

UNIFORM LAW COMMISSION

New Acts 2017: Summaries

UNIFORM DIRECTED TRUST ACT

A traditional trust is a relationship between three parties: a *settlor*, who transfers property to a *trustee*, which the trustee manages for the benefit of one or more trust *beneficiaries*. Under this type of arrangement, the trustee is a fiduciary with many responsibilities. Trustees hold property and manage investments, prepare reports and tax returns, and some have discretion to determine whether and when to distribute trust property to the beneficiaries. Trustees enforce the terms of the trust as set out by the settlor. Some trusts allow the trustee to adapt the terms to changing circumstances.

Modern trusts often divide the trustee's traditional responsibilities among several persons. These additional parties are called by different names: trust director, investment advisor, distribution director, and trust protector are some of the more common titles used. Division of the trustee's duties among multiple parties has caused some confusion. A solo trustee who commits a breach of trust is liable to the beneficiaries for any resulting damages. But the law is unclear about the allocation of fiduciary responsibility when multiple parties share control over trust property. This uncertainty has resulted in litigation to determine which party is responsible when something goes wrong.

The Uniform Directed Trust Act (UDTA) clarifies and modernizes trust law for this era of specialization. Under the UDTA, a non-trustee who holds power under the terms of the trust is called a "trust director" (regardless of the terminology actually used in the trust instrument). A trustee who has limited power over any aspect of the trust is called a "directed trustee."

The UDTA holds trust directors to the same high standards of conduct that apply to trustees. Directed trustees are relieved of responsibility for actions taken by, or at the direction of trust directors – unless the trustee commits willful misconduct in the process. Beneficiaries are protected to the same or greater extent as they would be under a traditional trust arrangement.

The UDTA requires multiple parties performing trustee-like duties to cooperate with each other, and provide information to the other parties when necessary to administer the trust according to its terms. This prevents problems that can arise when one party is unaware of the other party's activity.

Finally, the UDTA imports an enacting state's existing law governing trustees, and applies the same rules to trust directors. For example, a state's law on resignation or removal of trustees, on compensation of trustees, and on limitations for bringing legal action against trustees will apply equally to trust directors under the UDTA. This ensures the fair and consistent treatment of all parties under the law.

The Uniform Directed Trust Act is appropriate for consideration in every state, whether the state has enacted the Uniform Trust Code or a non-uniform trust statute.

UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

History. The first uniform law on guardianship was released in 1969 as Article V of the Uniform Probate Code. A few years later, it was re-published as the Uniform Guardianship and Protective Proceedings Act for states that preferred to enact only the UPC's guardianship provisions.

Guardianship law has advanced dramatically since 1969 to better protect the rights and interests of persons legally determined to need help caring for themselves. The Uniform Law Commission has encouraged the trend toward greater independence for persons under guardianship by revising its guardianship act three times in 1982, 1997, and most recently with the approval of the newly renamed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) in 2017. Some version of the uniform guardianship law has been adopted in nineteen states.

The modernization of guardianship law. In 2011, the National Guardianship Network organized the Third National Guardianship Summit. Held at the University of Utah, the summit brought together representatives from twenty national organizations concerned with issues of aging, intellectual impairments, mental illness, and the effective practice of guardianship law.

The summit produced a set of 70 recommendations and standards approved by the participants and published the following year in the Utah Law Review. The Uniform Law Commission formed a study committee to determine which of these recommendations and standards could be codified into a statute, and in 2014 approved a drafting committee to update the existing uniform law. The drafting committee was joined by participants from most of the same national organizations that attended the 2011 summit. UGCOPAA is the result of their two-year drafting effort.

A note about terminology. Throughout UGCOPAA, the term “guardian” refers to a person appointed by a court to make decisions about the care and well-being of another person. The term “conservator” refers to a person appointed by a court to manage the property of another person. Some states use other terms, and the act can be adapted to conform to local practices.

UGCOPAA introduces the term “protective arrangement” to describe a less-restrictive alternative to guardianship or conservatorship. A court can order a protective arrangement when appropriate to address a specific need while preserving an individual's autonomy to the greatest extent possible.

