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January 18, 1974

To: Members of the Executive Committee

Re: Uniform Marriage and Divorce Act

As you know, it appeared last fall as though a settlement with the Family Law Section might be accomplished by our accepting "the age of majority" instead of "age 18" as the test for marriage without parental consent. This was based on the personal estimate of some of the members of the Council of the Family Law Section that with this exception, the amendments adopted in 1972 and 1973 would be acceptable to Family Law. Our Drafting and Executive Committees approved such a change contingent upon its being part of a final settlement and that decision was communicted to Family Law. However, after Family Law met last fall, Ralph Podell notified me that the age of consent was not and never had been a real issue and that the Act would be approved only if amended as described in the enclosed report to the House of Delegates. Although that position seems to me to be absolutely indefensible, I have been unable to alter it. This, I believe, is primarily attributable to the fact which was communicated to me late in December that the Council of Family Law delegated to Ralph Podell and Louise Raggio of Texas the exclusive right to speak for Family Law on this subject. As you know, Ralph Podell is immoveable and other Section members of influence are not in a position to speak on the subject, partly because they do not know what position has been taken by their delegated spokesmen.

The present posture of the problem is described reasonably well in our respective reports to the House of Delegates. Bill Spann and I have selected members of the House of Delegates who we hope will assist us in obtaining the support of the respective delegates. In most cases, the state delegate will be contacted by an appropriate person. We hope that this kind of lobbying campaign will help to turn the tide in the House.

In addition, I request that each member of the Executive Committee contact the members of the House of Delegates with whom he feels he is most likely to be influential, particularly those from his own state. In my opinion, it is fair to say that the real issue is irretrievable breakdown, the other comments contained in the Family Law report being totally incidental; that Family Law has persistently refused to accept any workable definition of irretrievable breakdown; and that our contacts with members of the House are induced largely by the fact that it is obviously impossible to obtain the approval of the Family Law Section when the power to make all decisions has been delegated to one or two individuals.

You should know also that I have asked the ABA's new Standing Committee on Legislation to take an independent position on the problem. This is not the customary function of that Committee, but Chesterfield Smith specifically asked them to perform that function when indicated by unusual circumstances. I think that the history of prior negotiations, amendments adopted in 1972 and 1973 and the existing narrow delegation of authority constitute the kind of unusual circumstance contemplated.

I would also appreciate your giving some thought to members of the House of Delegates who might be effective in taking the floor on our behalf. Basically, Commissioners are not the best choice for this purpose. We have a few good candidates in mind but your suggestions will be appreciated.

It will be very helpful if each member of the Executive Committee will make every possible contact with the delegates and keep Bill Spann and me posted as to the results.

Cordially,

Harold E. Read, Jr.
President

HER,Jr.:shl
Enclosures

AMERICAN BAR ASSOCIATION

SECTION OF FAMILY LAW

RECOMMENDATION

RESOLVED, that the House of Delegates not approve the Uniform Marriage and Divorce Act as recently amended by the National Conference of Commissioners on Uniform State Laws, and that the recommendations previously made to the Commissioners by the Family Law Section be reconsidered and that certain additional amendments be made to said act by the Commissioners as proposed herein.

REPORT

The House of Delegates has considered the Proposed Uniform Marriage and Divorce Act drafted by the National Conference of Commissioners on Uniform State Laws on several occasions. At the request of the Section of Family Law, the House denied approval of the act when it was first submitted at the 1972 Midyear Meeting. Since that time the Section of Family Law has met with the Commissioners on a number of occasions; the Section prepared its own Proposed Revised Uniform Marriage and Divorce Act; and the Commissioners, in response to the objections of the Section,

have made revisions in their draft, the most recent having been adopted by them in August 1973. The most recent action of the House of Delegates was the postponement of approval until the 1974 Midyear Meeting, which action was agreed to by both the Section and Commissioners.

