

**MIDYEAR MEETING
OF THE COMMITTEE ON SCOPE AND PROGRAM**

UNIFORM LAW COMMISSION

**Monday, January 11, 2021
Wednesday, January 13, 2021**

Minutes

The meeting of the Committee on Scope and Program was convened at 1:30 pm on Monday, January 11, 2021, via video-conference technology by Chair Tim Berg. Committee members Diane Boyer-Vine, Marty Carr, Mary Devine, Lyle Hillyard, Lisa Jacobs, Gail Russell, Lee Yeakel, and Steve Wilborn were present. Also present were Carl Lisman, ULC President, Dan Robbins, Chair of the ULC Executive Committee, Tim Schnabel, ULC Executive Director, Katie Robinson, ULC Legislative Program Director, and Gloria Korpas, Legislative Assistant. Attending for a portion of the meeting were Commissioners Patrick Guida, Juliet Moringiello, Nora Winkelman, Mike Houghton, Ed Smith, Barbara Atwood, Barry Hawkins, Steve Frost, Peter Langrock, Gene Lebrun, Paul Kurtz, and Martha Walters; and guests Barry Nekritz, co-chair, JEB/Uniform Real Property Acts, Wilson Freyermuth, Research Director, JEB/Uniform Real Property Acts, Linda Elrod, Reporter, JEB/Uniform Family Law, and Tom Baxter and Michael Wiseman, co-reporters for the Study Committee on Special Deposits.

Chair Berg welcomed the committee and discussed the agenda for the meeting. A motion was made and approved accepting the minutes of the Scope and Program Committee meeting held October 29, 2020.

Study Committee Reports

- Study Committee on **Fines and Fees**
(Kay Kindred, Chair) Scope Liaison Mary Devine

Commissioner Devine reported on the progress of this study committee. This committee has studied the need for and feasibility of a uniform or model addressing the impact of fines and fees on people of limited means. The impact of fines and fees on those with means can be a mere inconvenience, but for the poor and working poor who are unable to pay, those same fines and fees can be devastating, resulting in thousands of dollars of debt and functioning as a poverty trap. The committee considered three major areas that might be addressed in a uniform or model law: (1) suspension of driving privileges because of unpaid fines and fees even when unrelated to public safety; (2) fines and fees imposed on juveniles and their parents in the juvenile justice system; and (3) fines and fees imposed without consideration of ability to pay because of adult criminal offenses. The committee requests that it be continued.

After discussion, the Committee on Scope and Program again requested that the study committee resubmit a report which further refines the three major areas identified by the study committee (above) and consider how any draft act would address those issues. The committee is

further requested to consult with appropriate stakeholders, particularly those which might oppose any reform in this area, and to better articulate its rationale for the need for uniformity on this issue. The committee is asked to report back any findings this spring, or at the July 2021 annual meeting of the Scope and Program Committee.

- Study Committee on **Special Deposits**
(Buzz Guida, Chair) Scope Liaison Lisa Jacobs

Commissioner Guida reported on the progress of this study committee. The committee has engaged two co-reporters: Thomas Baxter, who formerly served as General Counsel and Executive Vice President of the Federal Reserve Bank of New York, and Michael Wiseman, of Sullivan and Cromwell. The co-reporters polled senior bank executives and bank general counsel regarding their knowledge of special deposits. The co-reporters also recruited observers from the banking community. A special deposit involves three parties: A) a funder; B) a depository institution; and C) a beneficiary. If a contractually agreed upon condition occurs, the depository institution pays the beneficiary. If the stipulated condition does not occur, the special deposit reverts to the funder. The funder has no control over the special deposit once funded. What distinguishes the special deposit is that it is: established for a particular purpose by agreement among the depository institution and at least one of the other two parties subject to it; segregated from the general fund deposits of the depository institution; not assignable; not subject to legal process while still in the hands of the depository institution; and not subject to offset while in the hands of the depository institution. The full committee has met six times since it was appointed last year, and the chair and co-reporters have met numerous additional times. The committee requests the appointment of a drafting committee.

