

Colorado Commission on Uniform State Laws

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MINUTES

Colorado Commission on Uniform State Laws

December 3, 2021, 1:30 p.m.

Committee Room: HCR 0112

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

2. **Colorado Bar Association report - Amendments to the Uniform Probate Code (UPC).**

Darla Daniel, co-legislative liaison for the Colorado Bar Association (CBA) Trusts & Estates Section, reported that the section's review is completed and it has provided a summary table of changes to the commission. In summarizing the approved changes, Ms. Daniel stated that the vast majority of them involved modernizing language and making the language gender-neutral. The section recommends deleting the §15-11-103 in the C.R.S., regarding intestate succession hierarchy, and replacing it with the new language from the uniform act and amended §15-11-106 to align with §15-11-103 regarding concepts referenced in the Uniform Parentage Act (UPA), which Colorado has not enacted. Also recommends not adopting the five other sections in the amendments referencing concepts in the UPA for the same reason. Ms. Daniel confirmed that CBA Executive Council has approved and recommended the act, as revised, to move forward. The Commission thanked Ms. Daniel and the trusts & estates section for the time and detailed work and verified that the Uniform Law Commission (ULC) would consider the act, as revised, uniform.

Commissioner McGihon moved that the **Amendments to the Uniform Probate Code**, as amended, be included on the 2022 legislative agenda. Commissioner Pike seconded and the motion passed without objection. The bill will start in the Senate with Commissioner Gardner as sponsor.

3. **Uniform Acts for consideration as part of the 2022 legislative agenda**

a. **Amendments to the Uniform Common Interest Ownership Act (CIOA).** *Joseph Libinski, CBA Real Estate Section,* testified that the CBA does not recommend the act move forward in Colorado as a uniform act. Colorado's CIOA is unique and is significantly different from the uniform act enacted years ago. It is more appropriate that some of the principles and concepts in these amendments be considered and introduced in non-uniform bills. Commissioner Mielke agreed with the CBA's assessment and shared that he has asked for an analysis from the ULC to help Colorado determine what provisions might be beneficial for Colorado to consider. The Commission asked Mr. Libinski to monitor legislation for the opportunity to incorporate any beneficial Uniform CIOA (UCIOA) language. Commissioner Levy asked if there was agreement on what could be moved forward with at this time. Mr. Libinski replied that, generally, the procedural and operational elements in the act appear to be improvements and could be incorporated into Colorado law. The provisions amending portions of the UCIOA that were never adopted

in Colorado should not be moved forward. The emergency powers portion would need more vetting before that it could be moved forward. *Robin Nolan, CBA Real Estate Section*, testified that she concurred with Mr. Libinski's testimony and had nothing further to add.

Commissioner Pike moved that the **Amendments to the Uniform Common Interest Ownership Act** not move forward, but the commission is generally supportive of the CBA's effort to incorporate appropriate provisions into non-uniform bills. Commissioner Tipper seconded and the motion passed without objection.

- b. **Uniform College Student Athlete Name, Image, or Likeness Act.** There was no public testimony on this agenda item. The commission discussed the inevitability of a similar act being introduced in Colorado in the near future and the benefits of moving the uniform act forward to promote the uniform act and uniform language, even if it goes nowhere. Commissioner Tipper pointed out that the Governor has signed a similar bill into law, [Senate Bill 20-123](#), which goes into effect in 2023 and wondered what the differences might be between that bill and the uniform law. Commissioner Love volunteered to look into it. Commissioner Levy suggested that the commission take a closer look at the 2020 bill before moving forward with the uniform act. Commissioner McGihon noted that uniformity across state lines benefits the athletes and to draft the uniform act to update and not supercede the recently enacted bill.

Commissioner McGihon moved that the **Uniform College Student Athlete Name, Image, or Likeness Act** move forward as part of the commission's 2022 legislative agenda to update Senate Bill 20-123. Commissioner Gardner seconded the motion, but no vote was taken as it was determined that the motion was not needed. Commissioner Love will provide an analysis and Commissioner McGihon will contact the sponsors of the 2020 bill to see if there would be interest in updating it.

