
formed. Additional expenses for such a system would be minimal.
The principal expenses would include the printing and mailing of dis-
cussion drafts to group members, and possibly the holding of discus-

possible statutory provisions, the provision now set out in section 2-603(b)(3) was sup-
ported by a consensus of the membership of the Joint Editorial Board.
Edward C. Halbach, Jr. & Lawrence W. Waggoner, The UPC’s New Survivorship and Anti-
lapse Provisions, 55 ALB. L. REV. 1091, 1113-14 (1992). For someone like myself who is not in
the Board circle, the ability to peruse the materials considered would be an invaluable aid to
understanding and interpretation of that very complex section of the Code. Greater dissemina-
tion of materials of this nature through consultive groups would improve the chances of the
draftsmen and the Board receiving a broader range of input and reactions, of more accurate
final product interpretations, and of fewer frivolous or incorrect criticisms.

Ordinarily, the review processes for Uniform Acts, which are considered by the National
Conference and the American Bar Association, House of Delegates, are thorough and content
exacting. Recently, however, these organizations have been faced with the task of completing
work on long agenda and the intensity of review has varied depending on the circumstances.
For example, the amendments to article II of the 1990 UPC were approved at the 1990 annual
meeting of National Conference without significant discussion or debate. Interview with John
Phillip Carroll, member of National Conference from Arkansas, in Little Rock, Arkansas (Sep-
tember 29, 1992). This lack of debate occurred possibly for a combination of factors: first there
had been pre-review by the Joint Editorial Board; second, the proposal was for modifications of
only one of the Articles, and third, several of the parts of the amendments were recently con-
firmed Uniform Laws. Despite the review by the Board, an additional review body such as a
Consultative Group could prove to be useful, particularly if the National Conference may pro-
vide only a cursory review of Code amendments. The proposal for the creation of similar con-
sultative groups for Code development is in no way meant to imply that the current drafters
have failed to seek suggestions of others or have ignored the concerns of others. To the con-
trary, the 1990 Code is replete with ideas offered by others. Additionally, several years ago a
letter was sent to faculty soliciting submissions of their ideas and concerns about article II. I
am sure the Editorial Board considered seriously all responses. This random, shot in the dark,
communication approach, however, is not the equivalent of an organized communication sys-
tem. I suggest that an organization be created that encourages additional faculty and lawyers to
become directly involved in the drafting processes. Experience tells us that those interested in a
code project will take a more direct and focused interest in its success when they feel they are a
part of the official processes. Whether it is merely a perception or some other psychological
response, I am convinced that the initiation of such a program will benefit the Code and im-
prove its acceptance.
sion sessions. In fact, as a cost cutting technique and point of conve-
nience, these sessions could be held at one or more relevant
meetings already being held by the Association of American Law
Schools, the American Bar Association, or the American College of
Trusts and Estates Counsel.

One of the most beneficial by-products of this approach would be
increased involvement in the UPC project. This, in turn, will make
those involved more avid advocates for legislative adoption of the
UPC. After all, legislative adoption is the name of the game for uni-
form laws.

IV. FORMAT ISSUES IN THE 1990 UPC

A. Uniform Act Drafting Style

On the surface, format concerns may seem petty and unimportant
to some. When a work is promoted as a “model,” however, and its
acceptance is essential for success, format may be very important
both with regard to the work’s understandability and substantive
clarity. Perhaps it is inevitable or unavoidable with a code the size of
the 1990 UPC, but when one studies it, a significant number of for-
mat inconsistencies and inadequacies are readily apparent. Although
the basic format of the 1990 UPC is consistent, numerous internal
format problems exist and new ones continue to appear. Correcting
these technical matters will make the 1990 UPC a more attractive
and marketable package.

First, the 1990 UPC lacks a clear and consistent format style. For
example, some sections seem to be quickly broken down into parts,
while others are kept together without outlining. There does not ap-
pear to be any reason for this inconsistency. If there are distinguisha-
ble differences between various sections, such differences are the
third degree of small. Compare, for example, section 2-109 dealing
with advancement with sections 2-403 and 2-404. In the ad-
vancement section, each sentence is a separate paragraph. Further-
more, subparagraph (a) is broken into additional subparts, (i) and
(ii). Contrastingly, both sections 2-403, dealing with exempt property,

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64 Most of these organizations have multiple meetings during the year. In addition, the
American College of Trusts and Estates Counsel has committee meetings during the annual
American Bar Association meeting.


66 Id. § 2-403 (exempt property).

67 Id. § 2-404 (family allowance).
An Eclectic History

and 2-404, dealing with the family allowance, are not divided into two parts, notwithstanding the fact that their content has as much variation among the sentences as the advancement section. Personally, I prefer the approach taken in section 2-109 dealing with advancements. I find the outlined section easier to understand. Unfortunately, this type of inconsistent structure detracts from the argument that the 1990 UPC is a carefully crafted and integrated whole. Such inconsistencies might give the impression that the Code is merely a crazy-quilt of provisions from various jurisdictions and drafters.

Admittedly, the substantive consequences of these criticisms are not of any great magnitude. Some will think the issue unworthy of comment. On the other hand, when a concept such as a uniform code is marketed or advocated as a superior product, it should show its superiority throughout, even as to details.

B. New Drafting Format

The 1990 UPC introduces a new drafting format without explanation. I am referring to the titled or subtitled subparagraphs. Part 2 of article II dealing with the elective share of the surviving spouse now contains subheadings to subparagraphs. For example, section 2-201 dealing with the elective share now has emboldened subheadings for the subparagraphs beginning with (a). This format also appears in sections 2-706, 2-707, 2-709, part 8 of article II, and sections 2-901 and 2-907, but is not used in the other parts of article II, part 9. No explanation for the use of this technique is given, or why there continues to be inconsistency in its use even among logical comparables. All efforts should be taken to correct such inconsistencies.

In sum, I believe it is preferable that format be consistent throughout the 1990 UPC. All sections should either have emboldened subheadings or the ones that now appear should be removed.

