

Minutes of the Joint Editorial Board on Uniform Family Laws

The Uniform Law Commission Joint Editorial Board for Uniform Family Laws met on Friday, December 6, 2019, at the Madison, Washington D.C. Barbara Atwood, Chair, welcomed members, advisers and observers to the annual, in-person meeting at 9:00 a.m. Those present included:

Lorie Fowlke, ULC
Dianna Gould-Saltman, AFCC
Melissa Kucinski, ABA
Kit Petersen, AAML
Stacey Platt, AFCC
Sam Schoonmaker, ABA
Linda Lea Viken, AAML

Carl Lisman, ULC President (intermittent)
Barbara Atwood, ULC Chair, JEBUFL
Linda Elrod, Reporter JEBUFL

Mike Coffee, U.S. Department of State, Treaties
Sharla Draemel, U.S. Department of State, Family Law
Joseph Booth, ABA former Observer to UIFSA

For portions of meeting:

Carl Lisman, ULC President
Harry Tindall, JEBUFL Chair Emeritus
David English, Health Law Monitoring Committee; JEBUTEL
Chris Robertson, Reporter, ULC Health Law Monitoring Committee
John Collinge, attorney and advocate for reforms in end-of-life decision-making

Minutes of December 2018 and March 2019 meetings

Linda Lea Viken moved and Kit Peterson seconded the motion to approve the minutes as circulated. The motion passed.

Review of JEB Recommendations from Prior Meeting

1. Families First Prevention Services Act

Barbara discussed our March 2019 conference call during which the JEB wondered if there was a role for a uniform law in the Families First Prevention Services Act (FFPSA). Melissa Kucinski attended the D.C. conference put on by the ABA Center for Children and the Law in April 2019. She reviewed the materials and talked with people at the conference. The message from all of the panels was the law was too new for statutory implementation at the state level. No one knows

how to develop the evidence-based standards to qualify for federal funding on keeping children at home and out of foster care. Barbara noted that she is on the drafting committee for the Unregulated Transfers of Adopted Children Act and has proposed language and commentary for that act regarding post-adoption services that might qualify for federal funding under the FFPSA. She also noted that there may be an interface with the Nonparent Custody and Visitation Act – providing a safe living situation for a child without resorting to the child protection system.

2. Study Committee on Disposition of Human Embryos and Gametes at Divorce, Separation and Death

ULC did appoint a study committee in response to our 2018 JEB proposal on the topic of disposition of human embryos and gametes at divorce or death. The Study Committee had its second meeting at a Zoom conference November 13, 2019, and recommended that the ULC not appoint a drafting committee at this time. Shortly before the JEB meeting, members received the Study Committee's final report. The main problem is that there are strong voices opposed to any disposition of embryos other than implantation even if the parties agreed to discard the embryo in the event of divorce. Members of the JEB expressed disappointment. The JEB still thinks a uniform law might be helpful in this area but understands the problems of trying to enact such a law in the current political environment. Some discussion developed about whether the ABA Family Law Section which has had some luck getting ART policies through the ABA or the AAML might be able to come up with a resolution that would help. A new model act on assisted reproduction was approved by the ABA in 2019.

Review of Ongoing Drafting Projects

1. Economic Rights of Unmarried Cohabitants

The JEB members received the draft act just a couple of days before the JEB meeting. The drafting committee for the Economic Rights of Unmarried Cohabitants met in March without a draft and discussed policy and direction. The Committee is meeting December 6 and 7 here in D.C. in another room. JEB members are included as observers but are unable to attend today because of the JEB meeting. There were some JEB Concerns –

- Definition of cohabitation. One of the first issues is the current definition of cohabitant which appears to be too broad. Old friends who decide to room together to save money and share secrets could meet the definition.
- Does a presumptive equitable partnership status bring back common law marriage that all but nine states have abolished? Is this desirable? Should this status be reserved for long term cohabitation where parties have changed their economic positions in reliance on the relationship? This is the area that is likely to be the most controversial and raise the most issues. New South Wales; Ontario, Canada; and France have some forms of this status-based approach.
- No one on JEB had a problem with express contractual agreements

- What should be the basis for an implied-in-fact agreement? Is it necessary to have a child? There was some discussion that presence of children should not be the basis for creating a property right.
- There was a discussion that the unjust enrichment remedy may be the major equitable push. Kansas uses “inherent equitable remedies” which is a pretty broad brush.
- Linda Lea mentioned that the AAML has a cohabitation agreement form if it would be helpful to the committee.

