Date: November 12, 2010

To: Uniform Premarital and Marital Agreements Act Drafting Committee; ABA Advisors; Observers

From: Barbara Atwood, Chair

Re: Summary of Drafting Committee Meeting, November 5-6, 2010

The following individuals attended the first meeting of the Premarital and Marital Agreements Act Drafting Committee in Chicago, Illinois, November 5-6, 2010: Chair Barbara Atwood, Reporter Brian Bix, and Division Chair Gail Hagerty; Commissioners Turney Berry, Stanley Kent, Shelley Kurtz, Rob Sitkoff, Harry Tindall, Suzanne Walsh, and Stephanie Willbanks; ABA Advisors Carlyn McCaffrey and Linda Ravdin; and Observers Nancy Fax, Steve Peskind, and Michael Whitty.

Working from the draft prepared by Brian Bix, we reached at least preliminary positions on several policy questions. Brian's draft followed the structure of the Uniform Premarital Agreement Act (UPAA) and highlighted numerous questions that were discussed in the conference call held in September 2010. This memo summarizes the decisions *tentatively* reached by the Committee during the meeting and identifies questions about which Committee members remain divided.

I. Additional Stakeholders

At the outset, we discussed whether additional stakeholders or interest groups should be invited to participate as observers. Everyone seemed to agree that a representative of AARP should be at the table. We will once again extend an invitation to that group. We also agreed that we should contact a national or state-wide group that engages in advocacy for divorced women. Another suggestion was to circulate summaries of interim drafts on list-servs for family law and trusts and estates lawyers as a means of reaching a broad audience and eliciting broad-based feedback.

II. Structure of Act

At least for the time being, the Committee decided to retain separate articles in the Act dealing with premarital and marital agreements. We may end up collapsing these down the road, but we chose to continue using separate articles in part because numerous states differentiate the two categories of agreement and some states might want to enact one article but not the other. At the same time, we generally agreed not to differentiate in enforcement standards between agreements effective at divorce and those effective at death. We may revisit this in the future.

III. Definitions

We spent significant time discussing the definition of "marital agreement" and debating whether to provide a detailed list of interspousal transactions that we want to exclude from the definition. By the end of the meeting (when we returned to this topic), we opted for a general definition similar to language used by the ALI but tweaked to require that the agreement's "primary intent and effect" be to

alter or waive the legal rights and obligations between spouses that would otherwise arise at dissolution or death and that the agreement would have no other significant legal or economic purpose. A description of agreements we intend to cover would be set out in commentary, as well as a sample list of the numerous transactions that we intend to exclude. The black letter definition will also state that the term includes agreements to modify or revoke premarital agreements or previous marital agreements but does not include separation agreements or other agreements requiring court approval.

Other terms that we may need to include in the Definitions section are property, record, sign, dissolution, separation, child custody, and visitation.

We agreed that a legislative note should be provided at the en d of the Definitions section providing direction for state legislatures that wish to extend the Act to agreements between parties to civil unions, domestic partnerships, and other such formally-recognized relationships in a particular state. At the same time, commentary in the Prefatory Note will make clear that the extension of the Act to such relationships is solely a matter of state law. We will make clear in the Prefatory Note and the commentary that the Act is not intended to govern cohabitation agreements.

IV. Applicability of Common Law of Contracts Doctrine

We agreed that we should include an expanded section similar to Section 103 of the draft prepared for this meeting. The new section will state that common law contracts doctrines supplement the Act except to the extent displaced by the Act or provided for by the parties. Rob Sitkoff suggested that we look to Section 106 of the Uniform Trust Code as a model for this section. Following that model, we can clarify in this section the provisions of the Act that are mandatory and the provisions that are default rules that can be varied by the parties.

V. Governing Law

A new section on governing law will be inserted in the first article, modeled after Section 107 of the Uniform Trust Code. This section will recognize the right of parties to choose the law governing the validity, meaning, and effect of premarital and marital agreements unless contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. It will also direct courts to apply the law of the jurisdiction with the most significant relationship to the issue, in the absence of a choice of law.

VI. Formation Requirements

We decided that the formal requirements for both premarital and marital agreements should be that the agreement be in “a record” signed by both parties and that neither needs consideration. The “record” language will bring the Act into conformity with NCCUSL terminology. We decided against imposing additional requirements (notarization, witnesses, etc). We decided not to preclude the application of traditional contracts or equitable doctrines that can permit enforcement of oral agreements under certain circumstances, such as where there has been partial performance. Although

some people felt that these doctrines might undermine the requirement of a writing, most members of the committee concluded that we should leave such questions to state law.

VII. Scope of Agreement

Existing Section 203 will be renamed "Scope of Agreement," and the subsection on governing law will be removed and re-cast in a separate section entitled Governing Law, per the discussion above. We revised many of the items listed in Section 203 and decided to include those terms that are listed in the UPAA that were omitted from this listing. We also decided to list other term about which parties may contract, including management and control of property; allocation of tax liabilities and other tax matters; interests in trusts, inheritance, gifts, and other expectancies created by third parties; priority for appointment of a fiduciary or guardian for an incapacitated individual or personal representative of a decedent's estate; designation of an alternative method of dispute resolution, such as arbitration; attorneys fees; choice of law; and a residual category of terms affecting rights of either party under other law.

