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

From: **Barbara Atwood, Chair, and Brian Bix, Reporter**

Re: **Comments on Draft Act for Committee Meeting on November 11-12, 2011**

Date: **October 12, 2011**

Below are summarized the changes, both large and small, that have been made in the draft Act since the Annual Meeting, and a selection of issues that need to be discussed (but regarding which no substantive changes were made, pending discussion at our November meeting).

Changes Reflected in Draft:

- Small additions have been made to the commentary throughout.
- Section 2(2): added a definition of "child" (modeled after the definition in the proposed Deployed Parents Custody Act)
- Section 2(4): changed the definition of "marital agreement" to the language suggested by Linda Radvin, and which seemed to have majority Committee support in the September e-mail exchange.
- Section 2(6): the definition of "premarital agreement" was altered to make it parallel with the definition of "marital agreement."
- Section 2(11): modified the definition of "State" (using the definition from another Uniform Act) to one that expressly includes the Virgin Islands.

- Section 3: the title was changed, and in the text "common law" became "law," "modified" was changed to "displaced," and "another statute" became "other law."
- Section 4(1): the language was changed to clarify that the public policy test is judged according to the standards of the forum state (the state hearing the dispute). We have also include bracketed language in case the Committee might want to retain the power for a state to refuse enforcement of chosen law that is contrary not to forum public policy, but to the strong public policy of the jurisdiction having the most significant relationship to the parties. We need to discuss whether this is necessary or helpful.
- Section 5: was changed to have two sentences rather than just one.
- Section 7: the wording has been slightly revised in response to a suggestion at the Annual Meeting.
- Section 8: In 8(a)(11): the reference to collaborative law was removed, based on discussion at the Annual Meeting about the need for a present agreement to enter into a collaborative law process. In Section 8(a)(15), the phrase "or a statute imposing criminal penalties" was removed, per the suggestion at the Annual Meeting that the phrase was redundant and possibly overbroad. Section 8(b)(4) is unchanged but is a problematic section in the view of at least one of us. Barbara is concerned that the distinction is very gray between a prohibited penalty and the common practice of providing for greater financial recovery the longer the marriage lasts. We need to discuss whether we need the prohibition and, if so, whether we can tighten it. In Section 8(c), there was resistance at the Annual Meeting to the former language permitting a court to "consider the term in determining child custody." That language was removed for the present draft, but the Committee might wish to revisit the issue.

- Section 9 is, of course, the key section of the Act and the subject of some of our recent email conversations. Section 9(b) has been restructured to state the requirements for enforceable agreements in the affirmative, and it has been re-ordered to reduce confusion about the disjunctive and conjunctive words. We've not intended to make any substantive changes, but the revisions still may be significant. Under the revised structure, Section 9(c) is a new subsection intended to prescribe the burden of proof. By separating it out, we can bracket an optional provision to place the burden on the spouse seeking to enforce a marital agreement. This change recognizes that many states place the burden of proof on the enforcing spouse in light of the fiduciary relationship between spouses – the subject of a commentary circulated to the Committee this fall. As to the actual requirements, we've made a few minor revisions. Under Section 9(b)(1), the words "and not as a result of duress" have been added to the voluntariness requirement, primarily in response to concerns raised by the Domestic Violence Commission. This is a bracketed suggestion for the Committee to consider. Under Section 9(b)(3), in response to a suggestion made at the Annual Meeting, the right of access to independent legal representation has been extended to situations where the other party is *is* a lawyer. Similarly, the plain language requirement under Section 9(b)(4) does not kick in if the party was represented by a lawyer or was a lawyer. The Committee may want to discuss these changes further. Finally, the wording of bracketed Section 9(f) has been slightly reordered in an effort to make it less circular.
- Section 15: in response to a suggestion made at the Annual Meeting, we now list the Uniform Premarital Agreement Act and Section 2-213 of the Uniform Probate Act as

provisions that would/should be repealed by this Act.

A Partial List of Major Issues Where Changes Were Not (Yet) Made or Were Tentatively Made That Need to Be Discussed at the Meeting:

- Section 4: The UPAA authorizes choice of law provisions only as regards construction of an agreement. The current proposed Act allows the selection of law for "validity, enforceability, and construction." This broader scope elicited some comments at the Annual Meeting, and the Committee may want to revisit the matter.

- Section 9: The ABA Domestic Violence Commission and some written comments at the Annual Meeting strongly expressed the desire that the Act respond more to the issue of domestic violence. The bracketed reference to duress in Section 9(b)(1) is one way of addressing the Commission's concerns. The Committee may want to revisit the lawyer-screening provisions that were originally included and later excised from the proposed Act, or the provision authorizing judges to override agreements based on the presence of domestic violence

- Section 9: There were comments at the Annual Meeting questioning whether our draft Act, as currently written, would be enactable in jurisdictions that place the burden of proof for marital agreements on the party seeking enforcement (often justified by the fiduciary relationship between spouses). As mentioned above, we have restructured Section 9 and drafted, for the Committee's consideration, some bracketed

language within Section 9 to place the burden on the party seeking enforcement (for marital agreements only). We obviously need to consider Section 9's structure carefully at the meeting.

- Section 9(c): There were questions at the Annual Meeting asking for clarification of whether a court would strike an entire agreement or just modify it to the extent necessary to make a party no longer eligible for public assistance. We need to use language that is more precise, but first we need to decide on the policy. Do we intend for courts to be able to judicially rewrite agreements in a limited manner only to remove a party from welfare, and, if so, for how long? Or do we want courts to void the agreements in their entirety? These are questions we need to resolve.

