Date: **Sept. 30, 2015**

To: **Family Law Arbitration Drafting Committee**

From: **Barbara Atwood, Chair, and Linda Elrod, Reporter**

Re: **Recap of 2015 Annual Meeting and Summary of New Draft**

Friends, we hope you had a healthy, enjoyable, and productive summer. We're looking forward to the upcoming FLAA Drafting Committee meeting in Washington, DC, November 6-7, 2015. This memo will recap the reading of our draft at the 2015 Annual Meeting, provide an overview of changes that have been made in the new draft, and highlight additional issues for you to ponder in preparation for the Drafting Committee meeting. The new draft is attached.

1. Annual Meeting recap and major changes in draft

We were able to read most of the draft's significant sections during our allotted time in Williamsburg, but we weren't able to read the entire draft. We received valuable written commentary during and after the reading, including comments on sections that we did not read. Much of the feedback seemed to be geared toward strengthening the Act rather than questioning the underlying premise of arbitrating family law disputes. The topics listed below were the primary areas of focus.

a. Preemptive effect of FAA

Several questions were directed at the preemptive impact of the Federal Arbitration Act on our Act. As you know, the FAA, 9 U.S.C. §§ 1-14, was enacted to counter the strong anti-arbitration sentiment in many courts that resulted in refusals to enforce arbitration agreements. The FAA applies to agreements to arbitrate existing or future disputes arising from contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. Through a series of cases, the U.S. Supreme Court has construed the Federal Arbitration Act quite broadly to preempt state laws that exclude particular kinds of claims on policy grounds from arbitration. It is quite possible that the FAA would apply in the family law context if, for example, divorcing spouses agreed to arbitrate a dispute arising from a marital agreement about property located in different states or ownership of a

business with interstate elements. It is not clear whether a state law excluding family law disputes from arbitration or imposing distinct requirements for enforceable agreements would be preempted by the FAA, but the trend has definitely been in that direction. *See, e.g*., Marmet Health Care Center v. Brown, 132 S. Ct. 1201 (2012) (per curiam) (holding that wrongful death claim brought against nursing home was subject to arbitration under FAA because of arbitration clause in patient's admitting document, despite strong state policy holding such pre-dispute clauses unenforceable).

We believe the main potential impact of the FAA on our project is the draft's general exclusion of pre-dispute arbitration agreements, its imposition of special requirements for family law arbitration agreements, and its provision for more stringent judicial review of certain awards than is provided by the FAA. Since the FAA expressly makes pre-dispute agreements enforceable, see 9 U.S.C. § 2, the new draft now acknowledges the possible preemptive effect of the FAA in Section 3 (Scope). [1]

In addition, our draft imposes unique requirements for family law arbitration agreements under Section 7, derived from comparable provisions in Michigan law. Lower courts, however, have held that the FAA preempts state laws that impose special requirements for arbitration agreements. In light of the FAA, the new draft no longer states that agreements that don't comply with the act are unenforceable. Still, the requirements are there – and we need to decide what the consequences of non-compliance are. See discussion below. We may need to reference the FAA in this section as well.

Finally, the FAA also spells out limited standards for judicial review, standards held to be exclusive in *Hall Street Assoc. v. Mattel*, 552 U.S. 576 (2008). Those standards were relied on in the UAA and the RUAA, and our draft repeats them almost verbatim, except for review of child-related awards. Our draft necessarily provides more stringent standards of review for child-related awards, since many state courts have held that their parens patriae obligation to protect children trumps private agreements. We think it highly unlikely that a child-

[1] An interesting historical note: Way back in the 1920's, when the FAA was being considered by Congress for enactment, NCCUSL actively opposed the statute's inclusion of pre-dispute arbitration agreements. NCCUSL was worried about people far in advance of a dispute unwittingly waiving their right to go to court. That concern dissipated over time. The UAA, of course, tracks the FAA in its inclusion of pre-dispute arbitration agreements.

related claim would ever be governed by the FAA in the first place. Moreover, the Court in dicta in *Hall* recognized that an arbitration agreement enforceable under a different statutory scheme might be subject to different standards of judicial review without running afoul of the FAA. *Hall,* 552 U.S. at 589 (FAA is not only way into court for judicial review of arbitration awards, and parties may agree to enforcement under state statutory law or other possible avenues with different standards of review). Thus, our judicial review standards do not seem to raise the same preemption risk as does the draft's stance on pre-dispute arbitration agreements. We'll discuss this further at the meeting.

