

D R A F T  
FOR APPROVAL

# **UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTYFIRST YEAR  
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# **UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT**

*WITH PREFATORY NOTE AND COMMENTS*

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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 2, 2012

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## TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE.....	3
SECTION 2. DEFINITIONS.....	3
SECTION 3. SCOPE.....	6
SECTION 4. GOVERNING LAW.....	7
SECTION 5. COMMON LAW OF CONTRACTS; PRINCIPLES OF EQUITY.....	8
SECTION 6. FORMATION REQUIREMENTS.....	9
SECTION 7. WHEN AGREEMENT EFFECTIVE.....	10
SECTION 8. VOID MARRIAGE.....	10
SECTION 9. ENFORCEMENT.....	10
SECTION 10. UNENFORCEABLE TERMS.....	17
SECTION 11. LIMITATION OF ACTION.....	18
SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	19
SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	19
[SECTION 14. REPEALS.].....	19
SECTION 15. EFFECTIVE DATE.....	19

# UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

## Prefatory Note

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties' right at divorce, on the basis that such agreements were attempts to alter the terms of a status, marriage, or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties' rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16<sup>th</sup> century Statute of Uses. 227 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. See Jens M. Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012); see also Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), *The Future of Family Property in Europe* (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by twenty-six jurisdictions, with roughly half of those jurisdictions making significant amendments to the Uniform Premarital Agreement Act, either at the time of enactment or at a later date. See Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 *Journal of the American Academy of Matrimonial Lawyers* 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, mostly arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. E.g., Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 *Journal of Legislation* 127 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 9 *Yale Journal of Law & Feminism* 229 (1994); J. Thomas Oldham, "With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 *Duke Journal of Gender and the Law* 83 (2011). Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.

However, the situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, relating to waiver of rights at the death of the other spouse, the *Uniform Probate Code*, Section 2-213; *Restatement (Third) of Property*, Section 9.4 (2003); *Model Marital Property Act*, Section 10 (1983); and *Internal Revenue Code*,

Sections 401 and 417 (stating when a surviving spouse's waiver of rights to a qualified plan would be valid) all seem to impose somewhat different standards and requirements.

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other. Because a significant minority of states authorize some form of fairness review based on the parties' circumstances at the time the agreement is to be enforced, a bracketed provision in section 9(c) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because some states put the burden of proof on the party seeking enforcement of some or all of these sorts of agreements, legislative notes after section 9 offer alternative language to reflect that burden of proof.

This act chooses to treat premarital agreements and marital agreements under the same set of principles and requirements. A number of states currently treat premarital agreements and marital agreements under different legal standards, with higher burdens on those who wish to enforce marital agreements. *See, e.g.*, Sean Hannon Williams, "Postnuptial Agreements," 2007 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The *ALI Principles* and Agreements: Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at 382-387; Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 1 (2012). However, this act follows the American Law Institute, in its *Principles of the Law of Family Dissolution* (2002), in treating the two types of agreements under the same set of standards. While this act, like the American Law Institute's *Principles* before it, recognizes that different sorts of risks may predominate in the different transaction types – risks of unfairness based on bounded rationality and changed circumstances for premarital agreements and risks of duress and undue influence for marital agreements (*Principles of the Law of Family Dissolution*, Section 7.01, comment *e*) -- this act shares the American Law Institute's view that the resources available through this act and common law principles would be sufficient to deal with the likely problems under either type of transaction.

1                   **UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT**

2                   **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Premarital and  
3 Marital Agreements Act.

4                   **SECTION 2. DEFINITIONS.** In this [act]:

5                   (1) “Amendment” means a modification or revocation of a premarital agreement or  
6 marital agreement.

7                   (2) “Marital agreement” means an agreement between spouses who intend to remain  
8 married which affirms, modifies, or waives a marital right or obligation during the marriage or at  
9 separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence  
10 of any other event. The term includes an amendment, signed after the spouses marry, of a  
11 premarital agreement or marital agreement.

12                   (3) “Marital dissolution” means the ending of a marriage by court decree. The term  
13 includes a divorce, dissolution, and annulment.

14                   (4) “Marital right or obligation” means any of the following rights or obligations arising  
15 between spouses because of their marital status:

16                           (A) spousal support;

17                           (B) rights to property, including characterization, management, and ownership;

18                           (C) responsibility for liabilities;

19                           (D) rights to property and responsibility for liabilities at separation, marital  
20 dissolution, or death of a spouse; or

21                           (E) allocation and award of attorney’s fees and costs.

22                   (5) “Premarital agreement” means an agreement between individuals who intend to marry  
23 which affirms, modifies, or waives a marital right or obligation during the marriage or at

1 separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence  
2 of any other event. The term includes an amendment, signed before the individuals marry, of a  
3 premarital agreement.

4 (6) “Property” means anything that may be the subject of ownership, whether real or  
5 personal, or legal or equitable, or any interest therein.

6 (7) “Record” means information that is inscribed on a tangible medium or that is stored in  
7 an electronic or other medium and is retrievable in perceivable form.

