To: Uniform Child Transfer Protection Act Drafting Committee
From: Catherine Sakimura, Family Law Director, National Center for Lesbian Rights, Courtney Joslin, UC Davis, Martin Luther King Jr. Professor of Law
Re: Comments on July 2020 draft
Date: August 1, 2020

Dear drafting committee,

Thank you so much for inviting us both to be observers on this project and for considering our previous comments. Thank you for the opportunity to comment on this next draft. We write now to share two concerns about the current draft.

I. Concern that the draft regulates transfers to Persons *in loco parentis* as well as a range of family members who may be caring for children

We appreciate the addition of a provision excluding transfers between parents from the scope of this Act. However, because many people who are functionally parents are not or may not be legal parents, we strongly recommend that the Act also exclude transfers to people who, prior to the transfer, stood *in loco parentis* to a child. This is particularly important for LGBTQ parents. Otherwise, voluntary custody agreements between the people who view themselves and are viewed by the child as the child's parents would be rendered impermissible by the Act. Voluntary custody agreements between people who function as parents should be encouraged whether or not legal parentage is established.

We are also concerned that the list of relatives who the Act allows to accept transfer of custody in Section 202 is too narrow – what about step-grandparents, stepparents who may not be married, step-siblings? As discussed in more detail below, by excluding these parties from the Scope of the Act, the Act penalizes people for making good, child-centered decisions to place their children with people who may have been caring for them and who may have close relationships to them when the parent is not in a position to care for them.

While one could try to address these concerns by expanding the types of transfers that are outside the scope of/permitted by the Act,[1] a better way of addressing these concerns is, as we said before and as discussed more below, to limit this Act to the regulation of ***third parties only***.

II. Concern about regulating actions of parents directly

We continue to have serious concerns about prohibiting parents from choosing to place a child in the care of another. When a parent cannot care for their child, it is important for that parent to seek out someone else who can safely care for their child while they cannot. Policy should encourage parents to take this step, rather than regulating and limiting how this is done, and possibly further penalizing the parent for doing so. If a parent places the child in the care of someone who cannot provide a safe home, that is an issue that is already addressed by the child welfare system.

[1] For example, with regard to functional but not legal parents, the Act could also exclude transfers to people who, prior to the transfer, stood "in loco parentis" to the child. This is a term of art that is used in other statutes. For example, this phrase is used in the Family Medical Leave Act to capture those who are not legal parents but are providing care to a child as a parent.

Encouraging or requiring child protection departments to investigate parents who seek to take this responsible step may lead to increases in inappropriate removals of children, and discourage parents who feel they cannot adequately care for their children from taking steps to ensure for the safety of their children by asking for help. Expanding the bases for child endangerment to broadly include and penalize what may be responsible behavior on the part of a parent who temporarily cannot care for their child is concerning. Parents of color, LGBTQ parents, parents with disabilities, and low-income parents are already disproportionately investigated by child protection departments and disproportionately have their children removed. Providing a basis for such investigation or removal based on an apparent subjective intent of the parent creates increases the danger of unconscious bias leading to inappropriate removal of children from their parents. We oppose any expansion of what we believe has already led to the inappropriate removal of many children from their families of origin by the child welfare system.

Section 202, which lists permitted transfers, implies that even some transfers of custody on a temporary basis are prohibited. By allowing transfers only to listed family members or where there is a written document or other specific factors, any other transfer without such an intent is potentially prohibited. There is no reason, for example, why a parent having a mental health crisis who asks a friend to take care of her child without being clear about a timeline should be prohibited or discouraged from taking this responsible step to ensure that her child is cared for, or that this action should be classified as child endangerment. We also do not see any good policy justification for this novel, new intervention in and regulation of families.

Moreover, we do not believe that there is any wordsmithing that could eliminate this danger. We strongly urge the committee to avoid any direct prohibition on a parent's transfer of custody other than specific prohibitions on advertising, working with a third party, receipt of payment, or other specific action besides mere fact of making a transfer of custody.

We think regulating *third party involvement* in any attempted non-judicial transfer of children, *prohibiting advertising or compensation* about such attempts, and possibly provide some regulation of guardians' attempts to transfer custody, *is reasonable*. However, we would strongly recommend limiting the Act to address solely these concerns for both adoption and other transfers without attempting to regulate the actions and intent of individual parents.