MINUTES OF THE JOINT EDITORIAL BOARD ON UNIFORM FAMILY LAW

Chair Barbara Atwood called the meeting of the Joint Editorial Board on Uniform Family Law to order at 9:00 a.m. on Friday, November 18th at the Palomar Hotel in Chicago, Illinois.
Those in attendance were:

Barbara Atwood, Chair ULC JEB Family Law
Bill Barrett, ULC Commissioner
Mike Coffee, U.S. Dep't of State, Office of Private Int'l Law
Linda Elrod, Reporter ULC JEB
Melissa Kucinski, ABA Delegate
Kit Peterson, AAML
Stacy Platt, AFCC
Suzanne Reynolds, ULC Commissioner
Sam Schoonmaker, ABA
Harry Tindall, ULC Commissioner
Nancy VerSteegh, AFCC
Linda Lea Viken, AAML

Lisa Karzai, ULC Executive Director, and Lindsay Beaver, Legislative Counsel, alternated between our meeting and other ULC proceedings at the hotel.

Barbara opened the meeting by reminding members of the purposes of JEB:

- Promote education of the bar and public with respect to family law acts
- Provide timely reports to the respective organizations on board activities
- Review unofficial amendments proposed to the acts
- Review court decisions interpreting the acts
- Publish commentary or arrange for articles to encourage uniform interpretation of the act
- Vet proposals for drafting projects and study committees for new uniform family laws.

To provide an example of the commentary function, Barbara handed out a 2011 Report of the Permanent Editorial Board for the Uniform Commercial Code with special commentary on the UCC on Mortgage Notes. There was some discussion if we could, or should, be doing such commentary on any of the family law acts. The Uniform Commercial Code Editorial Board has one act; the Joint Editorial Board Uniform Family Law, however, has numerous family law acts to keep any eye on. Barbara mentioned that there have been questions about where commentary might be published or made accessible. Liza mentioned that the ULC website is undergoing revision and that there may be a more obvious place for such commentary to be published in the future.

Harry Tindall moved the minutes of the 12/12/2015 meeting be approved as circulated. The motion was seconded and passed.

1. **Update on International Developments**

Mike Coffee reported on international developments.

a. *Child Support Convention*

The President signed the instrument of ratification for the Hague Convention on Interstate Enforcement of Child Support and Other Forms of Family Maintenance on August 30, 2016. The instrument was deposited on September 7, 2016 and will enter into force January 1, 2017. Mike thanked Lindsay, Lisa and ULC staff for working to get UIFSA 2008 amendments passed in all 50 states. There was some discussion of how the United Kingdom post Brexit will deal with all of the treaties signed by the EU, including this one.

b. *Child Protection Convention*

The United States signed it in 2010 but has not yet ratified it. The ULC did amend the Uniform Child Custody Jurisdiction and Enforcement Act in 2013 to allow for ratification. The State Department is working on a transmittal package, including legislative issues. No states have adopted the amendments. Mike noted that the Convention is complicated and has not yet been pushed forward. There is still a need to find an incentive for states to want to enact the amendments, such as a conditional spending or conditional preemption mechanism.

c. *Hague Conference on Private International Law Issues*

(1) Status of Children/International Surrogacy Agreements

In 2015, Council authorized convening an Experts' Group to explore the feasibility of advancing work in the area of private international law issues surrounding the status of children, including issues arising from international surrogacy agreements. In particular the Group looked at the legal status of children in cross-border situations, including those born as a result of international surrogacy agreements. The Experts' Group met in February 2015 and will meet again in early 2017. The State Department convened two meetings on the topic in February and September. Mike noted that the Hague has broadened the scope to look at parentage more generally – surrogacy is one part of it. It is still in nascent stages. There is not much clarity yet.

(2) Recognition and Enforcement of Civil Protection Orders

The Council has invited the Permanent Bureau to continue exploratory work in the field of protection orders.