8 (8) “Separation” means a de facto or court-decreed separation of spouses which does not  
9 terminate the marriage.

10 (9) “Sign” means with present intent to authenticate or adopt a record:

11 (A) to execute or adopt a tangible symbol; or

12 (B) to attach to or logically associate with the record an electronic symbol, sound,  
13 or process.

14 (10) “State” means a state of the United States, the District of Columbia, Puerto Rico,  
15 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction  
16 of the United States.

17 ***Legislative Note:*** *If your state recognizes nonmarital relationships, such as civil unions and*  
18 *domestic partnerships, consider whether these definitions need to be amended.*

#### 20 **Comment**

21  
22 Through the definitions of premarital agreement and marital agreement, the drafting  
23 committee hopes to clarify that this act is not intended to cover cohabitation agreements,  
24 separation agreements, or conventional day-to-day commercial transactions between spouses.  
25 Marital agreements and separation agreements are usually distinguished based on whether the  
26 couple at the time of the agreement intends for their marriage to continue or whether a court-  
27 decreed separation, permanent physical separation or dissolution of the marriage is planned or  
28 imminent. To avoid deception of the other party or the court regarding intentions, one  
29 jurisdiction refuses to enforce a marital agreement if it is quickly followed by an action for legal  
30 separation or dissolution of the marriage. *See, e.g., Minnesota Statutes § 519.11, subd.*

1 1a(d)(marital agreement presumed to be unenforceable if separation or dissolution sought within  
2 two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves  
3 that the agreement was fair and equitable).  
4

5 While most premarital agreements and marital agreements will be stand-alone  
6 documents, a fragment of a writing that deals primarily with other topics could also constitute a  
7 premarital agreement or marital agreement for the purpose of this act.  
8

9 With premarital agreements, the nature and timing of the agreement (between parties who  
10 are about to marry) reduces the danger that the act's language will accidentally include types of  
11 transactions that are not thought of as premarital agreements and should not be treated as  
12 premarital agreements (but see the discussion of *Mahr* agreements, below). There is a greater  
13 concern with marital agreements, since (a) spouses enter many otherwise enforceable financial  
14 transactions, most of which are not problematic and should not be made subject to special  
15 procedural or substantive constraints; and (b) there are significant questions about how to deal  
16 with agreements whose primary intention may not be to waive one spouse's rights at dissolution  
17 of the marriage or the other spouse's death, but where the agreement nonetheless has that effect.  
18 In the terms of another uniform act, the drafting committee's purpose is to exclude from  
19 coverage "acts and events that have significance apart from their effect" upon rights at  
20 dissolution of the marriage or at the death of one of the spouses. *See Uniform Probate Code*,  
21 Section 2-512 ("Events of Independent Significance"). Such transactions might include the  
22 creation of joint and several liability through real estate mortgages, motor vehicle financing  
23 agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns,  
24 creation of joint property ownership with a right of survivorship, joint property with payment on  
25 death provisions or transfer on death provisions, durable power of attorney or medical power of  
26 attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of  
27 marital property into an irrevocable trust for a child, etc.  
28

29 The shorter definition of "premarital agreement" used by the Uniform Premarital  
30 Agreement Act (in its Section 1(1): "an agreement between prospective spouses made in  
31 contemplation of marriage and to be effective upon marriage") had the disadvantage of  
32 encompassing agreements that were entered by couples about to marry but that were not intended  
33 to affect the parties' rights and obligations upon divorce or death, e.g., Islamic marriage  
34 contracts, with their deferred *Mahr* payment provisions. See Nathan B. Oman, "Bargaining in the  
35 Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal Specialization," 45 *Wake*  
36 *Forest Law Review* 579 (2010); Brian H. Bix, "*Mahr* Agreements: Contracting in the Shadow of  
37 Family Law (and Religious Law) – A Comment on Oman," 1 *Wake Forest Law Review Online*  
38 61 (2011), available at <http://wakeforestlawreview.com/>.  
39

40 The definition of "property" is adapted from the *Uniform Trust Code*, Section 103(12).  
41

42 A premarital agreement or marital agreement may include other terms not in violation of  
43 public policy of this state, including terms relating to: (1) rights of either or both spouses to  
44 interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2)  
45 appointment of fiduciary, guardian, conservator, personal representative, or agent for person or  
46 property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5)



1 choice of law governing validity, enforceability, interpretation, and construction of the  
2 agreement; or (6) formalities required to amend the agreement in addition to those required by  
3 this act.

4  
5 The definition of “separation” was meant to be broad enough to cover those jurisdictions  
6 where a legal separation or its equivalent is effected without the need of a court judgment.  
7 However, it is not meant to cover situations where a couple is simply living apart as a matter of  
8 convenience or preference, e.g., when the spouses have jobs in different cities. This definition is  
9 not intended to change state law on the nature and effect of (legal) separation. In any event, it  
10 should be noted that the definition in Section 2(8) is relevant only to the definitions of marital  
11 agreement (Section 2(2)) and premarital agreement (Section 2(5)); both definitions note how  
12 parties can enter agreements that can waive or modify the legal rights that arise at separation (or  
13 divorce or death of the other party or any other event).