- Stan Kent also sent us two alternative drafts of Section 9, building on the approach of the American Law Institute's *Principles*, with presumptions and shifting burdens of proof (for both marital and premarital agreements). They are attached to this document as an Appendix.

- Section 10: Issue were raised at the Annual Meeting regarding whether modification and revocation of agreements should be governed by the same standard. When the question was offered for e-mail exchange, the Committee seemed to be in sharp disagreement. No changes were made to the draft, but the question needs to be resolved at the meeting.

More Minor Drafting Issues

- Section 8(b) & (c): There was some suggestion that these subsections should be moved to Section 9, as being more consistent with the rubric of enforcement. In the current draft, they have been kept in Section 8, on the grounds that given the long list of authorized provisions in Section 8(a), and the purpose of having that long list (to give guidance to parties and their lawyers drawing up such agreements), it makes sense to also include provisions that describe the limits on which terms will be enforced.
- Section 9(a): There were suggestions from the Floor at the Annual Meeting to move the definitions to the Definition Section. They are in Section 9 to begin with because of objections that these provisions are too substantive to be mere definitions. The Committee might want to consider whether we want to try (again) to move these definitions to the Definition Section.

- Section 9(a)(1): There were some comments at the Annual Meeting suggesting that we clarify in text or Commentary that the offer here be a "*good faith* offer," and that "costs" be "*reasonable* [not exorbitant] costs," and that we give some guidance as to what we mean by "adequate time." Brian seeks direction from the Committee on these matters.

- Section 9(e): There was resistance at the Annual Meeting to the language, "that enforcement would result in undue hardship for a party such that enforcement would be unconscionable," suggesting we revisit the question of whether having both

"undue hardship" and "unconscionability" might be confusing or redundant. With our reordered language, have we taken care of the problem?

Appendix: Stan's Two Proposals for Section 9

[Version 1] SECTION 9. ENFORCEMENT.

(a) In this section:

(1) "Fair and reasonable financial disclosure" means a reasonably accurate description of the nature and value of a party's income, property, and liabilities.

(2) "Access to independent legal representation" means adequate time to retain and consult an independent lawyer before signing a premarital or marital agreement and either the financial ability to retain the lawyer or an offer from the other party to the agreement to pay the costs of retaining and consulting the lawyer.

(b) A premarital or marital agreement is not enforceable against a party unless that party's consent was informed and obtained without duress.

(c) A party's consent to a premarital or marital agreement is [rebuttably] presumed to have been informed and obtained without duress if the party seeking enforcement produces evidence that:

(1) the other party had access to independent legal representation;

(2) before execution, the other party:

(i) was provided a fair and reasonable financial disclosure;

(ii) waived, in a separate signed record, the right to a fair and reasonable financial disclosure; or

(iii) did have, or reasonably could have had, adequate knowledge of the income, property, or liabilities of the enforcing party; and

(3) if the enforcing party was represented by counsel and the other party was not

represented by counsel, the agreement stated in plain language, understandable by an adult of ordinary intelligence, the nature of any rights or claims otherwise arising at separation, marital dissolution, or death which were altered or waived by the agreement, and the nature of the alteration or waiver.

(d) If the party seeking enforcement of a premarital or marital agreement raises the presumption under sub-section (c), the party against whom enforcement is sought has the burden of going forward with evidence that consent was uninformed or obtained through duress, but the party seeking enforcement has the burden of proving [by a preponderance of evidence] that the other party's consent was informed and without duress.

(e)

(f)

(g)

[Version 2] SECTION 9. ENFORCEMENT.

(a) In this section:

(1) "Fair and reasonable financial disclosure" means a reasonably accurate description of the nature and value of a party's income, property, and liabilities.

(2) "Access to independent legal representation" means adequate time to retain and consult an independent lawyer before signing a premarital or marital agreement and either the financial ability to retain the lawyer or an offer from the other party to the agreement to pay the costsof retaining and consulting the lawyer.

(b) A premarital or marital agreement is not enforceable against a party unless that party's consent was informed and obtained without duress.

(c) A party's consent to a premarital or marital agreement is [rebuttably] presumed to have been uninformed and obtained under duress if the party against whom enforcement is sought produces evidence that:

(1) the party did not have access to independent legal representation;

(2) before execution, the party:

(i) was not provided a fair and reasonable financial disclosure;

(ii) did not waive, in a separate signed record, the right to a fair and reasonable financial disclosure; or

(iii) did not have, or reasonably could not have had, adequate knowledge of the income, property, or liabilities of the enforcing party; and

(3) if the enforcing party was represented by counsel and the party against whom

enforcement is sought was not represented by counsel, the agreement did not state in plain language, understandable by an adult of ordinary intelligence, the nature of any rights or claims otherwise arising at separation, marital dissolution, or death which were altered or waived by the agreement, and the nature of the alteration or waiver.

(d) If the party against whom enforcement of a premarital or marital agreement is sought raises the presumption under sub-section (c), the party seeking enforcement has the burden of going forward with evidence that consent was informed and obtained without duress, but the party against whom enforcement is sought has the burden of proving [by a preponderance of evidence] that the party's consent was uninformed or under duress.

(e)

(f)

(g)