Date: **November 18 2015**

To: **Family Law Arbitration Act Drafting Committee**

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

Re: **Summary of recent drafting committee meeting**

Friends, we had a very productive meeting November 6-7, 2015, in Arlington, Virginia.. Although several commissioners and observers were absent due to conflicts, those who did attend reflected a range of viewpoints and areas of expertise. The discussions were spirited, as always, and everyone had a chance to be heard on the direction of the draft.

All commissioner-m**e**mbers were present except for Debra Lehrmann, Mary Quaid, and Cam Ward. Our new Division Chair, Bill Barrett, was a valuable participant. ABA Dispute Resolution Section Advisor Larry Rute provided thoughtful comments throughout the meeting. We were also grateful that Kay Farley of the Center for State Courts was present. Unfortunately, Advisor Phyllis Bossin and observers Kit Petersen and Linda Lea Vikens were not able to attend because of the AAML annual conference in Chicago. Kaitlin Dohse, our legislative counsel, was present throughout the meeting and was a great resource. We also benefitted enormously from the participation by ULC President Rich Cassidy. Professor George Walker submitted helpful written comments on the draft.

Significant developments during the meeting:

We began with a recap of the reactions to the draft during the second reading in Williamsburg, Virginia, at the 2015 ULC Annual Meeting. Unlike the first reading, the floor comments did not seem to be driven by a general hostility to binding arbitration. On that topic, everyone should look at the recent series published in *The New York Times* (October 31-Nov. 2, 2015) on the misuse of arbitration clauses in commercial contracts. Unlike arbitration clauses in contracts of adhesion, the parties to family law arbitration have a shared background, and the structure does not carry a built-in bias favoring one party over another. In addition, family law arbitration has the potential to provide benefits that may be particularly important to disputants in family court: privacy, informality, speed, and the ability to select an expert decision-maker. We hope our project will not fall victim to the anti-arbitration sentiment that seems to be on the rise.

The primary concerns that emerged during the second reading were the potential preemptive effect of the Federal Arbitration Act, particularly with respect to the draft's imposition of special requirements on family law arbitration agreements; the resistance to arbitration of child custody and child support that exists in many states, through court decision or legislative enactment; and the failure of the draft in various procedural sections to track the Revised Uniform Arbitration Act. Over the course of the meeting, Committee members suggested various changes in the draft to address these concerns while also keeping the focus on the over-arching goal of producing a law that is enactable.

(a) We once again returned to the issue of pre-dispute arbitration agreements. Based on additional research that is available in our Dropbox, we acknowledged that the draft's general exclusion of pre-dispute arbitration agreement is inconsistent with existing state law on family law arbitration and, significantly, might pose preemption problems under the FAA. Although some people at the meeting had a narrower view of the FAA's preemptive scope, a number of us were concerned because of case law broadly interpreting the Act. Representative cases are collected in our Dropbox under "Federal Arbitration Act." After lengthy discussion and consideration of amending language proposed by Commissioners Harry Tindall and Mike Getty, the Committee determined that the next draft should confine the prohibition of pre-dispute arbitration agreements to agreements concerning custodial responsibility and child support.

(b) As to purely financial disputes between the parties (property division and spousal support), the next draft will provide that written agreements to arbitrate existing and future disputes are enforceable, but it will also provide a mechanism for a party to challenge at the time of enforcement the validity of such agreements for lack of voluntariness, unconscionability, or other grounds. We debated whether court review of pre-dispute agreements at the time of enforcement should be *the default,* with the parties retaining the option to waive that review, or whether court review should be optional, at the request of a party. In all likelihood, the next draft will present these as alternatives for the Committee to consider. In a related vein, we generally agreed to put back into the draft a section on motions to compel/stay arbitration, tracking the RUAA, since these are the key procedural methods for challenging the validity and scope of arbitration agreements.

(c) The list of required caveats for arbitration agreements under the existing draft similarly poses a potential conflict with the FAA, since the Supreme Court has made clear that state law requirements that uniquely burden arbitration agreements are preempted. *See, e.g., Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996) (holding that a Montana law that required arbitration clauses to be typed in capital letters and underlined was preempted by the FAA). For that reason, the Committee decided that the requirements should be reframed as factors that a court *may c*onsider in determining whether an arbitration agreement is informed and voluntary. This change was based not only on concerns about preemption but also about the uncertain consequence of mandating specific language in an agreement. As noted during the 2015 Annual Meeting, the draft was unclear whether a failure to include such language would doom the agreement in its entirety. We will probably provide a recommended or model family law arbitration agreement in the commentary, building on a new procedural rule that the New Jersey courts recently promulgated. *See* N.J. Chancery Court Rule 5:1-5 and Appendix (available in Dropbox).

(d) The Committee also reconsidered the standard of judicial review for arbitration awards determining custodial responsibility or child support. A standard of "clear

error" was the approach taken in the draft that was read at the annual meeting. In light of case law around the country and significant resistance to arbitration of child custody altogether, the Committee decided to go with the more relaxed "best interests" standard of judicial review, a standard that appears in many state family law arbitration laws. Significantly, this review is *not* de novo. The court will be limited to the record in the arbitration hearing and any facts occurring since the hearing (drawing from the approach in New Mexico law). Also, the new draft will clearly state that the burden of proof is on the party seeking to vacate the award.

(e) A firm time limit for seeking confirmation of an award will be stated in the new draft in order to provide certainty for parties, arbitrators, and courts.

(f) Among other revisions, we also decided to reword certain procedural sections to more closely conform the draft to the RUAA.

Because we are in our final year of drafting (we hope), we will likely hold a telephone conference at least a month before our March meeting. Our reporter will have a draft ready by early February to distribute to the Committee, and we will set a date for discussion by phone. Then, with the benefit of Committee reactions gleaned during that telephone call, we can head into the March drafting committee meeting (March 18-19, 2016) with a draft that reflects a greater consensus.

Have a peaceful and safe holiday season.