

2017 PROJECTS PRESENTED TO THE LEGISLATURE

1. Alabama Partnership Law

Chairman: James C. Wilson

Reporters: Scott Ludwig

The revised Alabama Partnership Law updates Alabama's partnership law in a manner that provides for greater alignment with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law. The proposed Act is not based on a single source, but rather has borrowed concepts and provisions from a variety of sources.

A summary of significant features of the proposed Act are:

(a) Contractual Nature. The proposed Act focuses on the contractual nature of the partnership. There are few mandatory provisions in the proposed Act; most features of a partnership can be modified by the parties to suit their needs. The proposed Act includes many default provisions that apply if the partners do not modify those default provision in the partnership agreement.

(b) Mandatory Safeguards. Despite the emphasis on allowing the parties to make their own contract, the proposed Act provides that certain obligations, such as the implied contractual covenant of good faith and fair dealing, cannot be modified.

(c) Notice Filing. Normally a filing is not required to form a partnership. Rather, a partnership is the least formal of Alabama's entities, and thus the partners and third parties must look to the partnership agreement to determine many aspects of a partnership. However, the proposed Act does permit or under certain circumstances require notice filings normally referred to in the Law as "statements," such as (i) a statement of partnership, (ii) a statement of not for profit partnership, (iii) a statement of limited liability partnership, (iv) a statement of authority, (v) a statement of dissolution, (vi) a statement of conversion, (vii) a statement of merger, and (viii) a certificate of reinstatement. These statements are designed to notify the State and third parties that the partnership exists and how to contact it. The details about the conduct of the partnership will generally be contained in the partnership agreement.

(d) Not for Profit Partnerships. In addition, a new feature allows a partnership to conduct not for profit activities. Under existing law, partnerships are by definition only "for profit" entities. The main difference is that formation of a "for profit" partnership requires little formality and can be accomplished with or without an intention to do so. However, in order to form a not for profit partnership, the partners must intend to do so, and must file a statement of not for profit partnership with the Secretary of State.

(e) Agency. Unlike a limited liability company, but similar to a limited partnership, agency of a partnership is set by statute and is vested in the partners.

2. Alabama Uniform Voidable Transactions Act

Chairman: Bill Hairston, III

The Uniform Fraudulent Transfer Act (UFTA) (enacted in Alabama in 1989 as Alabama Code §8-9A-1 et seq., with only minor variations) governs not only transfers made with the intent to hinder or delay any creditor but also transfers made by an insolvent or to be insolvent debtor for less than reasonably equivalent value. To better emphasize this overriding dual role of the UFTA, the Uniform Bar Commissioners in 2014 revised the UFTA by amendments and promulgated the Uniform Voidable Transfer Act (UVTA) upon which this proposed act is modeled. Under the UVTA the term "fraudulent" is replaced by the word "voidable" to minimize confusion and to emphasize the continuing dual role of the act.

In addition to this clarifying wordsmithing, the UVTA also deals with a small number of narrowly-defined issues (as opposed to being a comprehensive revision). These issues include:

A) Choice of Law. The proposed act adds a new § 10, which sets forth a choice of law rule focusing on the residence of the debtor.

B) Evidentiary Matters. New §§ 4(c), 5(c), 8(g), and 8(h) add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims for relief and defenses under the Act.

C) Deletion of the Special Definition of “Insolvency” for Partnerships. Section 2(c) of the UFTA sets forth a special definition of “insolvency” applicable to partnerships. The proposed act deletes UFTA § 2(c), with the result that the general definition of “insolvency” in § 2(a) now applies to partnerships. One reason for this change is that original § 2(c) gave a partnership full credit for the net worth of each of its general partners. That makes sense only if each general partner is liable for all debts of the partnership, but such is not necessarily the case under modern partnership statutes. A more fundamental reason is that the general definition of “insolvency” in § 2(a) does not credit a non-partnership debtor with any part of the net worth of its guarantors. To the extent that a general partner is liable for the debts of the partnership, that liability is analogous to that of a guarantor. There is no good reason to define “insolvency” differently for a partnership debtor than for a non-partnership debtor whose debts are guaranteed by contract.

D) Defenses. The proposed act refines in relatively minor respects several provisions relating to defenses available to a transferee, as follows:

(1) Section 8(a) of the UFTA created a complete defense to an action under § 4(a)(1) (which renders voidable a transfer made with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee takes in good faith and for a reasonably equivalent value. The proposed act adds to § 8(a) the further requirement that the reasonably equivalent value must be given the debtor.

(2) Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (that is, a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent transferee from such a person. Among other things, the proposed act make clear that the defense applies to recovery of or from the transferred property or its proceeds, by levy or otherwise, as well as to an action for a money judgment.

(3) Section 8(e)(2) of the UFTA created a defense to an action under § 4(a)(2) or § 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The proposed act excludes from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy sometimes referred to as “strict foreclosure”).

