

ULC JOINT EDITORIAL BOARD FOR UNIFORM FAMILY LAW

**Fall Hybrid Meeting met on November 18, 2022, at 10:30 a.m. Central Time.
Those present included:**

Barbara Atwood, Chair

Linda Elrod, Reporter

JEB Members Present at Meeting

Lorie Fowlke, ULC

Melissa Kucinski, ABA

Dianna Gould-Saltman, AFCC

Sam Schoonmaker, ABA

Lane Shetterly, Division Chair for ULC

Members and Liaisons Present on Zoom

Tim Berg, ULC

Laura Belleau, AAML

Stacey Warren, AAML

Linda Lea Viken, AAML, retiring as member

Courtney Joslin, AALS Liaison

Sharla Draemel, U.S. State Department liaison

Lisa Vogt, U.S. State Department

Shannon Hines, U.S. State Department

Jeff Atkinson, ABA, former member

Tim Schnabel, Executive Director of ULC

Libby Snyder, Staff Liaison

Harry Tindall, ULC JEB Chair Emeritus

Invited Guests and Observers on Zoom

Joe Booth, ABA Publication Board

Amy Marcus, Reporter for the Wall Street Journal

For the last half hour of the meeting, Maxine Eichner joined. A law professor at UNC, she is a new commissioner but not new to the ULC. She was Reporter for the Uniform Deployed Parents Custody and Visitation Act and for the Study Committee on Family Court Procedures in times of Public Health Emergencies.

Mike Coffee, Dept of State, also joined at the end of the meeting.

Other experts joined to discuss the topic of genetic identity protection for donor-conceived persons (see below).

Meeting

Chair Barbara Atwood called the meeting to order at 10:30 a.m. on November 18, 2022, in Philadelphia, Pennsylvania at Stradley Ronon Stevens & Young law offices. Barbara welcomed the members of the Joint Editorial Board (JEB), observers and Uniform Law Commission staff. She also welcomed the new representatives from the AAML – Laura Belleau and Stacey Warren. There were introductions of everyone present in person and on zoom. Amy Marcus (WSJ) explained that she was there for educational purposes only and not as a reporter. She stated that if she wants to use anyone's comments for an article in the future, she will contact that person directly for permission.

Dianna moved that the minutes of the March 9, 2022, meeting be approved as circulated. Sam Schoonmaker seconded. The minutes were approved.

1. Update on Current ULC and ALI Family Law Projects

a. Child Participation in Family Court Proceedings Report

Melissa Kucinski, Reporter for the Child Participation Study Committee, explained the status of the project. After meeting four times, the Study Committee unanimously agreed to recommend to the Scope and Program Committee that a drafting committee be appointed to develop a law or court rule regarding interviews with children by judges or court-affiliated personnel to glean the child's views or preferences. The recommendation thus has a narrower focus than what was originally proposed. Almost all states authorize such interviews, but many states lack a structure and process by court rule or legislation. The hope is that the act can be helpful in distinguishing courtroom testimony from the information elicited during the informal interviews while at the same time protecting the parties' due process rights. This proposed drafting project would only cover custody proceedings in the family law context, not child protection proceedings arising from allegations of abuse or neglect. See Attachment A (*Child Participation in Family Court Proceedings Study Committee Report and Recommendation*).

b. Study Committee for the Indian Child Welfare Act

The Scope and Program Committee approved the appointment of a study committee for a possible uniform or model law on child welfare law applicable to American Indian and Alaska Native (AI/AN) children, in other words, a state Indian child welfare act. Currently these cases are governed by federal law, the Indian Child Welfare Act (ICWA), as well as myriad state laws. The protections ICWA provides for Native families are