b. Exclusion of pre-dispute agreements

Our exclusion of pre-dispute agreements triggered some interesting discussion. While no commissioner spoke directly against the draft's approach, some people wondered whether we might want to enforce pre-dispute arbitration agreements if both parties were represented by counsel at the time of the agreement. On the other hand, an expert in ADR has questioned whether we should make any exceptions to our general exclusion of pre-dispute agreements. His view is that binding arbitration should never be a method of dispute resolution that is forced on a person because of an agreement signed long ago. At the very least, we need to make clear that if parties enter into a pre-dispute arbitration agreement and both parties are still committed to arbitration at the time the dispute arises, they are free to confirm their agreement to arbitrate. The new draft leaves the pre-dispute language as is, with the addition of the FAA reference, but treats it as a matter of scope rather than a limitation on enforceable agreements.

c. Consistency with RUAA

The draft incorporates each state's law and procedural rules on binding arbitration, except as otherwise provided in the Act. Section 4 (Applicable Law). At the same time, the Annual Meeting draft used language similar to the RUAA in certain sections. Several commissioners voiced concern that the draft sometimes paraphrased the RUAA without tracking it verbatim, thus raising the question that we might have intended to convey a different meaning. In the new draft, we have tried to conform the language more closely to the RUAA where appropriate and, more often, to simply refer to existing state arbitration law and procedure.

d. Requirements for agreements

Several questions were raised about the consequence to parties if an arbitration agreement does not meet the requirements of the Act. These are important questions, since Section 7 spells out mandatory caveats about arbitration that a party must receive. The caveats themselves may need tweaking, but the draft is also unclear about whether an agreement that doesn't meet the standards is unenforceable. For example, assume that parties enter an agreement to arbitrate a dispute about dividing a family-owned business that meets all requirements except that the parties were never told arbitration may not be appropriate for disputes involving domestic violence. If there is no claim of domestic violence whatsoever, should that omission, if raised by a party, invalidate the agreement?

The intent of the draft is that any challenges to the agreement be raised early in the process, but we don't make that explicit until the section on vacating awards, Section 20(a)(7) (objection that there was no agreement to arbitrate must be raised before the arbitration hearing). We need to think carefully about whether to impose these requirements and, if we retain them, what the impact of non-compliance should be.

e. Qualifications, power, immunity of arbitrator

A strong objection was raised about our rather relaxed criteria for arbitrators, especially in light of the powers granted to arbitrators and the immunity provided. As you'll recall, we've moved toward more leniency on the qualifications issue, largely in response to requests from observers and in recognition of the practice across the U.S. Commissioners also voiced concern about our immunity provision. The current draft now directly adopts the immunity law of the forum state, rather than pronouncing an immunity standard on its own.

f. Standards of judicial review and custodial responsibility

Several commissioners have let us know that they are concerned about any inclusion of custodial responsibility in the range of family law disputes that may be arbitrated. Also, our legislative counsel Kaitlin Dohse is compiling a chart of state statutory law and case law on this question. Her research so far shows that

more than half the states exclude custodial responsibility from arbitration. We suggest that we bracket all references to custodial responsibility so that states may easily exclude these issues from arbitration.

Given the opposition to even including custodial responsibility, we may need to provide for closer judicial scrutiny than "clearly erroneous." For that reason, the draft now also provides two alternatives ("clearly erroneous," and "contrary to best interests of child") for reviewing child-related awards in Section 20 (Vacation of Award). These are alternatives for Committee consideration – not alternatives for states.

Finally, for both custodial responsibility and child support, Section 15 requires an adequate record for the reviewing court. Per a suggestion at the annual meeting, the absence of an adequate record is now a basis for vacating the award under Section 20.

2. Additional issues for consideration, section by section

Section 2 (Definitions): Note that the reference to "custodial responsibility" in the definition of "family law dispute" is bracketed. We may need to bracket "child support" as well, since some states reject arbitration for any child-related issues. The current draft does not include "parentage" as a separate category of dispute, but if we do include it, we will undoubtedly need to bracket it. Does our definition of "court" say all that we need it to say? Do we need to include additional definitions, such as a definition of "hearing"? Conversely, are there definitions we can eliminate?

