

DRAFT
FOR DISCUSSION ONLY

PREMARITAL AND MARITAL AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For March 25 – 26, 2011 Committee Meeting

With Prefatory Note and with Comments

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March 7, 2011

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1 Seeking a Balance Between Status and Contract,” in *Reconceiving the Family: Critical*
2 *Reflections on the American Law Institute’s Principles of the Law of Family Dissolution* 372-391
3 (Robin Fretwell Wilson, ed., Cambridge: Cambridge University Press, 2006), at 382-387.
4 However, this Act follows the American Law Institute, in its *Principles of the Law of Family*
5 *Dissolution* (2002), in treating the two types of agreements under the same set of standards, with
6 small exceptions. While this Act, like the ALI *Principles* before it, recognizes that different sorts
7 of risks may predominate in the different transaction types – risks of unfairness based on
8 bounded rationality and changed circumstances for premarital agreements and risks of duress and
9 undue influence for marital agreements (*Principles*, § 7.01, comment *e*), this Act shares the
10 ALI’s view that the resources available through the Act and common law principles would be
11 sufficient to deal with the likely problems with either type of transaction.
12

1 (8) “Marital agreement” is an agreement between spouses whose primary intent is to alter
2 or waive the legal rights and obligations that would otherwise arise between the spouses under
3 applicable law at dissolution of the marriage or at the death of one of the spouses, and that has no
4 other significant legal or economic purpose. The term does not include separation agreements or
5 other agreements requiring court approval.

6 (9) “Prenuptial agreement” is an agreement between prospective spouses contemplating
7 marriage that alters or waives the legal rights and obligations between the spouses that would
8 otherwise arise at dissolution of the marriage or at the death of one of the spouses.

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

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

13 (12) “Sign” means, with present intent to authenticate or adopt a record:

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

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

17 **Legislative Note:** *The extent to which this Act applies to officially recognized non-marital*
18 *relationships, such as civil unions and domestic partnerships, is a matter for state law.*

19

20

Comment

21 The definitions of “electronic record” and “electronic signature” are taken from the
22 Uniform Electronic Transaction Act.

23

24 The definition of “prenuptial agreement” is a slightly-modified version of the definition
25 used in the American Law Institute’s *Principles of the Law of the Dissolution of Marriage*. The
26 shorter definition of “prenuptial agreement” used by the UPAA (“an agreement between
27 prospective spouses made in contemplation of marriage and to be effective upon marriage”) had
28 the disadvantage of encompassing agreements that were entered by couples about to marry but

1 which were not intended to affect the parties' rights and obligations upon divorce or death, e.g.
2 Islamic marriage contracts, with their deferred *mahr* payment provisions. See Nathan B. Oman,
3 "Bargaining in the Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal
4 Specialization," 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix, "*Mahr* Agreements:
5 Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman," *Wake*
6 *Forest Law Review Forum* (forthcoming, 2011), available at
7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752289.

8
9 The definition of "property" is taken from the Uniform Trust Code.

10
11 The definitions of "record" and "signatory" are taken from the 2002 version of the
12 Uniform Parentage Act.

13
14 The definition of "sign" is taken from the 2010 version of the Uniform Collaborative Law
15 Act.

16
17 **SECTION 103. DEFAULT AND MANDATORY RULES.** The terms of a premarital
18 or marital agreement prevail over any provision of this Act, except:

19 (1) the applicability of this State's common law doctrines relating to capacity to contract,
20 estoppel, fraud, misrepresentation, duress, coercion, mistake, and other validating and
21 invalidating cause;

22 (2) the requirement that the agreement be in a signed record under Sections 201 and 301;

23 (3) the non-binding effect of an agreement that defines the terms of child custody or
24 visitation; adversely affects child support; prescribes fault-grounds for divorce; or regulates non-
25 economic conduct during marriage under Sections 203(b) and 302(b);

26 (4) the obligation of a party seeking enforcement of an agreement to make a full and fair
27 financial disclosure;

28 (5) the requirement that parties have access to independent counsel prior to signing a
29 premarital or marital agreement under Sections 203 and 303;

30 (6) the standards for enforcing premarital agreements under Section 204 [and Section

1 206], and marital agreements under Section 303 [and Section 305]; and

2 (7) the obligations of attorneys under Section 205 and Section 304.