- c. **Uniform Cohabitants' Economic Remedies Act.** *Chris Radeff, chair of the CBA Family Law Legislative Committee*, pointed out that in Colorado there is case law from a 2000 Supreme Court decision, [Salzman v. Bachrach](#), addressing many of the remedies for unjust enrichment available through the uniform act. She added that specific concerns with the act include the possibility of allowing a cohabitant to intervene in the divorce case of the other cohabitant and creating some issues regarding common law marriage by opening up the possibility of the duplication of judicial remedies. Currently in Colorado, common law marriage is a judicial decision determined at the time of a party seeking divorce. She explained that if a party is denied that determination they may be able to reach a similar result as a cohabitant in a different court under this act. There will need to be discussion regarding what court will have jurisdiction, with concerns that if it is the domestic courts it may cause backlogs. In addition, there are concerns regarding the possibility of a cohabitant who was a victim of domestic violence and left that relationship continuing to be harassed/harmed by the other cohabitant/perpetrator using the act and the courts. Ms. Radeff indicated that if the commission does move forward with the act that the CBA would like to work with the commission to address some of these issues. Commissioner Levy pointed out that the act acknowledges equitable interests, which would allow the court to weigh in domestic violence issues but the common law marriage concerns would need more discussion. The commission asked if the Supreme Court decision is comprehensive and considered settled law, or is this an area where statutory clarification would be helpful. Ms. Radeff replied that the case law covers most of the act but mostly relies on unjust enrichment and allowed parties that were not married and not seeking common law marriage to bring an action for recovery for damages. Commissioner Scott pointed out that common law cases can be complicated and that it is important to have

clarity in this area. Ms. Radeff agreed that the act provides clarity and the section's concerns are with the potential overlap in remedies (i.e. form shopping) and with judicial economy. Commissioner McGihon added that the commission would like to work closely with the CBA where needed to provide clarity with this act.

Commissioner Scott moved to keep the **Uniform Cohabitants' Economic Remedies Act** on the commission's 2022 legislative agenda. Commissioner Tipper seconded and the motion passed without objection. Commissioner Tipper volunteered to try to find a sponsor.

- d. **Uniform Community Property Disposition at Death Act.** *Darla Daniel, co-legislative liaison for the CBA Trusts & Estates Section*, testified that the section has not reviewed the act but that a subcommittee has been formed and will start its review in January. Ms. Daniel believes that the Trusts & Estates Section will be collaborating with the Family Law Section on the review but that there is not yet a projected timeframe for completion. The commission pointed out that there is potential need for legislation in this area because of the likelihood that people in Colorado who pass away in Colorado may own property in community property states. Ms. Daniel indicated that it is her understanding that this is a revision to Colorado's current community property at death act.

Commissioner Duran moved that the commission not move the **Uniform Community Property Disposition at Death Act** forward in 2022 but request that the CBA continue to review the act and provide their input prior to the 2023 session. Commissioner Pike seconded and the motion passed without objection.

- e. **Uniform Parentage Act.** *Chris Radeff, chair of the CBA Family Law Legislative Committee*, testified that the section would like to assist the commission on the parentage act and participate in the process, but does not have specific feedback today. Ms. Radeff added that there is interest in the act's gender-neutral language and in the act generally. Commissioner Levy noted that some of the act's surrogacy provisions were enacted in Colorado, but the gender-neutral language and some of previously discussed conceptual information have never been put into a bill. It is the commission's impression that the act could move forward but just needs time. Commissioner Tipper explained that her understanding is that the CBA wants to be involved if the act moves forward but believes existing law is satisfactory. Commissioner Levy pointed out that there are other stakeholders and practicing attorneys who are interested in moving this act forward. Commissioner Tipper indicated that she could work with an interested legislator and other interested parties on that, but that this process may need a year. Commissioner Scott emphasized that the outdated language and terms are a substantive problem and it is important to move the act forward this session. She proposed that she meet with stakeholders and report back to commission in January. The commission asked if the concerns outlined in the CBA memo from Marie Moses remain the concerns of the CBA and Ms. Radeff confirmed that they were. Commissioner Tipper indicated that there is commission bill version of the act available, [House Bill 20-1292](#).

Commissioner McGihon moved for Commissioner Scott to form a working committee with the CBA Family Law Section and other interested parties to report to the commission in January regarding what portions of a **Uniform Parentage Act** draft can move forward. Commissioner Pike seconded and the motion passed without objection.

- f. **Uniform Prevention of and Remedies for Human Trafficking Act.** There was no public testimony on this agenda item. Commissioner McGihon indicated that she had not yet obtained information from the district attorney's office and the Colorado District

Attorneys' Council but will do so and report on responses to the commission at the January meeting. The commission referenced a ULC comparison document highlighting the differences between Colorado law and the uniform law and noted that the issue is that Colorado law appears deficient and could use some of the uniform law updates. Commissioner Mielke recommended that, based on the ULC comparison, the commission move forward to strengthen Colorado law in this area.

