MEMORANDUM

TO: JEB Trust and Estates Acts
FROM: Sheldon F. Kurtz
RE: Marital and Premarital Agreements
Date: September 11, 2008

Introduction

In the process of drafting proposed amendments to the Uniform Probate Code, the Reporter, Larry Waggoner, proposed that changes be made the Section 2-213. The proposal mirrored principles that are incorporated in an ALI project of which Larry is also the reporter (Restatement (Third) of Property: Wills and Other Donative Transfers, § 9.4(2003)) but differed, to some extent, from concepts incorporated in the Uniform Premarital Agreement Act.

At the urging of the ULC leadership, the drafting committee for the UPC Amendments deleted proposed Section 2-213 with the idea that the JEBs for Trust and Estates Acts and Family Law would reconsider the appropriate approach for dealing with both premarital and marital agreements.

Meetings were held last fall with both JEBs and following those meetings a proposal for the creation of the study committee was made to the Scope and Program Committee of the ULC. A copy of the memo to Scope and Program is included in your materials. Scope and Program, in turn, requested the two JEBs to develop a more comprehensive memo on the nature of the problems.

Background

UPAA. The Uniform Premarital Agreement Act (“UPAA”) was adopted in 1983. It applies to agreements between prospective spouses made in contemplation of marriage and, when properly executed, become effective upon marriage. The Act requires a premarital agreement to be in writing and signed by both parties. In Section 3, the act lists the various areas over which the parties may contract. The list is illustrative and not exclusive. The agreement, however, cannot adversely affect child support.

At the heart of UPAA is Section 6 setting forth rules respecting enforceability. It provides:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

MMPA. Section 10 of the Model Marital Property Act provides:

(a) A marital property agreement must be a document signed by both spouses. It is enforceable without consideration.

(b) A marital property agreement may not adversely affect the right of a child to support.

(c) Except as provided in Sections 2 [requiring each spouse to act in good faith toward one another respecting marital or other property], 8(e) [dealing with creditors' rights], and 9(c) [protecting bona fide purchasers from either spouse] and in subsection (b), in a marital property agreement spouses may agree with respect to:

1. rights and obligations in any of their property whenever and wherever acquired or located;
2. management and control of any of their property;
3. disposition of any of their property on dissolution, death, or the occurrence or nonoccurrence of any other event;
4. modification or elimination of spousal support;
5. making a will, trust, or other arrangement to carry out the agreement;
6. a provision that upon the death of either of them, any of their property, including after-acquired property, will pass without probate to a designated person, trust, or other entity by nontestamentary disposition;
7. choice of law governing construction of the agreement; and
8. any other matter affecting their property not in violation of public policy or a statute imposing a criminal penalty.

(d) A marital property agreement may be amended or revoked only by a later marital property agreement. The amended agreement or the revocation is enforceable without consideration.

(e) Persons intending to marry each other may enter into a marital property agreement as if married, but the agreement becomes effective only upon their marriage.

(f) A marital property agreement executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

1. the agreement was unconscionable when made; or
2. that spouse did not execute the agreement voluntarily; or
(3) before execution of the agreement, that spouse:
   (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;
   (ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and
   (iii) did not have notice of the property or financial obligations of the other spouse.

(g) A marital property agreement executed before marriage is not enforceable if the spouse against whom enforcement is sought proves that:
   (1) that spouse did not execute the agreement voluntarily; or
   (2) the agreement was unconscionable when made and before execution of the agreement that spouse:
      (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse;
      (ii) did not voluntarily sign a written consent expressly waiving any right to disclosure of the property or financial obligations of the other spouse beyond the disclosure provided; and
      (iii) did not have notice of the property or financial obligations of the other spouse.

(h) An issue of unconscionability of a marital property agreement is for decision by the court as a matter of law.

(i) If a provision of a marital property agreement modifies or eliminates spousal support and that modification or elimination causes one spouse to be eligible for support under a program of public assistance at the time of dissolution, the court may require the other spouse to provide support to the extent necessary to avoid that eligibility, notwithstanding the terms of the agreement.

(j) A document signed before the effective date of this [Act] by spouses or unmarried persons who subsequently married each other which affects the property of either of them and is enforceable by either of them without reference to this [Act] is not affected by this [Act] except as provided otherwise in a marital property agreement made after the determination date.

Proposed Section 2-213: Proposed Section 2-213 (based upon Restatement (Third) of Property: Wills, and Other Donative Transfers § 9.4 (2003)) would provide:

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) For a premarital or a marital agreement or a waiver to be enforceable against the surviving spouse, the enforcing party must show that the surviving spouse's consent was informed and was not obtained by undue influence or duress.

