ULC JOINT EDITORIAL BOARD FOR UNIFORM FAMILY LAW

Spring Zoom Meeting on March 22, 2023, at 10:00 a.m. CT.

Those present included:

Barbara Atwood, Chair

Linda Elrod, Reporter

JEB Members

Laura Belleau, AAML; Lorie Fowlke, ULC; Melissa Kucinski, ABA Family Law Section; Dianna Gould-Saltman, AFCC; Stacey Platt, AFCC; Sam Schoonmaker, ABA Family Law Section; Lane Shetterly, Division Chair for ULC; Stacey Warren, AAML

Emeritus Members

Jeff Atkinson, ABA FLS; Paul Kurtz, ULC; Harry Tindall, ULC

Liaison Members

Sharla Draemel, U.S. State Department; Courtney Joslin, AALS

ULC Leadership & Staff

Pamela Bertani, ULC; Tim Berg, Chair, Executive Committee; Tim Schnabel, ULC Executive Director; Libby Snyder, ULC Legislative Counsel Liaison

Observers

Sarah Bennett, ULC Commissioner; Joe Booth, ABA Publication Board; Mike Coffee, DOJ; Maxine Eichner, ULC Commissioner; Linda Lea Viken, AAML

Chair Barbara Atwood called the meeting of the Uniform Law Commission Joint Editorial Board on Uniform Family Laws to order at 10:00 a.m. on March 22, 2023. Barbara welcomed the members of the Joint Editorial Board (JEB), other ULC commissioners, observers and ULC staff. There were brief introductions.

Stacey Warren moved that the minutes of the November 18, 2033, meeting be approved as circulated. Melissa Kucinski seconded. The minutes were approved unanimously.

1. Update on Current ULC Study Committees and Projects

a. Study Committee for Article 9 UPA 2017

At the November meeting, the JEB agreed to propose a study committee to consider revising Article 9 of the Uniform Parentage Act 2017 to require disclosure of donor identifying information on request by donor-conceived children. The proposal recommended revising Article 9 rather than draft a freestanding law such as Colorado's Protection for Donor-Conceived Persons and Donor-Conceived Families Act. The proposal, with a somewhat broader scope, was approved by the Scope and Program Committee and by the Executive Committee. Here is the Scope and Program recommendation:

> Resolved, that the Committee on Scope and Program recommends to the Executive Committee that a Study Committee on Gamete Donor Identity Disclosure be formed to consider whether donor identification should be mandatory upon request by a donor-conceived child. The committee should consider (a) whether to revise Article 9 of the Uniform Parentage Act (2017), whether to draft a separate act addressing the subject matter of Article 9, including such revisions, and (c) whether the issues addressed in Sections 904 and 905 of the Uniform Parentage Act (2017) should be moved into a separate article.

The study committee has not yet been appointed.

Barbara reported that she had attended a meeting called by Tyler Schiff, of the Donor Conceived Persons Council, on March 21, 2023, to discuss a broader ULC project to address multiple issues in the use of assisted reproduction technology. Those in attendance included Nicole Huberfeld, reporter for the JEB for Health Law. Schiff would like the ULC to develop uniform law regulating gamete donation, family size, and fertility clinic operation, among other issues. Courtney noted that in a Post *Dobbs* world, same-sex families are wary of losing recognition. An Oklahoma case reported in February gave the sperm donor superior rights to the former same-sex wife of the biological mother. See NBC News, Feb. 17, 2023. There is the potential of disrupting existing legal families and interfering with parental decision making as to whether they tell children they were donor conceived. Courtney pointed out that these issues need to be addressed within a comprehensive scheme that protects families created by assisted reproduction; otherwise, donor's rights may trump established parental rights. Harry and others agreed that the ULC's efforts at this point should be limited to amending Article 9 of the Parentage Act. Most sperm and gamete banks today are requiring donor identifying information. Barbara indicated that Jamie Peterson reported that in Washington, donors are given the choice of identity disclosure under Article 9 but have consistently agreed to disclose identity on request when a donor-conceived child reaches the age of 18.