Structure. UGCOPAA is organized into seven articles. Article 1 contains definitions and general provisions applicable to all types of court proceedings involving the protection of an individual. Article 2 addresses the guardianship of minors who do not have a parent capable of providing care. Article 3 addresses the guardianship of adults who are unable to care for themselves. Article 4 applies to conservatorships for both minors and adults who own money or property and need help with its management. Article 5 is entirely new and provides a set of rules for less-restrictive protective arrangements that a court can choose as an alternative to

guardianship or conservatorship. Article 6 contains a set of optional forms intended to help courts conduct a thorough assessment of an individual's capabilities and needs and craft appropriate, individualized orders for each case. Article 7 is a set of miscellaneous provisions to help with implementation and interpretation of the uniform act.

Innovations.

- ***Person-centered planning.*** Guardianships and conservatorships under UGCOPAA must include an individualized plan that considers the person's preferences and values, rather than using a generic "best interest" standard. Courts will monitor guardians and conservators to ensure compliance and update the plan in response to changing circumstances.
- ***Express decision-making standard.*** UGCOPAA clarifies that a guardian/conservator is a fiduciary and must always act for the benefit of the person subject to guardianship or conservatorship. A guardian for an adult must make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult. To the extent feasible, a guardian for an adult must promote the adult's self-determination, encourage the adult's participation in decisions, and take into account the values and preferences of the adult.
- ***Enhanced notice.*** UGCOPAA enhances protection for individuals subject to guardianship or conservatorship without greatly increasing the costs of monitoring by allowing the court to identify other persons to receive notice of certain suspect actions, and who can therefore serve as extra sets of eyes and ears for the court.
- ***Guaranteed visitation and communication.*** Without a court order, a guardian under UGCOPAA may not restrict a person under guardianship from receiving visits or communications from family and friends for more than seven days, or from anyone for more than sixty days. Family and friends must be notified of any change in residence.
- ***Less-restrictive alternatives.*** UGCOPAA prohibits courts from issuing guardianship or conservatorship orders when a less-restrictive alternative is available, such as assisted decision-making, technological assistance or an order authorizing a single transaction.
- ***Enhanced procedural rights.*** UGCOPAA requires notice of key rights to individuals subject to guardianship or conservatorship, including the right to independent legal representation. The act allows any interested party to petition a court for reconsideration of an appointment and places limits on a guardian or conservator's ability to charge fees for opposing the efforts to alter the terms of appointment.
- ***Updated terminology.*** The terms "ward," "incapacitated person," and "disabled person" are increasingly viewed as demeaning and offensive. UGCOPAA uses neutral terms such as "respondent" for the subject of a guardianship hearing, and "person subject to guardianship" once a court order has been issued.

Conclusion. UGCOPAA modernizes the law and protects the rights of individuals who are subject to guardianship and conservatorship. It encourages courts to impose the least-restrictive orders possible to adequately protect vulnerable minors and adults, and to monitor the protective arrangement to continuously adapt to an individual's changing capabilities and needs. It imposes clear duties upon guardians and conservators charged with protecting others and requires regular monitoring to ensure compliance. It allows courts to address specific problems with limited orders and preserve individual rights when possible.

UNIFORM PARENTAGE ACT (2017)

The Uniform Parentage Act (UPA) provides states with a uniform legal framework for establishing parent-child relationships. UPA (2017) updates prior versions of the UPA, last revised in 2002 (UPA (2002)).

The UPA was originally promulgated in 1973 (UPA (1973)). UPA (1973) removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage. When the UPA was revised in 2002, it augmented and streamlined UPA (1973). UPA (2002) added provisions permitting a non-judicial acknowledgment of paternity procedure that is the equivalent of an adjudication of parentage in a court and added a paternity registry. UPA (2002) also included provisions governing genetic testing and rules for determining the parentage of children whose conception was not the result of sexual intercourse. Finally, UPA (2002) included a bracketed (optional) Article 8 to authorize surrogacy agreements and establish the parentage of children born under the agreements.