Further discussion was delayed until Harry Tindall, who is also on the JEB, joined the group later in the day. Harry updated the JEB on the activities of the ERUC Drafting Committee. He explained that the Act would authorize nonmarital cohabitation agreements, but questions have arisen regarding what happens when parties marry. Formality requirements for cohabitation agreements are also an issue. Must they be in writing and signed by the parties, and can they be executed by email? There was a split over whether cohabitation laws should apply to the “polyamorous” – individuals with multiple partners. The drafting committee is split on whether the act should apply if one party is married. Additional questions include whether consideration for agreements should be required. Sex itself cannot be an essential part of consideration, but could moving in and giving up an apartment suffice? Courtney Joslin, reporter for the Uniform Parentage Act (2017), is proposing a new draft for the ERUC drafting committee based on the ALI De Facto Marriage framework. Burdens of proof are also being debated, including whether an elevated burden of proof should be required to impose equitable or status-based remedies that do not rely on the parties’ intent.

Harry encouraged JEB members to attend tomorrow’s continuation meeting of this committee. He stated the next meeting of this committee is Feb. 7-9th.

2. *Reporter’s Memo on the Uniform Disposition of Community Property at Death Act Revision Committee*

A memo from Ronald J. Scalise Jr., Reporter, suggested revisions to the Uniform Disposition of Community Property at Death Act. The 1971 Act establishes a system for non-community property states to address the treatment of property that was community property before the spouses moved from a community property state to the non-community property state. The purpose “is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their ‘community’ rights.” Seventeen states have enacted the Act. David English, Chair of the Oversight Committee, came to our meeting. He expanded on the report, indicating that much has happened since 1971, including domestic partnerships, civil unions, same-sex marriage, etc. The earlier act has some conflicting provisions as to the rights of creditors. There needs to be a section on tracing of the assets. The JEB supports the revision of this act.

3. *October 2019 Draft of Unregulated Transfer of Adopted Children Act*

The current draft discusses the two-fold purposes of the act – to provide sufficient information for high-risk adoptions and (2) to prohibit unregulated transfers of adopted children. The Reporter is suggesting separating the two functions into separate articles with clear titles to make it easier to identify and understand the two objectives of the act. The definition of “high-risk adoption” includes adoption of a child: (A) from a state child-welfare agency; (B) who had been previously adopted; (C) with a diagnosed attachment or trauma-related disorder; (D) with a physical, mental, or emotional disability; (E) with known adverse effects from exposure to alcohol or drugs; or (F) who, at the time of the adoption, was a [resident][citizen] of a foreign country. The key goal is to make sure parents get information about the risks at the time of adoption.

Questions arose during the reading at the annual meeting about whether lawyers are, or should be, included as child placing agency. The draft is intended to include lawyers and defines the duties that the lawyer must assume when serving in an adoption placement role. For example, attorneys who handle private placements have responsibility to provide information about high risk adoptions. JEB members noted that restrictions on advertising may raise First Amendment questions.

Barbara indicated that there was push back at the annual meeting because the draft created a crime on the prohibited transfer. The current draft has deleted that approach but still recognizes an unregulated transfer as child neglect or abandonment.

Survey of Family Law Enactments

The JEB materials included a current list of enactments for family laws, including:

UCAPA – 15
UCCJEA – 51 (but not Massachusetts)
UCLA 19
UDPCVA – 14
UFLAA – 3
IEDVPOA 19
UIFSA 53
UNCVA – 1
UPA (2017) – 3
UPAA – 27
UPMAA – 2
RECDVPOA 6
Model Marriage and Divorce Act 4

With respect to the UPMAA, the consensus was that part of the reason for stalled enactment is that 26 or 27 states have already enacted the Uniform Premarital Agreement Act and are comfortable with its standards. Lawyers and judges know how to apply it, and the UPMAA would expand the bases for challenging agreements in the UPAA states. In other words, the family law bar is not likely to advocate for a system that makes their drafted premarital agreements more vulnerable. In contrast, most states do not have statutory frameworks for

post-marital agreements and have varying common law standards for such agreements. The UPMAA treats both categories of agreements identically.

Linda Ravdin, the ABA Advisor for the UPMAA, compiled a statutory comparison of every state's statutory and common law in 2019 on premarital and post-marital agreements, including an assessment of how the UPMAA would change existing law. The UPMAA would change the criteria for enforceability of post-marital agreements in at least 45 states, according to Linda's research, particularly with respect to the requirements governing access to counsel and notice of waiver of rights.

Linda Elrod suggested that the JEB recommend a study committee to investigate whether drafting new standards for post-marital agreements would result in greater enactability. The JEB discussed various approaches, including revising the UPMAA to distinguish the two categories of agreement or, alternatively, to leave the UPMAA as is and to draft a new uniform post-marital agreement act. Kit Peterson moved that the JEB propose a study committee to explore these options, with the goal of producing revised standards for post-marital agreements. Linda Lea seconded. The motion passed unanimously.

