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Foreword

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UNIFORM COLLABORATIVE LAW ACT

FOREWORD

*Hon. Martha L. Walters**

Collaborating on the creation of the Uniform Collaborative Law Act (“UCLA”) has been a wonderful opportunity for me personally and for the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission or “ULC”) as an entity. That is true not only because the UCLA itself is so important, but also (and in some ways primarily) because of the people who have been the collaborators. Those collaborators include Dean Nora Demleitner, the dean of the Hofstra University School of Law—a law school that, with its focus on improving the legal system for children and families, stands out among law schools—and Professor Andrew Shepard, the irrepressible reporter for the UCLA, and his students.

Before I turn to the particulars of the UCLA and how and why it came to be, I would like to reflect on the concept of collaborative law. Collaborative law is a voluntary process in which the parties are represented by lawyers and the parties and the lawyers agree at the outset that the sole purpose of the process is to resolve a dispute.¹ They also agree that if they are unable to resolve the dispute, the lawyers will not participate in any further adversarial proceedings.²

Collaborative law recognizes that lawyers are called on to fulfill many essential roles. People need lawyers to teach them what the law is, to counsel them about their legal rights and responsibilities, and to advocate for them in negotiations with other parties and in courts of law. Further, lawyers are representatives of the judicial system. Their actions

* Associate Justice, Oregon Supreme Court. Justice Walters served as the President of the Uniform Law Commission during the drafting of the UCLA.

1. See Hofstra University School of Law, Uniform Collaborative Law Act, <http://law.hofstra.edu/Academics/InstitutesAndCenters/ChildrenFamiliesAndTheLaw/UCLA/> (last visited May 25, 2010).

2. See *id.*; Maury Beaulier, What is Collaborative Law?, <http://www.mediate.com/articles/beaulier1.cfm> (last visited May 25, 2010).

demonstrate to their clients and to the public what the law is and what the “rule of law” means. When lawyers participate in the collaborative law process by teaching, counseling, advocating for their clients, and, as they often do, resolving disputes efficiently and at an affordable cost without creating further animosity, they benefit their clients and they improve the public’s view of the judicial system as a whole.

As to the particulars, I will begin with a description of the ULC. The ULC is now 118 years old.³ It was organized in 1892 to promote uniformity of state law.⁴ It is composed of commissioners from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.⁵ The Commission is supported by state dues and commissioners are appointed by their states and serve without compensation.⁶ In its history, the Commission has drafted more than 250 uniform acts, including the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act.⁷

The Commission has a committee—the Scope and Program Committee—that twice a year considers ideas for new drafting projects.⁸ The Commission also has subject matter committees, called Joint Editorial Boards (“JEBs”), that monitor the development of the law in their subject matter areas and that make legislative suggestions to the Scope and Program Committee.⁹ One of those subject matter committees is the Family Law JEB.

The Family Law JEB is comprised of members from the ULC, the American Bar Association (ABA) and the American Academy of Matrimonial Lawyers.¹⁰ It has liaison members from the Association of American Law Schools, the ABA Center on Children and the Law, the Association of Family and Conciliation Courts, and the National

3. Unif. Law Comm’n, NCCUSL Home, <http://www.nccusl.org/Update/> (last visited May 25, 2010).

4. Unif. Law Comm’n, Introduction, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 25, 2010).

5. Unif. Law Comm’n, Frequently Asked Questions About NCCUSL, <http://nccusl.org/update/DesktopDefault.aspx?tabindex=5&tabid=61> (last visited May 25, 2010).

6. See UNIF. LAW FOUND., ANNUAL REPORT 2008, at 3 (2008), available at http://uniformlawfoundation.org/ulf/Uploads/ULFAnnRpt_2008web.pdf; Unif. Law Comm’n, About NCCUSL, <http://nccusl.org/update/DesktopDefault.aspx?tabindex=0&tabid=9> (last visited May 25, 2010).

