

**MINUTES OF THE JOINT EDITORIAL BOARD
FOR UNIFORM FAMILY LAW
October 27, 2017**

Barbara Atwood, Chair
Linda Elrod, Reporter
Lindsay Beaver, ULC Staff Liaison
Mike Coffee, U.S. State Department
Hon. Dianna Gould-Saltman, AFCC
Courtney Joslin, AALS
Melissa Kucinski, ABA
Carl Lisman, ULC Commissioner (Vermont)
Kit Petersen, AALS
Stacy Platt, AFCC
Sam Schoonmaker, ABA
Harry Tindall, ULC Commissioner (Texas)
Linda Lee Viken, AALS
Guests: Lisa Karzai, Anita Ramasastry

Chair Barbara Atwood opened the meeting of the Joint Editorial Board on Uniform Family Law at the Loews Ventana Canyon at 9:00 a.m. Because there were some new members, Barbara asked everyone to give their name and their affiliation.

Barbara then went over the purpose of the Joint Editorial Board for new members.

- (i) To promote the education of the Bar and the public with respect to the acts and to promote the act in various state legislatures;
- (ii) provide timely reports to the founding organization on Board activities, programs and actions;
- (iii) review unofficial amendments proposed by various persons or adopted in the state legislatures to any of the Acts within the board's jurisdiction;
- (iv) review court decisions interpreting the Acts and publish commentaries or arrange for articles to be written as needed to encourage uniform judicial interpretation of the acts;
- (v) make recommendations exclusively to NCCUSL for its consideration suggesting the NCCUSL draft, in accordance with its usual procedures, amendment, revisions or further uniform or model acts in relation to the subject matter of family and domestic relation law; and
- (vi) report on developments or trends that may influence NCCUSL decisions to draft, amend or revise uniform or model acts in the family law or domestic relations category.

Barbara then asked for approval of the minutes from the last meeting. Harry Tindall moved the minutes be approved as circulated. Sam seconded and the motion carried.

1. Review of Results of Last Year's Meeting

a. Economic Rights of Unmarried Cohabitants

Per the joint recommendation of the JEBUFL and the JEBUTEA, a study committee has been set up for rights of unmarried cohabitants.” Hon. Gail Hagerty is the Chair of the study committee. Barbara Atwood is vice chair and Naomi Cahn is reporter. The study committee will be forwarding a recommendation to Scope for consideration in January 2018. The committee is looking at whether any framework should be opt in or opt out. The goal is to improve fairness and predictability and to avoid harm to cohabitants who, by design, are getting benefits through some other legal regime.

b. Retirement of Uniform Adoption Act

Per the recommendation of the JEB in 2016, the Executive Committee voted to retire the Uniform Adoption Act (1994) in July 2017. The Act has been around for twenty years with only one (maybe) adoption.

2. Link to “Retired” and “Uniform to Model” Acts.

Reporter Linda Elrod pointed out that when the ULC takes down a former act, it is no longer being advocated for adoption. That does not mean, however, that lawyers and academics do not need to have access to the older versions of the uniform acts for history and research purposes. She proposed that the JEB website would be an appropriate place for posting a link to the earlier versions of uniform laws, such as URESA, REURES, UCCJA, UAA, UMDA, UCACA, UPA (1973), UPA (2002), etc. After some discussion, the JEB agreed that there should be a place to link the full retired acts on the JEB website.

3. Amicus Request

The Joint Editorial Board received a request to write an amicus brief last spring. The Chair and Reporter discussed whether JEB should file a brief, sign on to one on the “right” side of the issue, or something else. We learned that the ULC has worked on a standard for filing an amicus brief. A subcommittee proposed the following amicus policy in July, 2015:

If a Joint Editorial Board wishes to file an amicus brief on an appeal of any case having to do with an issue within the Board's jurisdiction, as provided by the Memorandum of Understanding (MOU), the Board shall submit the request to the Conference for approval, and provide a copy of the request to all of the parties to the MOU. The request must, at a minimum, identify the case and the court in which it is pending, the parties to the case, the issue or issues that the Board wishes to brief, and a statement justifying the need for

file an amicus brief. Any request must be made sufficiently in advance of the filing deadline to permit a reasonable time for the Conference to respond to the request and to allow preparation of a high quality brief.

Approval may be given only for amicus briefs to be filed in the highest tribunal of a state, a United States Court of Appeals or the United States Supreme Court, or, in extraordinary circumstances, in the intermediate appellate court of a state or a United States District Court. If the Conference approves the request through its designated representative(s), the final draft must be received by all parties to the MOU no later than five business days before the filing deadline, unless otherwise agreed.