E) Series Organizations. A new § 11 provides that each “protected series” of a “series organization” is to be treated as a person for purposes of the act, even if it is not treated as a person for other purposes. This change responds to the emergence of the “series organization” as a significant form of business organization. See Alabama Code § 10A-5A-11.01 et seq.

F) Medium Neutrality. In order to accommodate modern technology, the references in the Act to a “writing” have been replaced with “record,” and related changes made.

G) Style. The proposed act makes a number of stylistic changes that are not intended to change the meaning of the act. For example, the proposed act consistently uses the word “voidable” to denote a transfer for which the act provides a remedy. As originally written the UFTA sometimes inconsistently used the word “fraudulent.” No change in meaning is intended.

In keeping with Alabama’s long standing practice of not addressing “obligations,” within the purview of the act, we have once again (as we did back in 1989) removed all references to obligations from the act, leaving their determination to existing common law. See Alabama Comment 1 to Section 1. Whether an obligation is void as a voidable conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this act. The proposed act is neutral on this issue concerning an obligation.

Likewise, we retained Alabama existing statute of limitations for actions under this proposed act. Once enacted this new act will be controlling for transfers made on or after January 1, 2018, and the old Alabama Uniform Fraudulent Transfer Act is amended to only apply to transfers made prior to January 1, 2018.

3. Alabama Uniform Fiduciary Access to Digital Assets Act

Chairman: Leonard Wertheimer

(Special thanks to Brian Williams for spearheading this specific project)

The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) modernizes fiduciary law to accommodate our digital lives. Nearly everyone now has digital assets, such as documents, photographs, email, and social media accounts. Often times, fiduciaries are prevented from accessing those accounts by various means of protection or restrictive terms of service. While digital assets may value, both monetary and sentimental, they also present novel privacy concerns. UFADAA provides legal authority for fiduciaries to manage digital assets in accordance with the user's estate plan, while protecting a user's private communications from unwarranted disclosure.

4. Alabama Uniform Condominium Act

Chairman: John Plunk

Reporters: Carol Stewart and Melinda Sellers

Alabama's Condominium Act was passed in 1990 and is located in Chapter 8A of Title 35 of the Code of Alabama. During the past 26 years several issues have been raised needing clarification. This proposed bill would provide for consistent language throughout and address a number of practical matters. The bill would make the following changes:

1. Section 35-8A-102(c) was amended to clarify when an offering statement is required for the sale of units in condominiums located outside of Alabama which are sold to Alabama residents.
2. The amendment to § 35-8A-103(4) recognizes that easements and other interests in real property can be a common element.
3. The amendment to § 35-8A-103(11) identifies the development right to convert common elements to units when reserved in the declaration.
4. The amendment to § 35-8A-105(c) recognizes that some property subject to development rights cannot be separately assessed and taxed.
5. The amendment to § 35-8A-107(c) requires that any portion of an award attributable to condemnation of limited common elements be divided among the owners in accordance with the value of the interest in a particular limited common element assigned to the units rather than requiring the amounts to be equally divided among the unit owners.
6. Section 35-8A-201(b) was amended to delete the requirement of maintenance of a condominium book by the judge of probate in each Alabama county.
7. Section 35-8A-201(c) was amended to clarify that a declaration or an amendment to the declaration is not effective until there is substantial completion of the structural and mechanical systems in the buildings located on the property being submitted to the condominium form of ownership. The amendment to § 35-8A-210(c) also removes the requirement that the engineer or architect certify that the structural and mechanical systems of all buildings were "completed in accordance with the plans."
8. Section 35-8A-208(a) was amended to require the association's consent for limited common element reallocations.
9. The amendments to § 35-8A-209(b) were substantially revised to require all information to be included on the plat to the extent such information could be shown on a two dimensional page, showing the subdivision of land and reciprocal rights relating to the subdivision.
10. The amendments to § 35-8A-209(d) eliminate the requirement of showing development rights to subdivide if such rights are described in the declaration.

11. Section 35-8A-(209)(g) was amended to allow a licensed surveyor to provide the required certification. This change expands the prior law which provided that only a licensed engineer or architect could certify to a plat.

12. Section 35-8A-313 was amended to clarify that the Association shall be responsible for the insurance deductible unless the declaration provides otherwise.

13. Section 35-8A-410 was previously amended in 2015 by and the current draft of this bill includes such language as previously amended.

5. Alimony

Chairman: Dean Noah Funderberg

Reporter: Penny Davis

This act would apply to divorce, legal separations or annulment actions that are filed after the effective date of this act. Existing case and statutory law will govern alimony awards for cases filed prior to the effective date of this act, January 1, 2017.

This act continues the existing law of allowing the court to award interim alimony, but adds an enumeration of the factors for the court to consider when determining whether to award interim alimony. The court may also order the litigation cost and expenses, including attorney fees, necessary to pursue or defend the action out of marital property.