(3) Recognition and Enforcement of Voluntary Agreements

In 2015, Council invited the Permanent Bureau to circulate a questionnaire and to convene an Experts' Group to consider the role the existing conventions can play. The Experts' Group recommended, among other things, that a "navigation tool" be developed to provide best practices on how a voluntary agreement might be recognized and enforced pursuant to existing conventions. In 2016, the Council asked the Permanent Bureau to develop such a navigation tool.
Linda Elrod mentioned that she had recently read an interesting article on how to write premarital and marriage agreements in such a way that they could be enforced in Islamic countries. See Kristine Uhlman & Elisa Kisselburg, *Islamic Shari'a Contracts: Pre-Nuptial and Custody Protections*, 10 J. CHILD CUSTODY 359 (2013).

(4) Guide to Good Practice – Abduction Convention's Grave Risk Exception – work continues.

(5) Unmarried Couples

Council invited the Permanent Bureau to continue to develop questionnaire on private international law issues relating to cohabitation outside marriage, including registered partnerships. The Report is due in 2017. A questionnaire has been circulated.

2. Enactment Status of Approved Family Law Acts

UIFSA – all 53
UCCJEA – 49
Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (2000)(2002)- 21
Uniform Collaborative Law Rules/Act – 16
Uniform Child Abduction Prevention Act – 15
Uniform Deployed Parents Custody and Visitation Act – 12
Uniform Parentage Act (2000) – 11 jurisdictions
1973 Act – about 17 jurisdictions
Family Law Arbitration – two introductions for 2017
Premarital and Marital Agreements Act – 2
Marital Property Act – 2

3. Update on Current Drafting Projects

a. *Uniform Parentage Act Revised*

Harry Tindall reported on the Parentage Act drafting committee. Jamie Pederson is Chair; Courtney Joslin is Reporter. While its original purpose was to conform the

Parentage Act to post *Obergefell,* it now has three goals: The Parentage Act Revised should:

- extend parentage provisions to same-sex couples, married and unmarried;
- revise and update provisions applicable to assisted reproduction, including surrogacy; and
- provide for the child's right to genetic information.

Executive committee approved the broader revision. Extending parentage provisions to same-sex couples includes provisions for marital presumptions, holding out, de facto parentage, and other scenarios. The de facto parent, as of the current draft, is someone who with the consent of the parent and during the life of the parent assumes a parental role to the child.

Currently California, Delaware, Maine, and a few other states and North Carolina recognize de facto parents as full legal parents…same as adoption. The huge Issue with de facto parents is numerosity – can you have more than two legal parents? If a person is a full legal parent, that would pose potential problems for intestacy. The UPAR may require adjudication as a de facto parent before the child turns the age of majority and before the death of the alleged de facto parent. The child's rights to assert a claim of de facto parentage is unresolved.

The issue of voluntary acknowledgment of paternity is also being addressed by the UPAR Drafting Committee. It is an issue for couples who have not married but do have a child together. About 40.4 percent of children are born out of marriage. Acknowledgment creates a presumption, but only a court can make an adjudication.

The Drafting Committee is also grappling with the child's right to genetic information in surrogacy and other assisted reproduction techniques.

b. *Nonparental Custody and Visitation Act*

This drafting process is still struggling a little. The project began prior to Obergefell and the legalization of same-sex marriage. It also has encountered challenges because of the evolving status of parents and the *Troxel* overlay. Additionally, the Parentage Act will be incorporating the de facto parent doctrine. To avoid confusion, the Nonparent Custody and Visitation Act should probably avoid using that term.

Currently a nonparent might be a grandparent or other relative, stepparent, cohabitant, or other person who has a substantial relationship with the child. There may be two different categories. One would require the nonparent to show the child would be harmed by not maintaining the relationship, and the other category would not require a showing of detriment in order to have access, such as a grandparent. The challenge is identifying who these people are. How long does it take for a bonded relationship to be created? What about a stepparent who is divorced from a legal parent? What about

visitation post-adoption? The committee will need to consider whether there are some res judicata issues on custody post-adoption. Members of the JEB viewed the project as important but extremely challenging because of the range of situations that must be addressed.

c. *Technical amendments to ULC Acts after Obergefell v. Hodges* (U.S. 2015)
Barbara reported that the Committee, headed by Gail Hagerty, has identified several uniform acts that need to be revised to accommodate the reality of same-sex marriage. This revision process is non-substantive and generally involves substituting the word "spouse" for "husband" and "wife."