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68 See id. § 2-201.
69 See id. §§ 2-706, -707, -709.
70 See id. art. III, pt. 8 (general provisions concerning probate and nonprobate transfers).
71 See id. §§ 2-901, -907.
72 See id. art. II, pt. 9 (statutory rule against perpetuities; honorary trusts).
73 When I first noticed the inconsistencies, I thought perhaps the bolded subtitles were used because the sections were also part of a freestanding uniform act. On further inspection, however, I found that this clearly is not the case. For example, part 10 of article II and article V are also freestanding acts, but do not contain the bolded subparagraphs. I then speculated that it was new style versus old. But this does not seem to be the answer. Article VI dealing with nonprobate transfer is a totally new article in the 1990 UPC, but does not contain emboldened subparagraphs. Consequently, the inclusion of this new style may be accidental.
C. Comments: Style and Content

A more significant set of format problems concern the great variation among the official comments to various sections. For those comments that exist, they differ significantly in quality, style, length, content, and scope. Inexplicably, some important sections do not have a comment. This should not be the case. All sections, regardless of length, should have a comment. Even the most obvious and clearly stated section deserves some commentary. For example, there is hardly a section in any code of this magnitude that does not contain significant words requiring interpretation. Comments are essential sources of critical interpretive information.

The 1990 UPC omits other important material. Take, for example, section 2-108 dealing with afterborn heirs. Conceding that this is a relatively simple and straightforward concept, a comment is justified if only to explain the reasons for the changes that were made from the original Code to the 1990 version. Suddenly, we have expanded the coverage of the section from “relatives” (undefined) to “individuals.” This is not an insignificant alteration. Furthermore, we now require this person in gestation to survive birth by 120 hours. No explanation is given why an afterborn may have to live longer than an ordinary beneficiary. Regardless of whether the changes are justified and meritorious, the absence of explanatory materials in a comment is inexplicable.

Another section that, quite incredibly, has no accompanying comment is section 2-512 codifying the events of independent significance. The section is full of words deserving comment. Additionally, the section extends the doctrine regarding events of independent significance beyond its normal common law interpretation by applying it to wills of another being. This change is worthy of explanation and illustration.

One of the most irritating omissions in the comment portion of the 1990 Code is the unexplained absence of references to the old section numbers when the number has changed. It was irritating enough to find some of the numbers had changed but exasperating to find no cross-references. This problem is yet another reason to add “reporter’s notes” to the Code. For a discussion on the value of reporter’s notes see infra notes 89-91 and accompanying text.

See supra notes 59-64 and accompanying text.

Id. § 2-512. It may be that the absence of a comment indicates a disagreement among the draftsmen as to what should be said. Perhaps a stalemate of this nature could be resolved if the suggestions made, supra, concerning the drafting processes were instituted. See supra notes 59-64 and accompanying text.

Another shortcoming is that the existing comments are inconsistent in length and content. Some are very helpful and truly guide the reader, providing insight into the meaning and purpose of the section. Many of the comments that are included in the 1990 UPC are very good. An example is the comment to section 2-513 dealing with the separate writing disposing of tangible personal property. The comment explains the purpose and scope of the revision and provides an explanation of the clause itself. In addition, a planning example is provided for draftsmen. This helps to ensure that the intent of section 2-513 is carried out. The comment also discusses possible problems that may arise in the application of the clause, and what the consequences of those attempts will be. This is a truly useful comment.

At the opposite extreme is the comment to section 2-510 dealing with incorporation by reference. All we are told by the comment is that the section codifies the common law and that the common law is modified as to one particular element. No example of the section's use or intended purpose is provided. Considering that the incorporation by reference doctrine is a subject of continuing controversy among the states, the commentary should provide an explanation of the doctrine's meaning and the reason(s) for its incorporation into the 1990 UPC.

The comments to a uniform act are very important. The completeness and helpfulness of comments are very important selling points when promoting a uniform act to legislators. If the comments are helpful, proponents and legislators who study the act have something to relate to their concerns and answer their questions. Furthermore, courts have found comments to be reflective of the legislative intent
of the enacting state.\textsuperscript{88} It would be useful for the drafters of the 1990 UPC to work on improving existing comments, as well as including comments for sections that do not have them.

\textbf{D. Reporter's Notes}

As a reviewer of the work of the Uniform Commissioners, a member of the ALI, and participant in the preparation of the restatements, I am struck by the lack of coordination and cooperation between these two prestigious law reform groups. The debate during the May 1987 session of the ALI over the preferable meaning of representation\textsuperscript{88} showed a clear division between those who work on uniform laws and those who work on the restatements. Clearly, this conflict is less likely to occur now that Professors Langbein and Waggoner are directly involved with both the Uniform Probate Code and the \textit{Restatement of Property}.

I mention the ALI for two particular reasons. First, the technique and style of producing the restatements has some attributes deserving consideration. With the restatements, the commentary process has developed to a much greater extent than with uniform laws. The comments used with uniform laws are often extremely cursory and give short shrift to the issues involved. With a restatement, however, the comments elaborate the meaning and scope of the black letter law in great detail. These additional comments are extremely useful to users of the resource. I urge the commissioners, particularly those on the Joint Editorial Board, to consider adopting a style and approach to the comments similar to the ALI approach.

In addition, the reporter's notes accompanying each section of a restatement at the end of the comments are particularly beneficial to scholars and advocates.\textsuperscript{90} These notes constitute the scholarship upon which the black letter and its accoutermental comments are based. Something of this nature should be produced for the uniform laws. As with the comments, I believe all proponents would find it extremely helpful to be able to delve into the underlying bases for the section presented by the commissioner. This type of resource would

\begin{footnotes}
\item[88] See, e.g., Thompkins State Bank v. Niles, 537 N.E.2d 274, 283 (Ill. 1989). This point was stressed by professors Halbach and Waggoner in their article in this Symposium discussing the comment to § 2-603. Halbach & Waggoner, \textit{supra} note 62, at 1103.
\item[88] \textit{RESTATEMENT (SECOND) OF PROPERTY} (Donative Transfers) § 28.2 (Tentative Draft No. 10, 1987).
\item[90] See, e.g., \textit{RESTATEMENT (SECOND) OF TRUSTS} (1959) (providing an example of such reporter's notes).
\end{footnotes}
not only help advocates of the 1990 UPC, but also those who interpret it.

