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Chapter 742 and the UCCJEA: Is Childbirth an Unbridled Key to Forum Shopping?

by Christopher R. Bruce and Katherine E. Bruce

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The following hypothetical unfolded in and around the sleepy little island town of Palm Beach.

Dr. John is a native Floridian. After attending college and medical school at Florida State University, he returned to his home town of West Palm Beach to open a medical practice focusing on pediatric medicine. He always wanted to be a father.

Helen was born in California, raised in Texas, and always wanted to be a mother and a doctor's wife. After attending college in New York, Helen began a career as a drug sales representative in five different states across New England and the Midwest. Ten years into her career, Helen decided to follow through on her dream of living in a tropical climate and assumed a new sales territory covering Palm Beach County.

Helen quickly found and settled into an inexpensive condo with a spectacular view of the ocean. It wasn't long before Helen met Dr. John on a sales call. What quickly developed was a fiercely contested, law school exam-like jurisdictional custody dispute.

Helen became pregnant within the first two months of dating Dr. John. Dr. John believed he was the father. Soon after, the relationship began to disintegrate. The couple attempted to work things out, but were unsuccessful. Eventually, Helen told Dr. John she planned to break her condo lease, move back to Texas, and stay with her family for the remainder of her pregnancy.

On the eve of Helen's move to Texas, Dr. John retained a local family law attorney. The attorney immediately filed a petition to determine paternity and related relief, and Helen was served the next morning at her Palm Beach condo as she was leaving for the airport.

Upon arriving in Texas, Helen met with a family law attorney who was a family friend. As the attorney was reviewing Dr. John's paternity suit, he remembered the discussion of intrastate custody disputes from his law school class and decided the best course of action was to slow down the case by filing a motion to dismiss Dr. John's Florida action. After further research, the attorney, with the help of local counsel in Palm Beach County, filed a motion to dismiss, alleging that the Florida court lacked subject matter jurisdiction under both F.S. Ch. 742 and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[1]

Helen's attorney filed the motion to dismiss. The legal battle ensued, and Helen gave birth to a healthy baby girl named Emily.

Ch. 742 — Paternity Jurisdiction

Helen's attorney informed her that she could not challenge personal jurisdiction over child support issues since she had been served in Florida. Even if she had been served in Texas, the circuit court in Palm Beach County would have long-arm jurisdiction over her as she "engage[ed] in the act of sexual intercourse

within [the] state with respect to which a child may have been conceived."[2]

However, the question of whether the court had subject matter jurisdiction over Dr. John's lawsuit was not as clear. Helen's attorney's research revealed that parents of a child born out of wedlock in Florida can seek an order through the state's circuit courts establishing child support and timesharing,[3] but the law is silent as to whether Dr. John could file his paternity lawsuit while Baby Emily was in utero. F.S. §742.11 states, in pertinent part, that:

Any woman who is pregnant or has a child, [or] any man who has reason to believe that he is the father of a child… may bring proceedings in the circuit court, in chancery, to determine the paternity of a child when paternity has not been established by law or otherwise.[4]

Helen's attorney argued that, while F.S. §742.011 allows an unmarried, pregnant woman to bring a paternity action, the statute is silent as to whether a putative father can bring the same action *before* a child is born because Ch. 742 does not state whether a fetus is a "child" for purposes of the section. The attorney explained that Florida law dictates that "statutes should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute"[5] and that it is "a fundamental rule of construction that statutory language cannot be construed as to render it potentially meaningless."[6]

Helen's attorney explained in the motion that interpreting F.S. §742.011 in a manner that confers subject matter jurisdiction to a putative father *before* the birth of a child would render a portion of the statute meaningless. In other words, if the legislature intended to allow a putative father to bring a paternity action while a mother was still pregnant, there would be no need to fashion the statute in a manner that specifically provides a woman the ability to bring the action before *or* after childbirth, while stating that a male may (only) bring the action if he "has reason to believe that he is the father of a child."[7]

Helen's attorney further offered that "child," as written in F.S. §742.011, cannot include an unborn fetus because the "[a]ny woman who is pregnant" language in F.S. §742.011 would then be mere verbiage. Why would there be any need to specifically state that a mother may bring a paternity action if the definition of child in §742.011 included an unborn fetus?

