Date: **November 26, 2014**

To: **Family Law Arbitration Drafting Committee, Advisors, and Observers**

From: **Barbara Atwood, Chair**

Re: **Summary of Meeting November** 14-15, 2014, Chicago, IL

Hello, everyone. This memo summarizes the recent meeting of the Family Law Arbitration Act Drafting Committee. For those of you who were present, please let me know what I've left out or misremembered. For those of you who weren't able to be there, this will bring you up to speed.

All commissioners on the committee were in attendance, except for Commissioners Cam Ward and Mary Quaid. Reporter Linda (Cricket) Elrod was present, as was ABA Advisor Phyllis Bossin. Unfortunately, our ABA Section Advisors, Helen Casale, Dolly Hernandez, and Larry Rute, were not able to attend. Observers at the meeting included Kit Petersen, representing the AAML; Roy Moore, a family court judge from Texas; and Kay Farley, representing the National Center for State Courts. Professor George Walker, Reporter for the AAML Model Act, provided extensive comments on the draft but was unable to attend in person. We were also pleased to have the participation of Rich Cassidy, chair of the ULC Executive Committee, during the Friday session.

We hope that our Section Advisors can attend future drafting sessions or, at the least, give us their feedback on upcoming drafts. We're pleased that Larry Rute, representing the ABA Section on Dispute Resolution, is planning on attending the upcoming March 2015 meeting.

Significant committee action

The drafting session was very productive due to everyone's willingness to work for two full days and to civilly consider (or reconsider) some contentious issues. We spent much of the first morning recapping and analyzing the reactions to our draft at the 2014 Annual Meeting. We noted that some of the reaction was due the problematic use of arbitration clauses in consumer contracts and a consequent distrust of arbitration in general. In addition, many commissioners may be unfamiliar with the ongoing shift in family law from litigation to alternative dispute resolution methods. Most family law cases settle before actual trial, primarily through traditional negotiation, mediation, or a collaborative law process. Voluntary binding arbitration is simply another form of dispute resolution and is becoming more common. For the 2015 Annual Meeting, we can do a better job of setting the stage for consideration of our Act -- by differentiating family law arbitration from the consumer context, by pointing out

that arbitration provides another option in the menu of ADR methods for family law cases, and by emphasizing the perceived advantages of family law arbitration over litigation. If possible, we will also provide an early morning presentation at the Annual Meeting on the ADR movement in family law.

We also spent time at the outset considering whether to continue to draft a comprehensive, global family law arbitration act (our stated drafting goal last year), or to put together a bare-bones act that addresses unique family law concerns and incorporates by reference other law on voluntary binding arbitration. On the one hand, a comprehensive act would appeal to the family law bar because the act would cover the entire arbitration framework in one place. This would likely be the preference of family law lawyers, judges, and litigants. On the other hand, a bare-bones act would probably be more enactable from a legislative point of view and could build on existing law. Offering a bare-bones act would free the Committee from having to provide a detailed code of arbitration procedure. To highlight the choice, the Committee had before it two drafts, with Alternative A as a shorter, simplified act, and Alternative B as a longer, more comprehensive act. The Drafting Committee is split on which approach is preferable, so we delayed any final decision on this question. We will once again have two alternatives for consideration at the spring meeting and will decide then on which approach should be presented to the Conference in July.

A third option may be where we end up – a fairly comprehensive act that still incorporates existing arbitration procedure by reference, except where inconsistent with the act. This hybrid approach would set forth detailed provisions that the Committee deems important, even if they are covered in a state's commercial arbitration law.

During our section-by-section consideration of the draft, we referred only to Alternative A (referred to below as the November 2014 Draft). The following are the major drafting decisions we made at the meeting.

1. In Section 2 (Definitions), "award" is a new defined term in the November 2014 Draft, pursuant to a suggestion at the 2014 Annual Meeting. The goal is to drive home the fact that arbitrator action is not effective until it is included in a court decree. We will retain the term but revise the definition so that it is clear that an award can become effective through other judicial action beyond formal confirmation.

   The Committee found the revised definitions of "court" and "family law dispute" in the November 2014 Draft to be confusing and hard to apply. The next draft will revert to a listing of family law disputes similar to the listing in the July 2014 Draft, with a provision permitting a state to insert additional matters. We will re-insert

"marital tort," since financial fraud and other tort claims may be fairly common in certain jurisdictions. This list will be exclusive, not merely illustrative – an ambiguity pointed out at the 2014 Annual Meeting.

2. Section 3 (Scope) addresses whether the act will cover pre-dispute arbitration agreements. The November 2014 Draft limits arbitration agreements concerning custodial responsibility or child support to existing disputes, but it allows pre-dispute agreements as to other family law matters. After a lengthy discussion, the Committee voted 6-1-1 to generally require contemporaneous agreements (child-related and otherwise), with an exception for agreements pursuant to divorce settlements, mediation agreements, and parenting agreements. As a necessary corollary, the next draft will include a provision that a pre-dispute agreement to arbitrate a family law dispute is void (or unenforceable) unless it falls within one of the exceptions. By restricting the Act in that manner, the majority wants to ensure that arbitration agreements are truly voluntary and informed and that parties should not be compelled to arbitrate unless they presently consent. Dissenting members of the Committee continue to believe that arbitration clauses are often included in premarital agreements and that our act would run counter to accepted practice if we excluded such agreements. The draft for the July 2015 annual Meeting will highlight this issue and, hopefully, lead to a "sense of the floor" vote during the reading.