b. Child Participation in Family Court Proceedings Report

Barbara noted the JEB had recommended the appointment of a study committee on the broad topic of children's participation in family court proceedings. The study committee was appointed by ULC leadership, and Barbara was appointed chair. Over the course of several meetings, the committee narrowed the scope to focus on developing a law or court rule regarding interviews with children by judges or court-affiliated personnel to glean the child's views or preferences in proceedings to determine custody, visitation, legal decision-making, parenting time, and related issues. Many states lack a structure or process governing this aspect of custody dispute resolution. At its midyear meeting, the Committee on Scope and Program recommended a drafting committee:

> Resolved, that the Committee on Scope and Program recommends to the Executive Committee that a Drafting Committee on Judicial Interview Procedures for Children be formed to draft a a uniform or model act

addressing custody, visitation, parentage, and related proceedings in which other law permits or requires the child's views to be heard. The act should address (1) the factors to be considered when the law accords judicial discretion as to whether a child's views should be heard; and (2) the procedures to be used when either (a) the law requires or (b) a judge determines to permit a child's views to be heard. The procedures should explicitly address due process rights of parents including access to the results of the interview.

When the proposal was considered by the Executive Committee, however, the members were evenly divided, with one abstention, on whether to approve the appointment of a drafting committee. Two members of the Executive Committee were absent. Barbara and Melissa Kucinski, the Reporter for the Child Participation Study Committee, with input from other members of the study committee have produced a supplemental report to accompany a request for reconsideration. The report explains in more detail than the original proposal the value of uniformity and the concrete benefits of a clear framework on judicial interviews of children. As noted in the report, a uniform act on this topic would promote the efficient functioning of the UCCJEA while also protecting the parties' due process rights. In addition, it would assist courts in distinguishing courtroom testimony from the information elicited during the informal interviews. The Study Committee's request for reconsideration will be considered by the Executive Committee at its May 2023 meeting.

c. Study Committee for a State Indian Child Welfare Act

The Indian Child Welfare Act of 1978 is under attack from various groups. The United States Supreme Court is being asked to strike down ICWA in whole or in part under the equal protection principle of the 5th Amendment and the anti-commandeering doctrine. With *Haaland v. Brackeen* case pending in the United States Supreme Court (Nov. 9, 2022 - https://www.supremecourt.gov/oral_arguments/audio/2022/21-376), there is some concern that the Supreme Court may find that ICWA has gone too far in imposing various requirements on state agencies for removals of Indian children and terminations of parental rights (e.g., heightened burdens of proof, active efforts to preserve family, qualified expert witnesses) and for placements of Indian children. Half of the states joined an amicus brief urging the Court to uphold the law. There is a risk of upsetting settled principles of federal Indian law. There is speculation that there may be an equal protection holding as to the placement preference for "other Indian families." Because that placement preference is not linked to the child's tribe, challengers argue that it is racial in nature and therefore subject to strict scrutiny. Some of same groups attacking affirmative action are also attacking ICWA.

Barbara is on the study committee for a possible uniform or model law on child welfare law applicable to American Indian and Alaska Native (AI/AN) children—a state Indian Child Welfare Act. Several states have enacted such laws, with Minnesota having recently expanded its state ICWA. The protections ICWA provides for Native families are considered the "gold standard" for child protection. The committee is looking at drafting a state Indian Child Welfare

Act to fill in the gaps in the federal legislation or to replace it if ICWA falls. Kate Fort, a national expert on ICWA, is Reporter. This project was proposed by Kate and Addie Smith, an Indian law attorney, at the suggestion of Commissioner Martha Walters, who now chairs the study committee.

d. Uniform Transfers to Minors Act (UTMA)

A study committee has been appointed to update the UTMA. It has been widely enacted but needs modernization as well as revising to address frequently occurring issues. Most litigation comes up in context of divorce. One parent may improperly use the children's UTMA account as child support. See In re Marriage of Rosenfeld, 662 N.W.2d 373 (Iowa App. 2003). A parent custodian may use the funds for their own use. See Wilson v. Wilson, 154 P.3d 1136 (Kan. App. 2007), where a father's frauds and use of children's funds under the UTMA resulted in compensatory and punitive damages to his children.

