Date: Feb. 10, 2014

To: Family Law Arbitration Act Drafting Committee, ABA Advisors, Observers

From: Barbara Atwood, Chair

Re: New draft for upcoming meeting, Feb. 21-22, 2014

Friends, I hope the new year is off to a great start for you and your families. With this message you are receiving the new draft of the Family Law Arbitration Act that we'll consider at the upcoming meeting in Washington, D.C. The draft has been helpfully edited by the Style Committee, and our tireless Reporter Linda [Cricket] Elrod has been working hard to incorporate their changes and to develop a concise and readable act. This memo will briefly highlight some features of the draft and flag particular issues for in-depth discussion at the meeting.

The draft attempts to put into statutory language the policy positions that the Committee took at our first drafting committee meeting in Chicago in October 2013. As you'll recall, we decided that the act should be a free-standing set of statutory provisions on family law arbitration, without requiring parties or attorneys to reference other commercial arbitration provisions in state law. We've loosely tracked the Revised Uniform Arbitration Act in terms of structure but have not included everything that's in the RUAA. As you read through the draft, please consider whether we've omitted any essential procedural provisions. Also, unlike the RUAA, our draft does not list non-waivable provisions in one section – an approach that seemed cumbersome and hard to apply. Instead, by using phrases such as "unless otherwise agreed by the parties," or "unless otherwise provided in the arbitration agreement," we've tried to indicate throughout the draft when a statutory provision can be altered or waived by agreement. This may not be as clear as we hoped, and we may ultimately need to adopt the approach of the RUAA.

As to the name of the act: Style wants us to call the act the "Family-Law Arbitration Act," with a hyphen. "Family-law," as a hyphenated term when used as an adjective, is grammatically correct but would be very unusual. One alternative might be to call our act the "Family Arbitration Act"—a possibility we can discuss at the meeting.

Section 2, the definitions section, has been expanded, due to Style's suggestion, to include "arbitration agreement" and a few other standard terms for uniform acts. The term "family-law matter" is defined broadly, with a list of key issues that typically arise in family cases. Should it be made clear that the list is non-exclusive?

Section 3, on "Scope," spells out the limitations we discussed at the October 2013 meeting relating to domestic violence and child abuse and neglect. Read through these provisions carefully to make sure they create a workable framework for courts and arbitrators.

In Section 4, governing the requirements for an enforceable arbitration agreement, please consider whether we have successfully captured the sense of the Committee. Is it realistic to require that an agreement, in order to be enforceable, explicitly acknowledge that the parties have been informed of each of the listed features of arbitration? What if one of them is omitted? At the meeting, we might consider alternative ways of ensuring informed consent.

In Section 7, our requirements for arbitrators are designed so that we can have confidence in the arbitrator's ability to competently decide the issues presented. At the same time, the requirements should not be so stringent that we exclude very qualified individuals. (Note that we've included retired judges and attorneys, due to a suggestion from an experienced arbitrator/mediator.) Have we struck the right balance?

Section 13 on interlocutory review lists situations in which immediate access to a court is made available. Are there other circumstances beyond those listed in which interlocutory review should be permitted?

In Section 15, the grounds for challenging an award are spelled out. The "serious emotional or physical harm to the child" standard is what we agreed on in October for the scope of judicial review as to child custody terms. The draft also requires that the arbitrator comply with the state's child support guidelines. At least as to child custody, the draft takes a position that is in the minority across the U.S., with most states applying a "best interests" standards when reviewing child custody terms in arbitration awards. Are we comfortable with the approach of the draft?

There are many other issues that will arise as we go through the act line by line, especially since we have such an engaged committee. If we identify some particularly complicated or troublesome drafting issues, we may divide into subgroups during the meeting to help with the drafting of certain sections. I definitely expect to get though the entire act during our two full days in Washington. Our act will most likely be up for a first read in Seattle in July, so we want to develop as polished a draft as possible.

I very much look forward to a lively and stimulating meeting. Safe travels to all, and let's hope our meeting is not sabotaged by a polar vortex!