UPA (2017) makes five major changes to the UPA. First, UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. UPA (2002) was written in gendered terms, and its provisions presumed that couples consist of one man and one woman. In *Obergefell v. Hodges* (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. In *Pavan v. Smith* (2017), the Court reaffirmed that conclusion applies to rules regarding children born to same-sex spouses. After these decisions, parentage laws that treat same-sex couples differently than different-sex couples are likely unconstitutional. UPA (2017) updates the Act to address this potential constitutional infirmity by amending provisions so that they address and apply equally to same-sex couples. These amendments include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral. In addition to helping states comply with the Constitution, these updates provide clarity to these families and avoid unnecessary litigation.

Second, UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage. New Section 609 provides a statutory process for the recognition of such individuals as parents.

Third, UPA (2017) includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. The U.S. Congress adopted the Rape Survivor Child Custody Act in 2015, which provides incentives for states to enact "a law that allows the mother of any child that was conceived by rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court shall grant upon clear and convincing evidence of rape." New Section 614 provides language to implement the federal law.

Fourth, UPA (2017) updates the surrogacy provisions to reflect developments in that area, making them more consistent with current surrogacy practice and recently adopted statutes in several states.

Finally, UPA (2017) includes a new article – Article 9 – that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. While Article 9 does not require disclosure of the identity of a gamete donor, it does require that donors be asked whether they would like their identity disclosed. It also requires a good faith effort to disclose nonidentifying medical history information regarding the gamete donor upon request.

UNIFORM PROTECTED SERIES ACT

In response to the growing popularity of series limited liability companies in the United States, the Uniform Law Commission promulgated the Uniform Protected Series Act (UPSA). The UPSA is drafted as a “module” to be inserted into the enacting state’s existing LLC act and may be adopted whether or not the state’s LLC statute is based on the Uniform Limited Liability Company Act.

Article 1 contains general provisions, such as: definitions, a description of the nature of a protected series, as well as its power, purpose, and duration; how the protected series is governed by the operating agreement of the LLC; and rules for applying certain provisions of the state’s existing LLC act to protected series. The act uses the term “protected series” to highlight the internal liability shields which are a defining characteristic of the act, and to avoid confusion with the term “series,” which is often used to refer to classes of interests in business entities that do not affect liabilities to third parties. If the requirements of the UPSA are satisfied, then assets (referred to as “associated assets”) of one series are not available to satisfy claims of creditors of the LLC or of other protected series of the LLC.

Article 2 explains how to establish a protected series. As a default matter, all members must consent to establish a protected series. Further, the LLC must deliver a protected series designation to the Secretary of State, signed by the company. Article 2 also provides name, registered agent, and service of process provisions, as well as methods to obtain a certificate of good standing and reporting requirements.

Article 3 includes the record-keeping requirements that must be satisfied for an asset to qualify as an “associated asset” under the act. Unless provided otherwise in the operating agreement, the owner of an asset is responsible for meeting the record-keeping requirements for the asset. These provisions are designed to provide transparency of series transactions. Article 3 also provides rules for associating members with the protected series and addresses series transferable interests, management, and non-associated members’ rights to information.

Article 4 covers limitations on liability and enforcement of claims. The act provides two types of liability shields: vertical and horizontal. The traditional vertical shield protects equity holders and managers from status-based liability for an organization’s obligations. The horizontal shield

protects a protected series of a series LLC and its associated assets from liability for the debts, obligations, or other liabilities of the company or another protected series of the company. This article contains provisions for claims seeking to disregard limitation of liability, protected series-level charging orders for judgment creditors, and enforcement of judgments against certain assets of the company. A creditor may enforce a judgment against another protected series of a series LLC by pursuing assets owned by the company or another protected series of the company if the act's requirements are not satisfied for these other assets (or "non-associated assets").

Article 5 addresses grounds for dissolution and provisions for winding up. Under the act, dissolution of a series LLC immediately dissolves every protected series of the company. Reinstatement of an administratively dissolved series or the rescinding of a voluntarily dissolved company has the same retroactive effect at the protected series level.