The Section does not object to the reduction to 180 days of the "living apart" period provided for in Section 302 (2) of the Commissioners' amended act, but aside from that reiterates its objections to the Commissioners' proposed act. Briefly stated, the grounds of objection include, but are not necessarily limited to, the fact that the alternative provision for divorce in section 302 (2) of the amended act "or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage" makes possible a dissolution of marriage of however long duration by the whim of one party and, in practical effect, vitiates the 180 days separation period provided for in section 302 (2) (i); there is no provision for a "cooling off" period between the filing of the action and the granting of a decree of dissolution; there is no adequate provision for conciliation and reconciliation efforts and services; no adequate provision for support and maintenance, or for restraint on disposition or dissipation of assets while the parties are living separate and apart during the 180 day period prior to commencement of dissolution proceedings; no provision for mandatory representation of a child or children of the marriage; provisions relative to limitation periods for commencement of action for declaration of invalidity (annulment) due to non-age or for other reasons, are inadequate; provision for recognition of a marriage contracted in another state but void in the state of domicile is inadequate.

Copies of the proposals and recommendations of the Family Law Section, as well as copies of the Amended Act proposed by the National Conference of Commissioners on Uniform State Laws will be distributed to the members of the House of Delegates at its Midyear Meeting. Advance copies of both these documents are available upon request addressed to the Office of the Secretary at the American Bar Center.

The Section sincerely believes that its version of the proposed act will best serve society and protect the interest of all parties, including the state. We as a Section strongly recommend that

certain safeguards are necessary and should be provided in the act. The creation of a mere "rubber stamp type" of divorce procedure would not be in the best interest of the family, its individual members, and society in general. It is therefore respectfully urged that the House of Delegates not approve the Amended Uniform Marriage and Divorce Act drafted by the National Conference of Commissioners on Uniform State Laws. It is also respectfully urged that the prior made suggestions and recommendations of the Family Law Section in regard to the Amended Uniform Marriage and Divorce Act be again called to the attention of the Commissioners for their reconsideration. With so much at stake and with future generations to be affected, we cannot be too careful in what is recommended to the various states for adoption as law regulating the lives of the entire population.

The Section's Council has considered this matter and authorized the expression of the views herein.

Because of their interest, a copy of this report has been transmitted to the National Conference of Commissioners on Uniform State Laws, the Young Lawyers Section, and the National Association of Women Lawyers.

Respectfully submitted,

Arnold J. Gibbs, Chairman
Family Law Section

FEBRUARY 1974

UMDA 03364

AMERICAN BAR ASSOCIATION

REPORT TO THE
HOUSE OF DELEGATES

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

RECOMMENDATION

That the House of Delegates of the American Bar Association approve

1. Uniform Marriage and Divorce Act (1973)
2. Uniform Residential Landlord and Tenant Act (1973)
3. Amendment to the Uniform Controlled Substances Act (1973)
4. Uniform Drug Dependence Treatment and Rehabilitation Act (1973)
5. Uniform Parentage Act (1973)
6. Uniform Crime Victims Reparations Act (1973)
7. Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, Uniform Disclaimer of Transfers under Nontestamentary Instruments Act and Uniform Disclaimer of Property Interests Act (1973)
8. Revised Uniform Abortion Act (1973)
9. Uniform State Antitrust Act (1973)

REPORT

1. The Uniform Marriage and Divorce Act.

History of Drafting, Liaison and American Bar Association Action

Drafting of the Uniform Marriage and Divorce Act by the National Conference of Commissioners on Uniform State Laws commenced in 1967, after preliminary research and fund raising. Funding was pro-

vided by the Ford Foundation and the United States Department of Health, Education and Welfare. Professors Robert J. Levy of the University of Minnesota and Herma H. Kay of the University of California served as Reporters. The Drafting Committee was also assisted by Boards of Advisors and Consultants having special experience in family law or in social and behavioral sciences having particular relevance to the family.

Liaison was promptly established with the American Bar Association Section on Family Law whose representatives participated actively in all drafting sessions until the Act was promulgated by the Conference in 1970. Although Family Law and the Conference were in substantial agreement on most basic issues, particularly the adoption of a test of irretrievable breakdown as the sole ground for dissolution of marriage, some fundamentals were subject to persistent disagreement.

Thus, at a meeting in April 1971, Family Law designated 12 recommended changes as "critical" to its approval of the Act as promulgated. The Conference Drafting Committee agreed to 9 of these and they were presented to the Conference in August 1971. Eight of the 9 Committee recommendations were approved by the Conference and the Act, as amended, was finally submitted to the American Bar Association House of Delegates in New Orleans in February 1972.

