

MINUTES OF THE JOINT EDITORIAL BOARD ON UNIFORM FAMILY LAWS

The Joint Editorial Board of Uniform Family Laws met on Friday November 16, 2018, in Washington, D.C. Those present included:

Barbara Atwood, Chair
Michael Coffee, U.S. State Department
Sharla Draemel, U.S. State Department
Linda Elrod, Reporter
Lorie Fowlke, ULC
Hon. Dianna Gould-Saltman, AFCC
Anne Marie Jackson, ABA
Melissa Kucinski, ABA
Peter Lown, Alberta Law Reform Institute (intermittent)
Stacey Platt, AFCC
Harry Tindall, ULC

Carl Lisman, ULC, sat in on the meeting for a short while.

Barbara welcomed members to the meeting. She noted that Anne Marie Jackson was sitting in for Sam Schoonmaker (ABA) and that both of the AAML members were unable to attend for personal reasons. The AAML was still represented because Dianna, Anne Marie, and Harry are AAML members. After introductions and housekeeping, Barbara announced that we would have a working lunch to discuss issues pertaining to the newly formed drafting committee on the Economic Rights of Unmarried Cohabitants.

The minutes of last year's meetings had a few typos on names. Corrections needed to be made for spelling of Stacey Platt and Melissa Kucinski. In addition, Kit and Linda Lea's organizational designation needed to be changed, showing the AAML (not AFCC). The minutes were adopted as amended.

Barbara reviewed the JEB's original Memorandum of Understanding for the benefit of new members. The original MOU was with the ABA, ULC, and AAML. The AFCC was added in 2012. The purpose of the JEB is to promote understanding in the public of various uniform family law acts, make timely reports to member organizations, keep up with court decisions, and, perhaps most importantly, make recommendations to the ULC leadership about new drafting projects. Barbara explained that proposals go to the Scope and Program Committee first and then to the Executive Committee.

Chair's Report

After last year's in-person meeting, the JEB recommended the appointment of three study committees. The Executive Committee approved two of our recommendations – Economic Rights of Unmarried Cohabitants and Unregulated Transfers of Adopted Children. Those Study

Committees, in turn, gathered information during the spring of 2018 and ultimately recommended that drafting committees be appointed. This past July, the Executive Committee accepted those recommendations and appointed drafting committees for the two acts. Scope and Program rejected the JEB's third suggestion for a study committee on the Mandatory Minimum Age for Marriage. The consensus was that there is a strong movement in that direction already – and a uniform law was not needed.

The Unregulated Transfer of Adopted Children had its first drafting committee meeting in Tucson in early November. Commissioner David Biklen is chair, and Art Gaudio is the Reporter. Barbara is on the committee. Two State Department representatives who work in international adoption attended the first meeting and served as valuable resources. Among the items discussed were the need for more education of parents pre-adoption about the difficulties and risks of international adoption with children who may be impaired emotionally. The drafting committee discussed the need for services post-adoption to help adoptive parents and children deal with the many issues that may develop. We discussed an analogy to the foster care system where the state generally does provide a wide range of services and post adoption follow up. Utah's law requires that services be available and is useful as a model for the drafting process. During the drafting committee meeting, Carl Lisman, Chair of the Executive Committee, reminded the drafting committee to stay within the approved scope: unregulated transfers of *internationally* adopted children.

We discussed how the JEB should keep an eye on these committees and whether we should send a JEB member to each drafting committee meeting. Barbara is on the Unregulated Transfers Committee; Harry is on the Economic Rights of Unmarried Cohabitants Committee. Both committees will be meeting in the spring of 2019. Barbara may attend the ERUC drafting committee meeting as an observer from the JEB. At the very least, JEB members should read and comment on drafts from these committees as they are circulated. Melissa mentioned that about six years ago the JEB asked to be listed as observers so that members would receive all drafts and could attend drafting committees if in their area or convenient. Barbara will request that all members of the JEB be made observers on the two drafting committees and receive electronic notices of meetings and drafts of the proposals.