### 14 15 **SECTION 3. SCOPE.**

16 (a) This [act] applies to a premarital agreement or a marital agreement signed on or after  
17 [the effective date of this [act]].

18 (b) This [act] does not affect any right, obligation, or liability arising under a premarital  
19 agreement or marital agreement signed before [the effective date of this [act]].

20 (c) This [act] does not apply to:

21 (1) an agreement between spouses affirming, modifying, or waiving marital rights  
22 or obligations which requires court approval to become effective; [or]

23 (2) an agreement between spouses intending to obtain a marital dissolution or  
24 court-decreed separation which resolves their marital rights or obligations and is signed when a  
25 proceeding for marital dissolution or court-decreed separation is anticipated or pending [; or]

26 (3) an agreement between spouses intending to separate permanently which  
27 resolves their marital rights or obligations without court approval or affirmation, if each spouse  
28 had independent legal representation when the agreement was signed].

29 (d) The application of this [act] to the waiver of a marital right or obligation in a transfer  
30 or conveyance of property by a spouse to a third party does not adversely affect the rights of a

1 bona fide purchaser for value or a donee that establishes good faith reliance.

2 **Comment**

3  
4 This section distinguishes marital agreements, which are subject to this act, both from  
5 agreements that parties might enter at a time when they intend to obtain a divorce or legal  
6 separation or they intend to live permanently apart, and also from the conventional transfers of  
7 property that may require under state law that one or both spouses waive rights that would  
8 otherwise accrue at the death of the other spouse. Bracketed subsection (c)(3) is provided for  
9 those jurisdictions which enforce separation agreements without court approval.

10 In subsection (d) the language regarding a donee who detrimentally relied on the transfer  
11 could be useful language to give express protection for a charity which relied on a charitable gift  
12 of property.

13  
14 The reference to “the waiver of a marital right or obligation” in subsection (d) would  
15 include the release of dower, curtesy, or homestead rights that often accompanies the conveyance  
16 of real property.

17  
18 In general, the enforceability of agreements listed above is left to other law in the state.  
19 The category of agreement identified in bracketed subsection (c)(3), however, requires  
20 independent legal representation for those agreements to fall outside the act. Thus, if such an  
21 agreement were signed between spouses without independent legal representation, the act would  
22 govern.

23  
24 **SECTION 4. GOVERNING LAW.** The validity, enforceability, interpretation, and  
25 construction of a premarital agreement or marital agreement are determined:

26 (1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a  
27 significant relationship to the agreement or either party, and the designated law is not contrary to  
28 a fundamental public policy of this state; or

29 (2) absent an effective designation described in Paragraph (1), by the law of this state,  
30 including the choice of law rules of this state.

31 **Comment**

32  
33 This section is adapted from the *Uniform Trusts Code*, Section 107. It is consistent with  
34 *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects  
35 traditional Conflict of Laws and Choice of Law principles relating to the enforcement of  
36 contracts. *See Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). These  
37 Conflict of Laws principles include the authority of courts to refuse to enforce the law of another

jurisdiction, even if that jurisdiction has the most significant relationship to the agreement, if that other jurisdiction's rules are contrary to the fundamental public policy of the enforcing state. "Significant relation" and "fundamental public policy" are to be understood under existing state principles relating to Conflict of Laws, and "contrary to ... fundamental public policy" means something more than that the law of the other jurisdiction differs from that of the forum state. See, e.g., *International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508 (Or. App. 2011) (court refused to apply law under choice of law provision because contrary to "fundamental public policy" of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

The limitation of choice of law provisions to jurisdictions having some connection with the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which restricts choice of law provisions to states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

For examples of choice of law and conflict of law principles operating in this area, see, e.g., *Bradley v. Bradley*, 164 P.3d 567 (Wyo. 2007) (premarital agreement had choice of law provision selecting Minnesota law; amendment to agreement held invalid because it did not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the agreement is covered by Virgin Islands law, unless there is a clear party intention that Virginia law apply or Virgin Island law is contrary to the forum state's public policy); cf. *Davis v. Miller*, 7 P.3d 1223 (Kan. 2000) (parties can use choice of law provision to choose the state version of the Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would otherwise not apply).

## **SECTION 5. COMMON LAW OF CONTRACTS; PRINCIPLES OF EQUITY.**

The common law of contracts and principles of equity supplement this [act], except to the extent displaced by this [act] or another statute of this state.

### **Comment**

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*. Because this act contains broad, amorphous defenses to enforcement like "voluntariness" and "unconscionability" (section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not expressly displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress,

1 undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital  
2 agreement presented to one of the parties for the first time hours before a marriage (where  
3 financial commitments have been made and guests have arrived from far away) clearly raises  
4 issues of duress, and might be voidable on that ground. *Cf. In re Marriage of Balcof*, 141  
5 Cal.App.4th 1509, 47 Cal.Rptr.3d 183 (2006) (marital agreement held unenforceable on the basis  
6 of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257 (Fla. App. 2007) (affirming trial  
7 court conclusion that premarital agreement was voidable for undue influence).