Dr. John's attorney vehemently protested Helen's argument that Dr. John had no right to bring a paternity action under F.S. §742.011 while baby Emily was in utero. Dr. John's attorney argued that the position made no sense when Dr. John could bring an action for declaratory judgment to seek essentially the same relief.[8] Furthermore, he asserted, it would not make sense for the event of childbirth to trigger jurisdiction under F.S. §742.011. A putative father should not have to wait to assert his right as a father until the birth of the child when the biological mother has the right to file a lawsuit as soon as she is pregnant. This situation raises the question as to whether §742.011 violates the equal protection clauses of the U.S.[9] and Florida[10] constitutions.

The judge, after hearing the arguments raised by both attorneys (and being hesitant to address any constitutional questions), declared that it is elementary to discuss whether there is jurisdiction for the lawsuit under F.S. §742.011 until it can be determined whether there is jurisdiction for the court to make a decision on child custody issues under the UCCJEA. The next step was to determine whether the Florida court lacked jurisdiction under the UCCJEA to make an initial child custody determination.

UCCJEA — Introduction and Purpose

F.S. §61.502 (2011) explains the primary purposes of the UCCJEA, which include: 1) avoiding jurisdiction competition and conflict with courts of other states in matters of child custody; 2) promoting cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child; 3) deterring abductions; and 4) reducing the harmful effects of jurisdictional conflicts.[11]

Initial Child Custody Determination

Helen's attorney advised the court that the UCCJEA section pertaining to initial child custody jurisdiction is codified as F.S. §61.514 (2011). Pursuant to this section, a Florida court can only make an initial child custody determination[12] in four specific circumstances,[13] two of which are applicable to Dr. John and Helen's case. The court would be required to analyze whether Florida has "home state jurisdiction" under F.S. §61.514(1)(a), and if not, to determine whether there is a basis for acquiring "significant connections jurisdiction" under F.S. §61.514(1)(b).

Home State Jurisdiction Generally

Helen's attorney argued that, pursuant to F.S. §61.514(1)(a), the Florida court would have jurisdiction to render an initial child custody determination if 1) Florida was the "home state" of baby Emily when Dr. John commenced his paternity case or 2) was the home state of baby Emily six months before the paternity case was filed if baby Emily is absent from Florida, but a parent or person acting as a parent continues to live in Florida.

The attorney explained how the understanding of several definitions found in F.S. §61.503 are critical for determining whether Florida has "home state jurisdiction."

Child means an individual who has not attained 18 years of age[14];

Commencement means the first filing of the first pleading in a proceeding[15]; and

Home State means the state in which a child lived with a parent or person acting as a parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.[16]

Home State Jurisdiction of an Unborn Child

Helen's attorney argued that Florida was not baby Emily's home state for purposes of the UCCJEA because she was in utero when the lawsuit commenced. The attorney remarked that since baby Emily was unborn when the lawsuit commenced, the six-month residency requirement for home state jurisdiction set forth in F.S. §61.503(7) had not been satisfied. The attorney argued that baby Emily's "home state" is Texas, under the second sentence of F.S. §61.503(7) because she had lived in Texas since birth.

Helen's attorney argued that, in order to determine that F.S. §61.514(a) "home state" jurisdiction existed, the court would need to interpret the definition of "child" as set forth in F.S. §61.503(2) to include the unborn baby Emily. The issue challenges statutory interpretation and, possibly, an answer to the constitutional "when does life begin" question addressed by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and their progeny.[17]

Helen's attorney, choosing to avoid the "when does life begin" question, argued that Florida lacked F.S. §61.514(a) "home state" jurisdiction because the F.S. §61.503(2) definition of "child" only refers to an "individual who has not attained 18 years of age." The court must strictly construe F.S. §61.503(2)[18] to apply only to children that have been born, and not those in utero, because there is no evidence that Florida's legislature intended for F.S. §61.514(a) to apply to an unborn child. Further, other Florida courts have determined that an unborn fetus is not a "child" in the context of personal injury cases.[19]