Barbara reminded the members that at our last meeting, we recommended that all uniform family laws be available in one site for the convenience of researchers. Such a listing has now been compiled by ULC staff and posted on the JEB's webpage, but it is not placed in an obvious location. The listing of uniform family laws is located under the category of "DRAFTS." That category also contains minutes, reporter's memoranda, and other materials. The categorization is problematic, since the JEB materials are not "drafts." This discussion then turned to the limitations of the ULC website in general. It is somewhat cumbersome and not user friendly. Barbara has been in touch with the ULC technology experts as they revamp the ULC website. We are told that the new website will have more a more appropriate layout for the JEB webpage. Ideally, there would be a category for Minutes, for Commentary on Family Law Acts, and for Significant Cases. Barbara also noted that the Uniform Adoption Act has been "retired" as of July 2017 but is still listed on the webpage as a Uniform Act. Barbara will check on that and the other website issues in consultation with Steve Willborn, interim executive director.

Barbara updated members on the ongoing ALI project on the Restatement of Children and the Law – a comprehensive effort to restate key areas of legal regulation affecting children. There is a tension between restating the law and providing aspirational statements of what the law should be. The project includes the law relating to children in families, children in schools, juvenile justice, medical care and medical decision-making, sexuality and gender identity, and other topics. Barbara mentioned that reasonable corporal punishment of children is addressed in the Restatement as a defense to a charge of child abuse, rather than as an independent parental privilege. The JEB members discussed whether the UN Convention on the Rights of the Child – which prohibits corporal punishment -- should be included as international common law. We discussed a new Utah case on corporal punishment involving two parents who routinely disciplined children with belts with rhinestones. The state supreme court held that hitting a child with an object is not per se abuse but can form the basis of an abuse conviction if there is evidence of physical or emotional harm. *In re Interest of K.T.*, 2017 Utah 44, 424 P.3d 91 (2017).

Enactment update on Uniform Acts

We reviewed the progress in enacting uniform laws based on a listing prepared for us by legislative counsel Lindsay Beaver.

UCCJEA

Although our sheet indicated all states have enacted UCCJEA, to our knowledge Massachusetts has not yet enacted.

Uniform Parentage Act 2017 – California, Washington and Vermont have enacted.

Uniform Nonparent Custody and Visitation Act has no introductions yet.

Uniform Premarital and Marital Agreements Act – Only two states - Colorado and North Dakota. We discussed why there were so few enactments. One reason is 27 states have the UPAA. Another may be the application of the same standards to both premarital and postmarital contracts in the UPMAA. The UPMAA treats both categories of agreement in the same way, but in many states, contracts between spouses are subjected to higher scrutiny because of the fiduciary or confidential relationship the law ascribes to married people. Some states, like Kansas, treat postmarital agreements the same as separation agreements but uses UPAA for premarital agreements. A possible alternative to help enactments would be to provide states with an easy exclusion of marital agreements from the act.

Uniform Family Law Arbitration Act – only two states – Arizona and Hawaii – have enacted it. Arizona enacted the UFLAA through the rule-making process, and we anticipate that other states, particularly those that have enacted the RUAA, would consider this rule-making option.

Uniform Collaborative Law Act – 18 states – Tennessee is considering it as a court rule.

International Developments

Mike Coffee of the U.S. State Department reported on international family law developments. Mike first thanked the JEB for proposing and supporting the study committee on the Unregulated Transfer of Custody of Adopted Children. He then reported on issues arising in connection with the Hague Conference on Private International Law

1. Parentage and surrogacy: There was an “Experts Group” meeting looking at desirability of instruments recognition and enforcement of parentage determination, particularly in the context of surrogacy. One issue has been to explore whether there is a document or order that can be recognized and enforced evidencing parentage. In the United States, we can fill out the name on a birth certificate but it is not necessarily determinative. Some countries have registries but it is not clear what goes into the record. The Expert Group considered situations when there is not an opportunity to go to court to establish parentage and is trying to determine what the practice has been. Once the topic goes to experts’ group, the group may go on to draft an instrument and hold a diplomatic session. The questionnaire that went out did reference the Parentage Act (2017). Barbara asked if the question of a child’s citizenship was an issue discussed. Mike responded that without determination of parentage, it is hard to discuss the citizenship issue. There will be an Experts meeting at the Hague in February on Surrogacy – during which there may be an effort to introduce some human rights principles into family law.