8 The drafting committee recognizes that the application of doctrines like duress varies  
9 greatly from jurisdiction to jurisdiction: *e.g.*, on whether duress can be shown even in the  
10 absence of an illegal act, *e.g. Hall v. Hall*, No. 288241, 2010 WL 334721 (Mich. App. 2010)  
11 (refusal to set aside settlement agreement on the basis of duress, as duress under Michigan law  
12 requires illegal conduct, and none was alleged), and whether the standard of duress should be  
13 applied differently in the context of domestic agreements compared to commercial agreements.  
14 This act is not intended to change state law and principles relating to these matters.

15  
16 Rules of construction, including rules of severability of provisions, are also to be taken  
17 from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148 (N.M. App. 2010)  
18 (premarital agreement that improperly waived the right to alimony and that contained no  
19 severability clause deemed invalid in its entirety). Additionally, state rules and principles will  
20 govern the ability of parties to include elevated formalities for the revocation or amendment of  
21 their agreements.

22  
23 **SECTION 6. FORMATION REQUIREMENTS.** A premarital agreement or marital  
24 agreement must be in a record signed by both parties. The agreement is enforceable without  
25 consideration.

## 26 **Comment**

27  
28 This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all  
29 jurisdictions currently require premarital agreements to be in writing. A small number of  
30 jurisdictions have allowed oral premarital agreements to be enforced based on partial  
31 performance. *E.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This act does not  
32 authorize enforcement of oral premarital agreements on that basis.

33  
34 It is the consensus view of jurisdictions and commentators that premarital agreements are  
35 or should be enforceable without (additional) consideration (the agreement to marry or the act of  
36 marrying is often treated as sufficient consideration). However, most modern approaches to  
37 premarital agreements have by-passed the consideration requirement entirely: *e.g.*, *Uniform*  
38 *Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family*  
39 *Dissolution*, Section 7.01, comment *c* (2002); *Restatement (Third) of Property*, Section 9.4  
40 (2003).

41 In some states, courts have raised concerns relating to the consideration for marital

1 agreements. The view of this act is that marital agreements, otherwise valid, should not be made  
2 unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the  
3 distinction (not requiring additional consideration for enforcing premarital agreements, but  
4 requiring it for marital agreements): “This distinction is not persuasive in the context of a legal  
5 regime of no-fault divorce in which either spouse is legally entitled to end the marriage  
6 altogether.” *Principles of the Law of Family Dissolution*, Section 7.01, Comment *c* (2002). The  
7 consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the  
8 agreement, and the seriousness of the parties. *See, e.g.,* Lon L. Fuller, “Consideration and  
9 Form”, 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in  
10 this act directly by other provisions. On the conclusion that consideration should not be required  
11 for marital agreements, see *Restatement (Third) of Property*, Section 9.4 (2003), and *Model*  
12 *Marital Property Act*, Section 10 (1983).

13  
14 **SECTION 7. WHEN AGREEMENT EFFECTIVE.** A premarital agreement is  
15 effective on marriage. A marital agreement is effective on execution unless the agreement  
16 provides otherwise.

#### 17 **Comment**

18  
19 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The Drafting  
20 Committee took notice of the practice that parties sometimes enter agreements that are part  
21 cohabitation agreement and part premarital agreement. This act deals only with the provisions  
22 triggered by marriage, without undermining whatever enforceability the cohabitation agreement  
23 has during the period of cohabitation.

24  
25 **SECTION 8. VOID MARRIAGE.** If a court determines a marriage is void, a  
26 premarital agreement or marital agreement is unenforceable except to the extent necessary to  
27 avoid an inequitable result.

#### 28 **Comment**

29  
30 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example,  
31 if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but,  
32 unknown to Joan, John was still legally married to Martha, the marriage between John and Joan  
33 would be void, and whether their premarital agreement should be enforced would be left to the  
34 discretion of the court, taking into account whether enforcement in whole or in part would be  
35 required to avoid an inequitable result.

#### 36 **SECTION 9. ENFORCEMENT.**

37  
38 (a) A premarital agreement or marital agreement is unenforceable if a party against whom

1 enforcement is sought proves any of the following:

2 (1) the party's consent to the agreement was involuntary or the result of duress;

3 (2) the party did not have access to independent legal representation under  
4 subsection (e);

5 (3) the agreement did not include a notice of waiver of rights under subsection (f)  
6 or an explanation in plain language of the marital rights or obligations being modified or waived  
7 by the agreement unless the party had independent legal representation at the time the agreement  
8 was signed; or

9 (4) before signing the agreement:

10 (A) the party did not receive a reasonably accurate description and  
11 estimate of value of the property, liabilities, and income of the other party;

12 (B) the party did not expressly waive, in a separate signed record after  
13 independent legal advice, the right to financial disclosure beyond the disclosure provided; and

14 (C) the party did not have adequate knowledge or a reasonable basis for  
15 acquiring adequate knowledge of the property, liabilities, and income of the other party.