Commissioner Mielke moved the **Uniform Prevention of and Remedies for Human Trafficking Act** move forward as part of the commission's 2022 legislative agenda. Commissioner McGihon seconded and the motion passed without objection.

- g. **Uniform Restrictive Employment Agreement Act.** *Brian Moore, Executive Council of CBA Labor & Employment Section*, testified that the section is still looking at act and processing input from members to determine if it will be able to reach a consensus to provide section input or recommendations on the act. He invited the commission to let the CBA know if there are any specific issues regarding the act the section should look at. *Testifying only for himself as a practitioner in this area of law*, Mr. Moore went on to say that this is an area of law that would benefit from action by the general assembly. There is a lot of uncertainty regarding the enforceability of non-compete agreements leading to litigation. Colorado law in this area is unique and can be hard to explain. Some ways that the uniform act would change current law and potentially be beneficial include setting specific timelines, requiring advance notice of a restrictive agreement (before an employee accepts a job offer), and establishing an income test that makes restrictions void for incomes less than the state mean income. Colorado law enforces non-compete restrictions different depending if the employee is management or non-management and does not recognize customer relations as a valid reason to support a non-compete agreement. The uniform act would change this. Colorado law subjects any restrictive agreement, such as an agreement to not solicit, to the full non-compete analysis. The uniform act would fundamentally change that by making it easier for employers to have an enforceable restrictive covenant that stops short of being a full non-compete. Colorado law has separate provisions regarding physician agreements, which would need to be addressed in the commission bill. Mr. Moore stated that more input would be forthcoming in January. The commission asked whether current law was statutory or case law and if the uniform act was balanced in the protections of employees and employers. Mr. Moore replied that much of the uncertainty in the area is that current law is predominantly based on case law and that the act contains elements that affect both parties. The commission thanked Mr. Moore for his testimony and for outlining the issues and discussed moving forward with the act now to flesh out issues.

Commissioner Tipper moved the **Uniform Restrictive Agreements Act** move forward with as a part of the commission's 2022 legislative agenda. Commissioner McGihon seconded and the motion passed 8 to 1. The bill will start in the House with Commissioner Tipper as sponsor.

- h. **Revised Uniform Unincorporated Nonprofit Association Act.** *Herrick Lidstone, chair of the CBA Business Law Section's Business Entities Committee*, stated that the section generally supports looking at portions of the act that would be helpful to incorporate into Colorado law, but cautioned that not all provisions in the uniform act fit well with Colorado law. The commission acknowledged that business entities is a complex area and will need to be harmonized with current law. Commissioner Tipper shared feedback from the *Colorado Trial Lawyers Association (CTLA)* stating that the act is unnecessary and that nonprofits can obtain protections by registering as a nonprofit entity and complying with

existing legal requirements. In addition, the act could muddy existing waters and create new liability protections for groups of people who cause injury but claim to have been acting in a not-for-profit capacity. The act leaves ambiguous what exactly qualifies as an unincorporated nonprofit association, leaving an injured plaintiff trying to guess whether the correct defendant would be a collection of individuals or an unincorporated nonprofit not registered anywhere and may not even have a clear name and how judgments would be collected. Mr. Lidstone suggested that the individual liability provisions in Article 30 of Title 7 might address some of these concerns. Commissioner Levy asked if current law allows the incorporation of a nonprofit by oral agreement. Mr. Lidstone answered that §§7-30-101.1 and 7-30-101.2, C.R.S., might apply, but that one would still have to show a course of conduct, but there is no case law. Commissioner Gardner suggested that the act might be useful to inform, probably thousands of groups, currently engaging in common charitable, education, political, and other endeavors, such as book clubs or other study groups, that they may want to take the time to incorporate. The commission discussed if the uniform act was necessary at this time if Colorado already has law in this area. Mr. Lidstone noted that the existing law, adopted in 1997, is sufficient for now, but indicated that he would like to form a committee to take a closer look at the 2011 updates to see what can benefit Colorado. The commission asked Mr. Lidstone and the CBA to put together a committee of interested parties to look at the act.

Commission consensus was to not move forward with the **Revised Uniform Unincorporated Nonprofit Association Act** as part of the commission's 2022 legislative agenda and to reconsider it for the 2023 legislative agenda.