There was some discussion about what obligations parents have to hold funds for children generally. See Proposals, #8.

2. State Department Report

Sharla Draemel noted that there was not as much to report since the November meeting. The Hague Conference on Private International Law at its General Policy meeting decided to form a new working group to find some consensus on international cross-border recognition of parentage orders, but challenging issues relating to surrogacy and citizenship have arisen. Because many countries ban surrogacy entirely or ban the payment of compensation to surrogates, foreign nationals come to the U.S. for surrogacy contracting, but they face the risk that the child's home country will not recognize parentage of the intended parents. The experts' group on Parentage met last October. In January 2023, there was a meeting to review the initial report by the expert's group. It has proposed a bifurcated system - Convention on International Recognition of Parentage would exclude surrogacy. There would be a separate convention on surrogacy.

The United States, with significant support, would like to see a broader model with parental recognition in a single instrument. The process is moving forward but is not at treaty negotiation stage. The next meeting will have political representation of member states. Sharla noted that the EU is undertaking its own effort to recognize parentage across their countries through a standardized certificate. The U.S. State Department is following their progress. If the European Union cannot come to an agreement within itself, it is unlikely that agreement can be achieved in the broader international realm. The Experts group will make a report in March 2023 as to whether to draft a convention on cross border parenting and whether to include surrogacy. While the U.S. does not register parentage, such a convention would affect children born in the United States whose home country is overseas. The State Department Legal Adviser's Advisory Committee on Private International Law will have input at its meeting April 24th. Linda Elrod and Melissa Kucinski are members of ACPIL and will attend the meeting.

This fall there will be a Special Commission meeting on Hague Abduction Convention.

3. Enactment status of existing uniform laws relating to family law.

Libby Snyder, ULC Legislative Counsel, indicated that this has been a successful year for family law enactments. There have been several enactments and introductions. The Uniform Child Abduction Prevention Act is getting some traction after an endorsement from the National Center for Missing and Exploited Children. There are several introductions. The Uniform Parentage Act (UPA) 2017 has been enacted in California, Connecticut, Maine, Rhode Island, Vermont and Washington. It has been introduced in several other states. Montana enacted the Uniform Family Law Arbitration Act and it is being introduced in other states. The Uniform Unregulated Child Custody Transfer Act (UUCCTA) has been enacted in Utah and Washington. First introduction of Cohabitants Economic Remedies Act this year was in New Mexico. The materials for the meeting included a report and enactment chart assembled by Libby Snyder, ULC Legislative Counsel (attached).

4. State Attempts to Amend UCCJEA

There was discussion about the proposed Florida amendment to the UCCJEA which could allow temporary emergency jurisdiction if a child present in the state is at risk of being subjected to gender affirming treatment in another state. It allows a Florida court to ignore another state's custody decree if the child faces gender affirming medical treatment pursuant to the other state's custody order. The Florida bill also adds a provision that allows a parent to remove a child in violation of a custody order to prevent the other parent from submitting the child to such medical treatment. The Florida bill undermines the uniformity of the UCCJEA and its recognition of sister state decrees, and Lorie suggested that we submit a statement in support of maintaining uniformity in the UCCJEA. Courtney urged the ULC JEB to take a stand against the Florida bill. She distinguished the amendments to the UCCJEA in other states (e.g. California and Minnesota) which protect parents and children coming into the state for the purpose of receiving gender affirming medical treatment. The JEB discussed the pros and cons of weighing in on any of these bills.