Although the Act was favorably reported by the Board of Governors, the House first disapproved the Act and then adopted the following resolution:

> "RESOLVED, That the House of Delegates requests the Section of Family Law to prepare and submit to the National Conference of Commissioners on Uniform State Laws its suggestions with respect to the Uniform Marriage and Divorce Act, including, if the Section wishes, a complete act which it may ask the Commissioners to consider.
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> "FURTHER RESOLVED, That the House of Delegates requests the National Conference of Commissioners on Uniform State Laws to report further on the Uniform Marriage and Divorce Act in the 1972 Annual Meeting of the House of Delegates."

In December 1972, in response to this resolution, Family Law submitted to the Conference a proposed revised Uniform Marriage and Divorce Act. At the 1973 mid-year meeting of the American Bar Association, the subject was again deferred in order to give the Conference time to react to Family Law's draft. Responsive amendments were adopted by the Conference in the summer of 1973 and at

the annual meeting of the American Bar Association, the subject was again deferred in order to give Family Law an opportunity to react to the Commissioners' amendments.

As this report is written (January 4, 1974), Family Law has advised the Conference that one critical issue remains, but on that issue it has adopted an entirely new position which is at odds with both the Uniform Act and its own proposed revised Act. This new position, which is described in more detail below, cannot be considered by the Conference until the Commissioners next meet in the summer of 1974. On the other hand, Conference acceptance is most unlikely since the proposal is inconsistent with the most fundamental policies of the Act.

The 1973 Amendments.

When the Uniform Marriage and Divorce Act was considered by the House of Delegates in 1972, debate centered upon relatively few issues. These are the same issues emphasized by the Family Law draft and, with one exception, the 1973 amendments respond to them, although not in every case, in the manner proposed by Family Law.

(a) Section 201. [MARRIAGE - Formalities] As amended, this section is stated in additional detail to emphasize that the marriage relationship is based on a civil contract to which the assent of the parties is essential. The Conference did not accept the Family Law proposal for preservation of the theoretical interest of the state in each marriage contract; that concept has been the source of much of the artificiality which has characterized the dissolution of marriages which are, in fact, irretrievably broken. In the view of the Conference, the interests of society are better protected by provisions which deal directly with conciliation, protection of children and the like.

(b) Section 202(a)(5). [MARRIAGE - Marriage License and Marriage Certificate] In accordance with the recommendations of the Family Law Section, this subsection requires that the application for a marriage license state the name and date of birth of any then living child of which both parties are parents.

(c) Section 302. [DISSOLUTION - Dissolution of Marriage; Legal Separation] Section 303. [DISSOLUTION - Procedure; Commencement; Pleadings; Abolition of Existing Defenses]. Sections 302 and 303 are the foundation of the concept of irretrievable breakdown. On this subject the Conference and Family Law, though theoretically agreed in principal, have encountered the greatest disagreement in practice.

The Uniform Marriage and Divorce Act initially provided for dissolution on a judicial finding "that the marriage is irretrievably broken"; no further definition was provided on the theory

that the widespread use of the term in existing divorce reform statutes and in the literature of divorce reform had given it a recognized meaning which would serve as an adequate guide for the judiciary.

The House debate and negotiations with the Family Law Section convinced the Conference of the desirability of a statutory definition. The Family Law draft proposed in Section 302(2) that irretrievable breakdown "be established by proof (a) that the parties have lived separate and apart for a period of more than one year next preceding the commencement of this proceeding, or, (b) that such serious marital misconduct has occurred which has so adversely affected the physical or mental health of the petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable;".

Under the Conference's 1973 amendment, irretrievable breakdown may be supported by evidence either of separation for 180 days or that "there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage." It was adopted in preference to the Family Law recommendation because it imposes a factual standard without sacrificing flexibility or reviving fault, whereas the Family Law proposal is inflexible and requires analysis of fault (to determine the existence of "marital misconduct") and that the results thereof be so extreme as to make it "impossible for the parties to continue the marital relation" (seemingly an impossible burden of proof).

This is the issue on which the Family Law Section appears to have taken an entirely new position and it is discussed in more detail below.

(d) Section 307. [DISSOLUTION - Disposition of Property]. The Conference's original proposal was in substance that a community property rule govern the division of marital property. In House debate, this was hotly challenged by delegates from common law states and the Family Law Section recommended that it be eliminated.

