Date: May 7, 2013

To: Caribbean Harmonization Committee

From: Caribbean Working Group 2 (Enforcement of Foreign Child Support and Child Custody Orders)

Re: Recommendation to Appoint a Joint Study Committee to Study Harmonization of the Law Regarding Recognition and Enforcement of Foreign Child Support and Child Custody Orders Among the Commonwealth Caribbean and the States of the United States

I. Introduction

Working Group 2 was established at the conclusion of the January 9, 2013 Caribbean Harmonization Meeting held in St. Thomas, U.S. Virgin Islands between members of the Uniform Law Commission (ULC) and representatives of several Caribbean jurisdictions. Our purpose was to conduct an initial study of the topic of recognition and enforcement of foreign child support and child custody orders to determine whether a collaborative harmonization effort among Caribbean jurisdictions and U.S. states in this area might be sufficiently useful and feasible that the Working Group would recommend establishment of a Joint Study Committee to conduct a more in-depth study of the issue. The Joint Study Committee would determine whether a Joint Drafting Committee should be appointed to draft principles that would serve as a guide for harmonized legislation among participating jurisdictions on this topic.

The initial members of our Working Group were Vincent Frazer, Attorney General, Department of Justice, U.S. Virgin Islands, Dr. Christopher Malcolm, Attorney General of the British Virgin Islands, and Professor Kathleen Patchel. We were very pleased that Judge Battle Robinson, a ULC Commissioner and expert on U.S. law in this area, and Dr. Leighton Jackson, an expert on Caribbean law, subsequently joined our Working Group. Terry Morrow, Legislative Director of the Uniform Law Commission, also participated in the deliberations of the Working Group. Dr. Malcolm and Professor Patchel served as co-chairs of the Working Group.

The Working Group met twice by conference call. During those meetings, we focused on the following questions:

(1) What is the current law with regard to recognition and enforcement of foreign child support and child custody orders among Caribbean jurisdictions and U.S. states?

(2) What specific issues or problems have arisen under the current law?
(3) Which of these issues might effectively be addressed by harmonization among the jurisdictions?

(4) What would be the appropriate scope for a harmonization project in this area?

(5) Which jurisdictions should be the focus of harmonization efforts at this stage?

(6) Are there organizations or other interested parties that should be invited to participate or that could provide useful information if a harmonization project goes forward in this area?

These questions raise in a more general way the issues that would be considered by the ULC Committee on Scope and Program in deciding whether to appoint a Joint Study Committee to consider this area. As our ultimate goal was to make a recommendation as to whether a Joint Study Committee should be appointed, they seemed an appropriate focus for our enquiry. Our consideration of these questions led us to conclude that a harmonization project regarding recognition and enforcement of foreign child support and child custody orders among the Commonwealth Caribbean jurisdictions and the U.S. states would be sufficiently useful and feasible that a Joint Study Committee should be appointed with regard to the issue. We also concluded that participation by the Canadian provinces in this harmonization project would enhance its value and effectiveness, and thus further recommend that the Uniform Law Conference of Canada be asked to participate in the Joint Study Committee. A discussion of our reasoning and a formal statement of our conclusion follow.

II. Discussion

A. Existing Law Regarding Recognition and Enforcement of Foreign Child Support and Child Custody Orders

All U.S. states (including the U.S. Virgin Islands) have adopted a version of the ULC’s Uniform Interstate Family Support Act (UIFSA) and Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). These Acts establish acceptable grounds for jurisdiction and standards for recognition and enforcement with regard to child support and child custody orders, respectively. Both Acts provide a registration system for recognition and enforcement of orders, and both apply not only among U.S. states but also to orders from foreign jurisdictions. The latest reiterations of these Acts also have been drafted to conform to two conventions drafted by the Hague Conference on International Law. The UIFSA Amendments of 2008 are designed to implement the Hague Convention on International Recovery of Child Support. A ULC drafting committee currently is drafting amendments to the UCCJEA to implement in part the Hague Convention on the Protection of Children. The United States has not yet ratified either of these Conventions; however, it is anticipated that once both federal and state implementing legislation is finalized the U.S. will become a party to both of them. The United States is a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Hague Abduction Convention), which provides for enforcement of a child custody order of the child’s habitual residence by providing a prompt procedure for return of a child to the country
of habitual residence when the child has been removed from that country in violation of that country’s child custody order.