In many respects, uniform laws and the restatements are used similarly. Although the uniform laws, when enacted, become binding law on the courts, they often require interpretation. Resource notes, like comments, are helpful in developing those interpretations. On the other hand, the uniform acts and the restatements become authority (albeit persuasive) even where not officially enacted. Clearly, the 1990 UPC has been referred to as the model of interpretation for ambiguous statutes or where statutes do not exist. Consequently, the more comprehensive the information concerning the sections is, the more likely the interpretation will conform to desired results.

I believe that the Joint Editorial Board should produce a separate volume of reporter's notes related to each of the sections of the 1990 UPC. It may be a monumental task, one that cannot be done in short order, but if accomplished in a reasonable period of time it would prove worthwhile and greatly benefit the law. Such notes would increase the likelihood of the 1990 UPC becoming law in many jurisdictions.

V. Tracking Policies in the 1990 UPC

A. Introduction

Tracking policies in probate laws, even the 1990 UPC, may be similar to tracking court decisions concerning rules of will construction. It may be difficult to distinguish between what is a pervasive objective policy and a mere subjective result. Even among ascertainable and accepted policies there are overlaps, conflicts, and inconsistencies. Furthermore, because the 1990 UPC is so comprehensive, it is impossible to address all areas in the space of this Article. Consequently, I will be selective.

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91 See supra notes 54-55 and accompanying text.
92 With the 1990 UPC, we are dealing with proposed legislation. Once enacted, court interpretations will virtually always focus on findings of legislative intent. Legislatures, although mindful of the need to address the underlying purposes and policies of the laws, are not always proficient at this task. Accordingly, the result may be a poorly designed and conceived legislative product.
94 The 1990 UPC does not list comprehensively in a single place all of the policies and goals it embodies. It is probably impossible to do so. Recognizing the likelihood of omission, conflict, and ambiguity, the following provides, in non-hierarchial order, a representative list of the policies and goals in the 1990 UPC:
I want to discuss two generally accepted policies espoused by the 1990 UPC. First, that succession law should reflect the desires of the "typical person," both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented. The latter situation, of course, involves primarily intestacy and inadequately drafted writings. In such scenarios the legislature, by way of statutory enactment, determines an estate plan by

(a) To make testamentary dispositions as simple and convenient as other transfer devices such as joint tenancies, inter vivos trusts, employee benefit plans, and insurance policies. James N. Zartman, *Uniform Probate Code—Policies and Prospects*, 61 Ill. B.J. 428, 429 (1973).

(b) The probate administration system should be as simple, cheap, and efficient as possible. *Id.*

(c) The probate court should not be a regulatory agency but rather a court ready to dispose of litigable problems. *Id.*

(d) Notice requirements should be kept to a minimum unless controversies arise. *Id.* at 429-30.

(e) The probate of uncontested wills and the administration of uncontested estates should be administrative acts, not judicial controversies. *Id.* at 430.

(f) The relevant fiduciary, including the personal representative and the conservator, needs as much authority as is necessary to accomplish the tasks without court involvement. *Id.*

(g) Bonding for fiduciaries should not be required for estate administration unless requested by the testator or other interested persons. *Id.*

(h) Personal representatives should be able to settle claims and make distributions without court involvement unless an actual controversy arises. *Id.*

(i) The estate inventory should be a private matter between successors. *Id.*

(j) The intestacy laws should reflect the desires of a typical decedent. *Id.*

(k) Probate laws should be uniform. *Id.*

(l) Multistate estates should be settled efficiently with the domiciliary jurisdiction having primary control. *Id.*

(m) Rules of construction and interpretation as well as evidentiary presumptions should follow good estate planning technique.

(n) Formalities should be kept to a minimum except where they assist good estate planning.

(o) Wherever possible, probate law and procedure should apply to the intestate estate as well as the testate estate.

(p) Wherever possible, probate law and procedure should facilitate estate planning.

(q) Interested persons should be given as much control and flexibility over the settlement and management function as possible.

(r) Strong, effective remedies should be provided to discourage, prevent, and remedy avaricious, dishonest conduct.

(s) Parens patriae interference with freedom of property disposition should apply only where necessary to protect significant interests, integrate lifetime and death-time transfers, and establish identifiable parameters for planning and predictability.


The predecessor to the UPC explicitly adopted this policy. See M.P.C. § 22 cmt., *in Simes & Basve*, supra note 21, at 62. It was noted that this desire "is a highly speculative matter." *Id.*
operation of law. This legislative estate plan fills in where the dece-  
dent has failed to adequately provide for the transfer of assets upon  
death. Because we lack the appropriate information, we seek to find  
objective intent in such cases. The legislature substitutes its own  
perception of the desires and expectations of the average person for the  
unexpressed subjective intent of the decedent. Therefore, what the  
average person would do if that person had properly presented their  
intent in an estate plan is a major criterion in determining various  
probate questions.

We are also concerned with matters of predictability, provability,  
and correctness in result. These concerns are often represented most  
clearly by statutes of wills and other formality requirements. As outlined  
in the seminal article by Gulliver and Tilson, formalities pro-  
tect three basic functions: the ritual, evidentiary, and protective  
functions. Professor Fuller added the concept of the channelling  
function. Professor Langbein refines the functions to five: eviden-  
tiary, channelling, cautionary, protective, and level of formality.