After discussion, the Committee on Scope and Program recommended that a drafting committee be appointed. The Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Drafting Committee on Special Deposits be formed.

On January 22, 2021, the Executive Committee approved this resolution.

- Study Committee on **Supply Chain Transparency**
(Anita Ramasastry, Chair) Scope Liaison Diane Boyer-Vine

There was no new report from the study committee for consideration. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Online Sales Tax Collection**
(Lyle Hillyard, Chair) Scope Liaison Lyle Hillyard

Commissioner Hillyard reported on the progress of this committee. The committee has evaluated whether and to what extent the ULC should adopt a drafting project regarding the

collection of sales tax on online sales. The committee's outreach was extensive, and had observers representing both state interests and business interests. While the committee members believed that there is a need for uniformity in this area of law, there was little support among the stakeholders other than support for the NCSL model statute on this topic. Therefore, the study committee recommends that the ULC not move forward to drafting on this topic.

After discussion, the Committee on Scope and Program agreed with the recommendation of the study committee and recommended that the study committee be discharged. The Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that the Study Committee on Online Sales Tax Collection be discharged with a letter of thanks to the committee.

On January 22, 2021, the Executive Committee approved this resolution.

- Study Committee on **Tenancy in Common Ownership Default Rules**
(Juliet Moringiello, Chair) Scope Liaison Gail Russell

Commissioner Moringiello reported on the progress of this study committee. Tenancy in common (TIC) is a relationship between individuals who have a joint interest in property, either real property or personal property. Tenants in common may have equal or unequal shares of the property. There are three predominant problems with TIC property: (1) instability given that partition is generally the only remedy when disputes arise between tenants in common, (2) lack of clear title particularly for TIC property acquired through intestacy over the course of multiple generations, and (3) gridlock in managing or using the TIC property due to the general rule of unanimity in all decisions involving TIC property. In 2011 the ULC promulgated the Uniform Partition of Heirs Property Act (UPHPA) to address some of the concerns about heirs property. While the UPHPA made great strides in preventing inequitable partitions of heirs property, additional issues face holders of heirs property and, more generally, owners of TIC property. The committee recommends the creation of a Drafting Committee to draft a uniform law concerning the management of TIC property.

After discussion, the Committee on Scope and Program recommended that a drafting committee be appointed. The Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Drafting Committee on Tenancy in Common Ownership Default Rules be formed.

On January 22, 2021, the Executive Committee approved this resolution.

- Study Committee on **Uniform Health Care Decisions Act**
(Nora Winkelman, Chair) Scope Liaison Diane Boyer-Vine

Commissioner Winkelman reported on the progress of this study committee. The Uniform Health Care Decisions Act, approved in 1993, has been enacted in only seven states. Some of the key issues in the UHCDA which the committee reviewed included: who can act as surrogate; default surrogates; disagreement among surrogates; “un-befriended” patients; electronic documents; the use of medical orders known as POLST (physician orders for life sustaining treatments); scope of surrogate decisions. The committee recommends that the UHCDA be revised to address these, and potentially other, areas.

After discussion, the Committee on Scope and Program recommended that a drafting committee be appointed. The Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Drafting Committee to Revise the Uniform Health Care Decisions Act be formed, to address the issues set forth in the Study Committee’s report of December 18, 2020, with careful consideration to be given to the question of whether to address mental health issues.

On January 22, 2021, the Executive Committee approved this resolution.

- Study Committee on **Mitigation of Public Health Emergency Business Disruptions** (Mike Houghton, Chair) Scope Liaison Lisa Jacobs

Commissioner Houghton reported on the progress of this study committee. This committee has studied the need for and feasibility of one or more uniform state laws providing special rules and procedures to mitigate the impact of an epidemic, pandemic, or other public health emergency on the operation of businesses. The committee has considered such topics as non-liquidating receiverships, business interruption insurance, and the application of force majeure and impossibility doctrines. The committee requests that it be continued, but only in a stand-by mode. The continuation of the committee in this way would demonstrate the ULC’s willingness to engage with other organizations on the topics studied and it would be available to receive information and materials, but it would not actively research the area, monitor developments, or seek input from potentially interested constituencies until directed to do so by the Scope and Program Committee and ULC Leadership.