7. See *supra* notes 4-5.

8. See Unif. Law Comm’n, *supra* note 5; Unif. Law Comm’n, Proposals & Criteria, <http://nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42> (last visited May 25, 2010).

9. See Unif. Law Comm’n, Other Projects, <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=10&tabid=68> (last visited May 25, 2010).

10. See *id.*

Association of Counsel for Children.¹¹ The Family Law JEB made a recommendation to the Scope and Program Committee that the latter draft a uniform act on collaborative law.¹²

There are two criteria that the Scope and Program Committee uses to evaluate such proposals. First, whether the subject matter is within the purview of the states;¹³ and second, whether the subject matter is consistent with the conference objective “to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”¹⁴ In evaluating the latter criteria, the Scope and Program Committee must be able to make the following three findings: first, that there is an “obvious reason for an Act on the subject”;¹⁵ second, that there is a “reasonable probability that an Act,” when approved by the Conference, will be “enacted into law by a substantial number of jurisdictions, or, if not, will promote uniformity indirectly”;¹⁶ and, third, uniformity “will produce significant benefits to the public through improvements in the law” or avoid the disadvantages that would arise from diversity of law in the various states.¹⁷

When it received the proposal for a collaborative law act from the Family Law JEB, the Scope and Program Committee had no doubts about the concept of collaborative law. The practitioners who presented the proposal were well respected and had had very positive experiences with this approach. The question that the committee had, however, was whether there was a need for a uniform act.

One of the very interesting changes that has occurred in the law in the last 118 years is the role of states in creating the applicable rule of

11. *Banner Year for Uniform Family Law Acts*, UNIF. FAM. LAW ACTS UPDATE (Joint Editorial Bd. on Unif. Family Law, Chicago, Ill.), Fall 2002, at 4, http://www.nccusl.org/nccusl/docs/UFLAU_Vol_1.pdf.

12. See Meeting Minutes, Joint Editorial Bd. for Unif. Family Laws, Unif. Law Comm’n (Nov. 7, 2004), http://www.nccusl.org/nccusl/meetings/JEBUFL_1104_Mtg.pdf (indicating that the Family Law JEB voted to recommend a “uniform or model project on collaborative law” to the ULC); see also Meeting Minutes, Comm. on Scope and Program, Unif. Law Comm’n (Jan. 11, 2003), http://www.nccusl.org/nccusl/uniformact_factsheets/scope011003mn.pdf (deciding that the proposal to form a study committee to investigate the need for uniform laws on collaborative law was premature).

13. See Unif. Law Comm’n, *supra* note 8, at 1(a).

14. UNIF. LAW COMM’N, CONST. & BYLAWS § 1.2, available at <http://nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18>; see also NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS § 1(b), at 5 (2001), http://www.nccusl.org/nccusl/Scope&Program/ULONA_ScopeProposal_2006.pdf.

15. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 14, § 1(c)(i).

16. See *id.* § 1(c)(ii).

17. See *id.* § 1(c)(iii).

law. One hundred and eighteen years ago, most law that governed the affairs of private citizens and corporations was state law, and the diversity of that law was problematic.¹⁸ Businesses that operated in more than one state had to learn and operate under the divergent laws of each state, and individuals who moved between states faced the same challenges.¹⁹ The ULC was formed to bring uniformity to that state law.²⁰ Now, federal law is much more prominent. The federal government has become active in areas traditionally reserved to the states, even in the area of family law.²¹ When there is a great need for uniformity, that need can be met by enactment of federal law, making the law in all fifty states immediately uniform.

