JOINT EDITORIAL BOARD FOR UNIFORM FAMILY LAW

Spring Virtual Meeting met on March 9, 2022, at 1:00 p.m. Central Time. Those present included:

Barbara Atwood, Chair

Linda Elrod, Reporter

JEB Members

Lorie Fowlke, ULC

Melissa Kucinski, ABA

Paul Kurtz, ULC Commissioner, Chair Emeritus

Kit Peterson, AAML

Stacey Platt, AFCC

Dianna Gould-Saltman, AFCC

Sam Schoonmaker, ABA

Harry Tindall, ULC Commissioner, Chair Emeritus

Linda Lea Viken, AAML

JEB Liaisons

Sharla Draemel, U.S. State Department liaison

ULC Representatives

Pam Bertani, ULC Scope Liaison

Lane Shetterly, Division Chair for ULC

Tim Schnabel, Executive Director of ULC

Libby Snyder, Staff Liaison

Observers

Michael Coffee, DOJ

Joe Booth, ABA Publication Board

Jeff Atkinson, Reporter ABA FLS Model Relocation Act (2011)

Chair Barbara Atwood called the meeting to order at 1:00 p.m. on March 9, 2022. Barbara welcomed the members of the Joint Editorial Board (JEB), observers and Uniform Law Commission staff. There were introductions for members. Paul Kurtz moved that the minutes of

the October 22, 2021, be approved as circulated. Linda Lea seconded. The minutes were approved.

1. Recap of JEB activities in 2021

Barbara circulated her JEBUFL Report to Leadership summarizing our activities from last year. The highlights were seeing two family law acts originally proposed by the JEB receive final approval by the ULC at the July 21 ULC annual meeting: the Uniform Cohabitants' Economic Remedies Act (UCERA) and the Unregulated Child Custody Transfer Act. The UCERA reporter was Naomi Cahn. Harry mentioned that the breakthrough in the drafting process came when the group settled on a foundational premise: to stop handicapping agreements between unmarried cohabitants. Agreements between cohabitants will be enforced as any other agreement. UCERA Section 7 spells out the key factors for courts to consider in deciding whether to recognize equitable claims by cohabitants based on contributions to the relationship. UCERA also includes an array of options and alternatives as to claims by third parties (including spouses of cohabitants), ranging from very restrictive to generous. See Section 8. This set of alternatives will allow states to choose the policy they prefer regarding the protection of spousal rights as against cohabitants' claims.

The Unregulated Child Custody Transfer Act seeks to protect children from parents handing them over to strangers. The Act provides a framework for states to address unregulated child custody transfers when the goal of the transfer is to place a child permanently with someone other than close friends or family members. The act is divided into two parts: (1) the prohibition of unregulated transfers, the prohibition of intermediaries furthering such transfers, and the prohibition of advertising to promote such transfers; and (2) provisions to prevent disruptions of adoptions by requiring training and instruction of prospective adoptive parents for high-risk adoptions, including international adoptions, adoptions from foster care, adoptions of children previously adopted, and others. To accommodate concerns that the Act would expand child welfare authority, the drafting committee devoted substantial time to identifying the transfers that fall outside the act's coverage (transfers between parents, transfer to relatives and family friends, etc.).

Additionally, the JEB's recommendation for a study committee on child participation was accepted. Barbara is chairing the study committee and Melissa Kucinski is the Reporter. All members of the JEB are observers on the Study Committee and can join the meetings when time permits. There are several ABA advisors and observers, including observers with an international practice. That committee had its first meeting in February and will have another March 23rd.

2. Updates from JEB members representing ABA, AAML, and AFCC.

Barbara asked the JEB members to make a report on what their respective organizations were doing and if there were suggestions for projects for the JEB.

ABA – Melissa and Sam reported that there were no recommendations from the ABA Family Law Section on uniform acts at this time. The ABA Family Law Section will meet live in New Orleans in April.

AAML – Linda Lea reported that the AAML Executive Committee is considering whether to oppose a mandatory 50/50 presumption of parenting time for children in custody disputes. The 50/50 presumption seems to be gaining traction in a few states.

AFCC – Dianna reported that the AFCC is considering the Model Guidelines for Child Custody Evaluations. There has been some controversy as to whether they are "standards" or "guidelines."

AALS – Courtney Joslin, the AALS liaison, was not in attendance.

3. Report from Sharla Draemel, U.S. State Department liaison.

Sharla reported that most international meetings over the past two years have been postponed due to COVID-19. There are several planned for this year, however.

Ecuador ratified the Child Support Convention.

The Hague Permanent Body approved Cross Border Recognition of Agreements in Family Matters Respecting Children. There is an ongoing experts group studying the interaction of the Abduction Convention and the 1996 Convention on Child Protection in an attempt to facilitate enforcement of orders across country borders. This work on recognizing parental rights and obligations across borders is particularly focused on family agreements

Hague Conference Special Commission meetings on the Child Maintenance Convention will be held in May 2022. They are studying the method of payment, among other topics. Paper checks have been problematic and may be eliminated in favor of electronic transfers. Electronic payments for child support, however, involve complex bank regulations.