2. Voluntary agreements: In the United States, mediated or negotiated agreements are noted in consent orders of court so they can be enforced as a judgment and as a contract. The Hague support convention has procedures for child support. An Experts group is look at the existing conventions and is putting together a practical guide for family agreements and exploring how a record can be made that can be enforced. Some member states have almost no formality or court order. For example, in France, a simple divorce can happen if the parties sign an agreement in front of notaire. If, as part of the agreement, the parties move to Washington D.C., serious questions exist as to what do the parties should file for recognition and enforcement in the U.S. If parenting issues were addressed in the agreement, the lack of a judgment can be particularly problematic. We discussed that in the United States, the Institute for Advancement of American Legal System ---IAALS – wants to streamline procedures and have more administrative handling of noncontentious matters to preserve judicial time for true disputes. Some, however, still fear overreaching in contracts. Already there are procedures for agreed orders where the original petition is filed and when an agreement is reached, a one-page court order which states that the information is in the lawyer’s office. If authorized, Mike will share the draft when he gets it.

3. Article 13b of Hague Abduction Convention: A Special Working Group at the Hague attempted to draft a Guide to Good Practice on Article 13b of the Hague Abduction Convention – establishing an exception to the obligation to return the child when there is a showing of grave risk of physical or psychological harm. The Guide, however, focuses on domestic violence and does not give sufficient attention to other ways of establishing grave risk of harm. At the public meeting, everyone was unhappy with the Guide, particularly since the Guide seemed to be offering a roadmap for asserting a DV defense. The members resumed their work and said the Guide was not ready yet for distribution.

4. Rights of unmarried cohabitants: The Hague conducted an analytical and thoughtful study of conflict of law issues across the member states. There was little interest in moving ahead.
5. Child Protection Convention: There is a special commission preliminary document which suggests that the Hague should impose obligations to care for refugee children.
6. Recent controversial Washington case: Mike discussed a Washington case that was included in the materials. The case is important only because it contains an incorrect statement about treaties. In *In re Marriage of Long and Borrello*, 421 P.3d 989 (Wash. Ct. App. 2018), both counsel stated that because the United States is a party to the Hague Conference, the US is a party to all conventions, an obvious misstatement of the law. The US is a party only to the conventions that are signed and ratified, and most conventions require implementing legislation after ratification. In the Washington case an Italian court took emergency measures. While Italy is a party to the 1996 Protection of Children Convention, the US is not. The habitual residence of the child was Washington state. The Washington court held that the Italian temporary/urgent measures provision did not impair the jurisdiction of the court based on the child's habitual residence. As it happened, the court also applied the UCCJEA, and did so properly, thus reaching the right result. Review was denied. Some JEB members suggested perhaps an article in the Washington Bar Journal on the Hague and treaty obligations might be appropriate. We agreed that contacting one of the lawyers on the case and suggesting a short article would be a good idea.

Dues Structure

At the current time, the JEB receives \$5000 a year from four organizations which each send two members to one meeting a year. When the JEB started, there were three organizations (ABA, AAML, ULC) and the JEB met twice a year at a cost of about \$800-1000 per member per meeting. In 2012, JEB added the AFCC as a member organization. Over the past six years, the JEB has developed a surplus. The meeting expenses in the last six years have ranged from \$12,000 to \$20,000. The Reporter stipend is \$5000.00. We discussed ways to use the surplus, including sending members or observers to select drafting committee meetings on projects of interest. Harry Tindall moved to reduce dues from \$5000 year to \$4000 a year per organization for the next two years, at which point we will review the impact on our budget. Dianna Gould-Saltman seconded. The motion passed. We also agreed that JEB funds could be used to pay for members' attendance at select drafting committee members. Barbara is likely to attend the ERUC drafting meeting in the spring 2019, and Stacey Platt may attend the Unregulated Transfer of Adopted Children drafting meeting.

Lunch Discussion on Cohabitation

Harry Tindall led a discussion of the drafting project on economic rights of unmarried cohabitants. Peter Lown, Alberta Law Reform Institute, joined us as did Hon. Gail Hagerty (ULC) who is also on the Economic Rights of Unmarried Cohabitants Drafting Committee. During the wide-ranging discussion, participants suggested areas of concern and key questions to resolve for the drafting committee.

