

Colorado Commission on Uniform State Laws

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Colorado General Assembly

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MINUTES

September 18, 2020, 1:00 p.m.

(HCR 0112, Commissioners attended online)

Roll was taken and Commissioners Gardener and Grimshaw were excused. Commissioners Duran, Levy, Mielke, Morris, Pike, Scott, Tipper, and Whitfield were present. Commissioner Gardner was present after the roll call.

1. **Public comment regarding items not on the agenda.** There was no public testimony on this agenda item.

2. **Newly approved uniform acts for consideration as part of the 2021 legislative agenda:**

- a. **Easement Relocation Act** – *Amy Brimah, Secretary of the Colorado Bar Association (CBA) Real Estate Section*, stated that the section does not have an official position at this time. Based on the section's initial review, it appears that the proposed act tracks with the Third Restatement of Property adopted by the Colorado Supreme Court in *Roaring Forks Club LP v. St. Jude Company*, 36 P.3rd 1229 (Colo. 2001). As current Colorado case law is in alignment with the proposed act, the act may not be needed. If the act does move forward, the section would like feedback from water law practitioners, as case law crosses over with water law issues regarding water rights.

The commission discussed the benefit of codifying current case law and the Third Restatement through the uniform act. The commission agreed that section 11 of the act may cause problems with Colorado water law and would like feedback from water law practitioners. The commission asked about any sources of opposition and Ms. Brimah replied that as long as the act tracks with the Third Restatement, she is not aware of any opposition except regarding potential water law conflicts. The commission asked that the CBA reach out to water law attorneys and the commission will reach out to land surveyors and other potential interested parties.

Commissioner Morris moved to draft the Uniform Easement Relocation Act, with section 11 bracketed. Commissioner Mielke seconded and the motion passed without objection.

- b. **Pretrial Release and Detention Act** – *Rebecca Wallace, Senior Staff Attorney and Senior Policy Counsel with American Civil Liberty Union (ACLU)*, stated that the ACLU sees great value for this work to move forward on a national level and with uniformity and sees positive things in the act. But it does not want to see the act move forward to drafting without substantial feedback from the community and other stakeholders. Reform in this area of law has had problems with finding agreement in Colorado regarding clear

and convincing standards, cash bail, and bond release. Some concerns with the act include the limited summons provision and the lack of a definition for covered offenses. A narrow definition could help Colorado move forward in this area; a broad definition could move us back. These issues could be worked out during drafting, but are so central to reform that they should be discussed and some level of agreement reached before drafting starts.

Commissioner Levy, a member of the Uniform Law Commission's (ULC) drafting committee for the act, explained that the committee deliberately left the definition of covered offenses open so that it would be defined at the state level. The commission agreed that additional stakeholder involvement is necessary; stakeholders are vested in participating in the process and we need time to bring them into discussions. The commission asked if there were any constitutional concerns for the act and Ms. Wallace replied that there could be an issue regarding the definition of covered offenses that, in Colorado, may require a constitutional amendment to enact. Colorado's constitution allows a judge to intentionally detain a person only for a limited set of offenses, *i.e.*, capital offenses. Commissioner Gardner volunteered to bring the act to the Commission on Criminal and Juvenile Justice (CCJJ) and the commission asked that victim rights and other groups also be involved in the stakeholder process.

The commission will not move forward with this act at this time, but will have Commissioners Tipper and Morris request the Office of Legislative Legal Services (OLLS) to provide input regarding what definitions of covered acts would require a referred measure and what definitions would not.

- c. **Public Expression Protection Act** – There was no public testimony on this agenda item. Commissioner Tipper shared a quick comparison of the act to recently enacted Colorado law, section 13-20-1101, C.R.S. (House Bill 19-1324). In principle, both are similar, but there are portions of Colorado law that are not in the uniform law and vice versa, such as certain aspects of admissibility of evidence, public interest and business exceptions, and excluding media and publishers from being able to rely on the public interest exception. The commission noted that the 2019 bill's sponsor is willing to take a closer look at the uniform act and bring it to stakeholders but it will take time. The commission also noted that the stakeholders worked hard to pass the 2019 bill and the bill passed with only three no votes.

The commission will not move forward with the act at this time but may consider bringing it back next year if there is interest or need. In the meantime, Commissioner Levy will ask ULC staff to do a comparison of the uniform act to Colorado law and the commission will try to obtain feedback on how well the Colorado law is working.

3. Previously approved uniform acts for consideration as part of the 2021 legislative agenda:

- a. **Amendments to the Uniform Probate Code** – *Darla Daniel, Co-legislative Liaison for CBA Trust & Estate Section and chair of the subcommittee looking at the UPC 2019 revisions*, summarized the two-part review conducted to date. The Part I review regarding the modernization of language and removal of outdated terms is complete and approved by

the subcommittee. The subcommittee hopes to have CBA Legislative Policy Committee approval and language ready for a bill by November or December. The Part 2 review contains more substantive changes to the probate code dependent on the Uniform Parentage Act, which has not been adopted in Colorado, so that review is proceeding at a slower pace. The CBA will continue to monitor the status of the Parentage Act and if enacted, will complete the review and report back.