That does not mean, however, that federal law is always preferable. Our federalist system reflects the view that law is best made by those closest to the people that it governs. Furthermore, states can make a unique contribution to the law by serving as laboratories for creative new ideas. States can try new approaches that are not agreeable to all and experiment on a small scale. If the people of one state can agree on a new idea, they can try it and determine whether or not it is beneficial. Other states, or the federal government, may use successful state legislation or adapt it to their needs. When the ULC is presented with a proposal for a uniform act, it must decide whether the idea that the act seeks to implement will be enacted by only a select number of states and strengthened by their experiences, or whether the idea is amenable to broad adoption and uniform enactment.²²

In considering the Family Law JEB proposal, the Scope and Program Committee was of the view that the wave of collaborative law practice was cresting and that it was time to catch it. The Committee

18. See Unif. Law Comm'n, *supra* note 4 ("The Alabama State Bar Association recognized as early as 1881 the legal tangles created by wide variations in state laws.").

19. See Frederick H. Miller et al., *Introduction to the Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1449-51 (1991) (arguing that the success of the ULC can be attributed to the uniformity of state laws); see also Unif. Law Comm'n, *supra* note 6 ("NCCUSL's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.").

20. See Unif. Law Comm'n, *supra* note 4.

21. Cf. A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233, 236 (2007) ("Congress has pursued legislation, and the Supreme Court has rendered decisions, that impose upon, supplant, or usurp the judicial authority of states and their courts."). But see Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005) (discussing the historic role that federal actors and agencies have played in the creation of laws and policies that directly impact families and arguing that states have not historically enjoyed sovereign control over family law matters).

22. See *supra* notes 16-17 and accompanying text.

reasoned that if the ULC could draft a well thought out act, it was possible that states would ride the wave to widespread enactment. At the time of the second JEB proposal, practitioners had experience with the concept of collaborative law, but only a few states had enacted collaborative law statutes.²³ This was beneficial in that states had not become enamored with their own statutes and practices.

In my view, the ULC approved the Family Law JEB proposal for a uniform collaborative law act because it saw collaborative law as an important alternative dispute resolution tool and thought that the Commission could make a real contribution to domestic relations practice by drafting an excellent statutory framework that would enhance it and promote its use. We believed that if we drafted a good act, we could be successful in having it widely enacted.

In 2006, the Scope and Program Committee recommended and the Executive Committee approved a drafting committee.²⁴ The Commission appointed Peter Munson, a commissioner from Texas, to chair the committee.²⁵ Peter is a renowned domestic relations attorney with substantial collaborative law experience. Our Executive Director, John Sebert, then selected Professor Andrew Schepard as the reporter.²⁶ Professor Schepard was the perfect choice. He knew the ins and outs of collaborative law and he was willing to do the hard work of translating his conceptual and experiential knowledge and that of committee members into legislative terms. To take all of that knowledge and boil it down to a few understandable governing words and to make sure that those words would stand the test of application to innumerable hypothetical situations posed a very difficult, time-consuming task, and Professor Schepard did an excellent job.

Hofstra Law students also played an important role in the drafting process. They helped to draft provisions of the Act in those areas I have just mentioned and they did a great deal of the background research that is found in the preface and the commentary to the Act. Assistant Clinical Professor of Law Yishai Boyarin and Hofstra Law student Laura Daly

23. See Meeting Minutes, Comm. on Scope and Program, Nat'l Conference of Comm'rs on Unif. State Laws (July 8-9, 2006), at 3, <http://www.nccusl.org/Update/Minutes/scope070806mn.pdf>.

24. See *id.*; Press Release, Hofstra Law School, Hofstra Law School's Andrew Schepard Named Reporter of Drafting Committee on Collaborative Law Act (Dec. 19, 2006), http://law2.hofstra.edu/NewsAndEvents/PressReleases/pressreleases_schepard.html [hereinafter Press Release].

25. See Press Release, *supra* note 24; Unif. Law Comm'n, Standing and Governance, Drafting Committees, <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=2&tabid=59> (last visited May 25, 2010).

26. See Unif. Law Comm'n, *supra* note 25; Press Release, *supra* note 24.

attended drafting committee meetings. Other students who made important contributions to the drafts of the Act that the committee considered are Elizabeth Bruzzo, Rebecca Miller, Angela Burton, Jesse Lubin, Joshua Rieger, Brittany Shrader, Mary Ann Harvey, Ashley Lorange, Beyza Killeen, and Jessie Fillingim.