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

21 (c) A court may refuse to enforce a term of a premarital agreement or marital agreement  
22 if, in the context of the agreement taken as a whole[:]

23 [(1)] the term was unconscionable at the time of signing [; or

(2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising since the agreement was signed].

(d) The court shall decide a question of unconscionability [or substantial hardship] under subsection (c) as a matter of law.

(e) A party has access to independent legal representation under this section:

(1) if the party has a reasonable time to decide whether to retain an independent lawyer before signing a premarital agreement or marital agreement;

(2) if the party decides to retain a lawyer, the party has a reasonable time to locate an independent lawyer, obtain advice, and consider the advice provided; and

(3) if the other party is represented by a lawyer, either the party has the financial ability to retain a lawyer or the other party has agreed to pay the reasonable fees and expenses of representation.

(f) A notice of waiver of rights under this section requires language, prominently displayed, substantially similar to the following:

If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid.

1 **Legislative Note 1:** Section 9(a) places the burden of proof on the party challenging a  
2 premarital agreement or a marital agreement. Amendments are required if your state wants to  
3 (1) differentiate between the two categories of agreement and place the burden of proof on a  
4 party seeking to enforce a marital agreement, or (2) place the burden of proof on a party seeking  
5 to enforce either a premarital agreement or marital agreement.  
6

7 **Legislative Note 2:** If your state wants to permit review for “substantial hardship” caused by a  
8 premarital agreement or marital agreement at the time of enforcement, Section 9(c), including  
9 the bracketed language, should be enacted.  
10

## 11 **Comment**

12

13 This section is adapted from *Uniform Premarital Agreement Act*, Section 6.  
14

15 The use of the phrase “involuntary or the result of duress” in subsection (a)(1) is not  
16 meant to change the law. The drafting committee is aware of the (quite divergent) law that arose  
17 under the “voluntariness” standard of the Uniform Premarital Agreement Act – e.g., *compare*  
18 *Marriage of Bernard*, 204 P.3d 90 (Wash. 2009) (finding agreement “involuntary” when  
19 significantly revised version of premarital agreement was presented three days before wedding)  
20 *with Brown v. Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement  
21 presented agreement day before wedding; court held assent to be “voluntary”), *aff’d sub. nom Ex*  
22 *parte Brown*, 26 So.3d 1222 (Ala. 2009); *see generally* Judith T. Younger, “Lovers’ Contracts in  
23 the Courts: Forsaking the Minimal Decencies,” 13 *William & Mary Journal of Women and the*  
24 *Law* 349, 359-400 (2007) (summarizing the divergent interpretations of “voluntary” and related  
25 concepts under the UPAA); Oldham, “With All My Worldly Goods,” *supra* (same). This act is  
26 not intended either to endorse or override any of those decisions. The drafting committee does  
27 emphasize that the presence of domestic violence will be of obvious relevance to any conclusion  
28 about whether a party’s consent to an agreement was “involuntary or the result of duress.”  
29

30 The requirement of “access to independent counsel” in subsections (a)(2) and (d)(1)  
31 represents the drafting committee’s considered view that representation by independent counsel  
32 is crucial for a party waiving important legal rights. The act stops short of requiring  
33 representation for an agreement to be enforceable, *see California Family Code* § 1612(c)  
34 (restrictions on spousal support allowed only if the party waiving rights consulted with  
35 independent counsel); *California Probate Code* § 143(a) (waiver of rights at death of other  
36 spouse unenforceable unless the party waiving was represented by independent counsel); *cf.*  
37 *Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009) (*access* to independent counsel required, and  
38 *presumption of validity* for premarital agreement available only where party challenging the  
39 agreement actually consulted with independent counsel). When a party has an obligation to  
40 make funds available for the other party to retain a lawyer, under subsection (d)(1)(C), this refers  
41 to the cost of a lawyer competent in this area of law, not necessarily the funds needed to retain as  
42 good or as many lawyers as the first party may have.  
43

44 The notice of waiver of rights of subsections (a)(3) and (d)(2) is adapted from the  
45 *Restatement (Third) of Property*, Section 9.4(3) (2003), and it is also similar in purpose to  
46 *California Family Code* § 1615(c)(3). It creates a safe harbor when dealing with unrepresented



1 parties by use of the designated warning language of (d)(2), or language substantially similar, but  
2 also allows enforcement where there has been an explanation in plain language of the rights and  
3 duties being modified or waived by the agreement.  
4

5 The requirement of reasonable financial disclosure of subsection (a)(4) pertains only to  
6 assets of which the party knows or reasonably should know. There will be occasions where the  
7 valuation of an asset can only be approximate, or may be entirely unknown, and this can and  
8 should be noted as part of a reasonable disclosure. Disclosure will qualify as “reasonably  
9 accurate” even if a value is approximate or difficult to determine, and even if there are minor  
10 inaccuracies.  
11