considered the “gold standard” for child protection. More states are looking for guidance in how to implement ICWA standards into state law. Martha Walters is chair of the committee; Kate Fort is Reporter; Barbara Atwood is the division chair. The committee has met once and is looking at drafting a state Indian Child Welfare Act to fill in the gaps in the federal legislation. With the *Brackeen* case pending in the United States Supreme Court (oral arguments were heard on November 9, 2022), there is some concern that the Supreme Court may find that the ICWA has gone too far in imposing various requirements on state agencies for removals of Indian children and terminations of parental rights (e.g., heightened burdens of proof, active efforts to preserve family, qualified expert witnesses) and for placements of Indian children. The Court is being asked to strike down ICWA in whole or in part under the equal protection principle of the 5th Amendment and the anti-commandeering doctrine. Half of the states joined an amicus brief urging the Court to uphold the law. If ICWA provisions are invalidated, states may be receptive.

c. ALI Restatement of Children and the Law

The American Law Institute has been drafting a Restatement of Children and the Law. Elizabeth Scott is the Principal Reporter. The ALI has given final approval to some parts of the Restatement, including third party contact and visitation. That section is quite similar to the Uniform Nonparent Custody and Visitation Act in imposing a heightened burden of proof for awards of legal decision-making authority to third parties. The ALI working group has addressed many aspects of children’s rights, including medical decision-making, rights of children in school, and constraints on parental discipline. The current draft proposes that states appoint counsel for parents and children in child welfare cases and has developed a framework for standards governing children’s counsel. The committee has moved away from best interests representation. If a child is too young to express a preference, the lawyer should follow Model Rules of Professional Conduct 1.14 which allows substituted judgment for a client with impaired judgment. Important chapters of the Restatement deal with aspects of juvenile justice

2. Reports from JEB Organizational Representatives

Sam reported that the ABA Family Law Section is discussing same-sex marriage equality and parenting in the nontraditional family. The ART group remains very active, particularly in light of the *Dobbs* decision in June 2022 overturning *Roe v. Wade*. The Clarence Thomas concurring opinion suggests that the Court reconsider all substantive due process cases including *Obergefell* and *Lawrence v. Texas*. Note: The federal Respect for Marriage Act, which passed the U.S. Senate after the date of this meeting, requires federal and state recognition of same-sex marriages that were valid in states where they were performed while also protecting religious freedom. The Act requires interstate recognition but does not mandate that states permit same-sex marriages within their borders.

Dianna reported for AFCC. The 60th anniversary will be held in May 2023. Focus will be on Child Custody and recap social science research from the last sixty years, which is voluminous.

Linda Lea Viken and Laura Belleau reported that the AAML Board of Governors has adopted a resolution against a presumption mandating fifty-fifty parenting time. The AAML also issued a statement to condemn the decision in *Dobbs* as intruding on individual and familial rights to privacy and autonomy. The AAML representatives will send copies of these documents to Barbara.

3. State Department Report

Sharla reported that there have been more meetings this year than the last two.

- The Hague Permanent Body approved Cross Border Recognition of Agreements in Family Matters Respecting Children.
- There is an ongoing experts group studying the interaction of the Abduction Convention and the 1996 Convention on Child Protection in an attempt to facilitate enforcement of orders across country borders. This work on parental rights across borders is particularly focused on family agreements. Not as useful in U.S. since we have not adopted the 1996 Hague Protection of Children Convention.
- First Special Commission meeting on the Hague Convention on International Enforcement of Child Support and Other Forms of Family Maintenance was held at the Hague May 17-19, 2022. Generally, the Convention is operating smoothly. The report can be found at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6741&dtid=57>
- Hague Convention on Cooperation in Respect to Intercountry Adoption. There is now a Toolkit and checklist for Central Authorities which lists risk factors and types of behaviors that can create higher risk of problems, including the financial arrangements. There is a recognized need for post adoption services which may include workshops to let parties share experiences. See <https://assets.hcch.net/docs/c7696f38-9469-4f18-a897-e9boe1f6505a.pdf> Our Uniform Unregulated Child Transfer Act also proposed more services.
- Hague Abduction Convention. There will be a special commission meeting in the last quarter of 2023. Melissa mentioned the June 2022 *Golan v. Saada* case where the issue was whether courts are required to consider ameliorative measures after a finding of grave risk of harm to the child if the child is returned. The Supreme Court held that there is no mandate to consider ameliorative measures but that a court may do so within its discretion. Consideration must be given to the safety of the child. Measures must be limited in time and scope to provide expeditious return.

