Date: May 20, 2014

To: Uniform Law Commissioners

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

Family Law Arbitration Act Drafting Committee

Re: First reading of Family Law Arbitration Act Draft at ULC 2014 Annual Meeting

This memo provides a brief background on the family law arbitration drafting project. In addition to explaining some of the key provisions, the memo highlights areas that have provoked debate among members of the Drafting Committee. We look forward to discussing this important project in Seattle. As always, we welcome your comments and suggestions.

I. Background

Family law arbitration appears to be gaining in popularity across the United States and is the subject of proposed legislation in a number of states. There is growing interest in this means of dispute resolution largely because it is seen as cheaper, faster, more informal, and more private than litigation. Also, the ability of parties to select the arbitrator can ensure that the decision-makers will have expertise in family law – a result that is not always true of state court judges. A family law arbitration act would add to the menu of dispute resolution options for family court, which includes conciliation, mediation and collaborative law. Providing people with more alternatives to litigation is seen as a good in itself.

State law regarding family law arbitration varies widely and is in a state of flux. About one quarter of the states have no law on the subject. The states that have addressed the matter have authorized family law arbitration by statute, court rule, or case law. Significant variations exist, however, as to the comprehensiveness of the legislation, the categories of disputes that may be resolved, and the nature of judicial review. North Carolina in 1999 became the first state to enact a detailed family law arbitration act. *See* N.C. GEN. STAT. §§ 50-41 through 50-62 (providing for arbitration of all issues except divorce itself, and providing for a right of modification of terms relating to alimony, child custody, and child support). Five states exclude child custody matters. Only two states have expressly excluded family law issues from arbitration altogether. Others provide for varying degrees of judicial review and ongoing judicial supervision, particularly with respect to awards involving child custody and child support. In 2005, the American Academy of Matrimonial Lawyers promulgated the AAML Model Family Law Arbitration Act, carrying forward the policies of the North Carolina statute and using a structure similar to that of the Revised Uniform Arbitration Act. The AAML Model Act has not been adopted in any jurisdiction.

After extended discussion, the Drafting Committee decided to draft a free-standing act that would address family law arbitration in full, rather than a set of amendments to an existing arbitration act or a partial act with references that incorporate other arbitration law in the state. This decision was driven in part by the fact that the states are split between the Revised Uniform Arbitration Act (2000) and the original Uniform Arbitration Act (1955), with about two-thirds of the states still adhering to the latter. A free-standing comprehensive act will provide a single legislative framework for family law attorneys and arbitrators and will avoid many of the ambiguities that might arise otherwise.

II. Comments on selected provisions

Section 2 (DEFINITIONS): The draft defines "family law dispute" broadly and permits parties to arbitrate all the core issues that can arise in family court. Section 20, however, imposes a higher standard of judicial review for child-related issues than for property division or spousal support. Note also that the draft uses the term "custodial responsibility" for all powers and duties relating to caretaking and decision-making for a child.

Section 3 (SCOPE): This section excludes certain judicial actions from an arbitrator's power, primarily relating to judicial authority over determinations of parental status that are typically the province of juvenile or other specialized court.

Section 4 (PROTECTION OF PARTY OR CHILD): This section imposes certain duties on a court or arbitrator when a party is subject to an order of protection, the safety of a party or child is at risk, or a party's ability to participate effectively in arbitration is at risk. Representatives of the ABA Commission on Domestic and Sexual Violence voiced serious concerns about the arbitration process and the enforceability of arbitration agreements that might be the product of coercion. Rather than prohibit arbitration altogether in these circumstances, the draft permits arbitration to proceed when certain safeguards are met, including informed consent after advice of counsel.