12 The act makes waiver of the right of financial disclosure (or the right of financial  
13 disclosure beyond what has already been disclosed) possible only if the waiver is signed after  
14 receiving legal advice. This reflects a view by a majority of the drafting committee that it is too  
15 easy to persuade an unrepresented party to sign or initial a waiver provision, and that the party  
16 waiving that right would then likely be ignorant of the magnitude of what is being given up.  
17 Even when notified in the abstract of the rights being given up (consistent with subsection  
18 (d)(2)), it would make a great deal of difference if the party thinks the party is giving up a claim  
19 to a portion of \$80,000, when in fact what is being given up is a claim to a portion of \$8,000,000.  
20 There was a concern raised by some members of the drafting committee that this requirement of  
21 legal advice for a waiver of the right to (further) financial disclosure might effectively require  
22 legal representation for all premarital agreements and marital agreements. However, it remains  
23 the case that when agreements are signed with adequate financial disclosure, the absence of a  
24 valid waiver would be no defense to enforcement of an agreement under this act.  
25

26 Reference in subsection (a)(4)(C) to “adequate knowledge” of the other party’s “property,  
27 liability, and income” includes at least approximate knowledge of the value of the property in  
28 question.  
29

30 Subsection (b) as adapted from the *Uniform Premarital Agreement Act*, Section 6(b).  
31 The drafting committee has noted that other jurisdictions have in the past chosen even more  
32 significant protections for vulnerable parties. See, e.g., *N.M. Stat. § 40-3A-4(B)* (premarital  
33 agreement may not affect spouse’s right to “support”); *Spurgeon v. Spurgeon*, 572 N.W.2d 595  
34 (Iowa 1998) (widow’s spousal allowance could be awarded, even in the face of express provision  
35 in premarital agreement waiving that right); *Estate of Thompson*, No. 11-0940, 2012 WL 469985  
36 (Iowa App.) (same) *Hall v. Hall*, 4 So.3d 254 (La. App. 2009) (waiver of interim support in  
37 premarital agreement unenforceable as against public policy). However, the drafting committee  
38 decided that the procedural and substantive protections of this act already give vulnerable parties  
39 significant protections (including protections far beyond what was given in the original *Uniform*  
40 *Premarital Agreement Act*), and that the act creates an appropriate balance between protection of  
41 vulnerable parties and freedom of contract.  
42

43 The reference in subsection (c) to the unconscionability of (or substantial hardship caused  
44 by) a term is meant to allow a court to strike down particular provisions of the agreement while  
45 enforcing the remainder of the agreement – consistent with the normal principles of severability  
46 in that state (see section 5 and its commentary). However, this language is not meant to prevent

1 a court from concluding that the agreement was unconscionable as a whole, and to refuse  
2 enforcement to the entire agreement.

3  
4 Subsection (c) includes a bracketed provision for states that wish to include a “second  
5 look,” considering the fairness of enforcing an agreement relative to the time of enforcement.  
6 The suggested standard is one of “substantial hardship for a party because of a material change in  
7 circumstances arising since the agreement was signed.” This language broadly reflects the  
8 standard applied in a number of states. *E.g.*, *Connecticut Code* § 46b-36g(2) (premarital  
9 agreements); *New Jersey Statutes* § 37:2-38(b) (premarital agreements); *North Dakota Code* §  
10 14-03.1-07 (premarital agreements); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963-64 (Mass.  
11 2010) (marital agreements); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (marital  
12 agreements). However, it should be noted that even in such “second look” states, case law  
13 invalidating premarital agreements and marital agreements at the time of enforcement almost  
14 universally concerns rights at divorce. There is little case law invalidating waivers of rights  
15 arising at the death of the other spouse grounded on the unfairness at the time of enforcement.  
16

17 The optional provision in bracketed subsection (c)(2) permits states to authorize  
18 challenges to agreements when “enforcement of the term would result in substantial hardship for  
19 a party because of a material change in circumstances arising since the agreement was signed.”  
20 While a number of states allow such challenges based on the circumstances at the time of  
21 enforcement, the terminology and the application vary greatly from state to state. Courts  
22 characterize the inquiry differently, referring variously to “fairness,” “hardship,” “undue  
23 burden,” “substantial injustice” (the term used by the American Law Institute’s *Principles of the*  
24 *Law of Family Dissolution*, at § 7.05), or just “unconscionability” at the time of enforcement. In  
25 determining whether to enforce the agreement or not under this sort of review, courts generally  
26 look to a variety of factors, including the duration of the marriage, the purpose of the agreement,  
27 the current income and earning capacity of the parties, the parties’ current obligations to children  
28 of the marriage and children from prior marriages, the age and health of the parties, the parties’  
29 standard of living during the marriage, each party’s financial and home-making contributions  
30 during the marriage, and the disparity between what the parties would receive under the  
31 agreement and what they would likely have received under state law in the absence of an  
32 agreement. *See* Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital*  
33 *Agreements* 417 (2<sup>nd</sup> ed., ABA Section of Family Law, 2012). The American Law Institute  
34 argued that courts generally were (and should be) more receptive to claims when the marriage  
35 had lasted a long time, children had been born to or adopted by the couple, or there had been “a  
36 change of circumstances that has a substantial impact on the parties ... [and that] the parties  
37 probably did not anticipate either the change, or its impact” at the time the agreement was  
38 signed. American Law Institute, *Principles of the Law of Family Dissolution* § 7.05. One court  
39 listed the type of circumstances under which enforcement might be refused as including: “an  
40 extreme health problem requiring considerable care and expense; change in employability of the  
41 spouse; additional burdens placed upon a spouse by way of responsibility to children of the  
42 parties; marked changes in the cost of providing the necessary maintenance of the spouse; and  
43 changed circumstance of the standards of living occasioned by the marriage, where a return to  
44 the prior living standard would work a hardship upon a spouse.” *Gross v. Gross*, 464 N.E.2d  
45 500, 509-10 n.11 (Ohio 1984).  
46