4. *Discussion items referred from Scope*

a. Review of Uniform Adoption *Act*

The Joint Editorial Board thinks the UAA should be retired because of the following problems:

(1) Outdated in terms of its approach to open adoption

(2) Presumes male/female marriage

(3) Has its own intercountry adoption provision because it was finalized before ratification of the Hague Adoption Convention

(4) Tracks UCCJA rather than UCCJEA and does not prioritize home state jurisdiction

(5) Does not authorize open adoption with enforceable post-adoption contact orders except in context of stepparent adoption

(6) Act is quite traditional

(7) The Interstate Compact on Placement of Children has been amended.

Reporter Elrod suggested that the UAA be put on the shelf because it is out of date and no state in 22 years has attempted to enact it. She suggested that UCCJEA should be amended so a "child custody proceeding" would include adoption. Bob Spector, the Reporter for the UCCJEA, has indicated that adoption was omitted from the definition of "child custody proceeding" under the UCCJEA because of the existence of the UAA and its jurisdictional language. He would favor amending the UCCJEA to include adoption. (Email from Robert G. Spector, November 18, 2016).

Harry moved that we recommend to Scope that UAA be removed as an act of the conference. Linda Lea seconded the motion. The vote was unanimous.

It may be time to reconsider whether the UCCJEA should be amended or whether a comment should be written about adding adoption as a proceeding controlled by the jurisdictional provisions of the UCCJEA. There were other suggestions for commentary because of disagreement among the states as to whether UCCJEA covers termination of parental rights without personal jurisdiction over the parent. No decision was made as

to whether to write a commentary. Rather, the JEB formed an internal study committee to consider whether to recommend that adoption be included in the definition of child custody determination under UCCJEA or to develop a commentary to that effect.

Members of JEB study committee: Atwood, Elrod, Coffee, Spector. We will meet telephonically and come back to the JEB with a recommendation in the Spring 2017.

b. *Proposal about ULC drafting an act on forced marriage.*

The International Academy of Family Lawyers passed a resolution to support legislative efforts to end forced and child marriage. Nancy Berg Zablosky and Anne Marie Hutchinson were involved. The United Kingdom has a Forced Marriage Prevention Act. This is a serious topic for immigrant people. The discussion among JEB members noted that uniform laws with criminal or regulatory features are difficult to enact. We decided to hold off on any recommendation and to wait to see how the Child Sex Trafficking Act starts working. No action was taken.

c. *Proposal about a Study Committee on Foster Children Reaching the Age of Majority*

James Bristol sent a letter requesting that the ULC take up a project to create uniform law regarding financial support for children who age out of foster care. He provided research on the laws in the various states governing the provision of financial support for young adults in foster care who have attained the age of majority, as well as federal laws that provide funding. The submission details the various state approaches from all funding ending at the age of majority to funding going post-majority if the child is enrolled in certain programs. Without the support of family, these children aging out of foster care often become homeless, engage in criminal activities, or otherwise fall through the cracks. A uniform law on foster care and child services would fill an emergent need and modernize what has become an antiquated concept – the readiness of youth to assimilate into adulthood upon reaching the age of majority.

Bill Barrett supported the proposal to appoint a Study Committee for children aging out of foster care. The strong consensus was to recommend a study committee.

d. *Report on Proposal regarding visitation of incapacitated adults.*

Last year this proposal came before us (Peter Falk). We suggested that there was a drafting committee for the Revised Uniform Guardianship and Protection Proceedings Act which could appropriately address the issue. We reviewed the work of the UGPPA and think they have adequately covered it. Harry suggested that we thank them for their work and for addressing the concerns.