After discussion, the Committee on Scope and Program determined that the study committee be continued for at least the next six months. Scope will revisit the status of this committee once the Study Committee on Public Health Emergency Authorities has submitted its final report.

- Study Committee on **Public Health Emergency Authorities** (Diane Boyer-Vine, Chair) Scope Liaison Diane Boyer-Vine

Commissioner Boyer-Vine reported on the progress of this study committee. This committee has studied the need for and feasibility of one or more uniform state laws addressing the authority of state governments to respond to epidemics, pandemics, and other public health

emergencies. The committee has considered such topics as quarantines, business closures, collective purchasing mechanisms, and rules for medical practice. Soon, the chair and reporter will convene a subcommittee to draft a report to lay out the strongest case for recommending a uniform or model law on some or all of the issues discussed above. The full committee will then meet to determine whether a drafting committee should be formed. The committee requests that it be continued.

After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Criminalization of Student Discipline**
(Diane Boyer-Vine, Chair) Scope Liaison Diane Boyer-Vine

The report of the Study Committee on Criminalization of Student Discipline was accepted. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Cybercrime**
(Michele Timmons, Chair) Scope Liaison Diane Marty Carr

The report of the Study Committee on Cybercrime was accepted. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Uniform Determination of Death Act**
(Sam Thumma, Chair) Scope Liaison Lisa Jacobs

The report of the Study Committee on the Uniform Determination of Death Act was accepted. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Family Court Emergency Procedures**
(Paul Kurtz, Chair) Scope Liaison Mary Devine

The report of the Study Committee on Family Court Emergency Procedures was accepted. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Mortgage Modifications**
(Jack Burton, Chair) Scope Liaison Lyle Hillyard

The report of the Study Committee on Mortgage Modifications was accepted. The committee requests that it be continued. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Study Committee on **Recurring Service Charges**
(_____, Chair) Scope Liaison Gail Russell

There was no report from the Study Committee on Recurring Service Charges for consideration, as the committee has not yet been appointed. It is hoped that the study committee will begin its work this spring. After discussion, the Committee on Scope and Program determined that the study committee be continued.

- Joint Committee on **UCC and Emerging Technologies**
(Ed Smith, Chair) Scope Liaison Lee Yeakel

Commissioner Smith reported on the progress of this joint committee. This committee, formed jointly with members from the American Law Institute and the ULC, is reviewing the Uniform Commercial Code to develop amendments to the UCC necessary to accommodate emerging technological developments. The committee had previously received the permission from both ALI and ULC to act as a drafting committee for amendments to UCC Articles 3 and 9 dealing with electronic instruments (other than checks) and for certain other discrete amendments to the UCC unrelated to emerging technologies. The Committee now requests that the Committee act as a drafting committee for all subjects which it has been addressing: digital assets generally, payments issues, and bundled transactions.

After discussion, the Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that the Joint ALI-ULC Committee on the Uniform Commercial Code and Emerging Technologies be authorized to proceed to drafting on the remaining topics within its scope, i.e., digital assets, payments issues, and bundled transactions.

On January 22, 2021, the Executive Committee approved this resolution.

Joint Editorial Board Written Reports and Recommendations

- JEB – **Uniform Family Law**
(Barbara Atwood, Chair) – Scope Liaison Diane Boyer-Vine

Commissioner Atwood and Linda Elrod, Reporter for the JEB/Uniform Family Law, reported on the recommendation from the JEB to appoint a study committee to consider drafting a uniform or model act on children's participation in private custody proceedings. This proposal rests in part on obligations under the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures of Protection for Children. That Convention governs international recognition of custody decrees and requires that children be heard at proceedings to determine custody or visitation. The United States has signed but not yet ratified that Convention.

After discussion, the Committee on Scope and Program recommended that the proposal be referred back to the JEB with request that the JEB review the Uniform Child Witness Testimony by Alternative Methods Act (2002) to determine if that Act adequately addresses the issue of uniformity in the manner of taking testimony from child witnesses.