1 Subsection (c) characterizes questions of unconscionability (or substantial hardship) as  
2 questions of law for the court. This follows the treatment of unconscionability in conventional  
3 commercial contracts. *See UCC § 2-302; Restatement (Second) of Contracts § 208*, comment f.  
4 This subsection is not intended to establish or modify the standards of review under which such  
5 conclusions are considered on appeal under state law.  
6

7 A notice of waiver of rights is “prominently displayed” for the purpose of subsection  
8 (d)(2) when it is displayed in font larger than the rest of the document, in all capital letters, in  
9 bold print or italics, or if it is presented to the other party in a separate document requiring  
10 separate signature or initials.  
11

12 Waiver or modification of claims relating to a spouse’s pension is subject to the  
13 constraints of applicable state and federal law, including ERISA (Employee Retirement Income  
14 Security Act of 1974, 19 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*, 666 F.Supp.2d 463 (D.  
15 N.J. 2009) (wife’s premarital agreement waiving her right to any of her husband’s separate  
16 property did not qualify as a waiver of her spousal rights as beneficiary under ERISA); *Strong v.*  
17 *Dubin*, 901 N.Y.S.2d 214 (App. Div. 2010) (waiver in premarital agreement conforms with  
18 ERISA waiver requirement and is enforceable).  
19

20 In contrast to the approach of the Act, some jurisdictions put the burden of proof on the  
21 party seeking enforcement of the agreement. *See, e.g., Randolph v. Randolph*, 937 S.W.2d 815  
22 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in general,  
23 that other party entered agreement “knowledgeably”: in particular, that a full and fair disclosure  
24 of assets was given or that it was not necessary due to the other party’s independent knowledge);  
25 *Stancil v. Stancil*, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13,  
26 2012) (same); *In re Estate of Cassidy*, 356 S.W.3d 339 (Mo. App. 2011) (parties seeking to  
27 enforce waivers of rights at the death of the other spouse have the burden of proving that  
28 procedural and substantive requirements were met). Legislative Note 1 directs a state to amend  
29 subsection (a) appropriately if the state wants to place the burden of proof on the party seeking  
30 enforcement of a marital agreement, a premarital agreement, or both. In those jurisdictions,  
31 subsection (a) should provide that the agreement is unenforceable unless the party seeking to  
32 enforce the agreement proves each of the required elements.  
33

34 Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital  
35 agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d  
36 955 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17 (Conn. 2011). Those jurisdictions view  
37 agreements in the midst of marriage as being especially at risk of coercion (the analogue of “hold  
38 up” in a commercial arrangement) or overreaching. Additionally, these conclusions are  
39 sometimes based on the view that parties already married are in a fiduciary relationship in a way  
40 that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin,  
41 *Premarital Agreements: Drafting and Negotiation* 16-18 (American Bar Association, 2011).  
42 Many other jurisdictions and The American Law Institute (in its *Principles of the Law of Family*  
43 *Dissolution*, Section 7.01, Comment b (2002)) treat marital agreements under the same standards  
44 as premarital agreements. This is the approach adopted by this act.  
45

1           **SECTION 10. UNENFORCEABLE TERMS.**

2           (a) In this section, “custodial responsibility” means physical or legal custody, access,  
3 visitation, or other custodial right or duty with respect to a child.

4           (b) A term in a premarital or marital agreement is not enforceable to the extent that it:

5                   (1) adversely affects a child’s right to support;

6                   (2) limits or restricts a remedy available to a victim of domestic violence under  
7 law of this state other than this [act];

8                   (3) modifies the grounds for a court-decreed separation or marital dissolution  
9 available under law of this state other than this [act]; or

10                  (4) penalizes a party for initiating a legal proceeding leading to a court-decreed  
11 separation or marital dissolution.

12           (c) A term in a premarital agreement or marital agreement that defines the rights or duties  
13 of the parties regarding custodial responsibility is not binding on a court.

14 ***Legislative Note:*** *A state may vary the terminology of “custodial responsibility” to reflect the*  
15 *terminology used in state law other than this act.*

16  
17                                   **Comment**

18  
19           This section lists provisions that are not binding on a court (this contrasts with the  
20 agreements mentioned in section 3, where the point was to distinguish agreements whose  
21 regulation fell outside this act). They include some provisions (*e.g.*, regarding the parents’  
22 preferences regarding custodial responsibility) that, even though not binding on a court, a court  
23 might consider by way of guidance.

24  
25           The definition of “custodial responsibility” is adapted from the *Uniform Collaborative*  
26 *Law Act*.