The second subsection of the Scope section will be an identification of disfavored or unenforceable terms. This subsection will provide that terms of an agreement that regulate non-economic behavior during marriage or that define rights and responsibilities of the parties with respect to child custody and parenting time are not binding on a court. The subsection will also provide that an agreement may not adversely affect a child's right to support or impose fault grounds on the parties for legal separation of dissolution.

VIII. Enforcement Standards

We spent a long time debating the enforcement standards for premarital and marital agreements. There was a general consensus among the group that the UPAA's procedural fairness provisions should be strengthened. This consensus was based on the many critiques of the Act since its promulgation in 1983, the fact that numerous states had chosen to insert higher procedural fairness requirements in their enacted versions of the UPAA, the existence of a higher standard—at least as to knowledge of rights being waived—in the Uniform Probate Code, and the collective practical experience of practitioners at the meeting. We ultimately decided that the same enforcement standards should govern both categories of agreements, with a potential difference in allocation of burden of proof. With respect to premarital agreements, we agreed that the party challenging the agreement should bear the burden of proof. With respect to marital agreements, the Committee was evenly divided on whether the existence of the marital relationship should justify switching the burden of proof to the party seeking to enforce the agreement. For purposes of moving the discussion forward, the Chair broke the tie and sided with those wanting to place the burden on the party seeking to enforce the agreement. Thus, the draft for our Spring meeting will reflect that position, but this is obviously a policy question that we will revisit

For either category of agreement, we agreed on various elements of procedural fairness. The black letter will provide that an enforceable agreement must be voluntary, informed, and not obtained by undue influence or duress; an agreement must not be unconscionable at the time of execution; each

party must provide a fair and reasonable disclosure of property and financial obligations before executing the agreement (unless there is independent knowledge or signed express waiver of disclosure); each party must have general knowledge of the rights being waived or altered; and each party must have a meaningful opportunity to consult independent counsel (meaning sufficient time and financial ability to consult). The black letter will include a statement that a party will be deemed to have knowledge of rights being waived if the agreement expressly enumerates the rights. Commentary will explain that "fair and reasonable" financial disclosure requires disclosure of property interests or future interests known to the party at the time. On the question of waiver of the right to financial disclosure, we considered whether to bar waiver altogether. Although some individuals felt that waiver is too easily abused, the group ultimately decided that we should continue to permit express waivers that are signed separately before the agreement is executed

The primary differences between these standards and the existing formulation under the UPAA are (1) the decoupling of unconscionability and failure to provide reasonable financial disclosure; (2) the requirement that parties have general knowledge of rights being waived or altered; and (3) the requirement of meaningful opportunity to consult counsel.

As to whether there should be any substantive fairness review at the time of enforcement, a majority of those present agreed that the general approach of the UPAA –rejecting such a fairness review-- was a sensible policy. The experienced practitioners in the group emphasized the need for predictability and certainty. At the same time, a minority believed that a fairness review for unanticipated hardship would be appropriate in certain circumstances. After considerable debate, we agreed that the main text of the Act should limit substantive fairness review to waivers or modifications of support that make a party eligible for means-tested public assistance. For helpful language, we will draw on N.D. Cent. Code Section 30.1-05-07 (providing for non-enforcement of waiver at death if would reduce assets or income of survivor to amount less than allowed for persons eligible for need-based medical or other forms of public assistance). We decided not to impose any kind of time frame for determining eligibility for public assistance – leaving such decisions to the courts.

Nevertheless, since at least 15 states do require a more robust substantive fairness review at the time of enforcement, we will provide an alternative bracketed section for that purpose. The language of the section will permit nonenforcement or modification of an agreement if enforcement would cause undue hardship to one party such that enforcement would be unconscionable. This section will provide a list of non-exclusive factors that might be relevant to the court's review: length of marriage; loss of earning ability due to caregiving of children or other family members; disability; history of domestic violence; and extent to which agreement was designed to protect interests of third parties. The bracketed language will provide that courts may refuse enforcement only to extent necessary to avoid undue hardship.

IX. Domestic Violence

We decided not to provide specific references to domestic violence in the provisions requiring procedural fairness, since the Act's requirements of voluntariness and absence of duress at time of

execution should encompass an inquiry into domestic violence for purposes of determining the validity of an agreement. For the black letter, courts will be authorized to modify a waiver of support "as appropriate" to avoid undue hardship where there is a history of domestic violence. For those states adopting the bracketed alternative described above (requiring a substantive fairness review at time of enforcement), we will include a history of domestic violence as a relevant factor in deciding whether enforcement of the agreement is unconscionable because of undue hardship.

We will also follow Harry Tindall's suggestion and include language in the next draft modeled after a provision of the Uniform Collaborative Law Act requiring lawyers to screen for domestic violence before drafting premarital or marital agreements. We did not have time to fully consider the pros and cons of this approach at the meeting, so it will be ripe for discussion.

X. Future Plans

The next meeting of the Drafting Committee will be March 25-26, 2011, location TBA. We will circulate a new draft reflecting the decisions reached at the November 2010 meeting at least several weeks prior to the March 2011 meeting. In the meantime, for those of you who were present at the November 2010 meeting, please let me know where I've made an error in reporting our points of agreement and disagreement or if I've otherwise omitted important issues. Also, we always welcome input from people who weren't able to attend (or second thoughts from people who did attend).