

Minutes of the Joint Editorial Board on Uniform Family Laws

The Uniform Law Commission Joint Editorial Board for Uniform Family Laws met on Tuesday, March 24, 2020, on a Zoom conference call at 3:00 p.m. CST. Barbara Atwood, Chair, welcomed members, advisers and observers to the meeting, expressing sympathy and concern for all who are under quarantine and working from home during this world-wide pandemic of COVID-19. Those present included:

Hon. Dianna Gould-Saltman, AFCC
Melissa Kucinski, ABA
Paul Kurtz, ULC Commissioner
Sam Schoonmaker, ABA
Linda Lea Viken, AAML

Barbara Atwood, ULC Chair, JEBUFL
Linda Elrod, Reporter JEBUFL

Mike Coffee, U.S. Department of State, Treaties
Courtney Joslin, AALS Liaison
Joseph Booth, ABA former Observer to UIFSA and other ULC projects
Harry Tindall, JEBUFL Chair Emeritus
Tim Schnabel, Executive Director of Uniform Law Commission
Lindsey Beaver, ULC Legislative Counsel

Minutes of December 2019 JEB Meeting in Washington D.C.

The minutes were approved as circulated.

Review of JEB Recommendations from 2019 Meeting

1. Amending the Premarital and Marital Agreement Act.

The JEB had noted concerns with lack of enactments for the UPMAA- only two states. Linda Ravdin had compiled a list of current state approaches to marital agreements. The UPMAA would change the criteria for enforceability of post-marital agreements in at least 40 states, particularly with respect to the requirements governing access to counsel and notice of waiver of rights. The JEB proposed reviewing the UPMAA to determine if revising the standards governing post-marital agreements would result in greater acceptance and more enactments. Barbara received a letter from the Scope and Program Committee sending our proposal back to us to consider “these contracts more broadly.” Scope seems to be concerned with the overlap with the ongoing Economic Rights of Unmarried Cohabitants project. While some cohabitants’ contracts might meld into premarital agreements if the parties ultimately marry, the possibility of overlap did not seem problematic to the JEB members. We will reconsider this proposal next fall.

2. The Scope and Program Committee did accept our recommendation to create a study committee to consider an update to the Uniform Health Care Decisions Act to include considerations of decision-making by the mature minor and to expand the list of default surrogate decision-makers to include domestic partners, civil union partners, and other close relationships. Linda Lea Viken has worked with this issue in her state and is interested in serving as an observer on that study committee.

Review of Ongoing Drafting Projects

1. Economic Rights of Unmarried Cohabitants

The JEB members reviewed the March draft that was the basis of the ERUC drafting committee Zoom meeting just a couple of days before our meeting. The draft includes the usual contract and equitable remedies many states currently allow and a special, more robust, equitable remedy (Section 111). The drafting committee decided to permit contract and ordinary equitable claims by and against cohabitants who happen to be married to other people. While the drafting committee is concerned about protecting spousal rights, they tentatively agreed to look to existing law to address those concerns. Doctrines that penalize an individual for dissipating community or marital assets, for example, can be relied on if a cohabitant has used property to the disadvantage of the cohabitant's spouse.

Courtney and Harry expressed some concern with the draft's imposition of a heightened burden of proof for oral or implied contracts. Most cohabitant claims (usually asserted by women) currently fail even when a preponderance of evidence is the standard. We discussed the issue and questioned whether there was any basis for exhibiting hostility toward cohabitant claims in general. As the draft now stands, the heightened burden applies to oral and implied contracts as well as to the special equitable remedy. The consensus of the JEB was that the original proposal for drafting a uniform law on cohabitants' economic rights was intended to create clarity and to facilitate broader recognition of remedies. The current draft appears to go in the opposite direction, at least with respect to oral and implied contracts.

The JEB members voted to register opposition to the current draft's heightened burden for asserting claims based on oral and implied contracts. While other aspects of the current draft may also raise concerns, the consensus of the JEB was that its communication to the ERUC drafting committee should focus on burden of proof. Barbara agreed to communicate the JEB's position to the chairs and reporter of the ERUC drafting committee.

2. Uniform Disposition of Community Property at Death Act

This committee is important and moving forward with its work. Barbara and Harry are members of the drafting committee. It will have its first reading at the 2020 ULC annual meeting.

3. Unregulated Transfer of Adopted Children Act

The committee has met and was supposed to have its final reading this summer at the 2020 ULC annual meeting. The Act originally had two purposes – to require that comprehensive

information and preparation be provided to prospective adoptive parents before they enter into high-risk adoptions, especially international ones, and (2) to prohibit the unregulated transfers of adopted children. At its drafting committee meetings in 2019 and 2020, the drafting committee decided to expand the Act to include unregulated transfers of any child, since unregulated transfers harm biological children just as much as adopted children. This will be a bigger project, and the project will be carried over for another year to ensure that all stakeholders have an opportunity to weigh in.