Section 3 (Scope): The draft now covers the pre-dispute question here, rather than in the section governing agreements. We need to think through whether this act is the only way for family law arbitration to proceed, or whether parties can arbitrate family law disputes outside of this act and get courts to enforce the awards.

Section 4 (Applicable Law): The choice of law principles we're putting into effect may not work as smoothly as we would like, since the identity of "this state" may be unclear. "This state" refers to the forum state, but will that be the state where the award is subject to confirmation (or challenge), or is it the state where the arbitration is taking place, or the state where a family law action is

pending? These may all be the same state, but they could also be different states. Should we permit parties to choose other law? We need to think about this carefully.

Section 4 also provides that the forum state's law, including its choice of law rules, governs the family law dispute. A suggestion was made for us to clarify that the applicable law for custodial responsibility disputes should be the law of the state with jurisdiction under the UCCJEA. We hope to spend time discussing this in November.

Section 5 (Motion for Judicial Relief): The Annual Meeting draft referred to motions for judicial relief in numerous sections, but it did not direct a party to a particular court for making a motion. The new draft contains a new section (Section 5) that we hope fills in this procedural gap. It is based on a similar provision in the RUAA.

Section 6 (Protection of Party or Child): Several comments during the Annual Meeting were directed at what is now Section 6 (Protection of Party or Child), most of them suggesting ways of strengthening protections for victims. The draft contains a new subsection, Section 6(f), making clear that the remedies are not intended to exclude other remedies under state law.

One commissioner suggested that we require the arbitrator to take protective actions for children only if the arbitration relates to disputes about custodial responsibility or child support. We did not implement that suggestion, but we should consider it in November. In addition, please think about whether the act should require an arbitrator to report child abuse even if state law would not impose that obligation?

Another question we need to consider is whether arbitration should ever proceed if a protective order is in place that prohibits the parties from being in the same room together.

Sections 9 (Disclosure by Arbitrator; Disqualification): Rather than spelling out in detail the disqualification procedures, the new draft refers to the state's law on binding arbitration. You'll find a similar approach in Section 10 (Immunity of Arbitrator). Does this work?

Section 12 (Party Participation): Think about whether we actually need this section. Can its provisions be placed elsewhere? Also, Section 12(a)(2) seems to give a party an absolute right to bring a non-witness individual into the arbitration. We may need to limit this or qualify it in some manner.

Section 16 (Award): This section sets up a default requirement for a reasoned award but permits parties to agree that the arbitrator need not state reasons, except for awards concerning child-related issues. Should we require a reasoned award generally, without giving parties the option of agreeing otherwise?

Section 20 (Vacating Award): The new draft retains a full statement of grounds for vacating awards, but the wording more closely tracks RUAA than did the Annual Meeting draft. Do we need to spell these out or should we simply refer to the existing state law?

A question was raised at the Annual Meeting whether we should put in an outside time limit for belated discoveries of fraud under Section 20(b). There is no such time limit in the RUAA, and we believe it's unnecessary. A challenge to an award on the ground of fraud seeking to vacate the award would necessarily be made before confirmation. If fraud were discovered after an award has already been confirmed, then the challenger would be asking the court to reopen a court decree – and would be governed by the state's version of Rule 60(b). At least that's our analysis!

Section 22 (Modification Based on Change in Circumstance): Should this section be fleshed out more, since post-decree modifications are so frequently sought in family law?

Section 23 (Right of Appeal): The new draft brackets language in (a)(1) and (2) in order to have the Committee consider expanding the right of appeal. The original language tracked the RUAA, which itself tracked the FAA. It puts a heavy thumb on the pro-arbitration side of things, since it enables parties to appeal non-final rulings that impede arbitration. There may be good reasons in the family law context to authorize appeals from non-final pro-arbitration rulings. If, for example, a trial court grants a motion to compel arbitration but one of the parties opposes this on the ground that DV has made the arbitration untenable, should

the act authorize an immediate appeal to a higher court? We'll talk about this in November.

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As you can see, we have a lot of issues to resolve as we head into our final year of drafting. The Style Committee was not able to review the current draft, but Commissioner Jim Concannon, a member of Style, reviewed the draft closely on his own time and made extensive suggestions/edits. We appreciate the enormous effort he put into it. You are receiving a much better draft as a result of Jim's work.

We look forward to seeing everyone in November. For those of you who can't attend, please send us your comments ahead of time so that we can consider them fully at the meeting.