   In connection with that same discussion, the Committee also reaffirmed that any family law arbitration agreement must comply with the Act as a predicate for enforcement. In other words, agreements that fall outside the Act's framework would not be enforceable.

   With respect to matters that are beyond an arbitrator's authority, we had a vigorous discussion. The group tentatively decided to permit arbitrators to make awards with respect to grounds for divorce, since fault may be relevant to spousal support or property division. We also decided to permit arbitrators to determine uncontested parental status and to exclude from arbitrator authority the remaining matters listed in the November 2014 Draft. Any award determining parental status will fall within the same category as awards concerning custodial responsibility and child support, for purposes of required findings and judicial review.

3. As to Section 4 (Protection of Party or Child) in the November 2014 Draft, we considered what safeguards to impose when there is a protective order or other

facts indicating that a party is at risk of harm. We decided to permit either a court or an arbitrator to determine if parties consent to continue arbitration under those circumstances, and we endorsed the deletion of the advice-of-counsel requirement in the July 2014 Draft. The next draft will also clarify that any party who is dissatisfied with an arbitrator's action under Section 4 can seek relief in court.

4. We reworded the caveats listed in Section 5 (Arbitration Agreement), and decided to require that each party acknowledge in a record that the warnings were disclosed. At the next drafting meeting, we can spend additional time on making these warnings effective.

5. In Section 8 (Applicable Law), the Committee decided that arbitrations of custodial responsibility disputes must apply the law of the state that has jurisdiction under the UCCJEA. We need to consider whether a similar limitation should be imposed with respect to arbitration of child support disputes. The more flexible choice of law provision in the November 2014 Draft will remain applicable to purely financial disputes between the parties. With respect to the venue of the arbitration, we will gather information on whether arbitrations should go forward only in the state that has jurisdiction to enforce an award. This is a matter of particular concern as to the enforcement of temporary awards. An arbitration might take place in Colorado, for example, even though the court with subject-matter and personal jurisdiction might be Texas. If a temporary award is made by the arbitrator regarding the parties' bank account, or custodial responsibility of a minor child, enforcement of that order would presumably be available in Texas and not in Colorado. We will return to this issue at the next drafting meeting.

6. We considered Section 13 (Interlocutory Review) in the November 2014 Draft and decided to delete it as superfluous and possibly subject to abuse (as a way of delaying arbitration proceedings). Specific mention of the availability of immediate access to a court will be included in individual sections of the draft where appropriate.

7. In discussing Section 15 (Award), we considered whether to require findings of fact and conclusions of law, reasoned awards, or some other standard for arbitration awards. "Reasoned award" is a term of art in the arbitration world but is frequently criticized as exceedingly vague. Requiring findings of fact and conclusions of law, as in the November 2014 Draft, seemed unduly formal to the group. We ultimately decided to draw on language from the North Carolina family law arbitration act and

require the arbitrator to state the reasons that form the basis for the award with respect to child-related disputes. As to other family law disputes, the act will require the arbitrator to state reasons as a default rule, i.e. unless the parties otherwise agree. An issue for us to consider in the next meeting is what consequence should occur in a non-child-related case f an arbitrator fails to state reasons in her award and the parties did not otherwise agree. Is that an additional ground for challenge in court?

8. A serious concern was raised with respect to Section 16 (Confirmation of Award) and its provision that an award is "effective" on confirmation. The concern was that support awards might be entered as of a certain date, but that date would be meaningless if the award wasn't confirmed until a later date. If an award requires child support to be paid from January 1, for example, but it is not confirmed until March 30, it might be ineffective as to past-due amounts under the present version. A possible solution would be to use the term "unenforceable" rather than "effective." We will address this question in the next draft and discuss it at the March meeting.

9. In Section 18 (Vacation or Revision of Award), the Committee debated once again the appropriate standard for judicial review. While the standard in the July 2014 Draft (risk of harm to child) was criticized at the Annual Meeting as unduly narrow (and potentially unconstitutional), the judicial review standard in the November 2014 Draft seemed overly broad. The group in Chicago worried that the standard in the November 2014 Draft would invite judicial challenge, at least as to child-related issues. The group decided that a "clear and convincing evidence" standard should be applied to the review of child-related arbitration awards (i.e. clear and convincing evidence that the award does not comply with applicable law), and that the court's review should be confined to the arbitration record. This was based on the continuing view that we should discourage de novo challenges. Apart from child-related awards, the Section will otherwise track the strict provisions of RUAA on vacating awards. Of course, a state can add an additional ground for challenge if it so chooses.

10. In considering Section 19 (Modification), we decided to break it into separate subsections to make the separate concepts more transparent. In other words, we'll have a separate subsection on arbitrating future disputes about the meaning of the confirmed award, a separate subsection on arbitrating future requests for

modification, and a separate subsection on litigating rather than arbitrating, post-decree.

We made other less momentous changes in the November 2014 Draft, but please let me know if I've omitted a significant point of discussion. Our next drafting committee meeting will be March 20-21, 2015, in sunny Chicago. Cricket and I will circulate a draft several weeks before the meeting. Reminder: The 2015 Annual Meeting will be in Williamsburg, Virginia, from July 9-16, 2015.

I HOPE YOU HAVE A SAFE AND HEALTHY THANKSGIVING HOLIDAY SURROUNDED BY FAMILY AND CLOSE FRIENDS!