The commission discussed whether there was value in proceeding with a draft before getting the language from the section. The commission will consider moving forward on this at the next meeting to give the CBA a chance to approve and provide a draft of the Part 1 changes regarding language modernization. Part 2 changes regarding more substantive changes based on the Parentage Act will not be ready for introduction this session.

- b. **Electronic Wills Act** – *Leticia Maxfield, CBA Trust & Estate Section and member of the subcommittee of Trust & Estate and Elder Law attorneys*, has reviewed this act over the last 11 months. The act is unique in that it assumes significant variations in state laws in order to harmonize electronic wills (e-wills) within the existing probate codes of all 50 states. The CBA subcommittee elects the options proposed by the act that harmonize the proposed statutes applicable to electronic wills with existing statutes and common law doctrines applying to paper wills. This preserves Colorado's long-standing public policy of validating written expressions of testamentary intent. The subcommittee recommends minor variations in sections 5 and 8 to incorporate Colorado's recently enacted law on remote notarial acts (Senate Bill 20-096) which becomes effective December 31, 2020, allowing e-wills to be notarized remotely through audio-visual technology. The only other proposed variation is in section 2 (5) to the definition of "sign" to require that the signature on a e-will be an electronic image of a signer's handwritten signature instead of an e-signature or a typed signature. This is to apply Colorado's long-standing version of the harmless error doctrine and supporting common law doctrines. The ULC recommends applying a state's existing harmless error doctrine to e-wills so this deviation should not affect the uniformity of the act. The sections have voted to approve the proposed act as recommended by the subcommittee, subject to minor refinements required by conforming amendments and other language changes during the legislative process.

Due to the Covid-19 pandemic, temporary rules were created to allow for the creation of e-wills, so the adoption of this act in 2021 is critical to move forward with ways to make e-wills a more practical option for estate planners. The subcommittee favors the creation of a central digital database to store electronic wills, but due to the possible fiscal impact of such a database it recommends that the central repository follow at a later date. The uniform act, as recommended by the subcommittee, still needs the approval of the CBA Policy Committee before proceeding.

The commission had questions about changing the definition of "sign" and the use of electronic signatures. Ms. Maxfield answered that Colorado is unique in that it requires wills to be notarized and Colorado's harmless error document does require a

handwritten signature. The uniform act seeks to build on current state law to include e-wills and not create different standards for paper wills and e-wills. The commission also had questions about the deferment on a central repository or database. Ms. Maxfield answered that it may be appropriate to piggyback it onto a database that will be created through the court administrator's office (House Bill 19-1229) and is to be funded in 2023. Commissioner Morris will send the draft to the ULC for review to confirm that the proposed changes do not affect the uniformity of the act. Ms. Maxfield indicated that the subcommittee has also been in contact with the ULC on some of the changes.

Andrew White, CBA Director of Legislative Relations, confirmed that the CBA will share its draft and is working on obtaining final approval from the Legislative Policy Committee.

Commissioner Gardner moved to draft the Uniform Electronic Wills Act. Commissioner Whitfield seconded and the motion passed without objection. The commission thanked the CBA for their work on this act.

- c. **Partition of Heirs Property Act** – *Amy Brimah, Secretary of the CBA Real Estate Section Council*, indicated that the section has done two presentations on this issue and surveyed members and have not found examples in Colorado of people losing property due to partition. The section is aware of substantial issues in other parts of the United States but Colorado does not have the same underlying laws as the states with partition of heirs property issues have, and recommended that the commission not proceed with the act. The commission asked if there would be harm if the act were enacted. Ms. Brimah indicated that part of the issue with the act is that as it is not used in Colorado, it is not understood enough to properly review its potential effect on Colorado law.

The commission will not move forward with this act, but would reconsider moving forward with it in the future if there is a need or request for it.

- d. **Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act** – *Marie Avery Moses, Co-chair of the CBA Family Law Section*, stated that the act was introduced in Colorado during the 2016 legislative session and at that time the section thought it was a positive bill, but the act was not able to pass the Senate. If this act moves forward, Ms. Moses anticipates that the section would seek CBA support for it. The commission also discussed if it would also need to enact the Uniform Interstate Enforcement of Domestic Orders Act, which has not been adopted in Colorado. Ms. Moses indicated that interstate domestic protection orders are already enforced in Colorado. The commission suggested that perhaps they are enforceable under the Constitution's full faith and credit clause. Ms. Moses confirmed that domestic orders are enforceable under section 13-14-110, C.R.S., which does reference the full faith and credit clause. Twenty-three states have enacted the uniform interstate enforcement law and six states have enacted the Canadian orders act.

