Date: November 21, 2011
To: Premarital and Marital Agreements Act Drafting Committee, ABA Advisors, Observers
From: Barbara Atwood
Re: Summary of Recent Drafting Committee Meeting

We had a highly productive meeting in Nashville, Tennessee, on November 11-12, 2011. This report summarizes the tentative decisions reached by the Committee and the likely changes in the draft.

Attendees

All Committee members were present with the exception of Rob Sitkoff and Shelly Kurtz. Commissioners David English and King Burnett sat in on parts of the meeting and made some valuable suggestions. ABA Advisors Linda Ravdin and Carlyn McCaffrey were present, as were observers Barbara Handshu, Ira Ellman, and Tom Oldham.

Major revisions

We engaged in a line-by-line consideration of the current draft, taking account of suggestions and recommendations from the first reading at the Annual Meeting in July 2011. Most significantly, we altered the scope provision (formerly Section 8) to create a structure that adheres more closely to the Act's definitions of premarital and marital agreements. The revisions of that section attempt to hone in on those agreements that are of core concern in this area (i.e. agreements that alter spousal support, marital and community property rights during marriage and at divorce or death, responsibility for debt, rights of surviving spouses, and attorney fee allocations). The new section provides that any agreement (except for a separation agreement) that modifies or waives the identified rights and obligations is enforceable *only* if it is a premarital or marital agreement consistent with the Act. In other words, the section is no longer simply about permissible scope of agreements but is now a mandate that an agreement to alter core rights and obligations must be consistent with our Act. These changes are part of the Committee's ongoing efforts to narrow the application of the Act so that we aren't upsetting longstanding practices (the common practice, for example, of a single lawyer handling estate planning for a married couple, or everyday financial transactions between spouses). Because of the nature of the changes to the scope section, we decided that it should come early in the act and bumped it up to Section 3.

Paralleling the former Section 8, a new Section 3(b) sets out a nonexclusive list of other terms not in violation of public policy that may be included in a premarital or marital agreement. In addition, Section 3(c) and (d) identify terms that are not enforceable, similar to former Section 8(b) & (c). Note: we eliminated one of those matters (agreements giving legal significance to marital misconduct inconsistent with applicable state law) because of ambiguities in the law about the enforceability of such agreements.

The restructuring of the former Section 8 described in the preceding paragraphs reflects a fundamental shift in the Act's approach. Once you receive the new draft, we hope you'll give these changes careful thought as you prepare for the February meeting.

We also revised the enforcement provision (Section 9) to more broadly define the meaning of "access to independent legal representation." In particular, the right of access now applies to

everyone, not just to cases where one party is represented, and we have added "reasonable time" requirements, building on a proposal by Tom Oldham. However, the financial component of the right of access (financial ability or offer from other party to pay) is still confined to situations where the other party is represented by a lawyer.

In addition, we restructured the burden of proof provisions (consistent with the pre-meeting draft) to accommodate those states that hold marital agreements to higher scrutiny and place the burden on the party seeking to enforce the agreement. This concern was strongly advanced by Peter Munson by separate message to the Committee. The restructuring sets out the basic requirements of procedural fairness (Section 9(c) ("A premarital or marital agreement is unenforceable against a party unless…") after separately designating the burden of proof (Section 9(b)).

As to the basic procedural requirements, we've retained the existing list but moved unconscionability at time of execution/signing to a separate subsection to clarify the operation of a finding of unconscionability. The new subsection provides "A court may modify or refuse to enforce a premarital or marital agreement against a party to the extent that the agreement was unconscionable at the time of signing." Also, we reinserted "without duress" to the subsection on voluntariness (requiring that "the party executed the agreement voluntarily and without duress"), to remind parties, lawyers, and courts that an agreement that is signed under duress is unenforceable. Reinstating this language was partly in response to the significant concerns expressed by the ABA Commission on Domestic Violence.

We debated whether to retain the "plain language" subsection. Several members made the point that it's difficult if not impossible to give an accurate description of rights being waived in our mobile society with diverse state law. They also spoke persuasively about the need for practitioners to have a "safe harbor." On the other hand, several state courts have held that knowledge of rights being waived is a basic element of fairness. We have bracketed that subsection and will need to resolve the question at the February 2012 meeting.

Additionally, the wording of the last section--bracketed Section 9(f)--gives two alternatives for the Committee's consideration: "undue hardship" or "substantial injustice." Some have also suggested that we include a reference to a material change of circumstances in this subsection in order to constrain judicial discretion, building on the ALI model. We will need to resolve the proper standard at the next meeting.

Through other more minor revisions, we tried to simplify the act and to improve the coherence and policy of various provisions, including the section on definitions. The definition of "marital agreement" has been altered to provide that it is an agreement between spouses "intended to remain married," to more clearly distinguish it from a premarital agreement, on the one hand, and a separation agreement, on the other. "Separation agreement" is a newly-defined term in the Act.

Slight revisions were made to the sections on applicability of contract law and equitable principles (now Section 4), governing law (now Section 5), and revocation (formerly Section 10). Section 4 has been restored to its former wording ("The law of contracts and principles of equity supplement this [act], except to the extent displaced by this [act] or other statute of this state.") This language better reflects the Committee's intent. Section 5 has been simplified to call for application of forum law (including the forum's choice of law rules) when there's no controlling choice of law provision in the agreement. After considerable discussion, we agreed to treat amendments and revocations the same

under the Act, leading to the deletion of former Section 10. This decision was, in part, a response to the views expressed at the annual meeting in July 2011 about the potential risks associated with revocations.

Finally, after brief discussion, the Committee voted unanimously to recommend that the Act be designated a "uniform" rather than "model" act. The confusion caused by variations in law on this topic from state to state was a major impetus for the project.

Schedule

Our next drafting committee meeting will be held February 10-11, 2012, location TBA. As this report makes clear, we still have some important issues still to resolve. I hope that everyone will study the new draft carefully once it is circulated. More generally, please continue to discuss the project with local bar and professional associations to explain the policy positions we're considering.

The new draft will be circulated to you after our Style liaison (Commissioner Deborah Behr) has had a chance to review the draft and make appropriate changes.