Date: April 7, 2015

To: Family Law Arbitration Drafting Committee and Observers

From: Barbara Atwood, Chair

Re: Summary of Recent Drafting Committee Meeting, and a New Draft

This memo summarizes the main developments at the drafting committee meeting on March 20-21, 2015, in Chicago, Illlinois. All commissioners except Mary Quaid and Harry Tindall were in attendance. In addition, ABA Advisor Phyllis Bossin, and ADR Section Advisor Larry Rute were present, as well as AAML Observer Catherine (Kit) Petersen. Comments were submitted by other observers, including George Walker, Larry Fong, and Barbara Gislason. Lindsay Beaver, the ULC legislative counsel, was present throughout the meeting and was a valuable resource. We were also pleased to have intermittent participation from Rich Cassidy, Harriet Lansing, and Liza Karsai.

I reminded everyone of our reading schedule. The draft will have an interim reading at the Annual Meeting in Williamsburg, Va., this July. We are scheduled to be on the floor from 2:30 to 4:30 p.m. on Monday, July 13. We will have another year of drafting, with a final reading anticipated for July 2016. All agreed that we would benefit if our Section Advisors from the ABA Section on Litigation can take a more active role in the drafting project.

After you've had a chance to look over the attached draft, please let me know if you have suggested changes. I and our indefatigable reporter Linda (Cricket) Elrod hope that the present draft reflects the changes that were agreed on at the drafting committee meeting. We need to send our draft to Chicago by late April, so the sooner you can get comments back to Cricket and me, the better.

I look forward to seeing everyone in Williamsburg!

Significant Changes in the Draft

The drafting session was very productive, due to the active participation of everyone present. The resulting draft is shorter, less complex, and, we hope, more enactable. Our goal at this point, after considerable discussion, is to produce a draft that will operate against the backdrop of a state's existing arbitration procedures, i.e. either the RUAA or the UAA. It's clear that having the extra year of drafting has been very helpful.

a. **Scope:** Section 3 has been slightly reworded and, we hope, clarified. The listing in Section 3(b) is intended to identify those determinations of status that are off limits to an arbitrator under our act.

b. Applicable law: We have moved the applicable law section closer to the beginning of the act, since it provides necessary operating rules for the entire act. Section 4(a) makes clear that the backdrop of RUAA or UAA applies unless otherwise provided in the act. As to Section 4(b), the Committee decided to follow the approach of many family law arbitration statutes and mandate that the law to be applied by the arbitrator should be the law of "'this state" relating to family law disputes, including its choice of law principles, rather than permitting parties to select the law of another jurisdiction. If a state already permits flexibility in choice of law, however, then that would be permissible for arbitration as well. This avoids the need for the act to draw lines between acceptable and unacceptable law selected by parties. In addition, this means that certain areas of the law that are in flux (such as disputes between divorcing spouses over custody of pets) would be governed by the applicable law in the forum state.

c. Protection of party or child: Section 5 has been revised to *require* an arbitrator to report child abuse or neglect. The section also now extends the same protections to situations where there is reason to suspect harm to a child as are available where a party's safety is at risk. These subsections may seem duplicative, but there are slight differences that make it challenging to combine them into one subsection.

d. Pre-dispute arbitration agreements: The Committee once again discussed the difficult question of pre-dispute arbitration agreements. The draft for the meeting contained alternatives on this issue, and several committee members spoke in favor of striking Alternative B (the alternative that would have permitted pre-dispute agreements). They were opposed to submitting alternatives to the states on this question, since alternatives would indicate the absence of a strong preference one way or the other. After discussion, the Committee voted 6 – 0 (with one commissioner present but not voting) to limit the act to agreements to arbitrate *existing* disputes, with the exception of arbitration agreements within divorce settlements, parenting agreements, and similar agreements entered into at the time of separation or divorce. The language that the Committee approved is now in Section 6(a) and (b).

Although a strong majority of the Committee is firmly committed to limiting the act to agreements to arbitrate existing disputes, our discussion took place without the contribution of at least one commissioner who was firmly committed to the opposite position in earlier meetings. Also, several states do permit pre-dispute arbitration agreements in family law, such as in premarital agreements. On the other hand, the reaction from the floor during last year's reading seemed to support the majority's view.

