

Date: May 9, 2012
To: Uniform Premarital and Marital Agreements Drafting Committee, ABA Advisors, & Observers
From: Barbara Atwood
Re: Newly edited draft of UPMAA following review by Style Committee

Hello, hardworking Committee members. This memo outlines the major changes that are reflected in the current draft, and it flags some key issues for our upcoming conference call. I've asked for 90 minutes, but we may not need that full amount of time.

The Style Committee has provided many edits throughout the Act that have definitely improved the statutory wording. You are receiving both a final version and a redline version so that you can easily see the changes that have been made. On the conference call, we need to focus on the following issues, all of which will be familiar to everyone:

1. Section 2(8): Definition of "separation." Style has asked us to be more specific, either in the definition or in comments, to exclude couples who choose to live apart because of work or other reasons. Recall that we opted for a broad definition of "separation" because it is used in the definitions of premarital and marital agreements (e.g., "agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event").

To try to address Style's concern, Brian has added some language to the commentary. Is that sufficient or do we need to tweak the definition further, such as by adding "*which ends the marital relationship* but does not terminate the marriage"?

2. Section 3: Style has moved language from former Section 14 to this Section, as a new "(b)" (providing that the Act doesn't affect rights or obligations arising under agreements entered into before the effective date of the Act).

More importantly, Style has offered a rewriting of what is now Section 3(d) – the subsection about which we've had much discussion. Style's rewrite is the following:

"In a transfer or conveyance of real property to a third party, a failure to comply with Section 9 in connection with the release or surrender of a right of dower, curtesy, or homestead or other marital right in place thereof, does not affect adversely the rights of a bona fide purchaser for value or a donee that establishes good faith detrimental reliance."

Style posed several questions regarding this provision: what we meant by "conveyance of real property to a third party"; whether other marital rights, such as homestead allowance or exemption, should be listed; whether "in lieu thereof" is necessary; and whether this subsection should be moved to Section 9. The draft you are receiving keeps this where it is but clarifies the third party reference. In addition, it broadens the provision to apply to transfers of any property, not solely real property, as has been suggested previously by Committee members. Finally, it uses the language of "marital rights or obligations" rather than the string of words (dower, curtesy, etc) in the original text. Thus, the language in the current draft is the following:

“In a transfer or conveyance of property by spouses to a third party, a failure to comply with Section 9 in connection with the release or surrender of a marital right or obligation does not adversely affect the rights of a bona fide purchaser for value or a donee that establishes good faith detrimental reliance.”

Please consider whether this new language accomplishes our original goal with this provision.

3. Section 9(a)(3): Style has asked us whether our clear language requirement has to be in English or in the party’s primary language. We’ve revised it to require a “clear explanation in the party’s primary language.” Is this acceptable?

4. Section 9(a)(4)(A): The financial disclosure provision was edited by Style to simplify the language. They have deleted the reference to “the nature and value” of the other party’s property and liabilities and the “amount of” income, and their final language is the following:

“(A) the party did not receive a reasonably accurate description of the property, liabilities, and income of the other party;”

Does this simplification dilute the required showings that we intended, or can we live with this change and put our expectations in the commentary?

5. Section 9(a)(4)(B): The waiver of financial disclosure requirement shows no change, but Style asked us whether we intended to impose the requirement of independent legal advice on a person who is a lawyer. Linda Ravdin, who can’t be on the call, continues to urge us to delete the requirement altogether. Do we want to retain the requirement of independent legal advice but make it inapplicable to a party who is a lawyer? This gets more cumbersome, of course, in the drafting.

6. Section 9, Legislative Notes: Style, understandably, was not happy with our complicated train of legislative directions. Style suggested that we use alternatives provisions in the black letter (an approach we tried and then rejected several drafts ago) or place the optional provisions on burden of proof in the commentary. We’ve edited the legislative note according to Style’s suggestions but have left the language in legislative note format, pending our conference call. Please think about what approach would make the most sense.