Commissioner Mielke moved to draft the Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act. Commissioner Scott seconded and the motion passed without objection. Commissioner Scott agreed to act as commission

contact on the bill.

- e. **Protected Series Act** – *Steve Mulligan, Legislative Liaison for the CBA Business Law Section Legislative Policy Committee*: the section reviewed the bill introduced in 2020 and was opposed to it. When an LLC is formed, the operating agreement can provide for individual series underneath it that can be distinct and separate but remain protected under the LLC agreement. The section is working with Representative Baisley on a bill regarding protected series but that bill is also taking into consideration the Corporations and Associations act, specifically section 7-90-801, *et al.* C.R.S.

The commission clarified that the bill being drafted is not a uniform law. Mr. Mulligan confirmed that it would not be the uniform act. The CBA is not asking the commission to take a position on the bill, but is merely notifying the commission that the uniform act is not necessary in Colorado at this time as another group is working on a bill regarding protected series. Mr. Mulligan indicated that the section is reviewing the uniform act to see what portions may be incorporated into the bill. The commission encouraged the section to incorporate as much uniformity as possible to promote uniformity across the state lines.

Kurt Huffman, legislative volunteer for Representative Baisley, read a prepared statement from the Representative who was unable to attend this meeting. "While Representative Baisley supports the Uniform Protected Series Act, the Representative will be working with the Colorado Bar Association to write targeted legislation that will provide a legal framework that will allow foreign protected series to register and do business in the state of Colorado. Thank you."

The commission will not move forward with this act at this time. If protected series are allowed to operate in Colorado law, then the commission may revisit the Uniform Voidable Transactions Act.

4. Uniform acts previously approved for introduction for consideration as part of the 2021 legislative agenda:

- a. **Automated Operation of Vehicles Act** – There was no public testimony on this agenda item. Commissioner Mielke served on the ULC drafting committee and stated that the focus of act was creating a process for a state to register automated vehicles and define who the "driver" is to assign financial responsible for the vehicle and the vehicle's actions. The act defines the driver as the automated-vehicle provider. Current Colorado law deals only with the testing of the vehicles, not with ownership or registration of the vehicles and the uniform act will not affect it. The act benefits Colorado by putting in place a process that fits within current motor vehicle laws requiring automated vehicles to be federally certified in order to be registered. In addition, the act provides financial protection for a state by requiring that the expenses from any additional required actions for regulation is paid by the entity needing the action.

The commission asked whether passing the act would precipitate the need for additional conforming amendments or additional legislation. Commissioner Mielke indicated that this should not be the case as the act is intended to fit within current

motor vehicle law to hold automated vehicles to the same state laws as driver-driven vehicles. The act was not introduced last year due to the Covid-19 pandemic.

Commissioner Mielke moved to draft the Uniform Automated Operation of Vehicles Act. Commissioner Tipper seconded and the motion passed 6 to 2. Commissioners Mielke and Tipper are commission contacts on the bill. Commissioner Tipper agreed to help find a sponsor for the bill.

- b. **Collaborative Law Act** – Commissioner Tipper offered some history on the act introduced last year. The bill was amended to remove the provision of counsel to persons with low income. There was some discussion of narrowing the scope of the act to family law, but this was not done prior to introduction and it passed the House without objection. A Senate amendment to narrow the act was likely, but the act was not heard in the Senate due to the pandemic. The commissioner pointed out that there is nothing in Colorado statutes prohibiting collaborative law from being used in other areas of the law.

Terri Harrington, Family Law Executive Committee and past president of the Colorado Collaborative Law Professionals, stated that currently collaborative law is only used in divorce law in Colorado, although there are those that believe it could be used in other areas to help alleviate crowded court issues. Collaborative law resolves cases without using court time.

Marie Avery Moses, Co-chair of the CBA Family Law Section Legislative Committee, does not believe that the CBA as a whole would support this bill if it extends beyond family law. Last year, the CBA was working with the bill sponsors to narrow the use of collaborative law to family law.

Andrew White, CBA Director of Legislative Relations, stated that there was concern in applying family law provisions to dispute resolution in other areas of law. Concerns included relationships and the professional and ethical duties required of attorneys in other contexts.

The commission indicated that collaborative law has worked in other areas of law in other states and expressed concerns that narrowing the uniform act to family law may introduce a limitation on the use of collaborative law in Colorado that does not currently exist. There was testimony in the House that collaborative law could be beneficial in other areas of law in dispute situations to maintain or preserve an existing relationship, such as in a contract dispute in a small business. The commission also discussed the use of a delayed effective date regarding the use of collaborative law in areas outside of family law to give practitioners time to adapt to its use. The commission will continue to work on concerns and issues during the adoption process of the act.