Section 5 (ARBITRATION AGREEMENT): This section is one of the most important in the draft. It spells out the requirements for an enforceable agreement. A significant debate in the Committee has been whether to permit "pre-dispute" arbitration agreements, a common form of arbitration agreement in the commercial world. All members of the Committee want to ensure that any agreement for binding family law arbitration is a fully voluntary choice. Some members want an agreement to arbitrate to be contemporaneous with the dispute. They are concerned that a party might commit to arbitration in a premarital agreement or an early marital agreement without fully understanding the nature of arbitration, the rights being relinquished, or the possible changes in circumstances that can occur over the course of a marriage. Others point to the long-standing use of arbitration clauses in premarital agreements and the need for our act to apply to such clauses, both as a matter of enactability and as a

matter of policy. The current draft therefore brackets the phrase "or future" in Section 5(d) ("parties to an arbitration agreement may agree to arbitrate an existing [or future] family law dispute") in order to flag the issue for discussion at the annual meeting. If the current approach is ultimately adopted, states may choose whether to enact the bracketed language.

Section 5 also sets forth specific requirements for an arbitration agreement and includes a set of mandatory disclosures or caveats about the nature of arbitration. The list of caveats is largely patterned after a similar requirement for informed notice in Michigan law. See MICH. COMP. L. ANN. § 600.5072.

Section 6 (QUALIFICATION OF ARBITRATOR): This section sets forth qualifications for arbitrators but, in the interest of maximizing flexibility and party autonomy, permits parties to waive these qualifications by agreement.

Section 8 (APPLICABLE LAW): This section parallels the choice of law approach found in the Uniform Premarital and Marital Agreements Act.

Section 11 (DISCLOSURE AND DISQUALIFICATION OF ARBITRATOR): This section imposes an ongoing duty on arbitrators, parties, and their attorneys to disclose facts that might affect the arbitrator's impartiality. Under Section 20, arbitrator bias is a basis for challenging an award.

Section 12 (TEMPORARY ORDER): Because temporary orders regarding property, support, or custodial responsibility are frequently necessary in family law cases, this section authorizes arbitrators to issue such orders and permits parties to obtain court confirmation.

Sections 13-18: These sections govern the arbitration process, the hearing, interlocutory review, and confirmation of the award. Note that under Section 16, no record of an arbitration hearing is required except for proceedings concerning custodial responsibility or child support. Similarly, under Section 17, an award containing terms of custodial responsibility or child support must include findings of fact and conclusions of law.

Section 20 (REVISION OR VACATION OF AWARD): This is the core section for judicial review of family law arbitration awards, and, except for custodial responsibility and child support issues, it parallels the grounds for judicial review found in RUAA. For custodial responsibility, a court may revise or vacate an award that fails to contain findings of fact and conclusions of law or that will result in serious harm to a child. An award as to child support similarly may be revised or vacated if it fails to include findings of fact and conclusions of law or does not comply with the state's child support guidelines.

Although the AAML Model Act and most states with law on this question employ a "best interests of the child" standard for judicial review of child custody awards, at least two states

use a harm to the child standard. See N. MEX. STAT. ANN. § 40-4-7.2(T) (court may vacate award if it will cause harm or be detrimental to child, or will be adverse to best interests if circumstances have changed); *F*awzy v. *Fawzy,* 973 A.2d 347 (2009) (harm to child). The Committee was persuaded that the harm to the child standard is preferable since it provides necessary judicial oversight without inviting prolonged litigation and continued uncertainty for children.

Significantly, the current draft does not authorize parties to agree to judicial review for errors of law. We adopted the approach of the RUAA in order to retain the unique aspects of arbitration as a dispute resolution method. Although this approach may discourage some people from turning to family law arbitration, it sharpens the distinction between litigation and arbitration in general.

Section 21 (CONTEST OR MODIFICATION OF CONFIRMED AWARD): Arbitration awards regarding spousal or child support or custodial responsibility are generally subject to modification on a showing of substantial and continuing change in circumstances. Section 21 provides that the parties may agree to arbitrate disputes about confirmed awards, including motions for future modifications. Absent such an agreement to arbitrate, such motions would be handled by the courts according to other law.