- Hague Experts Group on Parentage last met in October. The law in the United States differs from much of the world. We have not ratified the UN Convention on the Rights of the Child. The Experts group will make a report in March 2023 as to whether to draft a convention on cross border parenting and will include surrogacy. Cross-border recognition of parentage orders was the original aim but many of the challenging issues relate to surrogacy and citizenship. Because many countries ban surrogacy, foreign nationals come to the U.S. for surrogacy contracting, but they face the risk that the child's home country will not recognize parentage of the intended parents. Whether it is worth doing a parentage convention without surrogacy is one issue. The U.S. does not register parentage but it does affect children born in the United States whose home country is overseas. The State Department Legal Adviser's Advisory Committee on Private International Law will have input. Linda Elrod and Melissa Kucinski are members of ACPIL and will attend the meeting.
- House of Parliament Committee on Women and Equalities published its final report and recommendations on the rights of cohabiting partners on August 4, 2022. The Report urges the Government to reform family law to better protect cohabiting couples and their children from financial hardship in the event of separation. The Report recommends an opt-out cohabitation scheme as proposed by the Law Commission in its 2007 report on the financial consequences of relationship breakdown. The Report recommends that the Government make a commitment to publishing draft legislation for pre-legislative scrutiny in the 2023–24 Session of Parliament. In the meantime, the Ministry of Justice may commission a review of the Law Commission's 2007 proposals to see if they need updating.

4. Enactment status of existing uniform laws relating to family law.

The materials for the meeting included a report and enactment chart assembled by Libby Snyder, ULC Legislative Counsel.

Libby Snyder, ULC Legislative Counsel, indicated that this has been a successful year for family law enactments, despite the pandemic. There have been several enactments and proposals. The Uniform Child Abduction Prevention Act is getting some traction after an endorsement from the National Center for Missing and Exploited Children. There are three introductions currently and nine are planned. See [Attachment B \(Enactment Status Chart\)](#). The Uniform Parentage Act (UPA) 2017 has been enacted in California, Connecticut, Maine, Rhode Island, Vermont and Washington. It has been introduced in several other states. Montana enacted the Uniform Family Law Arbitration Act and it is being introduced in other states. The Uniform Unregulated Child Custody Transfer Act (UUCCTA) has been enacted in Utah and Washington.

5. Relocation Reviewed

Since the last meeting, Linda Lea and Kitt conducted a survey of AAML members who were unhappy with current law and were supportive of a uniform law.

Linda Elrod provided a written history of prior attempts at drafting relocation acts by the American Academy of Matrimonial Lawyers, the American Bar Association Family Law Section, and the Uniform Law Commission. Linda also provided information on international developments and studies on relocation and impacts on children and their parents. Jeff Atkinson, the reporter for the American Bar Association Family Law Section Relocation Act discussed the history of various standards and the current legal landscape with more preferences for shared parenting. The discussion also considered social science data as reported in a recent academic article in the Journal of the AAML. Most agreed that there is a need for development and weighting of factors without a preference. Several members opined that the AAML article is slanted. One question is whether an objecting parent must file a petition for custody. The issue was tabled with the understanding that members who want the JEB to move forward on this topic should take the initiative to gather relevant information for consideration at the next meeting of the JEB.