There was some discussion of the intersection of nonparental custody and minor guardianships. David English is chair of the UGPPA Committee. The standards for standing differ in the two contexts. Also, the probate code requires a finding of unfitness or inability to parent for an involuntary guardianship to be established, while nonparental custody/visitation ordinarily would be determined according to the child's best interests. The Nonparental Custody and Visitation Act Drafting Committee needs to remain in touch with the UGPPA Committee.

5. Discussion items referred from other ULC Commissioners or Committees

a. Unilateral waivers of marital rights

Under UPC 2-213, a spouse may make a unilateral waiver of his or her right of election subject to certain conditions relating to conscionability, disclosure and voluntariness. An amendment has been proposed that would require all waivers to meet the same standards as those of the UPMAA for waivers of marital rights. A unilateral waiver is a waiver of marital rights that is signed only by the waiving party and is not part of a premarital or marital agreement. There was discussion as to whether the PMAA should make a clearer statement that marital rights cannot be waived by a unilateral waiver.

The consensus of the JEB was that an amendment to UPMAA is not required. The UPMAA is limited to actual agreements between the parties. Under the UPMAA, unilateral waivers of marital rights would not be enforceable. Colorado has covered this by statute and provides that any affirmation, modification or waiver of a marital right or obligation must comply with the Colorado UPMAA. COLO. REV. STAT. 15-11-207.

b. Uniform Voidable Transactions Act

Harry was concerned about fraud in the marital context, choice of law rules, and the Uniform Voidable Transactions Act. The discussion, however, showed that the UVTA is unlikely to cause problems in the marital context. Its provisions will apply to a creditor's efforts to retrieve assets from a transferee, not to disputes between spouses.

6. Proposals for new study/drafting committees

a. Economic Rights of Unmarried Cohabits Act

Last year the JEB recommended a study committee on the economic rights of unmarried cohabitants. Scope approved it but the Executive Committee voted it down. Tom Gallanis, the head of the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) has suggested that the JEB-UFL cosponsor a renewed recommendation this year with them. There was much discussion on the various ways states handle property when cohabitants split up – from not recognizing the relationship and any common law rights

in Illinois to partnership, inherent equitable powers, and almost full marital status if the parties can prove they are committed intimate partners in Washington.

There were discussions about common law marriage, de facto marriage, registration procedures and other common law remedies. Many were uncomfortable with a de facto marriage approach. Questions arise whether there should be an opt in or easy opt out on economic right provisions. With over eight million people cohabiting and the law in disarray, the JEB UFL decided to join with the JEB-UTEA to recommend again that a study committee be formed to at least look at the possibility of a uniform law.

b. Proposal on Child Custody Evaluators

California and Texas have statutes on qualification, training and contents of reports of child custody evaluators. AAML and AFCC have developed standards, including most recently requirements for screening for intimate partner violence. Kit voted to have it studied; Harry seconded but then the vote was to table this for perhaps an internal JEB study committee. JEB members noted that the ULC, unlike the AAML or the AFCC, does not generally promulgate professional standards.

c. Putative father registry

All agreed there needs to be a federal or national putative father registry. About 33 states currently have putative father registries, but without a federal or national registry, you have to inquire into all of them to ensure that men who have registered are contacted before an adoption goes forward. Courts need to talk to each other as under UCCJEA. JEB was sympathetic to the proposal, which we reviewed last year as well, but we believe a uniform law in this area would not solve the problem. A mandate from the federal government, perhaps through conditional spending, is the only way an effective national registry could be established. .

7. Reporter's Report on Cases

The Reporter submitted five cases for the JEB to review.

Emergency jurisdiction ends when the court ordered time expires or when the court in the state with appropriate jurisdiction acts, whichever comes first. A Kansas court assumed temporary emergency jurisdiction over child for period of six months, and adjudicated child as child in need of care. Following expiration of six-month period, the mother moved to extend the period. The Kansas Court of Appeals found that the mother was required to get an order from the Nebraska court which had exclusive, continuing jurisdiction. In re N.U., 369 P.3d 984 (Kan. Ct. App. 2016).