The are several types of acts in the Commonwealth Caribbean dealing with recognition and enforcement of foreign country judgments.1 With regard to child support orders, the most relevant are the Maintenance Orders (Reciprocal Enforcement) Acts, which are found in several Commonwealth Caribbean jurisdictions.2 The Jamaican Maintenance Orders Act is illustrative of these acts. It provides for reciprocal enforcement of maintenance orders3 through a registration process. It also provides a process by which a payee resident in one reciprocating jurisdiction can seek a maintenance order in that jurisdiction against a payer resident in another reciprocating jurisdiction. Evidence is taken in the payee’s jurisdiction and a provisional order is issued which then must be confirmed in the payer’s jurisdiction before it becomes an enforceable order. Confirmation involves consideration of the evidence taken in the payee’s jurisdiction and any defenses raised by the payer. Once a foreign child support order has been registered, it is given the same effect and is enforceable as if it were an order of the local court in which it is registered. Perhaps the most important feature of these Reciprocal Maintenance Orders acts is that they only apply among reciprocating jurisdictions, a determination that is made by a governmental official in each jurisdiction.4

When recognition of a child support order is sought in a Commonwealth Caribbean jurisdiction that either does not have a Reciprocal Maintenance Orders act or does not recognize the issuing jurisdiction as a reciprocating jurisdiction, common law principles apply to determine whether the child support order will be recognized and enforced, and the general rule at common law is that such orders are not subject to recognition and enforcement. For an order to be recognized and enforced under the common law, the order must be final, and child support orders normally are not considered final because they generally are subject to modification.

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1 A chart of statutes relating to enforcement of foreign judgments in force in the various jurisdictions in the Commonwealth Caribbean is attached as Appendix A. The Working Group is very grateful to Dr. Leighton Jackson for his efforts in developing this chart.

2 Commonwealth Caribbean jurisdictions that have Reciprocal Maintenance Orders acts include Barbados, Dominica, Montserrat and Jamaica.

3 Maintenance orders include an order providing for the payment of sums of money towards the maintenance of any person, an affiliation order providing for payments by a person adjudged to be a child’s father, and an order for reimbursement of sums paid by a public body to a payee.

4 Jamaica’s Reciprocal Maintenance Orders Act applies with regard to the following jurisdictions: Antigua and Barbuda; the Bahamas; Belize; Cayman Islands; Cook Islands; Dominica; Grenada; Bailiwick of Guernsey; Guyana; Isle of Man; Jersey; Montserrat; New Zealand; Niue; St. Christopher and Nevis; St. Lucia; St. Vincent and the Grenadines; Trinidad and Tobago; United Kingdom; British Virgin Islands; Western Samoa; the U.S. states of Maryland, New Jersey and Florida; and the Canadian jurisdictions of Manitoba, New Brunswick, Newfoundland, Prince Edward Island and the Yukon.
Our initial research suggests that the primary statutory schemes in the Commonwealth Caribbean relating to recognition and enforcement of child custody orders are the International Child Abduction Acts found in a number of Commonwealth Caribbean jurisdictions.\footnote{Jurisdictions with these acts include the Bahamas; Belize; British Virgin Islands; Cayman Islands; Monserrat; St. Christopher and Nevis; Trinidad and Tobago; and Turks and Caicos Islands.} A number of Caribbean jurisdictions are parties to the Hague Abduction Convention, and these acts serve to implement that Convention. As discussed above, the Hague Abduction Convention provides for enforcement of child custody orders of the child’s habitual residence by providing a prompt procedure for return of a child to the country of habitual residence when the child has been removed from that jurisdiction in violation of the child custody order. The Hague Convention on Protection of Children addresses other issues with regard to child custody orders; this Convention, however, apparently applies in only one Caribbean jurisdiction.\footnote{The Hague website lists the Dominican Republic as having acceded to the Protection of Children Convention in 2010. The Hague website does not list any Caribbean jurisdictions as parties to the Hague International Recovery of Child Support Convention.} For child custody orders not coming within one of the International Child Abduction Acts, the recognition and enforcement issues are determined by the common law and, as with child support orders, child custody orders are not the type of order that normally will be recognized and enforced under the common law.

B. Issues With Regard to Current Law

As the above discussion illustrates, the current law in the Commonwealth Caribbean with regard to recognition and enforcement of both child support and child custody orders needs improvement. With regard to child support orders, a number of Commonwealth Caribbean jurisdictions continue to apply common law principles that deny recognition and enforcement to these orders. In those jurisdictions that have Reciprocal Maintenance Orders Acts the situation is better. These Acts, however, are somewhat out of date, having been developed in the 1920s, and their reciprocity requirement, which requires official governmental action with regard to each determination of reciprocity, has led to their somewhat piecemeal application. For example, the Jamaican Act grants reciprocal treatment to only three U.S. states – Maryland, New Jersey and Florida – although all U.S. states, including the U.S. Virgin Islands, provide a registration system that would allow registration of Jamaican child support orders. With regard to orders originating in those jurisdictions that have not been granted reciprocating status, common law principles denying recognition and enforcement apply.

With regard to child custody orders, the statutory scheme under the International Child Abduction Acts is more widespread among Commonwealth Caribbean jurisdictions, but it also is focused only on the aspects of the recognition and enforcement issue that deal with the problem of child abduction. It would answer the question of whether a child removed from the jurisdiction of the child’s habitual residence in violation of a child custody order must be returned to that jurisdiction, but it would not address the question of whether a parent with a
valid child custody order in one jurisdiction could move with the child to another jurisdiction with confidence that the parent’s custody rights would be recognized in the second jurisdiction. As with the child support order situation, the common law is not helpful.