27  
28           There is a long-standing consensus that premarital agreements may not bind a court on  
29 matters relating to children – cannot determine custody or visitation, and cannot limit the amount  
30 of child support (though an agreed *increase* of child support may be enforceable). *E.g.*, In re  
31 *Marriage of Best*, 901 N.E.2d 967, 970-971 (Ill. App. 2009); *cf. Pursley v. Pursley*, 114 S.W.3d  
32 820, 823-825 (Ky. 2004) (agreement by parties in separation agreement to child support well in  
33 excess of guideline amounts is enforceable; it is not unconscionable or against public policy).

1 The basic point is that parents and prospective parents do not have the power to waive the rights  
2 of third parties (their current or future children), and do not have the power to remove the  
3 jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1)  
4 applies also to step-children, to whatever extent the state imposes child-support obligation on  
5 step-parents.  
6

7 The drafting committee has taken notice of the general consensus in the case-law that  
8 courts will not enforce premarital agreement provisions relating to topics beyond the parties'  
9 financial obligations *inter se*. And while some courts have refused to enforce provisions in  
10 premarital agreements and marital agreements that regulate (or attach financial penalties to)  
11 conduct during the marriage, *e.g.*, *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494 (App. 2002)  
12 (refusing to enforce provision in agreement imposing financial penalty for infidelity); *Marriage*  
13 *of Dargan*, 13 Cal. Rptr. 522 (App. 2004) (refusing to enforce provision that penalized husband's  
14 drug use by transfer of property); *see also* Brett R. Turner and Laura W. Morgan, *Attacking and*  
15 *Defending Marital Agreements* 379 (2<sup>nd</sup> ed., ABA Section on Family Law, 2012) ("It has been  
16 generally held that antenuptial agreements attempting to set the terms of behavior during the  
17 marriage are not enforceable" (footnote omitted)), the act does not expressly deal with such  
18 provisions, in part because a few courts have chosen to enforce premarital agreements relating to  
19 one type of marital conduct: parties' cooperating in obtaining religious divorces or agreeing to  
20 appear before a religious arbitration board. *E.g.*, *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983)  
21 (holding enforceable religious premarital agreement term requiring parties to appear before  
22 religious tribunal and accept its decision regarding a religious divorce). Also, while there appear  
23 to be scattered cases in the distinctly different context of separation agreements where a court  
24 has enforced the parties' agreement to avoid fault grounds for divorce, *e.g.*, *Massar v. Massar*,  
25 652 A.2d 219 (N.J. App. Div. 1994); *cf. Eason v. Eason*, 682 S.E.2d 804 (S.C. 2009) (agreement  
26 not to use adultery as defense to alimony claim enforceable); *see generally* Linda J. Ravdin,  
27 *Premarital Agreements: Drafting and Negotiation* 111 (ABA, 2011) ("In some fault states,  
28 courts may enforce a provision [in a premarital agreement] that waives fault"), and the drafting  
29 committee is aware of no case law enforcing an agreement to avoid *no-fault* grounds; the  
30 Drafting Committee preferred the position of the American Law Institute (*Principles of the Law*  
31 *of Family Dissolution*, Section 7.08 (2002)), that agreements affecting divorce grounds in any  
32 way should not be enforceable.  
33

34 The drafting committee took notice of the common practice of escalator clauses and  
35 sunset provision in premarital agreements and marital agreements, making parties' property  
36 rights vary with the length of the marriage. *Cf. Peterson v. Sykes-Peterson*, 37 A.3d 173 (Ct.  
37 App. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable  
38 because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable  
39 that penalize one party's initiating an action that leads to the dissolution of a marriage, does not  
40 cover such escalator clauses. Additionally, nothing in this provision is intended to affect the  
41 rights of parties who enter valid covenant marriages in states that make that alternative form of  
42 marriage available.  
43

44 **SECTION 11. LIMITATION OF ACTION.** A statute of limitations applicable to an  
45 action asserting a claim for relief under a premarital agreement or marital agreement is tolled

1 during the marriage of the parties to the agreement, but equitable defenses limiting the time for  
2 enforcement, including laches and estoppel, are available to either party.

3 **Comment**

4 This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the  
5 Comment to that Section stated: “In order to avoid the potentially disruptive effect of  
6 compelling litigation between the spouses in order to escape the running of an applicable statute  
7 of limitations, Section 8 tolls any applicable statute during the marriage of the parties ....  
8 However, a party is not completely free to sit on his or her rights because the section does  
9 preserve certain equitable defenses.”

10 **SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
11 applying and construing this uniform act, consideration must be given to the need to promote  
12 uniformity of the law with respect to its subject matter among states that enact it.

13 **SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the Electronic  
15 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not  
16 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
17 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
18 Section 7003(b).

19 **[SECTION 14. REPEALS.** The following are repealed:

20 (1) [Uniform Premarital Agreement Act]

21 (2) [Uniform Probate Code Section 2-213( ) (Waiver of Right to Elect and of Other  
22 Rights)]

23 (3) .....

24 (4) .....

25 (5) .....]

26 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect ... .