Intent serving is not always the paramount policy applicable to succession issues. For example, concepts of parens patriae come into play when interested persons need protection although they feel they do not, or when other persons need protection from unreasonable acts of the decedent. The former is represented clearly by the administration procedure requirements that attempt to reduce the possibility of fraud and avarice. See Mary L. Fellows, In Search of Donative Intent, 73 Iowa L. Rev. 611 (1988). Professor Fellows states:

Imputing individualized and generalized intent by reference to competent estate planning gives property owners the benefit of what may be called "equal planning under the law." This concept establishes a standard by which a state may identify the need to reform a donative instrument that resulted from inadequate legal advice and a basis for designing a remedy to correct the error. The standard is especially appealing because it extends the benefits of competent legal advice and drafting to all property owners, even if they did not have access to adequate counsel when they executed their donative instruments. Id. at 613.

We should be very careful, however, not to assume too quickly that the testator did not get good estate planning merely because the instrument does not conform to the "good estate planning" model. For example, we should not assume that testators prefer any family member over nonfamily. Testators often, I believe, say what they mean although some relatives may take offense. One of the inherent features of a will is that its consequences occur after a person's death and therefore the testator does not hear the carping of unhappy relatives.

Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 5-10 (1941).

Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 801 (1941). Fuller states that "[i]n this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention." Id. Accordingly, formalities can have two beneficial effects. First, they can assure that properly expressed intent will be carried out and, second, discourage or prevent frivolous contentions and law suits contrary to clearly and formally expressed intent.

Notwithstanding how the issue is dissected, the primary concern is the manner in which formality accommodates legitimate concerns against over-formalistic interpretation. In other words, we do not want formality to destroy what it is designed to protect. ¹⁰¹ A person who obeys the formalities has legitimate expectations that certain legal effects will result. ¹⁰²

I mention these policies not to address them in detail. ¹⁰³ That would be far beyond the scope of this piece. I mention them as a preface to a discussion of whether the 1990 UPC, and in particular

¹⁰¹ Professor Langbein states:

The essential rationale of these rules is that when the purposes of the formal requirements are proved to have been served, literal compliance with the formalities themselves is no longer necessary. The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are independently satisfied.

*Id.* at 498-99 (citations omitted).

¹⁰² Professor Fuller warns of the extreme ends of the formality debate.

If language sometimes loses valuable distinctions by being too tolerant, the law has lost valuable institutions, like the seal, by being too liberal in interpreting them. On the other hand, in law, as in language, forms have at times been allowed to crystallize to the point where needed innovation has been impeded.


¹⁰³ The proper place and scope of formalities in executing wills has become a cause celebre in recent legal literature. See, e.g., Langbein, *supra* note 100, at 489 (proposing a substantial compliance doctrine for wills); James Lindgren, *Abolishing the Attestation Requirement for Wills, 68 N.C.L. REV. 541* (1990) [hereinafter Lindgren, *Attestation Requirement*] (abolish the attestation by witnesses requirement); James Lindgren, *The Fall of Formalism, 55 ALB. L. REV. 1009* (1992) [hereinafter Lindgren, *Formalism*] (proof of testamentary intent is the key, not procedural techniques or physical attributes); Lydia A. Clougherty, Comment, *An Analysis of the National Advisory Committee on Uniform State Laws' Recommendation to Modify the Wills Act Formalities, 10 PROB. L.J. 283* (1991) (opposed to the "substantial compliance" doctrine). Cf. Gerry W. Beyer, The Will Execution Ceremony—History, Significance, and Strategies, 29 S. TEX. L.J. 413 (1987) (detailing the critical importance of the will execution ceremony and setting forth proper will execution technique). There is legitimate concern that when wills execution statutes mandate only "bare-bones" requirements, the legitimacy of some of the retained requirements is subject to question. For example, if the testator does not have to sign in the presence of witnesses, and the witnesses do not have to sign in the presence of the testator, the continued attestation of witnesses is hardly justifiable. Cf. *John Ritchie et al., Cases and Materials on Decedents' Estates and Trusts* 253 n.18 (7th ed. 1988). What might make the witnessing requirement worthy of retention is the ritual function of formalities and its psychological benefits. See Beyer, *supra*. The effort to eliminate rejection of wills because of technical formality errors has reached England and New Zealand. See R.T. Oerton, *Dispensing With the Formalities, 141 NEW L.J. 1416* (1991); Rosemary Tobin, *The Wills Act Formalities: A Need for Reform, 1991 NEW ZEALAND L.J. 191*. The issue has also been rekindled in Queensland, Australia, one of the first jurisdictions to enact the "substantial compliance" concept to wills validation. See John K. de Groot, *Will Execution Formalities—What Constitutes Substantial Compliance?, 20 QUEENSLAND L. SOC'Y J. 93* (1990).
the new article II,104 apply these policies consistently. Although they have generally been followed, there are several provisions in the 1990 UPC that warrant review in light of the policies mentioned above.

B. Tracking Intent-Serving Policies

Although the 1990 UPC strives for consistency when administering the intent-serving policy, it does not always demonstrate accurately what the intent-serving result should be. If the desires of the typical person under similar circumstance is the test, I am unsure that such a test is backed by sufficient empirical information. I recommend that additional studies be conducted on certain succession subjects. The Code may indeed be correct in its analysis, but I am not convinced that we have the necessary data to lend support.

Consider, for example, the 1990 UPC's reversal of the common law presumption concerning advancements.105 This provision is similar to the advancement provision in the original Act.106 In brief, the new section requires a writing by the donor or donee evidencing that an advancement or a gift in the nature of an advancement was intended.107 If there is no writing, the section establishes an irrebuttable presumption that no advancement was intended.108 The comment's justification for reversing the common law presumption is an unsubstantiated statement that most people consider and treat these transactions as outright gifts.109 What is the source of this statement?