Dr. John's attorney argued that the unborn baby Emily should be included in the definition of "child" set forth in F.S. §61.503(2), because any other interpretation is contrary to the stated purposes of the UCCJEA, which include deterring child abductions and jurisdictional conflicts.[20] If Florida was not baby Emily's "home state," then any expectant mother could use child birth as the vehicle for stripping a court's jurisdiction to make an initial custody determination by crossing state lines after being served with a child custody proceeding. Dr. John's attorney argued that since it is a maxim of statutory interpretation to interpret statutes so that a particular provision is not "construed as to render it potentially meaningless,"[21]

it would not make sense for Helen (or any other expectant mother) to be able to avoid the statutory framework in place to deter jurisdictional conflicts simply by choosing to leave Florida to give birth to her child in another state.

Additionally, Dr. John's attorney pointed out that if the court determined that F.S. §61.503(7) "home state" jurisdiction is created solely by childbirth, the court would be precluded from analyzing any of the other three situations set forth in F.S. §61.514 (b)-(d) that could allow the court to determine that jurisdiction to make an initial child custody determination exists.

Moreover, Texas lacked personal jurisdiction over Dr. John to decide issues pertaining to child support.[22] A determination that baby Emily's "home state" was Texas for purposes of the UCCJEA would create the absurd result where issues pertaining to timesharing and parental responsibility would be determined in Texas, while Florida would continue to have jurisdiction to determine issues pertaining to child support.[23] It did not seem practical to have the issues of timesharing, parental responsibility, and child support bifurcated and heard in two courts separated by over 1,500 miles.

Dr. John's attorney further directed the court's attention to F.S. §742.011, which allows a paternity action to be initiated before a child's birth. The UCCJEA's definition of "child" set forth in F.S. §61.503(2) arguably includes the unborn baby Emily because F.S. §742.011 allows a paternity action to begin, at least if initiated by the mother, and arguably if initiated by a putative father, while a child is in utero.[24] A mother able to file a paternity action under §742.011 while a child is in utero, while the court lacks subject matter jurisdiction to make an initial child custody determination if the mother later leaves Florida and later gives birth to her child in another state, creates an absurd conclusion.

Finally, Dr. John's attorney asserted that determining Texas as baby Emily's "home state" based solely on the fact that she was born in Texas contradicts the purpose of Florida's statute pertaining to parental relocation with a child.[25] This statute requires that specific actions be taken before relocating with a child to another state after a child custody proceeding has commenced.[26] Allowing a mother to avoid the strict requirements of F.S. §61.13001 by choosing to give birth elsewhere is unreasonable.

Significant Connections Jurisdiction Generally

Dr. John's attorney advised the court that F.S. §61.514(1)(b) allows Florida courts to make an initial child custody determination when Florida is not the "home state" of a child. If the court of another state is not the "home state," or if the "home state" declines to assume jurisdiction, a Florida court has jurisdiction to make an initial child custody determination if 1) the child and the child's parents, or the child and at least one parent or person acting as a parent, have a significant connection with Florida other than a mere physical presence[27]; and 2) substantial evidence is available in Florida concerning the child's care, protection, training, and personal relationships.[28]

Significant Connections Jurisdiction When Birth Is in Another State

Dr. John's attorney argued to the court that jurisdiction could only be assumed under the "significant connections" test in F.S §61.514(1)(b) if baby Emily had no "home state."[29] The attorney opined that if Florida was not baby Emily's "home state," then there was no F.S. §61.503(7) "home state" because baby Emily had not lived in Texas prior to Dr. John filing his petition for paternity.

The attorney argued that the first prong of the "significant connections test" was met because Dr. John has a significant connection with Florida beyond a mere physical presence. Dr. John was born and raised in West Palm Beach, had attended college and medical school at Florida State University, and had a pediatric practice and an extended family in West Palm Beach.