3 **Comment**

4 This Section is adapted from the Uniform Trust Code, Section 105.

5

6 The first set of mandatory rules derives from the common law of contracts, and is also
7 reflected in Section 104.

8

9 **SECTION 104. APPLICABILITY OF CONTRACT LAW.** The common law of

10 contracts, including the law relative to capacity to contract, estoppel, fraud, misrepresentation,

11 duress, coercion, mistake, and other validating and invalidating cause, supplement this [Act],

12 except to the extent modified by this [Act] or another statute of this State.

13 **Comment**

14 This provision is adapted from Uniform Trust Code § 106, combined with language from
15 Uniform Commercial Code § 1-103.

16

17 Where this Act does not expressly displace common law contract rules and principles,
18 they apply. Thus, it is open to parties, e.g., to resist enforcement of premarital and marital
19 agreements based on legal incompetency, misrepresentation, duress, undue influence,
20 unconscionability, etc. For example, a premarital agreement presented to one of the parties for
21 the first time hours before a marriage (where financial commitments have been made and guests
22 have arrived from far away) clearly raises issues of duress, and might be voidable on that ground.

23

24 **SECTION 105. GOVERNING LAW.** The meaning and effect of the terms of

25 premarital and marital agreements are determined by:

26 (1) the law of the jurisdiction designated in the terms, [if that jurisdiction has an

27 appropriate relation to the transaction or either of the parties, and] unless the designation of that

28 jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most

29 significant relationship to the matter at issue; or

1 **ARTICLE 2.**

2 **PREMARITAL AGREEMENTS.**

3 **SECTION 201. FORMATION REQUIREMENTS.** A premarital agreement must be
4 in a record and signed by both parties. It is enforceable without consideration.

5 **Comment**

6 This Section is adapted from UPAA Section 2.

7
8 Almost all jurisdictions currently require premarital agreements to be in writing. A small
9 number of jurisdictions have allowed oral premarital agreements to be enforced based on partial
10 performance. *E.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003). This Act does
11 not authorize enforcement of oral premarital agreements on that basis.

12
13 It is the consensus view of jurisdictions and commentators that premarital agreements are
14 or should be enforceable without (additional) consideration. In any event, those states that have
15 looked at the consideration issue for premarital agreements have concluded that the other party's
16 agreement to marry or the act of marrying constitutes valid legal consideration. However, most
17 modern approaches to premarital agreements have by-passed the consideration requirement
18 entirely: *e.g.*, UPAA, Section 2; American Law Institute, *Principles of the Law of Family*
19 *Dissolution*, Section 7.01, comment *c* (2002); *Restatement (Third) of Property*, Section 9.4
20 (2003).

21
22 **SECTION 202. EFFECT OF MARRIAGE.** A premarital agreement is effective upon
23 marriage.

24 **Comment**

25 This Section is adapted from UPAA Section 4.

26
27 **SECTION 203. SCOPE OF AGREEMENT.**

28 (a) A premarital agreement may include provisions relating to:

29 (1) the rights and obligations of each of the parties in any of the property of either
30 or both of them, whenever and wherever acquired or located;

31 (2) the disposition of property upon separation, marital dissolution, death, or the

- 1 occurrence or nonoccurrence of any other event;
- 2 (3) the disposition of debt, liability, or other obligation upon separation, marital
3 dissolution, death, or the occurrence or nonoccurrence of any other event;
- 4 (4) the characterization of property during the marriage as [community][marital]
5 or separate;
- 6 (5) the right to buy, sell, use, transfer, exchange, lease, expend, assign, create a
7 security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- 8 (6) the rights of either or both spouses to interests in trusts, inheritances, gifts, and
9 other expectancies created by third parties;
- 10 (7) the modification or elimination of spousal support, subject to Section 204(b);
- 11 (8) the making of a will, trust, or other transfer effective at death;
- 12 (9) the ownership rights in and disposition of the death benefit from a
13 life insurance policy;
- 14 (10) the rights in property arising at or after the death of either party, including
15 but not limited to inheritance, dower, curtesy, elective share, homestead allowance, exempt
16 property, and family allowance;
- 17 (11) the rights that either party might have under the provisions of other laws;
- 18 (12) tax matters arising out of the marriage;
- 19 (13) provisions for the resolution of disputes arising under the agreement,
20 including arbitration provisions;
- 21 (14) priority for appointment of a fiduciary or guardian for an incapacitated
22 individual or personal representative of a decedent's estate;
- 23 (15) choice of law governing construction and validity of the agreement; and

1 (16) any other matter not in violation of public policy or a statute imposing a
2 criminal penalty.