While the act does continue the existing law of allowing the court to award alimony after a final decree, the act does establish priorities, limitations and factors to be considered when making an award. First, unless the court expressly finds that rehabilitative alimony is not feasible, the court is to only award rehabilitative alimony, which is limited to five years, absent extraordinary circumstances.

Second, if the court determines that rehabilitative alimony is not feasible or has failed, the court may award periodic alimony. Generally, for marriages of less than 20 years, periodic alimony shall be limited to a period not to exceed the length of the marriage. If the parties have been married for 20 years or longer, the time limit on the eligibility to receive alimony does not apply. However, both rehabilitative and periodic alimony continue to terminate upon remarriage or cohabitation as provided in current law.

Modification of both rehabilitative and periodic alimony continues to be allowed based on a showing of a material change in circumstances. Also, unchanged is the current law that if there is not an award of alimony nor a reservation of jurisdiction for awarding alimony at the time of the divorce, the court permanently loses the ability to subsequently award alimony.

6. Custody Amendments

Chairman: Dean Noah Funderburg

Reporter: Penny Davis

This act amends and expands the current statutory law relating to joint custody to all custody arrangements. It abolishes the concepts of one parent being awarded sole physical custody and the other parent being awarded visitation. That concept is replaced with the concept that if the parents are not awarded joint physical custody, then one parent will have primary physical custody and the other parent will be the non-residential custodial parent or will have restricted physical custody.

Under existing law, both parents are required to submit a parenting plan to the court only if they both seek joint physical custody. Under this bill, both parents are required to submit parenting plans in all custody cases. Moreover, if both parents submit to the court the same parenting plan, that parenting plan shall be granted in the final court order unless the court makes specific findings as to why the parenting plan jointly submitted by the parties should not be granted.

The act enumerates the factors that the court shall consider when determining whether to award joint physical custody. Likewise, the act enumerates the factors to be used to determine which parent shall be designated as the parent with primary physical custody if joint custody is not awarded.

A new section provides additional remedies to a party when a parent, without proper cause, fails to adhere to the time-sharing schedule in a parenting plan. Make-up parenting time and reimbursement for costs and attorney fees are among the remedies available when a parent violates the time-sharing schedule in a parenting plan.

7. Division of Retirement Benefits Upon Divorce Act

Chairman: Dean Noah Funderburg

Reporter: Penny Davis

Section 30-2-51 of the Code of Alabama, concerning the division of retirement benefits upon divorce, is significantly amended. The court retains the discretion to award retirement benefits to the non-employed spouse within certain limitations. The act retains the limitation that precluded the court from awarding more than 50% of the non-employed spouse's retirement benefits accrued during the marriage. However, the act eliminated the threshold requirements that the parties must be married for at least 10 years before the court could consider awarding retirement benefits.

The bill grants the court broad discretion to use any equitable method of valuing, dividing and distribution of the benefits. It eliminated the costly requirement of providing evidence of the present value of the retirement benefits in all cases. Subsection (d) provides a more equitable result by requiring that each party equally bear the burden or benefit of the passive appreciation or depreciation of the retirement benefits during the time between the award of the benefits and their distribution.

Finally, the court is given the authority to enter orders to protect and preserve the interest of either spouse in the retirement benefits.

8. Criminal Code

Chairman: Howard Hawk

Reporter: William Bowen

There has not been a comprehensive review of the Alabama Criminal Code since it became effective on January 1, 1980. The Alabama Law Institute has undertaken such a review, and this bill represents an amendment of Chapters 1 through 6 of the Alabama Criminal Code to better achieve the purposes of the Criminal Code as set out in § 13A-1-3, Code of Alabama 1975; to better achieve clarity and consistency with subsequent legislation and State and Federal Supreme Court rulings; and to ensure that specific sections of the Criminal Code satisfy mandatory constitutional principles and requirements with special emphasis on achieving notice and fair warning of the nature of the proscribed conduct and the punishment authorized upon conviction and thereby ensuring public safety.

The effected chapters are Chapter 1 - General Principles; Chapter 2 - Principles of Criminal Liability; Chapter 3 - Defenses; Chapter 4 - Inchoate Offenses (solicitation, attempt, conspiracy, and defenses); Chapter 5 - Punishments and Sentences (which includes but is not limited to the Classification of Offenses, Repeat and Habitual Offenders, and the Death Penalty and Life Without Parole); and Chapter 6 - Offenses Involving Danger to the Person (Homicide, Assaults, Kidnapping and related offenses, Sexual Offenses, Sexual Offenses involving School Employees and Students, Stalking, Transmitting Obscene Material To A Child and Solicitation Of Children By Electronic Means, Domestic Violence and Related Offenses, the Domestic Violence Protection Order Enforcement Act, Human Trafficking, the National Human Trafficking Resource center Hotline Notices, Protecting Alabama's Elders Act, and Bestiality).