The ULC drafting process is a very transparent, tedious, and ultimately transformative process. The drafting committees meet in person.²⁷ Non-members may read and comment on the drafts and attend the meetings.²⁸ First, the committees discuss, determine, and agree upon the policies they want to implement. Next, the committees choose the words that will best help them accomplish those policies. The committee then selects the words necessary to achieve those policies and goes over and over them to make sure they capture the committee's intent and that everyone who reads them will understand and be able to follow them.

At the end of the first year, a committee presents the draft of its act to the entire conference, 300 commissioners from around the country.²⁹ The commissioners ask questions about the act and make suggestions for improvements. If the commissioners disagree with policy or wording choices the committee has made, they can require changes.³⁰

The committee also sends its work out to various ABA sections and committees for comments and to other organizations with an interest in the subject matter.³¹ The committee seeks all views and the Act improves each time a new person considers it.

With the benefit of conference and outside review, the committee meets for a second year and then returns to the conference floor for a second, and in most cases, final read.³² The committee sits on a dais at the front of the room, answers questions, and defends its product. Commissioners can seek to amend the act from the floor and at the end

27. See Unif. Law Comm'n, *supra* note 25 (noting that ULC drafting committees meet three times per year for at least two years).

28. See *id.*

29. See Unif. Law Comm'n, *supra* note 4 (stating that draft acts are submitted for initial debate at an annual meeting of the ULC).

30. See UNIF. LAW COMM'N, CONST. & BYLAWS, *supra* note 14, § 44A.1; Unif. Law Comm'n, *supra* note 4 ("With hundreds of trained eyes probing every concept and word, it is a rare draft that leaves an annual meeting in the same form it was initially presented.").

31. See UNIF. LAW COMM'N, CONST. & BYLAWS, *supra* note 14, § 30.1 ("During the preparation of an Act, the Special Committee . . . shall notify and confer with the appropriate committee or section of the American Bar Association . . ."); see also Unif. Law Comm'n, *supra* note 25.

32. See UNIF. LAW COMM'N, CONST. & BYLAWS, *supra* note 14, § 8.1 (stating that a draft act must be "considered at a minimum of two annual meetings of the Conference").

of the meeting, the act is presented to the conference as a whole for a vote of the states.³³

Not every drafting project is completed in this two-year time frame, but the UCLA met that standard.³⁴ The UCLA drafting committee tackled difficult questions about how to require informed consent, how to address concerns about domestic violence, and how to enable legal aid and government lawyers to effectively participate in the process.³⁵ The most important decision that the committee made was to create an evidentiary privilege for communications that occur during a collaborative process.³⁶

The committee included a number of individuals who also had been instrumental in drafting the Uniform Mediation Act (“UMA”).³⁷ They knew from their experience that the most important benefit the UMA had provided—and that the UCLA could provide—was an evidentiary privilege. No mediation or collaboration agreement can create an evidentiary privilege, but such a privilege is essential to create the trust that is necessary for those processes. The parties must have confidence that they are safe in disclosing information and that positions they take and concessions they make cannot be used against them in litigation. The committee decided to adopt and adapt the privileges that it had

33. See Unif. Law Comm’n, *supra* note 5 (“Once the Committee of the Whole approves an act, the final step is a vote by states—one vote per state.”).

34. See Cam Ward, *Alabama Attorneys Complete Work at Annual Uniform Law Conference*, 70 ALA. LAW. 454, 454 (2009), available at <http://www.alabar.org/publications/articles/Nov09/Annual-Uniform-Law-Conference.pdf>.