The basic policy of the ULC is that staff, leadership and the JEBs will not testify in opposition to bills because of the risk that the bill sponsor or other proponents will view it as a misuse of the public funds, leading potentially to a state's withdrawal from the ULC altogether. Individuals and the various professional groups who are the constituent members of the JEB can weigh in according to their own protocols and advocate for maintaining the uniformity of the UCCJEA. The JEB itself, however, cannot take a position unless each of their constituent organizations agree – a process that can be lengthy. The consensus among members was that no action should be taken.

5. Reports from JEB Organizational Representatives

ABA - Melissa reported that the ABA Family Law Section is geared to getting back to live meetings and creating strong CLE programs, rather than policy. The Reproductive Technology Committee is active and would be willing to send a member to the study committee to amend Article 9 of UPA (2017). The Board of Governors did urge Secretaries of State to implement the e-program for signatures, etc. Sam agreed.

AAML - Laura Belleau reported that the AAML Board of Governors has adopted a resolution to condemn the decision in *Dobbs* as intruding on individual and familial rights to privacy and autonomy. There has been some fallout from some of the AAML members who think the statement was outside of their mission. The AAML is also concerned about the various state proposals to amend the UCCJEA. Stacey Warren agreed.

AFCC - Dianna reported that the AFCC 60th anniversary national conference will be in May 2023 in Los Angeles and will focus on child custody. There will be a recap of the voluminous social science research on this topic from the last sixty years.

AALS - Courtney and Maxine indicated there was nothing from AALS at this time that impacts the work of the JEB on Uniform Family Laws.

Barbara queried whether there were other organizations that should be asked to join the JEB. She mentioned the National Council of Juvenile & Family Court Judges, the International Academy of Matrimonial Lawyers, and the International Society of Family Law. The consensus was not to expand the JEB at this time. The NCJFCJ is mainly focused on the work of the juvenile court. There are very few general family law judges in that group. As to the international groups, the consensus was that the ULC is concerned with state law, not international law. While we need to be aware of what is happening outside the United States, participation by those groups would not further our goals. Additionally, we receive regular comprehensive reports from our State Department liaison. Also, four of our members are also members of the IAML, and some current JEB members are likewise members of the ISFL. Neither the IAML or ISFL have committees that work on law reform.

We also discussed dues for JEB groups. Originally dues were $5000 when it was just ABA/FLS and AAML and there were two in-person meetings a year. Dues were waived a couple of years during COVID-19. They are now back to $4000 an organization. If we have one meeting a year and pay the reporter stipend, we exceed our dues revenue. Attendance at the Philadelphia meeting cost about $16,000. Because we have $52,000 in our reserves, we do not need to raise dues at this time, but the consensus also was that we should not lower dues.

6. Access to Justice

Barbara asked if the JEB should have a role in the access to justice movement and Family Justice Initiatives. Much of the momentum in this area is driven by the fact that over 70% of litigants in family court are self-represented. The materials included summaries of innovations in several states, including formal triage systems for case assignment, the use of informal trials for self-represented litigants, and the use of other dispute resolution methods. Sam mentioned the

trial program from the National Center for State Courts is very unpopular with the practitioners in Connecticut, owing in part to confusion about which cases belong in which category. The traditional goal in Connecticut was to triage hard cases, using case management tools, but implementation has been rough. There have been insufficient procedures to resolve temporary motions, such as for parental access or child support. It is too early to say if the Pathways process will be successful or not. Other reforms have focused on the lack of adequate technology and the possible uses of Artificial Intelligence to create uniform processes. The triage focus has changed to expecting the easier cases, while devoting more resources to harder cases. As these reforms develop, concerns for due process and access to justice intensify.

Barbara noted in that New York there is opposition to child custody evaluators. A New York task force recommended placing a moratorium on the use of child custody evaluators in family court, finding it was an abdication of judicial responsibility. There are also allegations of racial and economic bias since low-income litigants don't have the resources to challenge the conclusions of the child custody evaluator.

