

## MEMORANDUM

To: The Committee on Scope and Program

From: Jamie Pedersen, Chair, Study Committee on Possible Amendments to the Uniform Parentage Act and Other ULC Acts in Light of Potential Supreme Court Decisions Concerning Same-Sex Marriage (the “**Study Committee**”)

Date: June 12, 2015

Subject: Final Report and Recommendation That a Drafting Committee Be Established

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The Study Committee has completed its work and recommends that a drafting committee be established to draft amendments to the Uniform Parentage Act (the “**UPA**”) and other ULC Acts that currently include gender-specific references to married spouses, including but not limited to the Uniform Interstate Family Support Act, the Uniform Child Custody Jurisdiction & Enforcement Act, the Uniform Adoption Act, the Uniform Custodial Trust Act, and the Uniform Consumer Credit Code.

Given the widespread reality of legally married same-sex couples across the United States, the Study Committee believes that establishment of a drafting committee is both necessary and urgent regardless of the outcome of the litigation pending before the United States Supreme Court (*i.e. Obergefell v. Hodges*).

### **1. Committee Process**

The Study Committee comprises Commissioners Molly Ackerly, Barbara Atwood, Gail Hagerty, Melissa Hortman, Kay Kindred, Paul Kurtz, Debra Lehrmann, David McBride, Jamie Pedersen (Chair), and Harry Tindall. Lindsay Beaver and Liza Karsai provided staff support to the Study Committee. Commissioners Harriet Lansing, Rich Cassidy, Anita Ramasastry, and Battle Robinson have provided counsel as well.

The Study Committee held an organizational meeting on May 26, 2015. All members were present except for Commissioners Atwood and Hagerty, with whom the Chair conferred separately. Commissioner Robinson also participated in the meeting. The Study Committee includes several members with significant expertise in family law issues generally and marriage equality for same-sex couples and parentage law in particular.

### **2. Marriage Equality for Same-Sex Couples**

Nearly 72% of the U.S. population now lives in a state currently issuing marriage licenses to same-sex couples state-wide. The Washington Post reported on April 28, 2015 that more than 390,000 same-sex couples have married in the United States.

The change in policy to allow same-sex couples to marry legally has occurred with astonishing rapidity. The first legally-recognized marriages of same-sex couples happened in May 2004 in Massachusetts. As recently as October 2012, marriage equality was the law in only three states.

As of June 8, 2015, same-sex couples have the legal right to marry in 35 states (Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, North Carolina, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming), the District of Columbia, and Guam. Same-sex couples also can marry in some Alabama and Missouri counties, and the marriages of same-sex couples legally performed in other states are respected in Missouri.

On April 28, 2015, the U.S. Supreme Court heard arguments in several cases arising out of the Sixth Circuit and consolidated under one of the Ohio cases, *Obergefell v. Hodges*. The Sixth Circuit was the first U.S. Circuit Court of Appeals to find that laws restricting marriage to different-sex couples did not violate the equal protection and/or due process clauses of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court had previously declined to review final orders from the Fourth, Seventh, Ninth, and Tenth Circuits requiring states to issue marriage licenses to same-sex couples.

A decision in favor of the petitioners in *Obergefell* would likely mean that the remaining states would be required to issue marriage licenses to, and recognize the out-of-state marriages of, same-sex couples immediately after the mandate becomes effective. There is a possibility that the Court would require only recognition of out-of-state marriages, and not issuance of marriage licenses. But in either case, there would quickly be legally married same-sex couples in every state.

A decision in favor of the respondents in *Obergefell* on both issuance and recognition would mean no change for the 16 states in which marriage equality was achieved through court decisions based on the state constitution (*i.e.* Massachusetts, Connecticut, Iowa, New Jersey, and New Mexico), legislative action (*i.e.* Vermont, New Hampshire, New York, Hawaii, Illinois, Minnesota, Rhode Island, and Delaware), or a combination of legislative action and popular vote (*i.e.* Washington, Maine, and Maryland). It would likely mean no change in other states, such as California and Pennsylvania, in which federal court decisions have already become final and there seems to be a lack of political will to reimpose a marriage ban. And although a long period of litigation and legal uncertainty would ensue in some other states in which marriage equality was the result of federal court decisions, it is highly unlikely that existing marriages of same-sex couples in those states would be invalidated.

In any case, then, there is and will continue to be a large number of same-sex married couples living across the United States.

### **3. The UPA and Other ULC Acts**

Many ULC acts use gender-specific references to husbands and wives and thus do not provide for the possibility of legally married same-sex couples. This may lead to confusion about the application of the acts to married same-sex couples and legal uncertainty for the children born into these families. As the politics of this issue continue to evolve, the failure to incorporate same-sex couples into ULC acts may also become a barrier to adoption of those acts by state legislatures. There is anecdotal evidence that that is already the case with the UPA.

The UPA was most recently amended in 2002, before any state had permitted same-sex couples to marry legally. Its language is gender-specific and its approach to legal parentage is based on biology, with exceptions for adoption and “gestational agreement”. Under the current gender-specific language of the UPA, a court might take a literal approach and refuse to apply the marital presumption and other marriage-dependent doctrines to same-sex spouses.

Even if a court wanted to treat same-sex couples “equally” under the UPA, it is not clear how this would be accomplished, despite the statutory language in Section 106 that provisions of the UPA relating to determinations of paternity apply equally to determinations of maternity. Section 204, for example, provides for a “presumption of paternity” for a man who is married to the mother of a child at the time of the child’s birth. Under Section 201, an unrebutted presumption establishes parentage. However, under Section 631, the presumption of paternity may be overcome by genetic testing “excluding that man as the father of the child”.

How would a court treat a married lesbian couple who agreed to conceive a child with donor sperm, and then dissolved their relationship when the child was 18 months old? Would the non-biological mother have no rights because genetic testing revealed that she was not “the father of the child”? And would the non-biological mother have a free pass to avoid child support obligations simply because of the absence of a biological connection? What if the non-biological parent claims that the pregnancy lacked her consent?

The State of Washington amended its UPA in 2011 to address these issues both for same-sex couples in registered domestic partnerships and in anticipation of legislative action the following year to allow same-sex couples to marry legally. The Chair of the Study Committee was the prime sponsor of that legislation. Illinois is the only state to adopt the UPA recently; the General Assembly passed a version of the UPA amended along the lines of the Washington legislation, incorporating same-sex couples and making the act more gender-neutral. The bill awaits the Governor’s signature.

ULC staff have begun the work of reviewing other ULC acts that include gender-specific references to husbands, wives, mothers, and fathers. They have identified several acts that may need to be updated to cover legally married same-sex couples, including those listed in the first paragraph above.

#### **4. Conclusion and Recommendation**

Having considered these issues, the Study Committee finds that revision of the UPA and other ULC Acts to cover legally married same-sex couples would advance the law on subjects that the ULC has already addressed, address matters that have been the subject of successful enactment in the past, and cover an area of the law where the ULC has significant presence. It would also avoid conflicts of law when the laws of more than one state may apply, fill emergent needs, and modernize antiquated concepts. In light of the nationwide significance of UIFSA and the UCCJEA, in particular, uniform standards governing the recognition of parentage would be a clear benefit. The Study Committee therefore recommends that a drafting committee be established to undertake this work as soon as practicable.

The Study Committee briefly discussed the possibility that this work could be added to the charge of the Drafting Committee on Non-Parental Rights to Child Custody and Visitation, given the close connection in subject matter and the overlapping interest of many committee members. It was the sense of the Study Committee, though, that it would be better to keep the projects separate and encourage the chairs to remain in close contact, perhaps through serving on each other's committee.