To: MPMAA Committee

From: Brian Bix

Re: Model Premarital and Marital Agreement Act, First Working Draft

Date: October 20, 2010

I. Our September telephone conference made relatively few substantive decisions. For that reason, I have structured the first draft of the Act in a way which makes some tentative choices, but which displays (in "alternatives" sections) a wide range of alternatives the Committee might consider.

As written, the draft attempts to create a balance between predictability, on one hand, and the protection of vulnerable parties, on the other. The draft prefers bright-line rules, where possible, and presumptions in favor of enforcement where the bright-line rules are followed.

II. The draft is structured around the assumption that an Act of this sort has multiple audiences: legislators, judges, attorneys, and unrepresented parties seeking legal guidance. For that reason, there are provisions in the Act that arguably do not change the law (e.g., stating that contract law principles apply where they are not expressly displaced, or the conflict of laws rules), but which are there to give guidance or clarification to lawyers, judges, and to unrepresented parties who might otherwise be in doubt.

A different point about multiple audiences: part of the purpose of the Act is to give guidance to attorneys, to allow them to write agreements which will be certainly, or at least probably, enforceable. For such parties, bright-line rules are best. However, there inevitably will be parties who enter agreements without counsel (or with less than optimally able counsel). There should be provisions that allow enforcement of agreements by parties who might not have met strictly all the procedural or formal rules, but who have substantially complied, and whose agreements are generally fair. The Act should, I believe, respond to both sorts of parties and both sorts of situations (the current draft, it is conceded, at best, begins that process).

III. There are particular issues that predictably will – and should – be the focus of conversation during our November meeting. Barbara will have much more to say about this, but here is a tentative list, just to give things to look for, and at, in the draft:

1. The definition of "marital agreement" (and how much work can be done to make the definition workable by including anti-circumventing language in the Official Comments, or in the Act itself).

2. Financial disclosure and waiver. The draft takes the position that waiver should not be an alternative to disclosure (though independent knowledge should be). This is a controversial position, based in part on the idea that too often waiver provisions are slipped by parties who do not fully understand what they are signing (and would arguably not fully understand the significance of their waiver, in any event, without at least a rough sense of the financial facts they would waiving knowledge of). It should be noted (and the draft does note) that compromise positions are also possible (e.g., waiver allowed, but only where that provision is separately signed, and the party waiving rights is represented by independent counsel).

3. Should there be substantive fairness review focused on the conditions at the time of enforcement? And is there some way to create judicial power not to enforce, or to modify the agreement, in the most egregious situations, without undermining predictability for the vast majority of agreements. The draft attempts such a compromise, but the drafter hopes that clearer better options can be found.

4. Should marital agreements be treated differently from premarital agreements, and if so, in which ways? The draft follows the lead of most commentators and many states and imposes a higher standard and greater burden on parties seeking to

enforce marital agreements than on parties seeking to enforce premarital agreements.

5. Should the waiver of rights at divorce be treated differently than the waiver of rights against a spouse's estate? This draft treats the two the same.