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104 The Editorial Board of the Uniform Probate Code states that one of the themes to probate law sounded in the last twenty years is "the decline of formalism in favor of intent-serving policies." U.P.C. art. II, prefatory note (1991).
105 See id. § 2-109. A similar formality is required for gifts in satisfaction of devises under wills. See id. § 2-609 (Ademption by Satisfaction). The writing requirement for gifts in satisfaction is not as objectionable. The will to which the gift is said to relate must follow a formality. It is not illogical or unreasonable to require a reasonable formality in order to recognize changes to the will. The mere unadorned writing required by § 2-609 is not excessive. Advancements, of course, deal with intestacy where there is no writing or the writing is inadequate. A large gift to an heir is ambiguous at least, and may require extrinsic evidence for explanatory purposes.
106 See id. § 2-109. A similar formality is required for gifts in satisfaction of devises under wills. See id. § 2-609 (Ademption by Satisfaction). The writing requirement for gifts in satisfaction is not as objectionable. The will to which the gift is said to relate must follow a formality. It is not illogical or unreasonable to require a reasonable formality in order to recognize changes to the will. The mere unadorned writing required by § 2-609 is not excessive. Advancements, of course, deal with intestacy where there is no writing or the writing is inadequate. A large gift to an heir is ambiguous at least, and may require extrinsic evidence for explanatory purposes.
107 For the original provision, see U.P.C. § 2-110 (1969).
   Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of his estate, the donor may either execute a
Is it based upon an empirical study? Are we sure this intent applies to all gifts between persons? Would it not be reasonable to assume that a person might have a different intent as to large gifts?\textsuperscript{110} I am not sure one can take "judicial notice" of the 1990 UPC's justification.\textsuperscript{111}

I find it unlikely that most persons would consider large gifts of $10,000 or more to have no strings attached. Most people desire equality among equals. The extra windfall of large gifts during a lifetime to one and not to others is not consistent with the general intent of most people. In a perfect society people would not make large gifts without advice of counsel, but we know this is not a perfect world.

The intent-serving sections in which I have the most confidence are those where some attempt has been made to identify what the typical person would want under normal circumstances. An example of this is the new official definition of "representation" as employed in section 2-106.\textsuperscript{112} Interestingly, the new approach, referred to as "per capita at each generation," changes completely the approach taken in most jurisdictions, including the approach adopted in the original

will so providing or, if he or she intends to die intestate, charge the gift as an advance by writing within the present section.

\textit{Id.}

\textsuperscript{110} We might look to tax law for an example. The federal gift tax law says that gifts of $10,000 or less per year, per person, are exempt from gift and estate tax consequences. I.R.C. § 2503 (West Supp. 1992). The allegorical explanation for the exclusion was to prevent donors and donees from finding Uncle Sam under the Christmas tree. Similar to a no advancement rule, gifts of that nature have no subsequent consequences. The reverse is true of gifts above $10,000. Such gifts have gift and estate tax consequences. It might have been appropriate for the draftspersons of the 1990 UPC to consider this $10,000 threshold in reversing the common law presumption of advancement. It would have been logical to provide that gifts below $10,000 per donee, per year, are not considered advancements unless the particular formality is satisfied. Gifts above $10,000 might carry a presumption of, or against, advancement, with the qualification that relevant extrinsic information, including declarations by the decedent, would be admissible to determine intent.

The 1990 UPC even adopts the exclusion concept in its augmented estate provisions designed to protect a surviving spouse. Gifts made within two years of death become part of the augmented estate "to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000.00." U.P.C. § 2-202(b)(2)(iv)(D) (1991). Accordingly, it would not be inconsistent or unfamiliar to apply the $10,000 threshold to advancements.

\textsuperscript{111} The 1990 UPC formality requirement for advancements is not without its supporters. See, \textit{e.g.}, Martin L. Fried, \textit{The Uniform Probate Code: Intestate Succession and Related Matters}, 55 Alb. L. Rev. 927 (1992).

\textsuperscript{112} U.P.C. § 2-106 (1991). The general comment to part 1 of article II states: A system of representation called per capita at each generation is adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

\textit{Id.} art. II, pt. 1 gen. cmt.; \textit{see also id.} § 2-106 cmt. ("Recent survey . . . suggests that the per-capita-at-each-generation system of representation is preferred by most clients.").
The previous debate over representation rules concerned whether the court should adopt a pure per stirpes definition or a per capita with representation interpretation. Both statutes and court decisions varied on this issue. Then a relatively unique approach to intestate succession was proposed. Normally, I would have viewed this development with great skepticism. Having taught for many years, however, and having pursued this matter with class after class, I am convinced that the new provision accurately reflects the representation approach most people would want if they understand the options and have a choice. As indicated in the comment to section 2-106, survey results showed overwhelming support for the new technique.

I like this technique for law reform. Find an educated and informed audience and ask them what they would prefer in a specified situation. Law students may provide such an audience. Law students have an understanding of the legal concepts involved. Furthermore, they represent a wide range of societal backgrounds and, thus, provide an equally wide range of experiences upon which to base their opinions. If academics poll their classes regularly, and discover that the current Code approaches do not conform to the general desires of...
law students, the matter may be worthy of further study and additional surveys.\textsuperscript{116}

VI. Tracking Formalism

Although the concept of formalism is thoroughly discussed in relation to several particular provisions of the 1990 UPC,\textsuperscript{117} it is not discussed in every section where a formality, or the equivalent of a formality, is required. My concern here is that the merits and demerits of formalism arise any time a special requirement is set, not otherwise required, in order to determine or carry out a decedent’s intent.\textsuperscript{118} This not only includes the formality necessary to execute a will, but also any formality that is required of other dispositive doctrines such as advancement,\textsuperscript{119} satisfaction,\textsuperscript{120} disposition of certain types of tangible personal property,\textsuperscript{121} and succession contracts.\textsuperscript{122} More subtle formalities include special evidentiary standards such as a clear and convincing evidence standard\textsuperscript{123} and rebuttable presum-
Whenever formalities arise, they should be scrutinized as closely as will execution procedures have been.