3 (b) A premarital agreement may not adversely affect a child's right to support, or impose
4 fault-grounds on parties for legal separation or dissolution.

5 (c) Terms of a premarital agreement that regulate non-economic conduct of the parties
6 during marriage or that define rights and responsibilities of the parties regarding child custody
7 and visitation are not binding on a court.

8 **Comment**

9 This Section is adapted from UPAA, Section 3(a).

10
11 Under Section (a)(11), provisions relating to rights either spouse might have under other
12 laws would include rights under health care legislation and rights of fiduciaries to incapacitated
13 parties.

14
15 Sub-Section (b) reflects the consensus in the case-law, that courts will not enforce
16 premarital agreement provisions relating to topics beyond the parties' financial obligations *inter*
17 *se*. In particular, courts have concluded that the parties cannot waive their children's right to
18 child support payments (though some courts have held enforceable agreements that would
19 *increase* such payments beyond the amount set by state law). Nothing in this provision is
20 intended to affect the rights of parties who enter valid covenant marriages in states that make that
21 alternative form of marriage available.
22

23 **SECTION 204. ENFORCEMENT.**

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

26 (1) the party did not execute the agreement voluntarily, without undue influence
27 or duress;

28 (2) the agreement was unconscionable when it was executed;

29 (3) before execution of the agreement, the party:

1 (i) was not provided a fair and reasonable disclosure of the property
2 or financial obligations of the other party;

3 (ii) did not voluntarily and expressly waive, in a separate signed record,
4 any right to disclosure of the property or financial obligations of the other party beyond the
5 disclosure provided; and

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

8 (4) the party did not have meaningful access to independent counsel prior to
9 signing the agreement; or

10 (5) the party lacked general knowledge of the rights being altered or waived, and
11 the agreement did not expressly enumerate those rights; or

12 [(5) the party was not represented by counsel and the agreement did not state, in
13 language easily understandable by an adult of ordinary intelligence with no legal training, the
14 nature of any rights or claims otherwise arising at dissolution of marriage or at death that were
15 altered by the agreement, and the nature of that alteration.]

16 (b) A waiver or modification of spousal support in a premarital agreement is not
17 enforceable to the extent that the waiver or modification would limit the assets or income
18 available to the party to an amount less than that allowed for persons eligible for need-based
19 medical or other forms of public assistance.

20 [(b) A court may modify, or refuse to enforce, a premarital agreement, to the extent that
21 enforcement would result in undue hardship for a party such that enforcement would be
22 unconscionable. A determination of unconscionability shall be based on the parties'
23 circumstances at the time of enforcement, including, but not limited to, the following factors:

1 (1) the length of marriage;

2 (2) the loss of earning ability due to illness, disability, or care of the parties'
3 children or other family members;

4 (3) the extent to which the agreement was motivated by an intention to protect the
5 interests of third parties, such as children of a prior marriage or other family members; and

6 (4) any history of domestic violence between the parties.]

7 (c) A court may refuse to enforce a waiver or modification of spousal support as
8 appropriate where there is a history of domestic violence between the parties or against children
9 of the parties.

10 (d) Unless the agreement expressly states otherwise, terms in the agreement should be
11 treated as severable, such that the modification or non-enforcement of one provision will not
12 require the modification or non-enforcement of other provisions or the agreement as a whole.

13 **Comment**

14 This Section is adapted from UPAA, Section 6.

15
16 [Sub-section (a)(5) is adapted from the *Restatement (Third) of Property*, Section 9.4(3)
17 (2003).]

18
19 Sub-section (b) as adapted from N.D. Cent. Code Section 30.1-05-07.

20
21 Disclosure will qualify as “fair and reasonable” even if a value is approximate or difficult
22 to determine, and even if there are minor inaccuracies.

23
24 Waiver or modification of claims relating to a spouse’s pension are subject to the
25 constraints of applicable state and federal law, including but not limited to ERISA (Employee
26 Retirement Income Security Act of 1974, 19 U.S.C. 1001 *et seq.*).

27
28 The language in the bracketed subsection (b) is adapted from the American Law
29 Institute’s *Principles of the Law of Family Dissolution*, Section 7.05 (2002).]