6. Consideration of potential topics for new proposals

a. Transgender youth

Harry mentioned proposed legislation in Texas that would impose criminal penalties on parents who consent to gender affirming treatment for their child. Prohibitions along this line have been enacted in several states, with some states enacting laws that suspend medical licenses of doctors performing such care. Harry would like the ULC to take this topic up for consideration. After discussion, the general consensus was that the issue belongs with the newly-created JEB for Health Law rather than the JEBUFL.

b. Genetic Identity for Donor Conceived Persons

Barbara placed this topic on the agenda for consideration by the JEB for a possible proposal to be submitted to Scope and Program. The topic has been in the news recently as a result of Colorado's enactment of the Protection for Donor-Conceived Persons and Donor-Conceived Families Act, SB 22-224. For this discussion, several nationally-recognized experts on parentage and assisted reproduction technology (ART) joined the meeting, including Naomi Cahn, Professor UVA Law School and reporter for UCERA; Susan Crockin, Senior Fellow, Natl and Global Health, Georgetown; Nicole Huberfeld, a health law scholar at Boston University and research director for the new JEB on Health Law; and Katherine Kraschel, the Executive Director of the Solomon Center for Health Law and Policy at Yale Law School.

Naomi gave some background on the topic and discussed a gathering of stakeholders that was held October 21-22, 2022, which Libby Snyder attended. While there is a lack of solid data on the use of ART, the use of gamete-donation for reproduction is on the rise. The CDC has figures on egg donation and embryo donation, but there is no reliable estimate for sperm donation. Historically, gamete donation was used primarily by

heterosexual couples, but currently LGBTQ couples and individuals comprise a majority of ART users.

The Colorado legislation is the first to prohibit anonymous gamete donation, to go into effect in January 2025. Under Colorado's approach, gamete donors must agree to disclose their identities on request of donor-conceived children at age 18. Colorado also requires disclosure of nonidentifying medical history of donors on request of the parents of donor-conceived children or the children themselves at age 18. Outside the US, where compensated gamete donation is largely prohibited, several countries have likewise barred anonymous donation.

Article 9 of the UPA addresses this topic. Under Article 9, donors must state whether they agree to disclosure of their identities on request of a donor-conceived child at age 18. A donor who opts not to disclose may change the declaration and agree to disclose, but a donor who agrees to disclose initially may not change the declaration. Article 9 also requires disclosure of available non-identifying medical history on request to parents of a donor-conceived child or to the donor-conceived child at age 18.

Importantly, Courtney Joslin, reporter for the UPA (2017), explained that laws mandating disclosure of donor identity should be developed within comprehensive parentage legislation to ensure that disclosures do not disrupt settled parentage rights established through assisted reproduction. She also made the point that not all donor-conceived persons desire to know the identity of their gamete donors. Courtney recommended that any proposal on this topic be presented as a revision of Article 9 rather than as a free-standing act.

A far-ranging discussion ensued of the various issues relevant to gamete donation and the rights of donor-conceived individuals. Members of the JEB ultimately agreed to recommend that the ULC appoint a study committee to consider revising Article 9 to more fully address access of donor-conceived persons to information about their gamete donors while ensuring that parentage rights are protected. See Attachment C (*Recommendation for Study Committee*).

c. Terminology under UCCJEA that may disadvantage LGBTQ parents

A law review article was included in the meeting materials urging that the UCCJEA amend its definition of "person acting as parent..." to protect LGBTQ parents who are relying on the de facto parent doctrine. After discussing the recommendation, the group reached a consensus that an effort to formally revise the UCCJEA is not appropriate but that commentary might be developed to address the perceived problem.

8. Summary of Case Law Developments Interpreting Uniform Laws Relating to Family Law

Linda Elrod prepared a report and discussed some of the cases that have arisen with state interpretations of the Uniform Acts this year. Two cases involved custody disputes

involving children who are members of Indian tribes and potential conflicts between states and tribal courts– an area of growing visibility. See Attachment D (*Summary of Case Law*).

The JEB meeting adjourned at 4:00 p.m.