Since the Committee remains divided (while heavily tilting in one direction), we will likely consider this issue again in the coming year.

e. **Effective awards vs. enforceable awards:** We discussed at considerable length the legal effect of an arbitration award before and after confirmation. We ultimately achieved a loose consensus that an award is "effective" immediately but is "enforceable" as a judgment only after it is confirmed by a court. This will be of particular importance for awards ordering a party to pay support, for example, as of a certain date. Although noncompliance with the award would not be punishable as contempt, interest or other penalties might accrue from the date set by the award and would be collectible once the award is confirmed by the court. See Section 6(c)(4)(E), and Section 17(c).

f. **Arbitrator qualifications**: The Committee revised the qualifications for arbitrators by giving priority to any arbitrator agreed to by the parties, and by requiring, in the absence of agreement, that the arbitrator be either an attorney (or retired judge) or a "licensed professional" in a relevant field. In response to several observer comments, we decided to build in more flexibility. We kept the requirement that the arbitrator, whether an attorney or licensed professional, have training in domestic violence, but any of these requirements can be waived by the parties. See Section7.

g. **Disclosure by arbitrator:** The Committee added to the arbitrator's mandatory disclosure any fact that might affect the arbitrator's ability to make a timely award (such as a long-planned trip to Europe). See Section 8.

h. **Immunity of arbitrator:** Section 9(a) now extends immunity to an arbitrator's employer, partnership or organization – a needed change according to our experts on arbitration.

i. **Confidentiality and sealing of awards**: Comments from observers have emphasized that parties often choose arbitration because of the private nature of the process. We decided to create a separate section on confidentiality and to add provisions regarding an arbitrator's or court's authority to seal or redact an award. See Section 12.

j. **Powers of arbitrator**: Section 13 now includes a general statement acknowledging the arbitrator's authority to conduct the arbitration in a fair and expeditious manner.

k. **Record of hearing**: Section 14 was revised to make clear that a recording of an arbitration hearing need not be made (with the exception of hearings related to custody, parental status, or child support) but that the arbitrator can require that a record of a hearing be made or a party can request it.

l. **Award:** Under Section 15, the default rule is that an arbitration award should contain a statement of reasons for the award. It allows parties to agree otherwise, except that an arbitrator must give a statement of reasons to the same extent as required by state law of a court in a family law dispute.

m. **Revision of award by arbitrator:** Sections 16 and 18 authorize nonsubstantive revisions by an arbitrator or by a court. We are now using "revision" rather than correction.

n. **Confirmation:** Section 17 provides a framework for confirmation of an award by a court with jurisdiction to enforce the award. It requires confirmation if there is no motion to revise or vacate, except that for awards involving custodial responsibility parental status, or child support, the court may confirm only if it finds that the award on its face complies with state law.

o. **Judicial review**: The Committee discussed the standard of judicial review at length and arrived at a formulation of "clearly erroneous" for arbitration awards relating to custodial responsibility, parental status, or child support, with review being limited to the record and facts occurring after the award was entered. We are aiming for a standard that will discourage resort to the court after arbitration while still preserving a meaningful role for the court for awards affecting children. Apart from child-related awards, the bases for vacating an arbitration award in the act parallel those in RUAA. See Section 19.

p. **Modification of confirmed award:** We decided to create a separate section on disputes relating to modification of awards based on a change in circumstance, since that is a uniquely common proceeding in family law (primarily for changes affecting child custody, child support, and spousal support). See Section 21. That section now provides in clearer terms that parties can agree to arbitrate these disputes, either before the original arbitrator or a new arbitrator, or they can opt for ordinary court procedures. Section 20 continues to permit parties to agree to arbitrate disputes about the meaning of a confirmed award.

q. **Interstate enforcement:** We added a provision in Section 23 (Enforcement) to authorizing a court to confirm an arbitration award from another state if it was obtained through a process consistent with the act. Because family law cases sometimes involve multi-state jurisdictional dimensions, the need for interstate recognition may arise.