Peter Lown shared that all provinces in Canada allow some rights for adult cohabitants who have economic interdependent relationships. Sexual intimate relationship or any interdependent relationships require more than mere cohabitation. Peter suggested that defining the nature of the relationship is the place to start. Define the relationship and then define the basket of rights and obligations that the committee believes should arise from that relationship.

State laws range from the refusal to recognize any rights arising out of cohabitation (as in Illinois and Georgia) to full “marital-like” rights for committed intimate relationships in Washington state. NJ, MN and Texas by statute require written agreements for certain kinds of “palimony” claims.

A question was raised whether an act should prevent cohabiting individuals from eviction and use of private property. In other words, the drafting committee will need to decide whether the act should recognize cohabitants’ rights to avoid eviction.

Other concerns included whether a law should be time specific – whether the act should require that a couple cohabit for a certain period of time in order to be considered an “economic unit.” Should there be an opt in or opt out? Should you have a specific period of time after the relationship ends to bring an action? How should one define the end of the relationship? Most members agreed that there should be a statute of limitations. Should it be like nonclaim statute for death? Does it matter if oral or written? If oral, what about the dead man’s statutes?

Members seemed to agree that any act should avoid bringing back fault. Judges do not want to decide the quality of relationships or the depth of commitment to each other. Judges do not do this in marriage cases, they just divide property. On the other hand, under the law of some states, the quality of the cohabiting relationship is examined in order to determine rights to relief.

Other questions arose as to the scope of the project. Can there be tort and contract remedies? Liability for bad acts of a cohabitant comparable to a spouse’s liability for certain debts incurred by the other spouse? Would community property theories about joint liability for some debts apply to cohabitants in a committed intimate relationship? Wrongful death for cohabitant?

In addition, questions were raised about whether the same standards should be applied when the relationship ends by separation and when it ends by death of one of the cohabitants. We agreed that defining the scope of the project is of fundamental importance.

Interstate Compact on the Placement of Children

Although the Chief Justices asked the JEB to promote the adoption of proposed revisions to the Interstate Compact on the Placement of Children, the JEB consensus was that it was not within the JEB’s role to put our efforts into promoting interstate compacts. In addition, there were concerns about the jurisdictional confusion that might arise under the proposed revisions to the ICPC. We considered the Spector article in the Family Law Quarterly on ICPC and the Reporter’s Memo, both of which pointed to various potential problems regarding the revised ICPC.

Proposals for new drafting projects

1. Regulation of the disposition of human embryos and gametes

The JEB looked at whether there was a need for a uniform or model Disposition of Embryo and Gamete Act. Professor Susan Crockin, Georgetown, joined us for this part of the discussion. Susan is a nationally-recognized expert in the field of assisted reproduction law and was a valuable observer on the the Uniform parentage Act (2017). She spoke to the group at some length about current issues involving embryo and gamete disposition.

The Uniform Parentage Act addresses the parentage implications of posthumous use of embryo but does not cover the regulation of embryo or gamete disposition. Many contracts specify what happens at death of one party. But the question is what should happen at divorce or if one of the parties subsequently changes his or her mind?

The issue comes up more now because it is possible to store genetic material for extended periods of time. There is a decline in fertility, a longer shelf life for embryos, and differing laws as to how to dispose. There are currently at least five ways of looking at this:

- quasi or unique property because of potential to become human life; use balancing test if this is only way for one to conceive (*Davis*, Tennessee);
- the contract reigns (*Kass* – NY)
- contemporaneous agreement of parties as to use (*Witten*, Iowa)
- balancing factors that do not include questions about how many children they have or how much money they make (*Rooks*, Colorado); or
- potential life that goes to person who wants to use (Ariz. Statute).

Medical groups are trying to standardize consent forms, but courts are sometimes sympathetic to cancer survivors or other individuals for whom IVF is the only hope for biological procreation, contrary to the original consent documents. Doctors who use reproductive technology seem to want guidance and would appreciate model consent forms. Conflicts of law issues also arise as people migrate from one state to another.