Commissioner Tipper moved to draft the Uniform Collaborative Law Act. Commissioner Scott seconded and the motion passed without objection. Commissioners Tipper and Gardner agreed to sponsor the bill.

- c. **Parentage Act** – Commissioner Tipper offered some history on last year's bill. The bill

was introduced, but it became immediately apparent that stakeholders were too far apart for passage. Stakeholder meetings were to resume after session, but the pandemic prevented discussions from proceeding. There were multiple concerns with the act and moving the bill to introduction will require a lot of work, which makes it unlikely for this next session. Commissioner Scott concurred and stated that the stakeholders have very strong feelings about the act and cannot see achieving consensus by January. There was a bill introduced last year regarding surrogacy, but it, like many others, was sidelined by the pandemic.

Marie Avery Moses, Co-chair of the CBA Family Law Section and Legislative Chair of the CBA, said that the CBA appreciates the goals of the act but it is intended for states that do not already have the broad protections for non-biological parents that Colorado already has. Concerns include that the act actually narrows some of Colorado's definitions, so the section will want to be involved in stakeholder meetings and work with drafters so that they can support the bill into the future while protecting the parentage rights of as many as possible.

The commission thanked Ms. Moses for her commitment to the process, her detailed list of concerns with the act, and all of her hard work on the bill. The commission determined that a new draft would be needed for continued stakeholder involvement and discussed moving forward this year with the act's provisions that do have support – assisted reproduction, surrogacy, and rights of children born through assisted reproduction technology provisions – in order to strengthen Colorado law in those areas.

Commissioner Morris moved to draft a bill with sections 7, 8, and 9 of the Uniform Parentage Act. Commissioner Scott seconded and the motion passed without objection. Commissioner Scott volunteered to work with stakeholders.

- d. **Revised Athlete Agents Act (2015) and 2019 Amendments** – There was no public testimony on this agenda item. The commission reported that last year it requested a sunrise review report from DORA and the report is expected in October. The commission is free to draft and introduce a bill regardless of the outcome of the report. Commissioner Mielke indicated that forty-one states have enacted the act in order to protect student athletes and Colorado continues to leave its students unprotected from predatory and unethical agents. DORA was given lists of stakeholders who support the act to contact and other background information. For workload reasons it may be prudent to proceed with drafting prior to receiving the report.

Commissioner Mielke moved to draft the Uniform Revised Athlete Agents Act (2015) and 2019 Amendments. Commissioner Levy seconded and the motion passed without objection.

5. Colorado Bar Association reports regarding:

- a. **Uniform Trust Act, Part 5** – *Connie Eyster, CBA Trust & Estate Section and chair of subcommittee reviewing Part 5*, explained that this part deals with creditor's rights to trust assets and was reserved for further review when the rest of the act was enacted. The

subcommittee has reached consensus on Part 5 and is recommending some clarifications regarding limitations of actions, what is not a distribution, and some exceptions for special needs trusts. More significant variations adopted include who are the creditors and exceptions to the spendthrift clauses, self-settlor trusts, and third-party beneficiaries. Twenty of the 33 states that have enacted the act have amended or not enacted the language in the creditors and exceptions section. The final change concerns preserving Colorado case law regarding power of appointments.

The commission asked whether the proposed changes would prevent this from being a uniform law. Ms. Eyster answered that she did not know, but can only say that other states that have made amendments seem to still be considered uniform. She added that the review is complete and has been approved by the section and is waiting for approval from the CBA Legislative Policy Committee.

Commissioner Gardner moved to draft the Uniform Trust Act, Part 5, as amended by the CBA. Commissioner Morris seconded and the motion passed without objection. The commission thanked the CBA for the thoroughness of their review and their assistance in moving this forward.

- b. **Fiduciary Income and Principal Act** – *Georgine Kryda, CBA Trust & Estate Section and co-chair of the subcommittee reviewing the act*, stated the subcommittee was impressed with the wording in the act. It has completed its review and retained approximately 95% of the act as proposed, but does recommend some changes. The section has approved the recommendations and is now waiting for CBA Legislative Policy Committee approval. Mr. White has the subcommittee's notes on the act and can share them with the commission.

Darla Daniel, Co-legislative Liaison for CBA Trust & Estate Section, added that the act is not expected to be controversial and the section found the language to be an improvement on the existing principal and income act.

Commissioner Gardner moved to draft the Uniform Fiduciary Income and Principal Act. Commissioner Whitfield seconded and the motion passed without objection. Commissioner Gardner agreed to sponsor the bill

The commission thanked the members of the Bar again for their work and wide-ranging expertise on Colorado law and expressed gratitude for their assistance in helping the commission move these acts through the legislative process.

6. **Other business.** There was no public testimony on this agenda item. The commission decided to meet in early December, the date and time to be determined.