A special commission on the Hague Inter-country Adoption Convention will meet in July 2022. The goal is to finalize a toolkit for intercountry adoption.

An experts group is studying private international law that facilitates recognition of parentage across borders. There are sensitivities in many areas, including surrogacy. Because the United States has no federal law on surrogacy, state laws differ dramatically on the legality of surrogacy, enforceability of gestational or genetic surrogacy agreements, permissibility of compensation, and other core questions. Article 8 of the UPA (2017) addresses these questions, among others, and is gaining enactments but does not yet reflect the majority approach. An EU case holds that children born through surrogacy have a right to have their parents recognized. The European Union is trying to develop a more unified approach, a goal that is not likely to be achieved in the United States.

Hague Abduction Convention

A meeting of a Special Commission to consider the Hague Abduction Convention is tentatively planned for 2023.

The State Department is watching a case at the U.S. Supreme Court -- *Saada v. Golan*, 930 F.3d 533 (2d Cir. 2019). Under the Hague Abduction Convention, children wrongfully removed from their residence are to be returned promptly unless an exception applies. Article 13b's "grave risk" exception permits children to remain in the country to which they were taken, rather than being returned, if their return would expose the child to physical or psychological harm. In *Saada*, the question is whether, upon a finding that returning the child would subject the child to harm, the court is required to consider evidence of ameliorative or protective measures to resolve the harm (such as DV orders of protection). The Solicitor General filed a brief arguing against such a requirement. An amicus brief filed by judges suggested that a mandate to consider ameliorative measures after making a finding of grave risk in cases involving domestic violence will force judges to wade into the underlying custody determination. Most believe the treaty gives the court discretion to consider protective measures or ameliorative measures or undertakings but does not require it. The Supreme Court will hear oral arguments in the case on March 22nd.

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

The materials for the meeting included a report and enactment chart assembled by Libby Snyder, ULC Legislative Counsel.

Libby Snyder, ULC Legislative Counsel, indicated that this has been a successful year for family law enactments, despite the pandemic. There have been several enactments and proposals. See Attachment A (Enactment Status Chart). Highlights of our discussion are below.

Uniform Parentage Act (UPA) 2017: The UPA has been enacted in California, Connecticut, Maine, Rhode Island, Vermont and Washington. It has been introduced in several other states. The provision attracting the most discussion in the state legislatures is Section 609, the de facto parent provision. Alternative B of that section provides that a court can recognize more than two legal parents under certain circumstances when the heightened burden of proof is satisfied. States have not seemed to be troubled by that provision and have enacted it. The voluntary acknowledgment of parentage (VAP) has been expanded in 10 states to include women, an important method of confirming parentage for families. Acknowledgments must be respected in all states after a 60-day rescission period. The federal government has not yet weighed in on VAPs and the full faith and credit question. NOTE: After the JEB meeting, the Federal Office of Child Support Enforcement clarified that voluntary acknowledgments of parentage can be used by same-sex couples to establish parentage and that the genetic testing mandates applicable to male-female couples do not apply to same-sex couples. See Same-Sex

Parents and Child Support Program Requirements | The Administration for Children and Families (hhs.gov)

Uniform Family Law Arbitration Act: The UFLAA has had some introductions this year and was enacted in Montana. Linda Elrod reported that Kansas enacted the Revised Uniform Arbitration Act in 2019 and that the UFLAA has been introduced in Kansas, passed the House of Representatives, but has not been put on the Senate calendar. This act seems to have gained traction as divorcing couples were forced to consider non-judicial forms of dispute resolution during the pandemic.

Uniform Child Abduction Prevention Act: Linda noted that she and Lyle Hilyard appeared at a Webinar hosted by the New York State Bar International Law Section Family Law Committee and discussed UCAPA on November 4, 2021. UCAPA has received recent support from the National Center for Missing Children, and that endorsement may give rise to new interest in the act. In some states, domestic violence victim advocates have opposed UCAPA because of concerns that a woman's departure with a child from a state for safety reasons might be blocked by UCAPA. Linda, who was the reporter for the act, explained that it contains an emergency exception and was drafted with the participation of the ABA Commission on Domestic Violence.

Uniform Unregulated Child Custody Transfer Act: The UUCCTA has already been enacted in Utah and Washington and has been introduced in several states.

5. Children's participation in family court proceedings.

The ULC Executive Committee approved our recommendation for a study committee. Melissa Kucinski has been appointed as Reporter for the Study Committee. The Committee met on February 9, 2022. State law across the United States mandates that the child's voice be considered as factor in a judicial best interest determination, but state judges interpret that mandate differently. Melissa on behalf of the Study Committee, is compiling a chart of state law approaches from statutes, court rules, and case law, and she urged JEB members to share their own states' law on the topic.