As a general rule, formalities should be reduced to their least restrictive format. A balance must be reached that weighs the need for reasonable evidentiary reliability against the costs of proof of intent and denial of expectations. The draftsmen have not been consistent with this approach. A section that raises significant questions as to formality is the advancement section, which was discussed previously regarding the intent-serving policy. If the "writing" requirement is not satisfied, this formality denies donor expectations even in the clearest case of advancement intent because extrinsic evidence of intent is inadmissible. The formality, therefore, denies the intent rather than carries it out. Ironically, under the 1990 UPC, the formality required for an advancement is now almost equal to the formality required for a statutory will. Several commentators feel that the draftsman, sub silentio, repealed and reversed the common law concept of advancement without full justification. This criticism is justified in light of the fact that less restrictive approaches could have been adopted while still working to prevent the litigation evils caused by the common law presumption.

Another provision warranting the same level of scrutiny is the new antilapse section. Realizing this section will have its own separate discussion in this symposium, I will not go into detail. My concern in this area centers solely upon the inclusion of a new formality re-

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124 See, e.g., id. § 2-603 cmt. ("[T]he rule of Section 2-603 yields to a finding of contrary intention.").

125 Professor Lindgren suggests applying the concept of parsimony to will formalities. See Lindgren, Attestation Requirement, supra note 103, at 545-46. He states: "Here [in the jurisprudence of succession] parsimony means that states should impose the least restrictive requirements that serve the purposes of formalities without seriously undercutting the policy of free testation. The law should set requirements at a level that tends to enforce the testator's intent, not frustrate it." Id. at 546 (citations omitted). It is an idea that has meritorious application to all formalities.

126 Cf. Lindgren, Formalism, supra note 103, at 1016 (formalities are often unnecessary and create obstacles to carrying out testamentary intent).


128 See supra notes 105-16 and accompanying text.


130 Compare id. § 2-109 with § 2-503 (both requiring a writing and showing of intent).


133 See Halbach & Waggoner, supra note 62.
The antilapse provision of section 2-603 presumes that a mere statement of survivorship such as “if he survives me” or “my surviving children” is not “in the absence of additional evidence” a sufficient indication of an intent to override the provision’s presumption. In addition, section 2-603 reverses the presumption concerning the antilapse provision’s application to the exercise of powers of appointment.

One problem is the scope of the new antilapse statute. The 1990 UPC’s antilapse statute applies to all devisees who fall within the classification of being a grandparent or a descendant of a grandpar-

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134 The antilapse problem is a battle of presumptions that occurs when the testator has not adequately anticipated the possibility that a devisee may predecease the testator. See generally Atkinson, supra note 87, § 140 (discussing the problem and effects of lapse and methods to avoid such). In the absence of a statute, the common law presumed that the devise lapsed. Although a testator can indicate in a will an intent to prevent lapse, most courts have refused to admit extrinsic evidence to show intent. See Ritchie et al., supra note 103, at 976. Generally, if an antilapse statute exists, it is presumed that the lapse does not apply when the devisee has left one or more representatives. Id. at 977. State statutes vary greatly as to who, when, where, and how they apply. Some statutes apply the presumption strongly in that the presumption is rebuttable only if contrary intent is expressed on the face of the will. See, e.g., Ark. Code Ann. § 28-26-104 (Michie 1987). Others allow extrinsic evidence to be admitted to rebut the presumption. See, e.g., In re Estate of Burke, 222 A.2d 273 (N.J. 1966). All the antilapse statutes are intended to be “intent enforcing.” It is a matter of opinion, and much has been written on whether they have achieved that purpose. See Robert L. Fletcher, A Critical Note on Lapse, 8 GONZ. L. REV. 26 (1972); Susan F. French, Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform, 37 HASTINGS L.J. 335 (1985); Patricia J. Roberts, Lapse Statutes: Recurring Construction Problems, 37 EMORY L.J. 323 (1988).

135 U.P.C. § 2-603(b)(3) (1991). The statutory text uses the phrase “words of survivorship” and the comment uses the phrase “mere words of survivorship.” Compare U.P.C. § 2-603(b)(3) (1991) with U.P.C. § 2-603 cmt. (1991). It is clear that if the testator adequately expresses an intent to require survivorship, this expression will be given effect. U.P.C. §§ 2-601, 2-603 cmt. (1991). The comment to § 2-603 states that “foolproof” drafting techniques of expressing a contrary intent include adding an additional phrase to a devise that states “and not to [the devisee’s] descendants” or a separate clause that states “all lapsed or failed nonresiduary devises are to pass under the residuary clause,” or an additional phrase in the will that states “including all lapsed or failed devises.” U.P.C. § 2-603 cmt. (1991). Where or how the line is to be drawn between “mere words of survivorship” and “express contrary intent” is not explained. It is not unreasonable to speculate that litigation may develop over where and how that line is to be drawn, notwithstanding the draftsmen’s inclusion of the presumption to avoid litigation and case by case adjudication. For example, how will courts interpret a devise that states “to my surviving brothers and sisters, alone,” or an additional phrase in the will that states: “all others not named as devisees in this will are excluded from taking under this will”?

ent or who are testator's step children; when applicable a substitute gift for the devisee's descendants is created. It not only applies to wills, but also to life insurance retirement plans, accounts payable on death, and other transfers-upon-death registrations. The latter application means that a formality requirement has been added to non-testamentary and other will substitutes. Because the 1990 UPC, if enacted, would apply to wills of persons who die after the enactment date, these additional or changed rules may result in the denial of testamentary intent.

