Waggoner plays key role in reform of law of donative transfers

Ask Lawrence Waggoner for his job description and he'll probably say he's part academic and part politician. That's because Waggoner, the Lewis M. Simes Professor of Law at Michigan and one of the nation's leading scholars on trusts and estates, is the only person ever to hold both of the two most influential positions in the country in the area of reforming the law of donative transfers: Director of Research and Chief Reporter for the Uniform Probate Code (UPC), and Reporter for the American Law Institute's Restatement (3d) of Property, Donative Transfers.

As Chief Reporter for the UPC, Waggoner played a pivotal role in the recent four-year revision of the code, culminating in its adoption by the Uniform Law Commissioners (ULC) in 1990. Waggoner was responsible for researching, drafting and presenting the uniform code, first to the Joint Editorial Board (composed of representatives of the American Bar Association, the American College of Trust and Estate Counsel, and the ULC) and a special ULC drafting committee, then to the full membership of the ULC. Following its adoption, he's served as one of the point men in the effort to convince legislatures around the country to enact the code as their own. A dozen or so states have adopted the original code in its entirety, and many more have adopted substantial parts of the code. Now, many of those states, and others as well, are at various stages of considering the new revisions. So far, Waggoner says, prospects appear bright for widespread enactment.

"One of the first things I learned in doing this, however, is that it isn't enough to produce a sound piece of legislation," Waggoner adds. "It's difficult enough to do that, but even that doesn't guarantee that your legislation will get passed or get passed completely in its promulgated form."

Since local practices and custom sometimes result in pressure on bar associations and/or legislatures to amend the uniform code before adopting it, Waggoner and other UPC advocates spend a fair amount of time discouraging such moves. "Mostly you win, but sometimes you lose," he explains. "We try to make it clear that every time a state changes [the code], it undermines uniformity. Uniformity is very desirable, not only because many decedents own property in more than one jurisdiction and many move from their state of employment to another state upon retirement, but also because another state's judicial construction of the same statutory language makes legal research, counselling, and advocacy more efficient. But then again, sometimes we have to compromise. When we do, though, we try to limit local alterations to smaller details."

Responding to societal changes since the first UPC appeared in the late 1960s, the revised code vastly increases the intestate share of surviving spouses while being sensitive to the different circumstances of multiple marriages and blended families, aims to protect surviving spouses from disinheritance by implementing a partnership theory of marriage, recognizes the dramatic growth in non-probate transfers and, in the area of wills, minimizes the influence of formalism in favor of stressing the transferor's intent. While the debate over such reforms has taken place in the rarified atmosphere populated by legal scholars and top practitioners, Waggoner believes the change will most profoundly affect the average American.

"Those who are most affected by what we do are the people with fewer assets."
assets,” Waggoner explains. “People with large estates generally can get the high-powered firms to look after their interests, but we try to provide a decent product for a person who doesn’t go to a lawyer—or maybe goes to a lawyer who’s not totally adequate in the area.

“Because surviving spouses are mostly beyond working years, they depend to a large extent on capital-generated income and social security for support. The problem is especially acute for widows, who live alone far more often and are three times more likely to be in financial distress than widowers. What they take from the decedent’s estate can make a difference between a measure of economic security and sitting in an apartment with inadequate heat, because average social security payments barely exceed the poverty level. They don’t have a special-interest group monitoring their rights; we represent them. We’re their special-interest group, or one of them.

We’re particularly gratified that the American Association of Retired Persons and the National Association of Women Lawyers have endorsed our legislation.”

A Michigan Law graduate who went on to a Fulbright scholarship at Oxford, followed by a two-year stint as a captain in the army, Waggoner calls his other major area of extra-academic work—Reporter for the American Law Institute’s Restatement (3d) of Property, Donative Transfers—“truly a long-term project.” He is now in the third year of what’s expected to be a 10-year, five-volume project. Two preliminary drafts have been completed and presented to ALI advisory groups for comment.

Waggoner says that the Restatement tends to be written on a broader canvas than the UPC revisions, but will demand less post-adoption salesmanship. “The principle under which the ALI operates is that the Restatement rule is the rule an enlightened court would adopt, having all relevant arguments before it,” notes Waggoner, who as Reporter is uniquely situated to advocate proposed changes. “Therefore, what ends up a black-letter rule isn’t necessarily the majority rule. But if it’s well reasoned, it will be influential.”

A sobering by-product of working on both projects is the possibility of one’s carefully crafted work being used for unintended ends.

**Reflections on the responsibility that comes with creating new legal principles**

A major difference between professorial activities and working on the Restatement and the revised probate code—other than having as “colleagues” a network of judges, practicing lawyers, and academics at other law schools—is the responsibility that comes with helping create new legal principles. “One thing you quickly learn is that your first draft isn’t as flawless as you thought it was,” Waggoner explains. And while he remains committed to life in academia (he teaches a full course load at the Law School and recently has co-authored a casebook on Family Property Law, has written several law review articles, and has given the Hess Memorial Lecture to the Association of the Bar of the City of New York and the Trachtman Lecture to the American College of Trust and Estate Counsel), Waggoner says working on the UPC revision and new Restatement tends to place things in a different light.

“You always worry that what you’ve written could work an injustice if it turns out to be used in a case you didn’t anticipate,” Waggoner notes. “Moreover, there’s always going to be a lawyer on the other side trying to distort your words, and give them a meaning that wasn’t intended. It’s similar to the way academics feel if they become judges,” he explains. “They’ll all tell you that writing law as a judge is in many ways more constraining than writing proposals or analyses as an academic, where one is freer to be provocative or experimental. Writing statutes and restatements is similar to judging, because what you write can affect the lives and intra-family relationships of many people in future cases.”

—Michael F. Smith