While there was not widespread enthusiasm to pursue access to justice issues, Barbara, Sam, and Max agreed to look at some specific topics to discuss at our fall meeting.

7. Who can attend meetings

Barbara indicated that she has always considered our meetings open – but some have expressed concern, especially after the *Wall Street Journal* reporter Amy Marcus attended our last meeting as an observer. While Amy made clear she was there for her own education and not as a reporter, many expressed concerns about reporters attending in general. Stacey Warren noted that we benefit from confidentiality in discussing various proposed topics and that some guests could have a chilling effect on our frank and open discussions of issues. Dianna mentioned the problems for judges if they are quoted out of context or in connection with issues that might arise in pending or future cases. We discussed whether we should have an open policy for former JEB members. People recognized that the knowledge of institutional history that former members bring to the table can be extremely valuable.

Members agreed that we need a clear policy about guests. One suggestion is that if we are discussing a particular topic that requires some expertise, the JEB will invite academics or others with particular knowledge of the subject matter to attend. Barbara said she has made it a general practice to invite family law experts who are commissioners, since they may be appointed to the JEB in the future and their expertise is valuable. We also have had diligent observers over the years who have made significant contributions to our deliberations. There seemed to be agreement that guests should always be identified on the agenda.

Barbara and Cricket will come back with a proposal for an attendance policy at the Fall meeting.

8. Potential topics for new proposals

The JEB wandered into a discussion about social media and children. There was a discussion about the monetization of children via tik tok and other platforms. Only a couple of

states regulate this under child labor laws. Some people are getting millions of dollars using their children on Instagram, tik tok and other avenues. Parents and foster parents may use children to earn money by becoming influencers. One of the issues is who is legally entitled to the money. Most states do not have laws that require it go into the children's account or a UTMA transfer. California's Coogan's law requires any contract be reviewed by the court beforehand and approved and that a certain percentage is set aside for the child.

Other major concerns seem to be the potential for manipulation and abuse of children. There are issues of nonconsensual use of the child's image which can impact child safety, child dignity, exploitation, and the child's right to control their own images. Whether a pre-teen child can ever give informed consent is a complex question. The ability of teens to consent to the commercial use of their images is different but not easily defined. The Maryland Child Protection Act allows a child to withdraw consent. Perhaps a Child Social Media Protection Act would be a possibility. The ULC has promulgated a uniform law on the unauthorized disclosure of intimate images, but it was not focused on minors. We will return to this topic in the fall.

9. Summary of Case Law Developments Interpreting Uniform Laws Relating to Family Law

Linda Elrod prepared a report and discussed some of the cases that have arisen with state interpretations of the Uniform Acts since November last year. She reported that there were a couple of cases mentioning Uniform Child Abduction Prevention Act indicating that judges should require a parent who wants an abduction prevention order to analyze the risk factors. A mere feeling of insecurity is insufficient. The fact that the parent wants to take the child to a non-Hague signatory country is only one factor. Others cases that raised some concerns were temporary absences from home state. Most states are using a totality of the circumstances analysis to determine if the absence is a temporary one. The biggest problems are when a parent takes a child with permission, with promises to return and then keeps the child beyond the six months necessary for home state in the new state.

There were a couple of home state and continuing jurisdiction cases. A few cases dealt with when can a state exercise more than temporary emergency jurisdiction over a child in the state, such as to adjudicate the child dependent or terminate parental rights. Generally, if there is no other state with continuing jurisdiction, or with a pending proceeding or willing to take jurisdiction. There was one case this year dealing with registration of an invalid foreign child support order (no personal jurisdiction over the obligor) and the use of UIFSA to establish a new support order. The case also discussed the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. See Attachment (S*ummary of Case Law*).

The JEB meeting adjourned at 4:00 p.m.