In the comment to section 2-603, the justification for the reversal of the presumption is based upon two primary arguments. First, the statute is said to be remedial in that it favors family and thus deserves broad interpretation and, second, the issue has been litigated enough to have a firm rule. It seems that neither argument justifies the reversal of the presumption. For example, if there is an attempt by a testator to express his or her preferences as to the ap-

138 See id. § 2-706.
139 Id. § 2-801(b)(1).
140 If enacted, the 1990 UPC would, in effect, require that all persons review their beneficiary designation. Although reviewing one's estate plan is an activity to be encouraged, the section may, nevertheless, cause those who fail to review or alter their plans to encounter unexpected and unintended distributional results. Professors Halbach and Waggoner concede that this section should be given prospective application if existing law is changed. See Halbach & Waggoner, supra note 62, at 1114.
141 Professors Halbach and Waggoner express additional reasons for the rule in their discussion of § 2-603. See Halbach & Waggoner, supra note 62, at 1109-15. Notwithstanding this supplementation, the bottom line is that it is based on a hypothetical client who has an inadequate lawyer and who has never thought of the problem of lapse. Maybe we should investigate whether this person really exists and whether the rule conforms to the average person's desires and expectations. On this score, Halbach and Waggoner admit controversy. Id. at 1112-14.
142 Professor Fellows prefers a generalized imputed intent to favor family. She states:

Imputing to property owners an intent to prefer family is likely to achieve most property owners' donative wishes. Undoubtedly, the state's preference for family places at risk nontraditional distribution schemes that exclude some family members in favor of other family or nonfamily members. The interplay of individualized and generalized imputed intent responds to that risk by presuming that a property owner intended a traditional scheme that most other property owners would prefer, but allowing a party to rebut the presumption with objective evidence establishing a nontraditional plan. This method of imputing intent balances messily, but effectively, contradictory individual values by raising barriers to donative freedom, while only rarely prohibiting its exercise. Fellows, supra note 97, at 613.

Courts have disagreed on whether antilapse statutes are remedial or in derogation of common law. Compare Drafts v. Drafts, 114 So. 2d 473, 476 (Fla. Dist. Ct. App. 1959) (antilapse statutes are to be strictly construed) with Fidelity Union Trust Co. v. Berenblum, 221 A.2d 758 (N.J. Super. Ct. App. Div. 1966) (antilapse statutes are to be liberally construed).
143 The comment to § 2-603 notes the conflict among the cases and cites several examples. See U.P.C. § 2-603 cmt. (1991).
application of the statute, the first argument logically fails. It is arguable that when an expression of this nature is made, it should be given greater credence than the presumption of the statute.\textsuperscript{144} Although the antilapse statute is remedial, it does not attempt to overcome expressed intent. Moreover, it is legitimately arguable that any expression of intent should overcome a statutory presumption. Although there is disagreement,\textsuperscript{148} and the issue has not been litigated in all states, there is significant authority for recognizing that an expression that mere survivorship is required rebuts the antilapse presumption.\textsuperscript{148} Certainly, there should be some preference for persons named in the will over those not named.

The second argument, concerning the large amount of litigation over the survivorship issue, could have easily been resolved by making the opposite presumption\textsuperscript{147}—that is, confirm the cases that have held mere statements of survivorship to rebut the statute. This would place the burden of production on those who wish to show that the statement does not rebut the statute. It seems that when the testator has expressed some indication of intent, the burden should be on the challenger to overcome such indication. The conjectural argument that testators or lawyers have not thought about this issue does not justify the presumption. The presumption could logically go against the application of the statute rather than in favor of it and still emphasize to draftsmen the problems that must be dealt with concerning survivorship.

\textsuperscript{144} The existence of a contrary intent in wills that contain mere expressions of the need for survivorship is addressed in the comment to § 2-706. The comment criticizes "[l]awyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute." Id. § 2-603 cmt. If there are a significant number of lawyers who believe this, new § 2-603 may have serious consequences with wills already executed and not, or unable to be, changed because of client indifference to law changes, client incompetence, or attorney neglect, incompetence, or death. The malpractice threat to drafting attorneys who rely on the contrary presumption is thoroughly discussed by Professor Begleiter. Martin D. Begleiter, Article II of the Uniform Probate Code and the Malpractice Revolution, 59 Tenn. L. Rev. 101, 126-30 (1990). Limiting the application of the statute prospectively has been suggested as a possible cure for this problem. See Halbach & Waggoner, supra note 62, at 1114.

\textsuperscript{148} See U.P.C. § 2-603 cmt. (1991) (citing cases holding both for and against expressions of intent overcoming statutory presumptions). Two commonly used texts on the subject matter expressly state that a devise to a person, "if he survives," rebuts the application of the antilapse statute's application. Atkinson, supra note 87, §140, at 780; Thomas F. Bergin & Paul G. Haskell, Preface To Estates In Land And Future Interests 126 (2d ed. 1984).

\textsuperscript{147} When drafting language is key to the result, the purpose of the formality is reduced to administrative convenience. Gaubatz, supra note 93, at 546. Professor Kurtz also mentions this possibility. Kurtz, supra note 136, at 1189.
In many cases under the antilapse statute, no actual intent will be available and the court will be left with only the words of the will to decipher. As mentioned, the antilapse statute’s substitute devise presumably applies unless a contrary intent is found. When a testator uses survivorship words, however, a presumption stand-off arises: the presumption of statutory application against an expression of contrary intent. In such situations presumptions are frequently and properly used, in a sense, to break the tie. The draftsmen correctly contend that something has to be said to break the new tie and they opted for testator’s “express contrary intent” to rebut the statutory presumption but for testator’s “mere words of survivorship” to not rebut it.148

Without relevant extrinsic evidence to explain testator’s actual intent, however, we are flying blind. In these situations we should want our presumptions and rules of construction to conform to the desires of the average person because we have nothing else to go on. My concern is that the Code’s antilapse presumption concerning testator’s mere survivorship language does not necessarily conform to what an average person would want or believe has been required. It seems to me additional empirical evidence should be gathered before such dramatic changes are made.149

Analysis whether the presumption concerning survivorship language conforms to average intent may depend on the class of devisee involved in the devise. For example, it is one thing to say that most persons probably want grandchildren to take by representation in the place of deceased children and quite another to say they probably want their nephews and nieces to take by representation in the place of deceased brothers and sisters. If I were to interpret a will, for example, that provided: “I give $100,000 to my surviving brothers and sisters, and the residue to X charity,”150 I would conclude that the

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148 See supra note 135.

149 There have been several such studies. See, e.g., Allison Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. Chi. L. Rev. 241 (1963); Mary L. Fellows, et al., Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 AM. B. FOUND. RES. J. 319. The relevance of these studies cited in support of the 1990 changes is questionable. The studies have been over cited. Although legitimate as to their intended scope, they should not be expanded beyond their original designs or purposes.