Any party to the MOU may object to the filing of an amicus brief up to two business days before the filing deadline unless another deadline is agreed upon by all parties. Objections must be delivered to the Board and the other parties to the MOU. Upon receipt of an objection from a Member, the Conference, through its designated representative(s), will attempt to confer with the parties to the MOU and a designated representative of the Board, to resolve the objection. If the objection is not resolved, the brief shall not be filed.

Discussion ensued about how hard it is to draft amicus briefs within the deadlines given by the courts, let alone additional limitations of having to submit to ABA, AAML and AFCC for approval (or objections). The consensus was that the JEB may be more effective just posting commentary about good or bad cases which could be cited by the parties.

4. Report from State Department

Mike Coffee, Counsel for the U.S. State Department, reported on international family law issues that occur at the Hague Conference of Private International Law.

a. Child Protection Convention

At the 2016 meeting Mike had reported that his department would be working for approval of the Child Protection Convention which the United States signed in 2010. In 2013 the ULC adopted amendments to the UCCJEA to make it possible for us to implement the Convention. However, last year's focus was the Support Convention. The Child Protection Convention has not been actively pursued and the transmittal package has not been sent to Congress. The Child Protection Convention is moving up on the priority list.

b. Hague Conference

A Special Commission on the Practical Operation of the Abduction Convention and the Child Protection Convention met October 10-17, 2017. No new projects

are on the horizon. The paper on application of the Child Protection Convention to unaccompanied minors will be revised. The Commission determined that work on a model consent to travel form should not be pursued.

(1) The Guide to Good Practice – Abduction Convention’s Grave Risk Exception

The draft was sent out in advance of the 7th Special Commission. The State Department held a public meeting to discuss the draft in August. Numerous comments indicated that the Guide was out of scope, too long, too focused on domestic violence instead of other issues that come up under 13b. The Working Group will continue working.

(2) Status of Children/International Surrogacy Arrangements

In 2015, Council authorized convening an Experts’ Group to explore the feasibility of advancing work in the area of private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements. In particular, the Experts’ Group should first consider the private international law rules regarding the legal status of children in cross-border situations, including those born as a result of international surrogacy arrangements. The Experts’ Group met in February 2016 and again in January/February 2017. The State Department convened two public meetings in February and September, 2016.

The Experts’ Group agreed in principle on the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage. The Experts’ Group concluded that it needs to consider:

- the question of how an instrument dealing with the recognition of foreign judicial decisions on legal parentage could operate;
- the recognition of legal parentage when recorded in a public document; and
- the feasibility of the possible application of future agreed general private international law rules on legal parentage to international surrogacy arrangements, and the possible need for additional rules and safeguards in these cases as well as in cases of assisted reproductive techniques.

A third meeting of the Experts’ Group is scheduled for February 2018.

(3) Recognition and Enforcement of Civil Protection Orders.

The Council asked that the Permanent Bureau prepare a note to allow for discussion at the 2018 Council meeting. The Europeans are not too crazy about this one because they combine criminal and civil orders.

(4) Recognition and Enforcement of voluntary agreements.

In 2015, Council invited the PB to circulate a questionnaire and to convene Expert's Group to consider the role that the existing conventions play. The EG recommended, among other things, that a "navigation tool" be developed to provide best practices on how a voluntary agreement might be recognized and enforced pursuant to existing Conventions. In 2016, the Council asked the Permanent Bureau to develop such a "navigation tool." In 2017, the Council invited an update in 2018. Information Document 7 for the Special Commission addresses come of this issue.

(5) Rights for Unmarried Couples

Council invited the Permanent Bureau to continue to develop a questionnaire on private international law issues relating to cohabitation outside of marriage, including registered partnerships. PB reported to Council in 2017 that there is a general lack of interest in pursuing. The topic was removed from the agenda, although the PB was requested to continue monitoring the topic.

5. **Enactment of Uniform Family Law Acts**

UCCJEA – 51 – but not Massachusetts or Puerto Rico
Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (2000) (2002) - 21
Uniform Collaborative Law Rules/Act (2009) (2010) – 17
Uniform Child Abduction Prevention Act (2006) – 15
Uniform Deployed Parents Custody and Visitation Act (2012) – 13
Uniform Family Law Arbitration Act (2016) – 2
Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (2000) (2002) – 21 states
Uniform Interstate Family Support Act (2008) – all 53
Uniform Parentage Act (2017)
(2000) (2002) – 11 –AL, DE, IL, ME, NM, ND, OK, TX, UT, WA, WY
(1973) Act – 9 - CA, CO, HA, KS, MN, MT, NJ, OH, RI,
Uniform Premarital and Marital Agreements Act – 2
Uniform Premarital Agreement Act – 26
Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act (2015) - 4

On the issue of getting more enactments for the uniform laws, the Chair noted that Arizona adopted the UFAA by Supreme Court Rule, effective January, 2018. She included the petition used in Arizona and suggested other states might want to try the court rule route rather than legislation. The Collaborative Law Act has also had several enactments by court rule instead of legislation. She noted that only two states had enacted the UPMAA, perhaps because it makes it more difficult to enforce premarital contracts, as compared to the standard of the UPAA.

