

Commission weighs new family law-related acts

One proposal would update premarital agreement act; another deals with custody issues for parents in the military.

BY MARY KAY KISTHARDT AND BARBARA HANDSCHU

Although family matters are historically a matter of state law, there are numerous instances in which uniformity may be desirable or even essential. In fact, many of the current laws and procedures that affect domestic relations are based on uniform model laws. For instance, many states' divorce statutes are variations on the Uniform Marriage and Divorce

Act. All family law practitioners are aware of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has now been enacted in 49 states as the successor to the Uniform Child Custody Jurisdiction Act that was in effect in all 50 states. This act has significantly reduced the number of interstate custody disputes. Practitioners may not, however, be aware of the process by which these uniform acts are promulgated.

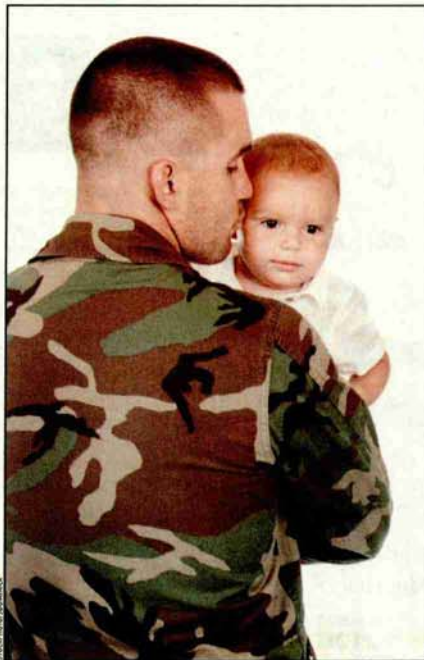
The Uniform Law Commission, also known as the National Conference of

adopted in 26 jurisdictions with various changes made by states either when they adopted it or subsequent to its adoption. See Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 J. Am. Acad. Matrim. Law. 355 (2010). The act provides standards for agreements that attempt to establish spouses' rights upon a subsequent divorce. While the act was generally met with approval, there have been significant criticisms, particularly with respect to protections for the more vulnerable spouse. The original act promotes the enforceability of agreements entered into before marriage generally without consideration of the fairness of those agreements at the time of their enforcement. In addition, the act applies only to agreements made prior to a marriage and not to those that were entered into during the marriage. Both of these circumstances have been addressed in the newly proposed act.

Because of a concern about fairness at the time of enforcement, the UPMAA provides for an alternative provision that offers the option of refusing enforcement based on a finding of undue hardship at the time of enforcement. This reflects the existing law in a significant minority of states. Perhaps most significantly, the UPMAA broadens the application of the standards for premarital agreements to those agreements entered into after the marriage. These agreements, frequently referred to as marital or postnuptial agreements, are becoming more common. The standards for reviewing their validity, however, have been far more varied throughout the country. Some states have imposed a higher burden on individuals seeking to enforce postnuptial agreements. Similar to the position taken by the American Law Institute in its Principles of the Law of Family Dissolution, the UPMAA treats both premarital and marital agreements in the same fashion.

COHABITATION NOT COVERED

The UPMAA is not intended to cover cohabitation agreements. Any applicability of the UPMAA to officially recognized nonmarital relationships, such as civil unions and domestic partnerships, will be a matter for state law other than the UPMAA. Also excluded from the coverage of the UPMAA are the traditional transactions that spouses enter into on a routine basis, which are not thought of as marital agreements because they are not primarily intended to effect rights at dissolution. These may include such things as entering into a mortgage, obtaining financing for a motor vehicle, agreeing to



when the deployed parent returns. Some states have addressed this issue in various state laws, but there are many that have not, leading to significant uncertainty regarding the status of custody upon the return of the parent. According to the prefatory note in the current draft, "A uniform approach to these issues would greatly increase predictability and certainty for the families affected, and would increase fairness by ensuring that the same standards applied no matter where the parents lived or a family happened to be posted before deployment." Finally, the act addresses the desirability of ensuring that deployed parents can maintain a significant connection to their children while they are away. Both the Uniform Premarital and Marital Agreements

Act and the Deployed Parents Visitation and Custody Act will be reviewed in final form this summer and we will report on them in future columns.

The Uniform Law Commission is also considering another act that would have implications for custody orders nationwide. In response to the custody issues facing the large number of parents being deployed for military or national service, the Uniform Law Commission has drafted an act entitled the Deployed Parents Visitation and Custody Act. The act addresses issues that are unique to the circumstances of deployed parents. These include the necessity of making determinations regarding custody in an expeditious fashion to respond to the sudden nature of the changed circumstances. In most circumstances, parents do not have the time to avail themselves of the usual child custody procedures before having to leave their children. While some states provide for expedited proceedings, many do not.

In addition, jurisdictional issues also arise when the parent who remains in the country relocates to another jurisdiction while the military spouse is deployed. Because child custody law varies so greatly from state to state, there can be significant variations in the standards and procedures that are used to govern these matters. Also, the deployment often results in a temporary custody situation that must be addressed

Another important project of the Uniform Law Commission this year is to revise the UCCJEA in order to incorporate the 1996 Hague Convention on the Protection of Minors. The United States has signed the convention, and the revision of this act will constitute part of the implementing legislation. The primary focus is to provide that courts in the United States will recognize foreign custody determinations if the facts and circumstances of the case indicate that the foreign custody determination was made in substantial conformity with the jurisdictional provisions of the UCCJEA. This act is subject to final approval in 2013.

Copies of all the drafts of these acts along with the status of committees' work can be found on the Uniform Law Commission Web site, www.nccusl.org. When considering the uniform acts, it's helpful to note that all acts have comments which, while not part of legislation, contain important information for courts and for lawyers. Careful review of the commentary is urged, especially since only the text of the act becomes the state enactment. The commentary often includes helpful examples that help to clarify the intent of the law.

THE PRACTICE

Commentary and advice on developments in the law

Commissioners on Uniform State Laws (NCCUSL), was established in 1892. It is an organization that is made up of practicing lawyers, judges, legislators and legislative staff and law professors who come together to draft and promote the enactment of uniform laws. These uniform laws must then be enacted by state legislatures.

The members of these various committees are appointed by state governments and serve without compensation. In the area of family law, there is also a specially designated committee that monitors the activity of NCCUSL on uniform and model acts that are family law-related. This committee known as the Joint Editorial Board on Uniform Family Law (JEB-UFL) is made up of Uniform Law Commission members, American Bar Association members and American Academy of Matrimonial Lawyers members, together with liaisons from a number of other entities such as the Association of Family and Conciliation Courts. The board is responsible for monitoring all uniform and model acts that are family law-related. This body makes recommendations concerning the work of other committees on family law matters. It may recommend that the Uniform Law Commission leadership undertake the study of the desirability of a uniform law in a particular area. For instance, recently the JEB-UFL suggested that arbitration may be an appropriate topic for a uniform family law.

The Uniform Law Commission is currently working on a number of family law-related acts of particular interest to family law practitioners. One of the most significant of these is the Uniform Premarital and Marital Agreements Act (UPMAA). The original Uniform Premarital Agreement Act was promulgated in 1983. Since that time it has been



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