- **JEB – Uniform Trust and Estate Acts**
(Tom Gallanis, Executive Director) – Scope Liaison Gail Russell

There was no proposal from the JEB, and the report of the JEB was accepted.

- **JEB – Uniform Real Property Acts**
(Barry Hawkins, Co-Chair; Wilson Freyermuth, Executive Director) – Scope Liaison Lyle Hillyard

Commissioner Hawkins reported on the recommendation from the JEB to appoint a study committee to consider drafting a uniform or model act on the redaction of personal information from real property records. If an individual owns a home in his or her own legal name, it is possible for one using public records to identify that individual's primary residence or other real estate owned by that person. The ready accessibility of this information not only facilitates efficient title investigation and transfer, but also the ability of creditors to enforce legitimate claims against judgment debtors. However, the ready accessibility of this information also has a potential downside from a privacy perspective. One person could use the information in the public records to identify the home of an individual and use that information to annoy, threaten, harass, or otherwise harm that individual in their home.

After discussion, a motion was made and seconded to appoint a study committee on the redaction of personal information from real property records. The motion failed by a vote of 3 to 5.

- **JEB – International Law**
(Henry Gabriel, Co-Chair) – Scope Liaison Lee Yeakel

There was no proposal from the JEB, and the report of the JEB was accepted.

- **JEB – Unincorporated Organization Acts**
(Lisa Jacobs, Chair) – Scope Liaison Lisa Jacobs

There was no proposal from the JEB, and the report of the JEB was accepted.

- **PEB – Uniform Commercial Code**
(Neil Cohen, Director of Research) – Scope Liaison Lee Yeakel

There was no proposal from the PEB, and no new report of the PEB to be considered.

Monitoring Committees Reports and Recommendations

- **Committee to Monitor Civil Litigation and Dispute Resolution**
(Lee McCorkle, Vice Chair) – Scope Liaison Martin Carr

There was no proposal from the Monitoring Committee and no new report of the Monitoring Committee to be considered.

- **Committee to Monitor Healthcare Law**
(Abbe Gluck, Chair) – Scope Liaison Lyle Hillyard

There was no proposal from the Monitoring Committee and no new report of the Monitoring Committee to be considered.

- **Technology Committee**
(Tom Buiteweg, Chair) – Scope Liaison Martin Carr

There was no proposal from the Technology Committee and no new report of the Technology Committee to be considered.

- **Committee on Criminal Justice Reform**
(Gail Hagerty, Chair) – Scope Liaison Mary Devine

There was no proposal from the Criminal Justice Reform Committee and no new report of the Criminal Justice Reform Committee to be considered.

- **Privacy Monitoring Committee**
(Rich Cassidy, Chair) – Scope Liaison Diane Boyer-Vine

There was no proposal from the Privacy Monitoring Committee, and no new report of the Privacy Monitoring Committee to be considered.

New or Pending Proposals

- **Revise or Amend the Uniform Trade Secrets Act**
(Prof. Sharon Sandeen) Scope Liaison Marty Carr

Commissioner Carr reported on this proposal, originally submitted in July 2020, to appoint a study committee to amend Section 7 of the Uniform Trade Secrets Act to correct confusion as to its meaning that has resulted in expensive litigation and inconsistent interpretations by State courts, some of which are directly opposed to the drafting history and purpose of that provision.

After discussion, the Committee on Scope and Program concluded to defer further discussion on this topic until the July 2021 meeting of Scope.

- **Restrictive Covenants in Deeds**

(Commissioner David Biklen) Scope Liaison Gail Russell

Commissioner Russell reported on this proposal to appoint a drafting committee on the issue of restrictive covenants in deeds. Many antiquated and objectionable restrictive covenants still exist, though they are no longer enforceable. This proposal, originally submitted in October 2020, had been referred to the JEB for Uniform Real Property Acts. The JEB reported that it supports the appointment of a drafting committee to prepare a uniform or model act governing the expungement and/or release of racial covenants.

After discussion, a motion was made and seconded to appoint a drafting committee on restrictive covenants. The motion failed by a vote of 2 to 6.