1 **ARTICLE 3.**

2 **MARITAL AGREEMENTS.**

3 **SECTION 301. FORMATION REQUIREMENTS.** A marital agreement must be in a
4 record and signed by both parties. It is enforceable without consideration.

5 **Comment**

6 This Section is adapted from UPAA Section 2.

7
8 In some states, there is case-law raising issues relating to a consideration requirement for
9 marital agreements. (Premarital agreements do not raise a consideration issue because the
10 agreement to marry can work as the consideration.) The view of this Act is that marital
11 agreements, otherwise valid, should not be made unenforceable on the basis of a purported lack
12 of consideration. As the American Law Institute wrote on the distinction (not requiring
13 additional consideration for enforcing premarital agreements, but requiring it for marital
14 agreements): “This distinction is not persuasive in the context of a legal regime of no-fault
15 divorce in which either spouse is legally entitled to end the marriage altogether.” *Principles of*
16 *the Law of Family Dissolution* § 7.01, comment *c* (2002). On the conclusion that consideration
17 should not be required for marital agreements, see also *Restatement (Third) of Property*, Section
18 9.4 (2003); Model Marital Property Act, § 10 (1983).
19

20 **SECTION 302. SCOPE OF AGREEMENT.**

21 (a) Spouses entering into a marital agreement may contract with respect to:

22 (1) the rights and obligations of each of the parties in any of the property of either
23 or both of them whenever and wherever acquired or located;

24 (2) the disposition of property upon separation, marital dissolution, death, or the
25 occurrence or nonoccurrence of any other event;

26 (3) the disposition of debt, liability, or other obligation upon separation, marital
27 dissolution, death, or the occurrence or nonoccurrence of any other event;

28 (4) the characterization of property during the marriage as [community][marital]
29 or separate;

- 1 (5) the right to buy, sell, use, transfer, exchange, lease, expend, assign, create a
2 security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- 3 (6) the rights of either or both spouses to interests in trusts, inheritances, gifts, and
4 other expectancies created by third parties;
- 5 (7) the modification or elimination of spousal support, subject to Section 303(b);
6 (8) the making of a will, trust, or other transfer effective at death;
- 7 (9) the ownership rights in and disposition of the death benefit from a
8 life insurance policy;
- 9 (10) the rights in property arising at or after the death of either party, including
10 but not limited to inheritance, dower, curtesy, elective share, homestead allowance, exempt
11 property, and family allowance;
- 12 (11) the rights that either party might have under the provisions of other laws;
13 (12) tax matters arising out of the marriage;
- 14 (13) provisions for the resolution of disputes arising under the agreement,
15 including arbitration provisions;
- 16 (14) priority for appointment of a fiduciary or guardian for an incapacitated
17 individual or personal representative of a decedent's estate;
- 18 (15) choice of law governing construction and validity of the agreement;
19 (16) the modification or revocation of a premarital agreement; and
20 (17) any other matter not in violation of public policy or a statute imposing a
21 criminal penalty.
- 22 (b) A marital agreement may not adversely affect a child's right to support, or impose
23 fault-grounds on parties for legal separation or dissolution.

1 (c) Terms of a marital agreement that regulate non-economic conduct of the parties
2 during marriage or that define rights and responsibilities of the parties regarding child custody
3 and visitation are not binding on a court.

4 **Comment**

5 This Section parallels the provisions of Section 203 for premarital agreements. With
6 premarital agreements, the timing of the agreement (between parties about to marry) reduces the
7 danger that the Act's language will accidentally include types of transactions that are not thought
8 of as premarital agreements and should not be treated as premarital agreements. There is a
9 greater concern with marital agreements, since (a) spouses enter many otherwise enforceable
10 financial transactions, most of which should not be made subject to special procedural or
11 substantive constraints; and (b) there are significant questions about how to deal with agreements
12 whose primary intention may not be to waive one spouse's rights at dissolution of the marriage
13 or the other spouse's death, but where the agreement nonetheless has that effect.
14

15 **SECTION 303. ENFORCEMENT.**

16 (a) A marital agreement is enforceable if the party seeking enforcement proves that:

17 (1) the other party executed the agreement voluntarily, without undue influence or
18 duress;

19 (2) the agreement was not unconscionable when it was executed;

20 (3) before execution of the agreement, the other party:

21 (i) was provided a fair and reasonable disclosure of the property
22 or financial obligations of the party seeking enforcement;

23 (ii) voluntarily and expressly waived, in a separate signed record, any right
24 to disclosure of the property or financial obligations of the party seeking enforcement beyond the
25 disclosure provided; or

26 (iii) had, or reasonably could have had, an adequate knowledge of the
27 property or financial obligations of the party seeking enforcement;

1 (4) the other party had meaningful access to independent counsel prior to signing
2 the agreement; and

3 (5) the agreement expressly enumerated the rights being altered or waived, or the
4 other party had general knowledge of those rights.