- i. **Uniform Unregulated Child Custody Transfer Act.** *Chris Radeff, chair of the CBA Family Law Legislative Committee*, stated that although this appears to be a family law specific issue, they rarely deal in domestic cases with third party or nonparent or stepparent adoptions. Currently language in Title 19 covers stepparent adoptions and as the uniform act does not appear to change the provisions regarding stepparent adoptions, the section does not object to the uniform language. The uniform act seems to affect the Department of Human Services and possibly private adoptions including foreign adoptions and there may more interest in the act from those practicing juvenile law. The Family Law Section is not taking a position on the act unless it changes the law regarding stepparent adoptions. Commissioner Scott testified that she is opposed to the act, it is over reaching, there is no need for the act, and she does not like the criminal violations included in the act. Commissioner Levy disagreed with that interpretation as it provides protections for children from being given to people who are not going to protect the child's welfare but that she also had concerns with the provisions for criminal liability. Commissioner Duran offered to contact the Office of Child Representative or Office of Respondent Parent Council for feedback. Commissioner Scott offered to help with coordinating stakeholders and getting additional feedback from Child Protective Services and adoption agencies.

Commissioner Scott moved that the **Uniform Unregulated Child Custody Transfer Act** not move forward. It was not seconded and the motion died. Commission consensus was to keep the act on the 2022 legislative agenda and consider additional feedback at the meeting in January.

Uniform Voidable Transactions Act. *Herrick Lidstone, chair of the CBA Business Law Section's Business Entities Committee*, testified that, with two exceptions, the section does not object to the act. The first objection is to the governing law provision in Section 10. The governing law provision allows the adjudication of transactions with assets located in Colorado in a different state. Mr. Lidstone proposed that this issue could be solved by

adding in "or the local law in which the asset is located" to the provision. He stated that the proposed wording is consistent with the language in the Uniform Commercial Code (UCC) §4-2-402, C.R.S. The second objection continues to be series organizations as presented in section 11. The section should be deleted as Colorado consistently opposes series organizations. He explained that Colorado law does address protected series entities from other states by allowing the mother or parent organization of the series to do business in Colorado. The commission discussed if the act would still be uniform without section 11 and with the amendment to governing law and moving forward with introducing the bill with the proposed amendments. Prior feedback from the ULC indicated that the altering the governing law portion might be a problem, but the commission will review past correspondence. Mr. Lidstone reiterated that the governing law provisions in UCC Articles 2, 2.5, 4, and 4.5 are consistent with his language proposal regarding the governing law. Commissioner Tipper shared feedback from the CTLA that it does not support the act for the same reasons as the CBA along with some other concerns. In addition, the CTLA has concerns that the proposed act would undo a statutory 50% penalty enacted in 2014 to discourage intentional fraudulent transfers.

Commissioner Pike moved that the **Uniform Voidable Transactions Act** move forward to drafting for the 2022 session with the proposed amendments, the deletion of section 11, and ensuring the 2014 penalties remain in place. Commissioner Mielke seconded and the motion passed without objection. The bill will start in the Senate with Commissioner Gardner as sponsor

4. **Crypto-currency legislation discussion.** Commissioner Tipper explained that this intention behind this agenda item is simply to raise awareness that the ULC is looking at possible changes to the UCC regarding emerging technologies and open up the discussion regarding this subject and identify any additional stakeholders that would be interested in weighing in on this topic. *Andy Toft, CBA*, stated that the bar has not yet taken a position on the proposed act but is monitoring the situation. He indicated that he and two others from Colorado, Rob Isham and Steve Keen, participated in the fall drafting sessions and that there are also other CBA observers involved. A revised draft of the act is expected to be ready in January, and the drafting committee plans to submit the act for approval by the American Law Institute in the spring, and then to the ULC at its annual meeting in the summer. The CBA would like to reach out to other interested parties to be involved in the process. Commissioner Tipper offered to help contact additional stakeholders. *William Wenzel, CBA*, is also signed up to be an observer and suggested types of organizations working in lending in crypto-currency who should be interested in the act as it moves forward.
5. **Election of Chair and Vice-Chair.** Commissioner McGihon's nomination as Chair and Commissioner Levy's nomination as Vice-Chair were approved by acclamation.
6. **Other business.** The next Commission meeting will be at 9:30 a.m. on January 14, 2022. Commissioner Mielke announced that he will serve on the Uniform Electronic Estate Planning Documents Committee and invited comments from interested parties on that subject.