Also, Dr. John's attorney explained, the second prong of the "significant connections test" was satisfied because there was substantial evidence available in Florida concerning baby Emily's care, protection, training, and personal relationships. The attorney argued that since Dr. John was, by profession, trained in caring for infant children, he would be able to care for his own infant daughter. The evidence showed that

Dr. John's family, including his parents, all lived in Palm Beach County and were eagerly awaiting the opportunity to welcome baby Emily to the family.

Helen's attorney countered, however, that the court was precluded, as a matter of law, from even delving into a "significant connections test" analysis because Texas was the "home state" of baby Emily. The attorney focused the court's attention to the second sentence of the definition of "home state" in F.S. §61.503(7), which says "[i]n the case of a child younger than [six] months of age, the term [home state] means the state in which the child lived from birth."[30] The attorney explained that Texas is baby Emily's home state because she has lived there since birth.

Furthermore, Helen's attorney argued that it was not possible for the second prong of the "significant connections test" to be satisfied. There could be no substantial evidence of baby Emily's care, protection, training, and relationships in Florida when the child had lived in Texas since birth. The attorney argued that the only substantial evidence concerning anything about baby Emily would lie in Texas where she had lived for all of her short life.

The Need for Clarity in Ch. 742 and the UCCJEA

The "jury is still out" as to how Dr. John and Helen's case should be resolved in Florida. None of the state's appellate courts have addressed whether a putative or expectant father can bring a paternity action or whether a circuit court has the subject matter jurisdiction to make an initial child custody determination when a lawsuit is properly commenced in Florida, but the child is born in another state. Some other states have taken up this issue, most deciding that the initial child custody determination should be decided in the "birth state"[31]; although some courts have held that there can be initial child custody jurisdiction in the state where the lawsuit commenced.[32] Notably, however, a majority of these cases were decided under the Uniform Child Custody Jurisdiction Act, the model multistate jurisdictional act that predated the UCCJEA.

Under the current state of the law in Florida, a family law practitioner is put in a precarious position when it comes to advising a client how to approach a paternity action or a multi-state jurisdictional custody challenge. How could a court interpret F.S. §742.11 to allow an expectant mother, but not a putative father, to commence a paternity proceeding while a child is in utero? Is it reasonable for a putative father to travel to another state and potentially risk subjecting himself to the jurisdiction of that state for child support-related issues simply because the mother moved there after commencement of a paternity suit? Does Florida propose that a putative father avoid visiting his child, depriving the father and child from forming a bond (while drawing the ire of a court or parenting plan evaluator during a §61.13 analysis), for the only purpose of defending a jurisdictional challenge?

Advocates for putative fathers might take the position that F.S. §742.11 and the UCCJEA currently give expectant mothers the ability to use childbirth as an unbridled key to forum shopping. Why should an expectant mother, after engaging in intercourse in Florida, be able to avoid a custody lawsuit or force what may be prohibitively expensive litigation in another state by making the conscious decision to give birth to their child across state lines? These putative fathers might say that they already face uphill battles in child custody proceedings and their plight for involvement as a father would become even harder and resource-intensive if they were put in the position of having to litigate uncertain jurisdictional issues before they can even get their local circuit court to address child custody issues.

Likewise, expectant mothers may argue that F.S. §742.11 and the UCCJEA are practical for the all too common situation of a putative father desiring to assert custody rights without the desire or ability to financially assist the mother with financial obligations related to the pregnancy and birth of their child. Why should F.S. §742.11 be reworked to allow putative fathers to initiate a paternity action before the child is born when paternity is unknown?[33] These expectant mothers could point out that the UCCJEA already has safeguards in place under the "inconvenient forum" provisions of F.S. §61.520[34] and the "bad faith conduct" provisions of F.S. §61.521.[35]

Seemingly, the legislature could eliminate future litigation and a great deal of uncertainty by making

simple changes to F.S. §742.11, the definition of "child" and "home state" that appears in F.S. §61.503, and the F.S. §61.514(1)(b) "significant connections test." Additionally, the second clause of F.S. §742.011 could be clarified to make it clear as to whether a father can initiate a paternity action while a child is in utero. One sentence could be added to the definition of "child" in F.S. §61.503(2) to clarify when an embryo becomes a "child" for purposes of child custody jurisdiction. The definition of "home state" in F.S. §61.503(7) could be changed to specify the procedure for determining the "home state" when a mother is served with a child custody proceeding while a child is in utero. Finally, language could be added to the F.S. §61.514(1)(b) "significant connections test" to clarify whether there can be "substantial evidence . . . concerning a child's care, protection, training and personal relationships" in Florida when the subject child was removed from Florida while in utero.