Article 6 includes restrictions on mergers and other entity transactions involving LLCs and protected series. The article provides additional definitions, and provides that a protected series may not be a party to an entity transaction. A series LLC may be a party to a merger if each other party to the merger is an LLC, and the surviving company is not created in a merger. Furthermore, Article 6 includes provisions dealing with plans, statements that must be filed with appropriate authorities, and effects of mergers. It also provides that a creditor's right that existed immediately before a merger may be enforced after the merger.

Article 7 addresses foreign protected series. The law of the jurisdiction of formation of a foreign series LLC governs certain aspects of a foreign protected series. Article 7 also provides guidelines for determining whether a foreign series LLC or foreign protected series of the company is doing business in the state. With respect to foreign LLCs, this act follows the common law approach and applies an enacting state's jurisprudence on piercing and affiliate liability companies and foreign protected series in carefully and narrowly delineated circumstances. The article also provides registration requirements for foreign protected series and disclosure requirements in cases where a foreign LLC or foreign protected series is a party to a proceeding in the state.

Article 8 contains miscellaneous provisions as well as transition rules for pre-existing series limited liability companies and protected series.

UNIFORM REGULATION OF VIRTUAL CURRENCY BUSINESSES ACT

The Uniform Regulation of Virtual Currency Businesses Act (URVCBA) provides a statutory framework for the regulation of companies engaging in "virtual currency business activity." Virtual currency business activity means exchanging, transferring, or storing virtual currency; holding electronic precious metals or certificates of electronic precious metals; or exchanging digital representations of value within online games for virtual currency or legal tender.

Under the URVCBA, "virtual currency" is a digital representation of value that is used as a medium of exchange, unit of account, or store of value and is not legal tender. This technology-neutral definition encompasses as many types of virtual currency as possible. The definition

excludes merchants' rewards programs or equivalent types of values on online game platforms.

The URVCBA is unique because it offers a three-tiered structure. Tier one represents persons that are exempt from regulation under the Act. Tier two is for providers that must register with the state. The registration tier is for providers with virtual currency business activity levels between \$5,000 and \$35,000 annually. The registration tier functions as a "regulatory sandbox" because it allows companies to focus on innovation and experimentation while they are in the early stage of business development. Businesses in the registration tier may operate as registrants for up to two years, so long as they remain under the \$35,000 threshold. Tier three, the full licensure tier, is for companies with virtual currency business activity levels greater than \$35,000 annually.

An application for a license under the URVCBA must include information such as: (1) a description of the applicant's current business; (2) a description of the applicant's business for the previous five years; (3) a list of the money transmission licenses the applicant holds in other states; and (4) lawsuit and bankruptcy history of the applicant and the applicant's executive officers.

The URVCBA creates two methods for an enacting state to authorize reciprocal licensing under the Act. Either the enacting state can choose to participate in the Nationwide Multistate Licensing System and Registry or the state can authorize reciprocity on a bilateral or multi-lateral basis.

The Act also exempts some forms of businesses already regulated by the federal government or by the states from licensure and supervision under the URVCBA.

The URVCBA is the result of two years of drafting work and collaboration with representatives from the virtual currency industry, state and federal government, trade associations, financial services providers, and academia, among others.

MODEL VETERANS TREATMENT COURT ACT / RULES

The veteran population suffering from combat related conditions continues to rise. This recent rise is attributable to the protracted conflicts in the Middle East and South Asia as well as a better understanding of the linkage of service related mental health disorders and criminal activity. This information, coupled with the success of diversionary courts in other areas such as drug treatment courts and mental health courts, has led to the creation of veterans' treatment courts in a number of jurisdictions across the United States. Veterans treatment courts ensure that veterans in the criminal justice system receive the treatment and support necessary to rehabilitate them back into being productive members of society. Recognizing that veterans have a shared cultural experience, the success of a veterans' treatment court is often found in pairing the defendant with a veteran mentor who supports and encourages the defendant's recovery. Very few states have legislation on veterans' treatment courts, but many local judicial jurisdictions have created veterans' treatment courts by rule or practice. This ad hoc creation of veterans' treatment courts has led to wide variation within states and at the national level regarding which

veterans are qualified to participate in these courts and how the veterans' participation is managed. As a result, there was a need to provide states with a model veterans court statute and rules that would address this growing issue.