Kit suggested that we should send our family law uniform laws to the legislative committees of the family law sections of the state bar associations. A note could accompany the act “Please consider this [uniform law] at your next meeting because it will . . .” Others suggested that the Academy of Matrimonial Lawyers has a journal and most states have a bar journal. The ULC could find authors (commissioners or others) in the state to author articles as to why the act would be good in the state.

6. Uniform Parentage Act (2017)

The Uniform Parentage Act (2017) passed in July and was finalized this fall. Courtney Joslin was the Reporter and noted that UPA (2017) makes five major changes:

- a. The new Act makes UPA gender neutral where appropriate. It updates the presumptions and acknowledgement process. Alleged genetic and presumed parent and intended parent can sign acknowledgement.
- b. UPA (2017) added a de facto parent provision. A functional parent can seek to be adjudicated under the act.
- c. There is a new provision to address the parentage of a child born of sexual assault. A court can declare that the biological father is not the legal father but can still order him to pay support.
- d. The UPA (2017) updates surrogacy. It still includes genetic and gestational surrogacy. The gestational model is no longer based on an adoption model, instead the intended parent is a parent by operation of law on the birth of the child. There are different requirements for genetic surrogacy and allows the mother to withdraw consent up to 72 hours after birth.
- e. The UPA (2017) includes the right of children born through ART to gain non-identifying information upon reaching majority and facilitates the disclosure of identifying information on agreement of the donor.

7. Nonparental Visitation Committee

The nonparental visitation committee is commencing its third year of work. It met recently and will meet again in March 2018. The process has been extremely fluid and the committee has had to change several policies. At present, there are two categories of nonparents who would have rights. “Substantial relationship” and “consistent caretaker,” with a requirement that the petitioner in the former category show detriment to child if contact is denied. JEB discussed the difference between harm to the child and detriment. There is a presumption a person is a consistent caretaker if relationship was formed without expectation of financial remuneration and has lasted for six months or more within the past year. There was lots of discussion about whether it is possible to get consensus and whether the act should be limited to grandparents and stepparents because de facto parents might be able to use UPA (2017). Chair Barbara is optimistic that the act

is coming together.

8. Discussion on Adoption and UCCJEA

The Reporter prepared a memo on adoption and the UCCJEA. While there is some disagreement as to exactly why adoption was omitted, most agree it was because the ULC had recently enacted the Uniform Adoption Act which had its own jurisdictional provision. Since only one state enacted it, states are widely divided on whether UCCJEA applies to adoption or not. Some states include adoption; most do not. Adoption requires a termination of parental rights, which clearly does fall within the UCCJEA, and the creation of new rights. Harry noted that for termination the court also needs personal jurisdiction over the person whose rights are being terminated. He suggested a study committee on jurisdiction, adoption and termination of parental rights. The JEB was not quite ready to endorse that yet.

9. Proposals for Study Committees

a. Unregulated Transfers of Custody and Rehoming

Lyle Hillyard, Commissioner from Utah, suggests the JEB look at unregulated transfers of custody which appears to be a most serious problem in intercountry adoption cases. There is only a smattering of legislation. Trish Matthew and Stephanie Eye, Office of Consular Services, joined us by phone. They mentioned a story about the Chicago PD having a case where a rehomed child was unsafe but Illinois had no law authorizing state intervention. After Reuters did a five part series entitled “The Child Exchange” in 2013, rehoming and unregulated transfers were pushed into the spotlight. There is currently an interagency working group consisting of HHS, DOJ and USCIS. It has expanded to include association of administrators of the ICPC and National Association of Attorney Generals. The group meets in person quarterly to develop strategy on how to coordinate responses to the issue, i.e. to keep it from happening and to coordinate responses to it to locate the child and confirm the child’s safety. The State Department has an interest because of bilateral relationships with other countries who send children to this country through international adoptions. HHS has a tip sheet to raise awareness by educating teachers, child protective services, and others of red flags, such as children who appear or leave on school rolls without explanation. Agencies for international adoption exist in different states but there is no ongoing obligation to check on children once they are placed.