Regardless of how the law is altered, it seems that family law practitioners, their clients, and courts all stand to benefit from some slight clarifications to F.S. §§742.11, 61.503(2) and (7), and 61.514(1)(b).

[1] The Uniform Child Custody and Enforcement Act (UCCJEA) is a uniform act drafted in 1997 by the National Conference of Commissioners on Uniform State Laws. The UCCJEA has been adopted in 48 states and is codified as Fla. Stat. §§61.501-542 (2010).

[2] Fla. Stat. §48.193(h). Theoretically, venue could be transferred to Texas if the requirements of Fla. R. Civ. P. 1.061 have been satisfied. Namely, the Texas court would need to have personal jurisdiction over the father. Fla. R. Civ. P. 1.061(a) (2010).

[3] *See* Fla. Stat. §742.031 (stating that "the court shall order either or both parents owing a duty of support to the child to pay support pursuant to F.S. §61.30… [and] may also make a determination of an appropriate parenting plan, including a time-sharing schedule, in accordance with chapter 61").

[4] Fla. Stat. §742.011.

[5] *Reeves v. State*, 957 So. 2d 625, 629 (Fla. 2007) (quoting *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 (Fla. 1984)).

[6] *Id.* (quoting *Ellis v. State*, 622 So. 2d 991, 1001 (Fla. 1993)).

[7] *See* Fla. Stat. §742.011.

[8] Fla. Stat. §86.011; *see also Kendrick v. Everheart*, 390 So. 2d 53 (Fla. 1980); *Fernandez v. Fernandez*, 857 So. 2d 997, 999 n.1 (Fla. 5th D.C.A. 2003) (recognizing that a putative father can bring an action for declaratory judgment to resolve a paternity dispute).

[9] U.S. Const. amend. xiv, §1.

[10] Fla. Const. art. 1, §2. This article will not fully address whether Fla. Stat. §742.011 is constitutional. However, in 1980, the Florida Supreme Court addressed whether an earlier version of Fla. Stat. §742.011 violated the Equal Protection Clause of the U.S. and Florida constitutions and found that it did not. *See Kendrick*, 390 So. 2d at 55-57 (holding that the purpose of Ch. 742 is to "afford a basis which a court may order child support from a man adjudicated to be the father of the illegitimate child" and that the father can achieve said purpose without litigation. *Id*. at 57. As of the date of this article, Florida appellate courts have yet to address whether the current version of §742.011 is constitutional).

[11] Fla. Stat. §61.502.

[12] The term "child custody determination" is a "judgment, decree, or other order of a court providing for the legal custody, physical custody, residential care, or visitation with respect to a child." Fla. Stat. §61.503(3). The term includes a permanent, temporary, initial, and modification order. *Id*. The term does not include an order relating to child support or other monetary obligation of an individual. *Id*.

[13] The four scenarios are detailed in Fla. Stat. §61.514(1)(a)-(d).

[14] Fla. Stat. §61.503(2).

[15] Fla. Stat. §61.503(5).

[16] Fla. Stat. §61.503(7).

[17] *See Anselmo v. Anselmo*, 2001 Conn. Super. LEXIS 863 at 7 (Conn. Super. 2001) (citing to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).This article does not address the federal constitutional case law addressing the question of "when does life begin." The U.S. Supreme Court has determined that a state has a fundamental interest in protecting an unborn infant at the point the unborn infant is viable in the mother's womb. *Id.*

[18] Normally, "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglas, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)).