In response to this issue, the Uniform Law Commission drafted and approved the Model Veterans Treatment Court Act and Model Veterans Treatment Court Rules. This model legislation has been drafted in two alternative ways to allow it to be enacted by state statute or, in the alternative, as court rules. The model act and rules allow a veteran to participate in a veterans' treatment court regardless of the character of his or her discharge from service, allowing judges and prosecutors the widest latitude possible to decide whether a defendant's situation and the court's available treatment resources would make participation in a veterans' treatment court successful. This act allows veterans suffering from traumatic brain injury, a mental-health condition, or substance use disorder to participate in the veterans' treatment court program, regardless of how these injuries or conditions were incurred. Furthermore, the act does not require that a veteran have combat service in order to be eligible to participate in a veterans' treatment court, recognizing that some disabilities are not incurred in combat, but may come from other events.

The act and rules authorize a court to administer a veterans' court that can adjudicate misdemeanor and felony offenses in order to give the court the broadest latitude for the appropriateness of a defendant's participation in a veterans' treatment court based on the requirements of the participation agreement. Furthermore, an eligible veteran defendant may be admitted into the veterans' treatment court at any stage of the proceeding. A state that chooses to enact this model legislation also has the option to include others who served the local community on the veterans' treatment court docket, such as firefighters and law enforcement personnel. The act and rules mandate that a veterans' treatment court must create a record of policies and procedures regarding implementation of the docket and do so with the assistance of prosecutors, defense counsel, and other interested parties.

The model act and rules have been drafted based on the widely recognized National Association of Drug Court Professionals' Ten Key Components of Drug Courts, which serve as evidence-based, scientifically validated principles which are considered industry best practices. These ten key components serve as an outline of policy and procedures for the veterans' treatment court. The components allow a veterans' treatment court to forge partnerships with a network of substance use disorder treatment programs, such as the U.S. Department of Veteran Affairs, the state, and community-based programs supported and sanctioned by either or both. The veterans' treatment court may also, in its discretion, employ additional services or interventions as it deems necessary on a case by case basis. The model act and rules also authorize a veterans' treatment court to adopt supplemental policies and procedures to offer treatment for cases of domestic violence, whether the defendant was a victim or perpetrator, as well as provide mentoring services that involve another veteran or servicemember with whom there is a shared culture.

The model act and rules require that in order for a defendant to be admitted to a veterans' treatment court, the defendant, prosecutor, and veterans' treatment court must be provided with and sign the participation agreement. The model legislation is designed to allow the prosecutor

and the court to determine the suitability of a defendant to participate in a veterans' treatment court as part of pretrial diversion. In all other cases, the court has the authority to determine a defendant's admission. The defendant will be admitted into the veterans' treatment court if the defendant is eligible and the defendant's participation would be in the interests of justice and of benefit to the defendant and the community.

The model legislation gives special attention to victims of domestic violence, recognizing that rights of victims of crimes may vary from state to state. The act provides that if a victim or alleged victim of the domestic violence offense that serves as the basis for the defendant's participation in a veterans' treatment court can reasonably be located, the victim or alleged victim must be offered (1) referrals to services of domestic-violence providers, as well as (2) information on how to report an allegation of an offense committed by the defendant or a violation by the defendant of the participation agreement. The model act and rules provide that participation of the defendant in a veterans' treatment court does not alter the rights of a victim or alleged victim of domestic violence under other law.

In the event that a defendant does not comply with the participation agreement, the court is given the ability to modify or terminate the defendant's participation in the veterans' treatment court. Additionally, if a defendant completes the requirements of the participation agreement, the model act and rules mandate that the court shall dispose of the charges that serve as the basis of participation in the veterans' treatment court in accordance with the participant agreement and any applicable plea agreement, court order, or judgment.

The model act and rules refer to federal law in governing the confidentiality of access to records in a veterans' treatment court. 42 U.S.C. Section 290dd-2 and 42 Code of Federal Regulations, Part 2 regulate disclosure of and access to information regarding patients who have applied for or received any alcohol or drug use-related services.