A Kentucky appellate case noted that before dismissing a case, the trial court should have asked the decree state to relinquish jurisdiction. The father, with whom the child had lived

in Kentucky for six years, filed motion to modify Nevada custody order. The trial court dismissed the case because Nevada, as the decree state, retained exclusive, continuing jurisdiction. Kentucky was now the home state with relevant information about the child's care. The appellate court found dismissal was not the only option. "Under the carefully crafted provisions of the UCCJEA, prior to dismissing for want of jurisdiction, the Boyd Circuit Court is authorized to request that the Nevada court consider "declin[ing] to exercise its jurisdiction ... if it determines that it is an inconvenient forum under the circumstances and that [the Boyd Circuit Court] is a more appropriate forum." Therefore, the Kentucky court should have asked the Nevada court to decline its jurisdiction. Ball v. McGowan, 497 S.W.3d 245 (Ky. Ct. App. 2016).

A recent Arizona case correctly applied the UCCJEA in international context. When a foreign country makes a child custody determination, and it has jurisdiction by virtue of being the home state of the child under factual circumstances in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), that custody determination must be enforced. Even though the law of jurisdiction in Mexico is different (relying on domicile), Mexico was the child's home state where the child had lived in Mexico for approximately ten months when father initiated custody proceedings in Mexico, and child's ten months in Mexico could not be considered a temporary absence from the state. Mexico, and not California, had exclusive jurisdiction. *In re* Marriage of Margain and Ruiz-Bours, 372 P.3d 313 (Ariz. App. 2016).

Inconvenient forum

Can a stay impliedly decline jurisdiction based on an inconvenient forum? Two states have said yes. In a Texas case, the failure of Florida courts to respond to inquiries from Texas, led to implied declining of jurisdiction. A judgment entered in a paternity action in Florida was an initial child custody determination. The parties' settlement agreement allowed mother and children to reside in Texas. Texas determined that Florida was an inconvenient forum to modify custody of children who had been residing with their mother in Texas for two years. Failure by Florida court to respond at all to Texas court's inquiries regarding its continuing jurisdiction over child custody issues (over 6 months or to rule on biological father's motion to reopen his paternity judgment (8 months) constituted implicit or implied determination that Florida court would decline to exercise its continuing jurisdiction over custody of children and that Texas was more convenient forum. "To hold otherwise would undermine the purposes of the UCCJEA. The comments to the UCCJEA state that the "Act should be interpreted according to its purposes which are to: ... [p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child" and to promote consistent and speedy resolution of child custody issues involving multiple states." In re T.B., 497 S.W.3d 640 (Tex. App. 2016).

In a California dependency case, however, Japan was "deemed" to have declined to exercise jurisdiction on the grounds that California was a more appropriate forum. The mother's home state was Japan. Judges from a Japanese family court and the Supreme Court

of Japan refused to participate in informal discussions of the issues in the case with the California judge on the basis that such contacts were not permissible in the Japanese legal system. California had significant connection and there was substantial evidence there. The domestic violence incident took place in California, minor and both parents lived there and father was currently stationed in Navy there. Any error in the California juvenile court's failure to allow for more than a month for a family court in minor's home state of Japan to respond to a letter in which the California judge requested an informal discussion of whether California was "the more appropriate forum" under the UCCJEA, or in the California judge's letter's failure to warn the Japanese judges that a failure to respond would be treated by the juvenile court as a declination of jurisdiction, was not prejudicial as to the California court's assumption of permanent jurisdiction and jurisdictional finding against mother. In re MM., 192 Cal. Rptr. 3d 849 (Ct. App. 2015). This case is a bit more troubling due to the cultural differences. It is one thing to not respond when you can. It would appear to be another issue when the law, rules or culture prohibit such communication.