There have been several strategies suggested to minimize the problem:

- Increase and improve preadoption training both domestically and abroad. Often parents are not prepared for the types of challenges and range of traumas these children have had. Domestic adoptions through foster care typically require 40 hours training; international adoption requires only 10.

- Create post adoption services for international families, especially with special needs children.
- Understand how state laws affect state authorities' ability to report unregulated custody transfer (UTC). UTC may not be a form of abuse or neglect under state law so child protective services may not understand UTC as an act that puts children in harm. Additionally, there is the issue of parental rights. Parents have the right to control a child's custody, including placing the child in the care of others. There may be a Power of Attorney (POA) in some cases, granting the power to register a child in school but it does not transfer parental rights. In a worst-case scenario, a child may be handed over in Walmart parking lot with no documentation.

Utah has a statute which defines "high needs" children and includes adopted children within that category. That category, in turn, triggers specific state responsibilities. Seven states – Arkansas, California, Colorado, Florida, Maine, Texas, Wisconsin – have additional criminal laws.

The goal would be a uniform law that allows child protective services to locate the child, ensure the child's safety, and make sure there is a "parent" with authority to act. There needs to be a multifaceted approach to the problem.

Kit Petersen moved that we recommend the appointment of a study committee. Dianna Gould-Saltman seconded. Linda Elrod noted that it appears the two issues are ensuring safety and legalizing the relationship. There was some discussion of the scope. Is it just adoption or other types of cases? Stacey noted that UTC might fit into an existing Ombudsman program in a state and failed adoptions from child welfare perspective. Sam wants to see if UTC is happening with surrogacy. The motion carried.

b. Proposal for Pet Custody

The JEB next considered a proposal that the ULC set up a study committee on the law of pet custody. Alaska recently enacted a statute allowing shared custody and consideration of the pet's well-being. Several states have laws considering pets in domestic violence situations. The consensus was that JEB is not ready to suggest a study committee. While everyone loves pets, especially their dogs, we should let each state do their own thing for now. In other words, the JEB found little need for uniformity. Concern was also expressed that establishing pet custody standards would exacerbate the bitterness of disputes at divorce and add to the burdens on family court judges.

c. Proposal on Child Marriage and Forced Marriage

Carl Lisman submitted a proposal for a study committee based on news reports in the New York Times about the problem of underage marriages, many forced. Three states, New York, Texas and Virginia, this year have raised the marriage age to 18 as an absolute. While some wanted to table it, others thought we should also look at the forced marriage issue. The consensus was that Linda Lee Viken would contact an attorney who works in this area to get more information. We will gather more information about the scope of the problem, existing legislation, and potential approaches. The JEB will have a conference call later in the spring, with a view toward possibly presenting a recommendation for a study committee by May.

d. Proposal for Uniform Family Law Code

Harry proposed that the ULC should aggregate the various family law acts into one code. His proposal contained a list of uniform laws in the family law area. There was some discussion if aggregating the uniform laws would help or hurt? Barbara suggested listing and linking all family law acts on the JEB website. We can also list the uniform acts that became model acts (UMDA) and retired acts as discussed earlier. There was strong support for making use of the website in this way.

e. Proposal for Stepparent adoption – third party

Harry recommended we look at stepparent adoptions and explore the creation of an act authorizing stepparent adoptions without termination of parental rights. States typically allow a stepparent to adopt without terminating the custodial parent's rights, but this proposal focuses on whether the other parent's rights could remain intact. California by statute authorizes the recognition of more than two legal parents. The UPA (2017) contains a de facto parent provision that could include a stepparent. It also has a bracketed provision for the recognition of more than two legal parents. Fourteen states allow second parent adoption (adoption by a cohabitant of a legal parent), a development largely driven by the unavailability of marriage to same-sex couples until 2015. In light of the related provisions in the UPA (2017), the JEB determined there was no basis for immediate action on this topic.

10. Discussion of Problem Areas with the UCCJEA and Recent Cases

The Reporter prepared a memo dealing with court interpretations of home state when there have been temporary absences and when an infant is involved. The topic of infants often leads to the adoption problem discussed earlier. The consensus is that perhaps the JEB can post some of the cases and commentary on the JEB website to guide lawyers and others in proper interpretation of home state.

A second memo looked at recent cases and at court interpretations of continuing jurisdiction when all parties have left the state. After summarizing the memos, Linda Elrod urged JEB members to read them closely, with a view toward posting them on the website as commentary.