150 The illustration raises two antilapse issues under the 1990 provision. The first is whether descendants of a predeceased brother or sister take under the section if one or more brothers or sisters survive. The second is whether descendants of predeceased brothers and sisters can take if no brother or sister survives or whether the charity takes instead. If the words “surviving brothers and sisters” are mere words of survivorship, the presumption of § 2-603(b)(3) would apply and the descendants of predeceased brothers and sisters might share with surviving
testator did not want nephews and nieces to take the devise under the antilapse statute unless all brothers and sisters died and unless the charity was incapable of taking. On the other hand, in interpreting a similar clause to testator's children, I might reach the opposite conclusion and allow descendants of predeceased children to take by representation in the place of deceased children and to the exclusion of the charity. This distinction between various classes of relatives is more likely to conform to average intent than the Code's relational umbrella approach. Maybe the presumption is not wrong but has been extended to too many persons. The antilapse statute in its desirable attempt to cover a large number of relatives may be at fault for not recognizing real distinctions between the relational categories. From an inheritance standpoint, one's descendants are vastly different from one's collaterals and the statutory presumption should probably recognize this.

brothers and sisters and take in lieu of the charity. U.P.C. § 2-603(b)(3) (1991). I doubt that this result would conform to the intent of most testators but maybe I am wrong. Certainly, no current survey of testators exists that will guide us in this matter.

It is also somewhat anomalous that merely by changing the survivorship language, one may change the answer. For example, if the devises stated, "I give my estate to my brothers and sisters, or to the survivor of them, but if none survives, to X charity," or "I give my estate to my surviving brothers and sisters, but if none survives, to X charity," the antilapse presumption may not apply because there are alternate gifts. U.P.C. § 2-603(b)(4) (1991). It seems to me that these distinctions are artificial because the above phrases are as subject to the evils of lousy lawyering as are mere words of survivorship.

Professor French proposes a statute that distinguishes between lineal descendants and other relatives and persons when survival language is used. See French, supra note 134, at 371-73. In the case of lineal decedents, the antilapse feature of the statute is presumed to apply unless a contrary intent is shown by extrinsic evidence. Id. When survival language is used in reference to other relatives (collateral) and to persons, lapse occurs unless "persuasive evidence" shows testator did not intend the devise to lapse, or to apply lapse would permit a disinherited person or the state to take. Id. at 372-73. As Professor French warns:

The major conceptual flaw in current antilapse statutes is that they assume that lapse always produces intent-defeating distributions, or that lapse of all devises to defined beneficiaries always produces intent-defeating distributions. . . .

The purpose of the antilapse statutes should be to provide an alternative disposition of the property that will further the testator's dispositive plan. Id. at 373.

The antilapse provision covers all devises who take from the will and who are grandparents or descendants of grandparents. See U.P.C. § 2-603 (1991). Although this broad pool of persons works for intestacy, it may be too extensive for certain will interpretations.

Minor changes to § 2-603(b)(3) would eliminate most of the reasons for my opposition. If the new presumption concerning words of survivorship only applied to devises who are descendants of the testator, the presumption would conform to what I would submit are the desires of most people who would evaluate this issue. When words of survivorship are used in a devise to the other covered relatives under the UPC's grandparent and their descendants umbrella, I would urge that a rebuttable presumption of lapse should apply if the devisee does not survive the testator.
I urge that additional inquiries into what most people think should be done in these circumstances be conducted. We might find that most think that language of survivorship would preclude use of the antilapse statute. If that is the case, then why reverse the presumption? If such is not the case, then the 1990 antilapse provision is correct. As it stands now, however, the necessary empirical research has not been conducted. The 1990 UPC can assist in clarifying a confused area of law by putting the presumption either way. Potentially, reasonable expectations of the parties may be destroyed no matter which way the presumption lies. This is not a moral issue where there is a right or wrong. So long as a testator has control over who takes the property from the testator, this type of decision is within private control and not one to be set by public policy. I am not against the provision as much as I am not convinced by its supportive arguments.\footnote{Unlike the statutory presumptions contained in the advancement, satisfaction, and succession contract sections, this presumption is correctable with extrinsic evidence after the decedent's death. See U.P.C. § 2-603 cmt. (1991). Notwithstanding the liberal extrinsic evidence rule, the mere fact that it imposes the risk of litigation in circumstances where there is some indication of intent is an unfair burden and thus, in effect, imposes a formality of greater clarity of language upon draftsmen. Is this form over substance? The evidentiary burden might better be put on those who contend the intent is wrongfully expressed rather than on those who rely on a reasonable meaning of what is expressed. An expression of intent is worth something even if it is not perfectly clear in meaning.}

VII. Conclusion

As with any project of the 1990 UPC's magnitude, continual review and revision is necessary. Despite its imperfection, it is the best legislative model: both comprehensively and individually. State legislatures need to overcome provincialism and recognize the changes that have occurred in the area of property ownership and transfer. Not only has property ownership changed from an emphasis upon real property to personal property, but even the type of personal property has changed. We live in a mobile, diverse society with a wide range of familial relationships. People believe that property transfers are private transactions not requiring continual court or government regulation, supervision, or intervention. Probate law needs to recognize these realities.

Several attempts at revision have not stimulated much positive response. Issuance of the universal succession provisions and its independent self-standing act has not been accepted by any state at this point. Obviously, there is still strong resistance to total noncourt
processes for succession at death. Despite the resistance, non-Code states need to seriously consider the 1990 UPC. It offers much more than current state law. If the Code is imperfect, that is no justification for ignoring it or rejecting it out of hand. The 1990 UPC is clearly a dynamic instrument of reform deserving wide support. In this Article I have attempted to review the past and to offer some suggestions as to how communication between interested advocates, the drafting processes and result, and the entire 1990 UPC can be substantively improved in the future. If these efforts are taken, I believe acceptance of the 1990 UPC will increase significantly.