Presentation from State Department Representative

Sharla Draemel, who has taken over Mike Coffee's prior position in the State Department Office of Legal Advisor working with International Family Law, discussed current projects. She said there is a working group studying recognition of Foreign Judicial Decisions on Legal Parentage. An experts group met on the topic in March at the Hague Conference. Surrogacy is the most controversial aspect. Several European countries oppose surrogacy and characterize it as the sale of children. The Hague will have to decide whether to move the project forward and hold a special session.

The Guide to Good Practice on the 13b Grave Risk Exception within the Hague Convention on the Civil Aspects of International Child Abduction was reviewed by the private advisory committee on private international law last March. The Guide will likely be adopted before March 2020.

Sharla also reported that there is continued study of Family Agreements within the international community. Enforcing voluntary agreements regarding adoption, abduction, or custody continues to present a challenge.

Sharla mentioned that people are watching the current case before the U.S. Supreme Court, *Monasky v. Taglieri*, No. 18-935, to be argued the week of December 9, 2019. The main issues are the appropriate standard of appellate review of a trial court's determination of habitual residence and the appropriate measure of habitual residence of an infant or child too young to acclimatize. The lower courts determined that Italy, the place where the child was born and where the parents resided, was the child's habitual residence and required the child's return. The American mother has argued that she left Italy to return to the U.S. to escape domestic

violence and that the parents had not agreed that Italy would be their infant's long-term residence. The State Department wrote an amicus brief on the issue of the standard of review of judicial determinations of habitual residence, concluding that determinations of habitual residence are fact-intensive and should be reviewed for clear error.

Another ongoing case of significance is *Abou-Haidar v. Sanin Vazquez*, 2019 WL 5061068 (D.C. Oct. 9, 2019). In that case, the father petitioner resides in Paris and filed for return of the child. His wife and 4-year-old are in D.C. where the family lived temporarily for mother's job. The lower court held the mother's action in filing for sole custody in the United States in May 2019 was a wrongful retention (similar to *Moses*) and granted father's petition for return.

On the International Enforcement of Child Support and Other Forms of Family Maintenance, the Hague Conference is figuring out how to facilitate alternative payment methods in light of the decreasing feasibility of relying on checks.

New Projects

1. Uniform Health Care Decision-Making Act

Professor Chris Robertson, ULC Health Law Monitoring Committee Research Reporter, spoke with the JEB via telephone about the need to revise the Uniform Health-Care Decisions Act. JEB materials included his 2018 memorandum on the UHCDA. The Act was drafted in reaction to *Cruzan v. Director, Mo. Dept of Health*, 497 U.S. 261 (1990) (holding that state's requirement that incompetent patient's wish to withdraw life-sustaining treatment be shown by clear and convincing evidence did not violate Due Process Clause). Most states enacted durable health care POA acts. At present, only 7 states have enacted the UHCDA. The key issues in the UHCDA identified by Professor Robertson are the priority list of those who can act as surrogates, residual surrogates, oral appointment, domestic partnerships, disqualification of surrogates, and scope of surrogate decisions. The JEB discussed some of the more salient needs in revising the UHCDA.

The lists of decision-making surrogates should be updated and should address the circumstance where no surrogate is available. Where no such person is available, a streamlined system should be established. Under the current UHCDA, a provider must go to court where no surrogate is available. Judicial action is cumbersome, expensive, and impractical in situations where time is of the essence. In addition, the UHCDA does not provide standards for such judicial intervention. Also, states vary widely on the validity of an oral designation of a surrogate, a method recognized by the UHCDA but not carefully defined.

Professor Robertson noted that shared decision-making is the current widely-accepted model for medical decision-making for seriously ill and incompetent patients. The concept of collective decision-making is missing from the UHCDA. There is also a need to integrate the use of popular forms, such as the Five Wishes and POLST forms, in a nationwide collaboration.

Scope of care is another issue that should be revisited under the UHCDA. At present, the Act encompasses a broad range of medical treatment, including withdrawal of life support and the imposition of mental health treatment, areas in which states differ widely. The UHCDA does not directly address treatment of terminally ill newborns, a topic about which hospital ethics committees may be at odds with parents.

The JEB noted the lack of provisions for decision-making by mature minors. The Act applies to adults and “emancipated minors,” but the statutory and common law has evolved since the Act was enacted to address the rights of the “mature minor.” Mature minors have been recognized in the context of terminally ill minors who wish to refuse treatment as well as minors’ access to reproductive health care, treatment for STD’s, and treatment for drug addiction. The trend in the law is toward greater deference to a minor’s views.

The JEBUFL recommends that the UHCDA be amended to address the areas discussed above and, in particular, to include attention to decision-making by mature minors. Lacking expertise in health care law, the JEB members opted to send its recommendation to the JEB on Trusts and Estates and to the Health Care Monitoring Committee, in order for those two groups to consider the proposal. NOTE: After the meeting, David English and Chris Robertson both recommended that we send the JEB proposal directly to Scope.