Discussion ensued on the scope of a potential act, a question directly relevant to enactability. States would likely be more receptive to a narrowly drawn statute addressing one or two aspects of children's participation, such as the procedural protections for *in camera* interviews or the criteria for permitting a child's direct testimony in court. States vary on whether due process rights of parents require that they be present during interviews of their children or, alternatively, have access to transcripts or recordings, or whether the interests of children supersede the parents' due process rights. Other questions include whether a child's age should trigger presumptive weight, whether interviews should be mandatory, and whether direct testimony should be limited. Dianna commented that new judges are at a disadvantage because they lack the training and experience to competently interview a child. She recommended that the project should include consideration of a training component. She also reported that California has a new statute on the topic, effective January 1, 2022. Barbara mentioned that the Arizona

legislature is considering a bill that would give the wishes of children aged 14 and older presumptive weight. Kit commented that states vary widely on the role of a GAL.

Harry expressed some concern about the vagueness of the project, but Barbara reminded the group that the study committee has just begun its work. The next meeting will be March 23, 2022

6. Consideration of Uniform Premarital and Marital Agreements Act

Barbara expressed ongoing disappointment that the UPMAA has not had traction beyond the first two enactments in Colorado and North Dakota. In Montana, the act was introduced last year, and the vote against the act closely followed party lines. Although the UPMAA has not been viewed as politically controversial, the opposition may arise because of its inclusion of marital agreements along with premarital agreements. Barbara explained that many states impose fiduciary obligations between spouses that the UPMAA may be seen as undermining. Barbara wondered if we should attempt to remove marital agreements from the act. The objection to the original UPAA was its pro-enforcement stance, including linking unconscionability to lack of disclosure. In other words, the UPAA recognized unconscionability as a defense to enforcement only if the parties had not engaged in full and fair disclosure of their assets at the time of signing. About 27 states have enacted the UPAA, however. Many states seem to like its pro-enforcement predictability. The states vary with respect to post-marital agreements, roughly following one of three approaches: (1) same rules as premarital agreements; (2) same rules as separation or settlement agreement in divorce; and (3) a special list of factors based on fiduciary relationship of the parties. There was some discussion of carving post marital agreements out of the act, but there was not a consensus that such a project would be worth the effort.

7. New proposals

a. Relocation

Reporter Linda provided a written history of prior attempts at drafting relocation acts by the American Academy of Matrimonial Lawyers, the American Bar Association, and the Uniform Law Commission. Linda also provided information on international developments and studies on relocation and impacts on children and their parents. Jeff Atkinson, who was the reporter for the American Bar Association Family Law Section Relocation Act, discussed the controversies encountered when the ULC briefly approved a drafting project on this topic in 2005 and then disbanded the committee. At that time, the law regarding relocation was polarized between presuming that a custodial parent's decision to move with the child was in the child's best interests, on the one hand, and presuming that any move would be against the child's best interests, on the other. Which parent would bear the burden of proof was linked to the presumptions. Today, with shared parenting now more reflective of the norm, many states have moved to a neutral best interests determination and an equal burden of proof. Jeff noted that the ABA Model Act does not place the burden of proof on one parent or the other. He also reminded the

group that the topic is still contentious, especially in parenting relationships involving domestic violence and international ties.

There was a healthy discussion of the problems from before, the current landscape with more shared parenting, and the availability of more social science data about the impact of relocations. Dianna commented that we need thoughtful guidelines for the exercise of judicial discretion. Paul Kurtz noted that the burden must be spelled out and that the party seeking to change the status quo will always have at least an initial burden of justifying a change in the child's location.

Most agreed that developing a uniform approach would be beneficial, but whether states would be receptive to a uniform relocation statute remains an open question. Stakeholders for such a project would include domestic violence victim advocates, the international family law practitioners, the National Organization of Women, and father's rights groups. At the suggestion of Pam Bertani, the Scope liaison for the JEB, the group discussed the possibility of conducting an informal survey of family law practitioners to determine if they are satisfied with their states' current approach to relocation disputes and whether they would be in favor of the ULC taking up a drafting project on the topic. The AAML members indicated that such a survey of their members' views might be feasible. The information gleaned from such a survey would help the JEB in deciding whether to recommend that a study committee be appointed on this topic. Barbara will follow up with Linda Lea and Kit. The JEB will return to this topic at the fall meeting.

b. Pet Custody Law

The law governing who gets to keep a dog or cat or other companion animal is changing. The traditional rule has been that animals are personal property and are allocated according to property principles. The pet would go to the person who purchased it or received it as a gift. The courts did not evaluate who fed the animal, walked and cared for it, or was the "primary caretaker." Within the past decade, courts have begun to change their view. In the widely-cited case of Travis v. Murray, 977 N.Y.S.2d 621 (Sup. Ct. 2013), a New York court announced a "best for all concerned" standard in deciding on custody of a divorcing couple's dog. That standard included consideration of which spouse had major responsibility for the dog (feeding, walking, etc.), but the court cautioned against having a full-blown custody hearing and ruled that a custody award would be sole rather than shared and would not be subject to modification. An article on this topic that was distributed to JEB members noted increasing interest among family courts and a handful of state legislatures. Alaska and Vermont have legislatively determined that household pets are more than property. For years, several states have added protections for pets to domestic violence protection orders. In considering whether to recommend a project on this topic, JEB members would need to determine whether there is an argument for uniformity. Also, as Dianna, noted, the family court bench is already burdened with heavy caseloads. The JEB may look at this further at the fall meeting.

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