[19] *See Stokes v. Liberty Mutual Ins. Co.*, 21 So. 2d 695 at 700 (Fla. 1968) (stating "in view of the peculiar language of F.S. §768.03, allowing recovery for the wrongful death of a 'minor child,' we hold that a stillborn fetus is not within the statutory classification. Conversely, we hold that a right of action for wrongful death can arise only after the live birth and subsequent death of the child.").

[20] *See* Fla. Stat. §§61.502 (1)-(4).

[21] *See Reeves v. State*, 957 So. 2d 625.

[22] *See* Fla. Stat. §§88.2011(1) and (6).

[23] *See, e.g., Hollowell v. Tamburro*, 991 So. 2d 1022 (Fla. 4th D.C.A. 2008).

[24] *See* notes two through 10 and accompanying text.

[25] Fla. Stat. §61.13001

[26] *See id*.

[27] Fla. Stat. §61.514(b)(1).

[28] Fla. Stat. §61.514(b)(2).

[29] It is possible under the UCCJEA for a child to not have a "home state." *See Hindle v. Fuith,* 33 So. 3d 782, 785 (Fla. 5th D.C.A. 2010). A Florida court does not have jurisdiction under Fla. Stat. §61.514(1)(b) unless a court of another state does not have "home state" jurisdiction under Fla. Stat. §61.514(a). Fla.

Stat. §61.514(1)(b); *Hindle*, 33 So. 3d at 785.

[30] Fla. Stat. §61.503(7).

[31] *See, e.g., Tonnessen v. Tonnessen*, 941 P. 2d 237, 239 (Ariz. App. 1997) ("[t]he statute [UCCJEA] does not contemplate the in utero period of time in determining domicile or home state; it contemplates a postnatal child"); *Arkansas Dept. of Human Serv. v. Cox*, 82 S.W. 3d 806, 813 (Ark. 2002) ("the UCCJEA does not apply to unborn infants"); *Waltenburg v. Waltenburg*, 270 S.W. 3d 308, 316 (Tex. App. 2008) ("the UCCJEA in general, and the versions of the UCCJEA enacted in Texas and Arizona in particular, do not authorize jurisdiction over a child custody proceeding concerning an unborn child. The plain language of the UCCJEA's definition of a child as 'an individual who has not attained 18 years of age' — adopted in chapter 152 of the Texas Family Code — does not include an unborn child.").

[32] *See, e.g., Gullett v. Gullet*, 992 S.W.2d 866, 869-870 (Ky. App. 1999) (stating that the state of commencement may look to the significant connections test to determine whether jurisdiction exists to make an initial child custody determination when the child is born in another state after the commencement of a child custody proceeding); *In re P.D.M.*, 2001 Iowa App. LEXIS 717 at 7, Case No. 1-728/01-0872 (Iowa App. 2001) (stating that the state of commencement could exercise jurisdiction to make an initial child custody determination when proceedings were commenced before the birth of the child and state law allowed a paternity action to be commenced before the birth of the child); *Stewart v. Yulliet*, 888 N.E.2d 761, 765-766 (In. 2008) (stating that state where the lawsuit was commenced before the birth of the child in another state could continue to exercise jurisdiction and the "birth state" could not make an initial child custody determination unless the proceeding in the state where the lawsuit was commenced was dismissed).

[33] It is possible to conduct a paternity test during an amniocentesis or chorionic villus sampling procedure while a child is in utero, but the aforesaid testing typically is a viable solution around only the 10th through 16th weeks of pregnancy. American Pregnancy Association, Paternity Testing, http://www.americanpregnancy.org/prenataltesting/paternitytesting.html.

[34] Fla. Stat. §61.520 states that a circuit court can decline to exercise jurisdiction to make an initial child custody determination if it determines it is an inconvenient forum under the factors set out in subpart (2)(a)-(j).

[35] Fla. Stat. §61.521 states that a circuit court can decline to exercise jurisdiction to make an initial child custody determination upon a finding that the person seeking to invoke the court's jurisdiction has engaged in unjustifiable conduct.

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This column is submitted on behalf of the Family Law Section, David Lawrence Manz, chair, and Sarah Sullivan and Amy Hamlin, editors.

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