The JEB also heard a presentation from John Collinge on the “death-with-dignity” movement. The materials included a recent report from the state of Oregon on its experience with the death with dignity statutory scheme enacted in 1998. Eight states and the District of Columbia now have such statutory schemes that permit a person to obtain and self-administer lethal drugs if two physicians confirm that the person is competent and likely to die within 6 months. These laws remain controversial (John Collinge testified in favor of a similar bill in Maryland in 2019, but it failed to pass by a close margin.) Apart from being controversial, these laws also fail to provide a solution for the incompetent patient who faces a long and debilitating illness. There was little interest in including this topic as part of the proposed revision to the UHCDA.

2. Midwifery in the United States

Ginger Breedlove, PhD and Certified Nurse Midwife, submitted a comprehensive written proposal for a uniform law on the role and scope of midwifery practice to ensure public safety as well as accountability. The problem is that states vary dramatically in their licensing requirements and in the scope of practice permitted. Some states require extensive training and certification while others have no regulation whatsoever and permit anyone to advertise midwifery services. In some states, midwives can attend a birth alone while in others a midwife must be supervised by an obstetrician.

The issue goes directly to maternal health. Over the last twenty years, maternal outcomes have worsened within the United States, particularly for low-income and minority women. At present, the US has the highest maternal mortality rate (death during or soon after childbearing) of all high-income nations. Part of the problem is the increasing “medicalization” of childbirth, the overuse of C-sections, and the lack of post-partum follow up care. There is also a work force shortage by geographic region and a lack of universal access to care.

Not only does the U.S. rank the worst in maternal and infant mortality, but it spends the most money on health care relevant to birth. In England, where midwifery is highly regulated, midwives attend most births and significantly outnumber obstetricians. In the US, midwives attend only about 15% of births nationwide. Significantly, in states where midwives are used more extensively, maternal outcomes are improved.

JEB members discussed whether the regulation of midwifery was an appropriate subject for the legal profession or if it should be left to state regulators and the medical profession. Dr. Breedlove recommended that a uniform law could not only define the appropriate scope of practice for midwives but also require a certification process to meet minimum standards, leaving the details to a regulatory licensing body. There was some discussion of the JEB policy to promote uniform laws that will be of public benefit. Kit Peterson moved that due to the worsening maternal mortality rate in the U.S., we should recommend that the ULC appoint a study committee to explore the framing of minimum standards for midwifery and defining scope of care. Rather than submit the proposal to Scope, we decided to forward Dr. Breedlove's proposal to the Health Care Monitoring Committee, a group with more expertise on the topic than the JEB possesses. David English, a member of that committee and present during this discussion, agreed with that plan. Linda Lea Viken seconded. The motion passed.

3. National Child Abuse Registry

The JEB discussed a recommendation for a uniform or national child abuse registry submitted by former Executive Director Liza Karsai. A 2018 report from the Children's Bureau of HHS was included in the JEB materials. Central registries on abuse and neglect are used to assist child protection agencies in protecting children and to screen people who will be entrusted with the care of children. The Children's Bureau report noted the lack of a uniform central registry for child abuse and neglect reports. Because states differ in what is reported and in who has access to the reports, individuals seeking to become foster or adoptive parents may qualify in some states but not in others, depending on what is contained in the registry. The JEB members observed that the lack of a national or uniform putative father registry raises somewhat analogous problems.

The consensus among JEB members is that requiring uniformity in the state child abuse and neglect registries is a matter for federal action since the obligation to maintain a registry derives from the requirements of federal conditional-spending law. The JEB supports the recommendation for uniform central registries and would like to see the ULC promote such a goal in Congress or with HHS.

4. Access to Justice Issues

Barbara included in the materials a 2019 resolution from the Conference of Chief Justices regarding reforms in family court. The resolution was driven in part by the high number of unrepresented litigants in family court and the resulting challenges facing the courts. One solution was structured family mediation, and another was to create service-based pathways to ensure access to justice for unrepresented litigants. Six pilot projects around the country have

been established to implement the CCJ Resolution. Barbara will continue to explore this area for topics that might be appropriately considered for JEB action.

Reporter's Presentation

Reporter Linda Elrod presented her fifteen-page paper on the interface between the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act (UIFSA/FFCCSOA). Linda's basic conclusion is that states should be encouraged to construe the two acts as consistent rather than follow a minority view that FFCCSOA conflicts with and preempts UIFSA. 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.

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.

Linda and members of the JEB strongly support the view 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 believes Linda's commentary should be posted not only on the JEB website but also on the link to UIFSA on the ULC's general website.

Linda also updated the JEB on recent decisions of note under the UCCJEA, including two court decisions involving international custody orders.