

Memorandum

To: Drafting Committee for the Uniform Collaborative Law Act

CC: Observers and Dennis Cooper, Style Committee liaison

From: Andrew Schepard

Re: Choice of Law Provisions for the UCLA

Date: July 27, 2009

Summary

I recommend that the following new provisions (with a comment for new Section 22) be included in the UCLA version to be reviewed by the Style Committee. They are based on identical provisions in the Uniform Trust Code (2005), as adapted for the UCLA. The separately enclosed Proposed Additional Statutory Revisions indicates where the proposed new provisions will be inserted in the UCLA. I will renumber sections appropriately after the insertions. I will also insert the new comment in the appropriate place in the next round of revisions.

Proposed New 2(14) (to be inserted in version sent to Style):

(14) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

Proposed New Section 22(to be inserted in version sent to Style):

GOVERNING LAW. The meaning and effect of the terms of a collaborative law participation agreement are determined by:

(a) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(b) in the absence of a controlling designation in the terms of the collaborative law participation agreement, the law of the jurisdiction having the most significant relationship to the matter at issue.

Proposed Comment to new section 22 (to be inserted in the draft to be sent to Style).

Comment

This section provides rules for determining the law that will govern the meaning and effect of particular collaborative law participation agreement terms. The law to apply to determine whether a participation agreement has been validly created is determined under Section 4.

Paragraph (a) allows parties to select the law that will govern the meaning and effect of the terms of the collaborative law participation agreement. The jurisdiction selected need not have any other connection to the agreement. The parties are free to select the governing law regardless of where the agreement was signed, the parties reside, or the events giving rise to the matter submitted to a collaborative law process took place. This section does not attempt to specify the strong public policies sufficient to invalidate parties' choice of governing law. These public policies will vary depending upon the locale and may change over time.

Paragraph (b) provides a rule for collaborative law participation agreements without governing law provisions – the meaning and effect of the agreement's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the agreement's creation, the domiciles and places of business of the parties, and where the events giving rise to the matter submitted to a collaborative law process took place. *See* Restatement (Second) of Conflict of Laws §§ 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6 (1971).

Reporter Comment

Commissioner Jack Burton made the suggestion to include a choice of law provision in the UCLA based on a similar provision in the Uniform Trust Code during the ULC meeting. I received the suggestion too late to include it in the draft approved by the ULC.

Upon reflection, I think Commissioner's Burton's suggestion is a good one for the following reasons:

- (1) Collaborative law participation agreements are contracts and in general terms it is good contract drafting to include a choice of law clause in an agreement;
- (2) As use of collaborative law grows, more and more participation agreements will involve parties and matters in different states, creating choice of law issues;
- (3) The proposed new section will remind participation agreement drafters to include choice of law provisions in their agreements;
- (4) The proposed section will also reduce uncertainty about the rules of law applicable to determine choice of law problems in participation agreements when they arise.

For all of these reasons, I would have recommended that a choice of law provision be included in the UCLA had the suggestion been made earlier.

I realize that it may be a bit late in the process to add a new provision to the UCLA. I do not, however, think that the proposed new section is controversial- it is a restatement of standard choice of law doctrine. Moreover, the language of the proposed section has been approved by the ULC when it approved the Uniform Trust Code.

In the alternative, I can simply refer to choice of law principles in the commentary. The enclosed August 2009 Complete Draft does so on page 34 of the Prefatory Note and in the comments to sections 4 and 21. I think, however, that the issue is potentially important enough that a statutory provision is preferable.

The proposed new definition of "State" is taken verbatim from the Uniform Trust Code and is also not controversial. It is necessary to make sense of the proposed new choice of law section.