The 1973 amendment reflects the conclusion that uniformity in this respect probably is not essential and offers alternative provisions, one of which is the community property rule originally proposed and the other substantially that recommended by Family Law.

(e) One continuing source of disagreement between the Conference and Family Law was not resolved by the 1973 amendments. Family Law has consistently maintained that marriage without parental consent should not be permitted until age 21. The Conference representatives have felt that such a provision is contrary to the trend

of modern legislation and that, in any event, the states will select the age which is consistent with other policy; regardless of the recommendation included in the Uniform Act. For that reason the age of consent for marriage purposes is stated to be 18, but it is bracketed to indicate that the Conference does not consider uniformity essential.

The Present Issue.

The Conference believes that it has responded reasonably and responsibly to each "critical" proposal of the Family Law Section. Nevertheless, dispute continues.

Specifically, Family Law has now informed the Conference that the Uniform Marriage and Divorce Act, as amended, will have its blessing if the sole test of irretrievable breakdown is 180 days separation without any reasonable prospect of reconciliation. Aside from the fact that this entirely new proposal cannot be considered by the Conference before its next meeting in the summer of 1974, it is entirely at variance with all prior discussions with Family Law, with Family Law's own draft, with the great volume of literature on the subject of divorce reform and with the statutes of the many states which have already adopted the concept of irretrievable breakdown.

Both the Conference and the Family Law Section long ago concluded that the determination of fault in divorce proceedings is an ineffective barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and the legal profession, and is the source of much of the bitterness and hostility of divorce proceedings. The essence of this dispute is whether the determination of fault will be eliminated and, if so, how.

Family Law's 1972 recommendation recognized quite properly that a period of separation may well be the most significant indicator of irretrievable breakdown, but that it is probably only one of the elements to be considered. Their alternative required a finding of marital misconduct having such an adverse effect on physical or mental health as to render impossible continuance of the marital relationship. These standards would be rejected by any student of the subject and they were rejected by the Conference.

The present proposal certainly eliminates determination of fault, but it also eliminates any genuine determination of the existence of irretrievable breakdown. Marriages are not irretrievably broken because the parties are separated; the parties may be separated because the marriage is irretrievably broken, but the attention of the law should be directed to the realities of the marital situation and not to superficial indicia.

Moreoever, the elimination of traditional defenses, such as condonation and recrimination, is an accepted basic objective of divorce reform. The Uniform Act tends to promote all reasonable prospects of conciliation by permitting dissolution whenever the marriage is, in fact, irretrievably broken, regardless of an intervening cohabitation which would give rise to these common law defenses. The Family Law proposal also eliminates these defenses, but if the parties cohabit in an effort toward conciliation and the statute recognizes only separation as evidence of irretrievable breakdown, they will forfeit their right to dissolution fully as much as though common law defenses still prevail.

The Uniform Marriage and Divorce Act has now been before the House of Delegates for several years. It has been extensively amended in the meantime in response to the request of the Family Law Section. In the view of the Conference, Family Law's recommendations have resulted in great improvement. No one can deny the need for reform in the law of marriage and divorce. The Uniform Act offers coverage which is comprehensive, rational and consistent with modern thought, both legal and social. No one can doubt the need for uniformity nor the discredit the legal profession has suffered under existing law.

The Conference respectfully urges that the House of Delegates approve the Uniform Marriage and Divorce Act.

2. The Uniform Residential Landlord and Tenant Act.

History of Liaison and American Bar Association Action.

Throughout drafting, the Special Committee of the National Conference of Commissioners on Uniform State Laws has maintained close liaison with the American Bar Association Section on Real Property, Probate and Trust Law. The report of that Section's subcommittee on the Model Landlord and Tenant Act of the Committee on Leases (Brian J. Strum, Esq., Chairman) appeared in the spring 1973 issue of the Real Property, Probate and Trust Journal.

In the light of certain negative statements contained in that report, consideration of the Act was deferred by the House of Delegates at the 1973 annual meeting. Subsequently, the Conference approved amendments responsive to the subcommittee's position. The Section Council has indicated that it will favor the Act in this posture but will recommend a special resolution reserving to the