(c) A rebuttable presumption arises that the requirements of subsection (b) are satisfied, shifting the burden of proof to the surviving spouse to show that his or her consent was not informed or was obtained by undue influence or duress, if the enforcing party shows that:
(1) before the agreement or waiver was executed, (i) the surviving spouse knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent or his or her representative provided in timely fashion to the surviving spouse a written statement accurately disclosing the decedent's significant assets and asset values, income, and liabilities; and either

(2) the surviving spouse was represented by independent legal counsel; or

(3) if the surviving spouse was not represented by independent legal counsel, (i) the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to obtain independent legal counsel, and offered to pay for the reasonable costs of the surviving spouse’s representation; and (ii) the agreement stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the agreement, and the nature of that alteration.

(d) A premarital or a marital agreement or a waiver is unenforceable if it was unconscionable when it was executed. An issue of unconscionability of an agreement or a waiver is for decision by the court as a matter of law.

(e) Unless it provides to the contrary, a waiver of “all rights,” or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

Differences

There are a number of significant differences between UPAA and Proposed Section 2-213:

1. Proposed Section 2-213, unlike UPAA, applies to both marital and premarital agreements.

2. UPAA provides that the party against whom enforcement is sought must prove that the agreement was not voluntary. Proposed Section 2-213, on the other hand, would provide that the party seeking enforcement must show that the surviving spouse’s consent was “informed and was not obtained by undue influence or duress,” although that party is aided by the presumption set forth in subsection (c) which, if it applies, shifts the burden of proof to the party seeking to avoid enforcement of the agreement, i.e., the surviving spouse.

3. UPAA and Proposed Section 2-213 both provide that an agreement is unenforceable if unconscionable. UPAA further provides additional requirements for avoidance of the agreement dealing with disclosure of assets. Proposed Section 2-213 builds on some of these factors plus others in the subsection relating to the shifting of the burden of proof.

4. A significant difference between the two relates to the disclosure of information concerning rights released by the agreement. UPAA is silent on this issue whereas Proposed Section 2-213 would allow the burden to shift to the surviving spouse if the party seeking enforcement shows that, in addition to providing the spouse with financial information and in cases where the surviving spouse was not represented by independent counsel, the agreement “stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the agreement, and the nature of that alteration.”
Issues ripe for discussion

As noted in the memo of June 16, 2008, there are a number of issues that appear ripe for discussion and that warrant Scope and Program to authorize the creation of a new drafting committee (or at least a study committee). These are:

1. UPAA only applies to premarital agreements. Since the enactment of UPAA, Congress amended ERISA to grant a spouse certain rights in ERISA covered retirement plans. These rights cannot be waived in a premarital agreement, but can be waived in a post-nuptial agreement. However, it is not clear whether all states would allow spouses to enter into post-nuptial agreements waiving ERISA rights. Related to 1 is that without definitive statutory law relating to post-nuptial agreements, it is not clear to what extent, if any, in all states spouses may enter into agreements intended to achieve appropriate estate planning objectives.
   (A) Is it important that spouses be able to enter into postnuptial agreements for estate planning purposes?
   (B) Should a new act be promulgated by the Conference that would apply to both pre-marital and post-nuptial agreements?

2. Should a new act impose similar standards for the enforceability of premarital and post-nuptial agreements and, if so, what should they be? If not, then how should they differ?

3. Assuming a new act would address marital agreements, should the act cover the three distinct types of spousal marital agreements: separation agreements, so-called reconciliation agreements, and postnuptial agreements? 1

4. UPAA and Proposed 2-213 incorporate a fairness notion at least as of the time the agreement was executed. Should marital agreements also have to be fair at the time enforcement is sought?

5. What kinds of information must be exchanged between the parties for the marital agreement to be enforceable? With respect to financial information, how extensive a disclosure should be required? In the case of waivers, should each party be informed of the nature of rights being surrendered and, if so, how specific a disclosure should be required?

6. Must the parties to a marital agreement be separately representing by counsel and, if the less wealthy party retains counsel, should the other party reimburse for the counsel’s fees?

7. What type of interspousal transactions would necessitate a post-nuptial agreement? Any act has the potential for being both under-and over-inclusive. For example, would a post-nuptial agreement be required if a wife transfers $5,000 from her

1Separation agreements are effectively divorce settlements; reconciliation agreements are agreements between spouses once thinking about divorce who have reconciled; and postnuptial agreements, like prenuptial agreements are signed by spouses, not contemplating divorce or separation, that seek to make more certain the parties financial circumstances.
checking account into a new joint account with her husband? A potential effect of this transfer is to remove those funds from testamentary disposition by the wife. Another potential effect is that the husband could withdraw the funds from the joint account without future accountability to the wife. Should this, and like type transactions, be subject to any requirements relating to post-nuptial agreements because they can have adverse economic effects on one or both spouse? Should post-nuptial agreements be limited to express waivers of rights? Should there be a de minimus transfer rule? Should agreements be limited strictly to financial matters (property divisions as well as future support) or can they also encompass household chores, parenting responsibilities, in-law obligations, vacations, and work outside of the home?

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