Susan Crockin discussed cases in which the parties created the embryos through their own gametes and agreed that they would be discarded if the parties were to get a divorce. Disputes arise when one party at the point of divorce wants to preserve the embryos for implantation, the contract notwithstanding. In such cases, medical professionals and fertility clinics maintain that if they cannot rely on document that patients sign, then they cannot practice.

Medical community generally takes position that protecting best interests of children is not their responsibility. They do not want to decide fitness to parent. There is also the progenitor issue – requiring a distinction between being a donor and being a parent. Jason Patrick said he was a person willing to donate sperm but did not want to be a father. In post birth behavior, however, he began acting as a father and was ultimately determined to be the legal father under California parentage law, based on his parenting conduct.

A model or uniform law would provide clarity, something desired by clinics, medical professionals, and customers.

Harry Tindall moved, Lorie Fowlke seconded, that the JEB recommend a study committee be appointed to consider a uniform law on disposition of embryos and gametes when a dispute arises. It passed unanimously.

2. Domestic Violence Definition

Nancy Berg, Esq., a professional acquaintance of Kit Peterson and an AAML member, submitted a proposal for a uniform definition of “Domestic Violence” that would incorporate the contemporary understanding of intimate partner violence, including the key element of coercive control. There are several uniform acts which use the term “domestic violence.” We need to do some more research as to what a new definition might do to existing uniform laws as well as to whether there would be any interest among the states in enacting a new uniform definition. The JEB consensus was to table this proposal and to take it up at our spring telephonic meeting.

3. Model or uniform early intervention and family preservation act

Through the Conference of Chief Justices, we received a recommendation for a uniform law that would be aimed at family preservation through early intervention and targeted services. In particular, a legal framework might identify at-risk families and provide parenting and other services in order to prevent the need for removal of children from the home. There might be state interest in this sort of legal framework because of new federal legislation, the Families First Prevention Services Act IV-D-II. Part of the drive for this legislation was to address the opioid epidemic and to create alternatives to foster care. To do justice to this proposal, the JEB should consult with federal child welfare people from HHS. The goal of such an act would be to provide a legal framework for states in order to receive federal funding under the Families First Prevention Services Act. Professor Clare Huntington, Fordham, has researched early intervention programs and early childhood courts and would be a valuable resource. The discussion was tabled until our spring telephonic meeting.

4. Female genital mutilation

Harry proposed a model or uniform law prohibiting female genital mutilation. Since 1996, federal law has banned the procedure for females under age 18. Harry would like to see a model or uniform law that would ban female genital mutilation for all ages. About 26 states presently have such criminal statutes. The JEB decided this is a human rights issue and not necessarily a family law issue. The consensus was not to go forward at this time. (Postscript: shortly after our meeting, a federal court in Michigan struck down the federal female genital mutilation criminal statute as beyond congressional authority.)

Update on Recent Cases

Linda Elrod talked about UCCJEA cases and referred to the materials she submitted. She indicated that courts are still rendering inconsistent decisions in identifying temporary absences

for jurisdictional purposes and in identifying the home state for infants. The infants issue often arises when a pregnant mother is trying to avoid the father of the children.

Adoption Memo

The Reporter's memo on the application of UCCJEA to adoption cases was sent to JEB members. Her conclusion is that even if a state did not include adoption in its version of the UCCJEA, the PKPA makes the UCCJEA applicable. An adoption is a child custody proceeding within the scope of PKPA. Therefore, home state jurisdiction is important in adoption cases also. The memo will be posted to the website if there are no objections.

Miscellaneous

The last discussion was about the Indian Child Welfare Act. Barbara discussed *Brackeen v. Zinke*, 2018 WL 4927908 (N.D. Tex. 2018), holding that ICWA and the 2016 regulations promulgated by the Bureau of Indian Affairs was unconstitutional in various respects. The Supreme Court in the *Baby Veronica* case – *Adoptive Couple v Baby Girl* (U.S. 2013) – effectively invited an equal protection challenge in the last paragraph of the majority opinion. *Brackeen* is the first case in which states themselves took on the role of plaintiffs in a constitutional challenge to ICWA.

Meeting adjourned at 4:00 p.m.