Reporter's Comments on UIFSA/FFCCSOA Conflict

Reporter Linda Elrod prepared a paper for the December meeting on the interface between the Uniform Interstate Family Support Act (UIFSA) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA). The controversy concerns the “play away” rule under UIFSA that defines and limits the modification jurisdiction of state courts. A party seeking to modify an out-of-state order must either file the action in the other party’s state of residence or the other party must consent to the jurisdiction of the moving party’s state. Section 611(a)(1). FFCCSOA requires that a modifying state have jurisdiction under its own law, but it does not expressly include the “play away” rule. Several state courts have concluded that the term “jurisdiction” includes jurisdiction to modify under UIFSA, but two courts have found that FFCCSOA requires only personal jurisdiction and preempts UIFSA. The JEB, which includes members and observers from the UIFSA drafting committees, agreed that there was no intent for the two acts to conflict. There needs to be more information available to judges, lawyers, child support workers, and others because UIFSA should control and works well. States should be encouraged to construe the two acts as consistent rather than follow the minority view that FFCCSOA conflicts with and preempts UIFSA.

Linda’s commentary noted that both UIFSA, which is state law, and FFCCSOA, which is federal law, have their roots in recommendations of the U.S. Commission on Interstate Child Support and were intended to be compatible. The Interstate Commission encouraged the National Conference of Commissioners on Uniform State Laws (NCCUSL) to scrap URESA and enact UIFSA in 1992. Two years later, at the urging of the Commission, Congress enacted the Full Faith and Credit to Child Support Orders Act of 1994 (FFCCSOA) to ensure that states would recognize and enforce child support judgments of other states. The Interstate Commission also supported the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) which mandated that all fifty states enact the 1993 UIFSA and the 1996 amendments by 1998 as a condition of welfare funding and also made some amendments to FFCCSOA to align it with UIFSA. In 2014 FFCCSOA was amended again as Congress mandated that all states adopt the Revised UIFSA 2008. All states have.

The JEB agrees that FFCCSOA should be interpreted as consistent with UIFSA and that the term “jurisdiction” in the modification section should be read as both personal and subject matter jurisdiction under state law – which is UIFSA. In light of the controversy, however, the JEB also favors Congressional action to amend FFCCSOA to avoid future controversy. The JEB discussed a couple of other ways to approach the issue because it is unlikely Congress is going to act. One solution is to post the paper but modify it to a simple question and answer type of format. Another suggestion is to identify additional publication avenues to get the word out, such

as short articles in child support publications, judges' journals, and family law newsletters. Linda will continue to explore avenues for publicizing the JEB's position.

Proposals for New Uniform Law Projects

1. Uniform Court Programs and Procedures to Respond to Emergency National Crises

Sam Schoonmaker and Melissa Kucinski have noted that the COVID-19 virus has created chaos in the court systems around the country. Social distancing, mandatory shelter in place orders, and quarantines prevent courts from operating as usual. There are varying approaches within the same state as to what is happening. They suggested that uniform or model standards would help during circumstances when it is impossible for courts and states to follow normal procedures in family law cases. For example, uniform standards might guide states on how to address domestic violence and other urgent proceedings when courts are partly or completely closed. If courts cannot hear family matters for many weeks or months, how should they prioritize the order in which family matters will be heard when courts reopen? How should courts resolve issues relating to child support, parenting, or contempt that are time sensitive but may not be viewed as urgent? What procedures should courts have to approve agreements between the parties? What is the appropriate balance between practicality and due process rights during an emergency? What considerations should there be for the safety of judges, lawyers and litigants? What role can videoconferencing play? How should existing orders be enforced?

Sam moved that the JEB recommend to the Scope and Program Committee that a study committee be appointed to consider creating uniform court programs and procedures in times of national emergency. Dianna seconded. The motion carried. Sam and Melissa volunteered to help develop the proposal for consideration by Scope and Program at its July 2020 meeting.

2. Uniform Child Participation in Custody and Visitation Proceedings Act

Reporter Linda Elrod submitted the introduction of a chapter she is writing on hearing children in custody and visitation cases. She noted that the many countries and the EU have adopted the 1996 Hague Convention on the Protection of Children. That convention requires that states report on how a child's voice was heard in a custody case for purposes of inter-country recognition. The United States generally has no uniformity on children's participation in custody dispute resolution. U.S. custody orders risk not being enforced internationally if there is no record as to how the child was heard. There are many ways to hear the child's voice – including judicial interviews, actual in-court testimony, evaluations by court personnel, and other procedures. This act could offer a framework for best practices – when to allow the child to testify in court and how to protect the child; how judges can conduct in camera interviews with children; the appointment of a lawyer, either a child's attorney or a best interest lawyer; or the use of custody evaluators or other third parties to get the child's voice in the record. The JEB members generally

thought it was a good idea. Barbara, Mike, Melissa and Linda will discuss this idea and prepare a proposal for the JEB to consider at its fall in-person meeting.

3. Relocation of Children

Several years ago the Uniform Law Commission put together a study committee on Child Relocation. It held one meeting and decided not to go forward. In the last ten years, the law has settled some but is still not uniform. There may be a role for a uniform law here. Because time was running out, discussion was postponed until the in person meeting in the fall. The meeting adjourned at 4:30 p.m.