5 [(5) the other party was represented by counsel, or, if the other party was not
6 represented by counsel, the agreement stated, in language easily understandable by an adult of
7 ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at
8 dissolution of marriage or at death that were altered by the agreement, and the nature of that
9 alteration.]

10 (b) A waiver or modification of spousal support in a marital agreement is not enforceable
11 to the extent that the waiver or modification would limit the assets or income available to the
12 party to an amount less than that allowed for persons eligible for need-based medical or other
13 forms of public assistance.

14 [(b) A court may modify, or refuse to enforce, a marital agreement, to the extent that
15 enforcement would result in undue hardship for a party such that enforcement would be
16 unconscionable. A determination of unconscionability shall be based on the parties'
17 circumstances at the time of enforcement, including, but not limited to, the following factors:

18 (1) the length of marriage;

19 (2) the loss of earning ability due to illness, disability, or care of the parties'
20 children or other family members;

21 (3) the extent to which the agreement was motivated by an intention to protect the
22 interests of third parties, such as children of a prior marriage or other family members; and

23 (4) any history of domestic violence between the parties.]

1 (c) A court may refuse to enforce a waiver or modification of spousal support as
2 appropriate where there is a history of domestic violence between the parties or against children
3 of the parties.

4 (d) Unless the agreement expressly states otherwise, terms in the agreement should be
5 treated as severable, such that the modification or non-enforcement of one provision will not
6 require the modification or non-enforcement of other provisions or the agreement as a whole.

7 **Comment**

8 This Section is adapted from UPAA, Section 6.
9

10 The main difference between this Section, for marital agreements, and Section 204 for
11 premarital agreements, is that for premarital agreements the burden of proof is on the party
12 opposing enforcement, while for marital agreements the burden of proof is on the party seeking
13 to enforce the agreement.
14

15 [Sub-section (a)(5) is adapted from the *Restatement (Third) of Property*, Section 9.4(3)
16 (2003).]
17

18 Sub-section (b) is adapted from N.D. Cent. Code Section 30.1-05-07.
19

20 Disclosure will qualify as “fair and reasonable” even if a value is approximate or difficult
21 to determine, and even if there are minor inaccuracies.
22

23 The language in bracketed subsection (b) is adapted from the American Law Institute’s
24 *Principles of the Law of Family Dissolution*, Section 7.05 (2002).]
25

26 Waiver or modification of claims relating to a spouse’s pension are subject to the
27 constraints of applicable state and federal law, including but not limited to ERISA (Employee
28 Retirement Income Security Act of 1974, 19 U.S.C. 1001 *et seq.*).

29 **SECTION 304. ATTORNEY OBLIGATIONS RELATING TO COERCIVE OR**
30 **VIOLENT RELATIONSHIPS.**

31 (a) The lawyer representing a client relating to the drafting, negotiation, and signing of a
32 marital agreement shall reasonably assess whether the party the lawyer represents has a history
33 of a coercive or violent relationship with the other party or prospective party to the agreement.

1 (b) If the lawyer reasonably believes that the party the lawyer represents regarding a
2 marital agreement or a party who consults the lawyer relating to such an agreement has a history
3 of a coercive or violent relationship with the other party or prospective party to the agreement,
4 the lawyer may not begin or continue representation for the purpose of signing a marital
5 agreement unless:

6 (1) the assent of the party or the prospective party to the negotiation and signing
7 of the marital agreement is in fact fully voluntary, not the product of force or threat of force; and

8 (2) the lawyer reasonably believes that the safety of the party or prospective party
9 can be protected adequately during the process of negotiating the marital agreement.

10 **Comment**

11 This Section is adapted from Uniform Collaborative Law Act, Section 15.
12