- **Use of Tenant Information in Rental Decisions**

(Commissioner Sandra Stern and Allen Joslyn) Scope Liaison Gail Russell

Commissioner Russell reported on this proposal to appoint a study committee on the issue of the use of tenant information in rental decisions. Landlords are generally free to utilize any information about prospective tenants that can be located. Frequently, such information is provided to the landlord on a "tenant screening report," which may use some information provided to the publishers of the report by the court system, i.e., the names of defendants in cases filed relating to particular premises, without further information. Prospective tenants can be denied rental housing if inaccurate or erroneous information is found on tenant screening reports. Commissioner Stern and Mr. Joslyn request the formation of a study committee on the subject.

This proposal had been originally submitted to Scope at its October 2020 meeting. At that time, Scope approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Study Committee on Use of Tenant Information in Rental Decisions be formed to study the need for and feasibility of a uniform or model act on the subject.

After this resolution was approved, Scope further recommended that the proposal be referred to the Joint Editorial Board for Uniform Real Property Acts, with the request that the JEB report directly to the Executive Committee as to advisability of a study committee on this topic. The JEB has submitted a brief letter supporting the appointment of a study committee on this topic. Therefore, the resolution will be considered by the Executive Committee at its upcoming midyear meeting.

On February 2, 2021, the Executive Committee approved this resolution.

- **Election Law**

(Commissioners Gene Lebrun, Paul Kurtz, Barbara Atwood, Owen Anderson, Ryan Leonard) Scope Liaison Diane Boyer-Vine

Commissioners Gene Lebrun and Paul Kurtz reported on this proposal to appoint a study committee on the feasibility of drafting a uniform or model law on elections. Such a study might include: who is eligible to vote; how to register to vote; voting machines; voting methods; early voting, recounts, and more.

After discussion, the Committee on Scope and Program recommended that a study committee be appointed. The Committee on Scope and Program approved the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Study Committee on Election Law be formed to study the need for and feasibility of a model act on the subject.

On February 2, 2021, the Executive Committee approved this resolution.

- **Policing Project**

(Commissioner Steve Frost) Scope Liaison Mary Devine

Commissioner Frost reported on this proposal to appoint a study committee to study the need and feasibility of a uniform or model law to govern policing procedures. The American Law Institute (ALI) has been working on its “Principles of the Law – Policing” principles project since 2015. Several chapters of the ALI principles — including principles on the use of force, police encounters, police questioning, and eyewitness identifications—have been approved by the ALI membership. Other chapters nearing completion cover a broad range of topics, including searches and seizures, the use of informants, and both internal and external accountability structures.

After discussion, the Committee on Scope and Program recommended that the Executive Committee refer the proposal to the Criminal Justice Reform Committee (CJRC) with a request that the CJRC review the proposal, review the ALI “Principles of the Law – Policing” material, reach out to relevant stakeholders as necessary, and recommend whether a drafting committee should be established to develop a uniform or model act on a subset of the topics included in the proposal.

On February 2, 2021, the Executive Committee did not approve this recommendation.

- **State Law on Standard Essential Patent Legislation**

(Brian Scarpelli, The App Association) Scope Liaison Marty Carr

Commissioner Carr reported on this proposal to appoint a study committee to consider the need for and feasibility of a uniform or model state law on standard-essential patent legislation.

After discussion, the Committee on Scope and Program concluded to defer further discussion on this topic until the spring meeting of Scope, or the July 2021 annual meeting of Scope. Commissioners Marty Carr and Dan Robbins will gather additional information for consideration at a future Scope meeting on state level enforcement of unfair competition through patents.

Other Business

Commissioner Martha Walters addressed Scope and submitted a memo for Scope's consideration regarding the work of the Committee to Review the Scope and Program Process. Scope members are encouraged to read the entire report of that committee and note the various recommendations. Commissioner Walters stressed the need for Scope to adopt the following recommendations: (1) Adopt criteria by which to evaluate Scope proposals and explicitly state objectives; (2) Continue to evaluate Scope's work and process.

Having no further business, the Committee on Scope and Program was adjourned.