The problems created by the lack of a uniform, effective system for recognition and enforcement of child support and child custody orders among the Caribbean jurisdictions are exacerbated by the degree to which these jurisdictions, while governed by different laws, are socially and culturally interconnected. Dispersal of families across international boundaries in the Caribbean is a frequent occurrence. There is also significant movement between the Caribbean jurisdictions and the U.S. states.

C. Can These Issues Be Effectively Addressed by Harmonization?

The Working Group concluded that harmonization of the law on recognition and enforcement of child support and child custody orders among Caribbean jurisdictions and U.S. states could significantly improve the law in this area. Currently, there is no effective, uniform scheme for recognition and enforcement of child support and child custody orders either among the Commonwealth Caribbean jurisdictions or between those jurisdictions and the U.S. states, despite the free flow of people among those jurisdictions. A harmonization project establishing uniform principles acceptable to all jurisdictions with regard to the basis for recognition of these orders and the procedure for registering them would help bring certainty and predictability to this area. In addition, while our initial research indicates that there are some differences with regard to the way child support and child custody determinations are made in the Commonwealth Caribbean jurisdictions and in U.S. states, there does appear to be a sufficient commonality in the underlying substantive law on these issues to make a scheme for mutual recognition and enforcement a viable proposition. Finally, the Working Group, and, particularly its Commonwealth Caribbean members, felt that a harmonization project could provide an important opportunity for Commonwealth Caribbean jurisdictions to consider alternatives to certain aspects of their current law in this area, such as the reciprocity requirement.

D. Appropriate Scope for a Harmonization Project

The Working Group also considered the appropriate scope for a harmonization project. The discussion focused primarily on whether the project should be limited to either recognition and enforcement of child support orders or recognition and enforcement of child custody orders, or whether both types of orders should be included. There was general agreement among the Working Group that, if the project were limited to only one type of order, it was more important to address recognition and enforcement of child support orders. There was also a strong feeling, however, among some of the Commonwealth Caribbean members of the Working Group that the project should deal with both types of orders, and that a project addressing both support and child custody orders would not involve significantly more work than one dealing only with child support orders. In this regard, it was noted that, while many courts in U.S. states treat the issues of child support and child custody separately, Commonwealth Caribbean jurisdictions deal with both issues together in the same proceeding.
The Working Group ultimately decided to leave the issue for determination by the Joint Study Committee, if one is appointed. The Working Group felt that the Joint Study Committee would be in a better position after further research to decide the relative merits of a project dealing only with recognition and enforcement of child support orders versus one addressing child custody orders as well.

E. Which Jurisdictions Should Be the Focus of Harmonization Efforts?

The Working Group decided that the appropriate Caribbean jurisdictions to include in the harmonization efforts at this time would be the Commonwealth Caribbean jurisdictions. Because these jurisdictions share a common law legal background with each other and with the U.S. states, the Working Group felt that these jurisdictions would have similar law and similar issues with regard to recognition and enforcement of foreign child support and child custody orders.

F. Organizations and Interested Parties that Might Participate or Provide Information

The Working Group believes that participation by the Canadian provinces in this harmonization project would enhance its value and effectiveness. Our initial research suggests that similar issues and problems to those describe in this Report with regard to U.S. states likely exist between Canadian provinces and the Commonwealth Caribbean with regard to recognition and enforcement of child support and child custody orders. Further, participation by Canada would provide an opportunity for Canadian provinces and U.S. states to further harmonize their law in this area. A representative of the Uniform Law Conference of Canada already is participating in Working Group 4, dealing with the analogous issue of recognition and registration of foreign country money judgments. The Working Group thus strongly recommends that the Uniform Law Conference of Canada be asked to participate in the Joint Study Committee, if one is appointed.

In addition, CARICOM might be a resource. CARICOM drafts model legislation for the Caribbean region with a focus on creating a single market economy. CARICOM has drafted model legislation on recognition and enforcement of maintenance orders, which is similar in its provisions to the Reciprocal Maintenance Order Acts discussed above. It, thus, appears to have an interest in this area.

III. Recommendation

For the reasons discussed above, Working Group 2 recommends that a Joint Study Committee among representatives of the Commonwealth Caribbean jurisdictions and the U.S. Uniform Law Commission be formed to consider whether a Joint Drafting Committee should be appointed to draft principles to harmonize the law among these jurisdictions with regard to recognition and enforcement of foreign child support and child custody orders, with the appropriate scope of that project to be determined by the Joint Study Committee. The Working
Group further recommends that the Uniform Law Conference of Canada be invited to participate in this project.
APPENDIX A

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¹ Foreign Judgment (Reciprocal Enforcement) Act
² Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act
³ Judgment Extensions Act
⁴ Maintenance Orders (Reciprocal Enforcement) Act
⁵ Maintenance of emigrants’ Children Act
⁶ Reciprocal Enforcement of Maintenance Act
⁷ International Child Abduction Act