35. See Memorandum from Andrew Schepard, Reporter, NCCUSL Drafting Committee to NCCUSL Drafting Comm. for the Unif. Collaborative Law Act 11-12, 15, 22-23 (Jan. 2, 2008), http://www.law.upenn.edu/bll/archives/ulc/ucla/2008jan2_suggestionsmemo.pdf; Memorandum from Linda K. Wray, Collaborative Law Institute of Minnesota, Uniform Collaborative Law Act 4-7 (2008), <http://www.collaborativelaw.org/res/documents/UNIFORM%20COLLABORATIVE%20LAW%20ACT.pdf>.

36. UNIF. COLLABORATIVE LAW ACT § 17(a) (2009), in 38 HOFSTRA L. REV. 421, 485 (2010) [hereinafter UCLA] (“[A] collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.”); see also *id.* prefatory note, at 463-65 (discussing the evidentiary privilege and its exceptions in the UCLA); Press Release, Unif. Law Comm’n, New Act on Collaborative Law Approved (July 22, 2009), <http://www.nccusl.org/update/DesktopModules/NewsDisplay.aspx?ItemID=218>.

37. Compare UNIF. MEDIATION ACT (2001), <http://www.mediate.com/articles/umafinalstyled.cfm> (last visited May 25, 2010) (listing Elizabeth Kent, Byron D. Sher, and Martha Lee Walters as members of the drafting committee for the UMA), with UCLA, at 422 (listing Elizabeth Kent and Byron D. Sher as drafting committee members and Martha Lee Walters as ex officio for the UCLA).

taken years for the UMA committee to devise and use them for collaborative communications.³⁸

The collaborative process set forth in the UCLA is excellent and it should not be limited to domestic relations practices. Its advantages are universal. Let me just state, however, a few caveats. In encouraging clients to use the collaborative process, there is no need to disparage the adversarial process. The collaborative process can be sold on its own merits without characterizing the adversarial process as wrong or evil. When explaining the downsides of the adversarial process, it is also important to explain that that system is necessary and provides benefits to citizens. Not all disputes can be resolved in a collaborative process. Not all people seek to fulfill their interests. Some seek to thwart the interests of others as well and are dedicated to doing so. The rights of citizens may not be effective unless they are established and enforced in a court of law. Citizens should not be ashamed to seek a court declaration of rights and in doing so they may benefit others. Court decisions arrived at through the adversarial process give collaborative lawyers and their clients necessary information about the law and define its parameters. Collaborative lawyers must know and communicate that law to enable their clients from a position of strength. The purpose of collaboration is not to relinquish one's rights and interests, but to find ways of giving effect to those rights and interests while also accommodating the rights and interests of other parties.³⁹ Disparagement of the adversarial system without explaining its benefits and the need for it harms people's view of that system as whole. It also harms clients who may not, without any fault, be able to resolve their dispute collaboratively and who then are afraid of the system with which they are left.

Not every act that goes through the drafting process is approved by the conference. I am very pleased to report, however, that the 118th conference meeting in Santa Fe, New Mexico in 2009 overwhelmingly approved the UCLA.⁴⁰

The UCLA is necessary. It meets the needs of people with legal disputes by enabling them to understand the law and to craft a result that is best for them. It also serves the legal profession by countering the public's idea that merely consulting a lawyer means that one seeks

38. See Schepard, *supra* note 35, at 21 (explaining that the drafting committee decided early on to model the UCLA evidentiary privilege provisions on the complex and sophisticated UMA provisions).

39. See UCLA, prefatory note, at 426.

40. See Press Release, *supra* note 36.

conflict rather than its resolution. Those who worked to draft the UCLA have provided a framework for the practice of collaborative law and they deserve our thanks and congratulations.

But the real measure of the success of the UCLA will be its enactment. We, as students of the law, and its teachers and practitioners, spend a great deal of time learning what the law is. We spend less time talking about what it could be, and few of us actually make it what it should be. Those who seek and work for the enactment of the UCLA will give life to the concepts it embodies. They also deserve our support and gratitude.
