

**Date: April 4, 2011**

**To: Premarital and Marital Agreements Drafting Committee**

**From: Barbara Atwood, Chair**

**Re: Schedule and Summary of Drafting Committee Meeting on March 25-26, 2011**

This memo will bring you up to date on our drafting process and will briefly summarize the major decisions reached during our recent drafting committee meeting as to the Act.

## **1. Schedule**

Thanks to the amazing diligence of Reporter Brian Bix, a new draft that incorporates the various revisions discussed at the recent drafting committee meeting will be sent to this committee's roster and to the Style Committee within the next few days. Because Style is working under a tight deadline, we will not be able to circulate the draft among this drafting committee *before* sending it to Style. In other words, you'll be getting the "pre-styled" draft, so feel free to focus your comments on substantive points and not on the stylistic matters that are the concern of the Style Committee. Based on everyone's feedback, we will decide if there is a need for a conference call to discuss particular provisions in the draft. Our absolute deadline to get the final draft to Chicago in preparation for the annual meeting is May 31, 2011.

At the annual meeting, our Act is now scheduled to be read on the floor on Tuesday, July 12, 2011. I may arrange a quick informal meeting of our committee at the annual meeting in order to talk about the process of reading the Act and to discuss any other issues that might have arisen in the meantime. I will try to give you plenty of advance notice.

## **2. Recent drafting meeting**

We made substantial progress toward producing an excellent Act. Major decisions reached during the meeting include the following:

- A. The draft will impose the same standards for premarital and marital agreements. At the previous drafting committee meeting, we were evenly divided on whether to subject marital agreements to a different burden of proof in light of fiduciary obligations between spouses. After a thoughtful discussion, informed by helpful examples from the practitioners in the group, we decided that the many different contexts of marital agreements make it difficult to justify a blanket assumption that such agreements should be subjected to a different burden of proof. A nice consequence of this decision is that the Act will be shorter and will probably not have separate articles. I'm also persuaded that this is a good step in terms of policy. While it may present enactment problems in those few states that don't

recognize marital agreements at all, a legislature could simply delete the Act's references to marital agreements.

- B. The draft will set forth two alternatives for the section setting out enforcement standards, without a preference expressed for either one. Two alternatives are necessary because states are almost evenly split on whether to subject agreements to a fairness review at the time of enforcement. Both alternatives will impose the same procedural fairness standards – standards that differ from those in the existing UPAA in significant ways. Under the new procedural fairness standards, the requirement that agreements not be unconscionable at time of execution is decoupled from the requirement that the parties make full and fair financial disclosure. In addition, the draft will impose two new requirements: that parties have reasonable access to independent legal representation before signing an agreement (at least if the other party is represented), and that unrepresented parties be informed in plain language of the general nature of the rights being altered or waived before signing. Adding that last requirement was one of the original reasons for this project -- since valid waivers of rights at death typically require at least general knowledge of rights being waived.

The two alternatives will differ with respect to fairness review at time of enforcement. Alternative A will impose only a limited review at time of enforcement: agreements are unenforceable to the extent that they would render a party eligible for means-tested public assistance. As to that provision, we decided to expand this review to include property division as well as spousal support terms.

Alternative B will be set out as a separate free-standing section and, in addition to the procedural fairness standards described above, will provide that an agreement is unenforceable to the extent that enforcement would be unconscionable because of undue hardship (or substantial injustice) for the party challenging enforcement. We opted not to set out concrete examples of undue hardship in the black letter but will provide examples in the commentary.

- C. We will add a provision stating that any term in an agreement that limits the remedies available to a party under domestic violence legislation is unenforceable. At the same time, we deleted a section that would have required lawyers to screen clients for domestic violence. This was rejected as unworkable and out of place in an act about premarital and marital contracts. We also deleted a provision that would have given courts authority to refuse to enforce agreements “as appropriate” when domestic violence has occurred. While domestic violence at the time of execution may well invalidate an agreement under the Act as involuntary, domestic violence as a general basis for refusing to enforce an otherwise valid agreement seemed hard to justify.

- D. We reached a series of decisions on various sections that will clarify the Act. We will include new sections on amendments and revocations; statutes of limitations; the effect of void marriages; and other boilerplate provisions for all uniform acts. We decided to delete Section 103 (on default and mandatory terms) as unnecessary in the context of a short act whose provisions are almost all mandatory. Section 104 will be revised to refer generally to “the common law of contracts and principles of equity” rather than itemizing a list of doctrines. In Section 203 (scope of agreements), we will combine certain related subjects and reorder the list for coherence. Also, we will draw on Section 7.08 of the ALI Principles of the Law of Family Dissolution for a description of unenforceable terms, and we will delete the reference to agreements that “regulate non-economic conduct of the parties during marriage” as ambiguous and overly broad.